To be Argued by:
JOHN N. LIPSITZ
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

Docket No.: CA 21-01542

MARK A. STONEHAM and BONNIE STONEHAM,

Plaintiffs-Appellants,

– against –

JOSEPH BARSUK, INC., DAVID BARSUK, LLC, HARRY BARSUK, LLC, BARSUK RECYCLING, LLC, BARSUK TRADING PARTNERS, L.P., BARSUK RENTALS, LLC, BARSUK HOLDINGS, LLC, BARSUK BUFFALO PROPERTIES, LLC and HARRY MARK BARSUK, individually,

Defendants,

– and –

DAVID J. BARSUK, individually,

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Respondent opens his Brief with the categorical assertion that a vehicle, or virtually anything with wheels capable of travelling on a road, "is not a structure" within the ambit of New York Labor Law § 240 (1). *Respondent's Brief on Appeal ("Respondent's Brief") at pp. 4, 13-20*. Respondent's assertion, that objects with wheels are not structures, runs contrary to established New York jurisprudence, which broadly defines the term "structure" under New York Labor Law § 240 (1).

Fundamental to an understanding of the term "structure" is the holding of the Court of Appeals in Caddy v. Interborough Rapid Transit Co., 195 N.Y. 415 (1909). As conceded on page fourteen of Respondent's Brief, the Court of Appeals in Caddy defined a structure as "any production or piece of work artificially built up or composed of parts joined together in some definite manner." Id. at 420.

Within the past 113 years, neither the Courts nor the Legislature has curtailed the broad definition of the statutory term "structure". Rather than reconcile his opposition with the established and judicially sanctioned definition of "structure", Respondent disingenuously canvasses recent Appellate Division precedent interpreting the term. Respondent implies that, following the Court of Appeals' decision in Dahar v. Holland Ladder & Holland Ladder & Mfg. Co., 18 N.Y.3d 521 (2012), New York's Courts have abandoned the authority of Caddy. For example, on page fourteen of his Brief, Respondent cites to Garcia v. 225 E. 57th St. Owners,

Inc., 96 A.D.3d 88 (1st Dept. 2012). Respondent points out, that, in Garcia, the First Department described the teachings of Caddy as "hoary". The dictionary, however, defines "hoary" as meaning "ancient or venerable," and not necessarily tedious or stale. See, Random House Compact Unabridged Dictionary (2nd Edition).

In Garcia, the First Department actually opined, "[i]n the case of section 240(1) claims, we still *broadly* construe the statute to protect workers falling from a height or being struck by a falling object." Garcia, supra at 91 (emphasis added). As discussed below, nothing about the language contained in either Dahar or Garcia would serve to undermine the continuing authority of Caddy. The same is true for the entire cohort of Appellate Division precedents cited in Respondent's Brief.

In addition to a gratuitous canvassing of the post-Dahar legal precedents, Respondent also advances a public policy argument to advocate against a definition of the term structure that includes objects with wheels. According to Respondent, such a definition would expand § 240 (1) into the realm of general automotive maintenance, yielding devastating consequences for automobile insurance premiums. Respondent's public policy argument is based on speculation, gross exaggeration, and hypothetical fact patterns that, for reasons discussed below, evade the Labor Law, irrespective of whether our courts consider vehicles to be structures. On this point, it is telling that Respondent's Brief contains no citation to any case

where a plaintiff, after being injured while changing an automobile tire, has attempted to invoke the protections of § 240 (1).

Closely associated with Respondent's public policy argument is Respondent's argument that the labor completed by Stoneham on the subject trailer amounts to "routine maintenance", as opposed to a repair. Appellants' Initial Brief on Appeal ("Appellants' Initial Brief"), demonstrates that Respondent failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of routine maintenance. Respondent's Brief does not directly challenge this contention. As previously set forth in Appellant's Initial Brief, and discussed further below, Stoneham's work in dismantling the trailer's entire airbrake system to restore the trailer to operable condition constitutes repair work as a matter of law.

Finally, Respondent suggests Appellants have feigned an issue of fact in order to avoid dismissal on the question of Stoneham's employment at the time of injury. The affidavit assailed by Respondent cites the exact page of Stoneham's deposition transcript containing the repayment discussion. R. 703. No statements contained in the affidavit contradict Stoneham's previous deposition testimony.

Respondent's Brief does not advocate for reversal of Supreme Court's decision on the issue of sole proximate cause. As previously discussed in Appellants' Initial Brief, Respondent failed to provide adequate safety devices to Stoneham on

August 18, 2018. *Appellants' Initial Brief at pp. 41-42*. Respondent is not entitled to reversal on this issue.

Finally, as conceded by Respondent in his Brief, Labor Law § 240 (1) does not solely apply to labor performed on construction sites. *Respondent's Brief at p. 16*.

Accordingly, it is respectfully requested that this Court reinstate Stoneham's claims under Labor Law § 240 (1), by reversing those aspects of Supreme Court's Decision and Order granting Barsuk's cross-motion for summary judgment.

ARGUMENT

POINT I:

RESPONDENT'S PROPOSITIONS REGARDING THE SUBJECT TRAILER ARE DISCORDANT WITH THE CONTROLLING § 240 (1) AUTHORITY

In his Brief, Respondent posits:

> Labor Law §240(1) only applies when a plaintiff is working on a building or a structure. A vehicle is not a structure, and so the statute does not apply in this case.

Respondent's Brief at pp. 3-4.

Respondent supports this proposition with erroneous interpretations of the Court of Appeals decision in Dahar and subsequent appellate authority. Id. 18 N.Y.3d 521. According to Respondent, Dahar, as well as subsequent Appellate Division precedents, demonstrates that, in recent years, New York's courts have

narrowed the definition of "structure" so as to exclude whole categories of objects such as "vehicles," like the subject trailer. *Respondent's Brief at pp. 13-20*. Respondent further warns that, should this Court reverse the Decision and Order of Supreme Court, it will necessarily implicate Labor Law actions for individuals engaged in automotive maintenance, thereby, unleashing havoc on automobile insurance premiums. *Respondent's Brief at p. 20*. There is no basis to this specter of a flood of litigation.

Appellants previously provided this Court with citations to several precedents, including this Court's decision in Moore v. Shulman, 688 N.Y.S.2d 854 (4th Dept. 1999), holding that, within the context of a § 240 (1) analysis, a vehicle is a structure. *Appellants' Initial Brief at pp. 20-23*. Respondent addresses these precedents only by calling into question their legitimacy in the aftermath of Dahar. To resolve doubt about the legitimacy of Caddy in the aftermath of Dahar, one need only look to McCoy v. Abigail Kirsch at Tappan Hill, Inc., 99 A.D.3d 13, 15-16 (2nd Dept. 2012). Seven months after the Court of Appeals issued Dahar, the Second Department, in McCoy, embraced the broad definition of "structure" set forth in Caddy. Respondent's analysis of Dahar and its progeny is erroneous.

Respondent's policy argument raises the specter of increased automobile insurance premiums were this Court to hold that Stoneham's repair work on the trailer is protected by § 240 (1). *Respondent's Brief at p. 17.* As a matter of practical

reality, however, much of the typical work of a garage mechanic involves routine maintenance and, thus, would not implicate § 240 (1). Even more to the point, because a garage mechanic's work is performed with traditional safety devices, such as hydraulic lifts and jacks, there is even less likelihood that such work would implicate § 240 (1).

The circumstances of Stoneham's case are in line with the underpinnings of this Court's decision in Moore, and easily distinguished from a hypothetical fact pattern, such as that presented in Respondent's Brief, involving injuries resulting from the replacement of an automobile tire with the use of a proper safety device, such as a lift jack. A reversal of Supreme Court's Decision and Order in favor of Appellants will not negatively impact insurance premiums, nor will it expand the scope of the Labor Law to encompass routine brake pad and tire replacements on automobiles. In any event, the Record is devoid of evidence to justify Respondent's speculation about expanded liability.

A. DAHAR DID NOT ALTER THE DEFINITION OF STRUCTURE SET FORTH BY THE COURT OF APPEALS IN CADDY

In attempting to persuade this Court that the subject trailer is not a structure, Respondent assails the definition of structure contained in Caddy, supra at 420 (defining structure to include "any production or piece of work artificially built up or composed of parts joined together in some definite manner"). *Respondent's Brief*

at pp. 14-15. Relying on Dahar, Respondent characterizes the definition as "too simple". *Respondent's Brief at p. 14*. Respondent then attempts to demonstrate that, in the aftermath of Dahar, the Appellate Division has curtailed the definition of "structure" to such an extent that it now excludes all vehicles, including the subject trailer. *Respondent's Brief at pp. 15-20*.

In Dahar, the plaintiff was injured while cleaning a "steel wall module", manufactured by the plaintiff's employer. 18 N.Y.3d 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 Respondent 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 an object comprised of parts joined together. 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).

Respondent is wrong in asserting that Dahar modified the Court of Appeals' definition of structure set forth in Caddy, supra. The holding of the Court in Dahar, while critical to an interpretation of the concept of routine maintenance, does not instruct lower courts in any way to curtail the definition of "structure" set forth in Caddy. The Appellate Division decisions cited in Respondent's Brief suggest no opposite conclusion.

Respondent cites Garcia, a case interpreting Labor Law § 241(6) involving an injury caused by a falling piece of mirrored wall. 96 A.D. 3d 88. Respondent cites the decision for its alleged criticism of Caddy as "hoary". Id. at 90. Respondent, however, neglects to mention that, in analyzing Caddy, the First Department stated as follows:

> [i]n *Caddy*, the 1897 statute at issue required employers to furnish scaffolding to workers engaged in the 'erection, repairing, altering or painting of a house, building or structure.' The purpose of the statute, as in the current *Labor Law § 240 (1),* was to protect workers from elevation-related hazards. The Court found that in addition

> to buildings and houses, the statute encompassed other 'structures' for which scaffolding would be required. 'Structure' was broadly construed in 1909 in order to effectuate the purpose of the statute in 1897. In the case of *section 240 (1)* claims, we still broadly construe the statute to protect workers from falling from a height or being struct by a falling object.

Id. at 91. Garcia, decided in the aftermath of Dahar, does not suggest a shift away from Caddy in the judicial interpretation of § 240 (1).

Respondent cites Dilluvio v. City of New York, 264 A.D.2d 115 (1st Dept. 2000) to demonstrate that the First Department declined to hold that a roadway is a "structure". *Respondent's Brief at p. 15.* Respondent, however, concedes that a roadway is comprised of "different substances". *Respondent's Brief at p. 15*. This concession removes a roadway from the definition of structure set forth in Caddy, supra, which discusses "parts joined together", rather than substances. When a roadway actually does contain "parts joined together", such as water mains or gas pipes, injuries resulting from work thereon may nonetheless be covered by § 240 (1). See, Marcinkowski v. City of New York 2011 N.Y. Misc. Lexis 2166 at *9-*10 (New York Co. 2011).

Respondent also cites Romero v. City of New York, a case involving the replacement of a motor in a large oven. 46 Misc.3d 144(A) (2nd Dept. 2015). While it is true that the Second Department Appellate Term held that the motor, itself, was not a "structure", the decision provides no physical description of the motor or its

size. The decision does, however, internally cite to Chuchuca v. Redux Realty, 303 A.D.2d 239 (2003), which cites to Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555 (1993) for the proposition that a "railroad car" is a structure. The facts of the instant case involve a large commercial trailer, which is more analogous to a railroad car than an oven motor. As such, Romero has no negative implications for plaintiff's §240 (1) claim.

Only Guevarra v. Wreckers Realty, LLC, 169 A.D.3d 651 (2nd Dept. 2019), cited by Respondent, appears to address whether a large, man-made, freestanding object, comprised of component parts, amounts to a structure. In Guevarra, the plaintiff was injured when he was struck by a piece of a skidloader, being used to hoist a nearby automobile engine. Id. at 652. At the time of the injury, the plaintiff was sweeping a floor, presumably adjacent to the automobile. In affirming an Order dismissing the plaintiff's § 240 (1) claim, the Second Department Appellate Term opined:

> Labor Law §240(1) is applicable to 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.' The dismantling of a vehicle unrelated to a building or a structure is not a protected activity under that statute (*see Strunk v. Buckley, 251 AD2d 491, 674 NYS2d 420 [1998])*. Further, the sweeping being performed by the plaintiff at the time of the accident cannot be characterized as 'cleaning' within the meaning of the statute, as it was the type of routine maintenance that occurs in any type of premises ….

Id. at 652.

The legal conclusion reached by the Second Department in Guevarra goes well beyond the facts of that case; and its brief, conclusory discussion of vehicles and structures amounts to mere dicta. A fair reading of the decision indicates the court's conclusion resulted from facts that likened plaintiff's floor sweeping to the type of routine maintenance that "occurs in any type of premises". Id. The court may have considered whether an automobile, presumably located near the area where plaintiff swept, amounted to a structure. However, as the plaintiff was sweeping a floor and not the automobile itself, the Court's determination on this topic was unnecessary to the legal analysis before it.

In any event, Stoneham's contention, unlike that of the plaintiff in Guevarra, is that the trailer he was engaged in repairing was itself a structure. See, Moore v. Shulman, supra. As such, by dismantling and then repairing it, his work was not thereby "unrelated to a structure", unless the law categorically excludes from the statutory definition – large and heavy objects, comprised of parts joined together in some definitive manner – simply because the objects have wheels.

To the extent Guevarra can be read as holding that a vehicle is never a structure in the eyes of § 240 (1), it was wrongly decided. The only support provided in the decision for the court's notion that "the dismantling of a vehicle unrelated to a building or structure" is not protected by § 240 (1), is a lone citation to Strunk v.

Buckley, 251 A.D.2d 491 (1998). Id. at 652. As discussed in Appellants' Initial Brief, Strunk fails to opine on the topic of whether a vehicle amounts to a structure, a point that even Respondent appears to halfheartedly concede. *Appellant's Initial Brief at pp. 21-22*; *Respondent's Brief at p. 18*.

Any confusion about the vitality of Caddy in post-Dahar jurisprudence is resolved upon a reading of McCoy, 99 A.D.3d 13. In McCoy, the Second Department affirmed a decision from Supreme Court, Kings County, finding that a Jewish wedding canopy (chuppah) was a structure for purposes of the statute. Id. The Second Department explicitly recognized the continuing authority of the broad definition of structure laid down by the Court of Appeals in Caddy. Id. In relevant part, the Second Department opined:

> [o]ver a century ago, the Court of Appeals made clear that the meaning of the word 'structure,' as used in the Labor Law, in not limited to houses or buildings (*see Caddy v. Interborough R.T. Co., 195 NY 415, 420, 88 NE 747, 20 NY Ann Cas 198 [1909]).* 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 to parts joined together in some definite manner *(id.)*.
>
> Since the legislature definitionally applied *Labor Law § 240 (1)* to buildings or structures, a structure, by implication, may include constructs that are less substantial and perhaps even more transitory than buildings.

Id. at 15-16; see, also, Eherts v. Shoprite Supermarkets, Inc., 199 A.D.3d 1270, 1271 (3rd Dept. 2021) (hot water heater deemed a structure.) If a temporary wedding canopy can be regarded as a structure, then the subject trailer, with its considerably greater size and durability, is also a structure.

B. RESPONDENT'S PUBLIC POLICY ARGUMENT CONSIDERS FACTS HIGHLY DISTINGUISHABLE FROM THOSE PRESENT IN THE INSTANT LAWSUIT

According to Respondent, a holding that the trailer is a structure would lead to an increase in the cost of automobile insurance premiums. Specifically, Respondent states:

> [t]his matter is analogous to any other vehicle, such as a car, falling off a lift onto a mechanic, as the trial court recognized. In fact, taking plaintiffs' position to its ultimate conclusion, even ordinary motorists who get stranded on a highway could be subject to Labor (sic) § 240 (1) liability. If an individual gets a flat tire and calls a mechanic who subsequently gets injured when the car falls off jacks, then the owner of the automobile would be subject to Labor Law § 240 (1). Of course, ordinary consumer automobile insurance policies would have to account for this policy, which presumably would make the cost of insurance even higher than it already is.

Respondent's Brief at p. 17 (internal citations omitted).

Respondent's argument is absurd because the statute's provisions implicate those situations where a laborer is not furnished with an appropriate "device" providing for his "proper protection". The mechanic's lift would amount to an

appropriate safety device for raising an automobile, so would the jacks. As such, civil recovery for any injuries suffered by Respondent's hypothetical garage mechanics would be typically governed by ordinary negligence principals.

The instant matter does not involve an automobile, a mechanic's lift, or a flat tire. In fact, nowhere in his Brief does Respondent suggest he provided Stoneham with a mechanic's lift or an appropriate jack. To this point, the Appellants presented evidence to Supreme Court demonstrating that defendant failed to provide Stoneham with "stanchions or commercial jack stands." R. at 706.

Indeed, on this issue, Supreme Court opined in its Decision and Order:

> [t]he record does not support a finding that adequate safety devices were available, that plaintiff knew both that they were available and that he was expected to use them; and that he chose for no good reason not to do so.

R. at 10-11. Respondent's response to the evidence in the Record and Supreme Court's holding is an argument that:

> there were various items on the subject property that Mr. Stoneham could have used to block the tires of the front loader to prevent it from moving, such as timber and metal objects of a substantial weight.

Respondent's Brief at 10. This argument, however, ignores Appellate Division precedent holding that § 240 (1) places no burden on a plaintiff to build an appropriate safety device. Collins v. West 13th St. Owners Corp., 63 A.D.3d 621, 622 (1st Dept. 2009) ("The motion court properly recognized that defendants'

argument, that the onus is on plaintiff to construct an adequate safety device, using assorted materials on-site which are not themselves adequate safety devices but which may be used to construct a safety device, improperly shifted to the workers the responsibility for creating a proper safety device").

The facts presented in this appeal are easily distinguished from Respondent's hypothetical situations involving routine automobile maintenance performed with the use of adequate safety devices. Instead, the facts are more closely aligned with this Court's decision in Moore, supra at 855 (holding § 240 (1) applied when a defendant substituted a "makeshift sling" for an adequate safety device during a plaintiff's work to dismantle a utility van), and the Court of Appeals' decision in Gordon, supra at 560 (holding § 240 (1) applied where a defendant failed to provide scaffolding to a plaintiff's efforts to clean a railroad car). The decisions in Moore and Gordon had no negative impact on the cost of automobile insurance. Likewise, there is no rational basis to believe that this Court's reversal of Supreme Court's Decision and Order would negatively impact insurance rates.

POINT II:

RESPONDENT HAS FAILED TO ESTABLISH THAT MR. STONEHAM'S WORK AMOUNTED TO ROUTINE MAINTENANCE

Referencing Stoneham's use of open-ended wrenches and a rubber mat, Respondent contends plaintiff's labor on the subject trailer amounted to a "routine"

and "simple" repair on "wear and tear" items, akin to the type of brake pad replacement that regularly occurs in an automobile mechanic' shop. *Respondent's Brief at p. 22*. For two reasons, Respondent's argument fails to establish Stoneham's labor amounted to routine maintenance that falls outside the purview of Labor Law § 240 (1).

First, a party seeking dismissal of a § 240 (1) claim on grounds that labor amounted to routine maintenance bears the initial burden of setting forth a prima facie showing that the labor amounted to a "scheduled" or "interval" replacement of a wear and tear item. *Appellants' Initial Brief at pp. 25, 30-31*. Respondent does not argue this initial moving burden is inapplicable, nor does he expressly identify any facts in the record that satisfy the burden. *Respondent's Brief at pp. 21-23.* Instead, Respondent submits, in a most conclusory fashion, that Mr. Stoneham's labor amounted to "maintenance" on "brakes". *Respondent's Brief at p. 22.* While Respondent does state Mr. Stoneham's labor "only required 'the use of some open-ended wrenches and a rubber mat'", he fails to cite any authority for the proposition that the use of "open-ended wrenches and a rubber mat" establish routine maintenance as a matter of law or satisfy a defendant's moving burden on this issue.

Second, a myriad of facts in the record establish that Stoneham's labor was not the type of interval brake pad or brake lining replacement that typically occurs in a mechanic's shop. *Appellants' Initial Brief at pp. 32-33*. As set forth in

Appellant's Initial Brief, work amounts to a "repair" when it is conducted to "fix something that is malfunctioning, inoperable, or operating improperly." *Appellants' Initial Brief pp. 25-26* (citing, Bissell v. Town of Amherst, 13 Misc.3d 1216A (Erie Co. 2005) *aff'd* 32 A.D.3d 1278 (4th Dept. 2006)). In general, wear and tear does not render something "inoperable," just as worn brakes do not render an automobile inoperable. The air tank leak at the focus of Stoneham's August 18, 2018 labor, however, did render the subject trailer inoperable. R. 97 at ¶ 13. Respondent does not argue otherwise. *Respondent's Brief at pp. 21-23*. Moreover, to restore the trailer to an operable state, Stoneham was required to dismantle and replace an entire airbrake system, comprised of an air tank and four air hoses. *Appellants' Initial Brief at pp. 32-33*.

Mr. Stoneham's labor was not performed to address ordinary wear and tear, as suggested by Respondent, but, instead, was completed in response to the presence of an unexpected leak in the trailer's air tank that rendered the trailer inoperable. *Appellants' Initial Brief at pp. 32-33.* Respondent's Brief sets forth no persuasive argument to the contrary.

POINT III:

RESPONDENT INACCURATELY SUMMARIZES MR. STONEHAM'S TESTIMONY REGARDING COMPENSATION FOR HIS WORK ON THE SUBJECT TRAILER

In an attempt to demonstrate that Appellants have created a feigned factual issue to defeat summary judgment on the question of Mr. Stoneham's employment on August 18, 2018, Respondent incorrectly asserts that Stoneham's affidavit, filed in opposition to Respondent's cross-motion for summary judgment, amounts to the first instance Stoneham stated the August 18, 2018 labor on the subject trailer was repayment for a loan. *Respondent's Brief at pp. 25-26.*

A statement contained in an affidavit is considered feigned when it contradicts statements contained in the affiant's prior sworn deposition testimony. See, Alati v. Divin Builders, Inc., 137 A.D.3d 1577 (4th Dept. 2016). Nothing contained in Stoneham's affidavit contradicts Stoneham's prior deposition testimony. During Stoneham's discovery deposition, which occurred well before defendant filed a cross-motion, Stoneham testified the labor on the trailer was repayment to Respondent for a previous monetary loan. Specifically, Stoneham testified:

> Q. Now we talked about a loan that you had taken out, prior to your accident, from David Barsuk for $24,000, correct?
>
> A. That's correct.

Q. And you told us earlier that the deal that you had with David [Barsuk] was that you were going to work that off, correct?

A. That's correct. And then when I closed and paid on the house, there was going to be enough to help pay it back.

Q. On the – the work that you performed on the air brake system, in your mind, was that work supposed to go toward repayment of your loan?

A. Yes.

R. 347 (lines 6 through 22).

Stoneham's Affidavit in Reply to Barsuk's Cross-Motion for Summary Judgment memorialized Stoneham's prior sworn deposition testimony. In relevant part, the affidavit reads:

4. As discussed in my sworn deposition testimony previously submitted to this Court with my moving papers, in the months before my injury, David [Barsuk] wrote me a check for a significant sum of money. David wrote the check in connection with a verbal loan agreement I entered into with him at that time. Pursuant to the terms of the loan agreement, I was to repay a portion of the loan to David by providing him with manual labor. Specifically, I hauled topsoil for David, helped him tear down a sewer plant, worked on his service trucks at the recycling plant, and also agreed to repair his trailer on August 18, 2018. (R. 159, L5-R. 161, L21)

5. *On Page 247 of my deposition transcript, I explained that I performed labor on the trailer's air*

> *brake system to repay David's loan. (emphasis supplied)* (R. 347)
>
> 6. A copy of the loan check, written in the amount of $25,000 is annexed hereto as EXHIBIT A. The check is signed by David [Barsuk].
>
> 7. My visits to the recycling plant on July 28, 2018, August 4, 2018 and August 18, 2018, as well as the labor I performed on those dates, were to repay a portion of the loan pursuant to the terms of the loan agreement. David maintained an accounting of the value of the work I performed so as to determine the remaining principal loan balance. David also paid me for the parts I purchased to complete the trailer repair.

R. 702-703 (emphasis added).

Supreme Court implicitly rejected Respondent's argument that Stoneham's March 8, 2018 affidavit contained feigned factual statements. R. 11, 724 at ¶ 3. The affidavit is consistent with Stoneham's prior deposition testimony.

CONCLUSION

Respondent's primary argument on appeal is essentially that large objects with wheels, capable of being used on highways, are never structures. None of the case law cited in Respondent's Brief supports this categorial exclusion of an entire class of objects from the ambit of Law Labor § 240 (1). Nor is Respondent's public policy argument persuasive: it merely sets forth hypothetical fact patterns never before analyzed by this Court in the context of a dispute arising under § 240 (1).

The Court of Appeals has held that a railroad car is a structure. Gordon v. Eastern Ry. Supply, supra at 560. This Court has previously held that a motorized van is a structure. Moore v. Shulman, supra at 855. And, this Court should now hold that the subject trailer, which collapsed upon Mr. Stoneham, is a structure. Accordingly, it is respectfully requested that this Court reinstate Plaintiffs' claims under Labor Law § 240 (1), by reversing those aspects of Supreme Court's Decision and Order granting Defendant Barsuk's cross-motion for summary judgment.

Dated: June 17, 2022
Buffalo, New York

Respectfully submitted,

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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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Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 4,788.