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

New York Supreme Court

Appellate Division—Fourth Department

MARK A. STONEHAM and BONNIE STONEHAM,

Plaintiffs-Appellants,

Docket No.: CA 21-01542

– 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.

BRIEF FOR PLAINTIFFS-APPELLANTS

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QUESTIONS PRESENTED

Question: Was the 35 foot-long, multi-ton trailer on which Plaintiff was working at the time of his injury a structure within the meaning of New York Labor Law § 240(1)?

Answer of the Court Below: No.

Question: At the time Plaintiff was installing new equipment on the trailer so as to render it operable, was he engaged in making a repair to a structure within the meaning of New York Labor Law § 240(1)?

Answer of the Court Below: No.

Question: Is liability under New York Labor Law § 240(1) limited to construction sites?

Answer of the Court Below: Yes.

PRELIMINARY STATEMENT

In this lawsuit, Plaintiffs-Appellants Mark A. Stoneham and Bonnie Stoneham (hereinafter "Plaintiffs" or "Stoneham") allege personal injuries resulting from, inter alia, Defendant-Respondent David J. Barsuk's (hereinafter "Defendant" or "Barsuk") violation of New York Labor Law § 240(1). (R. 35-38 at ¶55-66). On August 18, 2018, a large commercial trailer fell down upon Mark Stoneham's body, crushing his pelvis. (R. 99-100 at ¶26-34). As a result of the impact, Plaintiff suffered catastrophic and permanent injuries. At the time, Stoneham was working for Barsuk at a recycling plant in Batavia, New York. (R. 703 at ¶4-7). Barsuk owned the premises. (R. 83).

On November 20, 2020, Plaintiffs moved for summary judgment on the issue of Defendant's violation of Labor Law § 240(1) and corresponding absolute liability. (R. 15-16). On March 2, 2021, Defendant cross-moved for an order of summary judgment, dismissing Plaintiffs' Labor Law § 240(1) cause of action. (R. 508-509, 624-625). The following issues were raised and briefed in the parties' dueling motions: the issue of whether the subject trailer is a "structure"; the issue of whether Stoneham's labor on the trailer constituted a "repair"; the issue of Stoneham's status as an employee; and the issue of sole proximate cause. (R. 9-13).

On October 5, 2021, Supreme Court issued its Decision and Order denying Plaintiffs' motion for summary judgment and granting Defendant's cross-motion.

(R. 9-13). Supreme Court held the Record contained "material issues of fact" on the question of Stoneham's status as an employee of Defendant. (R. 11). Supreme Court further held that Defendant failed to establish his entitlement to judgment as a matter of law on the issue of sole proximate cause. (R. 10, 11). Nonetheless, the court granted Defendant's Motion, stating, in relevant part:

> Labor Law §240(1) imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site proximately causes injury to a worker (sic).
>
> [T]he plaintiff's work was limited to the replacement of a leaking air tank on the trailer's brake system. This kind of work is performed every day on trucks and trailers outside of a construction setting. It requires no special tools, aside from a mechanism to lift the truck or trailer. The plaintiff's task required the use of some open-ended wrenches and a rubber mat. Under plaintiffs' liberal application of Labor Law § 240(1), every truck mechanic who raises a truck on a lift in his or her shop would be subject to absolute liability under Labor Law §240(1).
>
> The plaintiffs have not identified, nor has the court found, any cases to support such a broad application of the provisions of Labor Law § 240(1).
>
> It has been held that the dismantling of a vehicle unrelated to a building or structure is not a protected activity under Labor Law § 240(1). It is also well settled that Labor Law §240(1) does not apply to routine maintenance in a non-construction, non-renovation context.
>
> * * *

> The court finds no reason to strain the language of the statute to encompass routine activities involved with repairing the brake system on a trailer, which is clearly distinguishable from the risks associated with the construction or demolition of a building.

(R. 12) (internal citations omitted).

It was error for Supreme Court to hold at least implicitly that the trailer Stoneham was working on at the time of his injury was not a structure within the definition accorded to that term by the courts of our State, including notably, by the Court of Appeals, which had held, more than one hundred years ago, that the term "structure" broadly includes objects composed of parts joined together. Supreme Court construed the statutory term in an unduly narrow fashion so as categorically to exclude work on vehicles, despite the existence of Fourth Department authority holding that vehicles can and should be deemed structures for the purposes of liability under the statute. Numerous decisions from the Appellate Division have also either implicitly or explicitly held vehicles to be structures.

Supreme Court improperly categorized Stoneham's work as "the kind of work performed every day on trucks and trailers" and his activities on the day in question as "routine" or "routine maintenance," when the particular repair work he was involved in on the day of his injury was far from routine and involved an inordinate risk of catastrophic injury from an elevation-related hazard. Defendant, in moving for summary judgment on the issue of routine maintenance (as opposed to the

performance of a repair to a structure), failed to set forth a prima facie case establishing his entitlement to judgment as a matter of law. Defendant adduced no facts that would allow for the conclusion that Stoneham was engaged in routine maintenance akin to changing the brake pads on a truck, or replacing a light bulb or any other item subject to ordinary wear and tear. The Record is devoid of evidence that Stoneham was addressing a problem precipitated by normal wear and tear, or otherwise required as part of scheduled maintenance.

On the other hand, Stoneham has pointed to ample evidence in the Record raising a triable question of fact on the issue of whether he was engaged in repair work required to remedy a malfunction that rendered the trailer inoperable. As such, the work he was engaged in performing amounted to a repair, not routine maintenance.

Supreme Court further erred in holding implicitly that Labor Law § 240 (1) applies only to workers injured on construction sites. That the trailer was present at a recycling plant does not remove it from the ambit of the statute. Due to the trailer's size and weight, it was necessary to employ construction-type equipment in order to raise it into the air. This was done, contrary to the obvious need for protective devices, without the use of jack stands or safety blocks.

It is noteworthy that Supreme Court did not dispute the proposition that what Stoneham faced on the day of his injury was an elevation-related risk. Rather than

focusing on the nature of the work site per se, Supreme Court should have examined more closely how the injury occurred and whether it resulted from Defendant's failure to provide Plaintiff "with adequate protections from reasonably preventable, gravity-related accidents." See Wilinski v. 334 East 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 7 (2011). Thus, rather than categorically excluding Stoneham's case from the protection provided by the statute, the court below should have concerned itself with whether Stoneham was faced with the special risks contemplated by the statute related to falling objects and whether appropriate safety devices were present to prevent injury from such objects. It is respectfully submitted to this Court that our State's jurisprudence defining the category of injuries that warrant the special protection of the statute applies directly in those situations where a heavy object falls or collapses on a worker, as long as the worker was working on a building or structure and as long as the elevation-related risk was one that could have been eliminated by the use of an appropriate safety device, regardless of whether the location of the accident was a traditional construction site. Plaintiff found himself on the day of his accident, unfortunately, in exactly such a situation.

Supreme Court correctly concluded that Defendant failed to satisfy its moving burden on the issue of sole proximate cause. And Supreme Court found that there exists a triable question of fact on the issue of Stoneham's status as an employee of Defendant. Plaintiff does not seek disruption of Supreme Court's finding that there

exists a triable question of fact on the issue of Stoneham's status as an employee of Defendant.

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.

STATEMENT OF FACTS

In July 2018, Defendant contacted Stoneham to come to his recycling plant in Batavia, New York, to inspect a trailer which was inoperable. (R. 96, at ¶9). A picture taken from video surveillance showing Defendant's trailer at his recycling plant on July 28, 2018, appears below. (R. 602-603).

The trailer is a 35 foot-long, 8½ feet-wide, tilt bed trailer used to haul heavy industrial equipment, like excavators and dump trucks, with a maximum hauling weight up to twenty tons. (R. 96 at ¶10; R. 148, Lines 1-3). Defendant owned both the trailer (R. 40-41 at ¶2) and the property where the accident occurred (R. 83). Defendant also operated, maintained, managed and controlled this location. (R. 28 at ¶9-12; R. 46 at ¶6).

A few months before the accident, Stoneham and Barsuk entered into a verbal loan agreement in which Defendant loaned Plaintiff the sum of $25,000. (R. 703 at ¶4-7). Pursuant to the terms of the loan agreement, Plaintiff was to repay a portion of the loan to Defendant by performing manual labor. (R. 703 at ¶4-7). Specifically, the work performed by Plaintiff on the date of the accident was part of the verbal loan agreement to repay a portion of the loan due and owing. (R. 703 at ¶4-7).

On July 28, 2018, the two parties met at Defendant's recycling plant to inspect the trailer. (R. 97 at ¶12). Plaintiff inspected the trailer's air brake system and concluded that he needed to dismantle and replace a leaking air tank underneath the trailer, as well as four air hoses that were part of the air brake system. (R. 97 at ¶13, 16). Video surveillance on August 18, 2018, at 12:20 shows that the black cylindrical air tank was approximately 3 feet long and 1½ feet in diameter. (R. 606-607). The air tank is designed to store air so that when a truck driver steps on the brake pedal, it has enough air pressure to engage the brakes, thereby stopping the trailer. (R. 327 at Lines 9-15). At the time of the July 28, 2018 inspection, the air tank looked black in color, similar to how it looked during plaintiff's initial inspection, except plaintiff noticed a leak in the air tank and concluded the leak rendered the trailer inoperable. (R. 239, Line 8 to R. 240, Line 1). Due to this leak, the 35-foot trailer was in a fixed position, inoperable and immobile. (R. 327 at Lines 19-25; R. 97 at ¶13).

Prior to July 28, 2018, Stoneham was familiar with the trailer. About four months earlier, at the time Barsuk bought the trailer, he called Stoneham with a request to deliver it to Defendant's property, which Stoneham did in February or March 2018. (R. 97 at ¶14). At the time of delivery, Stoneham inspected the trailer. (R. 97 at ¶15). He noticed that the air tank was painted black, looked nice, and was working properly (R. 97 at ¶15).

On Saturday, August 4, 2018, the two men met again at the recycling plant so that Stoneham could begin the work of dismantling the leaking air tank attached to the underside of the trailer. (R. 98 at ¶17). The trailer had to be lifted up off the ground in order for Stoneham to begin his repair work underneath it. (R. 98 at ¶18).

Defendant drove a front-end loader to the back side of the trailer. (R. 98 at ¶19). Then, he used the loader to lift the trailer up off the ground. (R. 98 at ¶19). Next, Plaintiff slid underneath the trailer to perform his initial repair work dismantling the broken air tank and the four air hoses which were part of the air brake system. (R. 98 at ¶20). At the time of plaintiff's work to fix the trailer and dismantle the air system, the original air tank was still black in color. (R. 236, Line 24 to R. 237, Line 17).

Having removed the leaking air tank, Stoneham then went to Fleetpride, a heavy truck and trailer parts store, to purchase a new air tank and four air hoses. (R. 98 at ¶21).

In mid-August, Stoneham informed Barsuk that he planned to install the new air tank and hoses over the coming weekend. (R. 98 at ¶23). On Saturday morning, August 18, 2018, Plaintiff left his home in Jamestown, New York. (R. 98 at ¶24). He first made a stop in Eden, New York, to check on a work project under way at the high school. (R. 98 at ¶24). After that, he drove to Defendant's recycling plant in Batavia to complete work on the trailer so as to render it operable. (R. 99 at ¶25).

Upon arriving at Defendant's recycling plant, Plaintiff found that the front gate was held shut by a dummy lock. (R. 99 at ¶26). This is when a lock is on the chain but left in the unfastened position, allowing Plaintiff to enter the recycling plant. (R. 99 at ¶26). Defendant would often either leave a key for Plaintiff or "dummy lock" the gate so Plaintiff could gain entrance to do his work. (R. 99 at ¶26).

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Defendant owned the front-end loader which Stoneham used on August 18th for the purpose of lifting the trailer up off the ground. (R. 256 at Lines 5-9). A picture of the front-end loader with bucket is shown below. (R. 420).

Barsuk told Stoneham earlier that he could use the front-end loader to complete the repair work. (R. 336 at Lines 11-18). Plaintiff could not have performed his repair work on August 18th without the use of the front-end loader. (R. 99 at ¶27). He needed it to lift the trailer in order to get underneath it, just as it

had been necessary to use this type of construction equipment on August 4th when Stoneham dismantled the leaking air tank and its four hoses. (R. 99 at ¶27).

Plaintiff lifted the back left section of the trailer so that it was elevated about 5½ feet above ground level, similar to what Defendant had done on August 4, 2018. (R. 99 at ¶27). Plaintiff then engaged the parking brake on the front-end loader to secure it in place. (R. 99 at ¶27).

A picture of the front-end loader with bucket elevating the 35-foot trailer about 5½ feet above ground level, taken from video surveillance on the day of the accident, appears below. (R. 383-384).

Plaintiff placed a black rubber mat under the trailer where he would perform his repair work. (R. 99 at ¶28). He gathered his tools, which included open-end wrenches, and the new air tank, with four new air hoses, and then positioned himself underneath the trailer to begin installing the new equipment. (R. 99 at ¶28).

While Plaintiff was underneath the trailer, lying flat on his back, looking up at the underside of the trailer, he began bolting the new air tank in place and then began hooking up the four air hoses to the brake chambers with the use of his open-ended wrenches. (R. 99 at ¶29).

Just as he was hooking up the last air hose to the brake chamber, he heard a loud clicking noise from the front-end loader, at which point the trailer fell from its lifted position pinning Plaintiff to the ground at his hips. (R. 99 at ¶30). A video showing the wheels of the front-end loader, rolling backward, causing the elevated trailer to collapse while Plaintiff lay underneath it, appears on the surveillance tape for August 18, 2018, starting at 12:56:50 through 12:57:00. (R. 383-384).

Plaintiff remained pinned underneath the trailer for approximately 5½ hours before Defendant arrived. (R. 99 at ¶30).

At no time on the day of the injury, did Plaintiff observe any jack stands to brace the underside of the elevated trailer, nor did he observe any safety blocks to secure the tires on the front-end loader, preventing it from rolling backward. (R. 99 at ¶31; R. 100 at ¶32). Neither did Defendant provide Plaintiff with any safety

equipment in the form of safety blocks or jack stands. (R. 100 at ¶33). As a direct result of the elevated trailer falling on Plaintiff, he suffered crush injuries to his right and left pelvis. (R. 100 at ¶34).

Plaintiff's expert witness, John Coniglio, in his sworn Affidavit stated that, had Plaintiff been provided with safety blocks (shown in yellow below) for placement between the front and back tires of the front-end loader, it would have kept the front-end loader from rolling backwards, thus preventing the trailer from crashing down on Plaintiff. (R. 392 at ¶21; R. 393 at ¶23; R. 415).

Also, according to Mr. Coniglio's Affidavit, had Defendant provided Plaintiff with bracing devices, such as either jack stands or stanchions, for placement beneath the elevated trailer, this, too, would have prevented the trailer from collapsing onto Plaintiff and causing his injuries. (R. 392 at ¶21; R. 393 at ¶23).

A picture of adjustable jack stands, with a lifting capacity of 22 tons, is shown below. (R. 417).

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ARGUMENT

POINT I:

CONTRARY TO THE IMPLICIT HOLDING OF SUPREME COURT, A VEHICLE IS A STRUCTURE WITHIN THE MEANING OF §240(1)

According to New York Labor Law §240(1):

> [a]ll contractors and owners and their agents…who contract for but do not direct or control the work, 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.

§240(1) imposes strict liability on all owners and contractors who fail to adequately protect persons employed in the erection, demolition, repair, alteration, painting or cleaning of a building or structure. The statute was designed to protect persons so employed from gravity-related injuries, such as falls and falling objects. Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514 (1991).

Plaintiffs contend the circumstances surrounding Stoneham's injuries fall well within the ambit of the statute, i.e., the occurrence of a gravity-related injury caused when a heavy object falls from an elevated height onto a laborer engaged in repairing a structure.

Supreme Court held, at least implicitly, that vehicles are not structures and that, because the subject trailer could be deemed to be a vehicle, it may not also be considered a structure. In its Decision and Order, the court opined, "it has been held that the dismantling of a vehicle unrelated to a building or structure is not a protected activity under Labor Law §240(1)". (R. 12).

Under §240(1), liability extends to work "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" under circumstances where appropriate safety devices are not provided. Thus, it is important for this Court to consider first and foremost what it is that constitutes a structure for purposes of the application of the statute, as well as whether the trailer on which Plaintiff was working falls within that definition.

More than one hundred years ago, the Court of Appeals, in Caddy v. Interborough Rapid Transit Co., held that a "structure" is "any production or piece of work artificially built up or composed of parts joined together in some definite manner." 195 N. Y. 415, 420 (1909). This definition has not changed in nearly one hundred years, as witnessed by a brief memorandum decision of the Court of Appeals in Lewis-Moors v. Contel of New York, Inc., affirming a decision of the Third Department, which rejected the contention of a regional telephone company that, as a matter of law, a telephone pole is not a structure within the meaning of the statute. 78 N.Y.2d 942 (1991); see also, Joblon v. Solow, 91 N.Y.2d 457 (1998).

In Lewis-Moors, the Third Department observed that, according to Court of Appeals precedent, "the term 'structure' must be broadly defined so as to bring within the protection of the statute all 'artificially built up' objects requiring" appropriate safety devices for workers engaged in the general work activities enumerated by the statute. See, Lewis-Moors v. Contel of New York, Inc., 167 A.D.2d 732, 733 (3d Dept. 1990). The Third Department further stated that the statute, "continues to embody the goal of protecting workers and imposing safety responsibility upon owners and contractors for 'a [broad] range of elevated-related hazards." Id. at 733.

Given the broad definition accorded to the word "structure" by our State's courts in connection with the application of the statute, there can be little doubt that the definition encompasses the trailer, beneath which Plaintiff was working at the time of his injury. The trailer was composed of parts joined together in some definite manner. There is, of course, also no particular reason or rationale for holding, as Supreme Court did implicitly, that a vehicle itself cannot be a structure within the meaning of the statute. As demonstrated by the photograph on page 8, supra, the trailer is composed of parts joined together in a definitive manner i.e., an assemblage of metal and wood parts.

By implying that the trailer, as a vehicle, falls outside the ambit of the protections afforded by the statute, Supreme Court applied an unduly narrow

definition of what constitutes a "structure" while, at the same time, acted unduly to narrow the range of elevated-related hazards within the statute's reach.

In Moore v. Shulman, this Court applied the liability afforded by the statute in favor of a plaintiff injured while involved in dismantling and converting five utility vans into cargo vans. 688 N.Y.S.2d 854 (4th Dept. 1999). Plaintiff filed a lawsuit against the owner of the vans, alleging a cause of action for breach of Labor Law §240(1). Defendant moved for summary judgment dismissing Plaintiff's §240(1) claim, and Plaintiff-cross moved for summary judgment with respect to said claim. Defendant's primary argument was that Plaintiff's work dismantling and converting the utility vans into cargo vans was not a "protected" activity under §240(1). Id. The trial court granted Defendant's motion and dismissed Plaintiff's claim. The Fourth Department reversed, denying Defendant's motion and granting Plaintiff's cross-motion. In its decision, the Fourth Department opined:

> [c]ontrary to the court's conclusion, Plaintiff was engaged in a protected activity at the time of the accident. *The van is a structure.*

Id. (emphasis added). This Court further stated that the work Plaintiff performed need not be conducted at a traditional construction site to fall within §240(1).

Moore's holding is in line with a series of other Appellate Division decisions involving vehicles and claims made pursuant to Labor Law §240(1). See, Spears v. State of New York, 266 A.D.2d 898, 899 (4th Dept. 1999) ("employer's dump truck

may be considered a structure within the meaning of [§240(1)]"); Hutchins v. Finch, Pruyn & Co., Inc., 267 A.D.2d 809, 811 (3d Dept. 1999) ("the definition of 'structure' is sufficiently broad to encompass the log truck here"); Gordon v. Eastern Ry. Supply Inc., 181 A.D.2d 990 (4th Dept. 1992) (a railroad car is a structure within the meaning of Labor Law § 240(1)); Cox v. La Barge Blos., 154 A.D.2d 947 (4th Dept. 1989) (Plaintiff's application for summary judgment on §240(1) claim granted in case involving a fall from pipes stacked upon a flatbed truck); Ampolini v. Long Island Lighting Co., 186 A.D.2d 772 (2d Dept. 1992) (demonstrating a plaintiff injured during a fall from a trailer may maintain a §240(1) claim); Myiow v. City of New York, 143 A.D.3d 433 (1st Dept. 2016) (fall from a flatbed truck afforded protection under Labor Law §240(1)).

Strunk v. Buckley, cited by Supreme Court in its Decision and Order for the proposition that "the dismantling of a vehicle unrelated to a building or structure is not a protected activity under Labor Law Section 240 (1)" is clearly distinguishable from Stoneham's case on both the law and the facts and should not govern the outcome of the summary judgment motions now before this Court. [251 A.D.2d 491 (2d Dept. 1998)]. In Strunk, the plaintiff, an experienced salvager, offered to purchase from the defendant a large component (the "dump body") of a damaged truck trailer, on condition that the sale would not include the tailgate and the frame of the trailer. After the defendant accepted the plaintiff's offer of money in exchange

for the salvage, the plaintiff and his two brothers proceeded to take the dump body from the frame using their own tools. Plaintiff was injured when the dump body slid from the frame and fell on him. In reversing the order of Supreme Court and granting summary judgment to the defendant, the Second Department found that the plaintiff "was not hired by anyone, and his claim that he was hired to demolish and alter the trailer is simply without merit." Id. at 492. Contrary to the supposition of Supreme Court, the Second Department's decision in Strunk had nothing whatsoever to do with the question of whether the salvaged material was a "vehicle" or, for that matter, whether a "vehicle" could be deemed to be a structure for purposes of the application of §240(1). In any event, it is clear that the Second Department, in deciding Strunk, did not hold that work on vehicles in general (or on trailers in particular) is excluded from the liability protections of the statute.

This Court's conclusion in Moore v. Shulman, that utility vans are structures, follows naturally from the broad definition accorded to the term "structure" by the Court of Appeals over one hundred years ago in Caddy v. Interborough Rapid Transit Co. 195 N.Y. 415 (1909). In Moore, the structures being converted were motorized, engine-powered utility vans. It follows that the very large and heavy trailer upon which Stoneham was working at the time of his injury, an object composed of parts joined together, which was inherently stationary unless pulled by a motorized vehicle, must also be considered a structure. Supreme Court erred when

it failed to follow this Court's decision in Moore, leading it to hold incorrectly that Stoneham's work dismantling a vehicle (the trailer) was unrelated to a structure and thus not a protected activity under Labor Law §240(1).

POINT II:

SUPREME COURT ERRED IN HOLDING AS A MATTER OF LAW THAT PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE AS OPPOSED TO REPAIR WORK

Supreme Court found that Plaintiff's "work was limited to the replacement of a leaking air tank on the trailer's brake system. This kind of work is performed every day on trucks and trailers outside of a construction setting." (R. 12). Supreme Court went on to assert that the logic of Plaintiff's argument would apply liability under § 240(1) to "every truck mechanic who raises a truck on a lift in his or her shop." (R. 12). Also, according to the court, the language of the statute should not be strained to "encompass routine activities involved with repairing the brake system on a trailer, which is clearly distinguishable from the risks associated with the construction or demolition of a building." (R. 12).

It is respectfully submitted that Supreme Court, in rendering its decision on the parties' dueling motions, improperly painted the facts and circumstances of Plaintiff's case with far too broad (and inaccurate) a brush. Categorical exclusions from the statute's reach (for example, work on "vehicles" or repairs to "brake systems") are not warranted by our State's decisional law and have the potential to

cause undue distraction from a court's proper decision-making function. Liability analyses under § 240 (1) should be conducted on a case-by-case basis, resisting urges to broadly exclude entire industries from the statute's protections.

In Riccio v. NHT Owners, LLC, plaintiff was a mechanic injured while replacing parts on a malfunctioning elevator. 51 A.D. 3d 897, 899 (2d Dept. 2008). While standing on a ladder with a tool in one hand and the other hand grabbing a newly installed piece of equipment, he fell backwards off the ladder striking the ground. The trial court denied plaintiff's motion for summary judgment on the issue of liability on the cause of action based on Labor Law § 240 (1) and also denied defendants' cross-motions. In affirming the order of Supreme Court, the Second Department stated that, "The question of whether a particular activity constitutes a 'repair' or 'routine maintenance' must be determined on a case-by-case basis." Id. The court then concluded that, "[c]ontrary to Defendants' contention, at the time of this accident, Plaintiff was engaged in a repair, and thus in an activity specifically protected by Labor Law Section 240(1)." Id. The plaintiff in Riccio was repairing an elevator when he fell to the floor, while Stoneham was repairing a trailer when the trailer fell down upon him. In both instances, the plaintiffs were engaged in making repairs to a structure when they suffered a gravity-related injury. Neither case, on its facts, should be categorically excluded from the protections of the statute.

In Stoneham's case, by engaging in a series of generalized propositions, Supreme Court improperly granted summary judgment to Defendant, despite particularized facts demonstrating Plaintiff was performing a repair, an activity clearly within the ambit of the statute, on a brake system that was part and parcel of a massive trailer which could not easily be described as anything other than a structure. Supreme Court also lost sight of the facts in the Record: Stoneham was neither using a mechanic's lift nor was he working in a mechanic's shop. Neither was he performing anything that could reasonably be characterized as "every" day work. Were it not for the fact that the structure under repair had wheels, allowing it to be pulled by a motorized vehicle, and a brake system in disrepair, Supreme Court would have, it is respectfully submitted, denied Defendant's motion for summary judgment.

In this Judicial Department, the distinction between repairs and routine maintenance, for the purposes of §240(1), was discussed in Bissell v. Town of Amherst. 13 Misc. 3d 1216A (Sup. Ct. Erie Co. 2005) *aff'd* 32 A.D.3d 1278 (4th Dept. 2006). According to Bissell:

> [w]hether a worker is engaged in repair or routine maintenance under Labor Law §240(1) may be a question of fact. Generally, work is a repair within the purview of Labor Law §240(1) if it involves fixing something that is malfunctioning, inoperable, or operating improperly. However, the work is routine maintenance if it is caused

> by a common problem, is the result of normal wear and tear, or is done as part of scheduled maintenance.

Id.; see also, Kostyo v. Schmitt v. Behling, LLC, 82 A.D.3d 1575, 1576 (4th Dept. 2011) (citing, Goad v. Souther Elec. Intl., 263 A.D.2d 654 (3d Dept. 1999) (Plaintiff engaged in repair when working to replace window that was not functioning properly); Carr v. Jacob Perl Associates, 201 A.D.2d 296 (1st Dept. 1994) (finding that a plaintiff was engaged in repair when remedying an inoperable elevator); Crossett v. Shofell, 256 A.D.2d 881 (3d Dept. 1998) (Plaintiff engaged in repair when silo fill pipe became plugged, rendering fill pipe inoperable); Buckmann v. State, 64 A.D.3d 1137 (4th Dept. 2009) (claimant demonstrated she was engaged in repair by establishing a structure was inoperable or not functioning properly); and, Caraciolo v. 800 Second Ave. Condo., 294 A.D.2d 200 (1st Dept. 2002) (inspection of water tank held to be a repair).

The lower court's decision in Bissell, supra, affirmed on appeal, provided practical guidelines for making the determination between repair work and routine maintenance, and Supreme Court should have followed those guidelines rather than engaging in misguided policy-making, divorced from the facts of the case.

Defendant Barsuk failed to provide the Court with any evidence in admissible form demonstrating that Plaintiff's work was necessitated by a "common problem," the result of "normal wear and tear," or was required as part of "scheduled

maintenance." Defendant has, thus, failed to set forth a prima facie showing of entitlement to judgment as a matter of law on this issue. Moreover, the evidence in the Record establishes that on August 18, 2018, Stoneham labored to fix a malfunctioning airbrake system that rendered the subject trailer inoperable. For these reasons, Supreme Court erred when it dismissed Plaintiff's Labor Law §240(1) claim for Plaintiff's purported inability to raise a triable question of fact.

This Court again took up the distinction to be made between "repair work" and "routine maintenance" in Buckmann v. State, where claimant "fell from an elevated platform while repairing a nonfunctional signal lamp at a lock on the Erie Canal." 64 A.D.3d 1137, 1137 (4th Dept. 2009). Claimant moved for partial summary judgment under §240(1), and the State cross-moved for dismissal under the same section. This Court held that the court below erred in denying claimant's motion for partial summary judgment and in granting defendant's cross-motion and reinstated the complaint. "In order to establish that she was performing repair work within the ambit of the statute, as opposed to routine maintenance, claimant was required to establish that the part of the building or structure 'being worked upon was inoperable or not functioning properly'" (citations omitted). Id. at 1139. This Court noted that claimant met her burden by showing that the signal light was not functioning because of a broken lens, the very thing she was repairing at the time of the accident. Claimant also established that the lens in question did not typically

require replacement as a result of normal wear and tear. Similarly, at the time of his injury, Stoneham was engaged in replacing broken equipment in order to return the trailer to an operable state.

What this Court did in reinstating the complaint in Buckmann is just the opposite of what the court below did in Stoneham; this Court judged the matter on a case-by-case basis, rather than engaging in broad over-generalizations about replacing burnt-out light bulbs or worn-out brakes.

This Court's decision in Dean v. City of Utica, provides even further guidance in determining whether, at the time of the accident, Stoneham was engaged in repair work or routine maintenance. 75 A.D.3d 1130 (4th Dept. 2010). In Dean, plaintiff was injured while working on a scissor lift. He was replacing bearing brackets on a large garage door and was injured when the garage door opened and struck the scissor lift causing it to fall over. This Court concluded that the court below erred when it dismissed plaintiff's claim under 240(1). This Court rejected defendant's contention that the scissor lift itself was an adequate safety device. It also rejected the contention that the actions of Plaintiff were the sole proximate cause of the accident. What is particularly important for the Stoneham case is that this Court in Dean also rejected defendant's contention that the statute was inapplicable because "Plaintiff was performing only 'routine maintenance' rather than 'repair' work on the garage doors." Id. at 1131. The Court stated:

> [t]he doors had been installed only weeks before and the new bearing brackets were required because the previously installed bearing brackets were wearing down prematurely. Such premature deterioration of the brackets cannot be deemed 'normal wear and tear' such that replacing the brackets would constitute routine maintenance.

Id.

It is respectfully submitted that if the work that plaintiff in Dean was performing, replacing prematurely deteriorated bearing brackets, was not "routine maintenance," it logically follows that the work that Stoneham was doing, replacing a leaking air tank and associated air hoses, that were otherwise in good condition, with new equipment, also cannot be considered routine maintenance.

This Court held in Dean that the defendant failed to carry its burden on its motion for summary judgment. As set forth in subpart A below, Barsuk also failed to make a *prima facie* showing establishing his entitlement to judgment as a matter of law on the issue of whether Stoneham's labor on the trailer amounted to routine maintenance, and it was an error for Supreme Court to hold otherwise. In order for Defendant in Stoneham to carry his burden on the motion, he would have to make a prima facie showing that the repair performed by Stoneham was either caused by a common problem, was the result of "normal wear and tear," or was done as part of a scheduled maintenance. There is no support in the Record for such a showing.

A. Defendant Failed to Set Forth a Prima Facie Showing Establishing Entitlement to Judgment as a Matter of Law on the Issue of Whether Plaintiff's Labor on the Trailer Amounts to Routine Maintenance

Defendant, as the proponent of summary judgment, must establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor, and he must do so by tender of evidentiary proof in admissible form. See, CPLR 3212(b); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Failure on Defendant's part to make such a showing requires denial of his motion, regardless of the sufficiency of the opposing papers. Id Defendant, in moving for summary judgment, cannot meet its burden by merely noting gaps or weaknesses in Plaintiff's opposing proof. See, Allen v. General Elec. Co., 32 A.D.3d 1163, 1165 (4th Dept. 2006) (citing, Orcutt v. American Linen Supply Co., 212 A.D.2d 979, 980 (1995)).

Apart from conclusory statements classifying Plaintiff's work as "vehicle maintenance", Defendant failed to provide the court below with evidence eliminating the existence of triable questions of fact on the issue of repair as opposed to routine maintenance. (R. 511-534; 626-639). The Record is devoid of evidence establishing the subject air brake system or its air tank required interval maintenance or interval replacement. The Record is devoid of evidence establishing the air brake system or its air tank fell victim to ordinary wear and tear. The Record is devoid of evidence demonstrating the subject air brake system or its tank had a limited useful

life span. Further, the Record is devoid of evidence establishing the labor Plaintiff performed on the air brake system was in anyway common, ordinary or "performed every day," as suggested by Supreme Court. For these reasons, Defendant has not satisfied his moving burden, and Supreme Court's grant of summary judgment to Defendant should be reversed.

B. The Evidence in the Record Raises a Triable Question of Fact on the Issue of Whether Plaintiff's Work Constituted a Repair or Routine Maintenance.

Even assuming, arguendo, that Defendant somehow met his initial burden on this issue, under Bissell, whether a worker is engaged in repair or routine maintenance under Labor Law §240(1) is generally a factual question. See, Bissell, supra.

In Bissell, plaintiff received a jury verdict for injuries he sustained while working to remedy an actively leaking roof. Plaintiff alleged a cause of action under §240(1). Defendant moved to set aside the verdict, arguing that plaintiff's work did not constitute a repair. In denying defendant's motion, the Court stated:

> [t]he evidence established that the roof draining system was malfunctioning or inoperable when [his employer] was called, although the cause was unknown. Plaintiff was part of the repair crew and climbing a ladder to the roof to determine the cause of the malfunction of the roof draining system and the work necessary to repair the roof when he was injured. The evidence showed that [the employer's] employees intended to begin the repair work

> after determining the cause of the leak. (Alteration to original.)
>
> No evidence was presented that the roof problem was a common one, regularly corrected as part of a scheduled maintenance program, or the result of normal wear and tear. Because the work involved fixing something that was malfunctioning or operating improperly, the work was not routine maintenance and constituted a repair within the meaning of Labor Law § 240(1).

13 Misc.3d 1216A (Sup. Ct. Erie Co. 2005). (emphasis added).

Clause v. Globe Metallurgical Inc., a precedent cited in Supreme Court's Decision and Order (R. 12), suggests no contrary rule or test. 160 A.D.3d 1463 (4th Dept. 2018). There, this Court left to a jury the ultimate determination of whether work on an industrial furnace amounted to a repair or routine maintenance. Id. at 1464.

The Record establishes the following with respect to Stoneham's August 18, 2018 labor on the subject trailer:

- In February/March 2018, approximately five months before the accident, Plaintiff, on Defendant's behalf, inspected the newly purchased thirty-five-foot-long trailer (R. 97 at ¶15);
- At the time of the purchase, Plaintiff inspected the air tank and air brake system and found that the air tank was painted black, looked nice and was working properly (R. 97 at ¶15; R. 233 at Line 16-24);
- On July 28, 2018, at the request of Defendant, Plaintiff went to Defendant's recycling plant to inspect the trailer (R. 97 at ¶12);

- At the time of the July 28, 2018 inspection, the air tank looked black in color similar to how it looked during Plaintiff's initial inspection, except Plaintiff noticed a leak in the air tank and concluded the leak rendered the trailer inoperable (R. 239, Line 8 to R. 240, Line 1);

- On August 4, 2018, Plaintiff began working to fix the inoperable trailer, which required him to first dismantle the airbrake system on the trailer's underside and then install a new air tank and new air hoses on August 18, 2018 (R. 98 at ¶17-20; R. 99 at ¶26-29);

- At the time of Plaintiff's work to fix the trailer and dismantle the airbrake system, the original air tank was still black in color (R. 236, Line 24 to R. 237, Line 17).

Plaintiff's observations of the trailer at various points in time throughout 2018 establish that its airbrake system had not succumbed to ordinary wear and tear. The airbrake system was in substantially the same condition on August 18, 2018 as it had been at the time of purchase, with one notable exception: an unexpected leak present in its air tank. A remediation of the leak would require not only a replacement of the tank, but also of air hoses that comprised the trailer's braking system. Plaintiff would be required to dismantle portions of the trailer's underside. Plaintiff's observations further establish that the malfunctioning air brake system rendered the trailer inoperable.

POINT III:

SUPREME COURT ERRED IN HOLDING THAT LABOR LAW §240(1) APPLIES ONLY TO WORKERS INJURED ON CONSTRUCTION SITES

Supreme Court erroneously limited the applicability of §240(1) to workers injured on construction sites. In relevant part, Supreme Court's Decision and Order states:

> Labor Law §240(1) imposes absolute liability on building owner and contractors whose failure to 'provide proper protection to workers employed on a construction site proximately causes injury to a worker. Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 7 [2011], quoting Misserritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490 (1995). (R. 12).
>
> * * *
>
> Plaintiff's work was limited to the replacement of a leaking air tank on the trailer's brake system. This kind of work is performed every day on trucks and trailers outside of a construction setting. (R. 12).
>
> * * *
>
> In view of the strict liability imposed by the statute and the facts that such liability is generally imposed only to guard against inordinate dangers, the court finds no reason to strain the language of the statute to encompass the routine activities involved with repairing the brake system on a trailer, which is clearly distinguishable from the risk associated with the construction or demolition of a building. Consentino v. Long Island R.R., 201 A.D.2d 528 (2d Dept. 1994).
>
> (R. 12).

The Court of Appeals has unequivocally rejected the notion that the protection afforded to workers under Labor Law §240(1) is limited to work performed on a construction site. See, Joblon v. Solow, 91 N.Y.2d 457 (1998). In Joblon, Defendants argued courts should examine the context of the work leading to the injury, and only when said work is performed as part of a building construction job should §240(1) liability attach. After considering this argument, the Court opined that:

> [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 N.Y.2d 555 supra), repairing an electrical sign (Izrailey v. Ficarra Furniture of Long Is., 70 N.Y.2d 813) or painting a house (Rivers v. Sauter, 26 N.Y.2d 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 New York, 78 N.Y.2d 942). 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 N.Y.2d 555, supra [railway car].) (emphasis supplied)

Id. at 464; see also Moore v. Shulman, 688 N.Y.S.2d 854, 855 (4th Dept. 1999) ("The work need not be performed at a traditional construction site to fall within the protection of the statute.").

As eloquently stated by this Court in DiPalma v. State of New York, the relevant inquiry is not whether injury occurred on a construction site, but, instead:

> the single decisive question is whether Plaintiffs' injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.

90 A.D.3d 1659, 1660 (4th Dept. 2011).

The fact that Plaintiff's accident occurred at Defendant's recycling plant, rather than a "traditional construction site", is not dispositive of whether Plaintiff engaged in a protected activity under Labor Law §240(1). It was an error for Supreme Court to hold otherwise. It was the intent of Labor Law §240(1) to protect workers, like Mark Stoneham, from gravity-related accidents while performing repair work on structures. At the time of his accident, Stoneham was repairing a structure, elevated above him. His injury was elevation-related. As such, Labor Law §240(1) applies.

While Supreme Court cited Wilinski v. 334 East 92nd House Dev. Fund Corp., in its Decision and Order (R. 12), it failed to grasp its greater applicability to the facts of this case. 18 N.Y.3d 1, 7 (2011). In Wilinski, the Court of Appeals 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." Id. During the demolition of brick walls in a vacant warehouse, two metal vertical plumbing pipes, which rose out of the floor on which Plaintiff was working, toppled over and fell approximately four feet onto Plaintiff, injuring his shoulder, elbow, arm and head, causing him to suffer a concussion. Defendant urged the Court to endorse the proposition "that a Plaintiff injured by a falling object has no claim under Section 240(1) where the Plaintiff and the base of the object stood on the same level." Id. at 8. The Court, however, rejected such a categorical exclusion. It did so by returning to its core premise: was there a failure to provide the worker with adequate protections from reasonably preventable gravity-related accidents?

It is the core premise of the State's jurisprudence that should govern the disposition of the opposing motions for summary judgment now before this Court, and not Supreme Court's unfounded speculation about opening the floodgates "to every mechanic who raises a truck on a lift in his or her shop." In adhering to the guidance provided by the Court of Appeals in cases such as Wilinski, it is respectfully submitted that, unlike the court below, this Court should engage in a practical analysis of the facts, without the preconceived application of categorical exclusions.

The Court of Appeals' jurisprudence, as enunciated in Wilinski, supra, was already embraced within the Fourth Department in such decisions of this Court as Smith v. Benderson., 225 A.D.2d 1073 (4th Dept. 1996) and Moore v. Shulman, 259 A.D.2d 975 (4th Dept. 1999).

In Smith v. Benderson, this Court ruled that Supreme Court erred in granting summary judgment to Defendant on Plaintiff's claim under § 240(1). Supra. There, "Plaintiff was injured when a payloader's hydraulically operated bucket malfunctioned while it was positioning a mobile home unit over the worksite, causing the unit to fall on Plaintiff's thumb and index finger." Id. at 1073. This Court observed that "Plaintiff was faced with the special risks contemplated by the statute." Id. In Moore v. Shulman, during work being done to convert a series of vehicles from utility vans to cargo vans, "Plaintiff was directed to stand inside a van and guide the pedestal as it was raised up by the forklift through the hole in the roof. The sling failed as the pedestal was being raised, and Plaintiff's foot was crushed." 688 N.Y.S.2d at 855. Citing its earlier decision in Smith v. Benderson, this Court again indicated that Plaintiff was faced with the special risks contemplated by the statute. Id. The risk was "created by a heavy object being hoisted to a height above the level of Plaintiff's worksite." Id. (citations omitted)

In each of these four cases—Wilinski, Smith, Moore, and Stoneham, a heavy object fell on Plaintiff damaging some part of his body by striking or crushing it. In

the first three cases, the courts ultimately ruled that the statute applied to a situation where a heavy object fell or collapsed on a worker, as long as the worker was working on a building or structure and as long as the elevation-related risk was one that could have been eliminated by the use of a safety device, as enumerated in the statute. The trailer in Stoneham's case was clearly a structure, notwithstanding the error of Supreme Court, and the facts of his case, just like the others, fit squarely within the statute's concern about the risks of falling objects. Yet, Supreme Court reached for a different result, far from the facts in the Record, by positing incorrectly that the inordinate risk facing Stoneham smacked of routine maintenance, rather than repair.

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POINT IV:

THE EVIDENCE IN THE RECORD WITH RESPECT TO THE REMAINING ISSUES DECIDED BY SUPREME COURT IS SUFFICIENT TO WARRANT REINSTATEMENT OF PLAINTIFFS' §240(1) CLAIM

The remaining issues before Supreme Court included whether Plaintiff was the sole proximate cause of his injuries, and whether Defendant hired Plaintiff to perform work on the trailer's airbrake system. Supreme Court denied the defendant's summary judgment on the first issue and found a question of fact on the second. (R. 10-11). Given that Defendant has not filed a Notice of Cross-Appeal seeking to reverse Supreme Court's decision on either of these two issues, it is respectfully submitted that this Court may not now decide either issue in defendant's favor. See, e.g., Buckmann v. State, 64 A.D.3d 1137, 1138 (4th Dept. 2009); CPLR 5515; Koch v. Consolidated Edison Co. of N.Y., 62 N.Y.2d 548, 562 n 10 (1984), *rearg denied* 63 N.Y.2d 771, *cert denied* 469 U.S. 1210; and, Zemun v. Falconer Elecs, Inc., 55 A.D.3d 1240, 1241 (4th Dept. 2008).

A reversal of Supreme Court's holdings on those issues discussed in Points I-III, above, would, of course, warrant reinstatement of Plaintiff's §240(1) claim.

A. Supreme Court Correctly Concluded Defendant Failed to Satisfy Its Moving Burden on The Issue of Sole Proximate Cause

For a plaintiff to be considered the sole proximate cause of his injuries, it must be shown that appropriate safety devices were available, but plaintiff chose not to use them. See, Rice v. West 37th Group, LLC, 78 A.D.3d 492 (1st Dept. 2010); Collins v. West 13th St. Owners Corp., 63 A.D.3d 621 (1st Dept. 2009); Vasquez v. 21-23 S. William St., No. 104246/07, Lexis 1350, at 26 (Sup. Ct. NY Co. Jan 20, 2010) ("a sole proximate cause defense is applicable in Labor Law §240(1) actions only when the owner or contractor establishes that adequate safety devices are available at the job site, and the 'worker either does not use or misuses them'." (citations omitted)). see also, Buckmann v. State, and additional authorities cited therein. 64 A.D.3d 1137, 1140 (4th Dept. 2009).

Defendant's sole proximate cause argument centers largely around his contention that he lacked "direction and control" over the work performed by Plaintiff. In response to this argument, Plaintiffs cited Santass v. Consolidated Investing Co., Inc, a Court of Appeals decision stating an "owner's lack of notice or control over the work is not conclusive." 10 N.Y.3d 333, 340 (2008). Plaintiffs further provided the court below with ample evidence, including two expert affidavits, establishing that Defendant failed to make adequate safety devices

available to Stoneham on August 18, 2018. (R. 99-100 at ¶31-33; R. 705-707 at ¶2-5; R. 390-393 at ¶17-23).

Plaintiffs submit Supreme Court correctly held that Defendant failed to establish entitlement to judgment as a matter of law on this issue.

B. The Record Establishes at Least A Triable Question of Fact on The Issue of Plaintiff's Status as An Employee of Defendant

An individual is "so employed" within the meaning of New York State Labor Law § 240(1) when he is "permitted to or suffered to work on the premises, for monetary consideration by the owner." See, Vernum v. Zilka, 241 A.D.2d 885 (3d Dept. 1997). Labor exchanged for the reduction of a monetary debt is sufficient monetary consideration to satisfy the statute's "so employed" language. Id.; see also, Thompson v. Marotta, 256 A.D.2d 1124 (4th Dept. 1998); and, Stringer v. Musacchia, 46 A.D.3d 1274, 1276 (3d Dept. 2007).

Plaintiffs argued before Supreme Court that the marshaled evidence established Stoneham's status as an employee as a matter of law. This evidence included testimony demonstrating that, in the months before the accident, Barsuk loaned Stoneham $25,000, and that Stoneham's work on the trailer was repayment for a portion of that loan. (R. 703 at ¶4-7).

If the evidence Plaintiffs relied upon does not establish their entitlement to judgment as a matter of law on the issue of employment, it, at the very least, creates

a triable question of fact. Indeed, with respect to this issue, Supreme Court held that "Plaintiff 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."

Plaintiffs submit that Defendant is not entitled to summary judgment on his contention that Plaintiff was a volunteer in August 2018.

CONCLUSION

Judicial analysis of liability pursuant to Labor Law §240(1) must be made on a case-by-case basis. Supreme Court dismissed the Plaintiffs' §240(1) claim to avoid expanding the provisions of the statute to brake pad replacements, performed on vehicles in mechanic shops. The instant matter, however, does not involve routine brake pad replacements, mechanics shops, or the vehicle lifts present therein. It involves the dismantling of portions of the underside of an elevated trailer, present at a recycling plant. A careful review of the particular facts and circumstances of this case demonstrates they fall squarely within the protections of §240(1).

For the reasons discussed above, this Court should modify Supreme Court's Decision and Order and reinstate Plaintiffs' §240(1) cause of action by reversing those provisions of the Decision and Order holding the subject trailer does not fall within the definition of a "structure"; reversing those provisions of its Decision and Order holding Plaintiff Mark A. Stoneham's August 18, 2018 labor to be "routine maintenance"; reversing those provisions of the Decision and Order holding §240(1)

applies only to workers injured on construction sites; and, granting such further and different relief necessary to reinstate Plaintiffs' §240(1) cause of action or that the Court deems to be just and proper.

At the time of this accident, Mr. Stoneham was doing repair work on a structure. The repair work he was doing was necessary and incidental to the overall job. His injury was elevation related. Labor Law §240(1) applies.

Dated: Buffalo, New York
March 17, 2022

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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Dated: March 17, 2022