*To be Argued by:*
JOHN N. LIPSITZ
*(Time Requested: 30 Minutes)*

APL-2023-00001
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Appellate Division–Fourth Department Docket No. CA 21-01542

# Court of Appeals

*of the*

# State of New York

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

At the Fourth Department, Respondent relied largely on the legal argument that the subject trailer is not a "structure," as that term was defined for purposes of Labor Law §240(1) by this Court's decision in Caddy v. Interborough, 195 N.Y. 415 (1909). In its Brief to the Appellate Division, Respondent questioned the validity of Caddy. Now that the case is before this Court, Respondent appears to concede that the trailer, a massive, wheeled platform, is a structure. But to accommodate this shift, Respondent now argues that §240(1), as determined by the majority below, simply does not apply to a "mechanic," even when he is engaged in repairing a vehicle such as the subject trailer. According to Respondent, this is because, under the State's Vehicle and Traffic Law (hereinafter "VTL"), the trailer is the equivalent of a family automobile.

Whether Respondent's theory is that the trailer is not a structure or that it is a structure but one categorically excluded by the VTL from the ambit of §240(1), the effect is the same. Under either theory, a mechanic, or any worker, engaged in repairing a massive, wheeled platform, who is grievously injured in a gravity-related accident, can never be covered by the protections of §240(1). If this Court were to so hold, it would constitute a radical transformation of the statute in a manner

inconsistent with the original intention of the Legislature and more than one hundred years of jurisprudence in New York.

Not one of the arguments that Respondent now raises before this Court is based on existing law, or even on a reasonable argument for an extension of existing law. Rather, Respondent's arguments are all based on alleged matters of fact, and accordingly none of them are properly before this Court.

Respondent's principal contention is that, vehicles being vehicles, no sort of work on any kind of vehicle would constitute protected activity by a covered person under §240(1). The proposition itself has no legal foundation. Rather, it is based on certain baseless suppositions of fact, such as those found on page 20 of Respondent's Brief, where it is stated, "[f]urthermore, given the millions upon millions of cars, trucks and buses that must have been on the streets of New York since 1908, one would expect that cars, or pieces of cars, have fallen on mechanics working under them on lifts countless times." Certainly, Respondent should not be heard to substitute speculation for facts or credible statistics, and there is no evidence in the Record to support this "flood gates" argument, only speculation. But, even if it were proven that cars regularly fall off of hydraulic lifts designed to hoist them up safely, this public policy argument for a drastic restriction of the scope of the statute

is better addressed to the Legislature than it is to the courts. See, Appellant's Brief at pages 39-44.

As counseled by this Court in Caddy, each §240(1) case must be worked out "upon its own peculiar facts in the light of the manifest purpose of the legislature to secure greater protection to the employee…" Caddy, supra, 195 N.Y. at 423. See also, Prats v. Port Auth. of N.Y.& N.J., 100 N.Y.2d 878, 883 (2003) and, Appellant's Brief at page 25-26. Cases such as Stoneham's should not be decided based on speculative concerns about the supposed implications of its outcome on other hypothetical cases of a distinctly different character.

There is no support in law for Respondent's argument that Stoneham is not covered by the protections of §240(1) because, as argued by Respondent, the risks he faced were merely those ordinarily faced by workers doing his type of work. This *ipse dixit* argument is based on Respondent's mischaracterization of facts in the Record.

Respondent's argument that there was an adequate safety device on the work site is likewise not based on a legal argument. See, Respondent's Brief at Section III, pages 34-36. Rather, it is based on a factual argument that was rejected below. This argument itself cannot withstand the affidavit evidence in the Record from Stoneham's safety expert, John P. Coniglio. R. 385-393, 705-707. Further, it relies

on the illogical assertion that, because the trailer did not collapse upon Stoneham on August 4, 2018, the first time that he hoisted it up with the front-end loader, the fork device he used at that time must have been adequate for use on August 18, the day of the accident. Yet the trailer collapsed when the wheels on the front-end loader shifted on the ground, because they were not secured with appropriate safety blocks and due to the failure of Barsuk to provide Stoneham with adjustable jacks or stanchions for placement beneath the elevated trailer. No evidence in the Record demonstrates the collapse had any nexus to Stoneham's failure to use a fork attachment to lift the trailer.

Finally, Respondent's argument that Stoneham was a volunteer is based purely on a dispute over the facts, incapable of being resolved in favor of Respondent on summary judgment. Moreover, Respondent never argued below that there was no proof that, whatever was "in Mr. Stoneham's mind" concerning the work he performed for Barsuk as partial reimbursement for a loan, "was actually based in reality." The words, "in my mind," may appear in the Record, but they are cited and relied on for the first time in Respondent's Brief. See, Respondent's Brief at pages 6-7. Nonetheless, Stoneham's sworn statements demonstrate that he was an employee of Respondent on August 18, 2018, pursuant to the meaning attributed to that term by §240(1). In addition, David Barsuk's sworn statement to the contrary

was never subject to cross-examination, because he has yet to give deposition testimony.

## COUNTER STATEMENT OF FACTS

On July 28, 2018, plaintiff Stoneham and Respondent met at Respondent's scrapyard to inspect Respondent's thirty-five-foot-long trailer. R. 96-97. Stoneham concluded that the trailer's airbrake tank needed to be removed and replaced. R. 97. At that time, damage to the tank rendered the trailer inoperable. R. 97.

While it is true that, prior to July 28, 2018, Stoneham had certain certifications, including HAZMAT and an OSHA 40 certification (which pertains to safety in connection with hazardous substances), Respondent has failed to establish any nexus between Stoneham's certifications and safety matters associated with elevation-related risks.

On August 4, 2018, Stoneham and Respondent again met at the scrapyard, this time for the purpose of commencing repair work on the trailer. R. 98. On said date, Respondent used a front-end loader to lift the trailer into the air from its backside, allowing Stoneham access to the trailer's underside. R. 98. This fact is confirmed in an affidavit, wherein Respondent affirms:

> [a]s part of the activities at the Property, I drove the front loader with the fork attachment to the rear of the trailer, placed the forks underneath the flatbed, and lifted it slightly so that I could look underneath.

R. 615. This sentence of Respondent's affidavit does not indicate Respondent lifted the trailer at the direction of Mr. Stoneham. Further, the sentence does not explain

why Respondent had any need to look under the trailer, a need which is peculiar when viewed in the context of a theme contained in Respondent's briefing, insinuating Respondent has no mechanical knowledge, expertise, or abilities. After the trailer was lifted, both Stoneham and Respondent spent time underneath it, while repair work was in progress. R. 98.

In the days preceding August 18, 2018, Stoneham telephoned Respondent to let him know that he planned to continue repairs to the trailer that upcoming weekend, on either Saturday or Sunday. R. 98. On Saturday, August 18, 2018, Stoneham arrived at the scrapyard and noticed its front gate was fixed with a "dummy lock", which involved a lock on the gate's chain that was not actually in a locked position, a setup Respondent often used to allow Stoneham access to the scrapyard when Respondent was not present. R. 99. On said date, Stoneham did not notice any jack stands or safety blocks in the vicinity of the scrapyard. R. 99-100. Stoneham lifted the trailer using the front-end loader that he observed Respondent use on August 4, 2018. R. 99. As discussed in plaintiff's opening Brief, while Stoneham was underneath the trailer, the front-end loader rolled backwards, dropping the trailer onto his body. R. 99.

Despite reminding this Court that he is no mechanic, in the Statement of Facts contained in his Brief, Respondent posits that appropriate safety devices to lift a

trailer were present at the scrapyard on August 18, 2018, including a fork attachment and "timber and metal objects of a substantial weight". See, Respondent's Brief at pp. 9, 11, 13. Expert affidavits submitted by Stoneham, however, demonstrate that adequate safety devices for Stoneham's labor on August 18, 2018 would have included both wedge safety blocks and hydraulic jacks. R. 385-393, 705-707. Respondent does not contend that he made wedge safety blocks or jacks of any kind available to Stoneham on August 18, 2018.

During his discovery deposition, Stoneham testified that his labor with respect to the trailer was a form of repayment for a loan Respondent previously made to Stoneham. Specifically, at the deposition, Stoneham gave the following testimony:

> Q: When you received that check, did you think of it strictly as a loan?
>
> A: No.
>
> Q: No? How did you think of that check? Was he paying you for something you did prior, or was he paying you for something you were going to do in the future, or was it a loan?
>
> A: It was – he said I could work some of it off, and then pay him back when I got the money.
>
> Q: Was there an accounting that either you or Dave were keeping, comparing work performed and the value of that work?
>
> A: Yes. Dave was.

* * *

> 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. 162-163, 347. Further, in a post-deposition affidavit submitted in this matter, Stoneham affirmed the following:

> 3. On the morning of Saturday August 18, 2018, I did not wake up and drive approximately 100 miles from Jamestown, New York to Batavia, New York in order to volunteer for David, nor did I complete the two-hour drive so as to barter with David. I completed the drive, and subsequently performed manual labor, to fulfill an obligation I owed to David.
>
> 4. As discussed in my sworn deposition testimony previously submitted to this Court with my moving papers, in the months before my injury, David 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.
>
> 5. On page 247 of my deposition transcript, I explain that I performed labor on the trailer's airbrake system to repay David's loan.

* * *

> 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.

Respondent has yet to give a deposition in this matter and, therefore, has not been subjected to any cross-examination on the self-serving statements relied upon to formulate the Statement of Facts contained in his Briefing.

## ARGUMENT

## POINT I

### THE MASSIVE TRAILER IN STONEHAM'S CASE IS BOTH A VEHICLE FOR PURPOSES OF THE VEHICLE AND TRAFFIC LAW AND A STRUCTURE WITHIN THE MEANING OF §240(1)

There is no legal basis to deprive Stoneham of the protections of Labor Law §240(1). Respondent argues that Stoneham was not engaged in "protected activity" under the statute because a trailer is legislatively defined as a vehicle under VTL §159. Respondent also argues that the consequence of finding that Stoneham is entitled to the protections of the statute is that those same protections must be equally accorded to workers injured while making repairs to passenger cars, and indeed even to motorcycles. This, according to the Respondent, would open the flood gates to countless claims. But the premise of Respondent's argument is false and the analogy between the peculiar facts of Stoneham's case and the case of the hypothetical automobile mechanic is equally misleading.

To prevent the opening of the flood gates of litigation, Respondent urges this Court to withdraw the worker-oriented protections of §240(1) from Stoneham, notwithstanding the compelling facts of his case and the grievous injuries he suffered from the accident on August 18, 2018. Stoneham's case, however, calls out for the protections accorded by the statute.

A major problem with Respondent's argument, apart from its logical absurdity, is that it begs this Court to restrict the traditional scope of §240(1) by withdrawing the protections of the statute from work done on all manner of structures defined by the VTL as "vehicles." The implicit rationale for Respondent's argument is that all or almost all work done on "vehicles" is necessarily "mechanical" in nature. According to this rationale, the restriction of the statute would also withdraw its protections from work on such other structures, such as elevators, where the case law and practice has typically labelled the worker as a mechanic, irrespective of whether the work he is doing is protected by §240(1), such as repair work to fix a broken elevator car, or, instead, amounts to routine maintenance to keep the car running smoothly.

There is nothing contained within the VTL which reflects a legislative judgment that "vehicles", as defined therein, fall outside the coverage of §240(1). Certainly, Respondent points to no such provision or aspect of its legislative history. One need only look at the basic purpose of the VTL Law to understand the inapplicability of Respondent's argument. The purpose of this statutory scheme is

to ensure safety on the roads by regulating traffic and ensuring proper vehicle registration. See, Vehicle and Traffic Law.[1]

Following Respondent's logic leads one to an absurd conclusion. VTL §159 defines the term "vehicle" as "[e]very device in, upon, or by which any person or property is or maybe transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks." As Respondent points out in his Brief at page 19, this definition encompasses the subject trailer, as well as "ordinary cars, trucks, or buses." The statutory definition of "vehicle," however, also applies to a variety of objects including, for example, "construction cranes," without which it would be difficult, if not impossible, to make repairs to buildings and structures, such as bridges. See, New York State Department of Taxation and Finance, Taxpayer Services Division – Technical Services Bureau, Advisory Opinion, 1991 TSB-A-91 8(S) (January 1991) at p. 3 ("truck cranes and boom trucks may be considered to be a single unit for vehicle and traffic law purposes), and, Cornacchione v. Clark Concrete Co., 278 A.D.2d 800, 801 (4th Dept.

[1] "Scope of Statute: This law covers vehicular traffic upon the public streets and highways; prescribes the powers and duties of the Commissioner and state Department of Motor Vehicles; and includes provisions relating to the licensing of drivers, the required safety responsibility and financial security of motorists, the civil liability of motorists, the rules of the road, the size and weight of vehicles, required equipment, periodic inspection and annual registration of vehicles, required accident reports, and as to the disposition of fines and forfeitures." See, NY CLS Veh & Tr, Scope of Statute.

2000) (holding a crane to be a structure under §240(1)). For an example of mobile hydraulic crane, see https://www.cranerentalcompany.com/images/slider/0006.jpg

The broad and amorphous category of "vehicles" encompassed by VTL §159 includes such objects as a travelling circus, a mobile library, and a sound stage to host a musical performance at the county fair. See, pages 4 and 24 of Appellant's Brief. These objects are structures as well as examples of vehicles, and they should come within the ambit of §240(1).

In People v. Guilianti, 10 NY2d 433 (1962), this Court considered the case of a defendant charged with operating a truck that was drawing an unregistered trailer on a public highway. According to the testimony at trial, the trailer was moved once or possibly twice a year. The trailer/construction field office was the sort commonly used at construction sites everywhere. This Court held that, "[t]he field office contained wheels, and was capable of being drawn on the highway. It undoubtedly was a 'vehicle' ([VTL] Section 159)." Id. at 436. Obviously, Respondent's "classification" argument under the VTL goes too far. For an example of a construction trailer and mobile office, see https://daccotrailers.com/wp-content/uploads/2018/06/fullsizeoutput_27f3.jpeg. It cannot reasonably be argued that a gravity-related injury resulting from the failure to provide adequate safety devices during repair work on the underside of a moveable field house should be

excluded from the protections of Labor Law §240(1), just because the structure is defined as a vehicle.

Respondent seeks to distinguish this Court's decisions in Caddy, supra, 195 N.Y. 415, and Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555 (1993), because those cases concerned the application of §240(1) to gravity-related injuries resulting from work on railcars and therefore the injuries did not involve "vehicles" as defined by the VTL. Of course, the railcars in those cases were structures. Just as there exists an extensive statutory scheme governing vehicles, namely the VTL, there is also a statutory scheme at the state level which regulates safety on our railroads and which aptly explains the exclusion of rail cars from the VTL. See, New York Railroad Law, Chapter 49 of the Consolidated Laws, Laws of 1910, Chapter 481, effective June 14, 1910, which provides that "[a] railroad is a separate and distinct entity used to facilitate passage and traffic, existing solely by virtue of statutory enactment, and having as its main purpose the transportation of persons and property for the public." New York Jur. 2d Rail Transportation, Section 1.

The railroad statute was adopted following the enactment of the predecessor legislation to §240(1). Like the VTL, this statute is detailed and specific, in contrast to Labor Law §240(1), which, due in part to its remedial character, is to be interpreted liberally to protect workers. Unlike the statutory schemes set out in the

VTL and the Railroad Law, §240(1) has always been a statute of broad and inclusive application. See, Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513 (1985). Respondent's straw man argument regarding §240(1)'s alleged inapplicability to structures encompassed by unrelated statutory schemes, such as the VTL, fails upon the realization that railroad cars are also covered by such a scheme, and yet have consistently been held to fall into the class of structures protected by §240(1). Accordingly, there is no reason to consider this Court's decisions in Caddy and Gordon to be inapplicable to Stoneham's case.

Moreover, there is nothing in the statutory definition of "vehicle" that would support Respondent's argument that somehow the trailer in Stoneham's case bears a closer comparison to a passenger car than it does to the railway cars in Caddy and Gordon.

The undisputed purpose of Labor Law §240(1) is to promote the safety of our State's work sites, whether they are traditional construction sites, railroad yards or scrapyards. Clearly, if the broad and enduring statutory definition of "structure" going back to this Court's 1909 decision in Caddy is to be restricted in the radical manner advocated by Respondent's rhetorical sleight-of-hand for supposed reasons of public policy, such change should be effectuated by the Legislature, not by the courts based on a concocted specter of a flood of claims.

## POINT II

## WHAT HAPPENED TO STONEHAM CANNOT REASONABLY BE LABELLED AS AN ORDINARY OR ROUTINE RISK OF HIS CUSTOMARY EMPLOYMENT

The corollary to Respondent's proposition that Labor Law §240(1) does not apply to repair work on any sort of vehicle as defined by VTL §159 is the equally odd proposition that the risks faced by Stoneham amounted to no more than the normal and ordinary risks of performing his customary work. The premise here is that work on a vehicle is necessarily mechanical in nature and that all mechanical work is routine. This premise is false whether it comes to repair work on a vehicle or repair work on an elevator or other object used for the purpose of conveying people or goods. In any event, the subject trailer is not the family car; the work at issue was performed in an open-air, unregulated work environment, not in a mechanic's garage; and, Stoneham was not an automobile mechanic.

Respondent's argument that Stoneham's case involves nothing more than the common, ordinary risk of injury associated with being a mechanic, fixing automobiles, conveniently ignores that his catastrophic injuries resulted from an elevation-related risk, as contemplated by §240(1). See, Nicometti v. Vineyards of Fredonia, LLC, 25 N.Y.3d 90, 97 (2015) ("Liability may, therefore, be imposed under the statute only where the 'plaintiff's injuries were the direct consequence of

a failure to provide adequate protection against a risk arising from a physically significant elevation differential' [citations omitted]."). Once again, the massive trailer was not an automobile, and, as the Appellate Division acknowledged, Stoneham was not engaged in routine maintenance, or, at the very least, whether he was engaged in repair work, on the one hand, or routine maintenance, on the other, is a triable question of fact, not properly before this Court. More to the point, Stoneham's case does not involve some virtually ordinary work site danger, such as an icy surface (see, Nicometti, supra) or tripping hazard (see, Melber v. 6333 Main St., Inc., 91 N.Y.2d 759 [1998]).

According to Respondent's logic, the risk of catastrophic collapse is an inherent (ordinary) risk of working beneath a massive structure, such that injuries directly related thereto are outside the ambit of §240(1). See, Respondent's Brief at page 23-24. If this were correct, the same could be said about the risk of falling from work typically performed at a great height. Obviously, accepting such a proposition would have the effect of scrapping more than a century of legal precedent, as well as nullifying the intent of the Legislature in enacting §240(1) and its predecessor legislation.

Respondent relies on two decisions of this Court – Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 (1995) and Narducci v. Manhasset Bay Assocs., 96

N.Y.2d 259 (2001), in arguing that the collapse of the trailer on August 18, 2018, does not come within the ambit of §240(1) because it was the type of peril usually encountered on a work site. Neither decision is apposite to Stoneham's situation. Respondent's invocation of these clearly inapplicable legal precedents from this Court should be rejected.

The Court should also reject Respondent's abstract and overgeneralized suppositions about the nature of a worker's customary employment. In this regard, in Joblon v. Solow, 91 N.Y.2d 457 (1998), this Court, unlike the majority of the Fourth Department below, dismissed as irrelevant to its determination the assertion made by the defendants in that case that the plaintiff's "job title, job description, and normal duties involved only routine maintenance…" Id. at 465. It is respectfully submitted that this Court should adhere to the teachings of Joblon and reject the *ad hominem* attack on Stoneham that, as a "diesel mechanic" or "diesel technician," his duties could involve nothing more than "routine maintenance." See Respondent's Brief at pages 16, 23. See also, Prats, supra, 100 N.Y.2d at 882 (indicating that merely calling the plaintiff a "mechanic" does not necessarily imply "routine maintenance" activity).

Indeed, our state courts have recognized that work done by mechanics on structures comes within the ambit of §240(1). As argued in Appellant's Brief at

pages 45-46, there is no justification for categorical exclusions from the protections of the statute for either "vehicles" or "mechanical" work. An elevator, in a generic sense, is a vehicle, because it moves people and goods from one floor to another. Individuals repairing and maintaining elevators are usually referred to as "mechanics." In the Second Department's decision in Riccio v. NHT Owners, LLC, 51 A.D.3d 897 (2nd Dept. 2008), the plaintiff was an elevator mechanic injured in a fall to the floor while replacing a hoistway door track. The court concluded that at the time of the accident the plaintiff was engaged in an activity specifically protected by §240(1).[2] See, e.g. Esquivel v. 2707 Creston Realty, LLC, 149 A.D.3d 1040 (2nd Dept. 2017); McCrea v. Allie Realty Co. LLC, 2015 N.Y. Misc. Lexis 3978 (New York County 2015); see, also, Neglia v. Fedcap Rehabilitation Servs., Inc., 2022 N.Y. Misc. LEXIS 10454 (New York County 2022).

According to Respondent, a 2019 decision of the Second Department "comes closest to contemplating whether automotive repair is a protected activity under" §240(1). Respondent's Brief at page 20. First, it is not the case that what Stoneham

[2] The trial court decision in Riccio, 13 Misc. 3d 1209(A)(Kings County 2006) helpfully lists the major cases holding that various objects are structures for purposes of §240(1), including Moore v. Shulman, 259 A.D.2d 975 (4th Dept. 1999) (utility vans determined to be structures for purposes of Labor Law §240(1)). One of the facts cited by the trial court in Riccio in finding that the mechanic was engaged in a repair, as opposed to routine maintenance, is that he was not completing an enumerated task in a maintenance contract at the time of injury, but rather on an *ad hoc* basis, just as Stoneham was on the day of his injury.

was doing on August 18, 2018, could reasonably be described as repairing an automobile. Second, the plaintiff in Guevarra v. Wreckers Realty, LLC, 169 A.D.3d 651 (2nd Dept. 2019), was sweeping the floor, presumably adjacent to the automobile, at the time he was injured. According to the court, "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 unavailing Guevarra case is the best authority that Respondent can produce.

To finesse his argument that what happened to Stoneham was necessarily a common or ordinary occurrence for which there should be no remedy under the statute, Respondent seeks to privilege "the dangers that beset workers in the construction industry," over those which beset workers in other non-construction site contexts. See, Respondent's Brief at page 24. Only in this way can Respondent make its point that the risks of collapse faced by persons who work beneath massive structures are less germane to the purpose of §240(1) than the risks of falling many feet to the ground, faced by workers who work atop tall buildings. See, Respondent's Brief at page 26. In short, there is no support in the decisions of this Court for the proposition that the statute does not apply with equal force to unregulated open-air

work sites, unrelated to more traditional construction activities. See, Appellant's Brief at page 20.

## POINT III

## BARSUK, AS STONEHAM'S EMPLOYER, FAILED TO PROVIDE SAFETY DEVICES ADEQUATE TO PROTECT AGAINST GRAVITY-RELATED INJURY

Respondent now argues adequate safety devices were made available to Stoneham on August 18, 2018, including a fork attachment to lift the trailer and timbers to prevent the front loader from rolling backwards. In the argument section of his Brief to the Appellate Division, however, Respondent never asserted that either the fork attachment or the timbers amount to adequate safety devices as a matter of law, nor did Respondent present the Appellate Division with argument or briefing on this issue. See, generally, Respondent's Brief to the Appellate Division. As such, the argument is not preserved for review by this Court. See, Aybar v. Aybar, 37 N.Y.3d 274, 282 (2021).

Nonetheless, while Respondent speculates that the fork lift was better suited to lift the trailer than the bucket lift used by Stoneham, Respondent presented the lower courts with no evidence that the bucket lift amounts to a proper or adequate safety device, capable of preventing injury to Stoneham in the event of a rolling incident. While Respondent alleges he made timbers available to Stoneham, his

argument that the timbers were adequate to prevent wheel rolling is premised upon mere conjecture.[3] Throughout his briefing, Respondent concedes that he has no knowledge of mechanic work. Respondent's Brief at page 32. As such his opinions regarding the type of devices capable of preventing a front-end loader from rolling backward are no substitute for expert opinion, which Respondent declined to submit to the lower courts.

In support of his own motion and in opposition to defendant's cross-motion, Stoneham submitted two expert affidavits. R. 385-393, 705-707. According to said affidavits, adequate safety devices for Stoneham's labor on August 18, 2018 would have included both wedge safety blocks and hydraulic jacks. R. 705-706. Both types of devices were required to properly secure the wheels of the front loader and safely elevate the trailer. R. 705-706. Respondent declined to address the opinions of Appellant's expert in his briefing to this Court. Moreover, Respondent does not contend that wedge safety blocks and stanchions or commercial jacks were provided to Stoneham on August 18, 2018.

After considering this issue, Supreme Court opined:

> [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

[3] Appellant adamantly disputes that defendant made timber blocks available at the scrapyard on August 18, 2018, a point raised and briefed in the Record. R. 694-695.

> that he chose for no good reason not to do so. Piotrowski v. McGuire Manor, Inc., 117 A.D.3d, 1390-91 (4th Dept 2014). The court finds that defendants have failed to carry their burden in establishing their entitlement to summary judgment on the issue of sole proximate cause. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

R. 10-11.

Appellant respectfully requests that this Court decline Respondent's invitation to disturb Supreme Court's Decision and Order on this particular issue.

## POINT IV

## THERE IS AT THE VERY LEAST A QUESTION OF FACT FOR THE JURY TO DECIDE ON THE MATTER OF EMPLOYEE VS. VOLUNTEER

Respondent erroneously submits that the Appellate Division's Memorandum and Order should be affirmed because Appellant acted as a volunteer at Respondent's scrapyard on August 18, 2018.

Respondent's argument is based upon contentions that were either previously rejected by a lower court or not properly preserved for appeal. The Appellate Division majority concluded that Stoneham was "engaged in his 'normal occupation' of repairing vehicles" at the time of his injuries. R. 761. When confronted with the issue of whether Stoneham was "so employed" at Respondent's scrapyard on August 18, 2018, Supreme Court opined:

> [t]he defendant denies that plaintiff worked for him on the date of the accident, describing the plaintiff's work on the airbrake system as one of many favors exchanged between the longtime friends over the years. Plaintiff testified, however, that in the months before the accident, defendant had loaned him $25,000. Plaintiff claims he was repaying a portion of the loan, as agreed upon, by providing defendant with manual labor in the form of work on the airbrakes system on the trailer. Plaintiff relies upon a line of cases holding that manual labor performed to fulfill a financial obligation can establish protection under Labor Law §240(1). Thompson v. Marotta, 256 A.D.2d 1124 (4th Dept. 1998).
>
> The court rejects the defendant's claim that the Labor Law §240(1) claim should be dismissed because plaintiff was a volunteer. Plaintiff has produced sufficient evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

R. 11.

In the context of a §240(1) analysis, an individual is "so employed" when he is "permitted to or suffered work on the premises, for monetary consideration by the owner." See, Vernum v. Zilka, 241 A.D.2d 885 (3rd Dept. 1997); see, also, Thompson v. Marotta, 256 A.D.2d 1124 (4th Dept. 1998).

Thompson is harmonious with Stringer v. Musacchia, 11 N.Y.3d 212, 215 (2008), a case Respondent now heavily relies upon, but abandoned in briefing to the Appellate Division. In Stringer, a plaintiff exchanged labor for a nonmonetary

benefit, namely a hunting invitation. Id. The Third Department held the plaintiff was not employed within the meaning of the labor law, opining:

> [i]t must be noted that a plaintiff's agreement with an employer that all earnings will be applied to reduce a debt owed to the employer will not affect the plaintiff's employment status if the plaintiff was 'permitted or suffered to work' on the premises, *for monetary consideration*, by the [employer]." When plaintiffs are not 'fulfilling [an] obligation' by performing work, however, they will be considered volunteers, even if they are to receive some nonmonetary benefit as a result of performing the job and defendants would otherwise have had to pay someone to complete the job.

Stringer, 46 A.D.3d 1274, 1276-1277 (3rd Dept. 2007) (emphasis in original) (alteration in original) (citations omitted).

This Court affirmed the Third Department's holding, stating:

> [w]e believe that the reasoning of the Appellate Division is consistent with both the intent of the Labor Law and the plain meaning of the terms "employee" and "for hire."

Stringer, 11 N.Y.3d at 216.

In dicta to Stringer, this Court indicated that three factors, are "usually" present when an employee is hired, which include whether the employee agreed to perform a service in return for compensation; whether the employer had authority to direct and supervise the work; and, whether the employer decides that the task undertaken by the employee was completed satisfactory. The Court, however,

stopped short of requiring a plaintiff to make an affirmative showing on each factor in order to establish he was "so employed", as the term is used in §240(1). See, e.g., Id. at 215 ("Second, although not an essential factor, an employer may exercise authority in directing and supervising the manner and method of the work (citations omitted)).

It would be illogical to require every plaintiff bringing a §240(1) claim to satisfy the second and third Stringer factors. In several labor contexts, a general contractor hires a sub-contractor to perform work only because the general contractor lacks the knowledge and skills necessary to execute the work itself. As such, the general contractor is unable to direct and supervise the manner and method of the sub-contractor's work. Similarly, with respect to the third Stringer factor, §240(1) claims often involved debilitating injuries that occur prior to the completion of agreed upon labor, precluding an employer from expressing satisfaction with a finished project.

The Record contains deposition testimony from Stoneham that, at a minimum, raises a triable question of fact as to whether Appellant was injured while laboring to fulfill the repayment terms of a loan agreement he entered into with Respondent, the first Stringer factor. R. 159-163, 347. For example, the following exchange took

place at Stoneham's deposition regarding the $25,000 loan Respondent gave to Stoneham:

> Q: When you received that check, did you think of it strictly as a loan?
>
> A: No.
>
> Q: No? How did you think of that check? Was he paying you for something you did prior, or was he paying you for something you were going to do in the future, or was it a loan?
>
> A: It was – he said I could work some of it off, and then pay him back when I got the money.
>
> Q: Was there an accounting that either you or Dave were keeping, comparing work performed and the value of that work?
>
> A: Yes. Dave was.
>
> * * *
>
> 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. 162-163, 347.

Respondent's opposition briefing contains an argument that Appellant cannot raise a triable issue of fact on whether Stoneham labored to repay a monetary debt simply by answering "yes" to a question seeking information about the contents of

Stoneham's own mind. Respondent's Brief at pages 29-30. In raising this argument, Respondent is grasping at straws. Respondent failed to make this particular argument in the courts below and it is not properly preserved for review. See, Aybar, *supra*; and, U.S. Bank N.A. v. DLJ Mtge. Capital, Inc., 33 N.Y.3d 84, 89 (2019) (explaining that to preserve an argument for review by the Court of Appeals, a party must "raise the specific argument" below and "ask the court to conduct that analysis"). Nonetheless, the argument ignores an affidavit from Stoneham wherein he states:

> 3. On the morning of Saturday August 18, 2018, I did not wake up and drive approximately 100 miles from Jamestown, New York to Batavia, New York in order to volunteer for David, nor did I complete the two-hour drive so as to barter with David. I completed the drive, and subsequently performed manual labor, to fulfill an obligation I owed to David.
>
> 4. As discussed in my sworn deposition testimony previously submitted to this Court with my moving papers, in the months before my injury, David 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.
>
> 5. On page 247 of my deposition transcript, I explain that I performed labor on the trailer's airbrake system to repay David's loan.

*  *  *

> 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.

R. 702-703.

Respondent further insinuates that Stoneham cannot raise a triable question of fact on the "so employed" issue without evidence in the form of "invoices or receipts". Respondent's Brief at page 28. This argument ignores Stoneham's testimony and affirmations that documentation of the loan repayment was maintained by Respondent, who has yet to be deposed in this lawsuit. Even assuming, *arguendo*, invoices or receipts are necessary for Stoneham to obtain an order of summary judgment on his own motion, Respondent cannot use gaps in Appellant's proof to obtain summary judgment on a cross-motion. See, Alvarez v. 21st Century Renovations Ltd., 66 A.D.3d 524, 525 (1st Dept. 2009).

Finally, Respondent indicates that, after August 18, 2018, Stoneham "testified that he was going to pay pack [sic] the full amount" of the loan owed to Respondent. Respondent's Brief at page 30. Specifically, the testimony reads as follows:

Q. Do you still intend to pay Mr. Barsuk back whatever you owe him?

A. Yes.

Q. How much do you owe Mr. Barsuk as we sit here today?

A. I intend on paying him $24,000.

R. 163.

Respondent interprets this testimony as a concession that, as of the date of his deposition, Stoneham had not yet paid back or worked off any portion of the loan balance. Respondent's Brief at page 30. Respondent ignores that reasonable minds could easily interpret Stoneham's testimony, indicating he intended to repay Barsuk $24,000, as a statement by Stoneham indicating that, through both past and future labor or monetary payments, he intends on repaying the loan to Respondent Barsuk in full, without default. This interpretation is consistent with Stoneham's deposition testimony indicating that Stoneham had already begun the process of repaying the loan through a course of manual labor.

In briefing to the Appellate Division, Respondent declined to definitively characterize Stoneham's deposition testimony, regarding an intent to pay Barsuk $24,000, as unassailable evidence that Stoneham had not yet "worked off" a portion of the outstanding loan balance. Instead, Respondent stated:

> "[s]trangely, Mr. Stoneham stated he still intends to pay Mr. Barsuk the entire amount of the loan, which calls into question whether he actually believes his labor was reimbursement for any portion of the loan."

Respondent's Brief to the Appellate Division at page 25 (emphasis added).

Questions surrounding Mr. Stoneham's deposition testimony should be resolved by a trier of fact, rather than a court of law.

## CONCLUSION

Based on the foregoing arguments, this Court should reverse the decision of the Appellate Division granting summary judgment to the Respondent Barsuk and remand the case for a factual determination on the issue of Appellant Stoneham's status as an employee.

Dated: Buffalo, New York
October 24, 2023

John Ned Lipsitz, Esq.
Zachary James Woods, Esq.

**NEW YORK STATE COURT OF APPEALS**
**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.13 that the foregoing brief was prepared on a computer using Microsoft Word.

*Type.* A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
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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 certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc. is 6,910 words.

Dated: Buffalo, New York
October 24, 2023

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