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March 7, 2023

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

Re: Stoneham v. Barsuk
APL-2023-00001

Dear Ms. LeCours:

I write in reply to Respondent's February 28, 2023 Letter Submission to this Court.

The question of the applicability of Labor Law Section 240 (1) to plaintiff-appellant Stoneham's case should be resolved by determining (1) whether the trailer which fell upon him by virtue of the force of gravity was a "structure" within the ambit of the statute and (2) whether the accident was caused by the failure of the Respondent to provide adequate safety devices as prescribed by the statute. Appellants' position, well supported by the Record, is that the trailer was a

structure under the test established by the Court's decision in *Caddy v. Interborough* and its progeny and that the Respondent did not provide safety devices adequate to prevent the gravity-related accident. Respondent observes in his letter brief that, "[t]he majority's Memorandum and Order does not state that the trailer was not a structure. It did not rule for Mr. Barsuk because the trailer was not a 'structure' within the meaning of the statute." (Respondent's February 28, 2023 Letter Submission at p. 7). Nor does Respondent dispute the proposition that the Respondent failed to provide appropriate safety devices. Rather, Respondent injects into this appeal a standard clearly inappropriate for a determination of the applicability of Labor Law Section 240 (1).

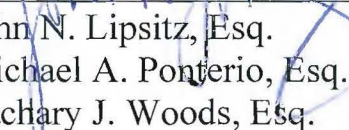
According to Respondent, "a fair reading of the majority's decision reflects that it took various other circumstances into account and determined that when viewed in their totality, Labor Law Section 240 (1) does not apply to the unique facts of this case." (Respondent's February 23, 2023 Letter Submission at p. 8). None of the case law cited by the parties to this appeal supports the application of a "totality of the circumstances" test to the overarching question of the applicability of the statute. As set forth on pages 21 and 22 of Appellants' February 10, 2023 Letter

Submission to this Court, such a test may fairly be held to apply to a determination of whether the object that fell on the plaintiff crushing his pelvis was, as a matter of law, a structure, with considerations given to factors such as the object's size, purpose, design, composition, weight, and the complexity of its construction. But the question remains and must first be addressed: was the trailer a "structure?" The question cannot be side-stepped or avoided by resort to a consideration of such factors as whether the accident took place on a "construction" site, whether a massive trailer hoisted into the air was a "vehicle," or whether the plaintiff was "a mechanic" at the time of the accident.

The language of the statute does not endorse the vague test proposed by the Respondent. It does, however, speak in mandatory terms about the obligation to furnish safety devices needed for the repair of a "building or structure."

Respectfully submitted,

LIPSITZ, PONTERIO & COMERFORD, LLC



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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing reply brief was prepared on a computer using Microsoft Word.

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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 and this Statement is 467.

Dated: March 7, 2023

STATE OF NEW YORK)
)
COUNTY OF MONROE)

ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT FEDERAL
EXPRESS DELIVERY**

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

On March 7, 2023

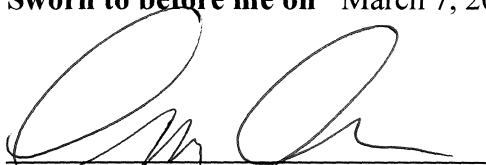
deponent served the within: **REPLY LETTER BRIEF**

Upon:

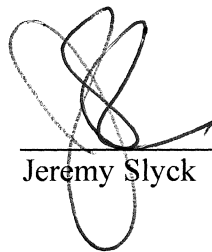
James M. Specyal, Esq.
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the address(es) designated by said attorney(s) for that purpose by depositing **one (1)** true copy of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on March 7, 2023



Andrea P. Chamberlain
Notary Public, State of New York
No. 01CH6346502
Qualified in Monroe County
Commission Expires August 15, 2024



Jeremy Slyck

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