To be Argued by:
JAMES M. SPECYAL
(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 DEFENDANT-RESPONDENT

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QUESTIONS PRESENTED

1. Is the portable trailer upon which plaintiff, Mr. Stoneham, worked at the time of his alleged injury a structure within the meaning of New York Labor Law § 240(1)?

   Answer: The trial court properly determined that the trailer was not a structure, and further properly determined that classifying the trailer as a structure would open the door to Labor Law § 240(1) liability in innumerable cases where the Legislature never intended it to apply.

2. At the time of his accident, was Mr. Stoneham's work on the braking system of the trailer routine maintenance, which falls outside the protections of Labor Law § 240(1)?

   Answer: The trial court properly determined that Mr. Stoneham's work was routine maintenance that mechanics frequently perform.

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

   Answer: Contrary to plaintiffs' view, the trial court did not suggest that Labor Law § 240 (1) never applies outside of a construction site. The court's ruling was much more limited, as it held that the statute "does not apply to routine maintenance in a non-construction, non-renovation context", which is correct pursuant to this Court's case law.

4. Was Mr. Stoneham "so employed" within the meaning of Labor Law § 240(1)?

Answer: The trial court concluded that there is a question of fact about whether Mr. Stoneham was an employee of Mr. Barsuk at the time of his accident, but this was error. According to Mr. Stoneham's deposition testimony, he was merely a volunteer on the day of his accident.

PRELIMINARY STATEMENT[1]

Mr. David Barsuk and Mr. Mark Stoneham were friends for over twenty years. The two would do various favors for each other over the course of their friendship. Being that Mr. Stoneham is a trained mechanic, he helped Mr. Barsuk with various mechanical projects. On the other hand, Mr. Barsuk, for example, lent Mr. Stoneham money to hire an attorney when the latter got himself into legal trouble. Mr. Barsuk also lent Mr. Stoneham $25,000 to purchase a home.

This case stems from an incident that occurred on August 18, 2018 when a trailer fell upon Mr. Stoneham, as he was working on the trailer's brake system. The trailer is classified as a vehicle, and as a result, this case in analogous to a situation where any automobile falls off a lift while a mechanic is working underneath. The trial court properly dismissed Mr. Stoneham's Labor Law § 240 (1) claim because the statute simply does not apply to situations like Mr. Stoneham found himself in on August 18, 2018. Labor Law § 240 (1) only applies when a plaintiff is working

[1] Goldberg Segalla LLP represents David Barsuk ("Barsuk" or "Mr. Barsuk") in his individual capacity, and this appeal stems from a motion for summary judgment against Mr. Barsuk. Goldberg Segalla LLP also represents named defendants Joseph Barsuk, Inc. and Harry Mark Barsuk. Plaintiffs' motion for summary judgment did not seek relief against either Joseph Barsuk, Inc. or Harry Mark Barsuk. Kenney Shelton Liptak Nowak LLP also represents David Barsuk in his individual capacity under a separate policy of insurance.

on a building or structure. A vehicle is not a structure, and so the statute does not apply in this case.

In fact, plaintiffs are asking this Court to expand Labor Law § 240 (1) to situations where neither the Legislature, nor the Court of Appeals, ever intended it to apply. According to plaintiffs, an individual is working on a structure under Labor Law § 240 (1) whenever he or she is working on virtually any man-made object. Following plaintiffs' argument to its conclusion, items such as clothing, office supplies, cell phones, and a legion of other items are structures within the meaning of Labor Law § 240 (1). This cannot possibly be what the Legislature intended. Plaintiffs are asking this Court to expand Labor Law § 240 (1) liability to, essentially, any case where a man-made object falls on top of somebody while that person is conducting manual labor on the object. This Court should reject this attempt.

Furthermore, braking systems on vehicles are, by their nature, wear and tear items. Mr. Stoneham's work on the braking system of the trailer was routine maintenance and as such, he is not entitled to Labor Law § 240 (1) protections. He was simply not exposed to the special hazards that the statute is meant to protect. Furthermore, volunteers are not entitled to Labor Law § 240 (1). Mr. Stoneham was a volunteer on the day of the incident. He was helping his friend, Mr. Barsuk. In their brief, the only "evidence" plaintiffs cite to in support of the idea Mr. Stoneham

was an employee of Mr. Barsuk is an affidavit from Mr. Stoneham himself, but the affidavit is tailored to avoid the consequences of his deposition testimony, which reflects that he was not an employee of any of the defendants in this matter.

For all of the reasons that follow, the trial court's decision to grant Mr. Barsuk summary judgment on Plaintiff's Labor Law § 240 claim should be affirmed.

STATEMENT OF FACTS

I. FACTUAL HISTORY

This case stems from an incident that occurred on August 18, 2018 when Mr. Stoneham was underneath a trailer, working on its air brake system, which was located at a recycling plant in Batavia, New York (R. 9; 326). However, unlike many (or most) plaintiffs who allege Labor Law § 240 (1) violations, Mr. Stoneham never considered himself an employee or independent contractor of Mr. Barsuk, or of the recycling plant where this accident occurred (R. 132-133). Instead, by all accounts, Mr. Barsuk and Mr. Stoneham were close friends (R. 611).

In fact, Mr. Barsuk first met Mr. Stoneham over twenty-years ago when they both worked at a company called IJR, Inc. ("IJR") (R. 611). At that time, Mr. Barsuk was working as a laborer, while Mr. Stoneham was "running jobs and operating heavy duty equipment" (R. 611). Indeed, after graduating high school in 1979, Mr. Stoneham became a diesel technician and is qualified to work on "heavy equipment, cars, trucks, [and] loaders" (R. 116). On the other hand, Mr. Barsuk has never been a mechanic (R. 611). Rather, he is a self-employed contractor (*id*.). Throughout the years, Mr. Barsuk learned that Mr. Stoneham has extensive experience maintaining heavy-duty equipment and trailers (*id*.).

Mr. Barsuk's belief is reflected in Mr. Stoneham's deposition testimony, as he stated that he began working at American Paving and Excavating ("American

Paving"), later bought out by IJR, in 1989 (R. 120-121). At American Paving, Mr. Stoneham worked on "dump trucks, lowboys, excavators, [and] dozers" (R. 121). Mr. Stoneham has also received various OSHA certifications over the years, including OSHA 40, which he obtained in 2018 (R. 117). He also has a Department of Transportation certification to work on air brakes, as well as a certification to conduct asbestos removal (R. 118).

Over the years, Mr. Barsuk became friends with Mr. Stoneham, and the two did favors for each other ranging from assistance with personal issues to helping with projects and other work (R. 611). For instance, Mr. Barsuk loaned Mr. Stoneham money to hire an attorney when the latter was arrested, and he also rented an apartment to Mr. Stoneham's daughter at a reduced rate (R. 112). On the other hand, most of the favors that Mr. Stoneham did for Mr. Barsuk involved mechanical work on trucks and other equipment, as that is Mr. Stoneham's area of expertise (*id.* 612). When Mr. Stoneham went to do mechanical work for Mr. Barsuk, the former would always bring his own tools and equipment (*id.*). Having said that, Mr. Barsuk stated that he never authorized Mr. Stoneham to enter his recycling plant, without prior permission (R. 610-612).

In October of 2017, Mr. Barsuk became interested in a trailer that was listed for sale for $5,500 (R. 613). He discussed the trailer with Mr. Stoneham and the latter, being the party experienced with the mechanics of heavy equipment, offered

to go and inspect the trailer and negotiate its purchase on behalf of Mr. Barsuk (R. 613-614). Mr. Barsuk gave Mr. Stoneham $5,500 in cash to purchase the trailer, but Mr. Stoneham negotiated the price down to $5,000 (R. 614). Mr. Barsuk gifted the remaining $500 to Mr. Stoneham as a token of appreciation for his assistance in purchasing the trailer (R. 614).

In the summer of 2018, Mr. Barsuk noticed what he believed to be a problem with the brakes on the trailer (R. 614). He spoke with Mr. Stoneham about the issue, and the two agreed for Mr. Stoneham to inspect the trailer on July 28, 2018 (*id*.). During the inspection, Mr. Barsuk was in and out of the area on his property where the trailer was located, as he was doing other work (*id*.). Mr. Barsuk relied on Mr. Stoneham's expertise when deciding how to lift up the trailer, and Mr. Stoneham decided to lift the trailer with an excavator (*id*.). Mr. Stoneham never sought advice from Mr. Barsuk on how to lift the trailer, but the trailer was lifted without incident (*id*.).

Mr. Barsuk and Mr. Stoneham agreed to continue to work on the trailer on August 4, 2018 (R. 614-615). On that day, both men arrived in the area of the trailer at the same time (R. 615, citing Aug. 8, 2018 surveillance at 54:00). As Mr. Stoneham was the one with the experience and knowledge to lift the trailer, he made all decisions concerning the equipment and methods used to lift and work on the trailer on August 4, 2018 (R. 615). Afterwards, Mr. Barsuk "drove the front loader

with the fork attachment to the rear of the trailer, placed the forks underneath the flatbed, and lifted it slightly" (R. 615, citing Aug. 8, 2018 surveillance at 1:06-1:23). Mr. Barsuk completed this task under the supervision of Mr. Stoneham, who can be seen on the surveillance video and still photographs wearing a yellow shirt (R. 615; 616; *see also* Aug. 8, 2018 surveillance 1:26-1:28). After lifting up the trailer in the rear, Mr. Stoneham told Mr. Barsuk that the trailer needed to be lifted up from the side (R. 617, citing Aug. 8, 2018 surveillance at 1:42:55). Mr. Barsuk left the area of the trailer after this conversation (R. 617).

In Mr. Barsuk's absence, Mr. Stoneham "moved the front loader to the side of the trailer, placed the forks underneath the bed of the trailer, and lifted it with the fork" (R. 617, citing Aug. 8, 2018 surveillance at 2:39:36-2:46:16). After the two men were done for the day, Mr. Stoneham left without any discussion of when he would return to work on the trailer, or even if he would return (R. 617). Mr. Stoneham came back to work on the trailer on August 18, 2018 without the knowledge of or receiving permission from Mr. Barsuk, or any other defendant (R. 617-618).

When Mr. Barsuk arrived on August 18, 2018, he found Mr. Stoneham underneath the trailer (R. 618). Mr. Barsuk then used the front loader to lift the trailer off of Mr. Stoneham, and then called for medical help (*id*.). Although Mr. Barsuk was not present at the time of the accident, he reviewed the surveillance video that

depicted the incident, and noted that Mr. Stoneham arrived alone, and decided to use the front loader to lift the trailer (R. 618). On this occasion, the front loader had a bucket attached to it, as opposed to the fork that was attached prior (R. 618-619). The fork attachment was near the trailer, was accessible to Mr. Stoneham, and could have been attached in seconds (*id*.).

Mr. Barsuk further noted that there were various items on the subject property that Mr. Stoneham could have used to block the tires of the front loader to prevent it from moving, such as timber and metal objects of a substantial weight (R. 619-620). Mr. Stoneham knew such items were on the property, as he walked from the back of the subject property carrying to two timbers that he placed under the trailer (R. 620). In fact, on the day of the accident, when Mr. Stoneham was driving the front loader, there was timber on the driver side fender (R. 619).

With respect to compensation for Mr. Stoneham for his work on the trailer, or lack thereof, Mr. Barsuk stated that the "two never discussed (nor made any arrangement or agreement, informal or otherwise regarding), compensation for his time, labor, or reimbursement for his expenses. Mr. Stoneham never asked me for money or compensation, and I never offered. His work was done as a favor, as a volunteer, one friend to another, without any form of compensation, or underlying arrangement requiring Mr. Stoneham to do these tasks" (R. 620).

Furthermore, Mr. Stoneham stated that he never considered himself an employee or independent contractor of Mr. Barsuk, or of the recycling plant where this incident took place (R. 131-132). Mr. Barsuk agreed that Mr. Stoneham was never employed by any named defendant, in any capacity (R. 613). Mr. Stoneham never entered any written contracts with Mr. Barsuk or the recycling plant (R. 143). Mr. Stoneham never provided any invoices or bills for any of his work (*id*.) In the approximately one hundred times he has worked at the recycling plant over the years, nobody has ever given Mr. Stoneham directions on how to do his work (R. 144). He agreed that he has complete control over how his work gets done (*id*.).

About three months prior to the accident, Mr. Barsuk loaned Mr. Stoneham about $25,000 to purchase a house, with the understanding that Mr. Stoneham would pay back the money when he was able to (R. 160;703).[2] Mr. Stoneham never purchased a house, and never returned the money (R. 160). He claims to have "worked" off some of the balance by hauling topsoil for Mr. Barsuk, helping with tearing down a sewer plant, and working on Mr. Barsuk's service trucks (*id*.). Nevertheless, after making this claim, Mr. Stoneham said he still intends to pay Mr. Stoneham the entire amount of the loan (R. 163).

[2] Mr. Stoneham originally stated that the loan was for $24,000, but the exact number is not an issue of this appeal (R. 160).

II. PROCEDURAL HISTORY

Plaintiffs commenced this action on December 21, 2018, alleging violations of Labor Law §§ 200 and 240(1), and alleging common-law negligence (R. 26-38). Bonnie Stoneham is Mr. Stoneham's wife, and her claim is based upon loss of consortium (R. 38).

Mr. Stoneham was deposed on September 20, 2019 (R. 101). Prior to Plaintiffs' motion for summary judgment, they amended their complaint to include an alleged Labor Law § 241(6) violation, after successfully moving for permission to do so (R. 566). On November 20, 2020, plaintiffs' moved for summary judgment against David Barsuk (R. 15-16). On March 2, 2021, Mr. Barsuk cross-moved for summary judgment (R. 508-509; 624-625).

On October 5, 2021, the trial court denied Plaintiffs' motion for summary judgment on the Labor Law § 240(1) claim, instead granting Mr. Barsuk summary judgment on the same claim. Plaintiffs now appeal this decision to this Court. For any and all of the reasons that follow, the trial court's decision should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DETERMINED THAT THE TRAILER IS NOT A STRUCTURE.

A. Introduction.

There is no dispute that Mr. Stoneham was doing mechanical work on the brake system of the subject trailer when it fell on him (R. 99; 299; 306). Nevertheless, this is not a Labor Law § 240 (1) case because that statute only applies when an individual is working upon a building or structure (Labor Law § 240 [1]). The subject trailer is not a structure, as the trial court correctly recognized (R. 12-13). Further, the trial court properly recognized that deeming the trailer to be a structure would open the door to a wide range of accidents to which Labor Law § 240(1) is not intended to cover (R. 12). In fact, considering all of plaintiffs' arguments in totality, their reasoning leads to the conclusion that virtually every man-made object is a structure, and there is a potential Labor Law § 240 (1) violation when anything falls on somebody performing manual labor. Plaintiffs' arguments would extend to Labor Law § 240 (1) liability well beyond the intent of the statute, according to the Legislature and the Court of Appeals. This Court should not approve of such an expansion.

B. The trailer is not a structure within the meaning of Labor Law § 240 (1).

Plaintiffs' argument that the trailer is a structure is grounded in a 111-year-old case, *Caddy v Interborough R.T. Co*., 195 NY 415, 421 (1909) (appellants' br. at 18). In *Caddy*, the Court of Appeals defined a structure as "any production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Caddy*, 195 NY at 420 [1909]). Having that said, the First Department has characterized the decision in *Caddy* as "hoary", which is perhaps not the most flattering term to use in connection with a Court of Appeals decision (*Garcia v 225 E. 57th St. Owners, Inc*., 96 AD3d 88, 90 [1st Dept 2012]). Indeed, case law reflects that that the definition of a structure has narrowed in the past century.

For instance, in *Dahar v Holland Ladder & Mfg. Co*., 18 NY3d 521, 523 (2012), the plaintiff fell off a ladder while cleaning a "wall module" that was to be attached to another wall to provide support for pipes (*Dahar*, 18 NY3d at 523 [2012]). Similar to Mr. Stoneham, the plaintiff relied on the extremely broad definition of a structure found in *Caddy*, and claimed that since he was cleaning the module, an activity specifically mentioned in Labor Law § 240 (1), he was entitled to the statute's protections (*id*.) The Court of Appeals stated that "the argument is too simple and would lead to an expansion of section 240 (1) liability that our cases

do not support and that we are convinced the Legislature never intended" (*Dahar v Holland Ladder & Mfg. Co*., 18 NY3d 521, 525 [2012]).

Here too, Mr. Stoneham's arguments are overly simplistic, and the rule from *Caddy* is no longer as important as it once was. The tendency to move away from *Caddy* is reflected in Appellate Division decisions. For instance, the First Department has had held that a parkway is not a structure for Labor Law § 240 (1) purposes (*Dilluvio v City of NY,* 264 AD2d 115, 121 [1st Dept 2000], *aff'd Dilluvio v City of NY*, 95 NY2d 928, 929 [2000]). The First Department rejected the idea that a parkway is a structure even though under *Caddy*, any type of roadway would be a structure. A road way is artificially "built up" by humans, and made of different substances or "parts" like black-top, concrete, and paint. Thus, if the *Caddy* standard was the beginning and end to any analysis of what constitutes a structure, any roadway would be a structure, but that is not the case.

More recently, the Second Department, Appellate Term, rejected the idea that a motor within an oven is a structure (*Romero v City of NY*, 46 Misc 3d 144[A], 144A, 2015 NY Slip Op 50197[U], *1 [App Term 2015]). Here again, if *Caddy* was the only relevant authority on the subject, a motor would be a structure because motors are both artificially "built up", and made of different parts such as metal, plastic or rubber seals, and other objects.

Plaintiffs' definition of a structure would essentially mean that any object, other than a "product of nature" such as tree, would be a structure (*Lombardi v Stout*, 80 NY2d 290, 296 [1992]). A pair of dress shoes would be a structure because dress shoes are artificially "built up" by humans, and made with different "parts" such as leather and laces. Telephones would be structures, as would fountain pens, thermostats, and countless other man-made objects that one sees around any office building. Virtually every object known to man other than products of nature would be structures. The Legislature could not have possibly intended this result when enacting Labor Law § 240 (1).

Instead of relying solely upon a definition from a case more than a century ago, the way to determine what is and is not a structure within Labor Law § 240 (1) is to look at the intent of the statute, and to consider the nature of the work the plaintiff performed (*Dahar*, 79 AD3d at 1633; *Dahar*, 18 NY3d at 525 [2012]).

While Labor Law § 240 (1) does not solely apply to construction sites, the Court of Appeals has described the legislative intent as follows:

> "It is apparent from the text of Labor Law § 240 (1), and its history confirms, that its central concern is the dangers that beset workers in the construction industry. The first version of the statute was enacted in 1885, in response 'to widespread accounts of deaths and injuries in the construction trades' (*Blake*, 1 NY3d at 285). More recent legislative history explains that the purpose of the statute is to place 'ultimate responsibility for safety practices at building construction jobs where such responsibility … belongs' (Mem of Senator Calandra and Assemblyman Amann, 1969 NY Legis Ann, at 407). The statute today is found in article 10 of the Labor Law, entitled 'Building Construction, Demolition and Repair Work"

(*Dahar*, 18 NY3d at 525 [2012]).

Here, there is no dispute that Mr. Stoneham was not engaged in construction at the time of his accident. Instead, he was working on the braking system of the subject trailer, which is defined as a vehicle by statute (R. 9; 236; Vehicle and Traffic Law §§ 156; 388[2]). Therefore, this matter is analogous to any other vehicle, such as a car, falling off a lift onto a mechanic, as the trial court recognized (R. 12 ["Under the 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]"). In fact, taking plaintiffs' position to its ultimate conclusion, even ordinary motorists who get stranded on a highway could be subject to Labor § 240 (1) liability. If an individual gets a flat tire and calls a mechanic who subsequently gets injured when the car falls off jacks, then the owner of the automobile would be subject to Labor Law § 240 (1). Of course, ordinary consumer automobile insurance policies would have to account for this policy, which presumably would make the cost of insurance even higher than it already is.

Plaintiffs' have failed to identify a case where, for example, Labor Law § 240 (1) applied when an ordinary consumer car fell of a lift at a repair shop. This could be telling because one would think that with the number of automobiles on the road, there would be case law addressing Labor Law § 240 (1) violations, if Labor Law §240 (1) applied to automobiles. Surely Mr. Stoneham is not the first person have a

vehicle or automobile fall off a lift, or an object acting as a lift, resulting in injury. Yet, there do not appear to be such cases that applied Labor Law § 240 to a car falling off a mechanic's lift. The most likely explanation is that automobiles falling off lifts is not the type of accident Labor Law 240 (1) protects, and nobody perceives the statute to apply to such situations.

In support of its conclusion that the subject trailer is not a structure for Labor Law § 240(1) purposes, the trial court referenced a Second Department case, *Strunk v Buckley*, 251 AD2d 491 (2d Dept 1998) (R. 11). Plaintiffs claim that "the Second Department's decision in Strunk had nothing whatsoever to do with the question of . . . whether a 'vehicle' could be deemed to be a structure for purposes of the application of §240(1)" (appellants' br. at 22). According to the Second Department, plaintiffs' interpretation of its decision *Strunk* is not exactly correct. That court, citing to *Strunk*, has unequivocally stated that "[t]he dismantling of a vehicle unrelated to a building or a structure is not a protected activity under" (Labor Law § (*Guevarra v Wreckers Realty*, LLC, 169 AD3d 651, 652 [2d Dept 2019], citing (*Strunk*, 251 AD2d at 491-492 [2d Dept 1998]).

With respect to the cases that plaintiffs cite in support of their position, notably, all except one were decided well before *Dahar* (appellants' br. at 19-21). The sole case plaintiffs' cite that came after *Dahar* is *Myiow v City of NY*, 143 AD3d 433, 434 (1st Dept 2016), but that case is irrelevant to Mr. Stoneham's accident. In

Myiow, the plaintiff was injured when he was preparing a steel beam to be hoisted from a flatbed truck (*Myiow*, 143 AD3d at 434 [1st Dept 2016]). He was standing on top of the steel beams to wrap rope around them, but then fell off the flatbed truck (*id*.). The First Department did not decide that the flatbed was a structure in *Myiow*. Instead, it appears that the structure in that case was a pavilion the plaintiff was helping to construct (*id*.). The structure at issue in *Myiow* was a pavilion, not the truck, or anything similar to the trailer that fell on Mr. Stoneham.

The case that is most analogous to the instant matter is *Guevarra*, *supra*. *Guevarra* was decided after *Dahar*, and concerns automotive repair. In *Guevarra*, the plaintiff claimed a violation of Labor Law § 240 (1) after a piece of a skid loader that was being used to hoist a car engine broke and fell on him (*Guevarra*, 169 AD3d at 652). As previously mentioned, the Second Department held that "dismantling of a vehicle unrelated to a building or a structure is not a protected activity under that statute" (*id*.). Here, the subject trailer is classified as a vehicle. Thus, Mr. Stoneham's work on the trailer is not a protected activity under Labor Law § 240 (1).

In sum, the trial court was correct in determining that the subject trailer is not a structure within the meaning of Labor Law § 240 (1). According to plaintiffs, nearly every man-made object, ranging from clothing to all kinds of electronics devices, are structures. This is not supported by relevant case law or the Legislative

history of Labor Law § 240 (1). Plaintiffs' arguments are overly simplistic, and should be rejected. Thus, the judgment of the trial court should be affirmed.

POINT II

(Responding to Plaintiffs' Points II and III)
PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE AT THE TIME OF HIS ACCIDENT

Preliminary, plaintiffs argue that in Point III of their brief that Labor Law § 240 (1) does not only apply to workers injured on construction sites (appellants' br. at 34-39). Plaintiffs are correct that there is no sweeping rule that Labor Law § 240 (1) only applies to work on construction sites (*Joblon v Solow*, 91 NY2d 457, 464 [1998]). However, it does not appear that the trial court indicated there was such a broad rule in its decision, and nobody is asking this Court to make such a rule. To the contrary, the trial court stated "[i]t is also well settled that Labor Law §240(1) does not apply to routine maintenance in a non-construction, non-renovation context" (R. 12, citing *Clause v Global Metallurgical, Inc*., 160 AD3d 1463 [2018]).

Notably, the court's ruling is a direct quote from this Court (*Clause,* 160 AD3d 1463, 1463 [4th Dept 2018], quoting *Ozimek v Holiday Val., Inc*., 83 AD3d 1414, 1415 [4th Dept 2011]). The trial court's decision is in no way dependent on the patently incorrect idea that Labor Law § 240 (1) never applies to any work area that is not a construction site. Instead, the trial court followed this Court's precedent and applied the narrow rule that Labor § 240 (1) does not apply when routine maintenance is conducted in a non-construction, non-renovation context (R.12).

While plaintiffs lament the trial court allegedly "misguided policy-making" when it determined Mr. Stoneham's work on the trailer to be routine maintenance, the court had to rely on the policy behind Labor Law § 240 (1) because the plaintiffs never provided a case that says the statute protects individuals engaged in repairing a vehicle's brakes (R. 12). The court observed that Mr. Stoneham's task on the day of the incident only required "the use of some open-ended wrenches and a rubber mat" (R. 12). The court also correctly observed that plaintiffs' arguments lead to the conclusion that even relatively simple brake repairs, which are hardly rare in the automotive industry, are within the purview of Labor Law § 240 (1) if vehicles are considered structures. There is simply a lack of support, in case law and the Legislative history of the statute, to support the broad argument that the statute applies when a worker performs maintenance upon a wear and tear item likes brakes.

As the Court of Appeals has noted, "the statutory language [of Labor Law § 240 (1)] must not be strained in order to encompass what the Legislature did not intend to include" (*Martinez v City of NY*, 93 NY2d 322, 326 [1999] [internal citations and quotation omitted]). According to plaintiffs, Labor Law § 240 (1) would apply when any automotive mechanic had a vehicle on a lift to work on, maintain, or replace brakes or any component of a braking system. This is not the type of elevation risk, commonly associated with construction work, that Labor Law § 240 (1) contemplates. In fact, the risk that Mr. Stoneham was exposed to was a

risk any mechanic faces when working underneath the vehicle on a lift. Any mechanic could get injured if a vehicle fell off a lift during repair, or if a piece of a vehicle or a tool fell during repairs of a vehicle on a lift. Therefore, Mr. Stoneham was subject to an "ordinary risk inherent" to working underneath a vehicle, "not a special hazard that Labor Law § 240 (1) was designed to address" (*Cabezas v Consol. Edison*, 296 AD2d 522, 523 [2d Dept 2002]). Therefore, Labor Law § 240(1) does not apply to Mr. Stoneham's work on the braking system of the subject trailer.

POINT III

PLAINTIFF WAS A VOLUNTEER AT THE TIME OF HIS ACCIDENT

Contrary to plaintiffs' contention, this Court can and should review the issue of Mr. Stoneham's status as a volunteer, which was adversely decided to Mr. Barsuk defendants. This Court has authority to grant summary judgment to non-appealing parties (*Strawberry Lane, Inc. v Fraser*, 129 AD2d 874, 875 [3d Dept 1987], citing [CPLR 3212 [b]; *Merritt Hill Vineyards v. Windy Hgts Vineyard, Inc.*, 61 NY2d 106, 110-111 [1984]; *Friedman v Carey Press Corp*., 117 AD2d 568, 569 [1st Dept 1986]). Furthermore, Mr. Barsuk was not aggrieved from the trial court's summary judgment order, as he won on his cross-motion for summary judgment (R. 12-13). There was no need for Mr. Barsuk to appeal an order that was ultimately favorable to him.

In any event, the trial court erred in concluding that is a triable question of fact as to whether Mr. Stoneham was an employee of Mr. Barsuk. He was a volunteer, and volunteers are not entitled to Labor Law § 240 (1). Thus, Mr. Barsuk is entitled to summary judgment.

It is well settled that Labor Law § 240 (1) only applies to employees and independent contractors (*see Koenig v Patrick Const. Corp*., 298 NY 313, 317 [1948]). It does not apply when an injured plaintiff is merely a volunteer (*Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]).

Here, Mr. Barsuk and Mr. Stoneham were longtime friends who would routinely do favors for each other (R. 611-613). Neither Mr. Barsuk, nor Mr. Stoneham, considered the latter to be an employee or independent contractor of the former (R. 132; 613). In this matter, the only way for Mr. Stoneham to argue that he was anything other than a volunteer when he worked on the subject trailer is to say that his work was a partial reimbursement for $25,000 Mr. Barsuk had loaned him to buy a house (R. 159; 703).

However, when specifically asked about the loan at his deposition, Mr. Stoneham stated that he agreed to pay Mr. Barsuk back when "he was able to get the money" (R. 160). This clearly indicates that the intention of the parties was for Mr. Stoneham to pay the loan with money, not work. After making this statement during his deposition, Mr. Stoneham stated he "worked some of" the loan off (*id*.). When asked an open-ended question about what he meant by "worked some of it off", Mr. Stoneham, notably making no mention of his work on the trailer, stated that he hauled topsoil for Mr. Barsuk, helped tear down a sewer plant, and serviced Mr. Barsuk's trucks (R. 160-161.). Strangely, 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.

Conveniently, on March 8, 2018, after Mr. Barsuk had moved for summary judgment on grounds that Mr. Stoneham was a volunteer, Mr. Stoneham submitted

an affidavit stating that in addition to the two aforementioned projects, the project on the subject trailer was also reimbursement of the loan (R. 626-627; 703). This Court should not consider Mr. Stoneham's affidavit from March 8, 2018 because "[a]n affidavit submitted in opposition to a motion for summary judgment does not raise a triable issue of fact where the affidavit "can only be considered to have been tailored to avoid the consequences of . . . earlier testimony" (*Fields v Lambert Houses Redevelopment Corp*., 105 AD3d 668, 671 [1st Dept 2013] [internal citation and quotation omitted]). Mr. Stoneham had an opportunity to mention the trailer when he mentioned the topsoil and sewer removal as reimbursement for the loan. He did not (R. 160-161).

When Mr. Stoneham was given a fair opportunity to discuss the terms of his agreement with Mr. Barsuk, his testimony was devastating to his position that he was compensated for the work on the subject trailer. Then, suddenly, after Mr. Barsuk moved to dismiss his Labor Law § 240 (1) claim, Mr. Stoneham remembers that his work on the trailer was compensated. This Court should disregard the affidavit as tailored to avoid the consequences of his deposition testimony. Since plaintiffs' only cite to Mr. Stoneham's affidavit in support of their contention that Barsuk employed him, and the affidavit should not be considered, this Court should affirm the order appealed from because the undisputed, admissible evidence reflects

that Mr. Stoneham was a volunteer, not an employee. Volunteers can simply not recover under Labor Law § 240 (1) (*Whelen*, 47 NY2d at 971 [1979]).

CONCLUSION

For the reasons stated above, Defendant, David Barsuk (improperly named herein as David J. Barsuk), requests that the Order of Supreme Court, dated October 15, 2021, be affirmed in every respect.

Dated: Buffalo, New York
May 17, 2022

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