To be Argued by:
JAMES M. SPECYAL
(Time Requested: 30 Minutes)

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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.

BRIEF FOR DEFENDANT-RESPONDENT

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QUESTIONS PRESENTED

1. Was Mr. Stoneham engaged in a "protected activity" to which Labor Law § 240 (1) applies when this accident occurred?

   Answer: The Appellate Division properly concluded that Mr. Stoneham was not engaged in a protected activity.

2. As a matter of law, was Mr. Stoneham acting as a volunteer at the time of this incident, thereby precluding Labor Law § 240 (1) liability?

   Answer: The trial court determined that there was an issue of fact as to whether Mr. Stoneham was a volunteer. This was plain error. The Appellate Division majority did not reach this issue, but this Court can and should rule Mr. Stoneham was a volunteer, thereby precluding Labor Law § 240 (1) liability.

3. Were adequate safety devices made available to Mr. Stoneham on the date of the accident?

   Answer: The trial court wrongly concluded that adequate safety devices were unavailable, but the Appellate Division majority did not need to reach the issue. Having said that, Appellants consider it important to determine whether adequate safety devices were made available to determine if a Labor Law § 240(1) violation occurred. This is accurate, but Appellants fail to appreciate that Mr. Stoneham did have adequate

safety devices available on the date of the accident. There was a fork attachment for the front loader available that was used to safely lift the trailer only two weeks prior to the accident. There were also timbers available to prevent the loader from rolling. Inexplicably, Mr. Stoneham decided not to use them.

PRELIMINARY STATEMENT

A substantial portion of Appellants' brief is devoted to arguments that this Court does not need to address. With their first and third questions presented, Appellants suggest the Appellate Division majority's decision calls the definition of a "structure" found in *Caddy v Interborough R.T. Co*., 195 NY 415, 417 (1909) into question (Appellants' br. at 6). This is clearly not the case and is a classic strawman argument. Appellants are attempting to make the Appellate Division majority decision appear controversial, but it is not. Pursuant to a string of cases from this Court, the Appellate Division's majority's decision is correct. The Appellate Division did not attempt to alter the definition of a "structure" found in *Caddy*. This Court does not need to alter the definition of a "structure" to affirm the Appellate Division. Certainly, Mr. Barsuk is not asking this Court to do so.

The inordinate amount of time Appellants spend discussing how the trailer that fell upon Mr. Stoneham is a "structure" is telling. In the end, Appellants are requesting this Court to primarily apply a two-prong test to determine the applicability Labor Law § 240 (1). They claim the "proper line of inquiry" is first to ask if "the injured party engaged in work on a building or structure". In Appellants' view, the second question to ask is "were adequate safety devices made available" (Appellants' br. at 21). This is an overly simplistic argument that does not comport with this Court's precedent. A plaintiff is not entitled to the extraordinary protections

of Labor Law § 240(1) just because he was injured while "working" on a structure in a generic sense. For the statute to apply, he has to be engaged in certain kinds of work or, in other words, a "protected activity". Mr. Stoneham was not engaged in such an activity. In this case, the "trailer" he was fixing at the time of the accident is not just a trailer. It is legislatively defined as a "vehicle", right alongside ordinary passenger vehicles such as cars and trucks. Fixing a vehicle, in the sense that word is being used in this case, is not a "protected activity".

Appellants allege that Mr. Barsuk is attempting "to drastically restrict the scope of § 240(1)", but the opposite is true (Appellants' br. at 22). Accepting Appellants' arguments would expand the protections of Labor Law § 240(1) far beyond what the Legislature intended. Given the "trailer" in this case is statutorily defined as a vehicle similar to a car, if this Court agrees with Appellants, the protections of Labor Law § 240(1) would be expanded to regular mechanics who work on passenger cars and trucks.

There is nothing in the Legislative history of Labor Law § 240(1) that suggests automobile maintenance was intended to be a "protected activity", nor would one expect to find such a suggestion. The ancestor of Labor Law § 240(1) was enacted in 1885, nearly thirty years before Ford's Model T was released to the public. Nobody would expect the Legislature to be thinking about automobile repairs in

1885. Since Mr. Stoneham was not engaged in a protected activity at the time of his accident, Labor Law § 240(1) does not apply.

Furthermore, even if a plaintiff is injured due to an elevation related risk, he is not entitled to Labor Law § 240(1) protection if the elevation related risk was an ordinary risk of his occupation. Mr. Stoneham is a mechanic. Mechanics of all kinds routinely work underneath cars, trucks, trailers, and other vehicles. Everybody who has ever owned a car has likely seen a car on a lift. Here, Mr. Stoneham was exposed to a risk that is a common one in his occupation. Every time a mechanic works underneath one of the millions of vehicles in New York State, there is a risk of the vehicle falling off a lift. Thus, the elevation risk Mr. Stoneham faced was a common and ordinary one in his occupation and Labor Law § 240(1) does not apply.

Similarly, this Court has expressly denied Labor Law § 240(1) protections when a wall collapsed down onto a construction worker because that is an ordinary risk of being a construction worker. Naturally, construction workers are around walls all the time on construction sites. There is always a risk one could collapse. Given that the central concern of Labor Law § 240(1) is the construction industry, mechanics cannot possibly receive the statute's protection if a car falls off whatever is raising it in the air. Mechanics are frequently exposed to this risk. Construction workers do not get Labor Law § 240(1) protections when an accident results from an ordinary risk and neither should mechanics. For this reason, too, Labor Law §

240(1) simply does not apply in this case. Applying Labor Law § 240(1) in this case would give greater protections to mechanics than construction workers which cannot be reconciled with the history of the statute and its central concern.

Having said that, even if this Court disagrees with the reasoning of the Appellate Division, this Court should still affirm the decision. Labor Law § 240(1) does not protect volunteers. The trial court decided there was a question of fact about Mr. Stoneham's status as a volunteer at the time of the accident, but this was plain error. To defeat a motion for summary judgment, there must be a legitimate dispute of fact. A party cannot defeat summary judgment with speculation or conclusory allegations.

The evidence overwhelmingly reflects that Mr. Stoneham was not compensated for his work. Mr. Stoneham made this abundantly clear at his deposition during defense questioning. The trial court found there was a question of fact due to a single question at the end of Mr. Stoneham's deposition when he said the work was compensated because "in his mind" it was partial reimbursement for a generous loan Mr. Barsuk previously offered him. There is absolutely no evidence to corroborate this testimony. There is no proof that whatever is in Mr. Stoneham's mind is actually based in reality. This testimony is conclusory and speculative. Thus, it is insufficient to create a legitimate question of fact requiring trial. To conclude

otherwise would be like concluding this case would require a trial even if this accident never occurred just because Mr. Stoneham said "in his mind" it happened.

Furthermore, even if this testimony was not conclusory, it still is not enough to defeat summary judgment. Even if Mr. Stoneham's work on the trailer was partial reimbursement for the loan, it still would not entitle him to the protection of Labor Law § 240(1). For liability to attach, Mr. Stoneham would have had to be Mr. Barsuk's employee. He was not an employee under the definition of an employee as this Court has defined the term. There is no set of facts that would ever allow a jury to determine Mr. Stoneham was an employee, regardless of the relationship between the work and Mr. Barsuk's loan. Therefore, Mr. Barsuk is entitled to summary judgment on this ground as well.

As will be explained, this Court has jurisdiction over this argument because it was properly raised in the trial court and Appellate Division. Furthermore, Appellants do not have a legitimate argument against Mr. Barsuk's position on this issue. Mr. Barsuk raised this issue in his SSM letter, but Appellants did not say a word about it in their reply SSM letter. That is because there is no legitimate response. At the time of the accident, Mr. Stoneham was a volunteer. There is no legitimate question of fact about it.

Appellants also spend time arguing that Mr. Stoneham was engaged in repair work, as opposed to routine maintenance at the time of the accident. There is no need for this Court to rule on this issue. The Appellant Division assumed that Appellants were correct on this particular issue. Thus, the Appellate Division did not rule in favor of Mr. Barsuk because Mr. Stoneham was engaged in routine maintenance at the time of the accident. Appellants' lengthy discussion of *Caddy* and the concept of routine maintenance is a smoke screen. Instead, the Appellate Division made a narrow, well-reasoned ruling that Labor Law § 240(1) does not apply to mechanics when they are fixing a vehicle comparable to an ordinary car.

Finally, Labor Law § 240(1) only applies when an owner or contractor fails to provide adequate fall protection. Mr. Stoneham was provided with adequate fall protection, but for some inexplicable reason, he decided not to use it. More specifically, Mr. Stoneham could have used the fork attachment for the front loader to lift the trailer, which was used to adequately and safely lift the trailer two weeks before the accident. For whatever reason, Mr. Stoneham did not do so. For this reason as well, Mr. Stoneham cannot recover under Labor Law § 240(1).

STATEMENT OF FACTS

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 the 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. 4, 2018 surveillance at 9:13). 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. 4, 2018 surveillance at 9:17-9:21).

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. 4, 2018 surveillance 9:26). 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. 4, 2018 surveillance at 9:28). 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. 4, 2018 surveillance at 9:45-9:46). 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 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*.). For some unknown reason, instead of attaching the fork, Mr. Stoneham used a bucket attachment to lift the trailer.

Mr. Barsuk further noted that there were various items at 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 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 as follows:

> "[Mr. Stoneham and myself] 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 performed work 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). 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 testified he still intends to pay Mr. Stoneham the entire amount of the loan (R. 163).

ARGUMENT

I. THE APPELLATE DIVISION PROPERLY CONCLUDED THAT LABOR LAW § 240 (1) IS INAPPLICABLE.

A. Introduction.

Preliminarily, it is important to note that Appellants' argument regarding *Caddy v Interborough R.T. Co*., 195 NY 415, 420 (1909), and the definition of a "structure" therein, is a red herring. The Appellate Division did not rule that Labor Law § 240(1) does not apply in this case because the subject trailer is not a "structure" within the meaning of the statute. It is easy to see why Appellants place so much emphasis on arguing the trailer was a structure. They want the "proper line of inquiry" to determine if Labor Law § 240(1) was violated to primarily consist of a two-prong test. The first question to answer is "was the injured party engaged in work on a building or structure" (Appellant br. at 21). The second is whether "adequate safety devices [were] available" (*id*.).

This two-prong inquiry is overly simplistic. The statute does not apply just because somebody is "working" on a structure in the broadest sense of the word. Rather, to recover under Labor Law § 240(1), a plaintiff has to be engaged in certain kinds of work. As the Appellate Division recognized, Mr. Stoneham was not engaged in a type of work, or in other words, a "protected activity", that is entitled to the extraordinary protections of Labor Law § 240(1) (R. 761). Mr. Stoneham, a

trained diesel mechanic, was working on the subject trailer's brakes when this accident occurred (R. 121). As will be discussed, the Legislature has unequivocally classified the subject trailer as a "vehicle", right alongside ordinary cars and trucks. Thus, applying Labor Law § 240(1) to this case would mean applying to cases involving automobile mechanics working under a regular car.

There is no support in the Legislative history of Labor Law § 240(1) that suggests the statute was meant to apply to automobile maintenance, or that such is a "protected activity". Furthermore, there is a dearth of case law that suggests automobile repair is a protected activity. Since Mr. Stoneham was not engaged in an activity that Labor Law § 240(1) protects, he is not entitled to the statute's extraordinary protections.

Even assuming, *arguendo*, automobile repair was a protected activity, which conceivably could be the basis for a Labor Law § 240(1) claim in certain extreme situations, this would not be one of those situations. This Court has a long list of prior cases that stand for the proposition that a worker is not entitled to the benefit of Labor Law § 240(1) if he or she is injured for accidents that result from an ordinary risk of his or her job. Here, Mr. Stoneham was engaged in his "normal occupation" when this accident occurred. (R. 761). He is a mechanic who works on heavy machinery (R. 116). Like mechanics of various kinds, including those who

work on cars, trucks, and buses, Mr. Stoneham was faced with a common risk of being a mechanic.

Most people are familiar with how automobile maintenance is regularly performed. Vehicles are raised on a lift so mechanics can easily stand underneath. It is common for mechanics like Mr. Stoneham to be exposed to the risks of a vehicle, or a piece of one, falling off a lift. It simply comes with the territory of being a mechanic. Therefore, Mr. Stoneham was exposed to a common, ordinary risk of his occupation. In such circumstances, Labor Law § 240(1) does not apply. To conclude otherwise, this Court would have to overturn four prior cases. This Court should not do so. Instead, the Appellate Division majority's decision should be affirmed.

B. Relevant Precedent.

As this Court has observed, the purpose of Labor Law § 240(1) is to protect workers from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]). Having said that, the statute does not apply just because a certain gravity related accident occurs. Indeed, the protections of Labor Law § 240(1) "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal citations omitted]).

Critically, injured workers are not entitled to the protections of Labor Law §240 (1), even if an accident occurred as a result of an elevation differential, if that elevation differential is one of the "ordinary dangers of a" worksite or, in other words, "a general hazard of the workplace" (*Narducci v Manhasset Bay Assoc*., 96 NY2d 259, 267-269 [2001], *quoting Misseritti v Mark IV Constr. Co*., 86 NY2d 487, 491 [1995]; *see also Toefer v Long Is. R.R*., 4 NY3d 399, 407 [2005]; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]).

C. Automobile Maintenance and Repair is not a Protected Activity.

The trailer in this case is not just a trailer. It is statutorily defined as a vehicle. The Vehicle and Traffic Law (VTL) defines the term "vehicles" as follows:

> "Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks"

(VTL § 159).

Here, as Appellants note, the trailer at issue " 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 (Appellants' br. at 12). Certainly, it cannot be moved by "human power". It must be towed, likely by a powerful truck. As a result, it is squarely a "vehicle" and it is classified alongside

other devices "in . . . which any person . . . may be transported", such as an ordinary cars, trucks, or buses.[1]

As a result of the Legislature's decision to categorize the subject trailer along with ordinary cars as a "vehicle", it is fair to compare this case to one involving a mechanic underneath an ordinary car, truck, or bus. However, there is no support for the proposition that Labor Law § 240(1) applies to work on the braking system of an ordinary passenger car, nor would one expect it to given the history of the statute.

As this Court has observed, the first "scaffold law", a predecessor of Labor Law § 240(1), was enacted in 1885 "in response to the Legislature's concern over unsafe conditions that beset employees who worked at heights. In promulgating the statute, the lawmakers reacted to widespread accounts of deaths and injuries in the construction trades" (*Blake v Neighborhood Hous. Servs. of NY City, Inc*., 1 NY3d 280, 284-285 [2003][internal citation omitted] [emphasis added]).

It is temporally impossible that the 1885 statute was meant to protect an automobile from falling on top of a worker who was changing its brakes. After all, Ford's Model T was not released until 1908, 23 years after the first scaffolding law.[2]

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[1] Notably, this definition excludes railcars since those move on stationary rails. This is one reason why *Caddy* and *Gordon v E. Ry. Supply*, 82 NY2d 555 (1993) are inapplicable to this case. Both of these cases were about working on railcars. While ordinary people may think of them as "vehicles", the Legislature expressly separated them from the category of "vehicles" at issue in this case.

[2] Ford Motor Company, https://corporate.ford.com/articles/history/the-model-t.html [last accessed August 3, 2023].

The legislative history confirms this. The bill jackets regarding amendments to Labor Law § 240(1) over the years are replete with references to construction, but references to automobiles or vehicles in general are nowhere to be found (*see* L-1947-CH-0683; L-1969-CH-1108; L-1980-CH-0670). Appellants have not referenced any legislative history that indicates Labor Law § 240(1) was ever intended to apply to automobile mechanics. Appellants' failure in this regard is predictable because there do not appear to be any such references.

Furthermore, 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. One would think that if anybody ever thought the Legislature intended Labor Law § 240(1) to apply to automobile repair and maintenance, there would be multiple cases applying the statute to that work. Yet, there is a dearth of such case law. From this lack of precedent, it is safe to "infer that it has been generally--and correctly--understood that the statute does not apply" to such situations (*Dahar v Holland Ladder & Mfg. Co*., 18 NY3d at 526 [2012]).

In fact, the case that comes the closest to contemplating whether automotive repair is a protected activity under Labor Law § 240(1) favor Mr. Barsuk. In *Guevarra v Wreckers Realty, LLC*, 169 AD3d 651, 652 (2d Dept 2019), the plaintiff was sweeping when "a piece of a skidloader being used to hoist a car engine broke

and fell onto him" (*Guevarra*, 169 AD3d at 652). When determining that Labor Law § 240(1) did not apply, the Second Department held, *inter alia*, that "[t]he dismantling of a vehicle unrelated to a building or a structure is not a protected activity under that statute" (*Guevarra*, 169 AD3d at 652 [2d Dept 2019], *citing Strunk v Buckley*, 251 AD2d 491, 492 [2d Dept 1998]).

Similarly, the First Department has held that "the mere act of dismantling a vehicle, whether a boat, a car or otherwise, unrelated to any other project, is not the sort of demolition intended to be covered by Labor Law § 241(6)", the cousin of the modern "scaffold law" (*Coyago v Mapa Props., Inc*., 73 AD3d 664, 665 [1st Dept 2010]).[3]

The fact of the matter is, applying Labor Law § 240(1) to this case would mean expanding its protections to automobile repair. Other than Appellants and the plaintiff in *Guevarra*, it does not appear that anybody is calling for such an expansion. There is no reason to expand Labor Law § 240(1) under such circumstances. There is no basis in the legislative history, or this Court's precedent, for such a vast expansion of the statute's protections.

[3] The Appellate Division dissent cited *Moore v Shulman*, 259 AD2d 975 (4th Dept 1999), a case in which the court held that a plaintiff was engaged in a protected activity. In *Moore*, plaintiff was performing major alterations to convert five utility vans into cargo vans. Work which necessitated lifting a 600 lb pedestal through a hole in the roof of the van, which is wholly distinguishable from simply working on the brakes of a vehicle.

Furthermore, Labor Law § 240(1) plainly states that "[a]ll contractors and owners and their agents . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor" various safety devices (Labor Law § 240 [1]). If the statute applies to fixing vehicles, then owners of ordinary cars would be on the hook for providing appropriate safety devices to lift cars. For example, if a stranded car owner calls AAA, that motorist will have to provide proper devices to jack up the car if the mechanic who arrives needs to get under the car for any reason. If something is wrong with those devices, then the owner will be subject to Labor Law §240(1) liability. There is nothing in the legislative history that suggests liability should attach to such a wide array of situations. Thus, since the subject trailer is comparable to an ordinary car, Labor Law § 240(1) cannot possibly apply. Neither case law, nor the legislative history, supports such a conclusion.

D. Labor Law §240 (1) does not Protect against Ordinary Dangers of a Worker's Profession.

Even assuming, *arguendo*, fixing an automobile could be seen as a "protected activity" that would allow some mechanics to recover in certain extreme cases with highly irregular fact patterns, this would not be one of those cases. This Court has ruled, repeatedly, that Labor Law § 240(1) does not apply in cases where a worker is injured due to the "ordinary dangers of a" worksite (*Narducci v Manhasset Bay*

Assoc., 96 NY2d 259, 267-269 [2001], *quoting Misseritti*, 86 NY2d at 491 [1995]; *Toefer*, 4 NY3d at 407 [2005]; *Rodriguez*, 84 NY2d 841 at 843 [1994]).

Misseritti is illustrative of this concept. In that case, a worker was severely injured when "a completed, concrete-block fire wall collapsed" (*Misseritti v Mark IV Constr. Co*., 86 NY2d 487, 489 [1995]). The wall collapsed because "[m]asons had not yet vertically braced the wall with the 2 feet by 10 feet wooden planks it had on the work site" (*id*. at 491). Although the worker was gravely injured by the falling wall, this Court still said that was the type of peril a construction worker usually encounters on the job site (*Misseritti*, 86 NY2d 487, 491 [1995]).

Here, Mr. Stoneham testified that he is a certified diesel technician, which qualifies him to "[w]ork on heavy equipment, cars, trucks, [and] loaders" (R. 116). He has worked on various pieces of heavy equipment such as dump trucks and excavators since at least 1989 when he was employed by a company called IJR Construction (R. 121-123). He is certified to work with heavy equipment and has OSHA training (R.115-117). Working on large vehicles such as the subject trailer is certainly Mr. Stoneham's occupation. He even has a Department of Transportation certificate to work on air brakes, the same type of brakes the subject trailer had (R. 117-118; 146; 149; 184).

Mr. Stoneham was faced with the same risk as every other mechanic that works underneath cars, trucks, or anything else categorized together as a vehicle

within the meaning of VTL § 159. Anytime a mechanic gets underneath a vehicle there is a risk that the vehicle, or a piece of the vehicle, will fall on the mechanic. It is an ordinary, common risk of being a mechanic. While Appellants contend Mr. Stoneham suffered "crushing injuries", it should be noted that the severity of injuries that result from an accident have nothing to do with if the risk was an ordinary one for a particular worker (Appellants' br. at 21). In *Misseritti*, the worker was at least gravely injured. Based on this Court's decision, it appears he may have actually died as a result of those injuries (*Misseritti*, 86 NY2d at 491 [1995]). Yet, this Court still ruled Labor Law § 240(1) did not apply (*id*.).

It would be unfair to give Mr. Stoneham the protections of Labor Law § 240(1) for a common, ordinary risk of his profession based upon the alleged severity of his injuries. The severity of the injuries to the worker in *Misseritti,* were grave, if not fatal, but this Court still found the injuries were a result of a common risk found at a construction site (i.e., a wall collapsing) and rejected the argument that Labor Law § 240(1) applied for that reason (*Misseritti*, 86 NY2d at 491 [1995]).

Applying the statute for an ordinary risk mechanics face would make little sense when construction workers do not get this protection for ordinary risks they face. After all, as the Appellant Division observed, the "'central concern'" of Labor Law § 240(1) "'is the dangers that beset workers in the construction industry'" (*Stoneham*, 210 AD3d at 1480 [4th Dept 2022], *quoting Dahar v Holland Ladder &*

Mfg. Co., 18 NY3d 521, 525 [2012]). Mechanics should not receive more protection than the workers who were the primary reason Labor Law § 240(1) was enacted in the first place.

To support its conclusion, the Appellate Division majority cited to *Dahar* and *Preston v APCH, Inc*., 34 NY3d 1136 (2020). While these cases are factually different from cases like *Narducci* and *Misseritti*, they do share an important common theme. In *Preston*, the plaintiff was injured while employed as a welder at Alstom Power, Inc. (*Preston*, 175 AD3d 850, 851 [4th Dept 2019], *aff'd* 34 NY3d 1136, 1137 [2020]). The plaintiff, along with a coworker, were assembling a rotor compartment weighing approximately five tons when the rotor compartment fell onto the plaintiff (*id*.).

On appeal, citing to this Court's decision in *Jock v Fien*, 80 NY2d 965, 967 (1992) and *Dahar*, among other cases, the Appellate Division majority held that the protections of Labor Law § 240(1) "does not extend so far as to cover a worker who performs customary occupational work of fabricating a component during the normal manufacturing process at a facility and is not involved in any construction project nor involved in renovation or alteration work on the facility" (*Preston*, 175 AD3d at 852 [4th Dept 2019] [internal citations an quotations omitted]). When this Court affirmed the Appellate Division majority, it noted that "[d]ecedent's work as a welder during the normal manufacturing process of fabricating rotor components

for air preheaters did not involve erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Preston*, 34 NY3d at 1137, *quoting Jock*, 80 NY2d at 968).

The plaintiff in *Preston* was engaged in normal work in his normal occupation so Labor Law § 240(1) did not apply. In light of cases such as *Narducci*, this conclusion is logical. The plaintiff was engaged in customary work in his normal occupation and was thus subject to an ordinary risk in his profession. The same is true of Mr. Stoneham. He was exposed to a risk that for him, and people who share his normal occupation, customarily face when they perform work underneath a vehicle. Thus, as the Appellate Division majority observed, it would be inconsistent with the purpose of Labor Law § 240(1) to conclude it applies in this case when it did not apply a case like *Preston*.

In sum, the Appellate Division majority is correct. Mr. Stoneham was not exposed to "extraordinary elevation risks" that Labor Law § 240(1) protects. (*Rodriguez*, 84 NY2d at 843). He was exposed to an ordinary risk of his occupation that mechanics like him face regularly. Thus, he is not entitled to the "extraordinary protections" of Labor Law § 240(1) (*e.g.*, *Nicometi*, 25 NY3d at 96 [2015]).

II. LABOR LAW § 240(1) DOES NOT APPLY BECAUSE MR. STONEHAM WAS A VOLUNTEER AT THE TIME OF THE ACCIDENT.

It is well settled that Labor Law § 240(1) does not apply to individuals engaged in volunteer labor (*see Stringer v Musacchia*, 11 NY3d 212, 213 [2008];

Whelen v Warwick Val. Civic & Social Club, 47 NY2d 970, 971 [1979]; *Ramsden v Geary*, 195 AD3d 1488, 1490 [4th Dept 2021]; *Doskotch v Pisocki*, 168 AD3d 1174, 1174 [3d Dept 2019]; *Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 570 [1st Dept. 2015]). Critically, as this Court has held, for Labor Law § 240(1) liability to attach, "'plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [an] owner, contractor or their agent'" (*Mordkofsky v V.C.V. Dev. Corp*., 76 NY2d 573, 576-577 [1990], *quoting Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]).

In this case, there is overwhelming evidence that Mr. Stoneham's work on the trailer was that of a volunteer. On this issue, the trial court erred in concluding there is a question of fact that precludes summary judgment in favor of Mr. Barsuk (R. 11). First, Mr. Barsuk and Mr. Stoneham were longtime friends who would routinely did 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 an affidavit submitted in support of summary judgment, Mr. Barsuk unequivocally stated that Mr. Stoneham was not compensated for the work on the trailer in anyway way (R. 620). Instead, the work was done as a volunteer and as a favor from one friend to another (*id*.). 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 a loan Mr. Barsuk had generously offered Mr. Stoneham to buy a house (R. 159-160).

When defense counsel asked Mr. Stoneham about the loan during a deposition, he stated the agreement entailed him paying back Mr. Barsuk "when [he] was able to get the money" (R. 160). Shortly after, he claimed he "worked off" some of the loan by helping Mr. Barsuk with various tasks (R. 160-161). When defense counsel expressly asked what tasks went towards allegedly paying back the loan, Mr. Stoneham mentioned things such as hauling topsoil and fixing Mr. Barsuk's trucks (*id*.). During this period of questioning, Mr. Stoneham did not state his work on the subject trailer was partial reimbursement for the loan (*id*.).

The notion that there is a dispute of fact that precluded summary judgment stems from a single question Mr. Stoneham's attorney asked him during his deposition. Mr. Stoneham's counsel asked him if the work on the trailer was reimbursement for the loan "in [Mr. Stoneham's] mind" and the answer was "[y]es" (R. 347). Notably, there were two objections to the form of this question (R. 347). This question does not create a legitimate dispute of fact that precludes summary judgment in favor of Mr. Barsuk.

Mr. Stoneham has no way to show that what is "in his mind" is based on reality. He never produced invoices or receipts indicating that his work on the trailer

was reimbursement from the loan or was compensated in any other way. There is no written agreement concerning the loan (R. 159). Mr. Stoneham's testimony about what is "in his mind" is not enough to create a legitimate dispute of fact about whether the work on the trailer was compensated in some way. Moreover, Mr. Stoneham's testimony is incredible as a matter of law because he claims he intends to pay the loan back in full. If he "worked off" part of the loan, he would not need to pay back the full amount.

It is clear that summary judgment is improper when there are "material issues of fact" (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). Having said that, a party cannot simply claim there is a factual dispute without any basis to do so in order to defeat summary judgment. For summary judgment to be improper, there must be "a legitimate fact dispute" (*Mandelos v Karavasidis*, 86 NY2d 767, 769 [1995]). Indeed, a party opposing summary judgment cannot defeat such a motion with "mere conclusions, expressions of hope or unsubstantiated allegations or assertions (*Zuckerman v New York*, 49 NY2d 557, 562 [1980])

Mr. Stoneham's bald, conclusory allegation that "in his mind" the work on the trailer was reimbursement from the loan is insufficient to create a legitimate dispute of fact requiring trial. There is not a shred of corroborating evidence to support this claim. Not only is Mr. Stoneham's claim conclusory, but his testimony on the subject of reimbursement of the loan is incredible as a matter of law because

it is utterly "contrary to common experience" (*Cruz v NY City Tr. Auth*., 31 AD3d 688, 690 [2d Dept. 2006], a*ff'd* 8 NY3d 825, 826 [2007]). When Mr. Stoneham was asked how much money he was going to pay back from the loan, he testified that he was going to pay pack the full amount (R. 159-163).[4]

It is completely contrary to common experience and logic to think that Mr. Stoneham "worked off" part of the loan if he intends to pay back the full amount. If he "worked off" part of the loan, he does not owe the full amount. Mr. Stoneham would like everybody to believe he intends to voluntarily give money to Mr. Barsuk for no discernible reason, all while suing the same man. This is simply completely contrary to logic.

Furthermore, even if Mr. Stoneham's work was partial repayment for the loan, that still would not be enough to evoke the protections of Labor Law § 240(1). As previously mentioned, to be entitled to Labor Law § 240(1) protections, "a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent'" (*Mordkofsky v V.C.V. Dev. Corp*., 76 NY2d 573, 576-577 [1990], *quoting Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979][emphasis added]). As this Court explained in *Mordkofsky*, "the clear legislative history of sections 200,

[4] Mr. Stoneham also submitted an affidavit containing an allegation that his work on the trailer was reimbursement for the loan, but it is just as conclusory as his testimony (R. 703).

240 and 241 of the Labor Law, which demonstrates that the Legislature's principal objective and purpose underlying these enactments was to provide for the health and safety of employees" *Mordkofsky*, 76 NY2d at 577). It is safe to say that this is a logical conclusion. After all, Labor Law § 240 is entitled "Scaffolding and other devices for use of employees" (Labor Law § 240 [emphasis added]).

Even assuming, *arguendo*, the work on the trailer was some type of barter agreement, Mr. Barsuk certainly did not hire Mr. Stoneham as an employee or a contractor (R. 132; 613). Usually, when a person has been "hired", three factors are present. "First, there is the voluntary undertaking of a mutual obligation--the employee agrees to perform a service in return for compensation (usually monetary) from the employer, thereby revealing an economic motivation for completing the task" (*Stringer v Musacchia*, 11 NY3d 212, 215 [2008]). Mr. Stoneham was not "obligated" to perform the work on the trailer to repay the loan, at least not in any meaningful sense. Instead of doing any work to pay off the loan, Mr. Stoneham could have simply paid off the loan. Apparently, that is still what he plans on doing (R. 159-163).

The second factor to determine if somebody is an "employee", although not essential to the analysis, is whether "an employer may exercise authority in directing and supervising the manner and method of the work" (*Stringer*, 11 NY3d at 216). Mr. Stoneham expressly testified that in the approximately one hundred times he has

worked at the recycling plant over the years, nobody has ever given him directions on how to do his work (R. 144). Furthermore, he agreed that he has complete control over how his work gets done (*id*.). It was Mr. Stoneham, not Mr. Barsuk, who had authority to control the manner and method of the work. In fact, Mr. Barsuk "never worked as a mechanic and [has] no training in mechanical work" (R. 611). Mr. Barsuk does not even have a knowledge base that would allow him to "direct" Mr. Stoneham's work in any meaningful sense.

The third factor is that "the employer usually decides whether the task undertaken by the employee has been completed satisfactorily" (*Stringer*, 11 NY3d at 216 [2008]). Here again, Mr. Barsuk does not have the knowledge to determine if the work was done satisfactory. He was totally dependent on Mr. Stoneham to make that determination. This is simply not a case in which Mr. Stoneham was an employee of Mr. Barsuk. Therefore, Labor Law § 240(1) is inapplicable in this case.

Lastly, to be clear, this Court has jurisdiction to rule on this issue. In the trial court, Mr. Barsuk raised the issue of Appellant's volunteer status as a reason to dismiss his Labor Law § 240(1) claim. Of course, that claim was dismissed, albeit not on the ground that Appellant was a volunteer (R. 9-11; 627). The trial court's decision was favorable to Mr. Barsuk. He obtained all the relief he asked for, which was dismissal of Appellant's Labor Law § 240(1) claim (R. 624-625). It was both unnecessary and impossible for Mr. Barsuk to appeal the trial court's decision. He

was not aggrieved by the order and could not appeal solely because he should have also obtained the same relief on an alternative ground (*see TDNI Props., LLC v Saratoga Glen Bldrs., LLC*, 80 AD3d 852, 853, n 1 [3d Dept 2011]l [3d Dept 2011], *citing Matter of Eck v County of Delaware*, 36 AD3d 1180, 1181, n 1 [3d Dept 2007]; *Parochial Bus Sys., Inc. v Bd. of Educ*., 60 NY2d 539, 545 [1983]; *see also Schramm v Cold Spring Harbor Lab*., 17 AD3d 661, 663 [2d Dept 2005]; *Caffrey v Morse Diesel Intl*., 279 AD2d 494, 494 [2d Dept 2001]).

While Mr. Barsuk could not appeal the trial court's erroneous decision on Mr. Stoneham's volunteer status, the Appellate Division had authority to use Mr. Stoneham's status as a volunteer as an alternative reason for affirming the dismissal of Appellant's Labor Law § 240(1) claim had it wished to do so (*see generally TDNI Props., LLC*, 80 AD3d at 853, n 1 [3d Dept 2011]; *see also Schramm,* 17 AD3d at 663 [2d Dept 2005]). Indeed, the Appellate Division has broad authority to grant summary judgment to a non-appealing party (*Strawberry Lane, Inc. v Fraser*, 129 AD2d 874, 875 [3d Dept. 1987], citing CPLR § 3212[b]; *Merritt Hill Vineyards, Inc. v Windy Hgts. Vineyard, Inc*., 61 NY2d 106, 111 [1984]; *Friedman v Carey Press Corp*., 117 AD2d 568, 569 [1st Dept 1986]).

Since Mr. Stoneham's status as a volunteer was raised as grounds for dismissal of the Labor Law § 240(1) in the trial court and the Appellate Division, this Court can and should rule that Mr. Stoneham was a volunteer and is not entitled

to the protections of Labor Law § 240(1) for that reason (*see Massena v Niagara Mohawk Power Corp*., 45 NY2d 482, 488 [1978]).

For these reasons, in the event that this Court disagrees with the Appellate Division majority, this Court can and should affirm the dismissal of Appellant's Labor Law § 240(1) claim since the statute does not apply in this case because Appellant's work on the subject trailer was uncompensated, volunteer work. There is nothing except bald, conclusory testimony to the contrary. This does not create a legitimate dispute of fact.

III. ADEQUATE SAFETY DEVICES WERE AVAILABLE ON THE DATE OF MR. STONEHAM'S ACCIDENT.

As this Court has observed, Labor Law § 240(1) does not attach when "adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*Robinson v E. Med. Ctr., LP*, 6 NY3d 550, 554 [2006]).

Here, there were adequate safety devices available to Mr. Stoneham. On August 4, 2018, a fork attachment was used to lift the trailer when Mr. Barsuk and Mr. Stoneham were working on the trailer (R. 615, citing Aug. 4, 2018 surveillance at 9:17-9:21). The trailer was lifted safely with the fork attachment, as one would expect. After all, the fork attachment was made to lift heavy objects.

Despite the fact that the fork attachment was near the trailer on the date of the accident and could have been installed in seconds, Mr. Stoneham used a bucket attachment to lift the trailer (R. 617). Inexplicably, despite Mr. Stoneham's extensive

experience with heavy equipment, he used an attachment that was obviously not made to lift heavy objects like a trailer at a time when Mr. Barsuk was not even at the recycling plant (*id*.).

Mr. Stoneham's "normal and logical response" should have been to install the attachment that was specifically designed to lift heavy objects and was actually used to safely lift the trailer a short time before the accident (*Montgomery v Fed. Express Corp*., 4 NY3d 805, 806 [2005] [internal citation and quotation omitted]). Similarly, Appellants contend that "Stoneham [should have] been provided with safety blocks (example shown in yellow below) for placement between the front and back tires of the front-end loader" (Appellants' br. at 18). While Mr. Barsuk does not concede the front loader rolled back, even assuming it did for the sake of argument, there were items that were functionally equivalent to safety blocks available to Mr. Stoneham. For example, as the video surveillance depicts, there were timbers on the fender of the front loader on the date of the accident (R. 619). In fact, prior to the date of the accident, Mr. Stoneham used timbers to secure the trailer itself (R. 620).

Mr. Stoneham clearly knew there were items available to prevent the front loader from rolling backwards. There were timbers located on the front loader itself. Further, Labor Law § 240(1) requires owners and contractors to provide "adequate" safety devices (*Robinson*, 6 NY3d at 554). There is no requirement that "perfect" or "ideal" safety devices be made available. There was an "adequate" safety device

available to Mr. Stoneham. The fork attachment safely and adequately lifted the trailer without incident on August 4, 2018. Between the fork attachment and the timbers, there were numerous objects Mr. Stoneham could have used to adequately and safely complete his task. For some unknown reason, this trained mechanic decided not to, outside the presence of Mr. Barsuk.

In these circumstances, it can only be said that Mr. Stoneham's "normal and logical" response should have been to install the fork attachment, which could have been done in seconds, as it was just used to safely lift the trailer two weeks prior to the accident. Thus, Mr. Stoneham is not entitled to recover under Labor Law § 240(1).

CONCLUSION

For the reasons stated above, Respondent, David Barsuk (improperly named herein as "David J. Barsuk"), respectfully requests that the Appellate Division decision be affirmed, and grant him any additional relief that this Court deems just and proper.

Dated: Buffalo, New York
September 21, 2023

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CERTIFICATE OF COMPLIANCE

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

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, 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 or at

On September 22, 2023

deponent served the within: **BRIEF FOR DEFENDANT-RESPONDENT**

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Mariana Braylovskiy

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