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February 28, 2023

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

Re: Mark A. Stoneham et al., Appellants, v. Joseph Barsuk Inc., et al., Defendants, David J. Barsuk, Respondent.
Docket No.: APL-2023-00001

Dear Ms. LeCours,

On behalf of Respondent, David Barsuk, please accept this letter submission pursuant to Rule 500.11 of this Court's Rules of Practice, as a reply to Plaintiff's letter, dated February 10, 2023 (hereinafter "SSM Letter"). For the reasons that follow, this appeal from a Memorandum and Order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, should be decided through this Court's alternative procedure pursuant to Rule 500.11. Furthermore, this Court should affirm the Memorandum and Order of the Appellate Division majority, which Plaintiff now appeals to this Court.

Review Pursuant to Rule 500.11

Contrary to Appellant's suggestion, full briefing and oral argument of this matter would not be beneficial or warranted (SSM Letter, pp. 3-5). In requesting full briefing and argument, Plaintiff rests upon fiction:

> "[i]f the majority's Memorandum and Order is allowed to stand, workers' engaged in making repairs to structures who are injured due to the failure of a defendant to provide adequate devices designed to prevent gravity-related injuries will never (or only in exceptional cases) enjoy the protections of [Labor Law] § 240(1)"

(SSM Letter, p. 4). This is an incredible overstatement and there is no evidence that any parade of horrible accidents across New York State will ensue from this matter. To the contrary, as will be discussed in this submission, the Appellate Division majority made a narrow, fact specific ruling that Plaintiff is not entitled to the protections of Labor Law § 240(1). In this case, Plaintiff was injured by a vehicle, while working on the vehicle's brakes, while the vehicle was located at a recycling plant (Memorandum and Order, pp. 1-2). The majority's decision is fact specific and Plaintiff has not shown it is applicable to other cases. Indeed, Plaintiff has not cited to any pending cases with similar facts that would render this case of statewide importance.

In fact, at this point in the proceedings, it is premature to determine that the Appellate Division's decision is even of any importance to Plaintiff himself. The original order from the trial court appealed is non-final. Plaintiff's negligence cause of action was not dismissed, nor was his Labor Law § 200 claim (R. 9-13; 26-35). Plaintiff still has an opportunity to recover for his alleged injuries. Whether the dismissal of the Labor Law § 240(1) claim will have any impact on his ultimate recovery is uncertain.

Given the lack of proof that this case is of any actual statewide importance, coupled with the narrow, fact specific ruling of the Appellate Division majority, there is no reason to go through the time and expense of full briefing and oral argument. Deciding this case using the alternative method is completely warranted.

Background Information

The course of events that lead to the instant litigation began in October 2017, at a time when Mr. Barsuk was interested in a trailer that was listed for sale in Watertown, New York (R. 613). As a result of this interest, Mr. Barsuk discussed the trailer with Plaintiff, his longtime friend (R. 611; 613). Mr. Barsuk first met Plaintiff decades ago and the two developed a friendship (R. 611). Plaintiff is a certified diesel technician, which qualifies him to "[w]ork on heavy equipment, cars, trucks, [and] loaders" (R. 116). Over the years, Mr. Barsuk learned of Plaintiff's

background, including his employment and training regarding "heavy-duty trailers" and equipment (R. 611). Since Mr. Barsuk did not have experience inspecting equipment such as the trailer, he asked Plaintiff to go and inspect the trailer on his behalf and negotiate its purchase (R. 613-614).

Mr. Barsuk's request of Plaintiff did not come out of the blue. As friends, Mr. Barsuk and Plaintiff regularly did favors for each other (R. 611-612). For example, Plaintiff worked on Mr. Barsuk's truck and other mechanical equipment, while Mr. Barsuk did Plaintiff various favors, including loaning him $25,000 to buy a house (R. 612; 718-719).

As a result of this discussion about the trailer, Mr. Barsuk gave Plaintiff $5,500 in cash to purchase the trailer, but Plaintiff negotiated the price down to $5,000 (R. 613-614). Mr. Barsuk gifted the remaining $500 to Plaintiff as a token of appreciation for his assistance with purchasing the trailer (R. 613-614).

In the summer of 2018, Mr. Barsuk noticed a problem with the trailer's brakes, and he made arrangements for Plaintiff to inspect the trailer on July 28, 2018 (R. 614). An inspection did occur on that day and the two men agreed that the work on the brakes would continue again on August 4, 2018 (R. 614). On August 18, 2018, Plaintiff again went to work on the trailer's brakes when Mr. Barsuk was not even present at the location of the accident (R. 617-618). It was on this day that the trailer

fell upon Plaintiff while he was working, leading to this litigation (R. 99-100). This appeal stems from Appellate Division's affirmance of the trial court's dismissal of Plaintiff Labor Law § 240 (1) cause of action (R. 9-14; *see also* Memorandum and Order).

Labor Law § 240(1)

On appeal to the Appellate Division, Plaintiff contended that he is entitled to the protections of Labor Law § 240 (1), but this is not the case. Labor Law § 240(1) states as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed"

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]).

For example, it does not apply when a worker was injured due to an elevation differential that was one of "'the usual and ordinary dangers of a construction site'", such as falling off a truck (*Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005], *quoting Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). It is clear the extraordinary protections of Labor Law § 240(1) apply only to a "narrow class of dangers" that are out of the ordinary or are, in other words, "special hazards" (*Nicometi*, LLC, 25 NY3d at 96 [internal citation and quotations omitted]).

The Decision of the Appellate Division

A. Introduction.

Plaintiff's criticism of the Appellate Division majority's decision is curious. He states that the "[f]irst" error the majority made involves a holding the majority never actually made. Plaintiff states as follows:

> "In its November 18, 2022, Memorandum and Order in the Stoneham case, the Fourth Department majority erroneously decided two separate but related issues of law. First, it erroneously held that the massive, multi-ton trailer, which plaintiff was in the process of repairing when it collapsed upon him, was not a "structure," as that term has been understood and defined for more than a hundred years by the appellate courts of this State"

(SSM Letter, p. 5).

Certainly, Mr. Barsuk argued that the trailer that fell upon Mr. Stoneham was not a "structure" within the meaning of Labor Law § 240(1) (Respondent's br., pp. 13-20). This argument was made because according to the plain terms of Labor Law § 240(1), that statute only applies when work is being done on a "building or structure" (Labor Law § 240[1]). Thus, one of Mr. Barsuk's arguments in the Appellate Division was that since the trailer was not a building or structure, Labor Law § 240(1) is inapplicable (Respondent's br., pp. 13-20).

Although Mr. Barsuk made this argument, there is no indication the majority of the Appellate Division adopted this argument in its decision. The 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 statue. Indeed, although Plaintiff's letter to this Court makes much ado about *Caddy v Interborough R.T. Co*., 195 NY 415, 421 (1909) and the definition of a "structure" therein, the definition of a "structure" is irrelevant to the Appellate Division majority's decision (SSM Letter, pp. 12-13). The majority opinion did not find Labor Law § 240(1) inapplicable because the trailer in question was not a "structure". It did not even mention the trailer not being a "structure" as one reason, among others, that reflects Labor Law § 240(1) does not apply in this case. Instead, 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 § 240(1) does not apply to the unique facts in this case. In other words, the majority recognized that a determination about whether Labor Law § 240(1) applies "must be determined on a case-by-case basis, depending on the context of the work" and decided accordingly (*Prats v Port Auth*., 100 NY2d 878, 883 [2003]).

The majority correctly determined that multiple factors, considered together, reflects that Labor Law § 240(1) does not apply. First, the majority noted that Plaintiff was not involved in a construction project (Memorandum and Order, p. 2). Second, the majority determined that Plaintiff was engaged in "vehicle repair work" (*id*.). Third, Plaintiff's work was within his normal occupation as a certified diesel technician (*id*.). These three factors lead to a conclusion that Labor Law § 240(1) does not apply, but notably, the definition of a "structure" has absolutely nothing to do with any of them.

Ironically, Plaintiff advocates for "a flexible test allowing the lower courts to examine the unique circumstances of each case in order to determine the applicability of the statute", but then complains of a majority opinion that did just that (SSM Letter, p. 21). The Appellate Division majority examined the unique facts of this case and correctly determined that given the totality of the circumstances, Labor Law § 240(1) does not apply.

B. Construction Projects.

One factor the majority relied upon was the fact that Plaintiff was not engaged in construction when he was injured (Memorandum and Order, pp. 2). This fact is undisputable because Plaintiff was working on the braking system of a flatbed trailer at the time of his accident, nothing to do with construction or the construction industry (R. 99; 326-327; 615). The Appellate Division majority correctly recognized that this fact is one factor, among others, in determining Labor Law § 240(1) does not apply in this case (Memorandum and Order, p. 2). Indeed, it is fair to say that whether or not a plaintiff is engaged in construction at the time of injury is critical to any analysis of whether Labor Law § 240(1) applies.

As this Court unanimously stated, "[i]t 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" (*Dahar v Holland Ladder & Mfg. Co*., 18 NY3d 521, 525 [2012], *citing Blake v Neighborhood Hous. Servs. of NY City, Inc*., 1 NY3d 280, 285 [2003]). In *Blake*, another unanimous decision, this Court offered an interesting and concise analysis of Labor Law § 240(1), tracing the statute back to its predecessor in 1885 (*Blake*, 1 NY3d at 285 [2003]). The *Blake* court observed that the ancestor of Labor Law § 240(1) was enacted to address "widespread accounts of deaths and injuries in the construction trades" (*Blake*, 1 NY3d at 285

[2003]). As the *Dahar* court observed, more recent legislative history from 1969 also reflects the main objective of Labor Law § 240(1) is to protect workers "at building construction jobs" (*Dahar* NY3d at 525 [2012]).

While this Court has held that Labor Law § 240(1) does not only apply to construction accidents (*Joblon v Solow*, 91 NY2d 457, 464 [1998]) it is extremely clear that the statute, as well as its predecessor were primarily, if not exclusively, enacted to combat obviously dangerous situations construction workers found themselves in during the late nineteenth and early twentieth centuries. Although not dispositive standing alone, the fact that Plaintiff was not a construction worker or at a construction site weighs heavily in favor of determining Labor Law § 240(1) does not apply in this case. Such a conclusion is firmly supported by in the history of the statute and its predecessor.

C. Plaintiff's Work.

Naturally, since Labor Law § 240(1) can apply outside of a construction site, the mere fact that Plaintiff's accident did not happen during a construction project is not dispositive, but the Appellate Division majority did not suggest it was dispositive. The Appellate Division majority also held, *inter alia*, that the "vehicle repair work" favored a conclusion that Labor Law § 240(1) does not apply (Memorandum and Order, p. 2).

This conclusion stems from an argument Mr. Barsuk made regarding the status of the subject trailer as a vehicle pursuant to the Vehicle and Traffic Law ("VTL") (Respondent's br., p. 17). The VTL specifically states that "[t]term 'motor vehicle' shall be defined as in section one hundred twenty-five of this chapter, *except that it shall also include trailers*" (VTL § 311[2] [emphasis supplied]). At the same time, VTL § 125 says the phrase "motor vehicles" means "[e]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power", except certain vehicles, "such as vehicles which run only upon rails or tracks" (VTL § 125). Thus, it is appropriate to compare work on a trailer's brakes to work on the brakes of a passenger vehicle because trailers are considered "motor vehicles", right along with ordinary vehicles one typically sees on a highway.

Plaintiff did not mention, or cite to, the VTL in his reply brief after Mr. Barsuk raised the issue (Respondent's br., p. 17), nor does he mention it in his letter to this Court. This is likely because the Legislature's decision is extremely detrimental to his argument.

There is no support for a 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 noted in *Blake*, the statute's history traces back to a predecessor from 1885 (*Blake*, 1 NY3d at 285 [2003]). It is exceptionally

unlikely that the 1885 statute was meant to protect an automobile from falling on top of a worker who was changing its brakes. After all, the Ford Model T was not even introduced until 1908.[1] With respect to Labor Law § 240(1) itself, Plaintiff has never provided evidence that when Labor Law § 240(1) was enacted, or at any time since, the Legislature intended to protect mechanics while working underneath an automobile.

Since there is no indication that Labor Law § 240 (1) applies to a mechanic working on brakes of a normal passenger car, it follows that there is no support for applying the statute to Plaintiff's work on the trailer. Of course, this is because the Legislature has decided to classify vehicles like the subject trailer alongside ordinary cars. While Plaintiff claims Mr. Barsuk wants to legislate by "contracting the reach of [Labor Law] § 240(1)", the opposite is true (SSM Letter, p. 9). Plaintiff seeks to extend the statute to automotive repair that has nothing to do with construction. None of the cases he references in his letter support this position because none contemplate the maintenance or repair of "motor vehicles" in the way the Legislature decided to define them.

[1] Ford Motor Company, https://corporate.ford.com/articles/history/the-model-t.html [last accessed Feb. 18, 2023].

For instance, Plaintiff spends a great deal of time discussing *Caddy*, but nothing in that case defeats Mr. Barsuk's position (SSM letter, p. 5; 9; 11; 14-15; 23-24). First of all, Plaintiff is using *Caddy* to suggest the Appellate Division majority improperly determined the subject trailer was not a structure within the meaning of Labor Law § 240(1) (SSM Letter, pp. 11-15). As already discussed, the majority did not make such a ruling. Further, *Caddy* does not support a conclusion that Plaintiff's work is a protected activity under Labor Law § 240. In *Caddy*, the plaintiff was injured while repairing a railroad car (*Caddy*, 195 NY 415, 417 [1909]). A railroad car is a vehicle "which run[s] only upon rails or tracks" and is expressly excluded from a definition of "motor vehicle" (VTL § 125). Thus, it cannot be said the plaintiff in *Caddy* was engaged in motor vehicle repair, as the VTL defines "motor vehicle", as Plaintiff was in this case. The same is true of *Gordon v E. Ry. Supply*, 82 NY2d 555, 558 (1993). That case is about a plaintiff who was injured while cleaning a railroad car, not about maintenance of a motor vehicle (*Gordon*, 82 NY2d at 558 [1993]).

The fact of the matter is that Plaintiff's work on the trailer is comparable to a mechanic working on an ordinary passenger car because the Legislature included trailers in the definition of "motor vehicles" alongside passenger cars (VTL § 125; VTL§§ 311[2]). There is no support for including automotive maintenance or repair

among the protected activities of Labor Law § 240(1). In fact, there appears to be a dearth of cases in which a plaintiff even tried to argue such a position. The case that appears to come the closest to contemplating whether automotive repair is a protected activity under Labor Law § 240(1) is *Guevarra v Wreckers Realty, LLC*, 169 AD3d 651, 652 (2d Dept 2019). In *Guevarra*, 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 [2d Dept 2019]). 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]). Of course, *Guevarra* favors Mr. Barsuk, not Plaintiff.

The trial court correctly observed that Plaintiff's work on the trailer was the "kind of work performed every day on trucks and trailers outside of a construction setting" (R. 12). Mechanics regularly work on the braking systems of trailers, trucks, sedans, buses, and all other vehicles that the VTL defines as "motor vehicles". The history of Labor Law § 240(1), which was undoubtedly enacted to primarily protect construction workers, does not support the statute's expansion to apply to work on the braking system of a motor vehicle, whether a passenger car or the subject trailer.

The cases Plaintiff relies upon do not suggest otherwise since none of them are about "motor vehicles" as the Legislature defines the term. Further, the legislative history does not support such an expansion. Thus, the type of work Plaintiff was engaged in at the time of his accident favors a conclusion that Labor Law § 240(1) does not apply.

D. Plaintiff's Occupation.

The Appellate Division majority noted that Plaintiff is a certified diesel technician and thus, working on the braking system of the subject trailer was within his normal occupation (Memorandum and Order, p. 2). This observation is correct. During his deposition, Plaintiff testified that he is a certified diesel technician, which qualifies him to "[w]ork on heavy equipment, cars, trucks, [and] loaders" (R. 116). This is an important observation because even construction workers, who are certainly the workers Labor Law § 240(1) was primarily designed to protect, do not get the benefits of Labor Law § 240(1) when faced with the "type of peril a construction worker usually encounters on the job site" (*Misseritti v Mark IV Constr. Co*., 86 NY2d 487, 491 [1995]). Labor Law § 240(1) is meant to protect against "extraordinary elevation risks", which courts must distinguish from the "usual and ordinary dangers of a construction site" (*Toefer v Long Is. R.R*., 4 NY3d at 407

[2005], *quoting Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]).

Certainly, it would be unfair to determine mechanics get the benefit of Labor Law § 240(1) when injured as a result of ordinary risks of their jobs when even construction workers do not get that benefit. Here again, as the trial court observed, Plaintiff's work was "the kind of work" that is "performed every day on trucks and trailers outside of a construction setting" (R. 12). It is hardly uncommon for mechanics to get underneath a vehicle, whether it be a car, bus, trailer, or other motor vehicle. The fact that a vehicle could fall off the jacks or a supporting lift is always a risk whenever a vehicle is lifted in the air. Thus, the risk a mechanic takes when working underneath a lifted vehicle is always present. It is a risk inherent to the job. It is an ordinary, common risk of the job, not an extraordinary one that Labor Law § 240(1) protects (*see generally Toefer Long Is. R.R.*, 4 NY3d at 407 [2005]).

Indeed, this Court has expressly endorsed the idea that if a worker is engaged in his or her "customary occupational work", it weighs against applying Labor Law § 240(1) (*Jock v Fien*, 80 NY2d 965, 966 [1992]; *see also Preston v APCH, Inc.,* 175 AD3d 850, 852-853 [4th Dept 2019], *aff'd* 34 NY3d at 1137 [2020]). In *Jock*, this Court found, *inter alia*, that Labor Law § 240 (1) did not apply when a plaintiff "fell from an upright steel mold that he was preparing during his customary

occupational work of fabricating a concrete septic tank" (*Jock*, 80 NY2d at 966 [1992]).

Here, Plaintiff's accident occurred when he was engaged in his customary work of working with large vehicles (R. 116). Plaintiff attempts to draw some distinction between his work and his "normal occupation" by claiming his work was "performed in an unregulated outdoor environment with the use of heavy construction equipment like a front-end loader" (SSM Letter, p. 29). This position fails for several reasons. First, whether an activity is a plaintiff's normal occupation has nothing to do with whether it involves work indoors or outdoors. The Meadowlands is not an enclosed dome, but the normal occupation of New York Giants players is football, just like players on a team with an enclosed stadium.

The fact that this matter involves heavy equipment does not make Plaintiff's work fall outside of his normal occupation. The exact opposite is true. Working with heavy equipment is his normal occupation (R. 116). Further, it is not completely clear what Plaintiff means by "unregulated," but certainly cases like *Jock* and *Preston* do not state an occupation has to be regulated by certain agencies or organizations to be a person's normal occupation. If somebody is trained to do something for a living and does that activity for a living, it is that person's normal occupation, regardless of who, if anybody, regulates his or her occupation. Here,

working with heavy equipment was Plaintiff's occupation and there is no getting around it. He is certified to work with heavy equipment and has OSHA training (R. 115-117). In fact, 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).

Further, Plaintiff 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). Working on heavy equipment is certainly Plaintiff's normal occupation. He is trained to do it and does it for a living. Thus, the fact that Plaintiff was engaged in his normal occupation when this incident occurred favors a conclusion that he was not engaged in activity that Labor Law § 240(1) protects.

E. Conclusion.

Contrary to Plaintiff's contention, the Appellate Division majority did not attempt to alter, change, or circumvent this Court's definition of "structure" found in *Caddy* (SSM Letter, pp. 5; 11-14). The majority did not hold that Labor Law § 240(1) does not apply because the trailer was not a structure within the meaning of the statue. Instead, the majority opinion clearly reflects it understood that whether a worker was engaged in an activity that Labor Law § 240(1) protects "must be

determined on a case-by-case basis, depending on the context of the work" (*Prats v Port Auth*., 100 NY2d at 883 [2003]). Plaintiff wants courts to review the "unique circumstances of each case in order to determine the applicability of the statute" and that is the type of review this case received (SSM Letter, p. 21).

Considering the totality of the circumstances, the majority properly concluded that Labor Law § 240(1) does not apply for several reasons. First, this was not a construction accident, which is clearly the primary type of accident the statute was meant to protect (*Dahar* NY3d at 525 [2012]). Second, Plaintiff's work on the trailer was comparable to work on the brakes on any ordinary passenger car because the Legislature has decided classify trailers as "motor vehicles" along with ordinary cars (VTL § 311[2]; VTL § 125). There is no precedent to support expanding the protections of Labor Law § 240(1) to situations where a mechanic is working underneath an automobile. The legislative history does not support it, nor do the cases Plaintiff relies upon because none of them concern a "motor vehicle" as the Legislature has decided to define the term. Third, Plaintiff was engaged in his normal occupation as was faced with an ordinary risk of being a mechanic. When underneath a vehicle, there is always a risk of it falling. There is no support for the conclusion that this is one of the "extraordinary elevation risks envisioned by Labor Law § 240 (1)" (*Rodriguez*, 84 NY2d at 843 [1994]).

Give the unique circumstances of this case, there is no basis to disturb the Appellate Division's decision. This is especially true when the issue may ultimately become moot since Plaintiff can still recover under a theory of ordinary negligence. Thus, Mr. Barsuk respectfully requests that this Court affirm.

Plaintiff's Volunteer Status

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]).

In this case, there is overwhelming evidence that Plaintiff'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 of all, Mr. Barsuk and Plaintiff were longtime friends who would routinely do favors for each other (R. 611-613). Neither Mr. Barsuk, nor Plaintiff, 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 Plaintiff 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 Plaintiff 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 Plaintiff to buy a house (R. 159-160).

When defense counsel asked Plaintiff about the loan during a deposition, Plaintiff stated the agreement entailed him paying back Mr. Barsuk "when [he] was able to get the money" (R. 160). Shortly after, Plaintiff 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, Plaintiff mentioned things such as hauling topsoil and fixing Mr. Barsuk's trucks (*id*.). During this period of questioning, Plaintiff 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 question Plaintiff's attorney asked him during his deposition. Plaintiff's counsel asked Plaintiff if the work on the trailer was reimbursement for the loan "in [Plaintiff'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.

Plaintiff 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). Plaintiff'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. It is axiomatic that a party cannot defeat a motion for summary judgment with "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980][internal citations omitted]; *see also Justinian Capital SPC v WestLB AG, NY Branch*, 28 NY3d 160, 168 [2016]).

Plaintiff's bald, conclusory allegation that "in his mind" the work on the trailer was reimbursement from the loan is insufficient to create a dispute of fact requiring trial. There is not a shred of corroborating evidence to support this claim. Not only is Plaintiff'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], *aff'd* 8 NY3d 825, 826 [2007]). When Plaintiff 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).[2]

It is completely contrary to common experience and logic to think that Plaintiff "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. Plaintiff 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 completely contrary to logic and common experience.

Plaintiff's bald, conclusory allegation that his work on the subject trailer was reimbursement for the loan is insufficient to defeat Mr. Barsuk's position that Plaintiff worked on the trailer as a friend and volunteer, without compensation (R.620). While Mr. Barsuk briefed this issue in the Appellate Division, the majority did not reach it (Respondent's br., pp. 24-27). This issue is mentioned in this letter in response to Plaintiff's meritless suggestion that the issue was not properly before the Appellate Division because "[d]efendant declined to file a Notice of Cross-Appeal with the Appellate Division seeking to reverse Supreme Court's decision" on the issue (SSM Letter, p. 28-29).

[2] Plaintiff 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).

In the trial court, Mr. Barsuk raised the issue of Plaintiff's volunteer status as a reason to dismiss his Labor Law § 240(1) claim. Of course, that claim was dismissed, albeit it not on the ground that Plaintiff 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 Plaintiff'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 generally TDNI Props., LLC v Saratoga Glen Bldrs., LLC*, 80 AD3d 852, 853, n 1 [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 Plaintiff's volunteer status, the Appellate Division had authority to use Plaintiff's status as a volunteer as an alternative reason for affirming the dismissal of Plaintiff'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* Lab., 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]). Furthermore, since Plaintiff's status as a volunteer was raised as grounds for dismissal of Labor Law § 240(1) in the trial court and Appellate Division, this Court can rule that Plaintiff was a volunteer and is not entitled to the protections of Labor Law § 240(1) for that reason (*see generally 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 Plaintiff's Labor Law § 240(1) because the statute does not apply in this case because Plaintiff's work on the subject trailer was uncompensated, volunteer work. There is nothing except bald, conclusory testimony to the contrary.

Conclusion

For any and all of the reasons stated above, Defendant-Respondent, David Barsuk, respectfully requests that this Court affirm the Memorandum and Order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, and grant him any further relief that this Court deems just and proper.

Dated: February 28, 2023
Buffalo, New York

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Printing Specifications Statement

I hereby certify pursuant to 22 NYCRR 500.11(m) that the foregoing letter

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Dated: February 28, 2023

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF MONROE	)		**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 February 28, 2023

deponent served the within: **LETTER SUBMISSION PURSUANT TO RULE 500.11 IN REPLY TO PLAINTIFF'S LETTER OF FEBRUARY 10, 2023**

Upon:

Lipsitz, Ponterio & Comerford, LLC
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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 February 28, 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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