Court of Appeals of the State of New York

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VICTOR J. RUNNER,

Respondent,

-against-

NEW YORK STOCK EXCHANGE, INC., and
AMEC CONSTRUCTION MANAGEMENT, INC.,

Appellants,

-and-

ALBIN GUFSTANSON CO., INC.,

Third-Party Defendant-Cross-Claimant.

On Questions Certified by the United States Court of Appeals for the Second Circuit (USCOA Docket No. 08-0653-cv)

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

The purposes of the Defense Association of New York, Inc. are to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense and also those whose practice consists in representing insurance companies, self-insured firms and corporate defendants; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings related to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standard of trial practice and develop, establish and secure court adoption or approval of a high standard code of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools and emphasizing trial practice for defense attorneys; to inform its members and their clients of

developments in the courts and legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just personal injury claim and to present effective resistance to every non-meritorious or inflated claim; to advance the equitable and expeditious handling of disputes arising under all forms of insurance and surety contracts; to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This is an action for damages for personal injuries sustained by plaintiff-respondent Victor J. Runner (hereinafter "plaintiff") in an incident which occurred on February 19, 2004. At the time of the accident, plaintiff was employed as a journeyman electrician by third-party defendant Albin Gufstanson Company, Inc. (hereinafter "Albin"). Albin was retained by defendant-appellant AMEC Construction Management, Inc. ("AMEC"), a general contractor for defendant-appellant New York Stock Exchange, Inc. ("NYSE"), on a project to install an "uninterruptible power system" at the NYSE. On the date of the incident, as part of their work on the project, plaintiff and two co-workers were transporting a reel of wire approximately four feet in diameter from one part of the NYSE building to

another. The path they took led them to a basement hallway which was uneven: one portion of the hallway was slightly higher than the other portion, with three or four steps in the middle. Plaintiff himself described it as "not a real staircase, it's a hallway that drops down to another level so it's a few steps in the middle of the hallway [.]" Witnesses testified that the distance from the bottom of the lower step and the top of the highest step was approximately two and one-half to three feet.

As the reel approached the steps in the middle of the basement hallway, plaintiff's supervisor directed plaintiff and his co-workers to secure one end of the ten-foot rope to the reel, wrap the other end of the rope around a ten foot long, two and one-half inch steel pipe, and placed the pipe horizontally spanning a nearby door jam. Plaintiff and his co-workers then took up the slack in the rope, with plaintiff being situated closest to the pipe that was wedged in the door jamb.

As the reel began to move across the steps, plaintiff's hands became caught in the nip point between the coiled rope and the pipe, resulting in the amputation of several fingers. Throughout the incident, plaintiff remained on the upper portion of the hallway.

Plaintiff commenced an action in federal court against NYSE and AMEC, alleging, inter alia, a claim under Labor Law §240(1). During the pending action, the district court granted defendants' cross-motion to dismiss some of the claims asserted

against them, but denied that portion of the relief seeking dismissal of the Labor Law §§ 240(1) and 241(6) claims. At trial, the jury rendered a verdict in favor of defendants, but the district court set that verdict aside and further determined that Labor Law §240(1) had been violated holding that "[o]n the basis of the evidence beyond any question . . . the device actually used in the operation did not give proper protection and . . . was a substantial factor in causing the accident." A trial on damages was then ordered.

Subsequent thereto, the parties agreed to settle the damages issue while preserving a Labor Law 240(1) issue. A final judgment was entered and defendants appealed to the United States Court of Appeals for the Second Circuit which, upon hearing the appeal, certified the following questions to this Court:

> 1. Where a worker who was serving as a counter-weight on a makeshift pulley is dragged into a pulley mechanism after a heavy object on the other side of a pulley rapidly descends a small set of stairs , causing an injury to plaintiff's hands, is the injury (a) an "elevation related injury," and (b) directly caused by the effects of gravity, such that Section 240(1) of New York's Labor Law applies?
>
> 2. If an injury stems from neither a falling worker nor a falling object that strikes a plaintiff, does liability exist under 240(1) of New York's Labor Law?

Runner v. NYSE, Inc., 568 F.3d 383 (2d Cir 2009). This Court accepted certification of the issues presented. Runner v. NYSE,

12 N.Y.3d 892, 883 N.Y.S.2d 792 (2009).

The Defense Association of New York Inc. respectfully submits that, in the case at bar, plaintiff's injuries did not arise out of an elevation-related hazard within the meaning of the statute. The mere fact that gravity played a role in this incident is immaterial; gravity plays a role in every action. This Court has specifically held that Labor Law §240(1) is limited to those height-related hazards intended by the Legislature to fall within the scope of the statutory provisions and that Labor Law §240(1) only applies to two incidents: a falling worker or a falling object. Plaintiff did not fall from a height. No object fell from a height and struck him. Rather, plaintiff was injured as a result of a lateral movement. Moreover, the injury sustained here, in the catching of plaintiff's fingers in the nip point between the rope and the pipes was not the type of harm associated with elevation related hazards. Thus, this is not a scenario which falls under the purview of Labor Law §240(1). Expanding application of the statute beyond its intended scope would turn owners and general contractors into insurers of the safety of all workers, something which the Legislature did not intend. Therefore, this Court should answer the Second Circuit's questions in the negative.

STATEMENT OF FACTS

The essential facts are undisputed. At the time of the accident giving rise to this litigation, plaintiff was employed as a journeyman electrician by Albin Gustafson Company ("Albin") (A 57; A 223). Albin was retained by AMEC Construction Management, Inc. ("AMEC"), general contractor for the New York Stock Exchange's ("NYSE") project to install an "Uninterruptible Power System" at the NYSE (A 94-96). On February 19, 2004, as part of their work on the project, plaintiff and two coworkers were transporting a reel of wire approximately four feet in diameter from one part of the NYSE building to another (A 276-281). The path they took led them to a basement hallway which was uneven: one portion of the hallway was slightly higher than the other portion, with three or four steps in the middle (A 70; A 281; A 490; A 673; A 733; A 1139). Plaintiff himself described it as "not a real staircase, it's a hallway that drops down to another level so it's a few steps in the middle of the hallway[.]" (R 290). Witnesses testified that the distance from the bottom of lowest step and the top of the highest step was approximately two and-a-half to three feet (A 673; A 1186).

As the reel approached the steps in the middle of the basement hallway, plaintiff's supervisor directed plaintiff and his co-workers to secure one end of a ten-foot rope to the reel, wrap the other end of the rope around a ten foot long, two and-a-half inch thick steel pipe, and place the pipe horizontally spanning a nearby door jamb (A 71-74; A 281-284). Plaintiff and

his coworkers then took up the slack in the rope, with plaintiff being situated closest to the pipe that was wedged in the door jamb (A 286-287).

As the reel began to move across the steps, plaintiff's hands became caught in the nip point between the coiled rope and the pipe, resulting in the amputation of several fingers (A 78-81; A 294- 295). Throughout the incident, plaintiff remained on the upper portion of the hallway (A 298).

Plaintiff commenced an action in federal court against NYSE and AMEC, alleging, inter alia, a claim under Labor Law §240(1) (A 31-37). During the pending action, the district court granted defendants' cross-motion to dismiss some of the claims asserted against them, but denied that portion of the relief seeking dismissal of the Labor Law §§ 240(1) and 241(6) claims (SPA 7-8). At trial, the jury rendered a verdict in favor of defendants, but the district court set that verdict aside and further determined that Labor Law §240(1) had been violated holding that "[o]n the basis of the evidence beyond any question . . . the device actually used in the operation did not give proper protection and . . .was a substantial factor in causing the accident" (A 1572-1585; SPA 9-23). A trial on damages was then ordered.

Subsequent thereto, the parties agreed to settle the damages issue while preserving a Labor Law §240(1) issue. A final judgment was entered and defendants appealed to the United States Court of Appeals for the Second Circuit which, upon

hearing the appeal, certified the following questions to this Court:

> 1. Where a worker who was serving as a counter-weight on a makeshift pulley is dragged into a pulley mechanism after a heavy object on the other side of a pulley rapidly descends a small set of stairs , causing an injury to plaintiff's hands, is the injury (a) an "elevation related injury," and (b) directly caused by the effects of gravity, such that Section 240(1) of New York's Labor Law applies?
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> 2. If an injury stems from neither a falling worker nor a falling object that strikes a plaintiff, does liability exist under 240(1) of New York's Labor Law?

Runner v. NYSE, Inc., 568 F.3d 383 (2d Cir 2009). This Court accepted certification of the issues presented. Runner v. NYSE, Inc., 12 N.Y.3d 892, 883 N.Y.S.2d 792 (2009).

POINT I

IN A SCENARIO WHERE PLAINTIFF DID NOT FALL FROM A HEIGHT, AND NO OBJECT FELL FROM A HEIGHT STRIKING HIM, LABOR LAW §240(1) DOES NOT APPLY; PROPER INTERPRETATION OF LEGISLATIVE INTENT AND STARE DECISIS DICTATE REJECTION OF PLAINTIFF'S EFFORTS TO EXPAND THE SCOPE OF LABOR LAW §240(1) TO ENCOMPASS A TYPE OF HAZARD NEVER CONTEMPLATED FOR INCLUSION IN THE STATUTORY STRICT LIABILITY PROVIDED FOR UNIQUELY HEIGHT-RELATED HAZARDS

Plaintiff did not fall from a height. No object fell from a height and struck him. The facts in this case involved a situation in which plaintiff was injured as a result of a horizontal or lateral hazard. Therefore, this was not a situation that the Legislature envisioned Labor Law § 240(1) would apply, and this Court should answer both certified questions in the negative.

This Court has often recognized that imposition of the "absolute" liability imposed by Labor Law §240(1), without a finding of traditional fault or negligence on the part of the target defendant, is limited to those height-related hazards intended by the Legislature to fall within the scope of the statutory provisions. Thus, Labor Law §240(1) was enacted "in recognition of the exceptionally dangerous conditions" presented by elevation differentials at work sites for "workers laboring under unique gravity-related hazards" Misseritti v. Mark IV Construction Co., 86 N.Y.2d 487, 491, 634 N.Y.S.2d 35, 37 (1995). However, the statute's extraordinary protections extend

only to a narrow class of special hazards. See, Nieves v. Five Boro Air Conditioning & Refrigeration Corp., 93 N.Y.2d 914, 690 N.Y.S.2d 852 (1999). While, to be sure, the statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 221 (1991), expanding application of the statute beyond its intended scope, this Court has recognized, would turn owners and general contractors into insurers of the safety of all workers, something which the Legislature did not intend. Respectfully, the lateral hazard in this case was not within the purview of the statute.

In order to obtain the benefit of §240(1), plaintiff must demonstrate that the statute has been violated and that the violation was the proximate cause of his injury. See, Rocovich v. Consolidated Edison Company, 78 N.Y.2d 509, 577 N.Y.S.2d 219 (1991). In Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993), this Court expanded upon Rocovich, and further defined, and narrowed, the incidents that are compensable under the statute, by holding that not every occurrence that was somehow related to gravity was entitled to §240 protection:

> The "special hazards" to which we referred to in Rocovich, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. (emphasis in original).

* * * *

> In other words, Labor Law Section 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective devices proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person. The right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist. (emphasis in original)

81 N.Y.2d at 501, 601 N.Y.S.2d at 52-53.

This Court has made it abundantly clear that Labor Law §240(1) covers two types of incidents: where a worker falls from an elevated work site or a worker that is injured by an object falling from an elevated work surface. See, e.g., Toefer v. Long Island R.R., 4 N.Y.3d 399, 795 N.Y.S.2d 511 (2005). Moreover, and contrary to plaintiff's argument, not every falling worker or falling object "on a construction site . . . gives rise to the extraordinary protections of Labor Law §240(1)." Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 41 (2001). While §240(1) is to be liberally construed, "this principle operates to impose liability only after a violation" had been established (emphasis in original). Id., 96 N.Y.2d at 267, 727 N.Y.S.2d at 41.

Over time, the courts have applied this statute to an increasing number of scenarios. But this Court has stressed that §240(1) should not be implemented by decisional law in such a manner as to create a right of recovery not envisioned by the

Legislature. See, Martinez v. City of New York, 93 N.Y.2d 322, 690 N.Y.S.2d 524 (1999). Significantly, caution must be exercised not to stretch the statute's reach beyond that intended by the Legislature since it incorporates the extraordinary remedy of absolute liability. See, Perchinsky v. State, 232 A.D.2d 34, 660 N.Y.S.2d 177 (3d Dep't 1997).

This point has been stressed by this Court in numerous contexts. Thus, for example, the Court has repeatedly recognized that the type of activities articulated by the statute delimit the application of its strictures, which should not be expanded to other trades involving dissimilar hazards (see, e.g., Schroeder v. Kalenak Painting & Paperhanging, Inc., 7 N.Y.3d 797, 821 N.Y.S.2d 804 (2006) [wallpapering not within statute]; Munoz v. DJZ Realty, LLC, 5 N.Y.3d 747, 821 N.Y.S.2d 804 (2005) [placing new ad on billboard is "cosmetic maintenance" not within the statute]; Beehner v. Eckerd Corp., 3 N.Y.3d 751, 788 N.Y.S.2d 637 (2004) [post-repair inspection not within statute]; Chizh v. Hillside Campus Meadows Assoc., 3 N.Y.3d 664, 784 N.Y.S.2d 2 (2004) [replacement of torn window screen is "routine maintenance" not within statute]; Esposito v. New York City Industrial Dev. Agency, 1 N.Y.3d 526, 770 N.Y.S.2d 682 (2003) [removing lid to effect repairs during regular maintenance of air conditioner is "routine maintenance" not within statute]; Martinez v. City of N.Y., 93 N.Y.2d 322, 690 N.Y.S.2d 524 (1999) [environmental inspection prior to asbestos removal not within statute]).

Even where the activity in which plaintiff was engaged falls within the statute, and a height differential is somehow involved, the statute does not provide automatic liability. In Blake v. Neighborhood Housing Services of N.Y.C., 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003), this Court traced the history of Labor Law § 240 (1) - - the "scaffold law" - - to demonstrate that the "strict" liability thereunder required not merely a showing that there was a fall from a height (or an object dropped from a height) which caused plaintiff injury - - the hazard contemplated by the statute, but that a violation of the statute - - a failure to provide "proper protection" from those height-related hazards, proximately caused the accident (1 N.Y.3d at 288-289, 771 N.Y.S.2d at 488). Accordingly, where the height differential involved was not of the type contemplated by the statute, or where no "failure" to provide statutorily-contemplated protection from height-related hazards was a proximate cause of plaintiff's injury, the statute was held inapplicable (e.g., Berg v. Albany Ladder Co., 10 N.Y.3d 902, 861 N.Y.S.2d 607 (2008) [fall from atop bundled trusses on flatbed truck not caused by failure to provide protective devices]; Keavey v. New York State Dormitory Auth., 6 N.Y.3d 859, 816 N.Y.S.2d 722 (2006) [fall in gap between stacked insulation boards not "gravity-related accident encompassed by" statute]; Robinson v. East Med. Center, LP, 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006) [fall from non-defective but insufficiently tall 6' ladder not due to failure to provide proper protection,

but to plaintiff's failure to obtain available 8' ladder]; Toefer v. Long Island R.R., 4 N.Y. 3d 399, 795 N.Y.S.2d 511 (2005) [4' descent from surface of flatbed truck not elevation-related hazard contemplated by statute]; Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005) [fall from inverted bucket was caused by plaintiff's failure to obtain available ladder, not failure to provide a safety device]; Blake, supra [fall from ladder due solely to plaintiff's failure to lock extension clips not caused by defendant's failure to provide safety]; Roberts v. General Elec. Co., 97 N.Y.2d 737, 742 N.Y.S.2d 188 (2002) [cut piece of asbestos deliberately dropped, which injured plaintiff, not falling object for which statutory safety device contemplated]; Narducci, supra [fall of pane from window on which no work was done not due to failure to provide safety in hoisting or securing objects]; Bond v. York Hunter Constr., 95 N.Y.2d 883, 715 N.Y.S.2d 209 (2000) [alighting from vehicle not elevation-related risk calling for protective devices contemplated by statute]; Dilluvio v. City of N.Y., 95 N.Y.2d 928, 721 N.Y.S.2d 603 (2000) [3' fall from pick-up truck not result of elevation-related risk within statute]).

Accordingly, where as here, plaintiff did not fall from a height, nor did any object fall from a height upon plaintiff, and the object upon which gravity acted was in fact deliberately being moved from one step to another in between two levels of a hallway, no height-related risk contemplated by the statute was involved in causing plaintiff's injury.

Of perhaps greater import, in line with the policy-based restriction of Labor Law §240(1), and beyond the limitations of its application noted above, this Court has made clear that the statute's strict liability will apply only where the hazard actually realized - - the hazard resulting in injury - - was that contemplated by the statute and falling within its intended protection from uniquely height-related injury. This point was made long ago by the Court in, among others, DeHaen v. Rockwood Sprinkler Co. of Mass., 258 N.Y. 350, 353-4 (1932):

> The violation of a statute calling for a prescribed safeguard in the construction of a building does not establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of injury (Am. Law Inst., Restatement of Tort [No. 4], § 176, Lang v. N.Y.C.R.R.Co., 227 N.Y. 507; 255 U.S. 455; Boronkay v. Robinson & Carpenter, 247 N.Y. 365; DiCaprio v. N.Y.C.R.R. Co., 231 N.Y. 94).

In more modern days, Rocovich, supra, is the seminal case. There, the Court ruled that plaintiff's 12" slip into a trough resulting in injury caused by the hot oil running through the trough did not involve the hazard contemplated to be protected against by the requirements of Labor Law §240(1).

The same analysis has been repeatedly employed by the Court when faced with a hazard other than the uniquely height-related hazard which underlies Labor Law §240(1) (see, e.g., Cohen v. Memorial Sloan-Kettering Cancer Center, 11 N.Y.3d 823, 868 N.Y.S.2d 578 (2008) [fall from ladder caused by two unconnected

pipes protruding from wall involved "a separate risk wholly unrelated to the risk which brought about the need for the safety device in the first place"]; Nieves v. Five Boro Air Conditioning & Refrigeration Corp., 93 N.Y.2d 914, 690 N.Y.S.2d 852 (1999) [fall when, upon descent from ladder, plaintiff slipped on drop cloth-covered portable light, not within hazards against which ladder was intended to protect]; Melber v. 6333 Main St., Inc., 91 N.Y.2d 759, 676 N.Y.S.2d 104 (1998) [fall when plaintiff, walking on stilts, tripped on protruding electrical conduit on floor, not caused by hazard within statute]; Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995) [collapse of completed fire wall not the type of hazard which Labor Law §240 was intended to guard against]; Ross, 81 N.Y.2d 494, 500, 601 N.Y.S.2d 49, 51 (1993) ["Labor Law §240(1) was aimed only at elevation-related hazards . . . and accordingly, injuries resulting from other types of hazards are not compensable under the statute even if proximately caused by the absence of an adequate scaffold or other required safety device. The injury sustained by the plaintiff in this case - - severe and disabling back strain - - is not the kind of harm that is typically associated with elevation related hazards"]).

Applying those principles, this case plainly does not warrant application of the strictures of Labor Law §240(1). Clearly, the hazard realized here - - the catching of plaintiff's fingers in the nip point between the rope and the pipe while attempting to ease the reel from hall level to the

next step, tragic as it may have been, was hardly "the kind of harm that is typically associated with elevation related hazards" (Ross, supra). Indeed, that type of nip point injury is in no way unique to or even generally found in height-related injury cases, being more typical of product liability related claims (see Gebo v. Black Clawson Co., 92 N.Y.2d 387, 681 N.Y.S.2d 221 (1998); Micallef v. Miehle Co., 39 N.Y.2d 376, 384 N.Y.S.2d 115 (1976); Wheeler v. Sears Roebuck & Co., 37 A.D.3d 710, 831 N.Y.S.2d 427 (2d Dep't 2007); Frisbee v. Cathedral Corp., 283 A.D.2d 806, 725 N.Y.S.2d 129 (3d Dep't 2001).

Thus, to sustain plaintiff's claim here would be contrary to firmly-established principles repeatedly enforced by this Court, restricting application of Labor Law §240(1) to accidents involving a person or object falling from a height, and to injuries resulting from realization of the hazards against which the statute was intended to protect. Neither factor is present here. Plaintiff is therefore not entitled to rely upon the strict liability provisions of Labor Law §240(1).

Plaintiff, however, wishes to unreasonably expand the statute's umbrella of protection to virtually any incident that is in any way tangentially related to the effects of gravity. This Court has previously rejected such arguments. See, e.g., Ross, supra.

As noted above, in Misseritti, supra, this Court defined the risks that fall under the protection of §240(1). This Court reiterated the long-held doctrine that not every hazard, danger,

or peril encountered on a construction site that is in some way connected with the effects of gravity falls within the scope of the statute. Rather, the Scaffolding Law addresses only those risks that are "exceptionally dangerous conditions posed by elevation differentials." 86 N.Y.2d at 491, 634 N.Y.S.2d at 37.

This was not an incident in which one of the devices that this Court outlined in Ross, supra, would have been necessary or expected. Plaintiff did not fall from a height. He testified that as the reel began to move across the steps, his hands became caught in the coiled rope and pipe. Plaintiff did not move to the lower level; he remained on the upper portion of the hallway. The rolling reel essentially pulled him laterally. And no object fell from a height and struck him. The reel did not hit plaintiff. His injury occurred when the reel pulled the rope, which caught his fingers.

In Smith v. New York State Elec. & Gas Corp., 189 A.D.2d 19, 595 N.Y.S.2d 563 (3d Dep't 1993), rev'd, 82 N.Y.2d 781, 604 N.Y.S.2d 543 (1993), this Court reviewed a situation where plaintiff was injured by an object moving laterally. Plaintiff was injured while dismantling machinery in a subterranean concrete vault. A crane, located at ground level, lowered a cable with a 200-pound metal tension ball attached. This allowed the machinery to be dragged along the floor until it could be hoisted up to the surface. The accident occurred when equipment snagged on the uneven concrete surface, and the crane's operator, who was unaware of the situation, continued to

exert tension until the cable snapped. The ball was then propelled against plaintiff.

The majority in the Third Department ruled that plaintiff's §240(1) claim was viable because "[t]he removal phase of the work exposed plaintiff and his co-workers to risks related to elevation differentials and the effects of gravity which required the provision of one or more of the safety devices listed" in the statute. 189 A.D.2d at 21, 595 N.Y.S.2d 15 564. The Appellate Division majority determined that the crane used to remove the pieces of equipment from the vault and hoist them to the ground constituted a device and, therefore, it had to be constructed, placed, and operated so as to give proper protection. The majority disregarded the fact that the crane's hoisting mechanism was "being used to apply horizontal force" at the time of the injury because the crane was used to perform horizontal movement and vertical lifting. Id. The Appellate Division majority reasoned that the crane was applying a lifting force to the cable when the cable detached from the equipment, "and gravity obviously played a substantial role in the risk of harm that actually resulted" in the injuries. 189 A.D.2d at 22, 595 N.Y.S.2d at 565.

This Court disagreed and rejected the analysis of the Third Department's majority. 82 N.Y.2d at 783, 604 N.Y.S.2d at 678. It relied upon its prior decisions in Rocovich and Ross and held that plaintiff's injury did not arise out of an elevation-related hazard. Id.

In the case at bar, plaintiff's injuries did not arise out of an elevation-related hazard. Similar to Smith, this case involves a lateral movement which caused injury. The mere fact that gravity played a role in this incident is immaterial: gravity plays a role in every action. This Court has specifically held that §240(1) only applies to two incidents: a falling worker or a falling object. See, Toefer, supra. Plaintiff did not fall from a height. No object fell from a height and struck him. To unreasonably expand the protections of the statute to include any worksite incident simply because the effects of gravity played a role would run contrary to this Court's explicit prohibition in Martinez, supra, where it warned that §240(1) was not to be implemented in a scenario not envisioned by the Legislature.

Therefore, this Court should answer the Second Circuit's questions in the negative and hold that where an object does not fall from a height and no object falls and strikes plaintiff, Labor Law §240(1) does not apply.

CONCLUSION

For the foregoing reasons, the certified questions should be answered in the negative.

Dated: Jericho, New York
October 8, 2009

Respectfully submitted,

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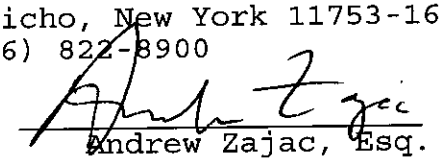
By: 
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