18-0861-cv

IN THE

United States Court of Appeals for the Second Circuit

MICHAEL JAY,

Plaintiff-Appellant,

v.

GLOBALFOUNDRIES U.S. INC.,

Defendant-Appellee,

TURNER CONSTRUCTION COMPANY,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK, NO. 1:15-CV-1066
DISTRICT JUDGE DAVID N. HURD

BRIEF FOR DEFENDANT-APPELLEE GLOBALFOUNDRIES U.S. INC.

ROBERT S. ROSBOROUGH IV
WHITEMAN OSTERMAN & HANNA LLP
One Commerce Plaza
Albany, New York 12260
(518) 487-7600
rrosborough@woh.com
Counsel for Defendant-Appellee

October 9, 2018

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee GLOBALFOUNDRIES U.S. Inc. is a foreign corporation, which is wholly owned by GLOBALFOUNDRIES Netherlands Cooperatief U.A. (Netherlands).

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JURISDICTIONAL STATEMENT

The District Court had diversity jurisdiction over this action under 28 U.S.C. § 1332(a). Plaintiff-Appellant Michael Jay was and remains a citizen of the State of New York. A30. Defendant-Appellee GLOBALFOUNDRIES U.S. Inc. is incorporated in the State of Delaware and has its principal place of business in the State of California. A10, A18. The amount in controversy, exclusive of interests and costs, exceeds $75,000. A14.

The District Court granted GLOBALFOUNDRIES summary judgment dismissing the complaint, and denied Mr. Jay's cross-motion for partial summary judgment on liability as to his cause of action alleging a violation of New York Labor Law § 240, on March 22, 2018. SPA1-12. The District Court entered judgment in GLOBALFOUNDRIES' favor on all claims on March 22, 2018. SPA13. Mr. Jay appealed the District Court order on March 28, 2018. A874. Mr. Jay has abandoned any issues on appeal concerning the District Court's dismissal of his claims alleging liability for common law negligence and violations of New York Labor Law §§ 200 and 241(6) by failing to raise them in his brief. *See LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir.

1995). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the District Court properly held that GLOBALFOUNDRIES was entitled to summary judgment because Mr. Jay's injuries were not covered by New York Labor Law § 240(1).

2. Whether the District Court judgment dismissing Mr. Jay's New York Labor Law § 240(1) claim should be affirmed on the alternative grounds that Mr. Jay was the sole proximate cause of his injuries.

STATEMENT OF THE CASE

Plaintiff Michael Jay was injured while working at the GLOBALFOUNDRIES' semiconductor manufacturing site in Malta, New York when he decided to forgo the use of a lull—a "heavy duty forklift" with "extendable fork[s] that actually telescope[]" that are used for lifting and loading heavy materials (A283)—to lift two pieces of large HVAC ductwork into the back of a pickup truck. Mr. Jay, instead of waiting for a lull to assist in performing the task safely, decided to load the two ducts manually and then jumped into the back of the truck as

the second duct was propelled into the truck by five workers. The second duct struck him, and he suffered injuries to his right side, shoulder, leg, and foot. Mr. Jay sued GLOBALFOUNDRIES, as owner of the site, alleging that it was liable for his injuries under New York Labor Law § 240(1). The District Court properly dismissed Mr. Jay's claim because his activities and injuries are not covered by section 240(1).

A. Mr. Jay was Solely Responsible for Ensuring that Construction Materials were Lifted, Loaded, and Moved Safely About the Construction Site.

At the time of the incident, Mr. Jay was a materials handler employed by J.W. Danforth, a HVAC and sheet metal contractor on the site. A111, A114, A123. In this role, Mr. Jay was responsible for moving the materials needed for the construction of the HVAC system in the new building, from the ductwork down to the screws and bolts, from where they were delivered on the GLOBALFOUNDRIES' site to the construction area. A116-17, A123-24. He was not, however, involved in any physical construction, repair, or alteration of the HVAC system. A123-24.

In the course of Mr. Jay's duties, he was solely responsible for determining the means by which he would move the materials about the worksite. A132-33, A175. Throughout his day, Mr. Jay received phone calls to his company cellphone telling him the materials to move and where they needed to be delivered, but it was his job to determine how to complete the task safely. A124-25, A132-33, A165-67. J.W. Danforth had at least two lulls on site and available for Mr. Jay's use at the time of the incident. A127. Mr. Jay moved HVAC ductwork about the site "[t]housands" of times and, "most of the time," he did not use a lull. A157.

B. The Incident.

On March 10, 2014, Mr. Jay, while working at the GLOBALFOUNDRIES' site, once again decided not to use a lull to lift two pieces of HVAC ductwork into the back of a pickup truck, but instead to have a crew of workers lift the ductwork by hand. And he decided to jump into the back of the truck before the second piece was loaded. He was injured as a result.

On March 10th, at approximately 2 p.m., Mr. Jay was unloading materials from his company pickup truck into materials storage

containers on site when he received a call from his supervisor Jerry directing him to escort a driver employed by Tougher Industries, a different contractor, off the site. A138-40. The Tougher driver did not have the necessary security clearance to drive on the site without an escort and needed to return to the Tougher shop, which was located in Menands, New York approximately 30 minutes away, by 3 p.m. to finish his workday. A138-40, A159. Although Jerry told Mr. Jay that the Tougher driver needed to return to the Tougher shop by 3 p.m., he did not specify any consequence if the driver was delayed or tell Mr. Jay that it was an emergency. *See* A138 (Jerry asked Mr. Jay "to please get the [Tougher driver] off the site because he had to get back to the shop by 3 o'clock . . . so he could go home"), A148 (the Tougher driver indicated to Mr. Jay that he "[j]ust wanted to go home").

Jerry then asked Mr. Jay, who did have the necessary clearance, to assist the driver's exit. A138-40. Mr. Jay told Jerry that his truck was still full of materials and he couldn't assist the Tougher driver immediately. A141. Mr. Jay expected that someone else could assist the Tougher driver, so he returned to unloading the materials from his truck. A142.

When Mr. Jay finished unloading most of the materials from his truck, he received a second call from Jerry, again asking him to escort the Tougher driver off the site. A142-43. Mr. Jay told Jerry that he would get to the Tougher truck driver's location and assist. A143. At approximately 2:08 p.m., Mr. Jay left the storage containers and drove 8 to 10 minutes through the very congested construction site to the Tougher driver. A144.

When Mr. Jay arrived, at approximately 2:18 p.m., a lull was still unloading steel I-beams from the Tougher truck. A144-45. Mr. Jay waited for the lull to finish unloading the materials, and then asked the lull operator to move out of the way so he could slowly guide the Tougher driver out of the congestion of the other construction trucks, machines, and workers nearby. A145-48. As Mr. Jay was guiding the driver out, Jerry called again. A149. Jerry, upon learning that the Tougher driver was still on the site, told Mr. Jay to take the Tougher driver first to pick up two pieces of HVAC ductwork from a different location on the site to bring back to the Tougher shop to be modified. A149-50. Jerry did not describe the size of the ductwork to Mr. Jay or dictate how it should be loaded into the Tougher truck. A150-51, A165-

66. That decision was left to Mr. Jay's discretion as the materials handler. A165-66, A174-75.

Mr. Jay never asked Jerry for the assistance of a lull or other equipment to load the ductwork. A166. Nor did he ask the lull operator that had just finished unloading the Tougher truck to follow them to assist with the task. A146-47, A162. Instead, Mr. Jay called a different Danforth lull operator, Tom Sweeney, to see if he could assist in loading the ductwork. A162-63. Mr. Sweeney told Mr. Jay that he was fully engaged on the other side of the site at that time and could not help. A163.

Mr. Jay escorted the Tougher driver to the location of the ductwork, and assisted him backing the Tougher truck down a "long road" to the ductwork. A151, A153. When they arrived, two other Danforth employees identified the two pieces of ductwork that needed to be loaded into the truck and returned to the shop, a 550-pound, 6-foot piece and a 450-pound, 5-foot piece, both with a 3-inch flange on each end. A154-56.

Another Danforth employee, Bob Hilton, approached and asked Mr. Jay if he wanted to use a lull to load the ductwork. A158-59, A166.

Mr. Jay, however, declined. A158-59, A166-67. He decided instead that he did not want to wait for a lull to come to the location of the ductwork, which he estimated was 20 to 25 minutes away, and that enough workers were present to load the ductwork manually. A159, A161-62, A167-68.

Although Mr. Jay's supervisor never told him that returning the Tougher driver to the Tougher shop by 3 p.m.—a deadline which was communicated *before* Mr. Jay's task was changed to add picking up the ductwork and only represented the end of the Tougher driver's time on the clock—was an emergency situation that required loading the ductwork without waiting the 20 to 25 minutes for a lull to travel to the location, Mr. Jay decided to load the ductwork manually, without the assistance of a lull. A159, A167, A322-23. Mr. Jay did not call Jerry to ask for the assistance of a lull. A166. He did not inquire whether the lull operator that had unloaded the Tougher truck was available. A168. Nor did he follow up with Mr. Sweeney again to see if he had become available to assist, even though Mr. Jay had by then learned that the ductwork weighed between 450 to 550 pounds apiece. A167.

Following Mr. Jay's instruction to load the ductwork manually, the workers tipped the top of the 550-pound piece, which was standing vertically on the ground like a smokestack, against the back of the open liftgate of the Tougher truck. A169. Using the liftgate as a leverage point, the workers, while all standing on the ground, picked up the bottom of the duct, used their energy to overcome the force of gravity, and flipped it 180 degrees into the truck bed. A169-70. Once loaded, the 550-pound duct again stood vertically like a smokestack in the back of the truck. A170.

Before the workers began to load the second duct into the truck, Mr. Jay got into the bed of the truck where the duct was going to be loaded to prevent the second duct from hitting the first. A171-72. As Mr. Jay put it,

> Foolishly, perhaps, I decided to jump in the truck. I said, "Hold up." Before you throw this piece in the truck, I need to make sure you don't -- I don't want this other piece smacking the other piece that's already in the truck.
>
> …
>
> So I just simply said, Let me get up there to make sure that didn't happen. I'm going to go guide it up.

A172. Mr. Jay never discussed with the other workers the safety of his decision to stand in the truck bed as the second duct was being loaded. A174. Instead, Mr. Jay's primary concern was ensuring that the second duct did not dent the first, regardless that his decision placed him directly in second duct's path. A172-74.

Repeating the same manual loading procedure that Mr. Jay had chosen for the first duct, the workers leaned the 450-pound second duct against the truck's open liftgate, picked up the bottom of the duct, and flipped it 180 degrees into the bed of the truck where Mr. Jay was standing. A171, A176-78. As the flange of the second duct that had been on the ground rotated upwards, Mr. Jay grabbed it with his right hand to try to stop it from hitting the first duct. A179-80. The other workers kept ahold of the second duct from the ground and guided it into the bed of the truck. A179.

Notwithstanding their efforts, the second duct struck Mr. Jay's right side and right foot as he was standing in the bed of the truck, injuring him. A181. Although Mr. Jay testified that the pivot point of the second duct—the point where the duct was leaned against the truck's liftgate in the manual loading process that Mr. Jay chose—came

off the truck bed by about a foot, he did not know whether the duct was in contact with the truck when it struck him. A185-86.

C. Mr. Jay's Suit.

Mr. Jay filed suit against GLOBALFOUNDRIES and Turner Construction Company, the general contractor on the project, alleging causes of action for negligence and violations of New York Labor Law §§ 200, 240, and 241. A9-15. Mr. Jay almost immediately dismissed Turner Construction from the action, pursuant to Rule 41(1)(A)(i) of the Federal Rules of Civil Procedure. A16. GLOBALFOUNDRIES then answered, denying the allegations of the complaint. A17-22.

Following discovery, GLOBALFOUNDRIES moved for summary judgment dismissing the complaint in its entirety. A23-24. Mr. Jay cross-moved for summary judgment on liability only "on the issue of [GLOBALFOUNDRIES'] violation of NYS Labor Law Section 240(1)." A824-25. Mr. Jay did not oppose those portions of GLOBALFOUNDRIES' motion that sought dismissal of his negligence and New York Labor Law §§ 200 and 241 claims. A404.

D. The District Court's Decision.

In a Memorandum-Decision and Order dated March 22, 2018, the District Court (Hurd, U.S.D.J.) granted GLOBALFOUNDRIES' motion for summary judgment, denied Mr. Jay's cross motion, and dismissed the complaint in its entirety. SPA1-12. Noting that Mr. Jay failed to oppose GLOBALFOUNDRIES' motion to the extent it sought dismissal of the negligence and New York Labor Law §§ 200 and 241 claims, the Court held that GLOBALFOUNDRIES had "shown it is entitled to judgment as a matter of law" on those claims and dismissed them. SPA8.

Turning to the contested New York Labor Law § 240(1) claim, the Court reviewed the relevant section 240(1) case law in New York concerning injuries sustained from objects that are thrown or fall as a result of kinetic energy, and properly held that "[s]ection 240 does not apply" to those injuries. SPA10-11. Thus, the Court held:

> Construing the facts in the light most favorable to [Mr. Jay] and drawing favorable inferences from [Mr. Jay's] version of the facts—that the duct did in fact lose contact with the tailgate and was in the air and that a lull should have been provided and was not—the duct simply fell as a result of the crew first propelling it upward. The incident and injury did not occur due to the direct consequence of the application of the force of gravity. The duct was thrown, despite any

> attempt by [Mr. Jay] to characterize it as being hoisted, as no mechanical apparatus was used.

SPA11.

The Court further held that the type of hazard that Mr. Jay faced was "not the 'elevation related hazard' envisioned by the statute as the duct was thrown from below [Mr. Jay]." *Id.* To be sure, the Court noted, "[t]his is not a case that entails the hazards presented by a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Id.* (quotation marks omitted).

The Court entered judgment dismissing the complaint on March 22, 2018. SPA13. This appeal followed.

STANDARD OF REVIEW

This Court reviews de novo the District Court's grant of summary judgment to GLOBALFOUNDRIES. *Diaz v. Globalfoundries U.S., Inc.*, 616 F. App'x 450, 451 (2d Cir. 2015) (summary order). The Court will affirm if "'there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

SUMMARY OF THE ARGUMENT

I. New York Labor Law § 240(1) does not make the owner of a construction site an insurer for all work or injuries that occur on a project. The New York Court of Appeals has emphasized that section 240(1) does not cover injuries sustained as a result of the usual and ordinary dangers of a construction site. Nor does the mere incidental effect of gravity on an object suffice to bring an injury within section 240(1)'s scope. Section 240(1) is a statute of extremely limited application that covers only "special hazards" that flow directly from the application of the force of gravity to the object" as a result of a physically significant elevation differential between the object and the worker.

New York courts and the district courts in this Circuit have consistently held, however, that when an object is thrown or is propelled upwards and falls as a result of its kinetic energy, any injuries sustained from being struck by the object do not result from the direct application of gravity to the object and, thus, fall outside the scope of section 240(1)'s protection against extraordinary elevation risks. The District Court properly held that that was what occurred

here. At Mr. Jay's direction, the workers intentionally propelled the second duct into the bed of the Tougher truck where Mr. Jay was standing and the duct struck him as a result of its kinetic energy from being intentionally put into motion.

Moreover, Mr. Jay did not face any special elevation-related hazard by standing in the bed of the truck, two feet off the ground, when the second duct was loaded. The New York Court of Appeals has consistently held that working on the bed of a truck, less than four feet off the ground, does not present the kind of harm against which section 240(1) is intended to protect. Indeed, the struck-by hazard that Mr. Jay faced did not arise because of any physically significant elevation difference between Mr. Jay and the second duct, as is required under New York precedent. It arose, instead, because he positioned himself in the direct path of the second duct as it was loaded. The District Court, thus, properly held that the injuries Mr. Jay sustained after he was struck by the second duct fell outside of section 240(1)'s protections.

Additionally, Mr. Jay cannot establish that the failure to provide a safety device was the proximate cause of his injuries. Mr. Jay admitted that there were lulls on the construction site for his use, but testified

that they were not necessary for the task of loading the ducts into the bed of the Tougher truck. Nor were the ducts being hoisted into the truck or inadequately secured within the meaning of section 240(1) at the time of the incident. Under the statute, to "hoist" has a specific meaning that involves the use of a mechanical apparatus to lift objects. The District Court properly held that that was not what occurred here. Instead, using his experience and authority as the materials handler, Mr. Jay chose to load the ducts manually. Once Mr. Jay made that choice, and the "foolish[]" decision to jump into the bed of the truck before the duct was loaded, there was no safety device that could have been provided to protect him from being struck by the duct. Because lulls were available for Mr. Jay's use on the construction site and he chose not to use them, the ducts were not being "hoisted" or secured within the meaning of section 240(1), and Mr. Jay conceded that the ducts did not need to be secured while they were loaded into the truck, GLOBALFOUNDRIES established its entitlement to judgment as a matter of law that any alleged failure to provide a safety device did not proximately cause Mr. Jay's injuries. Mr. Jay failed to raise a material issue of fact in opposition.

II. A worker cannot recover under New York Labor Law § 240(1) if his or her own actions were the sole proximate cause of the injuries alleged. Here, Mr. Jay's decision to proceed to load the HVAC ducts without waiting 20 to 25 minutes to use the available lulls on site to complete the task safely, and then his decision to get into the back of the truck before the second duct was propelled manually toward him, per his instructions, were the sole proximate cause of his injuries. The District Court, therefore, properly awarded GLOBALFOUNDRIES summary judgment and dismissed Mr. Jay's section 240(1) claim.

III. In the event that this Court concludes that GLOBALFOUNDRIES was not entitled to judgment as a matter of law, material issues of fact preclude an award of partial summary judgment on liability to Mr. Jay. The multiple disputed factual issues include: (1) whether the duct remained in contact with the bed of the truck as it was loaded, (2) whether lulls were readily available on site for Mr. Jay's use and he declined to use them, (3) whether an emergency situation existed that forced Mr. Jay to decide to load the ducts manually instead of waiting for a lull to assist with the task, (4) whether Mr. Jay's work at the time of the incident loading ductwork to be taken off site qualifies

for protection as construction work within the meaning of New York Labor Law § 240(1), and (5) whether Mr. Jay was the sole proximate cause of his own injuries.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT MR. JAY'S ACTIVITY AND RESULTING INJURY WERE NOT COVERED BY NEW YORK LABOR LAW § 240(1).

New York Labor Law § 240(1) requires owners and contractors to provide their workers with a safe workplace by furnishing safety equipment necessary to protect against special hazards flowing from the inherent effects of gravity. *See Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 286 (2003). Section 240(1), however, does not turn the landowner into an insurer of all accidents on a construction site. *See id.* ("At no time . . . did the Court or the Legislature ever suggest that a [property owner] should be treated as an insurer after having furnished a safe workplace. The point of Labor Law § 240 (1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so.").

As the New York Court of Appeals has made clear, section 240(1) does not cover "*any and all* perils that may be connected in some

tangential way with the effects of gravity." *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 (1993); *see also Rodriguez v. Margaret Tietz Ctr. for Nursing Care*, 84 N.Y.2d 841, 843-44 (1994) (holding that section 240(1) does not protect against "the usual and ordinary dangers of a construction site"). It is a statute of limited application (*see Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 267 (2001)), and the District Court properly held that Mr. Jay's activity and resulting injury did not fall within its scope.

New York Labor Law § 240(1) provides, as relevant here:

> All contractors and owners and their agents . . . 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.

To recover under section 240(1), "a plaintiff must show both (1)the existence of an elevation-related hazard of the type encompassed by the statute, and (2) an injury proximately caused by the absence of proper protection from the hazard." *Diaz*, 616 F. App'x at 452. Neither prong is satisfied here.

A. The District Court Properly Held that Mr. Jay's Injuries were not Caused by an Elevation-Related Hazard Flowing from the Inherent Effects of Gravity.

Mr. Jay argues that because the second duct fell as a result of his choice to have the workers propel it manually into the bed of the Tougher truck, gravity acted on the duct and his injury should be covered by New York Labor Law § 240(1). The District Court correctly rejected Mr. Jay's theory. The mere effect of gravity on the duct after the workers intentionally propelled it into the back of the Tougher truck where Mr. Jay was standing is not enough to bring Mr. Jay's activity and injury within section 240(1)'s limited protection. *See Melo v. Consol. Edison Co. of N.Y.*, 92 N.Y.2d 909, 911 (1998); *Ross*, 81 N.Y.2d at 501.

As the New York Court of Appeals explained, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)." *Narducci*, 96 N.Y.2d at 267. In fact, where, as here, the worker "was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240(1)," the statute does not provide for recovery. *Rodriguez*, 84 N.Y.2d at 843.

In a "falling object" case such as this, section 240(1) only covers extraordinary elevation-related risks that flow "directly from the application of the force of gravity to the object" as a result of a "physically significant elevation differential" between the object and the worker. *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603-04 (2009). New York courts and the district courts in this Circuit have consistently held that when an object is thrown or is propelled upwards and falls as a result of its kinetic energy—that is, the energy possessed by the object because of its motion (*see Kinetic Energy*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/science/kinetic-energy (last accessed Oct. 9, 2018))—any injuries that may result fall outside section 240(1)'s protection against extraordinary elevation risks. *See, e.g., Toefer v. Long Island R.R.*, 4 N.Y.3d 399, 408 (2005); *De Jesus v. Metro-North Commuter R.R.*, 159 A.D.3d 951, 952-53 (2d Dep't 2018); *Quishpi v. 80 WEA Owner, LLC*, 145 A.D.3d 521, 521 (1st Dep't 2016), *lv. denied* 29 N.Y.3d 914 (2017); *Joseph v. City of New York*, 143 A.D.3d 489, 490 (1st Dep't 2016); *Medina v. City of New York*, 87 A.D.3d 907, 909 (1st Dep't 2011); *see also Phaneuf v Tenneco, Inc.*, 938 F. Supp. 112, 118 (N.D.N.Y. 1996).

For example, in *Toefer*, the plaintiff was unloading steel beams from the surface of a flatbed truck's trailer, four feet off the ground, when a wooden pole that he was using as a lever to push the beams to the ground was launched back at him "with enormous force, striking him on the head and propelling him backwards, over the beams behind him that had not yet been unloaded, to the ground on the other side of the truck." *Toefer*, 4 N.Y.3d at 405. Although the plaintiff's injuries were serious, they were not, as the New York Court of Appeals held, "attributable to the sort of elevation-related risk that Labor Law § 240(1) was meant to address" because the plaintiff was not working on a sufficiently elevated surface at the time and he "was not injured by a beam, or by any falling object; the object that struck him inexplicably flew at him either upwards or horizontally." *Id.* at 408.

Similarly, in *Medina* and *Quishpi*, the Appellate Division expressly held that New York Labor Law § 240(1) does not apply to injuries that are caused by objects that are launched or propelled and then fall as a result of their kinetic energy. *See Quishpi*, 145 A.D.3d at 522 ("The Labor Law § 240 (1) claim was correctly dismissed, because the record demonstrates that plaintiff's injuries were not the result of a

failure to provide proper protection against the application of the force of gravity to an object or person, but rather the result of the propulsion of the vertical beam upward by the kinetic energy of the sudden release of tensile stress in the [beam]." (quotation marks and citations omitted)); *Medina*, 87 A.D.3d at 909 ("Here, the rail was propelled by the kinetic energy of the sudden release of tensile stress in the steel rail. Thus, plaintiff's injuries were not the result of the effects of gravity.").

The courts reasoned that because the objects were falling as a result of their kinetic energy, and not as a result of the application of the force of gravity, the injuries the objects caused were outside of section 240(1)'s scope. *See Quishpi*, 145 A.D.3d at 522; *Medina*, 87 A.D.3d at 909; *see also De Jesus*, 159 A.D.3d at 952-53 (dismissing Labor Law § 240(1) claim for lack of a gravity-related harm where "the plaintiff's injuries resulted when the tree was first propelled upward by the sudden release in tension of the catenary wires and then split in two, striking the plaintiff's leg"). This was true notwithstanding that the plaintiffs' injuries occurred, in both cases, when the objects were

falling back to the ground, and thus were incidentally affected by gravity at that time.

Mr. Jay's injuries here occurred in the same way. The second duct being loaded into the Tougher truck was propelled by the force the workers used to defeat the force of gravity and only fell striking Mr. Jay as a result of its kinetic energy. A171, A176-78, A322. Indeed, as the District Court properly held, the only reason that the duct struck Mr. Jay is because the workers intentionally propelled the duct into the back of the truck where he was standing. *See Joseph*, 143 A.D.3d at 490 (dismissing New York Labor Law § 240(1) claim where the plaintiff was struck by a pipe that was being flushed with a high pressure mix of air and water because the "mixture in the pipe did not move through the exercise of the force of gravity, but was rather intentionally propelled through the pipe through the use of high pressure"). Mr. Jay could not control the duct's kinetic energy as it settled in the bed, and was injured as a result. A179.

Mr. Jay's injuries are not elevation-related harms that flowed from the direct application of gravity to the duct. The force of gravity only incidentally acted on the duct because the workers intentionally

propelled it, at Mr. Jay's instruction, into the bed of the Tougher truck. *See Melo*, 92 N.Y.2d at 911; *Ross*, 81 N.Y.2d at 501.

Moreover, as in *Toefer*, the bed of the Tougher truck, which was only approximately two feet off the ground (A342), is not an elevated work surface within the scope of section 240(1). *See Toefer*, 4 N.Y.3d at 408 ("Casey was working on a large and stable surface only four feet from the ground. That is not a situation that calls for the use of a device like those listed in section 240 (1) to prevent a worker from falling."); *Brownell v. Blue Seal Feeds, Inc.*, 89 A.D.3d 1425, 1426 (4th Dep't 2011) ("It is well established that the surface of a flatbed truck does not constitute an elevated work surface for purposes of Labor Law § 240 (1)." (quotation marks omitted)). The hazards of loading the second duct into the bed of the truck here were that Mr. Jay or any other worker who may have decided to stand in the path of the duct would be struck by it. The District Court properly concluded that that struck-by risk is not the kind of physically significant elevation-related special hazard that falls within the scope of section 240(1). It is the type of normal construction site hazard that the New York Court of Appeals has routinely held does not entitle a plaintiff to recovery.

Indeed, this case is strikingly similar to *Rodriguez v. Margaret Tietz Ctr. for Nursing Care*, where the plaintiff was dismantling a hoist on the roof of a building manually when he, and three other workers who were assisting him, dropped a steel beam from seven inches above his head, and the beam fell and hit the plaintiff's knee, injuring him. *See Rodriguez*, 84 N.Y.2d at 843-44. Notwithstanding that the beam fell from above the plaintiff's head and was acted upon by gravity during its descent, the New York Court of Appeals held that the plaintiff "was not faced with the special elevation risks contemplated by the statute." *Id.* at 844. So too here.

The District Court properly held that harms caused by objects that are launched or intentionally propelled and fall as a result of their kinetic energy, as occurred here, do not flow from the direct application of the force of gravity on the object, as required under section 240(1). *See, e.g., Runner*, 13 N.Y.3d at 605 (distinguishing *Toefer* because *Toefer* involved the "launch of an object—not a falling object—in plaintiff's direction"). They are, instead, the normal dangers that Mr. Jay faced any time he is on the construction site. Thus, the District Court properly held that New York Labor Law § 240(1) does not apply.

Mr. Jay's argument that *Gutierrez v. Harco Consultants Corp.* (157 A.D.3d 537 (1st Dep't 2018)) and *Villanueva v. 114 Fifth Ave. Assocs. LLC* (162 A.D.3d 404 (1st Dep't 2018)) compel a different result is misplaced. Both cases are readily distinguishable.

In *Gutierrez*, for example, the plaintiff was "standing on footing rebar which was situated approximately nine feet above the ground and tying up 18-foot-long pieces of rebar that his coworkers were passing him from the ground below" when his co-workers dropped one of the pieces before the plaintiff had grabbed it, and it hit the plaintiff in the head, knocking him down. *Gutierrez v Harco Consultants Corp.*, No. 158284/2012, 2017 WL 529503, at *1-2 (Sup. Ct., New York County Feb. 9, 2017). Because the plaintiff was working on an elevated surface, *nine feet* above the ground, and his coworkers were lifting the pieces of rebar to him from the ground, a physically significant elevation differential, the Appellate Division, First Department held that the plaintiff "was exposed to elevation-related hazards" that required a section 240(1)-type safety device to secure and lift the rebar the nine feet from the ground. *Gutierrez*, 157 A.D.3d at 537.

In contrast here, Mr. Jay testified that loading the HVAC ducts into the bed of a truck was not the type of task that required a lull. A157. To be sure, it was not common for him to use one for the task. A157, A179. Moreover, as the Court of Appeals held in *Toefer* (4 N.Y.3d at 408), the two-foot differential between the ground and the bed of the truck was not a physically significant elevation differential that presented a special hazard contemplated by section 240(1) (A342), unlike the nine-foot differential in *Gutierrez*.

Mr. Jay's attempt to analogize this case to *Villanueva* similarly fails. In *Villanueva*, the plaintiff and three other workers were attempting to lower a 12-foot long steel beam from the 18th floor of the construction site to the ground floor by standing it up through the open hatch at the top of an 8-foot tall freight elevator. *Villanueva*, 162 A.D.3d at 405. While doing this, the workers dropped the beam onto the plaintiff's shoulder, injuring him. *See id.* The Appellate Division, First Department held that the plaintiff's task transporting the steel beam from the 18th floor to the ground floor presented an elevation-related special hazard for which a safety device should have been provided and wasn't. *See id.* Because the unsecured beam was dropped onto the

plaintiff, instead of being secured by a necessary safety device, the Court held that the plaintiff's injury resulted from the direct application of the force of gravity, and was covered by section 240(1). *See id.*

Unlike in *Villanueva*, Mr. Jay was not injured by any falling object that was dropped in the course of being hoisted or secured. He was struck by the second duct only after the workers intentionally propelled it into the bed of the truck where he was standing. A171, A176-78, A322. Moreover, a lull was available for Mr. Jay's use on the project site. A127. He just decided against waiting for it. A159, A167, A322-23. *Villanueva*, therefore, does not undermine the District Court's grant of summary judgment to GLOBALFOUNDRIES.

The District Court judgment should be affirmed.

B. Mr. Jay's Injury was not Proximately Caused by the Absence of Proper Protection from a Special Hazard.

Even if Mr. Jay was able to establish an elevation-related hazard protected by New York Labor Law § 240(1), which the District Court properly held he cannot, Mr. Jay cannot demonstrate that any alleged failure to provide him with a safety device of the type listed in section 240(1) was the proximate cause of his injuries. Therefore, the District Court judgment should be affirmed.

To establish proximate cause in a falling object case, "the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking." *Fabrizi v. 1095 Ave. of Americas, L.L.C.*, 22 N.Y.3d 658, 662-63 (2014) (quotation marks and citations omitted); *see also Quattrocchi v. F.J. Sciame Const. Corp.*, 11 N.Y.3d 757, 759 (2008). That is, "'[a] plaintiff must show that the object fell . . . *because* of the absence or inadequacy of a *safety device* of the kind enumerated in the statute.'" *Fabrizi*, 22 N.Y.3d at 663 (quoting *Narducci*, 96 N.Y.2d at 268). "[S]ection 240(1) does not automatically apply simply because an object fell and injured a worker." *Id.*; *see Blake*, 1 N.Y.3d at 289 ("[A]n accident alone does not establish a Labor Law § 240(1) violation or causation. This Court has repeatedly explained that 'strict' or 'absolute' liability is necessarily contingent on a violation of section 240(1).").

The HVAC duct here was not being hoisted or secured, within the meaning of section 240(1), at the time that it struck Mr. Jay. In the context of section 240(1) claims, to "hoist" has a specific meaning that involves the use of a "mechanical apparatus" to lift heavy objects. SPA11; *see* New York Labor Law § 240(1) (defining "hoists" as one of the

types of safety "devices" that must be provided); *see also Melo*, 92 N.Y.2d at 911 (noting that a mechanical hoist, "one of the safety devices enumerated in the statute," was moving a large steel plate that fell and injured the plaintiff); *Jarama v. 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 A.D.3d 691, 692 (1st Dep't 2018) (noting that a mechanical hoist was not provided "to aid in safely lifting and maneuvering the heavy stones"). As the District Court held, Mr. Jay specifically chose not to hoist the duct using a lull or other "mechanical apparatus," but instead decided to load it manually into the back of the Tougher truck. SPA11. Moreover, Mr. Jay admitted that the duct didn't need to be secured to complete that task. A157, A179. In fact, Mr. Jay conceded that he had loaded ductwork like this "thousands" of times without a lull. A157, A179.

What's more, a lull was, in fact, available to Mr. Jay on the project site, had he decided to wait the 20 to 25 minutes that he thought it would take for a lull to travel to his location to assist. A127, A159, A167, A322-23. Contrary to Mr. Jay's argument, the lulls were not "unavailable" merely because he would have had to wait a short period of time for one to travel to his location to assist with loading the

ductwork. The New York Court of Appeals has made clear that the safety device need not be *immediately* available to satisfy section 240(1). *See Gallagher v. New York Post*, 14 N.Y.3d 83, 88 (2010) ("Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident."). The safety device must only be present on the construction site and readily available for the worker's use, which Mr. Jay admitted the lulls were here, had he called for one and waited for it to arrive before loading the ducts.

Accepting Mr. Jay's argument that a safety device must be *immediately* available to satisfy section 240(1) not only runs counter to New York precedent, it would promote decisions for worker convenience and short cuts over worker safety on an inherently dangerous construction site. Such a rule is directly contrary to section 240(1)'s purpose. Indeed, section 240(1) was enacted to ensure that workers have ready access to the safety devices that they need to complete safely dangerous elevation-related construction work. *See Blake*, 1 N.Y.3d at

285-86 ("[T]he lawmakers fashioned this pioneer legislation to 'give proper protection' to the worker. Those words are at the heart of the statute and have endured through every amendment."). Safe work may not be the quickest means of completing a task, but the New York Legislature, through section 240(1), has chosen to promote worker safety over speed and convenience. This Court should decline Mr. Jay's invitation to reverse that legislative policy choice.

This is true notwithstanding that Mr. Jay believed that the lulls were engaged in other work at the time and he subjectively felt time pressure to complete the task. *See Robinson v. E. Med. Ctr., LP*, 6 N.Y.3d 550, 555 (2006) ("Plaintiff's own negligent actions—choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work—were, as a matter of law, the sole proximate cause of his injuries," even though he believed that "all the eight-foot ladders may have been in use at the time of his accident."). Mr. Jay was not faced with an emergency situation that forced him to place himself in harm's way instead of waiting for a lull to load the ductwork safely into the bed of the truck. *See, e.g., Egan v. A.J. Const. Corp.*, 94 N.Y.2d 839,

841 (1999); *Weingarten v. Windsor Owners Corp.*, 5 A.D.3d 674, 677 (2d Dep't 2004) (dismissing the plaintiff's section 240(1) claim for failure to establish proximate cause because the plaintiff's actions were unforeseeable and "no emergency situation existed"); *Antonik v. New York City Hous. Auth.*, 235 A.D.2d 248, 248 (1st Dep't 1997) (affirming dismissal of section 240(1) claim because "the decedent's attempt to exit the stalled elevator was an intervening act constituting a superseding cause of the accident. The decedent was an experienced worker, who was not in an emergency situation, and who would not have been injured had he waited for an engineer to restart the elevator, as was the practice in prior instances of elevators stalling at the project"), *lv. denied* 89 N.Y.2d 813 (1997); *Mack v. Altmans Stage Lighting Co.*, 98 A.D.2d 468, 473 (2d Dep't 1984) (affirming dismissal of section 240(1) claim for failure to establish proximate cause where "Plaintiff was not in an emergency situation and had he waited or asked a passerby to summon aid, he would not have been injured").

Mr. Jay admitted that the Tougher driver told him that the 3 p.m. deadline for returning the driver to the shop was nothing more than the end of the driver's day on the clock. A138, A148. Presumably, if the

Tougher driver didn't return to the shop in time, Tougher merely would have had to pay him for his extra time on the clock. And there is absolutely no evidence that Mr. Jay would have suffered any consequences at all for deciding to load the ductwork in the safest, albeit a delayed, manner.

Moreover, the instruction from Mr. Jay's supervisor to get the Tougher driver off the site and back to the shop by 3 p.m. was given during Mr. Jay's first phone call with Jerry. A138-40, A159. Once Jerry changed Mr. Jay's task substantially to include travelling across the very congested site to retrieve the HVAC ductwork, which Mr. Jay estimated would take 20 to 25 minutes on its own, before assisting the Tougher driver off the site, Jerry never told Mr. Jay that the 3 p.m. deadline still applied. A149-50.

Contrary to Mr. Jay's characterization, this was not an emergency situation that forced him to decide to load the ducts manually without the use of an available lull. Lulls were available on site for Mr. Jay's use in loading the ductwork into the Tougher truck, he exclusively controlled the method by which the ductwork would be loaded and could have decided to wait the 20 to 25 minutes necessary to perform the task

safely, and simply decided not to do so. A127, A132-33, A159, A167, A175, A322-23.

Once Mr. Jay made the independent decision to load the ducts manually without a lull, and to flip them 180 degrees into the bed of the truck to do so, there was no safety device listed in section 240(1) that could have possibly prevented his injuries. Indeed, the best way to have prevented Mr. Jay's injury was for him to use his authority to control the method by which the ducts would be loaded into the truck and make different decisions: first, to wait for the lull because he had not, at any time, been directed that the Tougher driver's 3 p.m. deadline to clock out was an emergency situation that necessitated eschewing the safest method for loading the ducts or, second, to make his own safety the highest priority by not getting into the bed of the truck where the duct was going to be loaded.

Mr. Jay, therefore, cannot establish that the failure to provide a safety device under section 240(1) was the proximate cause of his injuries, and his section 240(1) claim was properly dismissed on summary judgment. The District Court judgment should be affirmed.

II. THE DISTRICT COURT JUDGMENT SHOULD BE AFFIRMED ON ALTERNATIVE GROUNDS.

The District Court judgment should also be affirmed because Mr. Jay's actions were the sole proximate cause of his injuries. As the New York Court of Appeals has explained, "[w]here a plaintiff's actions are the sole proximate cause of his injuries, liability under Labor Law § 240(1) does not attach." *Robinson*, 6 N.Y.3d at 554 (cleaned up[1]); *see also Blake*, 1 N.Y.3d at 290. That is, where, as here, adequate safety devices are provided on the construction site, even if they are not immediately available or located in the immediate vicinity of the accident, and the plaintiff "either does not use or misuses them," there is no violation of section 240(1) because the plaintiff's injuries were not proximately caused by any failure to provide adequate safety devices, but by the plaintiff's actions alone. *Robinson*, 6 N.Y.3d at 554. Indeed, the New York Court of Appeals explained,

> to impose liability for a[n] . . . injury even though all the proper safety precautions were met would not further the

[1] "Cleaned up" is a new parenthetical used to eliminate unnecessary explanation of non-substantive prior alterations within quotations. *See* Jack Metzler, Cleaning Up Quotations, 18 J. APP. PRAC. & PROCESS 143 (2017), *available at* https://ssrn.com/abstract=2935374 (last accessed Oct. 9, 2018); *see also Avillan v. Brennan*, No. 16 Civ. 5611, 2018 WL 4680027, at *3 (S.D.N.Y. Sept. 28, 2018); *Stephens v. Brunsden*, No. 17-CV-1153, 2018 WL 4043147, at *4 (E.D.N.Y. Aug. 23, 2018).

> Legislature's purpose. It would, instead, be a sweeping and dramatic turnabout that the statute neither permits nor contemplates. As we recognized in a related context, the language of Labor Law § 240(1) must not be strained to accomplish what the Legislature did not intend. If liability were to attach even though the proper safety devices were entirely sound and in place, the Legislature would have simply said so, or made owners and contractors into insurers. Instead, the Legislature has enacted no-fault workers' compensation to address workplace injuries where, as here, the worker is entirely at fault and there has been no Labor Law violation shown.

Blake, 1 N.Y.3d at 292 (quotation marks and citation omitted).

Here, Mr. Jay admitted that lulls were available on the site for his use, and that it was exclusively within his province, as the materials handler, to choose the method by which the ducts were loaded into the Tougher truck. A127, A159, A167, A175, A322-23. Instead of waiting the 20 to 25 minutes it would have taken for a lull to travel to his location to assist in performing the task safely, Mr. Jay decided, first, to load the ducts manually by having the workers propel them into the back of the truck (A171, A176-78, A322) and, second, to get into the bed of the truck before the second duct was loaded in the same manner. A172-73. Those decisions were solely of Mr. Jay's own making. Mr. Jay's supervisor never told Mr. Jay how he should complete the task, but left that decision for Mr. Jay to make. A165-66.

But for his decisions not to wait for a lull to load the ducts safely and then to place himself in the bed of the truck directly in the path of the second duct as it was being propelled according to Mr. Jay's instructions, Mr. Jay would not have been injured. In fact, even accepting, arguendo, Mr. Jay's argument that he was under time pressure and was forced to load the ducts manually instead of waiting for a lull, the time pressure in no way compelled him to jump into the bed of the Tougher truck before the second duct was loaded and place himself in harm's way. Mr. Jay's negligent decision to do so was the sole proximate cause of his injuries. *See, e.g., Robinson*, 6 N.Y.3d at 554; *Montgomery v. Fed. Express Corp.*, 4 N.Y.3d 805, 806 (2005); *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 40 (2004); *Kipp v. Marinus Homes, Inc.*, 162 A.D.3d 1673, 1675 (4th Dep't 2018) (a plaintiff's mere negligence is sufficient constitute the sole proximate cause of his or her injuries; more egregious misconduct is not required).

The District Court, therefore, properly awarded GLOBALFOUNDRIES summary judgment and dismissed Mr. Jay's New York Labor Law § 240(1) claim in its entirety. The District Court judgment should be affirmed.

III. MATERIAL ISSUES OF FACT PRECLUDE AN AWARD OF SUMMARY JUDGMENT TO MR. JAY.

Mr. Jay argues that the District Court erred not only by granting GLOBALFOUNDRIES summary judgment dismissing the complaint, but also by not awarding him partial summary judgment on New York Labor Law § 240(1) liability. As demonstrated conclusively above, the District Court properly awarded GLOBALFOUNDRIES summary judgment and no legal basis exists to vacate the District Court judgment. *See* Points I and II, *supra*. At the very least, issues of material fact exist that preclude an award of summary judgment to Mr. Jay.

A. GLOBALFOUNDRIES' Expert Report may be Considered in Opposition to Mr. Jay's Cross Motion for Partial Summary Judgment.

On Mr. Jay's cross motion for partial summary judgment on liability, the evidence must be viewed in the light most favorable to GLOBALFOUNDRIES, as the nonmoving party. *See Diaz*, 616 F. App'x at 451. As this Court has explained, "[a]ffidavits submitted to defeat summary judgment must be admissible themselves or must contain evidence that will be presented in an admissible form at trial." *Santos v. Murdock*, 243 F.3d 681, 683 (2d Cir. 2001). Indeed, the nonmoving party

need not "produce evidence in a form that would be admissible at trial," but must "by her own affidavits . . . designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (punctuation and citation omitted).

The evidence used to defeat a summary judgment motion, therefore, may contain evidence that is not, at that stage, in admissible form, so long as it can be reduced to admissible form for trial. Although the District Court may have acted within its discretion not to consider GLOBALFOUNDRIES' expert report of Steven Pietropaolo, P.E. (A385-98) on GLOBALFOUNDRIES' affirmative summary judgment motion, the expert report can be considered in opposition to Mr. Jay's cross motion. It cannot be disputed that Mr. Pietropaolo, a professional engineer who is qualified to opine on how the incident occurred, can swear to the truth and accuracy of the expert report's conclusions at trial, and it would be admissible. *See* Fed. R. Civ. P. 702, 901(b)(1); *see generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The expert report, therefore, properly may be considered to raise a material issue of fact.

B. Issues of Material Fact Preclude an Award of Partial Summary Judgment to Mr. Jay on Liability.

As the District Court noted, the facts underlying the incident here are largely undisputed. The facts that are disputed, however, are material and preclude an award of summary judgment to Mr. Jay.

First, the parties dispute whether the second duct remained in contact with the bed of the Tougher truck while it was loaded. Mr. Pietropaolo concluded that

> [b]ased on the description of the procedures used, and simple physics, the duct would have remained in contact with the bed of the truck due to the use of the back bed as the 'fulcrum' point. The duct simply rotated about its axis. Based on the weight of the duct, there is enough energy created during this rotational move to cause the impact injuries as described by [Mr. Jay].

A398. This factual issue is material because it shows that Mr. Jay's injuries were not caused by the direct application of the force of gravity, and thus he cannot sustain a New York Labor Law § 240(1) claim.

Second, Mr. Jay's own testimony raises a material issue of fact regarding whether lulls were available on site for his use at the time of the accident. Mr. Jay testified that lulls had been provided on site, but that he believed that they were otherwise engaged or too far away at the time to wait to load the ducts. A127, A167-68. He did not call his

supervisor to request the assistance of a lull, nor confirm that neither lull that he knew was on site was available. A166-68. Material factual issues therefore exist concerning whether the lulls were available to Mr. Jay.

Third, a material issue of fact exists whether Mr. Jay actually faced an emergency situation as a result of the 3 p.m. deadline to return the Tougher driver to the shop to clock out. By the time that Mr. Jay arrived at approximately 2:18 p.m. to guide the Tougher driver off of the very congested construction site, it was already likely that the Tougher driver was going to be unable to return to the shop by 3 p.m. A144-45. Indeed, to meet that "deadline" for the end of the Tougher driver's workday, Mr. Jay would have had to finish at least 8 steps in 12 minutes to permit the Tougher driver enough time to drive the 30 minutes it took to get back to the shop: (1) wait for the lull to finish unloading the Tougher truck of the steel; (2) visually guide the truck out of the congested area slowly; (3) speak to Jerry and receive instructions changing the task to include first picking up the HVAC ducts; (4) drive the long distance across the construction site to the location of the ducts; (5) back the truck down a "long," narrow road; (6)

inspect the ducts and determine the method by which they should be loaded into the truck; (7) manually load the two ducts into the back of the Tougher truck; and then (8) guide the Tougher driver back through the congestion and off the site. A138-40, A144-51, A153, A159, A161-62. Put simply, that was not possible.

Moreover, after Jerry changed the Mr. Jay's task, he did not reiterate to Mr. Jay that the 3 p.m. deadline still applied. Material issues of fact exist, therefore, whether Mr. Jay actually faced an emergency situation that forced him to load the ducts manually, as he claims, and what the consequences would have been had the Tougher driver not arrived back at the shop by 3 p.m.

Third, to qualify for protection under New York Labor Law § 240(1), the plaintiff must initially establish that his or her work involved the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." New York Labor Law § 240(1). If the plaintiff is not involved in construction work within the meaning of section 240(1), he or she does not qualify for its protections, and a section 240(1) claim must be dismissed. *See e.g. Peterkin v. City of New York*, 5 A.D.3d 652, 652 (2d Dep't 2004) (holding that the "plaintiff

was not engaged in construction work within the meaning of Labor Law § 240 (1)" where he was "helping to unload from a truck bundles of fencing panels that he and a coworker had delivered to an off-site storage yard for subsequent use in a street repair project"), *lv. denied* 3 N.Y.3d 605 (2004); *Parot v. City of Buffalo*, 174 A.D.2d 1034, 1034 (4th Dep't 1991) ("The court properly dismissed his Labor Law § 240 (1) cause of action because the delivery of the street light standards was not to a construction site but was merely for stockpiling for future use.").

Here, questions of facts exist whether Mr. Jay's work to load the ducts into a truck to be taken off site and modified for use at an undefined future time is covered by section 240(1). A149-50. As a materials handler, Mr. Jay was not involved in the construction or alteration of a building or structure at the GLOBALFOUNDRIES' site (A123-24), and his work in this instance was not intended to ready the ductwork for "imminent use" in the construction or necessary to begin or complete the construction. *See Demeza v. Am. Tel. & Tel. Co.*, 255 A.D.2d 743, 744 (3d Dep't 1998) (dismissing a section 240(1) claim because the work was not covered where "the reels being loaded were

neither being readied for imminent use in a construction project, nor was their removal a necessary prerequisite to the commencement or completion of the actual construction work" (quotation marks and citations omitted)). Rather, he testified, the ductwork had to be taken back to the Tougher shop to be modified. A149-50, A172. There is no evidence that the ducts would then be immediately returned to the GLOBALFOUNDRIES' site for use in the construction, or merely stockpiled for future use. A149-50, A172. Accordingly, questions of fact exist regarding whether Mr. Jay's work at the time of the incident satisfies the threshold requirement to qualify as construction work protected by section 240(1).

Finally, if summary judgment is not awarded to GLOBALFOUNDRIES on the ground that Mr. Jay's decisions to forgo the use of the lulls and then get into the bed of the truck in the direct path where the second duct was being loaded were the sole proximate cause of his injuries (*see* Point II, *supra*), a material issue of fact at least exists precluding a partial summary judgment award to Mr. Jay. The purported time pressure that Mr. Jay felt—notwithstanding that the Tougher driver was likely already late to return to the shop by the time that Mr. Jay

and the driver drove to the location of the ducts—certainly did not compel Mr. Jay to jump into the path of the second duct before it was loaded. That was his own "foolish[]" decision (A172), and raises a material issue of fact regarding whether he was the sole proximate cause of his injuries.

As demonstrated above, the District Court judgment dismissing the complaint should be affirmed in its entirety. In the event that this Court holds otherwise, material issues of fact preclude an award of partial summary judgment to Mr. Jay.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

/s/ Robert S. Rosborough IV
ROBERT S. ROSBOROUGH IV
WHITEMAN OSTERMAN & HANNA LLP
One Commerce Plaza
Albany, New York 12260
(518) 487-7600
rrosborough@woh.com

Counsel for Defendant-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,251 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font.

/s/ Robert S. Rosborough IV
Robert S. Rosborough IV

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2018, I caused the foregoing to be filed through this Court's CM/ECF NextGen appellate filer system, which will send a notice of electronic filing to the following counsel of record for Plaintiff-Appellant:

Ryan Manley
Harris, Conway & Donovan, PLLC
Five Clinton Square
The Patroon Building
Albany, New York 12207
(518) 436-1661
RManley@capitalregionlaw.com

/s/ Robert S. Rosborough IV
Robert S. Rosborough IV