To be argued by:
MICHAEL T. REAGAN
Time Requested: 15 minutes

Supreme Court

State of New York

APPELLATE DIVISION — SECOND DEPARTMENT

LAWRENCE SEEM,

Plaintiff-Respondent-Appellant,

against

Docket No. 2019-11926

PREMIER CAMP COMPANY, LLC d/b/a CRESTWOOD COUNTRY DAY, CRESTWOOD COUNTRY DAY SCHOOL, INC., ROUND SWAMP ROAD ASSOCIATES LLC, SPLASH SWIMMING POOL & SPA, INC.,

Defendants-Respondents,

and

DILEO LANDSCAPING, LTD.,

Defendant-Appellant-Respondent.

REPLY BRIEF FOR DFENDANT-APPELLANT-RESPONDENT

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PRELIMINARY STATEMENT

The defendant-appellant, DiLeo Landscaping, Ltd., ("DiLeo") submits the within reply appellate brief in further support of its instant appeal from the Order of the Supreme Court, County of Suffolk, (Hon. Joseph A. Santorelli), dated September 16, 2019, which denied DiLeo's motion for summary judgment and dismissal of plaintiff-respondent-appellant, Lawrence Seem's, ("Seem"), complaint.

SYNOPSIS OF LEGAL ARGUMENTS

DiLeo Established, in the First Instance, its Entitlement to Summary Judgment

Seem asserts that DiLeo failed to establish, in the first instance, its entitlement to summary judgment, as: (1) DiLeo "speculated" that it was Seem's failure to unpin the tailgate during the unloading process which was the sole proximate cause of his accident; and (2) Seem's expert has opined that his accident occurred because Seem was 'directed' to unload the tractor and trailer upon ground unsuitable for this purpose. As set forth, *infra*, Seem's argument is without merit.

First, DiLeo's argument is not speculation. In this regard, expert opinion is not required to establish that concentrating 60,000 pounds, or *30 tons*, of recycled concrete aggregate at the tail end of a flatbed delivery truck bed lifted to a 45 degree angle will render a delivery vehicle dangerously unstable. This is simple common sense, explicitly recognized in numerous trade publications and, being an experienced dump truck operator, a fact of which Seem must have been aware.

Second, Seem's 'expert's' opinion is rank speculation, predicated upon false factual assumptions. In this regard, while Seem's engineer, James Pugh, asserts that the proximate cause of Seem's accident was the "unstable, loose, somewhat wet and un-compacted dirt" upon which he vehicle was unloaded,[1] there is absolutely no evidentiary support for these assertions, which are belied by the photographic evidence and the laws of physics. Moreover, Pugh's opinion is predicated upon his demonstrably false assumption that that trailer's tailgate had been unlatched prior to the commencement of the unloading process. *In reality*, Seem's accident occurred because he attempted to dump 60,000 pounds of recycled concrete aggregate over the top of a closed trailer tailgate.

Seem's 'Premature'/Withholding Records Assertions

Seem asserts that DiLeo's summary judgment motion was premature, as DiLeo intentionally withheld "contractual records" for the purpose of impeding plaintiff's prosecution of the within action. Seem's argument is frivolous. As established in the underlying motion practice, DiLeo was a landscaper which *only* provided property maintenance services, in the spring of every year, at the Crestwood Country day camp. Thus, DiLeo has no such 'contractual records.' Seem has not – because he cannot – point to one scintilla of evidence that DiLeo has withheld anything, let alone for the purported purpose of 'preventing plaintiff

[1] R, 601-602.

from making a case for Labor Law §241(6),'[2] and the making of this baseless accusation warrants rebuke.

Seem' 'Failure to Retrofit' Contention

Seem asserts that "this was a rushed job for the convenience of the defendant at Mr. Seem's expense," and that DiLeo was negligent because it "could have [ ] retrofitted the truck with Outrigger stabilizers to give the truck more stability, but that wasn't done."[3] Counsel's argument is absurd. DiLeo was a landscaper contractor – nothing more. If 'safety devices' were required, it was incumbent upon plaintiff's employer to provide same. It was <u>not</u> within DiLeo's ability, let alone its obligation, to, upon observing Seem's delivery truck, take possession of same and bring it to a 'retrofitter' to have 'outriggers' installed.

Labor Law §240(1)

a. Seem's 'Gravity Related' Argument

Seem asserts that he is entitled to Labor Law §240(1) recovery, as "[i]t is indisputable that Mr. Seem sustained gravity related injuries."[4] Seem's argument is overly superficial and without merit. As set forth in DiLeo's initial brief - and simply ignored by Seem in his opposition thereto - not every injury tangentially related to the effects of gravity implicates Labor Law §240(1). Rather, scaffold law liability is contingent upon the existence of a hazard contemplated in section

[2] *See* Seem's appellate brief, at 50.
[3] *See* Seem's brief, at 31.
[4] *See* Seem's appellate brief, at 39.

240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein, and it has been explicitly held that the overturning of a dump truck during the course of its unloading, occurring at ground level, does not involve an elevation-related risk of the kind against which Labor Law §240(1) was meant to protect.

b. Seem's 'Working on a Structure' Contention

Seem contends that he was working upon a Labor Law 'structure' at the time of his accident. Seem's argument does not withstand even cursory scrutiny. As set forth in DiLeo's initial brief – and, once again, simply ignored by Seem in his opposition thereto - it is settled law that roadway surfaces are not 'structures' within the meaning of the Labor Law. In apparent recognition of this fact, under the subheading "The Parking lot is a Structure"[5] Seem argues that "[t]he raised container bed of the tractor trailer truck that Mr. Seem was working on meets the definition of a structure within the meaning of Labor Law §240(1)."[6] However, Seem's 'bait and switch' argument ignores the inconvenient fact that, to be entitled to scaffold law recovery, the plaintiff's injury must have been sustained while he/she was working *upon* a 'building or structure' - that a plaintiff was, purportedly, utilizing a 'structure' to perform work is insufficient.

c. Seem's 'Repairing'/'Altering' Contention

Seem asserts that "[h]owever labeled, the project at the parking lot was essentially paving… and [ ] fits the description of 'repairing' and 'altering' work of

[5] *See* Seem's appellate brief, at 42.
[6] *See* Seem's appellate brief, at 44.

Labor Law §240(1).” Seem’s contention is without merit. First, to constitute an ‘alteration,’ the work at issue must involve the making of a significant physical change to the configuration or composition of a building or structure, and, in this matter: (1) there was no significant physical change; (2) let alone to a building or Labor Law ‘structure.’ Second, the activity underway at the time of Seem’s injury involved the refurbishment of the gravel parking lot prior to the commencement of the camp’s summer season, and it is settled law that routine maintenance activities which take place in a non-construction, non-renovation context, undertaken to remediate conditions attributable to normal wear and tear, are not entitled to statutory protection.

LEGAL ARGUMENTS

POINT I

SOLE PROXIMATE CAUSE

1. Seem’s Expert’s Opinion is Rank Speculation Devoid of Any Evidentiary Support

Engineer Pugh’s contention - that the proximate cause of Seem’s accident was the unloading of the dump truck on “unstable ground” - is based upon false factual assumptions and constitutes rank speculation. Scrutiny reveals that, *in reality*, it was Seem’s failure to unpin the tailgate during the unloading process which caused the truck to topple over. "An expert's affidavit - offered as the only evidence to defeat summary judgment - must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation, and

would, if offered alone at trial, support a verdict in the proponent's favor." *Ramos v. Howard Industries, Inc*. 10 N.Y.3d 218, 224, 885 N.E.2d 176, 179, 855 N.Y.S.2d 412, 415 (2008); *Darrow v. Hetronic Deutschland GMBH*, 181 A.D.3d 1037, 1042, 121 N.Y.S.3d 173, 178 (3rd Dept. 2020) (same).

"An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion." *Rosato v. 2550 Corp.*, 70 A.D.3d 803, 805, 894 N.Y.S.2d 513, 515 (2d Dept. 2010) (rejecting the opinion of plaintiffs' environmental investigator - that the subject building was contaminated by leaking USTs beneath a gas station – as it "was not based upon facts either contained in the record or within his personal knowledge"); *Pascuzzi v. CCI Companies Inc.*, 292 A.D.2d 685, 739 N.Y.S.2d 209 (3rd Dept. 2002) (in order to be properly admitted, expert opinion evidence must be based upon facts either in the record or personally known to the witness; an expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion). Likewise, "[a]n expert cannot reach a conclusion by reliance on a "contingent, speculative, or merely possible" foundation of material facts." *Kirker v. Nicolla*, 256 A.D.2d 865, 867, 681 N.Y.S.2d 689, 691 (3rd Dept. 1998). Accordingly, where - *as here* - "an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion is of no probative force."

Persaud v. City of New York, 307 A.D.2d 346, 347-348, 762 N.Y.S.2d 641, 644 (2d Dept. 2003); see *Stewart v. Canton-Potsdam Hosp. Found., Inc.*, 79 A.D.3d 1406, 1408, 912 N.Y.S.2d 773, 775 (3rd Dept. 2010) (holding to be of no probative value an "expert's opinion [which] is based on an assumption that enjoys no evidentiary support in the record"); *Fernet v. Morvillo*, 30 A.D.3d 670, 815 N.Y.S.2d 795 (3rd Dept., 2006) (expert's opinion found no evidentiary support in the record, and thus not entitled to consideration).

In this matter, plaintiff's expert engineer states his belief that, immediately prior to Seem's accident, "[a]s with prior loads, the operator [i.e., Seem] electronically unhitched the pin to open the bottom of the tailgate from inside the cab," after which he recited the following, purported facts:

> At the time of the incident, the only difference between the subject load when the truck toppled over and the prior loads that were successfully completed without incident was the ground that the truck rested on. The prior were done safely on stable, firmly packed ground, i.e., a gravel parking lot, while the last load when the truck toppled over was done on unstable, loose, somewhat wet and un-compacted dirt.

(R, 601-602).

Thereafter, Pugh opines that:

> Given that all factors were the same between the successful unloadings at the gravel parking lot and the unsuccessful unloading on the soft, somewhat wet, un-compacted dirt of the last load - same RCA materials, same truck, same wheels, same driver and same tailgate - and the only difference is the ground the truck rested on on these occasions, it is determined to a reasonable degree of engineering certainty that the cause of the toppling of the tractor-

> trailer truck… [was] due to unstable, soft, somewhat wet, un-compacted ground that the truck rested on.

Seem's expert's opinion reflects a stunning ignorance of, and/or blasé disregard for, the actual facts. First while in his made-for-the-motion affidavit Seem asserts that upon each delivery of RCA he unlatched the tailgate before commencing the unloading process: (a) both Mr. DiLeo and Splash Swimming owner, Lawrence Stadleman, gave sworn affidavits affirming that he did not, which Seem essentially concedes, stating that "even if the pins of the tailgate were still hitched and the tailgate did not open, the truck would not have tilted and toppled over… has the ground been firm and stable;"[7] and (b) the post-accident photographs of the subject 22 wheel tractor and trailer clearly show that the trailer's tailgate was closed, which, as shall be established, *infra,* would not have been physically possible had 60,000 pounds of RCA been spilling out of the bottom thereof when the truck and trailer tipped over. Second there is a total and complete absence of *any* evidence that the subject occurrence took place upon "unstable, loose, somewhat wet and un-compacted dirt."[8] In this regard, not only did Pugh neither inspect the accident site nor reference any evidence upon which he could possibly render this determination, but the photographic evidence clearly demonstrates that the tractor and trailer were located upon a dry, well-worn pre-

[7] R, 153.
[8] R, 601-602

existing dirt and gravel road which, as demonstrated by the numerous tire marks thereupon, was well used by vehicular traffic. (R, 110).

It shall be demonstrated herein that, *in reality*, the dispositive difference between "the subject load when the truck toppled over and the prior loads that were successfully completed"[9] is that, after Seem arrived with the first delivery of gravel and began lifting up the bed of the tractor trailer - without having first opened the tailgate - Mr. DiLeo screamed to Seem, telling him to lower the trailer bed so that the tailgate could be opened, after which Seem complied. (R, 107, 698-699). However, when Seem thereafter returned with the second load and began dumping same without the tailgate being unhitched, he ignored Splash Swimming owner, Lawrence Stadleman's, warning that he had to unlatch the tailgate and proceeded ahead with the unloading process.

2. DiLeo Need Not Present Expert Testimony to Establish Sole Proximate Cause

It is not necessary that DiLeo rely upon expert testimony to demonstrate that Seem's reckless failure to unlatch the trailer's tailgate was the proximate cause of his accident. Expert testimony is necessary only when it clarifies an issue calling for professional or technical knowledge possessed by the expert which beyond the ken of a lay person. *De Long v. County of Erie*, 60 N.Y.2d 296, 457 N.E.2d 717 (1983) ("expert opinion is proper when it would help to clarify an issue calling for

[9] R, 601-602.

professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror").

To illustrate, in *Klein v. Hyster Co.*, 255 A.D.2d 425, 680 N.Y.S.2d 583 (2d Dept. 1998) plaintiff brought an action, seeking recovery for personal injuries allegedly sustained when a load of lumber fell on his hand as he operated a forklift. After the jury rendered a plaintiff's verdict, it was set aside by the trial court upon the ground that plaintiff failed to demonstrate the defendant's acts/omissions were a proximate cause of his accident. The Appellate Division affirmed the trial court's decision, holding that "the plaintiff failed to show any causal connection between his injury and the allegedly defective design of the retaining pin in the forklift[,] [as] plaintiff admitted that he did not use either a retaining pin or a carriage bolt to lock the forks into place, even though he knew that without such a safety mechanism, the forks could and did move." *Id.*, 255 A.D.2d at 426, 680 N.Y.S.2d at 584. Thereafter, the Court held that "the trial court did not err in precluding the plaintiff's expert witness from testifying as to proximate cause because… that connection did not require expert testimony but an understanding of the facts surrounding the accident." *Id.*

In this matter, in arguing that Seem's failure to unlatch the tailgate was not the proximate cause of his accident, opposing counsel contends as follows:

> "Defendant claimed that the truck toppled the last time because Mr. Seem [ ] forgot to unlatch the pin of the tailgate the second time as he

> did the first time. If that were the case, then why didn't the truck topple the first time when defendant also claimed that Mr. Seem forgot[10] to unpin the tailgate?"

The answer to counsel's rhetorical question is simple – as set forth above, when Seem made his first delivery the trailer's tailgate was, ultimately, unhitched. (R, 107, 698-699). However, when Seem thereafter returned with the second load and began dumping same without the tailgate being unhitched, he ignored Splash Swimming owner, Lawrence Stadleman's, warning that he had to unlatch the tailgate and proceeded ahead with the unloading, resulting in his accident. (R, 116).

In arguing that his failure to unlatch the tailgate was not the proximate cause of his accident, Seem also contends as follows:

> "[U]nder the defendants rational, (*sic*) every single time the operator of the truck forgot to unpin the tailgate, the bed could not be lowered safely and that it must necessarily result in the whole truck tipping over… Defendant's version of event (*sic*) would make it unsustainable to operate a dump truck."[11]

Seem's argument is without merit. Lifting a trailer bed to a 45 degree angle and attempting to unload 60,000 pounds, or *thirty tons,* of recycled concrete aggregate by spilling it over the top of a closed tailgate can - *and did* - destabilize the tractor/trailer and resulted in its overturning. In no way does this equate to an

[10] DiLeo does not contend, and the facts do not demonstrate, that Seem 'forgot' to unlatch the tailgate – this was an intentional decision for which he alone should bear the consequences.

[11] See plaintiff's brief, at 34.

assertion that “every single time the operator of the truck forgot to unpin the tailgate…it must necessarily result in the whole truck tipping over.”[12] Moreover, it is hardly ‘unsustainable’ to unlatch a dump truck’s tailgate prior to dumping a load.

In conclusion, expert opinion is not needed to establish that concentrating 30 tons of recycled concrete aggregate at the tail end of a flatbed delivery truck bed lifted to a 45 degree angle will destabilize the vehicle. See https://www.safetytalkideas.com/safetytalks/dump-truck-overturns/ (noting that “a load that shifts… to the back of the bed can cause a tip over incident,” with a “common example” being “a tailgate that does not open or unlatch,” causing the entire load to shift to the back of the bed and causing a turn over). This is a matter of common sense, and Seem’s reckless disregard of same was the sole proximate cause of his accident.

3. Seem’s Version of His Accident’s Occurrence is Belied by the Photographic Evidence

"'[I]nsufficient’ evidence is, in the eye of the law, no evidence." *Blum v. Fresh Grown Pres. Corp.*, 292 N.Y. 241, 245, 54 N.E.2d 809, 811 (1944). Accordingly, “testimony ‘'which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue,[13] physically impossible,[14] contrary to

[12] *Id*.

[13] S*ee Dorazio v. Delbene*, 37 A.D.3d 645, 646, 830 N.Y.S.2d 329, 329 (2d Dept. 2007) ("plaintiff's version of the accident was not credible as a matter of law since it was refuted by the physical evidence at the accident scene and the characteristics of the location where the collision

experience,[15] or self-contradictory,[16] is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case.'" *Malanga v. City of New York*, 300 A.D.2d 549, 550, 752 N.Y.S.2d 391, 393 (2d Dept. 2002), *quoting People v. Garafolo*, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500 (2d Dept. 1974).

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occurred"); *Abrams v. Gerold*, 37 A.D.2d 391, 394, 326 N.Y.S.2d 1, 5 (1st Dept. 1971) ("since the physical facts demonstrate that appellant's approaching vehicle must have been there to be seen, [respondent's] testimony that he 'looked in the direction of an approaching car in full view and did not see it' is 'incredible as a matter of law'");

[14] *See Ardolic v. New Water St. Corp.*, 26 Misc. 3d 145(A), 907 N.Y.S.2d 435 (N.Y. App. Term. 2010) (elevator repairer established, *prima facie*, that it was not negligent by showing that it was mechanically impossible for the accident to have occurred in the manner alleged by plaintiff); *Williams v. Port Auth. of New York & New Jersey*, 247 A.D.2d 296, 669 N.Y.S.2d 285 (1st Dept. 1998) (escalator rider could not recover in negligence action in which she alleged that she fell when escalator suddenly reversed direction, as un-contradicted evidence showed that her theory was an utter impossibility); *Stone v. Great E. Stages*, 256 A.D. 822, 8 N.Y.S.2d 673, 673 (2d Dept. 1939) *aff'd*, 280 N.Y. 762, 21 N.E.2d 524 (1939) (evidence adduced by plaintiff as to manner in which accident happened was physically impossible and thus incredible as matter of law and raised no issue); *Spitz v. United Elec. Light & Power Co.*, 175 N.Y.S. 737 (App. Term. 1919) (in action by plaintiff, struck while crossing a street by defendant's automobile, plaintiff's evidence as to the manner in which injury occurred *held* physically impossible);

[15] *See Sullivan v. Pilevsky*, 281 A.D.2d 410, 721 N.Y.S.2d 396, 396-97 (2nd Dept., 2001) (rejecting plaintiff's testimony that she was caused to fall by particles of styrofoam dust which entered her eye as contrary to "common sense and common knowledge"); *Connolly v. City of New York*, 26 A.D.2d 921, 274 N.Y.S.2d 818 (1st Dept. 1966) (plaintiff's testimony that while he was dozing off in back seat of automobile, surrounded by three other passengers in back and three more in front, while automobile was traveling between 50 and 55 miles per hour, he saw hole in pavement which allegedly caused automobile to lurch into trolley tracks, was incredible as matter of law and could not be accepted as evidence that depression was proximate cause of accident); *Feinstein v. New York City Transit Auth.*, 17 Misc. 2d 45, 46, 190 N.Y.S.2d 304, 305 (App. Term 1958) (verdict properly set aside, as " the testimony of plaintiff-husband that on the day preceding the accident he saw the 'jelly spot' on which his wife claims to have slipped was too pat to be worthy of belief").

[16] *See Hacker v. City of New York*, 26 A.D.2d 400, 403, 275 N.Y.S.2d 146, 151 (1st Dept., 1966) *aff'd*, 20 N.Y.2d 722, 229 N.E.2d 613 (1967) ("the case as presented by plaintiff is so obscured by contradictions, evasions and inherent improbability as to warrant rejection as incredible").

When "[t]he credible proof negates plaintiff's contention as to how the accident occurred," *McCarthy v. Port of New York Auth.*, 30 A.D.2d 111, 114, 290 N.Y.S.2d 255, 258 (1st Dept. 1968) the court is "'not required to give credence to a story [which is] inherently improbable.'" *Id*., *quoting Hacker v. City of New York*, 26 A.D.2d 400, 403-04, 275 N.Y.S.2d 146, 151 (1st Dept. 1966) *aff'd*, 20 N.Y.2d 722, 229 N.E.2d 613 (1967) *citing Bottalico v. City of New York*, 281 App. Div. 339, 341, 119 N.Y.S.2d 704, 706 (1st Dept. 1953).

The Court of Appeals has clearly enunciated the standard for the direction of judgment when the only opposing evidence is incredible:

> "When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 246, 54 N.E.2d 809 (1994).

Applying this standard, the courts have rejected testimony which is at irreconcilable variance with the documentary evidence. *See Harnischfeger v. Moore*, 79 A.D.3d 1706, 1708, 914 N.Y.S.2d 482, 484 (4th Dept. 2010) (rejecting testimony which "was contradicted by documentary evidence in the record"). Likewise, photographs may be relied upon to demonstrate that a party's testimony is, as a matter of law, unworthy of belief. *Walker v. Murray*, 255 A.D. 815, 7 N.Y.S.2d 336 (2d Dept. 1938) *aff'd*, 280 N.Y. 709, 21 N.E.2d 209 (1939) ("[t]he

plaintiff was not entitled to recover for injuries sustained in fall on stairs leading to train level at defendant's subway station, where photographs, including plaintiff's exhibit, showed without doubt that his testimony concerning condition of stairway was incredible as matter of law"). Indeed, the court so recently ruled in *Weinert-Salerno v. Stefanski*, 170 A.D.3d 1601, 1603, 94 N.Y.S.3d 496, 498 (4th Dept. 2019). In that case, plaintiff commenced an action seeking damages for injuries that she allegedly sustained when the vehicle she was operating was involved in a series of collisions with three other vehicles. Rejecting plaintiff's testimony that one of the defendant driver's vehicles was "positioned at a 90-degree angle to plaintiff's vehicle when the two vehicles collided," *Id*., 170 A.D.3d at 1603, 94 N.Y.S.3d at 498, the court noted that "[t]he photographic evidence submitted in support of and in opposition to the motion [ ] establish[ed] that plaintiff's testimony to that effect [was] incredible as a matter of law." *Id.*

In this matter, Seem asserts that, immediately preceding his accident, while he was in the process of dumping the RCA on "soil" which was "wet," "loose," "unstable" and "unsuitable for the purpose of unloading the RCA," he "noticed that the ground on the driver side (*sic*) gave way, and [he] felt the truck began to tilt to the driver side (*sic*) and the RCA on the container bed began to shift towards the driver side (*sic*)." (R, 198, 200). Thereafter, Seem asserts, one of the vehicle's rear tires blew, after which the tractor and trailer tipped over. (R, 198). Scrutiny reveals

Seem's assertion to be manifestly untrue. In this regard, photographs - unlike people - do not lie, and the photographic evidence demonstrates that the tractor and trailer were located upon what is clearly a longstanding, pre-existing dirt and gravel road which, as demonstrated by the numerous tire marks thereupon, was well used by vehicular traffic. (R, 110). Moreover, while this dirt and gravel roadway is clearly depicted in the photographs, notably absent is any evidence of the ground having, purportedly, 'given way.' (R, 110, 113). In this regard, while the photograph at page 113 shows the dirt roadway to be partially disturbed directly adjacent to the tractor's wheels, this 'disturbance is merely to the top couple of inches of the roadway surface and appears to have been the effect - as opposed to the cause - of the 90,000 to 95,000 thousand pound tractor and trailer tipping over.[17] There is no roadway failure/depression, let alone one of a sufficient depth to have caused the entire tractor and trailer to list to the driver's side. Indeed, Seem's vehicle had twenty-two (22) wheels, with the trailer resting upon three sets of double wheels, such that, for the tractor and trailer to list, all six driver's side wheels would have had to sunk into the roadway, which the photographic evidence demonstrates did not occur.

Seem argues that the photographic evidence demonstrates that the tailgate pins were unlatched when his vehicle tipped over, asserting as follows:

[17] The load being unloaded was 60,000 to 65,000 thousand pounds and the tractor and trailer had a combined weight of around 30,000 pounds. (R, 195). .

> The presence of that pyramidal pile of RCA [at page 110 in the record] closer to the observer of the photo shows that the pins at the bottom of the tailgate were indeed unhitched and the tailgate was open as the container bed was being raised and the RCA was sliding up towards the back of the truck before the truck toppled over on the driver's side.

(R, 201).

The logic of Seem's argument is elusive. The Court is referred to page 211 in the Record, in which an exemplar illustration of the tractor trailer at issue - submitted by plaintiff - is contained. As depicted in that illustration, in this matter Seem contends that the bed of the flatbed truck was approximately ¾ elevated at the time of his accident, which is confirmed by the post-accident photographs. (R, 112, 149). According to Seem, at the time of this incident he was unloading 60,000 pounds, or approximately 570 cubic feet,[18] of RCA, which was 75% of his vehicle's loading capacity.[19] Under these facts, it is simple common sense that, had the tailgate been unlatched when the truck tipped, the bottom of the tailgate would have been extended out – exactly as depicted in the illustration at page 211 in the Record – with RCA spilling out of the back of the truck and coming in-between the bottom of the tailgate and the body of the truck. Indeed, in his brief Seem essentially concedes this fact, stating that, even before the trailer bed had been

[18] For the purpose of this calculation it is assumed that gravel and RCA have approximately the same density, and one ton of gravel is approximately 19 cubic feet. See https://www.gigacalculator.com/calculators/gravel-calculator.php#:~:text=A%20ton%20of%20gravel%20with,leftover%20dirt%2C%20sand%2C%20etc.

[19] Seem's truck had a maximum capacity of 80,000 pounds. (R, 195).

elevated, “[the] force of 60,000 lbs of cargo” was “pushing against] the inside of the tailgate. Thus, if the tailgate was open it would have been physically impossible for it to have thereafter closed when the truck tipped.

POINT II

SEEM'S 'PREMATURE' CONTENTION IS BASELESS, AND HIS 'WITHHOLDING RECORDS' ASSERTION FRIVOLOUS

1. There is No Merit to Seem's 'Premature' Assertion

"[T]o defeat summary judgment, the opponent to a motion must make an evidentiary showing to support his conclusion, mere speculation or conjecture is insufficient." *Robles v. GNF Properties Co., Inc.*, 5 Misc. 3d 1006(A), 798 N.Y.S.2d 713 (Bronx Sup. 2004), *citing Odorizzi v. Otsego Northen Catskills Board of Cooperative Education Services*, 307 A.D.2d 490, 762 N.Y.S.2d 691 (3rd Dept. 2003); *see Washington v New York City Bd. of Educ.*, 95 A.D.3d 739, 740, 945 N.Y.S.2d 87 (1st Dept. 2012) ("the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during discovery is insufficient to deny the motion"); *Morgan v. New York Telephone*, 220 A.D.2d 728, 729, 633 N.Y.S.2d 319, 320 (2d Dept. 1995) ("[m]ere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, [to defeat summary judgment] as is reliance upon surmise, conjecture, or speculation").

"The 'mere hope' of [plaintiff] that evidence sufficient to defeat [] a [summary judgment] motion may be uncovered during the discovery process is not enough." *Frierson v Concourse Plaza Assoc.*, 189 A.D.2d 609, 610, 592 N.Y.S.2d 309 (1st Dept. 1993). In the absence of an *evidentiary* showing "that facts essential

to justify opposition [existed] but [could] not then be stated", *Firth v. State of New York*, 287 A.D.2d 771, 773, 731 N.Y.S.2d 244 (3rd Dept. 2001), *affd.* 98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 (2002), there is "no merit in plaintiffs' argument that the motion for summary judgment should [be] denied as premature." *Id*., (cit. omit.); *see also Pina v Merolla,* 34 A.D.3d 663, 824 N.Y.S.2d 411 (2d Dept. 2006) (summary judgment was not granted prematurely in favor of premises owner in suit brought by contractor's employee to recover damages for personal injuries sustained when he fell from scaffold, where employee failed to offer an evidentiary basis to suggest that discovery might lead to relevant evidence, and that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the owner); *Keeley v. Tracy*, 301 A.D.2d 502, 503, 753 N.Y.S.2d 519, 520 (2d Dept. 2003) ("the respondents' contention that summary judgment is premature because they were denied discovery is without merit. The mere hope that they will uncover evidence that will prove that the appellant committed malpractice is not a basis for postponing a decision on a summary judgment motion); *Aminov v. E. 50th St. Rest. Corp.*, 232 A.D.2d 592, 593, 649 N.Y.S.2d 452, 453 (2d Dept. 1996) ("plaintiff's contention that summary judgment is premature because she was denied full discovery is without merit; she raises no more than a '[m]ere hope that somehow [she] will uncover evidence that will prove [her] case'"); *Brummer v. Barnes Firm, P.C.*, 56 A.D.3d 1177, 1179, 868 N.Y.S.2d

434, 436 (4th Dept. 2008) ("[l]ikewise without merit is plaintiff's contention that the court should have denied defendants' motion as premature. Plaintiff failed to establish that facts essential to oppose the motion were in defendants' possession, and a 'mere hope' that discovery will disclose evidence to prove plaintiff's case is insufficient to defeat the motion").

In this matter, in the underlying motion practice Seem argued that DiLeo's instant motion was premature, as: (1) DiLeo is, purportedly, "withholding contractual records of other related projects of structures/buildings in [its] sole possession that are pertinent to plaintiff establishing labor (*sic*) Law 240(1) and 241(6);" and (2) DiLeo is "in direct violation of this Honorable Court's Order of March 1, 2018 directing defendants to provide to plaintiff contract records of all the projects on the premises at the time of the accident." (R, 138). In response thereto DiLeo submitted his affidavit, setting forth therein that, as he was just a landscaper which only provided yearly, spring property maintenance services at the Crestwood Country day camp, he was in possession of no 'contractual records of other related projects of structures/buildings' which he could conceivably "withhold," after which it was pointed out that, as DiLeo did not even join issue through the service of its Verified Answer until June 11, 2018, it could not be in violation of a court order issued over three months previously. (R, 684-685, 698). Nevertheless, upon appeal Seem asserts that DiLeo's 'just a landscaper'

explanation is “simply too convenient,” after which he contends that “[t]he contract records and deposition of defendant-contractor of DiLeo Landscaping… would demonstrate the true nature of the work at the parking lot.”[20]At best, Seem’s assertion raises nothing more than a “[m]ere hope that somehow [he] will uncover evidence that will prove [his] case,’” *Aminov v. E. 50th St. Rest. Corp.*, 232 A.D.2d at 593, 649 N.Y.S.2d at 453; at worst, it is a baseless an unwarranted accusation of wrongdoing, unbecoming of a member of the bar.

2. Seem’s ‘Withholding Records’ Assertion is Frivolous

Pursuant to 22 NYCRR 130–1.1(a),[21] a court, "in its discretion, may award to any party or attorney in any civil action or proceeding before the court... costs in the form of reimbursement for actual expenses reasonably incurred, and reasonable attorney's fees, resulting from frivolous conduct." *In re Estate of Levine,* 82 A.D.3d 524, 526, 918 N.Y.S.2d 445, 447 (1st Dept. 2011) *citing* 22 NYCRR 130–1.1 (c)

[20] R, 278.

[21] 22 NYC RR §130-1.1. provides, in pertinent part, as follows:

> "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

22 NYCRR § 130-1.1.

Entm't Partners Group, Inc. v. Davis, 155 Misc. 2d 894, 897-98, 590 N.Y.S.2d 979, 982 (N.Y. Sup. Ct. 1992) aff'd, 198 A.D.2d 63, 603 N.Y.S.2d 439 (N.Y. App. Div. 1993)

(additional citations omitted). "Under part 130 of the Rules, frivolous appellate litigation may be found to exist where the appellate arguments raised are completely without merit in law or fact, where the appeal is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, *or where the party or attorney asserts material factual statements that are false.*" *In re Estate of Levine, supra,* (italics added) *citing* CPLR §8303-a. "An appeal also may be frivolous 'if it consists of irrelevant and illogical arguments based on factual misrepresentations and false premises.'" *EarthGrains Baking Cos. v. Sycamore*, 721 F. App'x 736, 741 (10th Cir. 2017) *quoting Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1031 n.14 (10th Cir. 2002) *quoting Romala Corp. v. United States*, 927 F.2d 1219, 1222 (Fed. Cir. 1991).

In this matter, Point IV of Seem's brief is entitled: "DEFENDANT-CONTRACTOR DILEO LANDSCAPING AND CO-DEFENDANT PREMIER CAMP ARE WITHHOLDING RECORDS TO PREVENT PLAINTIFF FROM MAKING A CASE FOR LABOR LAW §241(6)."[22] Seem has not, however, put forth any evidence - <u>whatsoever</u> - to support this scurrilous accusation, the leveling of which should not be countenanced and which deserves admonishment.[23]

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[22] <u>See</u> plaintiff's brief, at 50, (emphasis omitted).

[23] Although Law 240(1) and 241(6) are "not limited to building sites," *Mosher v State of New York*, 80 N.Y.2d 286, 288, 604 N.E.2d 115, 590 N.Y.S.2d 53 (1992), "the work in which plaintiff was engaged must have 'affected the structural integrity of the building or structure [or have been] an integral part of the construction of a building or structure.'" *Crossett v. Wing Farm, Inc.*, 79 A.D.3d 1334, 1337, 912 N.Y.S.2d 751, 755 (3rd Dept. 2010) *quoting Walton v Devi*

POINT III

DiLeo HAD NO DUTY TO PROVIDE SEEM WITH 'SAFETY DEVICES'

"It is axiomatic that a finding of negligence requires a finding that defendant breached a duty it owes to plaintiff[,] [and] 'the existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations.'" *Kuti v. Sera Sec. Servs.*, 182 A.D.3d 401, 402, 121 N.Y.S.3d 263, 265 (1st Dept. 2020), *quoting Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120, 122, 773 N.E.2d 485, 487 (2002). "'Unlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration.'" *Id., quoting Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585, 634 N.E.2d 189, 611 N.Y.S.2d 817 (1994).

It is settled law that a contractor has no duty to provide another contractor's employee with equipment adequate for the performance of his/her work. *See*

Corp., 215 A.D.2d 60, 63, 632 N.Y.S.2d 898 (3rd Dept. 1995), *lv denied* 87 N.Y.2d 809, 664 N.E.2d 1258, 642 N.Y.S.2d 195 (1996) (brackets in original). In this matter, as it strains credulity to the point of absurdity to argue that Seem's delivery of RCA for the annual resurfacing of the parking lot at issue could possibly have affected the structural integrity of a building or structure, and/or have been an integral part of the construction of a building or structure, even if DiLeo was in possession of any such records – which it is not – they would, nevertheless, be totally irrelevant herein.

Vargas v. N.Y.C. Transit Auth., 54 A.D.3d 579, 583, 863 N.Y.S.2d 426, 429 (1st Dept. 2008) ("[t]he record establishes that [ ], the rolling door subcontractor… had no duty to provide [plaintiff] with equipment adequate for the performance of his work"), *vacated upon other grounds*, 60 A.D.3d 438, 441, 874 N.Y.S.2d 446, 450 (1st Dept. 2009); *Titus v. Kirst Constr., Inc.*, 43 A.D.3d 1324, 1325, 843 N.Y.S.2d 878, 879 (4th Dept. 2007) ("[w]e reject plaintiffs' contention that [construction manager]… had a duty to provide plaintiff with the proper equipment to ensure his safety).

In this matter, Seem asserts that "this was a rushed job for the convenience of the defendant at Mr. Seem's expense," and that DiLeo "could have [ ] retrofitted the truck with Outrigger stabilizers to give the truck more stability, but that wasn't done."[24] Counsel's argument is absurd. Again, DiLeo was a landscaper contractor. If 'safety devices' were required, it was incumbent upon *plaintiff's employer* to provide same. It was <u>not</u> within DiLeo's ability, let alone its obligation, to, upon observing Seem's delivery truck, take possession of same and bring it to a 'retrofitter' to have 'outriggers' installed, such as to stabilize the truck on the purported 'unstable ground.'

[24] *See* Seem's brief, at 31.

POINT IV

LABOR LAW §240(1)

1. It Stands Un-rebutted That Seem's Accident Was not 'Gravity Related'

Seem asserts that he is entitled to Labor Law §240(1) recovery, as "[i]t is indisputable that Mr. Seem sustained gravity related injuries."[25] Seem's argument is without merit, as evidenced by his failure to cite to a single case even remotely factually analogous herein. In *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 583 N.E.2d 932 (1991) the Court of Appeals dealt with the breadth of Labor Law § 240(1) and the nature of the occupational hazards intended to be covered by the statute, stating:

> The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or 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., at 514, 583 N.E.2d at 934;

Thereafter, in *Ross v. Curtis–Palmer Hydro–Elec. Co*, 81 N.Y.2d 494, 618 N.E.2d 82 (1993) the Court of Appeals observed:

> Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or*

[25] *See* Seem's appellate brief, at 39.

> *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.

Id., at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82 (emphasis in original).

In *Rocovich v. Consolidated Edison Co., supra*, and *Ross v. Curtis–Palmer Hydro–Elec. Co., supra*, "the Court of Appeals [thus] clarified the nature of the occupational hazards that warrant the protection of Labor Law § 240(1)," *Oakes v. Wal-Mart Real Estate Bus. Trust,* 99 A.D.3d 31, 34, 948 N.Y.S.2d 748, 751 (3rd Dept. 2012), limiting the scope of the statute to "the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured.'" *Id*., *quoting Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d at 500–501, 601 N.Y.S.2d 49, 618 N.E.2d 82, *in turn quoting Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932.

With these proscriptions in mind, the court has held that there is no Labor Law § 240(1) right of recovery for "tangentially" 'gravity related' injuries, such as when: (1) a construction worker was injured when a co-employee ran into him and knocked him over while avoiding a falling pipe, *see Dority v. Zurn Indus.,* 226 A.D.2d 983, 641 N.Y.S.2d 188 (3rd Dept. 1996); (3) a worker sustained injury while lifting a heavy piece of equipment when a co-worker lost his footing and dropped his end of same, *see Fills v. Merit Oil Corp.,* 258 A.D.2d 556, 685

N.Y.S.2d 472 (2d Dept. 1999); (3) a ditch excavator's hand was crushed when bucket attached to mechanical arm of backhoe came down on his hand as he lowered himself into ditch, *see Elezaj v. P.J. Carlin Const. Co.*, 225 A.D.2d 441, 639 N.Y.S.2d 356 (1st Dept. 1996) *aff'd*, 89 N.Y.2d 992, 679 N.E.2d 638 (1997); (4) a worker was knocked off a ladder when a roof truss that he was securing to a building under construction broke apart, rose, and struck the worker, *see Bruce v. Actus Lend Lease*, 101 A.D.3d 1701, 959 N.Y.S.2d 574 (4th Dept. 2012); and (5) a construction worker sustained a hand injury when a co-worker suddenly released a rope while lowering a bucket of construction debris. *See Zdunczyk v. Ginther*, 15 A.D.3d 574, 792 N.Y.S.2d 496 (2d Dept. 2005).

As demonstrated above, in order to obtain Labor Law § 240(1) recovery it is thus not enough that a plaintiff's injury be 'gravity related'. Rather, "liability [remains] contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein," *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259, 267, 750 N.E.2d 1085 (2001), and, critically, "[t]he kind of accident triggering section 240(1) coverage is one that will sustain the allegation that an adequate 'scaffold, hoist, stay, ladder or other protective device' would have 'shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person.'" *Salazar v. Novalex Contracting Corp.*, 18 N.Y.3d 134, 139, 960

N.E.2d 393, 396 (2011) *quoting Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604, 895 N.Y.S.2d 279, 922 N.E.2d 865 (2009) (emphasis removed). "It thus remains the law that a plaintiff cannot prevail under section 240(1) where the kinds of protective devices enumerated by the statute are shown to be useless or inapplicable with regard to the prevention of the injury that eventuated." *Murdock v. R & P Oak Hill Dev., LLC*, 53 Misc.3d 1216(A), 52 N.Y.S.3d 247 (Erie Sup. 2011).

As set forth in DiLeo's initial brief, it has been explicitly held that "the overturning of [a] dump truck… during the course of its unloading, occur[ing] at ground level, [does] not involve an elevation-related risk of the kind the statute [Labor Law §240(1)] was meant to protect against." *Bianco v. McGuire*, 2018 NY Slip Op 32032(U), (Suffolk Sup. 2018). Thus, as discussed in DiLeo's initial brief, in the only two reported cases *directly analogous* to the facts herein – i.e. *Barreiros v. Inter Cty. Paving Assocs., LLC*, 2017 NY Slip Op 30481(U), (Suffolk Sup. 2017) and *Shaw v. RPA Assocs., LLC*, 75 A.D.3d 634, 906 N.Y.S.2d 574 (2d Dept. 2010) – both courts determined that Labor Law §240(1) was not meant to protect against the danger of a dump truck overturning while in the process unloading/'dumping' its load. Seem has not discussed - let alone refuted - either case, and/or the reasoning upon which both decisions were rendered. Rather, Seem

discusses *Janowitz Constr. Corp.*, 44 A.D.3d 721, 843 N.Y.S.2d 386 (2d Dept. 2007), a case of no conceivable relevance herein.

Although Labor Law §240(1) mandates the provision of "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, [and] ropes," N.Y. Lab. Law §240 (McKinney), it is clear that "[Seem] was not exposed to any risk that the safety devices referenced in Labor Law §240(1) would have protected against." *Shaw v. RPA Assocs., LLC,* 75 A.D.3d at 636, 906 N.Y.S.2d at 577. Thus, as Seem did not sustain a 'gravity related' injury within the meaning of the Labor Law, it stands un-refuted that his Labor Law §240(1) cause of action should have been summarily dismissed herein.

2. It Stands Un-rebutted That Seem Was Not Working Upon a 'Structure'

While Seem's cursory asserts that "The Parking Lot is a Structure,"[26] his contention cannot withstand even cursory scrutiny. In this regard, as set forth in DiLeo's initial brief - and simply ignored by Seem in his opposition thereto - it is settled law that a gravel roadway is not a 'structure' within the meaning of the Labor Law. *See Juett v. Lucente*, 112 A.D.3d 1136, 1136-37, 977 N.Y.S.2d 426, 427 (3rd Dept. 2013) (holding plaintiff's claim that he was entitled to Labor Law § 240 (1) recovery "unavailing for the simple reason that construction work, as here, involving only a parking area or highway and nothing more, 'does not constitute

[26] *See* Seem's appellate brief, at 42 (emphasis omitted).

work on a [building or] structure for purposes of Labor Law § 240 (1)'") *quoting Dilluvio v City of New York*, 264 A.D.2d 115, 121, 704 N.Y.S.2d 550 (1st Dept. 2000), *affd* 95 N.Y.2d 928, 744 N.E.2d 138, 721 N.Y.S.2d 603 (2000) ("[r]epaving a parkway at grade does not constitute work on a structure for purposes of Labor Law § 240 (1)"); *Spears v. State*, 266 A.D.2d 898, 698 N.Y.S.2d 135 (4th Dept. 1999) ("a highway at grade is not a building or structure within the meaning of section 240 (1), that section imposes no duty upon the owner of a highway under construction or repair"). In apparent recognition of this fact, under the subheading "The Parking lot is a Structure"[27] Seem performs a 'bait and switch' and argues that "[t]he raised container bed of the tractor trailer truck that Mr. Seem was working on meets the definition of a structure within the meaning of Labor Law §240(1)."[28] However, Seem's argument ignores the inconvenient fact that, to be entitled to scaffold law recovery, the plaintiff's injury must have been sustained while he/she was *working upon* a 'building or structure' - that a plaintiff was, purportedly, utilizing a 'structure' to perform work is insufficient. Accordingly, it also stands un-refuted that Seem's Labor Law §240(1) cause of action should have been summarily dismissed herein for this further, additional reason.

3. It Stands Un-rebutted That Nothing But Routine Maintenance Was Underway at the Time of Seem's Accident

[27] See Seem's appellate brief, at 42.
[28] See Seem's appellate brief, at 42.

Citing to *Duffina v. Cty. of Essex*, 111 A.D.3d 1035, 1038, 974 N.Y.S.2d 645, 649 (3d Dept. 2013) and *Mosher v. State*, 80 N.Y.2d 286, 287, 590 N.Y.S.2d 53, 54, 604 N.E.2d 115, 116 (1992), Seem asserts that he is entitled to scaffold law recovery, as repaving a parking lot is an 'alteration' within the meaning of the Labor Law §240(1). Seem's argument does not withstand scrutiny. First, *Duffina* and *Mosher* concern Labor Law §241(6), not §240(1), liability, and, unlike §240(1), §241(6) does not condition coverage upon a demonstration that plaintiff's injury occurred while working upon a building a structure. Thus, assuming *arguendo* that Seem was performing an alteration, it nevertheless remains that it was not to a 'building' or 'structure' within the meaning of Labor Law §240(1). Second, regardless of the validity of Seem's assertion, it is simply not relevant herein, as the parking lot at issue was not being 'repaved.'

Seem contests the above, unassailable fact, contending that "however labeled, the project [at issue]… was essentially paving, repairing, altering the surface of a parking lot by filling up holes with new materials that had not been used before."[29] In making this argument Seem goes on to assert as follows:

> In fact, defendant's own description demonstrated that the material that Mr. Seem was delivering and unloading, i.e. RCA, has never been used in the parking lot before. Defendant DiLeo Landscaping left out the details as to what was on the parking lot before, and what it was

[29] *See* Seem's brief, at 45.

> when the defendant worked on the surface with the new material that Mr. Seem was delivering.[30]

Seem's argument is baseless. In this regard, in support of its motion for summary judgment DiLeo submitted the affidavit of Daniel DiLeo, who attested therein as follows:

> As part of its property maintenance services, in the spring of every year DiLeo Landscaping spreads approximately half an inch of new gravel over the existing gravel parking lot, to get the parking lot surface ready for the summer day camp season.

(R, 107).

Assuming *arguendo* that Seem was delivering RCA to be spread upon an existing gravel roadway, this purported fact is of no relevance herein. What is dispositive is that this delivery was undertaken in conjunction with DiLeo's yearly property maintenance services, undertaken to remediate holes created in the parking lot surface due to wear and tear, which is the very essence of 'maintenance,' not 'repair. *See Gaston v. Trs. of Columbia Univ. in the City of N.Y.*, (N.Y. Sup. 2019) ("[g]iven plaintiff's testimony that the valves were changed as part of annual maintenance, and the mechanic's testimony that the valves must be replaced due to normal wear and tear, defendants show, *prima facie*, that plaintiff was engaged in routine maintenance"); *Metcalf v. Commerce Bank*, 2007 NY Slip Op 33489(U), (N.Y. Sup. 2007) ("plaintiffs seek to recover damages for personal

[30] *See* Seem's brief, at 45.

injuries sustained… when he fell from an A-frame ladder while polishing the metal window frames of an office building… the cross-motion by [ ] for summary judgment dismissing plaintiffs' claim against it pursuant to Labor Law § 241(6) is granted, as this Court finds that plaintiff was involved in routine annual maintenance work and was not engaged in 'construction, excavation or demolition work' within the meaning of the statute"). Accordingly, it stands un-refuted that Seem's Labor Law §240(1) cause of action - *as well as his Labor Law §2401(6) claim*[31] - should have been summarily dismissed herein for this third, independent reason.

[31] As set forth in DiLeo's initial brief, "[t]asks comprising 'routine maintenance' are not protected under Labor Law §241(6)." *Kearney v. Bay Hills Prop. Owners, Inc.*, 2012 NY Slip Op 31574(U) (Suffolk Sup. 2012).

CONCLUSION

For all of the foregoing reasons, the defendant-appellant, DiLeo Landscaping, Ltd., respectfully submits that the Order of the Supreme Court, County of Suffolk (Hon. Joseph A. Santorelli), dated September 16, 2019, which denied DiLeo's motion for summary judgment and dismissal of plaintiff-respondent-appellant, Lawrence Seem's, complaint, should be reversed.

Respectfully submitted,

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