Why New Jersey Is a Safer Place after the Supreme Court Decision in *Fernandes*

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The Purpose of OSHA

The Industrial Revolution and 20th century in America was marked by higher rates of injury and death in the workplace than in war. Statistically speaking, before OSHA was passed, a person had a better chance of survival as a soldier than working on a U.S. construction site or factory. Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99, 100-103 (1994) The 1911 New York City Triangle Shirtwaist Factory fire was a "poster child" incident that demonstrated the need for serious reform. Linder, Marc. 20 J. Legis. at 99. In that incident 146 garment workers perished from fire and smoke inhalation because the factory owners locked the doors to the stairwells and exits to prevent unauthorized breaks. Most of the workers were Jewish or Italian immigrants. www.wikipedia.org/wiki/Triangle_Shirtwaist_Factory_fire

In response to these kinds of incidents and statistics suggesting that every year in America 14,000 workers were killed and 2.5 million permanently injured, in 1970 the United States Congress enacted the Occupational Safety and Health Act ("OSHA"), 29 U.S.C.A. § 651 to § 678, to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 *U.S.C.A.* § 651(b); *see Gonzalez v. Ideal Tile Importing Co., Inc.,* 371 N.J. Super. 349, 359 (App. Div. 2004), *affd*. 184 N.J. 415 (2005); Linder, Marc. 20 J. Legis. 99; *see also Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents.* 101 Harv. L. Rev. 535 (1987). In pursuing those goals, Congress authorized the Secretary of Labor to promulgate health and safety standards for workplaces, 29 U.S.C.A. §655. In short the OSHA Act requires "employers" to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C.A. §654(a). "Employer" refers to the entire contractor chain on a construction site; from the general contractor at the top, down through each tier of subcontractor. 29 C.F.R. §1926.32 (defining "employer" as "contractor or subcontractor."); 29 C.F.R. §1926.16 (general and each tier of subcontractors have all "employer" obligations.); *see also Meder*, 240 N.J.Super. at 476 (declaring the reasoning that the OSHA definition of "employer" does not include general contractors as "flawed."); *Alloway v. Bradlees*, 157 N.J. 221, 238 (1999) ("'the prime contractor assumes all obligations prescribed as employer obligations under the [OSHA] standards...'" *citing,* 29 C.F.R. §1926.16(b)

OSHA's safety standards for the construction industry are found in 29 C.F.R. §1926. These standards include general health and safety rules that essentially require a "culture of safety" in the workplace. They require safety training of everyone that works on a job site, safety inspections, investigations and other steps to prevent needless injury. 29 C.F.R. §1926.20 OSHA also has specific standards applicable to certain trades and tasks such as, among other things, masonry, ladders, welding, scaffolding and power tools. 29 C.F.R. §1926, Subparts I, J, L, Q, X. OSHA's safety rules mirror those of certain industry safety standards including from organizations that were in existence long before OSHA was established. These include, for example, the National Safety

Council which was founded in 1913 and Chartered by Congress and the Associated General Contractors of America.

Top down Safety Scheme; the Non-delegable Duty

OSHA and the industry safety standards recognize that in order for meaningful workplace safety and injury prevention to occur, there must be a top down requirement to manage safety and enforce recognized safety rules on a construction project. Since the general contractor has the power to hire and fire the various subcontractors, it also has the power to set the "rules of the road" as a condition of working on a project. 29 C.F.R. §1926.16 ("In no case shall the prime contractor be relieved of overall responsibility for compliance with..." managing and enforcing OSHA work safety rules); *see also, e.g. Alloway,* 157 N.J. at 237-38 (general contractor has non-delegable duty to maintain a safe workplace); Associated General Contractors of America, *Manual of Accident Prevention for Construction,* 9th Edition, Ch. 1 (detailing management's responsibility for job safety); American National Standards Institute, Standard A10.33-1992. OSHA was passed because contractors would risk the lives of workers rather than invest in safety. Linder, Marc. 20 J. Legis. 99. The requirement of top down safety enforcement is the lynchpin of this safety and injury prevention scheme long recognized by industry safety authorities and enacted into federal law under OSHA.

New Jersey courts have also long recognized that a general contractor (aka prime contractor) on a worksite, as well as each tier of subcontractor down the chain, has a joint, non-delegable duty to manage safety and enforce the OSHA rules on the job. *Alloway v. Bradlees Inc.,* 157 N.J. at 237-38 (1999); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994); *Bortz v. Rammel,* 151 *N.J.Super.* 312, 321 (App. Div. 1977), *cert. den.* 75 N.J. 539; *Meder v. Resorts International*, 240 N.J.Super. 470, 473-77 (App. Div. 1989), *cert. den.* 121 N.J. 608; *Dawson v. Bunker Hill Plaza Assocs.,* 289 N.J.Super. 309, 320-21 (App.Div.1996); *see also* N.J.A.C. 5.23-2.21 "Construction Control" (requiring contractor listed on construction permits to make sure all methods of construction are executed in a safe manner.) Job site injuries arising from violation of this duty has long been a recognized basis for tort liability. *Id.*

The "non-delegable" part of this calculus is critical. Without it the responsibility would almost always get delegated by contract down the chain, ultimately to the injured worker's direct employer which is immune from tort liability under exclusive remedy provisions of the Workers Compensation Act. *N.J.S.A.* 34:15-1 *et seq*. Any erosion in this principle results in a corresponding erosion of safety for workers and anyone else that comes near a construction project. Tort liability is critical to discouraging dangerous conduct and taking the profit out of breaking safety rules. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 448 (1993) (the imposition of liability through tort law is essential to discourage irresponsible conduct and create incentives to minimize risks of harm.); *Weinberg v. Dinger*, 106 N.J. 469, 494 (1987) (same); *see also Prosser and Keeton on Torts* § 4 (5th Ed.1984) (noting that "prophylactic" factor of preventing future harm is a primary consideration in tort law)

Perceived Profit Motive to Break the Rules

In the short term compliance with safety rules under OSHA and industry standards costs money and takes time to implement. But in the long run it saves money in lost productivity, medical and life care treatment, and other intangible ways. Kessler, Karen. "Commitment to Workplace Safety Pays off for Workers and Employers" *N.J. Labor Market Views Issue #25,* N.J. Dept. of Labor and Workforce Development (Apr. 8, 2013). Contractors will look to save short term costs by cutting corners on safety and, in many cases, ignoring the rules altogether. *See, e.g. Costa v. Gaccione*, 408 N.J.Super. 362, 367 (App.Div. 2009) (general contractor "admitted that the job site had no safety supervision or express safety rules [and] that safety was not discussed, that there was no written safety policy, that there were no rules relating to the scaffolding, that he was never instructed or certified by OSHA, and that he did not investigate plaintiff's accident."); *Fernandes v. DAR Development*, 2015 WL 4524162 *3 (Sup. Ct. July 28, 2015) (plaintiff's direct employer, Freitas, "had no established health and safety protocol and asserted that DAR [the general contractor] did not require one. DAR made no inquiries...about Freitas' safety protocol, did not request a breakdown of the amount of money earmarked for such concerns, and did not conduct OSHA training on DAR-Freitas jobsites. No one from DAR had ever addressed safety protocol with [Freitas]")

Indeed, as far back as the end of the 1930s when construction was "by far the most hazardous" industry, (Linder, Marc. 20 J. Legis. at 109-110[1]), the National Safety Council recognized:

> Progressive and successful contractors . . . have learned that the most important thing in the building industry is time; that material and men must be kept moving without loss of time if a building is to be ready on the contemplated date; and also, that all of their equipment, labor and capital must be used all of the time if maximum profits are to be counted. The tenor of the present day building business is unrelenting competition, fast production with rising pressure upon personnel and equipment. This is a fast moving era and speed is its urge. The business of today that succeeds must move fast . . . .

William Wheeler, *Results Through Voluntary Cooperation in Accident Prevention in Construction*, reprinted in 1929 Transactions of the National Safety Council: Eighteenth Annual Safety Congress 1:650, 655 (1929) (executive secretary of the Committee on Accident Prevention of the Building Trades Employers' Association of the City of New York). The *Fernandes* Court noted that plaintiff's expert in the field of construction site safety management and OSHA compliance, Vincent Gallagher, "opined that DAR increased its profits by regularly hiring unscrupulous subcontractors who did not adhere to OSHA standards." *Fernandes* at *3. In fact in the *Fernandes* trial, the general contractor's project manager admitted:

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[1]Even today construction is still one of the most hazardous industries. www.forbes.com/sites/jacquelynsmith/2013/08/22/americas-10-deadliest-jobs-2/

Q. Making the job move fast and maximizing the profit is more important to DAR than worker safety; isn't that right?
A. To speed up the work and maximize -- maximize profits, is that what you're asking?

Q. Yes.
A. Yes, correct.

(*Fernandes Trial Transcript #7, 2/1/11 at 69*)

Non-delegable Duty Reaffirmed; Tarabokia in Jeopardy

Since 2012 contractor defendants in construction injury cases have argued they in fact do not have a duty to manage safety, relying on *Tarabokia v. Structure Stone,* 429 N.J.Super. 103 (App.Div. 2012). *Tarabokia* addressed a very narrow set of facts whereby a worker on a highly OSHA compliant worksite suffered a repetitive stress injury over the course of several weeks from the use of an otherwise safe tool for which the worker was trained and certified to operate. Under the unique facts of that case, the Appellate Division ruled based primarily on a lack of forseeability, that the general contractor was entitled to a summary judgment dismissal. *Tarabokia* at 117-118, 120.

The plaintiff in *Tarabokia* was relying on a weak set of facts and his ultimate failure to prevail is not surprising. *Fernandes* is significant because it dispels any argument that *Tarbokia* somehow represents a shift away from the non-delegable duty of contractors to manage safety which has been firmly established in New Jersey jurisprudence over for the last 30 years. Among other things, the Court in *Fernandes* noted defendant's liability expert, Timothy Carlsen, "[A]cknowledged that, in accordance with the Act, a general contractor has a non-delegable duty to ensure the safety of a workplace." *Id.* at *4. The Court also made reference that:

> In its charge, the trial court instructed the jury that a general contractor has a non-delegable duty to maintain a safe workplace. The court informed the jury that a general contractor must exercise reasonable care under general negligence principles to protect its workers—and those of its subcontractors—from foreseeable harm.

Id. at *5. The Court further made reference to "the non-delegable duty of a general contractor to maintain safe working conditions" and specifically relied upon that non-delegable duty embodied in 29 C.F.R. §1926.16 in support of its ruling. *Id.* at *6, *7. The Court specifically stated, "a general contractor is expected to protect its workers from the myriad of potential dangers encountered on a construction site '"so far as possible."' *Fernandes* at *11, *citing* 29 *U.S. C.A.* § 651(b). And further, "[T]he [OSH] Act places the burden of deciding when and where to take protective measures squarely on [the direct employer and] the general contractor." *Fernandes* at *12.

The *Fernandes* reaffirmation of the non-delegable responsibility for safety works to reduce the level of danger in the community. The imposition of tort responsibility is critical to discouraging

the perceived profit motive to cut corners on safety or ignore the rules altogether. Ethelbert Stewart, Accidents in the Construction Industry, MONTHLY Lab. Rev., Jan. 1929, at 63, 65 (vol. 28), as cited in Linder, Marc. 20 J. Legis. at 104. The fact of the matter is that if courts do not hold contractors responsible for this kind of thing, then scrupulous contractors will be economically compelled to do the same thing or risk being out bid. Linder, Marc. 20 J. Legis. at 104 (1994) ('"It must be frankly accepted that the most efficient method of prosecuting work is not always the safest." Conversely, the "safe builder is . . . put at a disadvantage in bidding..."'), *quoting* Ethelbert Stewart, Accidents in the Construction Industry, Monthly Lab. Rev., Jan. 1929, at 63, 65 (vol. 28) That would be bad for workers and bad for the public. The argument that *Tarabokia* stands for the proposition that contractors no longer have a duty to manage safety is misguided and has been properly extinguished in *Fernandes*.

Uphill Battle to Blame the Worker

OSHA was enacted to protect workers by imposing affirmative safety obligations on contractors (aka "employers" under the Act). An equally dangerous tactic to avoid responsibly for injuries arising from those ignored obligations is to blame the very workers those ignored standards were meant to protect. In many cases not only will job site leaders ignore basic safety rules, but they will actually discourage it to speed up the job. Workers with no safety training and no mechanism to complain have no real choice in the matter. *Green v. Sterling Extruder Corporation*, 95 N.J. 263, 271 (1984) ("The practicalities of the workday world are such that in the vast majority of cases, the employee works 'as is' or he is without a job."); *Cavanaugh v. Skil Corporation*, 331 N.J.Super. 134, 185 (App. Div. 1999) (workers on construction sites often have no real choice about working under known unsafe conditions.) *Fernandes* is significant because it recognizes these realities and significantly increases the threshold for a defendant to prevail on a "blame the worker" comparative negligence argument.

The Plaintiff in *Fernandes* moved *in limine* at trial to bar any claim or arguments about comparative negligence. The trial judge denied the motion and allowed defendant to present any arguments or evidence it had on the issue. DAR thus presented evidence and argued, among other things, that the plaintiff was an experienced 19 year veteran plumber who dug thousands of trenches and was well aware of the danger of collapse. In the days prior plaintiff was in charge of digging the trench and watched it collapse several times. OSHA complaint trench protection that he used on other jobs was available to him here but he chose not to use it. At the conclusion of evidence the trial court decided these facts were insufficient to warrant a finding that plaintiff was comparatively negligent and removed the issue from the jury. It returned a unanimous verdict for the plaintiff molded to $892,000.[2]

Among other issues, Defendant appealed the trial court's removing comparative negligence from the case. Rather than apply an ordinary comparative negligence standard, in affirming the Appellate Division applied a heightened standard because the case involved an injury to a

[2]Midway through the trial the $500,000 offer of the insurance carrier was rejected.

construction worker. The Court ruled, "defendant failed to present competent evidence that at the time of the accident, plaintiff voluntarily and unreasonably proceeded in the face of a known danger - which is the standard against which an injured construction worker's conduct is measured. *Green v. Sterling Extruder Corp.*, 95 N.J. 263, 270 (1984); *see also Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 167 (1979). Therefore, the trial court did not err when it declined to charge the jury on comparative negligence." *Fernandes v. DAR*, 2013 WL 2660745 *10 (App.Div. June 14, 2013)

In its Petition for Certification to the Supreme Court, DAR took issue with the Appellate Division applying this heightened standard. DAR characterized it as a dramatic departure from "twenty years [of] settled law" and a "more stringent standard governing the availability of the comparative negligence defense for contractors in construction accident actions." *DAR Petition for Certification at 3, 11*. DAR argued that rather than ask whether the worker, "unreasonably proceeded in the face of a known danger [the Court instead should have considered] whether he exercised reasonable care in entering the trench without safety equipment, given his knowledge and experience." The former is clearly a heightened standard which DAR pointed out, "[S]ubjects DAR and similar contractors to enhanced liability (approaching strict liability) and diminished defenses, marking a dramatic shift in the law." *DAR Petition for Certification at 8-9*. The Supreme Court granted the Petition.

The Supreme Court affirmed the Appellate Division's application of this heightened standard. It found the otherwise compelling evidence of worker fault was insufficient to overcome this new hurdle. The New Jersey Association of Justice ("NJAJ") as *amicus curiae* advocated for a bright line rule that comparative negligence should not be available as a defense in nearly any worker injury case. That is, NJAJ argued for an expansion of the "*Suter* doctrine" which bars comparative negligence claims against workers in products liability workplace matters. *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150 (1979).

The *Fernandes* Court declined the invitation to expand the *Suter* doctrine beyond products liability work injury cases. Nevertheless, in striking something of a middle ground, as defendant pointed out in its Petition, it significantly raised the bar of proving comparative negligence in work injury cases. It did so by borrowing concepts from the *Suter* line of cases, including considerations of whether the worker "unreasonably confronted a known risk" and whether he "had a meaningful choice" in the matter. *Fernandes* at *11.

The Court took particular note that Fernandes had no work safety training from the general contractor or his direct employer. *Fernandes* at *12. Thus, even though this highly experience plumber knew the trench was unstable, had elected to use the available trench protection many times in the past, and was well aware of the dangers of unprotected trenches, "his behavior must be evaluated against that of a reasonably prudent person in his exact circumstances, and that evaluation includes whether he had a meaningful choice in the manner in which he performed his assigned task on that day." *Fernandes* at *12.

A Safer New Jersey

OSHA was passed to protect workers from the natural compulsion of contractors to speed up work at the expense of safety. The lynchpin of the OSHA scheme and related industry standards is a top-down requirement to enforce safety rules. The New Jersey Supreme Court in *Fernandes* is important because it reinforces this critical principle. It also makes it more difficult for contractors to escape liability for ignoring these rules by blaming the very people the law was meant to protect. This important decision reduces the level of danger to workers and others that come near construction projects in New Jersey. Ultimately this will result in fewer victims, fewer lawsuits and a safer New Jersey.

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