June 4, 2009

VIA ELECTRONIC AND REGULAR MAIL
Maria Faone
New Jersey Superior Court Appellate
25 Market Street, PO Box 006
Trenton, New Jersey 08625
ATTN: Committee on Opinions

Re: Dione Costa v. Salvatore Gaccione
Appellate Division Docket No.: A-6022-07T1
Law Division Docket No.: ESX-L-2319-06
Our File No.: 61-7531

Request for Publication of Judicial Opinion

Dear Committee on Opinions:

Enclosed please find 5 sets of the May 27, 2009 Appellate Division opinion in the above matter. We are requesting this opinion be approved for publication pursuant to R. 1:36-2 for the following reasons.

This is a construction accident case where the plaintiff suffered injuries when he fell from makeshift scaffolding. The Law Division dismissed all claims against the landowner/general contractor, Gaccione, on the basis that he had no duty to manage safety or enforce the OSHA regulations on the project. The Court reasoned that under the case Slack v. Whalen, 327 N.J. Super. 186 (App. Div. 2000), as a residential landowner Gaccione had no duty to enforce OSHA or mange safety.

Prior to the Slack case, New Jersey law was clear the general contractor has a non-delegable duty to maintain a safe worksite that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." Alloway v. Bradlees Inc., 157 N.J. 221, 237-38 (1999), *citing,* Kane v. Hartz Mountain, 278 N.J.Super. 129, 142-43 (App. Div. 1994) State public policy and OSHA impose a duty on the general contractor to ensure the protection of all of the workers on a construction project, irrespective of the identity and status of their various and several employers, by requiring, either by agreement or by operation of law, the designation of a single repository of the responsibility for the safety of

them all. Alloway, 157 N.J. at 238, *citing* Bortz v. Rammel, 151 N.J.Super. 312, 321 (App. Div. 1977), *cert. den.* 75 N.J. 539. As a matter of public policy and federal law, the general contractor is the single repository of responsibility for the safety of all employees on the job. Meder v. Resorts International, 240 N.J.Super. 470, 473-77 (App. Div. 1989), *cert. den.* 121 N.J. 608; Kane, 278 N.J.Super. at 142-43; Dawson v. Bunker Hill Plaza Assocs., 289 N.J.Super. 309, 320-21 (App.Div.1996).

The same was essentially also true for landowners who chose to serve as their own general contractors on a construction project. Bozza v. Burgener, 280 N.J.Super. 583, 586-87 (App. Div. 1995); Meder v. Resorts International, 240 N.J.Super. 470 (App. Div. 1989), *cert. den.* 121 N.J. 608; *see also Kane*, 278 N.J.Super. at 134-35, 142-43 (owner serving as general contractor had non-delegable duty for safety on jobsite). As the Appellate Division explained in *Bozza*:

> In *Meder v. Resorts International,* 240 N.J.Super. 470 (App.Div. 1989), *cert. den.* 121 N.J. 608, we held the landowner liable because the owner was also acting as the general contractor and, as such, had failed to provide a safe workplace. We concluded the landowner was responsible for injuries sustained by an employee of a sub-contractor because the landowner had failed to comply with the applicable regulations of the Occupational Health and Safety Administration (OSHA). *Id.* at 477. A similar situation existed in *Kane.* There, the landowner, Hartz Mountain Industries, Inc., was also the general contractor and, as such, had a non-delegable duty to maintain a safe workplace including compliance with applicable OSHA regulations. 278 *N.J.Super.* at 142-43.

Bozza, 280 N.J.Super. at 586-87 (App. Div. 1995) (citations abridged) The case of Slack v. Whalen, 327 N.J. Super. 186 (App. Div. 2000) represented something of a departure from this otherwise longstanding law. In Slack the court ruled for various reasons discussed in the opinion we seek to be published, that the landowner/general contractor had no duty for safety and the injured worker's claim was dismissed on summary judgment.

As frequent construction accident practitioners, we can represent to the Committee that the Slack case is frequently cited for the proposition that a general contractor owes no duty to manage safety or enforce the federal OSHA regulations. Typically toward the end of a construction accident case, after extensive discovery and litigation, almost inevitably a "Slack" summary judgment motion will be made and the argument will be advanced that the general contractor owes no duty. In the case of a landowner serving as a general contractor, our experience has been the motion is made nearly 100% of the time.

We are requesting publication of the subject opinion in Costa v. Copeland and believe such is appropriate under sections 2, 5, 6 and potentially 7 of Rule 1:36-2(d). The Costa v. Copeland opinion is significant because it substantially clarifies the limits of Slack v. Whalen, 327 N.J. Super. 186 (App. Div. 2000). As stated, the Slack case has been the impetus behind a substantial amount of motion practice and confusion concerning the duty of a landowner that also serves in a general

contractor role. The Costa opinion substantially clarifies the application and reach of Slack in this context. As such, the opinion represents an important contribution to the legal question about the duty for safety of a landowner that also serves as its own general contractor. In fact, the Slack opinion is nearly 10 years old, yet no subsequent published decisions have discussed nor cited to it, as the attached Westlaw Keycite shows. The Costa opinion offers a substantial contribution and determines a new and important question of law about the extent of the duty for safety of a landowner/general contractor owed to employees of a subcontractor on a construction project.

There is also an important public policy component to construction site safety management and OSHA enforcement. In the United States, about a million workers have been killed on-the-job since the 1920's. The United States Bureau of Labor Statistics estimated annual workplace fatalities at 30,039 in the early 1920's. 75,000 railroad workers died in the quarter century before World War I alone. The construction industry was just as dangerous, if not more so. The International Association of Bridge and Structural Steel Workers (Iron Workers), for example, lost a full one percent of its membership to workplace accidents in fiscal year 1911-12. A leading skyscraper construction firm admitted at the end of the 1920's that one worker died for every 33 hours of employed time during the previous decade. The United States led the world in casualty rates. Coal worker fatality rates were triple those in the United Kingdom, to cite one example.[1]

High fatality and injury rates continued beyond the early twentieth century. Into the 1990's, the Iron Workers continued to report losing about 100 members a year to workplace accidents.[2] Responding to National Safety Council statistics suggesting that 14,000 Americans are killed and 2.5 million permanently injured in the workplace every year[3], the United States Congress passed the Occupational Safety and Health Act of 1970 "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." At the time of OSHA's passage, the country was losing more men and women to workplace accidents than to the war in Vietnam.[4] Today, according to OSHA's own numbers, 6,000 American workers per year die from workplace accidents, 6 million American workers per year suffer injuries due to such accidents, and 50,000 American workers per year die from illnesses related to occupational hazards.

Death and disability due to unsafe or unhealthy workplaces remain America's hidden epidemic. In 1994, there were 6.8 million job-related injuries and illnesses in the private sector

---

1 [1] Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994).

2 [2] Linder, 20 J. Legis. 99.

3 [3] Linder, 20 J. Legis. 99. See Also *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosectuions for Industrial Accidents.* 101 Harv. L. Rev. 535 (1987).

4 [4] Linder, 20 J. Legis. 99.

alone, an average of more than 18,000 injuries and/or illnesses each and every day of the year. U.S. Department of Labor, Bureau of Labor Statistics, *Annual Survey of Occupational Injuries and Illnesses*, 1994. The cost of these injuries and illnesses has been estimated at $120 billion for 1994 alone. *National Safety Council, Accident Facts*, (1995 Edition). Researchers at Mt. Sinai Medical School have estimated that 50,000 to 70,000 workers die each year as a result of major occupationally acquired diseases like cancer, lung disease and coronary heart disease. Landrigan PJ, Baker DB, "The recognition and control of occupational disease," *Journal of the American Medical Association* 1991;266:676-80. In 1998, the number of confirmed deaths due to occupational injuries in the U.S. was 6,026, approximately one-tenth the estimated number of deaths due to occupational illnesses. U.S. Department of Labor, Bureau of Labor Statistics, "National Census of Fatal Occupational Injuries," 1998, U.S. Department of Labor, August 4, 1999.

OSHA was implemented with these systemic inadequacies in mind. OSHA was enacted to provide prevention; however, as discussed earlier, a high incidence of occupational injury and illness persist. When construction site leaders fail to follow OSHA safety standards, the imposition of liability through tort law is meant to discourage irresponsible conduct, compensate the injured and create incentives to minimize risks of harm. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 448 (1993); *People Express Airlines, Inc. v. Consolidated Rail Corporation,* 100 N.J. 246, 266 (1985); *Weinberg v. Dinger*, 106 N.J. 469, 494 (1987); *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). Tort law provides the bite to work in conjunction with OSHA's bark. It provides real economic incentive for firms to invest in safety for their workers, rather than turn a profit on the potential for injury. The Costa opinion addresses important questions about construction site safety and OSHA enforcement in this regard.

Furthermore, to the extent the Slack opinion represents a departure from the prior case law concerning the duty of a general contractor, Costa may also be appropriate for publication in that it tends to resolve, or at least temper, that apparent conflict. Costa substantially clarifies and qualifies the scope of the Slack opinion which has been the genesis of much motion practice.

For all these reasons publication would be of substantial aid to the bench and bar and we respectfully submit it to the Committee for consideration.

Respectfully,

GERALD H. CLARK
For the firm

cc: Jason S. Winkler, Esq.