August 31, 2015

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

Re: Slatina v. D. Construction, et al.
Docket No.: HUD-L-1182-08

Request for Publication of Judicial Opinion

Dear Committee on Opinions:

Enclosed please find 5 sets of the December 4, 2014 Law Division opinion in the above matter. This matter has since been settled and there have been no appeals. We are requesting this opinion be approved for publication pursuant to sections 6, 7 and 8 of *Rule* 1:36-2(d) for the following reasons.

This is a construction injury case involving a worker that had a cinder block wall collapse on him on high rise construction project in Jersey City. This opinion decides the summary judgment motion of the general contractor/developer. It addresses and develops in a comprehensive and thorough manner several issues of importance to the bar and public in the field of construction project safety and OSHA compliance.

In response to statistics suggesting that every year in America 14,000 workers are killed and 2.5 million are permanently injured, in 1970 the United States Congress enacted the Occupational Safety and Health Act (the OSH Act), 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). The lynchpin principle of OSHA and related industry safety standards is that there must be a top-down duty to manage safety on a construction project, beginning with the general contractor. 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 the 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 v. Bradlees Inc.*, 157 N.J. 221, 237-38 (1999) (a general contractor on a work site has a non-delegable duty to maintain a safe workplace). OSHA was passed because contractors would risk the lives of workers rather than invest in safety. Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield* 20 J. Legis. 99 (1994)

New Jersey courts have also long recognized that a general contractor on a worksite has a 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). Job site injuries arising from violation of this duty has long been a recognized basis for tort liability. *Id.*

Tort liability is critical to discouraging dangerous conduct and taking the profit out of breaking these 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) Any erosion in this basic legal principal about a non-delegable, down the chain duty to manage safety results in a corresponding erosion of safety for workers and anyone else that comes near a construction project. This includes, for example, for a family that might be looking at a home under construction.

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. osha.gov/dcsp/products/topics/businesscase/costs.html Contractors will look to save short term costs by cutting corners on safety and, in many cases, ignoring OSHA and industry safety rules all together. *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[1], the National Safety Council recognized:

[1]Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99, 110 (1994)

> 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 . . . .

Linder at 109, *citing* 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); *Fernandes* at *3 (noting plaintiff's expert in the field of construction site safety management and OSHA compliance "opined that DAR increased its profits by regularly hiring unscrupulous subcontractors who did not adhere to OSHA standards.")

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.

Judge Arre's decision in *Slatina* is appropriate for publication because it thoroughly addresses these important legal and public interest policy considerations in the construction injury context. It comprehensively discusses the development of the non-delegable duty set forth in OSHA and New Jersey jurisprudence in a fact pattern similar to others trial courts will continue to confront. This is of significant public importance because even today construction continues to be among the most hazardous industries in America. www.forbes.com/sites/jacquelynsmith/2013/08/22/americas-10-deadliest-jobs-2

The *Slatina* opinion is also appropriate for publication because it provides a comprehensive discussion of the *Tarabokia* case and will assist other courts in grappling with the apparent conflict many argue *Tarabokia* caused with regard to the non-delegable duty of a general contractor established in prior cases. It helps to define the limits of *Tarabokia* and places the unique facts it presented in a context which will be helpful to other courts grappling with these same issues. No other published opinions do this.

In the end Judge Arre in *Slatina* found the general contractor/developer did have a duty to manage safety and enforce the OSHA and industry safety rules on its project. The facts showed the developer simply chose to ignore these responsibilities. This opinion is of critical public importance because 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. 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* at 104 ("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 . . . ."). Publication of this important decision would work to reduce the level of danger to workers and others that come near construction projects in New Jersey. Ultimately this will result in fewer victims and fewer lawsuits.

Publication of this opinion would be of substantial aid to the bench and bar. The opinion also comprehensively addresses issues of continuing public importance. We respectfully submit it to the committee for its consideration.

Respectfully,

GERALD H. CLARK

cc: Hon. Patrick J. Arre, J.S.C.
Edward DePascale, Esq.

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