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PROCEDURAL HISTORY[1]

The Procedural History contained in Defendant-Appellant's brief contains incorrect factual arguments which Plaintiff-Respondent objects to. However, the various dates contained therein are correct and in the interest of efficiency Plaintiff-Respondent relies upon that and adds the following.

In or about October 13, 2013 Defendant Cumberland USA moved for summary judgment on the basis that there was no evidence it committed any intentional conduct. The Court agreed and granted the motion on November 22, 2013. (*Pr7-8*)

QUESTIONS PRESENTED

1) Is a construction site project manager and owner that contractually agrees to manage safety and does so negligently which needlessly endangers the public to lessen the short term cost of the job (all supported by unrebutted expert testimony) entitled to summary judgment?

2) Is a construction site project manager/owner that was contractually bound to manage job safety entitled to summary judgment in the face of, among other things:

a. requiring or permitting a job to be carried out using ladders contrary to OSHA and industry safety standards;

b. requiring or permitting a job to be done while ice and snow is on the roof;

c. requiring or permitting a job to be carried out without 100% fall protection contrary to OSHA, industry, and the owner's own safety standards.

3) Is it a "novel cause of action" to hold a landowner liable for

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[1] "1T refers to the 1/17/14 summary judgment oral argument transcript. "2T" refers to the 4/11/14 reconsideration oral argument transcript.

breach of its non-delegable duty to make its premises safe for contractors when such has consistently been the law of New Jersey since before 1893? *Murphy v. Core Joint Concrete Pipe Co.*, 110 N.J.L. 83, 86 (E. & A.1932); *Phillips v. Library Co. of Burlington*, 55 N.J.L. 307 (E&A 1893)

4) Does the "contractors hazard exception" to the non-delegable duty rule apply where the contractor neither created, nor was hired to remove, the hazard of ice and snow on the roof?

5) If the contractor created or was hired to remove ice and snow from the roof (untenable conclusions), is there still a question of fact about involvement in the manner and means where the project manager gave unsafe instructions to the workers about how to do the job with ladders and fall protection?

6) If the contractor created or was hired to remove ice and snow from the roof, and gave no direction to the workers, is there still a question of fact as to whether MSU hired a safety incompetent contractor?

7) Is Respondent entitled to "public entity" defenses for the claim of dangerous condition on its property when the record does not establish it qualifies as a public entity and case law indicates the contrary?

8) If Respondent is entitled to "public entity" defenses for the claim of dangerous condition on its property, is there a jury question of fact as to whether the failure to protect against the dangerous condition was "palpably unreasonable?"

9) If Respondent is entitled to "public entity" defenses for the claim of dangerous condition on its property, should the worker's claims be dismissed on a "due care" argument where the worker had no meaningful choice but to do as he was told and Defendant expected?

STATEMENT OF FACTS

I. The Project

This is a safety rules violation construction project personal injury case. The project was the installation of "snow guards" on the roof of the Administration Building on the campus of Montclair State University ("MSU"). Snow guards prevent ice and snow from falling off the roof. (*Da298-300*) The roof is 35 to 50 feet high and steeply pitched. (*Da291-293*) (*Da294-296*) (*Da532-539*) (*Pr1-6*) Victor Misarti of MSU was the supervisor of the project. He was designated "Senior Project Manager" and "Project Safety Coordinator" for the job. (*Da294-296*) (*Da365, 369, 372, 389*)

In December, 2009 Victor Misarti wrote a "Request for Proposals" ("RFP") to enable contractors to bid on the job. (*Da294-296*) (*Da368*) Although the work can be done faster and cheaper using ladders, basic safety standards require it be done using a man lift or scaffold, not ladders. Due to the height, pitch, winter weather conditions and fact that the guards are installed on the edge of the roof, the use of ladders is extremely dangerous. (*Da323-326, 337-340, 342-345*) (*Da520-521, 527, 533-538, 540-547*) (*Da594*) (*Da294-296*) (*Da298-300*) Despite the danger, Victor Misarti specified in the RFP, "the work can be done using ladders or lifts." (*Da296*) (*Da323*) (*emphasis added*) (Da368)

Since ladders are cheaper and the lowest bid would get the work, Victor Misarti was essentially requiring the use of ladders.

(*Da339*)(*Da450-452*)(*Da385*) In response to the RFP, MSU received three bids:

Cumberland:	$22,128
Pfister Roofing:	$23,000
Northeast Roof Maintenance:	$49,000

(*Da302*) Northeast Roof Maintenance (the highest bid) was the only to specify using a lift instead of ladders. (*Da303*)(*emphasis added*) MSU selected the lowest bid, from Cumberland USA (hereafter "Cumberland"), plaintiff Italo Gomez's direct employer. (*Da302*) (*Da323-324, 337-345*)(*Da347-353*)(*Da312-313*) Victor Misarti directed the job be "started and completed as quickly as possible". (*Da454*) (*emphasis added*)(*Da593*)

II. MSU Responsible to Manage Job Safety

Senior Project Manager and Project Safety Coordinator Victor Misarti has an architectural degree and 30 years experience in construction. (*Da365*)(*Da294-296*) He has extensive OSHA training including a 30-hour certification and scaffolding safety certificate. (*Da365-366*) Under well-settled construction law in New Jersey, OSHA, and industry standards, construction project mangers like Victor Misarti/MSU have a responsibility to maintain a safe workplace and ensure workplace safety rules are followed on the job. *See, e.g. Alloway v. Bradlees Inc.,* 157 N.J. at 237-38 (1999); *Carvalho v. Toll Brothers,* 143 N.J. 565 (1996) (summary judgment denied for project manager site engineer that oversaw construction project); *Constantino v. Ventriglia,* 324 N.J.Super. 437 (App.Div.

1999) (industry safety standards are pertinent in determining negligence in construction injury case)

As the self-designated project manager and job safety coordinator, MSU through Misarti was required to take proactive measures to manage safety and prevent accidents. This was especially so as to OSHA's fall protection rules. It was also supposed to make sure its subcontractor, Cumberland, did the same. The purpose of these safety rules is to prevent injury to workers, students, visitors and anyone else that comes near the project. (*Da322-345*) (*Da412*) (*Da369*)

To this end, MSU incorporated a job Safety Program into the contract documents which it was required to follow. (*Da354-360*) (*Da369, 387*) (*Da595-596*) Misarti testified:

> Q. And Montclair State University was also required to follow those same safety rules to the extent they applied to them as well, correct?
> A. Yes.

(*Da387*) This included that MSU was required to supervise job safety. (*Da367, 369, 387-388*) The Safety Program states:

> One of the Owner's primary responsibilities is to provide oversight for a comprehensive Safety Program for this Project.
>
> This Safety Program is to embody the prevention of accidental injury, occupational illness and property damage. Owner [MSU] shall endeavor to provide and maintain a safe, hazard free workplace for its employees, for fellow workers and for the general public.

(*Da412*) Under the Safety Program MSU was required to provide a Project Safety Coordinator to supervise safety. (*Da412-413*)

(*emphasis added*) Victor Misarti was this supervisor:

> Q. And who from the owner was charged with that primary responsibility to provide safety oversight for the project?
> A. That would be me.
>
> Q. At the time you sent out the RFP, did you know that was part of your responsibility would be to provide safety oversight on the project?
> A. Sure, sure.

(*Da369, 372*) (*Da372*) (*Da337-345*) (*emphasis added*)

The purpose of the Safety Program (as well as the above referenced construction law and industry standards) is to, "Prevent jobsite accidents by pre-planning work activities with emphasis on safety." (*Da324-337*) (*Da412*) (*Da369*) Victor Misarti testified:

> Q. And the safety program essentially will set forth certain rules that have to be followed, correct?
> A. Yes.
>
> Q. And the purpose of those rules is essentially to prevent, you know, unnecessary injury to people that may come in or near the project, correct?
> A. Yes.
> ....
> Q. And that would also include students that may come near the project?
> A. Yes, I would say yes.

(*Da369*)

Victor Misarti testified MSU had an obligation to maintain a safe, hazard free workplace for employees, fellow workers and the general public. (*Da367, 369, 371, 388*) As the safety supervisor for the project, Misarti had, among others, the following obligations:

a. Shall make regular Project Safety Inspections and distribute a written report.
b. Shall implement immediate corrective action regarding noncompliance with the Safety Program and/or Federal,

State and Local Codes and Regulations.

c. Shall check with Shop Stewards and other Safety Representatives on disposition of safety related matters.
d. Shall render assistance at Contractor's Tool Box Talks if requested.
e. Shall be notified immediately of any accidents.
f. Shall comply with the Project Safety Program and all Federal, State and Local Codes and Regulations.

(*Da413*)(underline added)(*Da324-338*) Industry standards also set forth the types of things MSU and Misarti should have done as the Project Safety Coordinator and Project Manager, including:

a. Require contractors to designate safety to someone on the site.
b. Provide contractors with safety guidelines he must follow.
c. Discuss safety at the owner-contractor meeting.
d. Conduct safety audits of the contractor during construction.
e. Stress safety as part of the contract during pre-walk around.
f. Conduct periodic safety inspections.
g. Set goals for safety construction.
h. Set up a contractor safety management department to monitor contractor safety.
i. Set safety guidelines into the body of the contract.

(*Da330-331*) Misarti and MSU were negligent in carrying out these safety supervision duties.

III. MSU and Victor Misarti Had the Opportunity and Responsibility to Avoid the Risk of Harm

As the project supervisor and safety coordinator, Misarti was actively involved in managing project safety. (*Da366*) Misarti gave specific instructions to Cumberland workers about fall protection. (*Da372-373, 391*):

> I remember reviewing with...the workers...that did go on the roof, when they came down I spoke to them about

safety.

(*Da372-373*)

> I'm just thinking if the accident was on the 28th...this might be Monday to say his guys were on site maybe after he told me this, maybe that's when I went and I met with them and I discussed safety with them.

(*Da391*) In fact, he held a meeting wherein <u>he gave the workers specific instructions as to how harnesses, rings and fall protection were to be installed and used on the roof</u>. (*Da465-466*) (*emphasis added*) However, contrary to basic safety standards that require 100% fall protection, Misarti communicated that it was acceptable for workers to be unprotected at times while in the process of attaching the fall protective anchors to the roof. (*Da375*)(*Da337-345*) This is precisely what Italo Gomez was doing when he fell. (*Da484-485*)

Victor Misarti was well aware of the foreseeability of the risk of harm:

> Q. In any event, you understand that the risk of a fall from 30 to 40 feet to the cement walkway that the risk of harm is severe, right?
> A. Yes.
>
> Q. And it's foreseeable to you, is it not, that if a worker is on the roof and not protected by fall protection, that he could suffer serious harm from a fall?
> A. Right, yes.

(*Da386-387*) Misarti testified he had the power and opportunity to stop work as he saw fit and/or modify the workers' methods as it pertained to safety:

> Q. As the senior project manager for this job, did you have

the authority to give safety instructions to those workers on this project?

A: [I]f I saw something and I said, look, you know, don't do this, ... they would have to listen to me. I would assume.

Q. Okay. And you would also have the authority to stop work if you felt...the need to stop work?

A. Right. I would say the same thing, yeah.

(*Da371*)

Q. [I]f you saw or knew about an unsafe condition with respect to the work, you had the power and authority to halt the work until the dangerous conditions or correct[ive] measures were taken?

A. Yes.

(*Da387*)

Victor Misarti monitored the job site everyday. (*Da371, 386-387, 392*)(*Da424*) He had specific authority over the workers with regard to safety:

Q. And what, if anything, would you do in response to that if they told you that they were not going to have fall protection?

A. I felt like I answered that before. But, yeah, hypothetically if I saw them being dangerous just, you know, doing their own thing without any safety, I would have...told them no, you can't do that, you're going to get hurt...

Q. <u>And you would have had the authority to stop the work or [tell] them to not go up on the ladders, correct?</u>

A. <u>Yes.</u>

(*Da372*)(*emphasis added*) If Misarti instructed Cumberland workers to stop work due to inclement weather, they would have to comply. (*Da598*) Glenn Crooker, Jr., an owner of Cumberland, confirmed:

Q. <u>...And did he have the power and authority to tell you when it was clear or when it was okay for your people to go up on the roof?</u>

A. He could stop us from working, yes.

(*Da424*) (*emphasis added*)

He's on site, he knows the conditions. So if there was snow on the roof, he can make the call and say hey, I showed up and if he didn't want us working he would stop us and we wouldn't work.

(*Da424*) Misarti confirmed it was his responsibility to monitor the progress of the work:

Q. Were you required to monitor the progress of the work being the senior project manager?
A. I did- my involvement was like I say I came by like once a day, I saw that they were working, I saw that they started. When they were done, you know, my obligation was to pay them so I would verify say 50 percent was done, 100 percent was done.

(*Da386-387*) (emphasis added)

The record here strongly indicates that if safety conditions could affect work progress, Misarti (like the owner's representative in *Carvalho v. Toll Brothers*, 143 N.J. at 576), had the control and authority to take or require corrective measures to address safety concerns. These safety issues would clearly have an impact on the progress of the work. Misarti was unequivocal that if a worker fell from the roof, the work would be stopped. (*Da373*) Misarti testified:

Q. [W]as it part of your duties and responsibilities to monitor the progress of the work?
A. Yes.

Q. And a fall from the roof or an accidental injury would affect the progress of the work in that it would slow it down, right?
A. Yes.

Q. And part of your monitoring the progress of the work

implicates safety concerns inasmuch as one of your primary responsibilities was to provide oversight for a comprehensive safety program for this project?
A. Yes.

(*Da387*) Misarti also had the power to dismiss anyone that did not follow his directions:

Q: My point is if your contractors are not doing what you tell them in terms of safety, you do have the power to dismiss them from the job, right?...
A: Right. I would say we have that power.

Q: Okay. And it would be within the scope of your authority or your responsibility to either actually make the decision to dismiss someone or recommend to your superior that a contractor be dismissed?
A: Yes

(*Da382*) (*emphasis added*)

IV. The Incident

On the day of the fall it was snowing "alot." (*Da479*) A large amount of snow and ice had also accumulated on the roof over the previous weeks. (*Da481*) (*Da464-466*) (*Da462*) (*Da337-345*) (*Pr1-6*) This made it difficult for the workers to install fall protection anchors. (*Da482*)

Italo Gomez had never before worked on such a high pitched, snow covered roof 50 feet up. (*Da482, 486*) He expressed apprehension to his boss:

...I did...say to him that I did not think it was feasible to use a ladder, and that's when he told me that this job does not require a boom and we're not going to waste time with a scaffold, with scaffolding, and he told me, "Come on, man. You have wings. You can fly."

(*Da487*) (*Da545*) (*Da324*) Italo Gomez had no meaningful choice but to do as he was told:

A. [M]any people in the university told us that we were stupid working, without a boom, without a scaffold. And he sent us to that job, to that project, because we could, because for food we'll do anything anywhere. And if I said no, we were fired, we would be fired. I cannot call my boss that I cannot work.

(*Da486*) (*emphasis added*)

Q. And so you believed on that day that going up on that ladder was dangerous?
A. I believed it from the first day.

Q. And is it your testimony that despite thinking that it was dangerous, that you climbed the ladder and went on the roof anyway?
A. I had no other options, sir. I have to work. I cannot drop my job. I have to do it...

(*Da486*) (emphasis added) The Cumberland workers did not create the hazardous condition:

Q. But that snow that was up on the roof, that was not created by the workers, right?
A. No

Q. And as far as you know, the workers did not in any way cause that snow to fall?
A. No.

(*Da380*) (emphasis added) And Cumberland was also not hired to remove snow from the roof:

Q: Cumberland was not hired to remove any snow from the roof, right?
A: Correct

Q: And the snow guards were not meant to prevent snow from sliding down the roof, rather they were meant to prevent the snow from falling off the roof, right?
A: Correct. . . .

(*Da382*)

At the moment he fell, Gomez was in the process of installing his safety anchor to the roof. (*Da484*) Suddenly a sheet of snow/ice

slid down and knocked him about 35 feet to the ground. (*Da485, 504-505*)(*Da376, 378*) He sustained catastrophic injuries. (*Da505*)

V. Negligent Supervision and Management of Job Safety

MSU and Misarti negligently supervised and managed safety on this job. MSU and Misarti selected an unsafe, low bid contractor that did not use proper equipment. (*Da302*)(*Da335-339*) MSU compelled the use of ladders to complete the work. Misarti negligently instructed workers on fall protection and communicated it was acceptable, in violation of clear safety standards, for workers to be unprotected on the roof before securing anchors, as Gomez was when he was knocked off. MSU through Misarti and his boss, Charles Sarajian, compelled or permitted the work to take place while ice and snow was on the roof. It was not until after the fall that MSU prohibited this. (*Da376-378, 383, 385*)(*Da337-345*)(*Da462*)

A. Negligent to Permit the Use of Ladders

Snow guards cannot be safely installed, nor can fall protection anchorage points be safely installed or removed on this roof with ladders. Yet this was permitted, in fact *de facto* required, by Victor Misarti and MSU. (*Da296*)(*Da323-324, 338-341*) (emphasis added)(*Da368*)(*Da294-296*)(*Da339*) To be awarded the work, bidders had no real choice but to use ladders. (*Da339*) Former OSHA safety official Vincent Gallagher explains:

> By permitting the work to be done from ladders, it gave the bidders the choice to choose the least expensive way of performing the work. In order to win the bid, the

> bidder knows that the lower the bid, the more likely to be awarded the contract. In this case, Montclair State University selected the lowest bidder. They rejected the bid of Northeast Roof Maintenance which included the cost of lifts and was more than double the bid of Cumberland. They also did nothing whatsoever to evaluate bids relative to the safety performance of contractors, that is, as indicated in Paragraph IX of this report.
>
> Montclair State University made a conscious decision to permit the work to be done from ladders while at the same time selected the lowest bidder and rejected the bidder that chose to use safe equipment to perform the work. While in a manlift, a worker would be automatically protected from falls from elevation by the guardrails. The use a manlift would eliminate a worker standing on a slippery roof. The use of a manlift would eliminate the use of a personal fall arrest system which is a less reliable means of fall protection than a manlift.

(*Da339*) Misarti was also aware that heavy job materials would be carried up and down 40 foot ladders in violation of OSHA standard 1926.1052(b)(21) which requires three points of contact at all times. (*Da344*) This all violated basic safety rules. (*Da337-345*) (*Da520-521, 527, 533-538, 540-547*)(*Da594*)

Victor Misarti had <u>actual knowledge</u> of the workers using ladders on the project. (*Da371*)(emphasis added) He testified:

> Q: Did you see them using the ladders to complete this work?
> A: Yes

(*Da371*) MSU preferred that Cumberland not utilize a lift because it was cheaper to use ladders. (*Da533*)(*Da341-342*) The OSHA report states, "[MSU] didn't want a lift. Due to small size of project more cost effective than using a lift." (*Da545*) However, it would have been feasible to use a lift or scaffolding. (*Da434*)(*Da527, 533*)(*Da303*)

B. Negligent to Permit Workers to be Unsecured at Times

MSU failed to require proper fall protection and did no analysis to make sure proper anchorage points were established. (*Da375*) This is significant because the roof is Spanish tile. Below that is plywood. Both are too weak to hold the anchors. (Da323-324, 337-338)

It was also acceptable to Misarti, who himself gave fall protection instruction to the Cumberland workers, that they be unprotected at times while in the process of securing the fall protection anchors to the roof. (*Da375*)(*Da337-345*) Victor Misarti testified:

> **Q. [W]as it acceptable to the University that the workers were unprotected during the time period when they went off the ladder onto the roof before the anchorage point was secured?**
> ...
> **THE WITNESS: Okay. Is it acceptable? I would say was it acceptable, yes.**

(*Da375*) This is exactly what Italo Gomez was doing when he was knocked off the roof. (*Da484-485*) Under no circumstances should work have been permitted while the workers were unsecured. This is contrary to basic work safety rules under OSHA, industry standards and MSU's own policy which all require 100% fall protection. (*Da324-325, 336, 344-345, 373*)

C. Negligent to Require or Permit Work to Take Place While Ice and Snow is on the Roof

It was also a violation of basic safety rules under OSHA,

industry standards and MSU's own policy, to permit this snow guard installation work to take place while there was snow and ice on this ceramic tile, sloped roof. OSHA does not permit this. (*Da323-324, 337-345*)(*Da377, 382*) Yet, as discussed *infra* and *supra*, MSU and Misarti were well aware of, permitted, and in fact required this needlessly dangerous method.

The incident occurred on January 28, 2011 in the midst of a month long snow trend, and the day after a significant, 15.5" snowfall. (*Da460*)(*Da380*)(*Da433*) The National Weather Service report for Montclair documents snow falls on the following days:

December 27, 2010- 24 inches.
January 7, 2011- 3.3 inches.
January 11, 2011- 4.6 inches.
January 12, 2011- 8.2 inches.
January 18, 2011- 2.3 inches.
January 21, 2011- 5 inches.
January 25, 2011- 1.2 inches.
January 26, 2011- 4.2 inches.
January 27, 2011- 15.5 inches

(*Da610-628*)(*Pr1-6*)(*Da337-345*) (See also *Da337-338 and Pr1-6*)

Victor Misarti knew about this snow:

Q. Were you aware during this time period, January 28, January 27, during that time period, were you aware that there was snow on the roof? I think you had commented earlier in the deposition how you understood that it had been snowing?
A. Right. They worked for, I'm taking a guess now, three days or so that side and this side, and then it snowed and then there was snow on the roof.

Q. And you knew that?
A. I knew there was snow...

Q. But in any event, you knew on that day that there was snow on the roof, right?
A. Yes, I did.

(*Da387*) MSU and Misarti also knew this snow would avalanche down. This is why they had the snow guards installed. (*Da338-339*)(*Da450-460*)(*Da377, 382, 387*) Misarti testified:

> Q. So there had been snowfall in the days before the day of the incident?
> A. Yes
>
> Q. And it was somewhat of a common situation when there was snow, that snow would fall from the roof, slide down the roof?
> A. Yes, I understand that, yes.
>
> Q. In fact, that's part of the reason that they wanted to put up snow guards was to prevent that snow from falling off the roof?
> A. Yes.

(*Da380*)(emphasis added)

Misarti monitored the job every day. (*Da371, 386-387, 392*) He was always on campus before the fall. (*Da392*) Glenn Crooker, Jr. corroborated:

> He's on site, he knows the conditions. So if there was snow on the roof, [Misarti] can make the call and say hey, I showed up and if he didn't want us working he would stop us and we wouldn't work.

(*Da424*)(emphasis added) E-mails further show that before the fall MSU and Misarti gave direction to Cumberland as to when the workers could go on the roof. (*Da392*) MSU knowingly permitted and directed Cumberland workers on the roof using ladders, without the OSHA required 100% fall protection, while ice and snow had accumulated on the roof. (*Da455*)(*Da324-325, 336, 344-34*)

A January 17 email from Cumberland boss Glen Crooker, Jr. to Victor Misarti confirms work will proceed while, "snow/ice is on the

roof," it was just a question of "how much." Misarti responds, "sounds good." (Da455) On January 21, 2011, Misarti wrote an email to Glenn Crooker, Jr. advising him that a snowstorm had occurred the prior evening, and that another was forecasted for "next Tuesday" (January 25). (*Da456*)(*Da338*) The message goes on to assure Crooker of Misarti's confidence that with "a few days without snow" Cumberland could complete its work. (*Da456*) The fall scene photos and weather reports show Misarti and Cumberland had a low threshold of how much snow and ice on the roof was acceptable for work to proceed. (*Da610-628*)(*Pr1-6*)(*Da338*)

These emails from January 21 and 24 further show that before the fall it was acceptable to Misarti for workers to be on the snow covered roof. (*Da455-456*) A January 26 email shows Misarti is pleased work was completed in the midst of snow which had fallen on January 21-26. (*Da456-457*) Misarti's boss further compliments him stating, "great job and timing of the weather, Victor, thanks." Misarti explains that as long is it is not actively snowing, it is ok for the workers to be on the roof. He allows work to take place while accumulated snow is present. (*Da458*)(*Da390-391*) MSU was clearly aware work was ongoing while it was snowing and/or snow and ice was on the roof.

Furthermore, there is more than a question of fact in the record that MSU administrators had specific knowledge workers were on the "Administration Building," on the day in question. The workers arrived on site that day at 6am. (*Da480*) Misarti's work

hours were 8:30-4:30. His practice was to check the jobs every day at about 9am or earlier. (*Da380, 387, 392*) His office is five minutes from the Administration Building job site. (*Da385*) Victor Misarti was on site throughout the Project. (*Da371, 386-387, 392*) (*Da475*) He was on the scene within minutes of the fall. (*Da377*)

Misarti claims he did not know workers were on site on January 28th, and that had he known that he would have stopped it. (*Da382*) This defense argument is largely a red herring because the negligence of MSU and Misarti goes far beyond specific knowledge of the workers on the roof the day of the fall. Had Misarti properly managed safety as he was required to as the job safety supervisor, he would have made it clear from the outset that no work is to proceed while snow or ice was present.

Regardless, Misarti's claim of ignorance is extensively disputed in the record. (*Da427*) (*Da462*) (*Da464-466*) On the morning of the fall on January 28, 2011, Crooker confirmed that his workers were on-site to complete the snow guard installation at MSU. (*Da462*) (*Da464-466*) Crooker testified:

> Q. And did you notify Victor before the fall that your men would be on the roof that day?
> A. Yes.
>
> Q. And how did you do that?
> A. Email
>
> Q. And what was the purpose of that email notifying him?
> A. To notify him.

(*Da427*) (*emphasis added*) (*Da460*) (*Da464-466*) Misarti had constant

access to email:

> Q. And you believe at the time of this incident you had a Blackberry?
> A. Yes.
>
> Q. And would you get your...work emails on that Blackberry at that time?
> A. Yes.
>
> Q. Did you have your Blackberry that day of the incident?
> A. Yes. I'm sure...I would say I always had it, so I would have it, yes.

(*Da381*) And as to the email from Cumberland specifically notifying him they were on site on January 28th, Misarti admits:

> Q. Okay. This E-mail indicates that it came in at what time?
> A. I believe that was the same day, right, and it was 11:09.
>
> Q. All right. And when did you get the E-mail?
> A. I'm assuming I got it 11:09. If he sent it at that point, I'm sure I got it at that point.

(*Da382*)(emphasis added) And as discussed above, Misarti was well aware of the ongoing work in heavy snow conditions in the days leading up to the fall. (*Da387*)

The fact of the matter is that MSU and Misarti were in charge of safety on the project. They had ongoing knowledge of the conditions. Prior to the incident they failed to establish and communicate clearly to Cumberland that no work is take place while snow is on the roof. (*Da337-345*)(*emphasis added*)(*Da378*) Victor Misarti testified:

> Q. Did the university make it a requirement that was communicated to Cumberland that they were not to be on the roofs during times when there was snow on the

roof?
A. No.

Q. Did you ever communicate to them and tell them that you shouldn't go up there when there's snow on the roof because the snow is prone to falling down and could be a hazard, did you ever say that to them?
A. No.

Q. Did you or someone from your department ever consider removing the snow from the roof at anytime before the project was complete?
A. No.

Q. Was the hazard of snow on the roof and snow falling from the roof ever discussed with Cumberland by way of a safety meeting or otherwise?
A. No...

(*Da383*) And further:

Q. Did you ever provide a warning to Cumberland about the hazard of snow on the roof?
A. No.

(*Da385*) MSU also generated no safety inspection reports like it was supposed to. (*Da413*) (*Da596*)

To the contrary MSU directed the job was to be "started and completed as quickly as possible". (*Da454*) (*emphasis added*) Misarti expressed approval with Cumberland for performing the work under these conditions. Misarti later admitted work should not have been allowed to take place while snow was on the roof. (*Da382*) It was not until after the fall that Victor Misarti told Cumberland not to proceed without his clearance and no snow on the roof. (*Da338-341*) (*Da464-466*) (*Da462*) (*Da391*)

In the end, Victor Misarti admitted:

Q. What is your understanding of what went wrong on this project?

A. ...So what I would say contributed to this accident, you know, was snow -- snowy conditions ...up on the roof and since you asked me, I would just say the worker should not have been up there. They started the job, they should not have -- like the day before the accident it was a heavy snow, ... there was still snow up on the roof, the workers should not have been up there.

(*Da376*) Misarti says that had he seen the workers on the roof on the day he would have told them to get down due to the snow on the roof. (*Da382*) There is substantial evidence in the record he did in fact know. *supra*. Regardless, Misarti and MSU should have made this a safety rule before the incident.

D. Negligent Hiring of Unsafe Contractor

MSU also breached the standard of care for hiring safe contractors. (*Da323, 335, 338-345*) It rejected a responsible bid that specified the use of lifts and simply selected the lowest bid. (*Da386*)(*Da341*)

Cumberland was an unsafe contractor that should not have been awarded this work. Contrary to OSHA and other industry standards, Cumberland had no written safety program, and MSU never asked or required they have one as a condition of getting the work. (*Da341-344*)(*Da384-385*) Cumberland did hold any fall protection or other safety meetings on the job. (*Da431*)

At the beginning of the Project, Italo Gomez requested lift. Glenn Crooker refused. (*Da488*)(*Da428*) The day before the fall there was a 15.5 inch snow fall on top of seven previous snow days that month. Before going on the roof the day he fell, Italo Gomez

expressed apprehension to his employer. (*Da487*)(*Da338*) In response to his concerns. Glen Crooker, Jr. told Gomez, "Come on man. Fuck it. You have wings. You can fly. I have to get paid it's the end of the month, I need money baby". (*Da545*)(*Da487*)(Da342-345) OSHA reported that after the fall Crooker "visited him at the hospital, asked what had happened to his wings"? (*Da545*)(*emphasis added*)

The job was found to be in violation of several OSHA standards which led to the fall. OSHA found that "had the employer chosen to, it would have been feasible to [utilize] a lift in order to better protect employee(s)." (*Da527*) The job was in violation of CFR 1926.501(b)(11) that "each employee on a steep roof with unprotected sides and edges 6 feet (1.8m) or more above lower levels was not protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems... thereby exposing employee(s) to fall hazards." (*Da532*) OSHA also found:

> A) Hazards-Operation/Condition-Accident: Employee(s) were directed to install snow guards on a 6 in 12 slope roof of building approximately 35 feet above ground level. Employee(s) were provided with a personal fall arrest system, were given three nails and were told to connect the anchorage wherever they could. In order to connect/reposition the anchorage point, employee(s) had to climb up on the sloped roof surface without any type of fall protection, thereby exposing employee(s) to fall hazards.....

(*Da532*) The OSHA safety officer found "the employer (Cumberland) failed to assure that each employee had been trained, as necessary, by a competent person." (*Da537*) The job was also in violation of OSHA 29 CFR 1926.503(a)(2) because:

> The employer failed to assure that each employee had been trained, as necessary, by a competent person. ...employee(s) assigned to install snow guards on a 6 in 12 slope roof surface approximately 35 feet above ground level were not provided proper training on the procedures for properly erecting, maintaining and disassembling fall protection systems utilized

(*Da532*) The OSHA safety officer noted the building had "enough clearance space to utilize a lift rather than a fall arrest system with anchorage point on slope roof surface." (*Da536*)

Cumberland was an unsafe contractor. MSU was further negligent for selecting it on this job.

LEGAL DISCUSSION

I. MSU's Motion for Summary Judgment Was Properly Denied Because There Are Questions of Fact as to Whether it Negligently Managed Safety on the Project

A. MSU Has Not Satisfied its Burden of Proving it Is a Public Entity

As a threshold matter, MSU has the burden of proving it is entitled to the limited protections of the Tort Claims Act. *Bligen v. Jersey City Housing Authority*, 131 N.J. 124, 128 (1993). Furthermore, although "public entity" under the Tort Claims Act has been given broad interpretation, not every governmental entity is a public entity. *Leibig v. Somerville Senior Housing, Inc.*, 326 N.J.Super. 102 (App.Div. 1999) There is no certification, deposition or anything else in the motion record below for MSU to satisfy its burden that it qualifies as a "public entity." In fact, case law shows that MSU is not a governmental entity. As the Supreme Court discussed in *Tonelli v. Board of Educ. of Tp. of*

Wyckoff:

> In *O'Connell*, a case involving a student injured at Montclair State University, Montclair invoked charitable immunity on the ground that it was a **private** non-profit corporation organized exclusively for educational purposes. 171 N.J. at 486-87...
>
> ...Montclair was allowed to invoke charitable immunity essentially because it is not governmentally operated; it is not wholly supported by public funds but largely by tuition and charitable contributions; and it does not provide a service to which our citizens are entitled as of right. *Id.* at 493-96. ...because of its hybrid nature, Montclair is not [a public] entity. *Id.* at 497.

Tonelli v. Board of Educ. of Tp. of Wyckoff, 185 N.J. 438, 439-440 (2005) (emphasis added) This stands in sharp contrast to cases such as *Mittra v. UMDNJ*, 316 N.J.Super. 83 (App.Div. 1998) where the Court found UMDNJ was a public entity because it was, "[A] body corporate and politic within the Department of Higher Education." As MSU has not satisfied it burden of proving it is a public entity, it should not be entitled to any Tort Claim Act defenses as a threshold matter.[2] [3]

B. Regardless, Public Entities Are Liable for the Negligence of Their Employees

Even if MSU did satisfy its burden of proving it is a public entity, summary judgment was still properly denied because, among

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[2]Appellant writes that Cumberland was hired, "under the Local Public Contracts Law." (Db1). However there is no such evidence in the record and this unsupported factual assertion is against appellate Rules. *Rules* 2:6-1; 2:6-9.

[3]It should also be noted that no University funds are implicated in this matter because MSU is being defended and indemnified by the insurance company for Cumberland. (2T 23)

other reasons discussed herein:

> A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

N.J.S.A. 59:2-2. The Official Comment to *N.J.S.A.* 59:2-2 states, "this section provides a flexible liability provision which will permit the courts to adapt the principles established in this act to the particular circumstances of the cases coming before them." This liability provision does not require any "palpably unreasonable" or other heightened standard. Rather, the central question is, "whether the same act or omission by a private individual would be actionable in tort." *Kolitch v. Lindedahl*, 193 N.J.Super. 540, 547 (App.Div. 1984). Furthermore, in order for the public entity to be liable, it is not necessary that the individual employees be named in the lawsuit. *Marion v. Borough of Manasquan*, 231 N.J.Super. 320, 327 (App.Div. 1989); *Camburn v. Marlboro Psychiatric Hospital*, 162 N.J.Super. 323 (App.Div. 1978) (state may be held liable in negligence in failing to exercise reasonable care by starting in motion a sequence of events involving patient who wandered off and was injured which could reasonably have been foreseen).

As discussed in detail in the facts section above, there are numerous questions of fact to support the denial of MSU's motion for summary judgment. MSU and Misarti negligently supervised and managed safety on this job. MSU and Misarti selected an unsafe, low bid contractor that did not use proper equipment. (*Da302*)(*Da335-339*)

MSU compelled the use of ladders to complete the work, contrary to basic safety standards. Misarti had significant control over the workers. He gave them specific instructions on how to install fall protection on the roof and communicated it was acceptable, in violation of clear safety standards, for workers to be unprotected on the roof at certain times. MSU through Misarti and his boss, Charles Sarajian, compelled or permitted the work to take place while ice and snow was on the roof. It was not until after the fall that MSU prohibited this. (*Da376-378, 383, 385*)(*Da337-345*)(*Da462*) *Lavin v. Fauci*, 170 N.J. Super. 403, 407, 406 (App. Div. 1979) (subsequent remedial measures admissible to show standard of care, feasible alternative or control)

C. MSU's Contractual Obligation to Manage Safety

MSU's motion for summary judgment was also properly denied because, as set forth in detail in the facts section above, MSU had a contractual duty to manage safety on the job site. For the reasons previously discussed, there are numerous questions as to whether MSU and Misarti were negligent in carrying out this responsibility. It is well recognized that a party to a contract may assume a duty that is "necessary for the protection of the other's person or things." *Pfenninger v. Hunterdon Cent. Reg. High School,* 167 N.J. 230, 241 (2001) (citing *Restatement (Second) of Torts* § 323 (1965)). Where such a duty is breached, tort liability may be imposed. *Id.* at 242. As the Supreme Court noted in *Pfenninger*:

> Thus, in a contractual relationship, an individual may be liable in tort if he or she undertakes "gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things." *Restatement (Second) of Torts* § 323 (1965).

Pfenninger, 167 N.J. at 241.

In *Pfenninger* the decedent, Matthew Pfenninger, was the owner of Coutrywide Excavating Co. ("Countrywide"). Countrywide was hired by the Hunterdon Central Regional High School Board ("School Board") to install an athletic field drainage system. In its contract with Countrywide, the School Board agreed to supply the materials for the job. *Id.* at 237-238. Pursuant to the contract, Pfenninger requested the School Board provide flexible drainage piping that is installed without the worker having to enter the trench. Instead the School Board provided hard PVC piping which required Pfenninger to enter the trench to install it. It collapsed on him and he was killed. *Id.* at 238-240.

Like MSU argues here, the School Board in *Pfenninger* argued that as a landowner that hired an independent contractor, it had no duty to protect workers from job hazards. The Law Division agreed and granted the School Board summary judgment. The Appellate Division found the School Board owed a duty and reversed. The Supreme Court affirmed that decision finding, among other things, that the School Board had agreed to provide the materials for the job. It breached its agreement in failing to supply the proper materials. This breach and the surrounding circumstances formed the

basis of its duty to the injured worker.

Similarly, in *Medina v. BRW Ltd. Holdings, L.L.C,* 2008 WL 2520882 (App. Div. June 26, 2008) (*Da570-579*), a worker who was applying laquer finishing to wood floors was injured when the gas water heater in the building turned on and ignited the fumes. The Law Division improperly granted the owner summary judgment on the basis that it was not liable for the negligence of independent contractors. The Appellate Division found the trial court improperly overlooked the fact that the hazardous condition was not created by the worker and the owner failed to provide a reasonably safe work environment. *Id.* at 6. The Court also noted the building owner undertook a duty for safety in connection with turning off the gas to the building during the laquer application process and that its failure to do so was a cause of the explosion and injuries. The Court held that because the owners agreed to be responsible for turning off the gas, they breached their contractual duty and are thereby liable in tort for the resulting injuries. *Id.* at 6-7.

Similarly in the instant matter, MSU undertook a contractual duty to supervise safety. It is well-established that supervision, once undertaken, must be conducted in a non-negligent manner. *See Troth v. State*, 117 N.J. 258 (1989); *Dudley v. Victor Lynn Lines, Inc.*, 32 N.J. 479 (1960); *Restatement (Second) of Torts* § 323 (discussing negligent performance after undertaking to render services) There are numerous questions of fact in this regard. Summary judgment was properly denied.

D. Summary Judgment Was Also Properly Denied under a "Fairness Analysis"

Regardless of labels placed on parties, at the end of the day it is "general negligence principles" and a "fairness analysis" that controls the legal question of duty. *Pfenninger v. Hunterdon Cent. Reg. High School,* 167 N.J. 230, 241 (2001) ("[W]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."); *Carvalho v. Toll Brothers*, 143 N.J. 565, 572 (1996) ("The question of whether a duty to exercise reasonable care to avoid the risk of harm to another exists is one of fairness and policy that implicates many factors."); *Pfenninger v. Hunterdon Cent. Reg. High School,* 338 N.J.Super. 572, 583 (App.Div. 1999) ("'general negligence principles,' rather than strict categorical analysis, govern tort claims involving worker safety issues."). As the Supreme Court stated:

> The desire to maintain fairness and justness in our tort jurisprudence led to the recognition in *Hopkins,* that premises liability should no longer be limited by strict adherence to the traditional and rigid common law classifications based on the status of the person entering the premises.
> ...
> The inquiry should be not what common law classification or amalgam of classifications most closely characterizes the relationship of the parties, but ... whether in light of the actual relationship between the parties under all of the surrounding circumstances the imposition...of a general duty to exercise reasonable care in preventing foreseeable harm...is fair and just.

Olivio v. Owens-Illinois, Inc., 186 N.J. 394 (2006) Under the "general negligence principles" "fairness analysis," the Court is to consider the foreseeability of harm, the relationship between the parties, the opportunity and capacity to take corrective action, i.e., control, and the public policy interest in the result. *Olivio*, 186 N.J. at 402-408; *Pfenninger,* 167 N.J. at 240-243; *Carvalho*, 143 N.J. at 572-578.

i. Foreseeability and Severe Risk

This incident was clearly foreseeable and the attendant risk was severe. In considering whether the risk of injury was foreseeable, the Court looks to the "likelihood of the occurrence of a general type of risk rather than the likelihood of the occurrence of the precise chain of events leading to the injury." *Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc.*, 342 F.Supp.2d 267, 281-82 (D.N.J.2004); *Cassanello v. Luddy*, 302 N.J.Super. 267 (App.Div. 1997) ("Foreseeability does not depend on whether the exact incident or occurrences were foreseeable. The question is whether an incident of that general nature was reasonably foreseeable."). As previously discussed in the facts section, MSU mis-managed job safety. It was clearly foreseeable that a fall incident like this would result.

The attendant risk of a fall from this roof is severe. Fall-related incidents are the leading cause of fatalities in construction, accounting for 33 percent of all construction fatal injuries in the United States and 45 percent in New Jersey. (*Da324-325*); D. Herbele, *Construction Safety Manual* (1998), p. 263. ("Falls

from elevation are the leading cause of disabling and fatal injury in construction.") Victor Misarti testified:

> Q. In any event, you understand that the risk of a fall from 30 to 40 feet to the cement walkway that the risk of harm is severe, right?
> A. Yes.
>
> Q. And it's foreseeable to you, is it not, that if a worker is on the roof and not protected by fall protection, that he could suffer serious harm from a fall?
> A. Right, yes.

(*Da386-387*) Yet Misarti gave fall protection instructions to the workers and testified it was, "acceptable to the University that the workers were unprotected during the time period when they went off the ladder onto the roof before the anchorage point was secured." (*Da375*) This incident was clearly foreseeable and the attendant risk was severe.

ii. Relationship of the Parties

The relationship of the parties was such that MSU had the "opportunity and capacity ... to have avoided the risk of harm." *Alloway v. Bradlees,* 157 N.J. 221, 231 (1999). The risk of harm here was an untrained laborer compelled to use ladders to install roofing accessories on a high and sloped roof covered with ice and snow, without the required 100% fall protection. Misarti was the project manger and job safety coordinator. (*Da366*) He gave specific mis-direction to Cumberland workers about fall protection (*Da372-373, 391*) Judge Furnari correctly found:

> When Montclair State signed this contract, they also included a clause that created a responsibility in Montclair State [to] supervise the safety. It was a

> safety program, but it was an extraordinary safety program that, in practice, had a Mr. Victor Mazardi, a senior project manager ... who would report to the job at least twice a day, who would check for compliance with OSHA, as well as other requirements. And, he even would go so far as to wait for when the workers were on the roof, to have them come down, and to demonstrate to them the manner in which they could most safety be secured to the roof and the manner in which they were to do the job.

(1T, 55) It was acceptable to MSU that Italo Gomez was unsecured while in the process of attaching the anchor when he fell. (*Da484-485*) (*Da375*) (*Da 337-345*)

Misarti testified he had the power and opportunity to stop work if safety rules were not being followed:

> Q. As the senior project manager for this job, did you have the authority to give safety instructions to those workers on this project?
> A: [I]f I saw something and I said, look, you know, don't do this, ... they would have to listen to me. I would assume.
>
> Q. Okay. And you would also have the authority to stop work if you felt...the need to stop work?
> A. Right. I would say the same thing, yeah.

(*Da371*)

> Q. I think we talked about this earlier but just going through my notes and stuff, if you saw or knew about an unsafe condition with respect to the work, you had the power and authority to halt the work until the dangerous conditions or correct[ive] measures were taken?
> A. Yes.

(Da387) Victor Misarti monitored the job site everyday. (*Da371, 386-387, 392*) (*Da424*) He had specific authority over the workers with regard to safety:

> Q. And what, if anything, would you do in response to that if they told you that they were not going to

have fall protection?

A. I felt like I answered that before. But, yeah, hypothetically if I saw them being dangerous just, you know, doing their own thing without any safety, I would have...told them no, you can't do that, you're going to get hurt...

Q. And you would have had the authority to stop the work or them to not go up on the ladders, correct?

A. Yes.

(*Da372*) (*emphasis added*) If Misarti instructed Cumberland workers to stop work due to inclement weather, they would have to comply. (*Da598*)(*Da373*) Glenn Crooker, Jr. confirmed:

Q. ...And did he have the power and authority to tell you when it was clear or when it was okay for your people to go up on the roof?

A. He could stop us from working, yes.

(*Da424*) (*emphasis added*)

He's on site, he knows the conditions. So if there was snow on the roof, he can make the call and say hey, I showed up and if he didn't want us working he would stop us and we wouldn't work.

(*Da424*) Appellant misrepresents the record, among other places, at Db6 when it says MSU "relinquished control" over the project. The cited deposition does not support that and would in any event merely be a question of fact. The wholly false statement, "MSU did not undertake any supervisory role over Cumberland's work." (Db6) is devoid of any citation to the record whatsoever.

Carvalho v. Toll Brothers, 143 N.J. 565 (1996) was a trench collapse injury case where the Law Division granted summary judgment in favor of the property owner's representative, Bergman. The Appellate Division reversed and the Supreme Court upheld that ruling

based upon a "fairness analysis." Among the critical factors the Court recognized in finding a duty was that Bergman's role included project oversight and an element of control. Like Victor Misarti in the instant matter, it was critical to the Court in *Carvalho* that "Bergman had the authority to stop the job." The Court further noted:

> The record thus strongly indicates that if safety conditions could affect work progress, the engineer had the authority and control to take or require corrective measures to address safety concerns.

Carvalho, 143 N.J. at 576. The same is the case here. Misarti specifically testified:

> Q. [W]as it part of your duties and responsibilities to monitor the progress of the work?
> A. Yes.
>
> Q. And a fall from the roof or an accidental injury would affect the progress of the work in that it would slow it down, right?
> A. Yes.
>
> Q. And part of your monitoring the progress of the work implicates safety concerns inasmuch as one of your primary responsibilities was to provide oversight for a comprehensive safety program for this project?
> A. Yes.

(*Da387*) As Judge Furnari recognized:

> ...Montclair State places themselves in the position with ...Mazardi, who says I can stop a job, I go on the job and talk to people about safety issues, when they're working there during the day. I inspect the site. I do it twice a day. He takes on a significant role during this...

(1T 8)

> [T]hey assume the responsibility of being involved in the job, the opportunity...for safety and being able to create or ...or stop a job from happening...

(1T 10-11) MSU and Victor Misarti clearly had the authority and control to take or require corrective measures to address safety concerns. They could enforce their power with dismissal. (*Da382*)

Appellant argues it should be entitled to summary judgment because the RFP said "weather permitting." (Db2-3) The record is quite ambiguous as to what MSU meant by that. Did that mean no work was to take place during a lighting storm or an active blizzard, but that once it stopped snowing work could proceed regardless of ice and snow on the roof? These are just more fact issues for the jury. This is particularly so given the extensive acts and omissions contained in the record, including Victor Misarti directing the job be "started and completed as quickly as possible". (*Da454*) (*emphasis added*) (*Da593*)

It was also important to the Court in *Carvalho* that Bergman had knowledge of the risk of harm of the unstable trench. (*Da386-387*) *Carvalho* at 576. As stated above, the same thing is present here. Misarti knew the workers were using ladders under these conditions and he admitted:

> Q. What is your understanding of what went wrong on this project?
> A. ...So what I would say contributed to this accident, you know, was snow -- snowy conditions and-- up on the roof and since you asked me, I would just say the worker should not have been up there. They started the job, they should not have -- like the day before the accident it was a heavy snow, ... there was still snow up on the roof, the workers should not have been up there.

(*Da376*) As the Appellate Division recently noted in *Tarabokia v.*

Structure Stone, 429 N.J.Super. 103, 118 (App.Div. 2012), in a fairness analysis, "actual knowledge of the risk of harm may be dispositive for the imposition of a duty of care..." *citing, Carvalho, supra,* 143 N.J. at 576-77.

Furthermore, MSU had the contractual duty to manage safety. Yet far less is sufficient to impose a duty of care:

> The existence of actual knowledge of an unsafe condition can be extremely important in considering the fairness in imposing a duty of care. Courts in several other jurisdictions have imposed a duty on a supervising architect or engineer with actual knowledge of a serious safety risk even if the supervisor never expressly assumed responsibility for safety.... In *Balagna v. Shawnee County,* 233 *Kan.* 1068 (1983)...The court imposed a duty on the engineer who had actual knowledge that the trenching operations were being carried out in violation of OSHA standards and had the authority to stop the work, or at least to say something to the contractor.
>
> We conclude that considerations of fairness and public policy require imposing a duty on Bergman and Stonebeck to exercise reasonable care to avoid the risk of injury on the construction site. The risk of serious injury from the collapse of an unstable trench was clearly foreseeable. Bergman had explicit responsibilities to have a full-time representative at the construction site to monitor the progress of the work, which implicated work-site conditions relating to worker safety. ...The engineer had sufficient control to halt work until adequate safety measures were taken. There was a sufficient connection between the engineer's contractual responsibilities and the condition and activities on the work site that created the unreasonable risk of serious injury. Further, the engineer, through its inspector, was on the job site every day, observed the work in the trench, and, inferably, had actual knowledge of the dangerous condition.
>
> In sum, the engineer had the opportunity and was in a position to foresee and discover the risk of harm and to exercise reasonable care to avert any harm. Under these circumstances, we hold that Bergman and Stonebeck had a duty of care to the decedent.

Carvalho, 143 N.J. at 576-578 (underline added). And as discussed in detail in the facts section above, there are clearly questions of fact as to whether Victor Misarti had actual knowledge of the needlessly hazardous working conditions at issue here. As the Law Division correctly found, "they knew that there was snow on the roof, they knew that there had been snow on the roof before."(1T, 12) MSU and Misarti clearly had the power and opportunity to take corrective measures. In fact the record shows they largely set in motion the conditions which resulted in the fall. *Camburn*, 162 N.J.Super. 323 (App.Div. 1978) (state may be held liable in negligence in failing to exercise reasonable care by starting in motion a sequence of events involving patient who wandered off and was injured).

Similarly in *Pfenninger v. Hunterdon Cent. Reg. High School*, the Courts found the public school property owner owed a duty for safety to the independent contractor. Critical in the Court's fairness analysis was the School Board's knowledge of the dangerous condition, contractual obligation relative to the project, limited involvement in project safety concerns and its authority to stop work for safety reasons. *Pfenninger v. Hunterdon Cent. Reg. High School*, 338 N.J.Super. 572, 583-86 (App.Div. 1999), *affd. as modified*, 167 N.J. 230 (2001). The relationship of the parties is such that defendant had significant control over safety and work progress issues. Judge Furnari properly recognized its duty and should be affirmed.

iii. There Is a Public Interest in Preventing Needless Injury and Death to People That Come near Work Sites

Responding to National Safety Council statistics suggesting that 14,000 Americans are killed and 2.5 million permanently injured in the workplace every year, 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." 29 *U.S.C.A.* § 651(b); *Gonzalez v. Ideal Tile Importing Co., Inc.*, 371 N.J. Super. 349, 359 (App. Div. 2004). At the time of OSHA's passage, the country was losing more men and women to workplace accidents than to the war in Vietnam. Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994) Death and disability due to unsafe workplaces persist. In 2007 for example, there were 4 million non-fatal workplace injuries and illnesses and 5657 fatal injuries in the United States. Bureau of Labor Statistics, *Workplace Injuries and Illnesses in 2007; National Census of Fatal Occupational Injuries in 2007;* (*Da324-337*)

Hispanic workers like Italo Gomez disproportionately suffer workplace injury and death. Rick Jervis, *Hispanic Worker Deaths Up 76% Since 1992*, USA Today, July 20, 2009; Mark LeWinter, *Dying for a Paycheck: Body Count Rises as Workers Fall*, N.J.L.J., Oct. 28, 2008 ("[R]ecent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths.") LeWinter

writes:

> A casual drive past a residential construction site in New Jersey on any given day will reveal that the framers and roofers are working at elevations where they are exposed to significant risk of catastrophic injury or death. The problem, however, is not limited to New Jersey; it is industry wide. The National Association of Homebuilders (NAHB) recently completed the most comprehensive analysis of fatalities in the residential homebuilding industry. Falls from elevation continue to be the leading cause of fatalities and the highest proportion of those killed worked for small contractors with less than 10 employers.
>
> . . . .
>
> While injury on residential work-sites certainly occurs across all demographics, recent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths. The NAHB concluded that 28 percent of all fall fatalities were Hispanic workers and 29 percent were foreign born. Between 2003-2006, 34 percent of all Hispanic worker deaths occurred in residential construction—an increase of 370 percent over prior periods. These statistics do not include the number of workers that suffer career-ending or catastrophic spinal or brain injuries as a result of falls.

LeWinter, *Supra*. The federal government reported that 937 Hispanic workers died from job-related injuries in 2007, representing a 76% increase from 1992. Jervis, *Supra*. Most striking, however, is that the nationwide total decreased during the same period; Hispanics died in record numbers as the American workplace became safer. *Id.*

There are important questions of fact about MSU mismanaging safety on this job site. The imposition of liability through tort law is essential 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). In the construction industry, everyone recognizes quickly that "time is money." If you cut corners related to safety and no injury occurs, you can save money. But this should not be permitted because the inevitable resulting injuries end up costing society more. That is why OSHA was passed. (*Da337-345*) Falls on construction sites are notorious for causing serious harm and death. But they are preventable. Had MSU enforced the industry safety rules it agreed to, this fall never would not have occurred.

Excusing this conduct encourages it to be repeated. This places pressure on other project managers to cut the same corners to remain competitive, thereby increasing the danger to the public. Here it happened to be a worker that was seriously injured. Just a easily a student, parent or anyone else could have been injured or killed from a worker or materials falling from the roof. The public policy prong of the fairness analysis strongly supports imposition of a duty of care.

II. MSU's Motion for Summary Judgment was also Properly Denied Because it Had a Non-delegable Duty to Protect the Workers from the Dangerous Condition of Ice and Snow on the Roof

As a general rule, a landowner has "a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers." *Moore v. Schering Plough*, 746 N.J. Super. 300 (App. Div. 2000). This general rule operates to protect individuals

performing work on the premises of the landowner, most commonly independent contractors and their employees. *See Accardi v. Enviro-Pak Sys. Co.,* 317 N.J.Super. 457 (App.Div.1999). The duty a landowner such as MSU owed to the workers in this case is succinctly set for in *Sanna v. National Sponge Co.*, 209 N.J.Super. 60 (App.Div. 1986):

> The owner of land who invites workmen of an independent contractor to come upon his premises is under a duty to exercise ordinary care to render reasonably safe the areas in which he might reasonably expect them to be working. The landowner's duty includes the obligation of making a reasonable inspection to discover defective and hazardous conditions. The obligation upon the landowner of either making the condition of his premises reasonably safe or giving adequate warning imposes upon him the duty to furnish such safeguards as may reasonably be necessary. Moreover, the duty of a landowner to such an invitee is nondelegable. The landowner cannot escape its responsibility to provide a safe place to work by attempting to transfer it to another. The possibility that another person may also have been negligent does not relieve the landowner of his legal duty.

Sanna, 209 N.J.Super. at 66-67 (citations omitted) Contrary to defendant's hyperbole (Db2, 14, 30), there is nothing "novel" about this cause of action; it has been the law of New Jersey since at least 1893. *Murphy v. Core Joint Concrete Pipe Co.*, 110 N.J.L. 83, 86 (E&A 1932); *Phillips v. Library Co. of Burlington*, 55 N.J.L. 307 (E&A 1893)

However, a "landowner is under no duty to protect an employee of an independent contractor from the very hazard created by doing the contract work." *Sanna*, 209 N.J.Super. at 67; *Accardi v. Enviro-Pak Sys. Co.*, 317 N.J.Super. 457, 463 (App.Div.1999); *Burger v.*

Sunoco, Inc. 2009 WL 4895207 (D.N.J. 2009) This is known as the "Contractor's Hazard Exception" to the general duty. *Id.* The Court below also referred to it as the "Fireman's Rule." (1T, 37). This exception originated in *Broecker v. Armstrong Cork Co.*, 128 N.J.L. 3 (N.J.1942). In *Broecker*, an independent contractor fell through a rotted portion of the roof that he was repairing and replacing. The court reasoned that there should be an exception to the general duty owed by a landowner when "an independent contractor, comes upon lands, at the instance of the owner or occupier, to correct the precise condition which causes the injury." *Id.* at 7.

A. The Contractor's Hazard Exception Does Not Apply Because Cumberland Neither Created the Dangerous Condition Nor Contracted to Remove the Ice and Snow from the Roof

As a threshold matter the "Contractor's Hazard Exception" does not apply here because the independent contractor, Cumberland USA, and its employees did not create the dangerous condition of snow and ice on the roof. *Sanna*, 209 N.J.Super. at 67; *Accardi*, 317 N.J.Super. at 463. As the Court articulated in *Burger*:

> Even though every injury that occurs on a contractor's job site can ultimately be reduced to some decision made by the contractor about how to perform the job, the scope of the exception does not extend to every possible injury that occurs in the course of the contractor's work. *See Reiter v. Max Marx Color & Chem. Co.*, 170 A.2d 828, 829-30 (N.J.Super.Ct.App.Div.1960), *aff'd*, 35 N.J. 37 (1961) (declining to apply the exception when a contractor was injured by a defective ladder). Instead, the exception applies when the contractor is called "to correct the precise condition which causes the injury," *Broecker*, 24 A.2d at 196 (fix collapsing roof), or the injury results from a hazardous condition created by the contractor. *E.g., Wolczak*, 168 A.2d at 415 (constructing a structure

> on which employees would work without scaffolding); *Dawson,* 673 A.2d at 852 (choosing not to brace the trusses). Thus, if a contracted worker is injured while ascending a ladder with an unknown defect belonging to the landowner, the exception would not apply. *Reiter,* 170 A.2d at 829-30. While a contractor could be said to have created the hazardous condition in that case by choosing to ascend the faulty ladder without inspecting it or without a separate safety harness, that is not the kind of creation of the hazard falling under this exception.

Burger 2009 WL 4895207 *3. In *Burger*, Plaintiff's employer was contracted to repair leaky skylights in the building's roof. *Id.* at *2. In the course of traversing the roof, plaintiff was caused to fall due to a defect in the roof that preceded the work. Judge Furnari correctly found:

> [T]here was absolutely no damage to Montclair State's roof, and certainly there is no claim that there was any problem with...the structure of the roof itself that caused the plaintiff's injury.

(1T, 53-54) Further, Victor Misarti testified:

> Q. But that snow that was up on the roof, that was not created by the workers, right?
> A. No
>
> Q. And as far as you know, the workers did not in any way cause that snow to fall?
> A. No

(*Da380*)(emphasis added)

Defendant's summary judgment motion was further properly denied because Cumberland was not hired to remove snow and ice from the roof. The Request for Proposals, bid documents, and project contract are clear in this regard. Cumberland's job was to install the snow guard roofing accessories, not to remove snow or ice from the roof. (*Da294-296*) Therefore, the Contractor's Hazard Exception

does not apply. *Broecker v. Armstrong Cork Co.*, 128 N.J.L. 3, 7 (N.J.1942) (the exception applies when the contractor is called "to correct the precise condition which causes the injury.") Judge Furnari correctly concluded:

> [W]e used to call the fireman's rule. ...you're coming to fix the very thing that causes [injury]... and then you sue for the negligence in causing that very thing. ...that isn't the case [here].

(1T, 37 at 15-18)

Breach of the general duty of a landowner to independent contractor employees has been found on multiple occasions. For example, in *Piro v. PSE&G,* 103 N.J.Super. 456, 459-60 (App.Div. 1968) the defendant provided plaintiff's employer with a workplace and a very large saw and saw table, which caused plaintiff's injuries. The saw did not have safety guards in place and the work area was not barricaded to protect workers from flying wood. *Id.* at 460-61. The jury verdict in favor of plaintiff was affirmed on the ground that defendant had breached its duty to make the premises reasonably safe for the work. *Id.* at 463.

In *Moore v. Schering Plough, Inc.,* 328 *N.J.Super.* 300, 302 (App.Div.2000), the court considered whether defendant had a duty to an employee of its security service to remove snow and ice from walkways and ramps to walkways. The motion judge had ruled that " 'a security guard has to take the risk of weather' and that slipping on snow or ice was a 'risk of employment.' " *Id.* at 306. Yet, the plaintiff was not hired for "snow removal on the walkways." *Id.* at

307. As a result, the Appellate Division concluded the defendant owed plaintiff, a business invitee, a duty of reasonable care that included removal of snow and ice. *Id.* Similarly here, nowhere in either the bid nor contract documents does it say that Cumberland was hired to clear ice and snow from the roof.

Judge Furnari's analysis is consistent with the law:

> We have a person charged with the responsibility of going up on the roof to do a job. When he gets up on the roof it...was covered with too much snow in a precarious situation. That activity of going up to do the normal, reasonable job of putting these rails on the roof, that it could be...in a dangerous condition. Now, I say that it's really no different than the case of the security guard [in *Moore v. Schering Plough, Inc.*, 328 *N.J.Super.* 300 (App.Div.2000)] who was given the responsibility of patrolling the area of the municipal housing authority who comes across the patchy ice on he walkway. ...It's no different than an icy, patch condition on a roadway as in Meta v. the Township of Cherry Hill at 152 N.J. 228. It's no different than the accumulation of sand and dust on the floor in the state employment office in Milacci v. Mato at 217 N.J.Super. 297, or Robinsn v. the City of Jersey City at 284 N.J.Super. 596, when a gigantic patch of ice on Tonnelle Avenue. ... Or any other case that we'd have where the condition, because of ice and snow or debris, makes the place the dangerous condition.

(2T, 17-18) Appellant makes the absurd argument that because the general public would not normally be on the roof, that it could never be deemed in a dangerous condition and the case should be dismissed. Under this logic a public entity would virtually never be liable to workmen who are injured in working/employee areas where the general public does not go. This would include, for example, shipping and receiving areas, kitchens, supply areas, employee entrances, prisons and secured areas of courthouses. The

fallacy of defendant's position is shown in *Craggan v. IKEA,* 332 *N.J.Super.* 53, 56 (App.Div.2000) where the plaintiff was the principal of a trucking company that was an independent contractor delivering furniture almost exclusively for defendant. Defendant had an area in the parking lot with an overhang to protect merchandise staged for pick up on pallets. *Id.* Only truckers were allowed under the overhang and metal railings prevented customers' cars from entering. *Id.* at 57. Despite the exclusion of cars, the area contained boxes of string to assist customers in tying down their purchases. Truckers did not use the string. Plaintiff was injured when his feet became entangled in a mass of string on the ground and he fell. *Id.* at 58.

Defendant argued that it was not subject to the general duty owed invitees because plaintiff was an independent contractor and defendant could assume that he would recognize the dangers of his task and adjust his methods accordingly. *Id.* at 63. The Appellate Division found this exception to landowner liability inapplicable because "plaintiff was not injured by a condition created by his task or a risk inherent in his work" but, rather, was injured by conditions of the property. *Id.* So too here, Italo Gomez did not create the ice and snow on the roof. And not only was this condition not inherent in the roofing work, but if MSU had properly managed safety as it contractually agreed to, very simply, work would not have taken place at all while snow was on the roof. Furthermore, the risk of people or materials falling off this roof

did pose a danger to the public that would traverse below.

MSU failed to provide a reasonably safe place to work. The Contractor's Hazard Exception does not apply as a threshold matter because the record is clear Cumberland neither created the dangerous condition nor contracted to remove snow and ice from the roof. The analysis can end here. Defendant's motion for summary judgment was properly denied.

B. Even If the Contractor's Hazard Exception Did Apply, Defendant's Supervisory Responsibilities and Giving Job Instructions to the Workers Implicates the "Manner and Means" Exception

The general rule is that a landowner has a non-delegable duty to make its premises safe for contractors. An exception to this general rule is that the landowner has no duty to cure dangerous conditions that the contractor either created or was hired to fix. An exception to this exception is that a landowner is liable if it exercised a degree of control over the manner or methods by which the work is to be completed. *Sanna v. National Sponge Co.*, 209 N.J.Super. 60, 67 (App.Div. 1986) The Court in *Sanna* held:

> In determining whether the landowner was implicated in negligence, both the *Wolczak* and *Gibilterra* decisions stressed the degree to which the landowner participated in, actively interfered with, or exercised control over the manner and method of the work being performed at the time of the injury. *See Gibilterra*, 19 N.J.171, *Wolczak*, 66 N.J. Super at 73.

Sanna, 209 N.J.Super. at 67. As discussed in detail in the fact section above, MSU exercised significant control over the work of Cumberland. (*Da354-360*)(*Da367, 369, 371, 372, 387-388*) (*Da595-596*)

(*Da413*)(underline added)(*Da330-331, 324-338*)(*Da366*) It was the project manager and safety supervisor. MSU's representative was required to work with the contractor to plan how the job would be completed. (Da355)

Misarti even gave specific instructions to Cumberland workers about fall protection, including about how harnesses, rings and fall protection were to be installed and used on the roof. (*Da372-373, 391, 465-466*) Judge Furnari correctly recognized this:

> [Mizarti] even would go so far as to wait for when the workers were on the roof, to have them come down, and to demonstrate to them the manner in which they could most safety be secured to the roof and the manner in which they were to do the job.

(1T, 55) Yet, contrary to basic safety standards, Misarti communicated that it was acceptable for workers to be unprotected while climbing up the ladders onto the roof and in the tedious process of removing ceiling tiles, finding a beam and attaching the anchors. (*Da375*)(*Da337-345*). This is what Italo Gomez was doing when he was knocked off. (*Da484-485*)

Misarti specifically testified MSU had significant authority and control over Cumberland workers. (*Da372*)(*emphasis added*) (*Da424*)(*emphasis added*) MSU compelled the use of ladders to complete the work because it was cheaper. (*Da368*)(*Da294-296*) (*Da339, 342-343*)(*Da533, 558*) ("[MSU] didn't want a lift. Due to small size of project more cost effective than using a lift.") Summary judgment was properly denied. *Ishaky v. Jamesway Corp.*, 195 N.J.Super. 103,

107 (App.Div. 1984) ("some degree of involvement [in the work] removes the limited immunity provided by *Wolczak*"). Indeed, as the *Ishaky* Court stated, "A showing of control by the owner over the operation is not necessary." *Id.* Here we have control.

C. Even If the Contractor's Hazard Exception Did Apply, There Are Questions of Fact as to Whether Defendant Hired a Safety Incompetent Contractor

Another exception to the Contractor's Hazard Exception is that a landowner is liable for injuries arising from the hiring of a safety incompetent contractor. *Mavrikidis v. Petullo*, 153 N.J. 117, 136 (1998); *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 575-76 (2006) Liability against a landowner for hiring an incompetent contractor is derived from basic negligence principles. *The Restatement (Second) of Torts section 411* (1965) states:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.

Comment a to *section 411*, in turn, defines a competent and careful contractor as "a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others." (emphasis added). Comment b to *section 411* further explains:

> The employer of a negligently selected contractor is subject to liability under the rule stated in this Section for physical harm caused by his failure to exercise reasonable care to select a competent and careful contractor, but only for such physical harm as is so caused. In order that the employer may be subject to liability it is, therefore, necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him.

Restatement (Second) of Torts section 411 (1965); *see also Bergquist v. Penterman*, 46 N.J. Super. 74, 84 (App. Div. 1957), *certification denied* 25 N.J. 55 (1957). In other words, to prevail against the principal for hiring an incompetent contractor, a plaintiff must show that the contractor was incompetent or unskilled to safely perform the job for which it was hired, that the harm that resulted arose out of that safety incompetence, and that the principal knew or should have known of the incompetence. *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 575-76 (2006); *citing Mavrikidis, supra* at 136-37.

As set forth in the facts section above, there are questions of fact as to whether MSU hired an unsafe contractor and complied with corresponding industry standards. Vincent Gallagher writes:

> The reason that the industry standard exists is because if contractors and subcontractors are selected based upon low bid without regard to whether or not they customarily work safely, the bidder will be tempted to cut safety costs in order to get work. OSHA was passed because of the tendency of decision makers in the construction industry to save money by cutting costs associated with safety. Often the entity hiring the contractor will create contracts which indemnify them against economic loss in the event of an injury or death. That is, they protect their economic risk. They should also take reasonable steps to ensure that serious injury and death does not result by ensuring that the contractors that they

> hire are safe contractors and perform their work in compliance with OSHA regulations. By hiring low bid without regard to safety performance, the bidder may be put in a position of having to cut safety costs in order to get work.

(Da335) ...

> Montclair State University selected Cumberland USA as the company to do this work because they were low bid. Deposition testimony shows that Montclair State University did nothing to comply with the standard of care for hiring safe contractors as indicated in paragraph IX.

(Da323) Among other things, "Montclair State University did not look into the Workers Comp experience nor OSHA history nor OSHA incidence rates of bidders. They simply selected the lowest bid." *(Da341)* Misarti's dismissive response about Northeast Roof Maintenance being the only bid to specify lifts is consistent with other evidence that MSU did nothing to ensure that work was done by a safe contractor that had the proper equipment for the job. *(Da341)*

D. Defendant's "Intentional Conduct" Argument Is Frivolous

MSU has never disputed that Cumberland was a safety incompetent contractor. Instead it argues that its safety practices were so bad, that it should be deemed to have "intentionally" injured Italo Gomez, and that it can not be liable for "intentional conduct" of third parties. (Db23-24) This wholly unsupported argument is frivolous, factually and legally.

Legally, movant relies upon *N.J.S.A.* 59:2-10 which says the public entity is not liable for criminal or fraudulent acts of its own employees. There is no law that says if its contractor engages

in intentional conduct, the public entity is entitled to a dismissal. Defendant cites *Sharra v. Atlantic City*, 199 N.J.Super. 535 (App.Div. 1985) and *Setrin v. Glassboro*, 136 N.J.Super. 329 (App.Div. 1975) in support. *Sharra* had nothing to do with "intentional conduct" and says nothing of the sort. *Setrin* involved a plaintiff that sought to hold the public entity defendant liable for a stabbing by a criminal. It has nothing to do with the facts of the instant matter. There is simply no legal support for appellant's contention.

Factually, there is no evidence of an assault, battery or any other intentional tort; Cumberland did not push plaintiff off the roof. Even if there were, that would be a question of fact for the jury to decide. (1T, 61) More importantly, the Court previously found that Cumberland did not intend to injure Gomez and all claims against it were dismissed under the workers compensation bar. (Pr7-8) As such, MSU is precluded from arguing Cumberland actually did intend to injure Italo Gomez or otherwise "pointing the finger" at that dismissed party. *Ramos v. Browning Ferris Indus. of South Jersey, Inc.*, 103 N.J. 177 (1986) (remaining defendants can not point finger at employer who was dismissed on workers compensation bar); *Bahrle v. Exxon Corp.*, 279 N.J.Super. 5, 22 (App.Div.1995).

E. "Palpably Unreasonable" Is a Jury Question

Plaintiff has to prove five prongs at trial in order to prevail on a claim of dangerous condition on public property: 1) that a

dangerous condition exists; 2) that the injury/damage was proximately caused by the dangerous condition; 3) that the dangerous condition created a reasonable foreseeable risk of injury; 4) that either a public employee created the dangerous condition or had actual or constructive notice of it and; 5) that the failure to protect against the dangerous condition was "palpably unreasonable." *N.J.S.A.* 59:4-2; *Thompson v. Newark Housing Authority*, 108 N.J. 525 (N.J. 1987). Basically plaintiff has to show he was injured by a dangerous condition on public property that the entity either created or knew or should have known about and that its failure to make it safe was "palpably unreasonable." *Id.*

To be "palpably unreasonable," a plaintiff must show that the public entity acted or failed to act under the circumstances that were "plainly, obviously, patently, distinctly, or manifestly unreasonably." *Polyard v. Terry*, 160 N.J. Super. 497 (App Div. 1978). The standard does not "mean 'very' negligent, 'grossly' negligent or 'extraordinarily' negligent." *Holloway v. State*, 239 N.J.Super 554, 560 (App.Div. 1990) *aff'd in part and rev'd in part on other grounds,* 125 N.J. 386 (1991). The palpably unreasonable standard is normally a fact question for the jury. *Vincitore v. New Jersey Sports Exposition Authority*, 169 N.J. 119, 130 (2001); *see also Posey ex rel. Bordentown Sewerage Auth.*, 171 N.J. 172, 191 (2008) (jury question whether it was palpably unreasonable for a public defendant not to warn or protect against a dangerously deep

pond near where children played) *Tymczyszyn v. Columbus Gardens*, 422 N.J. Super. 253 (App. Div. 2011) (a jury could find defendant was palpably unreasonable in failing to ensure sidewalk was free of snow during time of high-pedestrian traffic).

The dangerous condition of snow and ice on the roof has been discussed in detail. There is no question the worker was swept off the roof when it avalanched down. MSU clearly knew about this. Forseeability and notice to MSU has already been discussed in detail in the facts section above. The Law Division correctly found:

> And, it seems to me [MSU] clearly would have known that if...the person was going to put these snow guards to stop what Montclair State knew was occurring[;] that snow avalanches off of the top of their roof. That's exactly what happened, and so I think that that would be foreseeable that, if you have somebody up there banging around trying to attach a snow guard and there is snow actually on the roof, that he could be swept off by the avalanche.

(1T 59)

> [MSU] had the opportunity to do so and could have said -- for example, in this instance, we know that an e-mail occurred at least 20 minutes...before the fall had occurred indicating that they were on the job doing this work. Now, the supervisor from Montclair State knew that the construction had already occurred...on one side. They were going to the second phase of the job. He also knew that there had been...and ample amount of snow, and there had been a great snow storm just recently. And, he knew that their work was there, and putting these up is to stop the snow that piles up on the roof. It's...it's obvious that he had knowledge that this dangerous condition existed if they were to work on that roof on that day.

(1T, 60) Appellant misrepresents the record, among other places, at Db6 when it says Misarti did not receive the January 28 email when

it was sent to him on his Blackberry at 11:09. To the contrary, Misarti specifically testified:

> Q. Okay. This E-mail indicates that it came in at what time?
> A. I believe that was the same day, right, and it was 11:09.
>
> Q. All right. And when did you get the E-mail?
> A. I'm assuming I got it 11:09. If he sent it at that point, I'm sure I got it at that point.

(*Da382*)(emphasis added) And it was appropriate for Judge Furnari to point out the obvious:

> ...[W]e have a number of questions of fact. But, it seems to me -- I get all my e-mails on my phone. Today just about every one does. ... There's a question of fact about whether [Mazardi] knew they were there on this day doing the job. But, if it came to his phone, came to his Blackberry, he could just as easily have picked up his phone without writing, or he could have done it from his office, if he received it, and said, wait, are you crazy? You can't work on that roof when there is a tremendous amount of snow. And, that very well could be conduct that a jury could conclude was palpably unreasonable.

(1T, 60-61) At a bare minimum this is more question of fact on the broader notice issue. "Palpably unreasonable" is ordinarily a jury question of fact, and especially so in this case as discussed at length. *Vincitore*, 169 N.J. at 130. Defendant argues its conduct was not palpably unreasonable because "it expressed its desire that the independent contractor proceed in a safe manner and under safe conditions..." (Db29) This self-serving "desire" for safety does not nullify its palpably unreasonable actions set forth herein. The Project Safety Coordinator specifying ladders for this work, retaining an irresponsible contractor, giving incorrect and unsafe

fall protection instructions to the workers, and permitting or requiring the work to take place in the midst of heavy snow and ice conditions, is not acceptable under any circumstances.

Bernardo v. County of Ocean, OCN-L-941-08 (*Da630-637*) is instructive. There the County of Ocean was the general contractor on a construction project. The plaintiff was an employee of a subcontractor who was injured on rolling scaffolding. The court found there was a question of fact as to "palpably unreasonable" where the County failed in its non-delagable duty to manage safety. The Court found it significant that several OSHA safety rules with respect to safety management and the scaffolding were not followed. The Court concluded a reasonable jury could conclude these failures were palpably unreasonable. *Id.; citing; Vincitore v. NJSEA,* 169 N.J. 119, 130 (2001) (palpably unreasonable standard is ordinarily a question of fact for jury).

Defendant's reliance upon *Muhammad v. New Jersey Transit*, 176 *N.J.* 185 (2003) is misplaced. In *Muhammad*, the building owned by New Jersey Transit was being put up for bid for asbestos demolition on the roof. *Id. at 186* At a pre-bid meeting, all potential contractors were informed the roof was in "very poor condition". *Id.* at. 185-186. At a walk through inspection, the representative from the owner informed the contractors they would need to use extra caution due to the old, dilapidated roof they were hired to demolish. It was reported at deposition that the owner's representative was "very, very adamant about the damaged condition

of the roof" and stressed that potential contractors should "look at the whole job as the roof being in bad condition." Plaintiff fell through a hole that had been previously identified and it was "well known" on the job site. *Id.* at 187.

Plaintiff's only claim was that it was palpably unreasonable for NJT to not warn of the dangerous condition of the dilapidated roof. But there was no dispute NJT did in fact warn multiple times. *Id.* at 188. In granting Summary Judgment the court held it was not palpably unreasonable for NJT to expect that S & W would inform its employees of the dangers inherent to the project. *Id*_at. 1157. MSU admits there were no such warnings or discussions at all about the conditions present here. (Da383, 385) Furthermore, the contractor in *Muhammad* was hired to engage in demolition and repair functions of the dilapidated roof; it was a component of the project. *Id.* at 1155-56. There are no such facts here.

F. The Law Division Properly Rejected Appellant's Argument That the Worker Doing His Job as He Was Told and MSU Instructed Constituted Lack of "Due Care"

This is not a routine slip and fall on public property case. Rather, it is a workplace safety, OSHA violation case on behalf of an injured worker who had no meaningful choice; "He either worked at his assigned task or was subject to discipline or being labeled as a troublemaker." *Crumb v. Black & Decker*, 204 N.J.Super. 521, 527 (App.Div. 1985), *citing*, *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 167 (1979); *see also Green v. Sterling Extruder*

Corporation, 95 N.J. 263 (1984) (comparative negligence may be disregarded in a workplace safety negligence case); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402 (1972); *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.)

Unlike for the plaintiff in *Speziale v. Newark Housing Authority*, 193 N.J. Super. 413 (App. Div. 1984) walking in a basement to do laundry, the industry safety standards and the Occupational Safety and Health Act which was intended 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); *Gonzalez v. Ideal Tile Importing Co., Inc.*, 371 N.J. Super. 349, 359 (App. Div. 2004); Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994) The record is clear MSU undertook the duty to manage safety and enforce these OSHA standards. As such, MSU had a responsibility to make sure the jobsite was "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 *U.S.C.A.* § 654(a); *Carvalho v. Toll Brothers*, 143 N.J. 565, 572 (1996) (job owner's safety representative responsible for OSHA violations which caused trench collapse death).

Speziale v. Newark Housing Authority, 193 N.J. Super. 413 (App. Div. 1984) was a narrowly tailored decision dealing with a

residential tenant that needlessly chose to walk into a basement with 2-3 inches of rain water. The plaintiff slipped and fell while attempting to step from a staircase over a pit filled with water onto a single step leading into a laundry room. *Id.* at 415. The Court found her actions under these particular circumstances were unreasonable because she could have sought assistance or waited for the water to abate. As such, she did not meet the "reasonable user" requirement of N.J.S.A. 59:4-1a. This is just like the decedent in *Hawes v. NJDEP*, 232 N.J.Super. 160 (1988) who tried to cross railroad tracks far from any designated pedestrian crossing and it was argued fencing should have been erected along the entire line to prevent it.

Although the plaintiff's lack of due care negated a finding of a dangerous condition, the Appellate Division in *Speziale* emphasized that a plaintiff's contributory negligence will not ordinarily immunize a public entity from liability. *Id.* at 418. The Appellate Division reasoned that such a conclusion would be contrary to *N.J.S.A.* 59:9-4, which provides that a plaintiff's negligence shall not bar her claim unless her negligence is greater than that of the public entity. *Id.* at 418-19. The court indicated that when a condition is dangerous to all users, the plaintiff will be able to establish the existence of a dangerous condition even though he may have been contributorily negligent. *Id.* at 419.

As the Law Division recounted in detail, the facts here are far different than *Speziale*. This is a workplace safety case subject to

industry standards and federal OSHA rules for the protection of workers and others who come near job sites. MSU contractually agreed to manage safety on the project and had an on site safety coordinator that gave specific job instructions to the men. Defendant completely misstates the record when it writes, "Plaintiff climbed onto a roof with snow on it and began to work on that roof without attaching himself to any safety equipment." (Db17) This is entirely false and unsupported. At the time he was swept off the roof, plaintiff was doing exactly what MSU instructed the workers to do.

The workers were expected to be unattached and unprotected from the time they climbed up the 40 foot ladders onto the roof, removed roofing tiles to find a beam, attached an anchor point and then clip in. They were expected to do this in the dead of the winter after a month long period of heavy snow. (Da337-345, 372-373, 375, 465-466, 484-485) As Gomez was in the process of removing the roof tile so he could attach the anchor point and set up his fall protection, it avalanched and knocked him off. *(Da504-505)*:

> Once I was in the bracket, I attempted to make a little bit of room to...remove the shingles...to be able to find the beam, because at 55 feet, I am not stupid, I don't want to fall. It's very high. I was always tied, especially with so much snow around me. I have a family and son. I don't want to die. ...I took all the precautions. While I was making room in the snow, space, all the snow came down. I tried to hold onto anything and I couldn't. I couldn't. I couldn't.

(Da485) Victor Misarti agrees Gomez was attempting to secure fall protection when he was struck. *(Da377-378)* This is far different

from the tenant in *Speziale* who was not directed into the basement by anyone and could have come back later when the water subsided. As Judge Furnari pointed out:

> But, I distinguish, you know, those facts here because in this case [MSU] undertook with its plan to monitor and provide safety for the employees on the job. And...the employee was going to...his work place, which just so happened to be the roof, and it had snow and ice on it.
> ...
> ...I find that snow...on a roof when it's your workplace would be enough to get by the first prong.

(1T, 58) It is also far removed from *Garrison v. Twp. of Middletown*, 154 N.J. 282 (1997) where the plaintiff decided to play football in a parking lot and was injured when he fell on the asphalt. It can not be said as a matter of law that Italo Gomez failed to act with "due care;" that doing what MSU and his direct employer expected him to do was, "[S]o objectively unreasonable that liability for resulting injuries may not be attributed to the condition of the property." *Vincitore v. New Jersey Sports Exposition Authority*, 169 N.J. 119, 125 (2001) (unprotected rail road crossing deemed a dangerous condition, even though collision could be avoided by looking both ways).

The workers were expected and required to be on the roof. Their choice was to do as they were told with whatever equipment they were provided, or find another job. *Crumb*, 204 N.J.Super. at 527 (workers often have no meaningful choice, "He either worked at his assigned task or was subject to discipline...") When Italo

Gomez expressed fear, he was told, "Fuck it. You have wings. You can fly . . ." *(Da487)(Da545)* Gomez explained as best he could:

> I had no other options, sir. I have to work. I cannot drop my job. I have to do it...because for food we'll do anything anywhere. And if I said no, we were fired, we would be fired. I cannot call my boss that I cannot work.

(Da486)

Italo Gomez would not have been injured if MSU in charge of the job site properly carried out its safety management responsibilities. *(Da343-344)* As explained in detail by Vincent Gallagher, these unreasonable work conditions would be dangerous to anyone. *(Da322-345)* Defendant's argument that plaintiff is somehow at fault for doing as he was told would be, "relevant only to proximate causation and comparative fault." *Vincitore* at 126. *Daniel v. N.J. DOT,* 293 *N.J.Super.* 563, 588 (App.Div. 1990) (a plaintiff "may be able to establish the existence of a dangerous condition even though he personally may have been contributorily negligent."); *N.J.S.A.* 59:9-4 ("[c]ontributory negligence shall not bar recovery....") Viewing all facts in the light most favorable to plaintiff's contentions, Appellant's motion for summary judgment was properly denied. *See Brill v. Guardian Life Ins. Co.,* 142 N.J. 520 (1995).

CONCLUSION

Plaintiff/Respondent Italo Gomez respectfully requests this Honorable Court affirm the January 17, 2014 Order of the Court which denied Defendant/Appellant's Motion for Summary Judgment.

Respectfully submitted,
Clark Law Firm, PC
Counsel for Plaintiff/Respondent Italo Gomez

By: _____
GERALD H. CLARK

Appeal- combined brief.wpd