



CLARK LAW FIRM

A PROFESSIONAL CORPORATION

811 Sixteenth Avenue
Belmar, New Jersey 07719
Office: 732-443-0333
Fax: 732-894-9647

January 4, 2015

www.ClarkLawNJ.com



Gerald H. Clark*
Certified Civil Trial Attorney

William S. Peck
Cynthia P. Liebling
Stephanie Tolnai

*Member, New Jersey and
New York Bars

Of Counsel
John J. Bruno, Jr.
Joseph T. Duchak
Robert A. Ferraro

VIA LAWYERS SERVICE

Essex County Courthouse
Hall of Records
465 Dr. Martin Luther King Jr., Blvd. – Chambers 224 HOR
Newark, New Jersey 07102
Attn: Hon. Ned McRosenberg, J&Sc

Re: Tenezaca & Zuna ve Toll Brother's Ince, et al
Docket Noe ESX-L-e262-ee
Our File Noe 33-50

Plaintiff's Motion to Compel Production of Signed Authorizations
Currently Returnable: January 23, 20e5

Dear Judge Rosenberg:

Please accept the following letter brief on behalf of Plaintiffs Feliciano Tenezaca and Jose Zuna in support of the above-referenced motion.

Ie Case Background

This is a construction project safety rules violation injury case. The project in question is the construction of a large luxury townhouse community with resort style amenities including an 18 hole golf course. The project is named the "Country Club of the Poconos" and is located in Marshalls Creek, Pennsylvania, which is just over the border from New Jersey.

The general contractor and developer of the project is the Toll Brothers defendants. Toll Brothers in turn hired defendant Anchor Framing Corporation as a subcontractor to perform framing and sheathing work on the project. Plaintiffs Feliciano Tenezaca and Jose Zuna were both direct employees of Anchor Framing at the time of their respective fall down incidents. The fall down injuries occurred because defendants failed to follow basic work safety rules established by OSHA and other industry authorities. Defendants specifically chose to not follow OSHA general health and safety regulations and they also failed to enforce OSHA's specific fall

protection and scaffolding safety rules. They also failed to follow the pertinent safety industry standards for the prevention of fall injury and death on work sites. (*Exhibit A- Gallagher Report*)

Under well-settled construction law in New Jersey and under OSHA, general contractors like Toll Brothers have a non-delegable duty to maintain a safe workplace that includes “ensur[ing] ‘prospective and continuing compliance’ with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations.” *Alloway v. Bradlees Inc.*, 157 N.J. at 237-38 (1999); *Kane*, 278 N.J. Super. at 142-43; 29 *C.F.R.* §1926.16. As such, the general contractor is required to actively manage safety on this job site and see to it the subcontractors comply with the federal safety regulations and other safety standards in the construction industry. *Id.*

OSHA and industry safety standards are supposed to be enforced from the top down. (*Exhibit A- Gallagher Report*) It is undisputed that the Toll Brothers defendants were the general contractors and developers of the jobsite. As such, they had a non-delegable duty to ensure that OSHA regulations were enforced on the jobsite. Despite this the Toll Brothers defendants did nothing to ensure that OSHA was followed, particularly concerning fall protection for the workers. As such, it is clearly foreseeable that untrained laborers like Jose Zuna and Feliciano Tenezaca, being directed to work on an OSHA non-compliant major construction project on a scaffold and roof some 20 and 40 feet high, respectively, with no harness, lanyard, toe boards, nets or other fall protection can foreseeably result in a fall injury of the type plaintiffs sustained. (*Exhibit A- Gallagher Report*) (*Exhibit B- Selected Portions of OSHA Investigation File*)

Plaintiffs allege there was an ongoing practice on this project to disregard the safety rules, including non-compliance with OSHA fall protection and scaffolding safety standards. As a result, both plaintiffs Tenezaca and Zuna, employees of Anchor Framing, suffered serious fall injuries within 7 working days of each other. (*Exhibit A- Gallagher Reports*) (*Exhibit B- Selected Portions of OSHA Investigation File*)

This is how Feliciano Tenezaca was injured. On February 23, 2009 he was directed to work on a three story high roof of a townhouse completing certain framing work. He was not provided with nor directed to utilize any fall protection. He was also not trained in fall protection safety. As he was working at the height, he fell to the ground and sustained serious head and other injuries. Toll Brothers had direct knowledge of the ongoing failure to follow the fall protection rules. After Tenezaca’s fall, defendants did nothing to correct the ongoing failure to follow the safety rules on this project. As such, only nine days later another Anchor Framing worker, Jose Zuna, suffered a similar fall down incident and serious injuries. (*Exhibit A, Gallagher Report*) (*Exhibit B- Selected Portions of OSHA Investigation File*)

On March 4, 2009 Jose Zuna was directed to replace a framed in window on another townhouse on the same worksite. He was directed by the his foreman, who was working along side him, to climb a scaffold and remove and reset the window. The scaffold was built so they could access the height required and be able to remove the window without lowering it to the ground. Anchor was receiving pressure from Toll Brothers to get the work done as fast as possible, without

regard for safety. OSHA and industry standard fall protection and scaffolding safety rules were neither enforced nor followed. As a result, the worker was caused to fall about 20 feet to the ground and also sustain serious injuries. (*Exhibit A- Gallagher Report*) (*Exhibit B- Selected Portions of OSHA Investigation File*)

The second incident- Zuna- occurred about seven working days after the first one- Tenezaca- and involved the same defendants and actors, even with actual knowledge of the previous catastrophe, defendants chose to continue to disregard safe working practices. Given their similar and linked nature, OSHA conducted a joint investigation into both incidents and issued citations. (*Exhibit B- Selected Portions of OSHA Investigation File*)

Both workers continue to suffer from the resulting severe injuries.

II. Legal Discussion

The Toll Brothers defendants have served an expert report from Timothy Carlsen, PE of Affiliated Engineering.¹ In typical fashion, Carlsen concludes Toll Brothers has no fault for the incidents at issue. (*Exhibit C, Carlsen Report*)

Among the qualifications Carlsen offers in support of his expert testimony is his membership in and/or titles from several professional organizations including the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers. (*Exhibit D, Carlsen CV*). Plaintiff is entitled to explore the legitimacy of these proffered credentials.

In a litigation case like this it is proper and appropriate to investigate the purported qualifications of an expert. *Lawlor v. Kolarsick*, 92 N.J.Super. 309, 312-13 (App.Div.), *certif. denied*, 48 N.J. 356 (1966) (cross examination of a purported expert witness may include evidence that the witness's purported qualifications to comment on the issues presented “was less than he claimed, and that such deficiency affected his credibility.”) When impeaching an expert in this regard, “the test of relevancy” “is not whether the answer sought will elucidate any of the main issues, but whether it will to a useful extent aid the court or jury in appraising the credibility of the witness.”*Id.* at 314 (quoting *Mc-Cormick, Evidence*, § 29, 54-55 (1954)).

Cases like this are, in essence, a battle of the experts. *Das v. Thani*, 171 N.J. 518, 524 (2002). It is entirely proper to explore the purported qualifications of the experts. *See, e.g. Maccarone v. Edison Metuchen Orthopedic Group*, 2008 WL 4763026 (App.Div. 2008) (“Plaintiff's expert had obvious credibility issues and there were substantial, legitimate questions respecting his credentials.”) Credibility of an expert is uniquely within the province of the jury. *State v. Vandeweaeghe*, 177 N.J.229, 239 (2003). The jury is never bound to accept the testimony of an expert

¹The Court may take judicial notice that Affiliated Engineering is primarily retained by defendants/insurance carriers in construction injury litigation.

witness. *State v. M.J.K.*, 369 N.J.Super. 532, 549 (App.Div.), *certif. granted*, 181 N.J. 549 (2004), *appeal dismissed*, 187 N.J. 74 (2005). And with respect to purported qualifications specifically, the Supreme Court has observed that potential weaknesses in credentials should be the subject of “searching cross-examination” to guide the jury in the weight it ascribes to the expert's testimony. *State v. Jenewicz*, 193 N.J. 440, 455 (2008).

Furthermore, the scope of discovery as set forth in the New Jersey Court Rules must be “construed liberally, for the search for truth in aid of justice is paramount.” *Myers v. St. Francis Hospital*, 91 N.J.Super. 377, 385 (App.Div.1966). In fact *Rule 4:17-4 (e)* requires expert's to disclose their purported qualifications. Our courts have consistently held that pretrial discovery should be liberally construed and accorded the broadest possible latitude because we adhere to the belief that justice is more likely to be achieved when there has been full disclosure and all parties are conversant with all available facts. *Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524, 535 (1997); *Jenkins v. Rainer*, 69 N.J. 50, 56 (1976); *In re Selser*, 15 N.J. 393 (1954); *Blumberg v. Dornbusch*, 139 N.J.Super. 433, 437 (App.Div.1976); *Rogotzki v. Schept*, 91 N.J.Super. 135, 146 (App.Div.1966); *Martin v. Educational Testing Serv., Inc.*, 179 N.J.Super. 317, 327 (Ch.Div.1981). Such liberal construction allows the court to compel a party to produce all unprivileged information which is relevant or may lead to the discovery of relevant evidence concerning the respective positions of both plaintiff and defendant. *Shanley & Fisher, P.C. v. Sisselman*, 215 N.J.Super. 200, 216 (App.Div.1987); *Huie v. Newcomb Hospital*, 112 N.J.Super. 429 (App.Div.1970); *Rogotzki v. Schept*, 91 N.J.Super. 135, 146 (App.Div.1966)

As stated, plaintiff seeks to look into these purported qualifications of this expert. For example, among the qualifications Carlsen relies upon is his being designated a “Certified Safety Professional” by the Board of Certified Safety Professionals. Although he holds himself out as a “Safety Professional,” since at least 2002 Carlsen by all accounts has been exclusively testifying for contractors seeking to avoid safety responsibility for safety violations. Putting aside this unsettling reality, there is reason to question the accuracy of what Carlsen represented to the Board in receiving this “Certified Safety Professional” title.

A safety professional is one who has a legitimate dedication to safety. In order to become a “Certified Safety Professional” (“CSP”) by the Board of Certified Safety Professionals specifically, the candidate must have four years of professional safety experience where professional safety is the primary function of the position. Collateral duties in safety are not counted. Whereas for the last 13 years Carlsen has devoted his career to protecting contractors whose safety violations needlessly endanger the public after injury has already resulted, to become a CSP the candidate's “primary responsibility must be the prevention of harm to people..., rather than responsibility for responding to harmful events.” Furthermore, these “professional safety functions must be at least 50% of the position duties.” (*Exhibit E, CSP Application at 3*)

Despite this clearly a proper area of discovery, cross-examination and impeachment, Carlsen was highly resistant to disclosing the information supporting these qualifications. He recently testified at his deposition:

- Q. ...When you took the test to be a Certified Safety Professional – By the way, did you take a test?
- A. Yes, I did.
- Q. ...Did you fill out an application?
- A. Yes.
- Q. ...And are you in fact a Certified Safety Professional by the Board of Certified Safety Professionals?
- A. I am.
- ...
- Q. And all the information you submitted to the Board of Certified Safety Professionals in your written application, was it all correct and accurate?
- A. Of course.
- Q. And you did not misrepresent anything in there?
- A. Correct.
- Q. Would you have any problem with us getting a copy of your application from the Board of Safety Professionals?
- A. I would.
- Q. Why?
- A. You're not entitled to it.
- Q. Well, but why as you sit here would you have a problem with us getting that?
- A. I don't see any need for me to present that for any purpose.
- Q. Okay.
- A. The Board of Certified Safety Professionals found my application, my test scores, my experience to be suitable.
- Q. And you stand behind everything you put in that application?
- A. Absolutely.
- Q. Okay. And everything you put in that application is true and correct?
- A. I think I just answered that. Absolutely.
- Q. Okay. But you don't want us to see the application. Is that what you're telling us?
- A. You do not need to get a copy of any application for any of my societies, my licenses, my memberships, anything. You do not.
- Q. Well, you say I don't need to. That's a different question. The question very simply is you don't want us to get it. Right? You don't want us to see that?

A. I do not feel obligated to give you the permission to obtain that application. That's correct.

Q. Okay. And that's because you're concerned about what might be in there in relation to what you've testified to here or previously?

MR. PERRONE: Objection.

THE WITNESS: No.

MR. CLARK:

Q. Okay.

A. I don't think I need to give you any further explanation.

Q. And is that because you don't have any further explanation?

A. There's no need for a further explanation.

Q. Well, there is if I ask you in a deposition.

A. I've given you the most complete answer I can give you. No. I will not give you permission to acquire my application to the Board of Certified Safety Professionals.

Q. Okay.

A. I won't give you authority to obtain any of my applications for anything that I've done.

Q. And one might say that's because there might be a question about what's in there as an explanation. Do you have any other explanation as to why you don't want that other than you just don't want it?

MR. PERRONE: Objection.

THE WITNESS: It's not a publicly available document. It's between the board and me. And there's no reason for you or anyone else to acquire it.

(Exhibit F, Carlsen Deposition at 60-64)

Despite the above, Carlsen believes no one should find out what the Board was told in connection with his receiving that Certification:

Q. ...If expert X holds herself out as an expert in the field of construction-site safety and part of that holding herself out as an expert is that they have a certification from the Board of Safety Professionals, don't you think the judge or jury should be entitled to know what information was provided to the board to get that certification?

MR. PERRONE: Objection

THE WITNESS: No.

(Exhibit F, Carlsen Deposition at 68-69) He refused to sign any authorizations to enable us to obtain this information. *(Exhibit F, Carlsen Deposition at 71-74)*

We even offered a proposition to end the inquiry:

Q. Do you want to stipulate today that you will not, moving forward in this case, tell anyone, including a judge or a jury, or -- hold yourself out as a Certified Safety Professional? Do you want to stipulate that that's going to be removed from your CV in the case and that would end the inquiry?

MR. SULLIVAN: Objection.

BY MR. CLARK:

Q. Do you want to do that?

MR. PERRONE: Objection.

THE WITNESS: Of course not.

(Exhibit F, Carlsen Deposition at 70-71)

This is clearly the proper subject of discovery, cross-examination and impeachment. The Court, counsel and jury are entitled to know what this purported expert told the various professional organizations to obtain the kinds of credentials he relies upon to give expert testimony in this case. The law is clear on this issue.

Accordingly, it is respectfully requested the Court grant the within Motion to Compel the defense liability expert to produce of signed authorizations with respect to the Board of Certified Safety Professionals, International Code Council (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers, which are attached hereto as Exhibit G.

Respectfully submitted,



GERALD H. CLARK

cc: Bonnie Hanlon, Esq. (Via Electronic and Lawyers Service)
Patrick Perrone, Esq. (Via Electronic and Lawyers Service)
John Sullivan, Esq. (Via Electronic and Lawyers Service)

Compel Authorizations- letter brief.vpd