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| JOAO ABILIO SILVA; MARIA SILVA (his wife),<br><br>Plaintiff(s),<br><br>v.<br><br>CONTI ENTERPRISES, INC; THE CONTI GROUP; CONTICO CORP.; CONTICO CORPORATION; MANUEL "MANNY" BARBOSA; FORD MOTOR COMPANY; JACOBS ENGINEERING GROUP INC.; READING EQUIPMENT & DISTRIBUTION, LLC; FRED BEANS FORD INC.; NAIK CONSULTING GROUP, PC; JIM CAFFREY; PAUL DECASAS; BILL MOSER; JEFF BOWSER; CHARLIE ANDERSON; JOHN WALDORF; JOHN DOES 1-20; ABC CORPORATIONS 1-20,<br><br>Defendant(s). | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION - MIDDLESEX COUNTY<br><br>DOCKET NO.: MID-L-7167-15<br><br>Civil Action |

**BRIEF ON BEHALF OF PLAINTIFFS JOAO SILVA & MARIA SILVA IN OPPOSITION TO DEFENDANT JACOBS ENGINEERING GROUP INC.'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF BREACH**

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## LEGAL DISCUSSION

### I. As the Prime Contractor in Charge of the Project, Jacobs Engineering had a Duty to Manage Safety and Enforce Workplace Industry Safety Standards

#### A. The Law is Clear a Prime Contractor Must Manage Safety

Congress enacted the Occupational Safety and Health Act (the OSH Act), 29 *U.S.C.A.* § 651 to § 678, to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 *U.S.C.A.* § 651(b); *see Gonzalez v. Ideal Tile Importing Co., Inc.*, 371 N.J. Super. 349, 359 (App. Div. 2004). In pursuing those goals, Congress authorized the Secretary of Labor to promulgate health and safety standards for workplaces, 29 *U.S.C.A.* § 655, and established the Occupational Safety and Health Administration (OSHA) to enforce those standards through inspections and investigations, 29 *U.S.C.A.* § 657; *Gonzalez, supra.* The OSHA Act requires employers to comply with specific standards and also imposes a general duty on employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 *U.S.C.A.* § 654(a); *Gonzalez* at 359-60. Violators of specific OSHA standards or OSHA's general duty to provide a safe workplace face civil monetary penalties, as well as criminal sanctions, 29 *U.S.C.A.* § 666. *Gonzalez, supra.*

Specifically, the OSHA regulations provide that "no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety." 29 *C.F.R.* § 1926.20. While it is recognized that the subcontractors have a responsibility to the OSHA Regulations, it is ultimately the prime contractor at the top of the job hierarchy that must enforce these Regulations and determine whether or not they

are being followed by the subcontractors. 29 *C.F.R.* § 1926.16. Jacobs Engineering was the construction manager and resident engineer at the top of the job hierarchy chart; they were the Turnpike Authority's prime contractor on the job. (*Exhibit AA, Dep of Hogan at 23*) (*Exhibit D- Job Organization and Jacobs Hierarchy Charts*) As such, a prime/construction manager cannot delegate its duties to maintain a safe workplace under the federal OSHA regulations to another; but rather, the prime contractor must maintain overall responsibility for the project.

> (a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually. Thus, for example, the prime contractor and his subcontractors may wish to make an express agreement that the prime contractor or one of the subcontractors will provide all required first-aid or toilet facilities, thus relieving the subcontractors from the actual, but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility). ***In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract***.
>
> (b) By contracting for full performance of a contract subject to section 107 of the Act, ***the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.***
>
> (c) To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. ***With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.***
>
> (d) Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.

29 *C.F.R.* §1926.16 (emphasis added); *see Alloway v. Bradlees*, 157 N.J. at 237-38 (a prime contractor on a work site has a non-delegable duty to maintain a safe workplace); *Carvalho v. Toll Brothers*, 143 N.J. 565 (1996) (summary judgment denied for daily construction manager site

engineer that oversaw construction project).

We will not repeat the Statement of Material Facts herein. Suffice to say, Jacobs was the construction manager and resident engineer on this project. They were the prime contractor for the project owner. (*Exhibit Q at 1*) (*Exhibit A- Deposition of Kelly Herlihy at 23-37*) (*Exhibit AA, Dep of Hogan at 23*) (*Exhibit D*) They were coordinating and overseeing the job. They were on site at all times while work was ongoing. They supervised and gave instructions to Conti, including about how to do the work and safety issues. (*Exhibit L, Olcott dep at 24-26*). (*Exhibit B, Decasas dep at 74-76, 106-107*) (*Exhibit P, Barbosa dep at 12-15*, 59-50) (*Exhibit Q at 5-8*- "We can then...recommend other options [in how to do the work] that the Contractor may not have thought of, since our senior staff has seen many different ways contractors have successfully performed or failed in performing the same type of work.") (*Exhibit R at CONTI 01397-98*) (*Exhibit A at 88-90*) They were clearly, according to their own documents and testimony, managing the job. They were the prime contractor with power, control and authority over Conti. (*Exhibit L Olcott dep. at 84-85*) (*Exhibit D- Job Organization and Jacobs Hierarchy Charts*)

Under well-settled construction law in New Jersey, prime contractors/construction managers like Jacobs Engineering 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), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994) State public policy and OSHA impose a duty on the prime contractor to ensure the protection of all of the workers on a construction project, irrespective of the identity and status of their various and several employers, by requiring, either by agreement or by operation

of law, the designation of a single repository of the responsibility for the safety of them all. *Alloway*, 157 N.J. at 238, *citing Bortz v. Rammel*, 151 *N.J.Super.* 312, 321 (App. Div. 1977), *cert. den.* 75 N.J. 539.

As a matter of public policy and federal law, the prime contractor is the single repository of responsibility for the safety of all employees on the job. As such, the prime contractor bears responsibility for all OSHA violations on a project. *Meder v. Resorts International*, 240 N.J.Super. 470, 473-77 (App. Div. 1989), *cert. den.* 121 N.J. 608; *Kane*, 278 N.J.Super. at 142-43; *Dawson v. Bunker Hill Plaza Assocs.*, 289 N.J.Super. 309, 320-21 (App.Div.1996). As such, while it is recognized that lower tier contractors have a responsibility to comply with OSHA Regulations, it is ultimately the prime contractor that must enforce these Regulations down the job hierarchy chain. This was also discussed at length in plaintiff's liability expert reports. (*Exhibits S-U*).

As such, prime contractor enforcement is a key component of the federal workplace safety scheme embodied in OSHA. Jacobs' argument that it owed no duty to the plaintiff contradicts long-standing workplace safety law in the State of New Jersey. Adoption of the argument would make workplaces needlessly less safe, which is why the argument has time and again been rejected by our Supreme Court. *Fernandes v. DAR*, 222 N.J. 390, 411-415 (2015) (contractor at the top of the job hierarchy has a non-delegable duty to manage safety and prevent injuries to workers on the job); *Alloway v. Bradlees*, 157 N.J. at 237-38 (same); *Carvalho*, 143 N.J. 565 (resident engineer overseeing job has duty to manage safety).

## II. Jacobs Also had a Duty for Safety under a General Negligence Principles "Fairness Analysis" and this Case Falls Squarely Within the Rubric of *Carvalho v. Toll Brothers*, 143 N.J. 565 (1996)

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. 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.") 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. *Carvalho*, 143 N.J. at 572-578.

### A. 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 discussed in detail in the Statement of Material Facts, there is no serious question this incident was foreseeable. The plain testimony of the defense witnesses conclusively establishes it. It was commonplace on this job site for two years before the incident that this pick-up truck and

several others like it, had to regularly backup on the worksite. The trucks could not make u-turns because they could not shine lights into the oncoming Turnpike traffic. Construction vehicles with no warning devices backing into people is a well known hazard. The Conti official most knowledgeable in job safety, David Olcott, testified:

Q. So it would have been common on this job site with regard to this work for vehicles such as this Ford to back up, correct?
A. Yes.
Q. And it's foreseeable, is it not, that if a vehicle has an obstructed rear view and there is no backup alarm, it's foreseeable that that could pose a safety work risk to workers, correct?
A. Yes.
Q. It's foreseeable that one of the safety risks could be the worker getting struck by the vehicle, right?
A. Yes.

(*Exhibit L Olcott dep. at 81-83*) This is why all the industry safety standards, OSHA, and the project rules call for backup alarms. It is why Jacobs required them on all their vehicles.

Furthermore, there were several prior backing incidents serious enough to cause incident reports to be generated. One even involved the site safety engineer for the project, Gary Moseley. Jacobs knew about all of them. (*Exhibit J, Prior Backing Incidents*) (*Exhibit A at 77, 83-84, 97-98*) (*Exhibit J at 05060*) (*Exhibit B, Decasas dep at 68*) (*Exhibit L, Olcott dep at 14-16*) In fact, a Daily Log report from the day of the subject incident makes note of one of these prior incidents, "*NOTE: 12/5/13 had another backing incident, vehicle vs. vehicle" (*Exhibit C- Incident Reports and Daily Log at CONTI 03605*) It is a basic safety principle that prior incidents and "near misses," even if no one gets hurt, are important safety learning tools. (*Exhibit A at 136-137*) (*Exhibit B, Decasas dep at 63-65, 147*) As such, Jacobs was required to be notified immediately of any such incidents and

receive a report of same within 24 hours. (*Exhibit V at CONTI 03643, 45, 51- Turnpike Authority Health and Safety Plan Requirements*) There is no serious question this incident was foreseeable.

Defendants' own materials and common sense show there is also no question the attendant risk of a worker being struck by a backing truck is severe. Indeed it caused severe injuries to the worker here. (*Exhibit G*) Between 2003 and 2016, 1,269 workers lost their lives at road construction sites. (*Exhibit Y - Safety Articles, Safety & Health Magazine,* Fatal Injuries at Road Construction Sites among Construction Workers, Nov. 2018, at 1). Half of these fatalities were due to workers being struck by a vehicle or some type of mobile equipment. *Ibid.* (*Exhibit S - Expert Report of Vincent Gallagher* at 5). Between 2005 and 2010, 200 workers were killed by vehicles backing up. (*Exhibit S - Expert Report of Vincent Gallagher* at 5) (*Exhibit Y - Safety & Health Magazine,* Fatal Injuries at Road Construction Sites among Construction Workers, Nov. 2018, at 5). According to OSHA, "79 workers were killed in 2011 when backing vehicles or mobile equipment, especially those with an obstructed view to the rear, crushed them against an object and/or struck or rolled over them." (*Exhibit Z - OSHA - Preventing Backover Injuries and Fatalities*). Defendants' own Safety Training Materials further show workers being struck by vehicles constitutes one of the leading causes of construction site deaths. (*Exhibit Y - Safety Articles, Tailgate/Toolbox Safety Training,* Topic 115: 12 Deadliest Accidents, CONTI 04753).

This incident was clearly foreseeable and the attendant risk was severe.

**B. Relationship of the Parties**

The relationship of the parties was such that Jacobs had the "opportunity and capacity ... to have avoided the risk of harm." *Carvalho*, 143 N.J. at 576. The risk of harm here was a construction truck regularly backing up on this job for two years with no spotter nor backup alarm. There is no

question Jacobs had the opportunity, capacity, power and authority to enforce job safety rules, including about backup alarms and spotters. We do not want to make this brief unnecessarily long by recounting all the facts already set forth in the Statement of Material Facts. These facts clearly show Jacobs had the power to correct this well known hazard.

Jacobs was on site at all times while work was ongoing. They were the construction manager and resident engineer. They were supervising the construction. They were the prime contractor. It was their job to see to it this kind of thing did not happen. They knew this truck was regularly backing up with no alarm nor spotter. They knew about the clear job site rules requiring a backup alarm on the vehicle. Their own safety rules called for backup alarms on all job vehicles. Jacobs had the opportunity, capacity and power to correct unsafe job conditions.

Jacobs regularly gave directions and instructions to Conti, including about unsafe job conditions. They also involved themselves in the manner and means of the work. In fact, as part of their proposal documents in being awarded the job, they touted their expertise in running jobs like this, including telling the contractor better ways to do the work and giving them safety instructions. They had the power to stop the job for safety or other reasons. They had the power under the contract documents to approve or reject of any equipment Conti used. (*Exhibit R at CONTI 01401-02*- "All equipment shall be subject to the approval of the Engineer.")

Jacobs conducted prior safety inspections of Conti work, noted deficiencies, and issued corrective actions which Conti was expected to comply with. Jacobs was on site at the time of the incident, and for the entire shift, watching this truck backing up in the vicinity of the workers with no spotter nor backup alarm, just like they had done for 2 years prior. Jacobs called 911. They issued a stop work order after the incident, collaborated on the drafting of the "Lessons Learned"

document, and specifically required backup alarms on all these trucks after the fact, having failed to enforce that basic safety rule beforehand. The backup alarm would have cost $80; Joao Silva's past medical bills alone exceed $500,000. (*Exhibit G*).

The relationship of the parties was such that Jacobs had the "opportunity and capacity ... to have avoided the risk of harm." *Carvalho*, 143 N.J. at 576. In fact it was their job to do so.

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

Another element of the fairness analysis set forth in *Carvalho* is the public policy interest in holding the defendant responsible for violating basic job safety rules. There is a strong public interest in preventing the kind of thing that happened here. *Carvalho*, 143 N.J. at 573.

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.*

Hispanic workers like Joao Silva 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.") 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.*

It is not unreasonable to hold Jacobs accountable here. It was well within the scope of their responsibility on the job, under industry standards, and under New Jersey workplace safety law, to prevent the kind of thing that happened here. Defendants own documents point out, "Practically all backing accidents are preventable." (*Exhibit Y at CONTI 04749*). 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).

Jacobs resident engineer Paul Decasas, further explained that in construction, time is money, so it was Jacobs' job to see to it the job got done fast. (*Exhibit B, Decasas dep at 104-105*) In fact, the job got done ahead of schedule. (*Exhibit B, Decasas dep at 107*) If you cut corners on safety and no injury occurs, you can save money. Jacobs' official line is that its responsibility to manage safety

is top priority. But their corporate representative testified, "you know, reality? A higher-up maybe money is more important..." (*Exhibit B, Paul Decasas dep at 91*) (underline added)

Here Jacobs got away with permitting this dangerous practice on the job for two years. But this kind of thing should not be permitted because the inevitable resulting injuries end up costing society more. That is why OSHA was passed. (*Exhibit S at 5-12*) (*Exhibit L Olcott dep. at 68-70*) Struck by incidents like this are notorious for causing serious harm and death. (*Exhibit Y*) (*Exhibit S* at 5) (*Exhibit Z*) But they are preventable.

Had Jacobs enforced the industry and job safety rules like it was supposed to, this incident never would not have occurred. Excusing this conduct encourages it to be repeated. This places pressure on other contractors 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 because of these safety violations. But just a easily members of the public could be injured when this kind of thing happens, such as a family boating under the Turnpike bridge where they were working. (*Exhibit B at 103-104*) The public policy prong of the fairness analysis strongly supports imposition of a duty of care here, just like it did in *Carvalho*.

Combining and weighing these factors--the foreseeability of the nature and severity of the risk of injury based on the defendant's actual knowledge of dangerous conditions, the relationship of the parties and the connection between the defendant's legal responsibility for work progress and safety concerns, and the defendant's ability to take corrective measures to rectify the dangerous conditions- considerations of fairness and sound public policy further impel the recognition of a duty on Jacobs to meet their obligations under the law. It had a duty to avoid the risk of injury to employees of its subcontractors. Viewing all facts in the light most favorable to plaintiff's

contentions, defendants' motions for summary judgment should be denied. Had Jacobs done its job, this incident would not have happened. Jacobs' motion for summary judgment should be denied.

Furthermore, because there is no question Jacobs had a duty to manage safety, including safety rules about trucks with no backup alarms nor spotters, was fully on notice of the ongoing violations, plaintiff's cross-motion for partial summary judgment on the issue of breach should be granted. *See Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995).

### D. This Case Is Strikingly Similar to *Carvalho*, Except the Facts Here Are More Compelling

*Carvalho v. Toll Brothers*, 143 N.J. 565 (1996) is nearly on all fours with the instant matter, except here there is an even more compelling case for denial of summary judgment. Like the instant matter, *Carvalho* was a public job. The owner, West Windsor Township, hired defendant Bergman Engineering ("Bergman") to be its resident engineer to oversee and manage a sewer installation project. Like Jacobs Engineering here, Bergman Engineering was on site at the time of the incident, was aware of the site conditions, was observing the work being done and witnessed the incident. Like Jacobs, Bergman had a contract with the owner which required them to be on site every day monitoring the work. *Carvalho*, 143 N.J. at 569.

As stated, the facts of the instant matter are more compelling that in *Carvalho*. Most notably, in *Carvalho*, "The engineer did not have any contractual obligation to supervise the safety procedures of the construction." *Carvalho*, 143 N.J. at 569. Also in *Carvalho*, the contract did not give the engineer any authority, control or responsibility over construction methods. *Id.* at 570. In the instant matter however, Jacobs clearly had a substantial contractual authority and responsibility to manage safety. It also gave them, and they did exercise control over construction methods. *See*

*Facts Section IV.* Jacobs conducted safety inspections of Conti's work, gave them instructions and directives about safety, and had the authority to inspect and approve their equipment (such as their trucks). Conti was contractually obligated to follow Jacobs' directives. *See Statement of Facts, Section IV.*

> The question for the Supreme Court in *Carvalho* was as follows:
>
> > We must decide whether an engineer has a legal duty to exercise reasonable care for the safety of workers on a construction site when the engineer has a contractual responsibility for the progress of the work but not for safety conditions yet is aware of working conditions on the construction site that create a risk of serious injury to workers.

*Carvalho*, at 569 (underline added). That is almost the same question here, except that the engineer here did have a contractual obligation for job safety conditions. The Supreme Court answered the question in the affirmative. So too should this Court and deny Jacobs' motion for summary judgment. In fact, given it has this duty, and there is no genuine issue that they breached it, plaintiff's cross-motion for partial summary judgment on the issue of breach should be granted.

In *Carvalho* the Law Division granted summary judgment in favor of the resident engineer, Bergman. The Appellate Division reversed and the Supreme Court upheld that ruling. Among the critical factors the Court recognized in finding a duty was that the resident engineer's role included project oversight and an element of control. Like Jacobs 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 facts are more compelling here because in *Carvalho* the engineer had some indirect control over safety to the extent work progress concerns had an effect on that.

However in the instant matter, Jacobs had a direct responsibility for safety, as well as an overall responsibility to supervise and manage the work progress. Indeed, job safety official David Olcott testified:

> Q. And with regard to the work, safety concerns cannot be neatly separated from carrying out the job concerns or work progress concerns, there's a significant overlap with regard to a job like this in terms of getting the job done and safety, correct?
> THE WITNESS: Correct.
> Q. And it was not unusual for this vehicle to back up on the job, correct, that's expected they would have to do that?
> A. Correct.
> Q. So it would have been common on this job site with regard to this work for vehicles such as this Ford to back up, correct?
> A. Yes.

(*Exhibit L Olcott dep. at 81-83*)

> Q. So on this job, there was an overlap of work progress, considerations and work safety concerns, correct?
> THE WITNESS: Yes.
> Q. And Jacobs had a responsibility to supervise the work of Conti?
> THE WITNESS: Yes.
> Q. And a safety issue such as an injury or death to a worker could result in slowing down the progress of the work, right, and cause a job stoppage?
> A. Absolutely.
> Q. And, in fact, in this case...the one incident report...says that the brass had come down and...halted the job, do you recall that?
> A. Yes.

(*Exhibit L Olcott dep. at 85-86*) Far less than these compelling facts are 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); *See also Pfenninger v. Hunterdon Cent. Reg. High School*, 167 N.J. 230 (2001) (summary judgment in favor of school board that undertook a duty for job safety reversed on appeal). And just like in *Carvalho*, Jacobs ordered a job down after the incident. *(Exhibit A- Deposition of Kelly Herlihy at 23-37*) (*Exhibit B, Decasas dep at 105-106*) Jacobs clearly had the authority and control to take or require corrective measures to address safety concerns. They could enforce their power with dismissal.

Given the above, Jacobs' reliance on the New Jersey Turnpike Construction Manual is of no moment. First, this document was never produced in discovery, which is now long closed. In fact, the manual appears to be 219 pages. Jacobs attaches essentially one page as an exhibit. *See N.J.R.E.* 106. It looks like it was marked at a deposition as "J-10" on 12-19-17, but there were no depositions

in this case on that date, nor were any exhibits marked in that manner. It appears to be from another case. The manual is also dated June 1987. (*See Certification of Counsel*)

Second, Jacobs' reading of this document clearly contradicts the overwhelming evidence in the case, including their own documents and testimony about Jacobs' construction management and safety role. In fact, the document appears to start with the line – "The Authority is committed to safety and expects the engineer to maintain a close scrutiny of the contractor's methods of construction to maintain the Turnpike's excellent construction safety record. Authority contracts specify that precautions be exercised at all times for the protection of persons and property."

Third, it does not matter anyway, because in *Carvalho*, the resident engineer had, "a contractual responsibility for the progress of the work but not for safety conditions..." *Carvalho*, at 569 (underline added). Indeed, to the extent Jacobs argues this document from 30 years ago contracts away the prime contractor's safety responsibility, that too is of no legal significance because under the law, their duty is non-delegable. It cannot be contracted away because that would eviscerate the whole top-down safety principle. *Fernandes*, 222 N.J. at 411-415 (2015) (contractor at the top of the job hierarchy has a non-delegable duty to manage safety and prevent injuries to workers on the job); *Alloway*, 157 N.J. at 237-38 (prime and lower tier contractors "have a joint, 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.'"); *Carvalho*, 142 N.J. at 579 (1996).

It was also important to the Court in *Carvalho* that the resident engineer had knowledge of the risk of harm of the unstable trench that collapsed on the workers. *Carvalho* at 576. As stated

above, the same thing is present here. Jacobs knew this and similar vehicles were on site for two years, regularly backing up with no spotters nor warning devices. This is a notorious and deadly job site hazard that every industry safety authority requires be corrected. This hazard was also contrary to the job site rules Jacobs was supposed to enforce, as well as their own safety policy.

Jacob's motion for summary judgment should be denied. Plaintiff's cross motion for partial summary judgment should be granted.

## III. There Is No Reason to Consult Factually Dissimilar Lower Court Opinions, Unpublished Opinions, Nor out of State Cases When We Have the Controlling Law of *Carvalho v. Toll Brothers*, 143 N.J. 565 (1996)

### A. The Unpublished Opinions Defendant Relies Upon Have No Precedential Value and Are Otherwise Not Applicable

The Court Rules provide that no unpublished opinion shall constitute precedent or be binding upon any court. *R.* 1:36-3; *see e.g., Trinity Cemetery v. Wall Tp.*, 170 N.J. 39, 48 (2001)(Verniero, J., concurring)(an unreported decision "serve[s] no precedential value and cannot reliably be considered part of our common law'). The rule only permits unpublished opinions to be called to the attention of the court by a party as a type of secondary research material. *Falcon v. American Cyanamid*, 221 N.J. Super. 252, 261 (App. Div. 1987). Accordingly, as a threshold matter, the unpublished opinions defendants cite have no precedential value and should be disregarded.

The unpublished opinions have no applicability to this case. None of them have any impact on the controlling law of *Carvalho*. The *Budz v. Paragon* case is an unpublished abbreviated opinion on a factually dissimilar matter. The court in *Budz* specifically noted that unlike in *Carvalho* where the engineer as assigned to observe the worksite, the defendant in *Budz* had no knowledge of the hazard at issue. The unpublished opinions of *Knopka v. Schiavone* and *Bennett v. Cedar Brook*

are similarly very different from the instant matter where Jacobs had and exercised substantial control over the work and safety issues, was supervising the job at all times, had a contractual responsibility for safety issues, knew about and had rules against the very hazard that caused the incident, which it witnessed happen.

In fact, there are many unpublished opinions which say many things. This is why *Rule* 1:36-3 mandates:

> No unpublished opinion shall constitute precedent or be binding upon any court. ... No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of the client.

For example, movants have not cited to the Court the cases of *Analuisa v. Richards, et al.*, A-6669-03T1 (June 21, 2005) and *Horvath v. Home Care Industries, Inc., et al.*, A-6236-00T3 (Nov. 1, 2002).

In *Analuisa v. Richards, et al.*, A-6669-03T1 (June 21, 2005), plaintiff was standing on a ladder supplied by his employer when he fell from the ladder to the ground sustaining multiple injuries. Plaintiff argued that the prime contractor on the site- who did not get involved in the manner and means of the job- nevertheless owed him a non-delegable duty to maintain a safe work environment since under OSHA regulations and general negligence liability law, the prime contractor is responsible to ensure that the work site is safe. *Id.* at 2. The Appellate Division held that the contractor owed a duty to the plaintiff since obligations imposed against prime contractors under OSHA support a tort claim under state law citing *Alloway, supra*, 157 N.J. at 235-36 (violation of OSHA regulation relevant on liability inquiry). *Id.* at 7. Thus, plaintiff's evidence of OSHA violations supported his cause of action against the contractor. *Id.* at 11.

In *Horvath v. Home Care Industries, Inc., et al.*, A-6236-00T3 (Nov. 1, 2002), the Estate of the decedent Horvath sought damages arising from the defendants' negligent failure to comply with the duty owed to decedent, as an invitee working on the premises, to inspect and protect or warn against the dangers on the property where he and other invitees might reasonably be expected to go. *Id.* at 2. The Appellate Division held that there was a factual issue as to defendant landowner's duty of maintaining a safe workplace since there was a question of fact as to whether the defendants must have foreseen that some workmen would be entering upon the shed roof, and whether these facts establish defendants' duty to provide a safe workplace and to make a reasonable inspection to assure that safety. *Id.* at 10. Moreover, the Appellate Division rejected the same argument defendant makes in this case, that *Slack v. Whalen*, 327 N.J. Super. 186, 191 (App. Div.), *certif. denied*, 163 N.J. 398 (2000) bars the claim.

Defendant's arguments should be rejected.

**B. The Lower Court Opinions Also Have No Impact on the Supreme Court Law Set Forth in *Carvalho***

i. *Slack v. Whalen* Did Not Overturn 30 Years of Construction Site Safety Law and Instead Involved a Very Narrow Set of Circumstances Not Present Here: And In Any Event, *Slack* Has Largely Been Nullified By The *Costa v. Gaccione* Decision

Jacobs Engineering was the resident engineer and construction manager on this project. *Carvalho* makes it clear its motion for summary judgment should be denied. Nevertheless Jacobs cites the lower court opinion of *Slack v. Whalen*, 327 N.J. Super. 186 (App. Div. 2000) to argue it is somehow not liable.

*Slack v. Whalen* did not overturn some 30 years of construction site OSHA negligence law, and it certainly did not overturn *Carvalho*. Instead, *Slack* addressed a very narrow set of facts

whereby a husband and wife who were abandoned by the general contractor they hired to build the home they intended to live in and as such were thrust into having to complete the construction job on their own. *Slack* did not involve the more common situation presented here where a commercial general contractor engaged in the business of real estate development consciously and voluntarily decides to serve as his its general contractor on an industrial construction project.

In *Slack v. Whelan*, 327 N.J.Super. 186 (App. Div. 2000), defendants Tom and Margaret Whelan owned a modest residential lot in Warren County on which, one can infer, they endeavored to build their "dream home." They retained Trident Builders, a professional general contracting firm, to serve as the general contractor on the job and build their home. The cost was to be $80,000. At some point during the project Trident failed to perform and the Whelans, who had no experience in building a home, were forced to complete the project on their own. *Id.* at 188 (emphasis added). The Court found based on the specific facts of the case that the homeowners had no legal duty to exercise reasonable care for the employee's safety at the worksite since defendants had no opportunity or capacity to exercise control over the manner or means by which plaintiff chose to perform the spackling work. *Id.* at 194.

However, the facts and issue presented in *Slack* are quite unlike those faced in the instant matter. Most notably, *Slack* hired a professional general contracting firm to oversee and manage the project. It was only after the firm reneged on its contract, that the Whelan's were thrust into the position of having to finish the construction of their home on their own while not having any prior experience in construction. The Court ultimately found in fairness, under the specific facts of that case, that the liability duties imposed on professional contractors should not be imposed on them as the unwitting homeowners who got involved in finishing the construction project only after their

professional general contractor abandoned them.

Here Jacobs is an commercial engineering and construction firm that manages billion dollar public projects. This is not even remotely close to a situation where a private homeowner has been abandoned by a general contractor and was forced to complete the project on his own. *Slack v. Whelan* is simply completely inapplicable to the facts of this case.

Furthermore, the case of *Slack v. Whalen* has been largely nullified *Costa v. Gaccione,* 408 N.J.Super. 362 (App. Div. 2009). *Costa v. Gaccione* involved a construction accident case where the plaintiff suffered injuries when he fell from makeshift scaffolding. *Id.* The Law Division dismissed all claims against the homeowner who was also serving as his own construction manager, on the basis that he had no duty to manage safety or enforce the OSHA regulations on the project. The Court reasoned that under the case *Slack v. Whalen*, 327 N.J. Super. 186 (App. Div. 2000), as a residential landowner Gaccione had no duty to enforce OSHA or mange safety. The Costa decision highlights the "quite limited" nature of the *Slack* decision and further shows why *Slack* has no precedential value to the issues before this Court. *See also, Gerald H. Clark, "Loosening the Slack on Slack*", 198 N.J. Law Journal 274 (2009)(discussing the import of the *Costa* decision on *Slack*).

The Appellate Division in *Costa v. Gaccione* distinguished *Slack* which did not involve the more common situation presented in *Costa* where a person makes an affirmative choice from the outset to serve as his own general contractor on a residential construction project. The Court stated:

> *Slack* represents an exceptional situation where this Court held that the property owners could not be held liable as general contractors due to the specific factual circumstances.

*Costa v. Gaccione*,408 N.J.Super at 365. Taking into account the volitional act of Gaccione in *Costa* to serve as his own general contractor, the obligations imposed under the OSHA federal workplace regulations, and the particular facts of the case, the Court found under a fairness analysis that the

defendant should be held accountable and the summary judgment decision of the trial court was reversed.

Accordingly, it is clear that *Slack v. Whelan* is a very limited decision. It deals only with the rather uncommon situation where a private homeowner is thrust into the role of serving as their own general contractor midway through a project after being abandoned by their commercial general contractor. The case *sub judice* does not deal with an owner serving as its own general contractor, much less a private homeowner being thrust into that role. The *Slack* decision simply has no bearing on this case. Defendant's motion for summary judgment should be denied.

ii. *Tarabokia v. Structure Stone* Involved a Narrow Set of Circumstances Dealing with a Repetitive Stress Injury from a Power Tool and Did Not Overturn *Carvalho*

Jacobs also points to *Tarabokia v. Structure Stone,* 429 N.J.Super. 103 (App.Div. 2012) to argue it has no liability for its decision to disregard the basic work safety rules it was required to enforce. *Tarabokia v. Structure Stone* did not overturn *Carvalho.* Instead, *Tarabokia* addressed a very narrow set of facts whereby a worker allegedly suffered a repetitive stress injury over the course of several weeks from the use of an otherwise perfectly safe tool for which the worker was trained and certified to operate. This simply has no relation to the facts of this case, which is nearly on all fours with *Carvalho.*

In *Tarabokia* the plaintiff alleged a repetitive stress injury that developed gradually over the course of several weeks from firing the tool over 3000 times. *Tarabokia* at 108. The alleged danger was not readily apparent, and the defendant had no knowledge of it. This is completely different than the instant matter. Indeed, as the Court in *Tarabokia* noted, "This case presents a very different factual scenario [than *Carvalho*]." *Tarabokia* at 117. Unlike in *Carvalho* and the instant case, there is no proof defendants knew about the gradually repetitive stress injury that can develop from firing

the tool over 3000 times over the course of a month. As such, there is no real forseeability. But here, among several other things, a defense safety official testified:

> Q. And it's foreseeable, is it not, that if a vehicle has an obstructed rear view and there is no backup alarm, it's foreseeable that that could pose a safety work risk to workers, correct?
> A. Yes.
> Q. It's foreseeable that one of the safety risks could be the worker getting struck by the vehicle, right?
> A. Yes.

(*Exhibit L Olcott dep. at 81-83*) As the *Tarabokia* court explained:

> Unlike *Alloway* and *Carvalho,* where the dangerousness of the condition, although not inherent in the work performed, was nonetheless immediate and clearly visible, here the actual risk of harm concerned a latent injury not readily apparent that developed gradually from the repeated use of the tool over an extended time period.
> ...
> As defense counsel acknowledged at oral argument before us, while actual knowledge of the risk of harm may be dispositive for the imposition of a duty of care, *Carvalho, supra,* 143 *N.J.* at 576–77, something less in the way of constructive notice may also suffice.

*Tarabokia* at 117-118 (underline added). As has been discussed, in the instant matter there was actual knowledge. Jacobs' motion for summary judgment should be denied. Plaintiff's cross motion for partial summary judgment on the issue of breach should be granted.

### C. Out of State Opinions

There is no reason for movants' reference to out of state cases when the law in New Jersey on this issue, particularly under the facts of this case, is well settled. *Carvalho v. Toll Brothers*, 143 N.J. 565 (1996) Accordingly we will not address these cases further, nor cite to a plethora of cases from those and other jurisdictions which are more consistent with our law.

## IV. Vincent Gallagher Has Not Issued a Net Opinion; Defendants Own Witnesses and Documents Admit the Vehicle Should Have Had a Backup Alarm Which Would Have Prevented the Incident

Defendants misleadingly isolate portions of Plaintiffs' liability expert's report in an effort to make it seem as if Mr. Gallagher's opinions are unsupported by the record and standards in his industry. Not so. Indeed, Gallagher testifies and concludes Jacobs' failed in its responsibility to enforce job-site safety rules under OSHA, the standards of the industry and Defendants' own documents. These opinions are all well supported by the record and Defendants' own admissions. Mr. Gallagher's testimony should not be barred as a net opinion.

Consistent with the policy of admitting all relevant evidence, it is well established that a decision to reject an expert's testimony should be used sparingly and only with great caution. *N.J.R.E.* 402; *Reinhart v. E.I. DuPont De Nemours,* 147 N.J. 156, 164 (1996). It is the jury's function to weigh any alleged deficiencies in the testimony or qualifications of a proffered expert. *Rubanick v. Witco Chemical Corp.*, 242 N.J.Super. 36, 48 (App. Div. 1990), *mod. on o.g.*, 125 N.J. 421 (1991). Any alleged weaknesses in an expert's qualifications or testimony are the subject of cross examination and not grounds to bar the expert's testimony outright. *See, e.g., State v. Jenewicz,* 193 N.J. 440, 455 (2008) ("courts allow the thinness and other vulnerabilities in an expert's background to be explored in cross-examination and avoid using such weaknesses as a reason to exclude a party's choice of expert witness to advance a claim or defense."). But there is no "thinness" to the opinions of Gallagher; they are supported by the overwhelming evidence.

An expert's report should not be barred as a net opinion unless it is composed of solely "bare conclusions, unsupported by factual evidence[.]" *Buckelew v. Grossbard,* 87 *N.J.* 512, 524 (1981). This is fr from the case here. To avoid being deemed a net opinion an expert must provide the why and wherefore of his opinions, not just offer mere conclusions. *Jiminez v. GNOC, Corp.*, 286 *N.J.*

*Super.* 533, 540 (App. Div. 1995). That is, the report must be based on supporting standards, data and facts where the expert's opinion seeks to establish a cause and effect relationship. *Rubanick, supra,* 242 *N.J. Super.* at 49. The standards, facts or data relied on must either be part of the record or the type usually relied on by experts in the field. *N.J.R.E.* 703. If there is a "means-ends-fit," the report is not a net opinion and the testimony should not be barred. *Rubanick, supra,* 242 *N.J. Super.* at 49.

The mere discounting of a fact in evidence by an expert which is deemed to be important by an adverse party- like Jacobs does here- does not reduce the expert's testimony to a net opinion:

> The failure of an expert to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion. *State v. Freeman,* 223 *N.J. Super.* 92, 115-16 (App. Div. 1988), *certif. denied,* 114 *N.J.* 525, 555 (1989). Rather, such an omission merely becomes a proper "subject of exploration and cross-examination at trial." *Rubanick, supra,* 242 *N.J.* at 55.

*Rosenberg v. Tavorath,* 352 *N.J. Super.* 385, 402 (App. Div. 2002); *see also, Creanga v. Jardal,* 185 *N.J.* 345, 360-61 (2005). Fact finders are free to accept parts of an expert's testimony and reject others. *See, e.g., Todd v. Sheridan,* 268 *N.J. Super.* 387, 401 (App. Div. 1993).

Moreover, where there is a so called, "battle of the experts," summary judgment should be denied and the fact finder permitted to assess and weigh each expert's testimony. *Ruvolo v. American Cas. Co.*, 39 *N.J.* 490, 500 (1963) ("where a case may rest upon opinion or expert testimony, a court should be particularly slow in granting summary judgment."); *Lee v. Travelers Insurance Co.,* 241 *N.J.Super.* 293, 295 (Law Div. 1990) ("Ordinarily, where a case may rest upon expert testimony justice is best served by a plenary trial on the merits. A court should be particularly slow in granting summary judgment when a determination rests upon the opinion of an expert witness.").

Defendant Jacobs argues "Plaintiff's expert provides no factual basis for his opinion, and cites to no applicable standards," despite Mr. Gallagher's 26 page narrative report and roughly seven hours of deposition testimony giving the basis for his opinions and conclusions. *Db* at 15. Mr. Gallagher's opinions and conclusions are supported by the facts in evidence and the standards in his industry.

Tellingly, Defendant does not challenge the reports of Keith Bergman or Donald Phillips as net opinions, essentially conceding these reports are supported by sufficient facts in evidence and appropriately tied to industry standards. Bergman and Phillips rely on much of the same evidence as Gallagher to conclude the subject vehicle had an obstructed view to the rear, was required to utilize a backup alarm under OSHA and other standards and that Jacobs failed in its responsibility to enforce and maintain job site safety. As such, any alleged deficiencies in Mr. Gallagher's opinions can be explored via cross examination (at Jacobs' peril) and his testimony should not be barred as a net opinion.

**A. Gallagher's Finding Barbosa Had an Obstructed View to the Rear of His Vehicle Is Not a Net Opinion as it Is Based on Scene Photographs, Photographs of the Incident Vehicle, Incident Reports, Deposition Testimony, Industry Safety Standards, the Opinions of Other Experts and Common Sense**

Defendant Jacobs argues Gallagher's conclusion Barbosa had an obstructed view constitutes a net opinion because it discounts portions of Mr. Barbosa's testimony stating he did not have an obstructed view to the rear of his vehicle. *Db* at 16. In that regard, Mr. Gallagher testified:

> A. He said he [had] an unobstructed view. And he also said he could see everything that was behind the truck. And he also said when he looked he didn't see Mr. [Silva]. So Mr. [Silva] was visible but he didn't see him. And he says there was no obstruction. And he said he has good eyesight. So something's not logical.
>
> Q. He didn't look perhaps?
> A. He testified that he looked.

Q. And do you believe that he looked?
A. I believe that he didn't see Mr. Silva and didn't know he was going to run him over. And I know he had an obstructed view to the rear because I could see obstructions in front of the window in the back.

(*Defense Exhibit K - Deposition of Vincent Gallagher* at 87:13-25). Indeed, as Barbosa testified, despite checking his mirrors and proceeding in a slow and controlled manner, he never saw Silva, who was wearing high visibility safety gear, prior to striking him with his vehicle. ( *Exhibit C- Incident Reports*) ( *Exhibit P, Barbosa dep at 18, 25, 44*). As previously stated, an expert's discounting of a fact or testimony an adversary deems important does not render the expert's opinion a net opinion so long as the opinion is supported by other facts or testimony in the record. *See, e.g., Rosenberg, supra,* 352 *N.J. Super.* at 402.

The overwhelming evidence in this case supports Mr. Gallagher's position Mr. Barbosa had an obstructed view to the rear when he reversed the F-350 vehicle which struck Mr. Silva. Scene photographs, which Mr. Gallagher reviewed, clearly show the F-350 vehicle was equipped with a cargo box, a vertically mounted spare tire behind the driver's side window and various shovels and tools sticking up behind the passenger side rear window at the time it reversed into Mr. Silva. (*Exhibit E- Scene Photos of Truck*) (*Defense Exhibit K - Deposition of Vincent Gallagher* at 80:17-25, ". . . Olcott-5 has three photos. And the third one would be one of the two that I think are most descriptive of the obstruction to the rear.") (*Exhibit H- Photos of Truck after Sold by Con*)(*Exhibit F, Reading Service Utility Body Description*).

Bergman, like Gallagher, reviewed scene photographs and concluded these photos "illustrate the inability to see the driver and passenger side mirrors as well as the obstructions located in the back of the truck." (*Exhibit T - Expert Report of Keith Bergman* at 20). Likewise, Phillips agrees, based on the scene photographs, "there was a spare tire that was mounted vertically on the left side

of the utility bed that would have been blocking the driver's view out of the rear cab window. On the right rear side of the cab, there were shovels and other similar hand tools. The hand tools would also have been partially blocking the driver's view out of the right rear side of the cab window." (*Exhbit U - Expert Report of Donald Phillips, P.E.* at 7).

Gallagher likewise reviewed deposition transcripts and discovery documents wherein Defendants' own representatives and post-incident safety materials acknowledge the vehicle had an obstructed view to the rear. (*Exhibit A- Deposition of Kelly Herlihy at 38*) (*Exhibit L Olcott dep. at 77-78*) (*Exhibit C- Incident Reports*) (*Exhibit M- Post Incident Emails at J015969*) (*Exhibit A at 101*) (*Exhibit B, Decasas dep at 120-121*) (*Exhibit L Olcott dep. at 77-78*) (*Exhibit AA, Hogan dep. at 57-58, 87-88*) (*Exhibit P, Barbosa dep at 20-22, 27-28*) (*Exhibit K, Accident Review/Lessons Learned Document*) (*Exhibit M- Post Incident Emails*). Defendant's Safety official testified:

> Q. So just common sense looking at that picture, does it appear that the tire and tools are partially obstructing the view out the rearview window?
> ...
> THE WITNESS: I would say yes.

(*Exhibit A at 40*)

The Conti official most knowledgeable in safety on the project testified:

> Q. Okay, great. And let's focus on Photo No. 3 of Olcott-6 if you can. Do you see there's a spare tire in the truck?
> A. Yes.
> Q. And it seems to be up in the bed -- why don't you describe where it is.
> A. It is on the left side of the bed of the truck inside adjacent to or up against the driver's side toolbox.
> Q. And are you able to see the entire rear window of the cab portion of the vehicle?
> A. No.
> Q. Why not?
> A. Because there's a tire.
> Q. And why else?
> A. There is a rack that's installed on the truck and what appears to be shovels standing up on the right side.

Q. And you testified you're not able to see the entire rear window, correct?
A. That's correct.
Q. And is that because your view of that is obstructed by the things you just described?
A. My view is, yes.
Q. ...And your point of view in looking at that picture is essentially standing behind the truck?
A. That's correct.
...
Q. And so are you familiar with the basic safety principal with regard to backing up that if the driver cannot see the pedestrian, the pedestrian cannot see the driver?
A. Yes.

(*Exhibit L Olcott dep. at 77-78*).

Lastly, Gallagher reviewed photographs which showed poor lighting at the area where the incident occurred. (*Exhibit C- Incident Reports*) (*Exhibit I, Scene Photos*) (*Exhibit L, Olcott dep at 144*) (*Exhibit AA, Hogan dep. at 57-58*). Specifically, Mr. Gallagher testified:

Q. Did you review any testimony or documentation about the lighting condition at the site?
A. Yes. The police said it was horrible. And you could see there was some glare. And by the way, with regard to obstruction, OSHA finds lighting condition to be an obstruction.

(*Defense Exhibit K - Deposition of Vincent Gallagher* at 129:14-19) (*See also Exhibit Z - OSHA - Standard Interpretations - "Obstructed View to the Rear" includes poor lighting*). As such, Mr. Gallagher's opinion Barbosa had an obstructed view to the rear is well supported by the factual record and his discounting of Mr. Barbosa's illogical testimony to the contrary does not render his report a net opinion. *See, e.g., Rosenberg, supra,* 352 *N.J. Super.* at 402.

**B. Industry Standards Further Support the Experts' Conclusions the Vehicle Had an Obstructed View to the Rear.**

OSHA defines an obstructed view as:

"anything" that would "blockout" (interfere) with the overall view of the operator of

> the vehicle to the rear of the vehicle, at ground level.
>
> "Obstructed view to the rear" could include such obstacles as any part of the vehicle such as structural members, its load (gravel, dirt, rip-rap) . . . in addition, it could include restricted visibility due to weather conditions such as heavy fog; or work being done after dark, without proper lighting.

(*Exhibit Z - OSHA - Standard Interpretations - "Obstructed View to the Rear" Relative to Use of Back-up Alarms*) (emphasis added). Mr. Gallagher's position the "toolbox, tire, tools, rack and shovel" obstructed Mr. Barbosa's view to the rear is supported by OSHA's very definition of the term obstruction. (*Exhibit S - Expert Report of Vincent Gallagher* at 18). The toolbox and rack constitute structural members of the vehicle and likewise the tire, tools and shovel comprise the vehicle's load. These objects, individually and collectively act to create an obstructed view to the rear of the vehicle and Mr. Gallagher's position regarding same does not constitute a net opinion.

Mr. Gallagher also testified based on his review of the records, photographs and deposition testimony, the lighting at the scene of the incident was "horrible." (*Exhibit S - Expert Report of Vincent Gallagher* at 18); (*Defense Exhibit K - Deposition of Vincent Gallagher* at 129:14-19). Under OSHA, poor lighting also qualifies as an obstruction. (*Exhibit Z - OSHA - Standard Interpretations - "Obstructed View to the Rear" Relative to Use of Back-up Alarms*). Mr. Gallagher accordingly had more than sufficient facts to conclude Mr. Barbosa had an obstructed view.

Defendant's position that Gallagher needed to take "line of sight observations or calculations" to avoid being barred as a net opinion is misguided. Our Supreme Court notes:

> It is undisputed that an expert should fully document his opinion. An expert's duty to do so must never be compromised. However, an expert can always assemble more evidence than is necessary to support his opinion. In considering an expert's evidence a court should be cognizant of the expense incurred by litigants in engaging an expert. Therefore, the volume of information that is required to support an expert's opinion must be kept within practical and realistic limits.

*Glen Wall Assocs. v. Twp. of Wall* , 99 *N.J.* 265, 280 (1985) (emphasis added); *Molino v. B.F.*

*Goodrich Co.*, 261 *N.J. Super.* 85, 98-99 (App. Div. 1992) ("Although [plaintiff's expert] stated that he had never done any research regarding warnings or their effectiveness, he did state that those individuals involved with ergonomics often came to him to determine what the specific dangers are. [Plaintiff's expert's] extensive background in tire analysis qualified him to testify regarding the need for an adequate warning."). Here, Gallagher did not need to perform "line of sight calculations." It was clear from the photographs and other evidence there was an obstructed view to the rear of the truck created by the tire, shovel, tools, utility boxes, rack and poor lighting. ( *Exhibit S - Expert Report of Vincent Gallagher* at 18) (*Exhibit E- Scene Photos of Truck*) (*Exhibit H- Photos of Truck after Sold by Conti*) (*Exhibit C- Incident Reports*) (*Exhibit M- Post Incident Emails at J015969*) (*Exhibit A at 101*) (*Exhibit B, Decasas dep at 120-121*) (*Exhibit L Olcott dep. at 77-78*) (*Exhibit AA, Hogan dep. at 87-88*) (*Exhibit P, Barbosa dep at 20-22, 27-28*) (*Exhibit K, Accident Review/Lessons Learned Document*) (*Exhibit M- Post Incident Emails*). Anything more would be excessive and not required by our Court Rules. Tellingly, neither Phillips or Bergman performed line of sight calculations, yet Defendant does not seek to have their reports barred. Defendant's attempt to have Gallagher's report stricken for not doing more is a clear attempt to escape liability for saving the $80 it would have cost to make this truck safe. Their motion should be denied.

### C. It Is Not Mr. Gallagher's "Personal Opinion," the Subject Vehicle Should Have Been Equipped with a Backup Alarm, but Rather the Mandates of OSHA, Jacob's Own Contractual Documents and Other Industry Standards That Recognize the Risk of Death or Injury to Workers Struck by Vehicles with Obstructed Views Being Reversed Without Backup Assistance

Defendant Jacob's provides a deceptively abridged reference to Mr. Gallagher's deposition testimony in an effort to make it appear as if he does not believe the subject vehicle was required to have a backup alarm under OSHA. *Db* 14. Specifically, Defendant argues, "[w]hile Mr. Gallagher may seek to impose a higher duty of care than OSHA requires, this is his personal opinion and

certainly does not give rise to a valid expert opinion." *Ibid.* Mr. Gallagher's full testimony as to the OSHA standard is as follows:

> [Discussing an article he wrote on the OSHA standard for backup alarms]. I did talk about back-up alarms in there, and that the back-up alarm standard that OSHA has doesn't require back-up alarms on trucks. It says if you have a spotter, that's okay instead. And I believe I pointed out in the article that this is an example of a deficient standard in OSHA.

(*Defense Exhibit K - Deposition of Vincent Gallagher* at 46:10-15). Mr. Gallagher further testifies:

> Q. And you also state in your article, this is your 2003 article, "However, the current 1926 standards essentially say a back-up alarm is not needed as long as a spotter is used, correct?
> A. That's what the standard says.
>
> Q. Okay.
> A. That's the problem.

*Id.* at 140:12-18. Mr. Gallagher's criticism of the OSHA standard is due to the fact "[t]he problem with spotters is you can't carry them in the truck with you. When you're on a construction site or many other places and you have to back up and there's nobody around to act as your spotter, your back-up alarm will be there all the time, you're spotter won't. *Id.* at 156:24-4 (emphasis added).

Here, there is no dispute the vehicle was used in the fashion for two years before with no backup alarm nor spotter. (*Exhibit P, Barbosa dep at 16*). Likewise, as discussed, *supra*, common sense, site photographs, incident reports and deposition testimony establish the vehicle operated by Mr. Barbosa had an obstructed view to the rear. (*Exhibit E- Scene Photos of Truck*) (*Exhibit H- Photos of Truck after Sold by Conti*)(*Exhibit F, Reading Service Utility Body Description*) (*Exhibit A- Deposition of Kelly Herlihy at 38*)(*Exhibit L Olcott dep. at 77-78*) (*Exhibit C- Incident Reports*) (*Exhibit M- Post Incident Emails at J015969*) (*Exhibit A at 101*) (*Exhibit B, Decasas dep at 120-121*) (*Exhibit L Olcott dep. at 77-78*) (*Exhibit AA, Hogan dep. at 87-88*) (*Exhibit P, Barbosa dep at 20-22, 27-28*) (*Exhibit K, Accident Review/Lessons Learned Document*) (*Exhibit M- Post Incident*

*Emails*) (Exhibit S- Expert Report of Vincent Gallagher at 18); *Exhibit T- Expert Report of Keith Bergman* at 20); (*Exhibit U- Expert Report of Don Phillips* at 7); (*Defense Exhibit K - Deposition of Vincent Gallagher* at 80:17-25, ". . . Olcott-5 has three photos. And the third one would be one of the two that I think are most descriptive of the obstruction to the rear."). Since the vehicle had an obstructed view to the rear and a spotter was not used while reversing the vehicle, under OSHA, the vehicle was required to utilize a backup alarm. 29 *C.F.R.* 1926.601; *see also,* (*Exhibit S - Expert Report of Vincent Gallagher* at 10) (*Exhibit T - Expert Report of Keith Bergman* at 24-25) (*Exhibit U - Expert Report of Donald Phillips, P.E.* at 10). This is not Mr. Gallagher's "personal opinion," but rather the requirement under the preeminent industry standard and plain common sense.

Bergman agrees, since the vehicle had an obstructed view, "the incident Ford F350 vehicle should have been equipped with a backup alarm and/or had the benefit of a spotter when being operated in reverse." (*Exhibit T - Expert Report of Keith Bergman* at 21). Phillips also concluded the vehicle should have been equipped with a backup alarm under OSHA and the parties contractual agreements. (*Exhbit U - Expert Report of Donald Phillips, P.E.* at 38). According to Mr. Phillips, had the vehicle been equipped with a backup alarm, the incident would have been avoided. *Ibid.*

Mr. Gallagher's conclusion the vehicle should have been equipped with a backup alarm is also supported by Jacob's own contractual documents. Jacob's policy is to install backup alarms on all of their vehicles. (*Exhibit A at 69-70, 107, 145* ) (*Exhibit X- Jacobs Safety Documentation*) (*Exhibit B, Decasas dep at 113, 116, 145-146* ). Jacob's holds contractors to the same safety standards they hold themselves. (*Exhibit S - Expert Report of Vincent Gallagher* at 15) (*Exhibit S - Expert Report of Vincent Gallagher* at 18, 23); (*Defense Exhibit K - Deposition of Vincent Gallagher* at 117:13-118:4) (". . . And then the deposition testimony of Jacobs' representatives point out that the policy of Jacobs is to have back-up alarms on all vehicles. So they had the responsibility to

oversee with the same priority and emphasis on safety as their own policy...And they didn't.). Moreover, under the Health and Safety Plan, the "[a]bsence of an applicable standard or regulation does not preclude the Contractor from providing appropriate controls within a SWP." (*Exhibit V at CONTI 03643, 45, 51- Turnpike Authority Health and Safety Plan Requirements*). As such, under the contractual documents, the Conti F-350 vehicle which struck Mr. Silva should have been equipped with a backup alarm. (*Exhibit A- Deposition of Kelly Herlihy at 93-95*) (*Exhibit W- Conti Site Safety and Health Plan at CONTI 05568, 77, 05616-17*) (*Exhibit V at CONTI 03643, 45, 51- Turnpike Authority Health and Safety Plan Requirements*). Mr. Gallagher's opinion to this effect is not a net opinion.[1]

### D. Mr. Gallagher's Conclusion Jacob's Had a Duty to Manage Job Site Safety Is Well Supported by the Record and Is Not a Net Opinion

Defendants claim Mr. Gallagher "fails to cite any fact in the record," for his conclusion Jacob's had a responsibility to ensure job site safety is patently false. As Mr. Gallagher testified:

> Q. Are you aware of what Jacobs' role was on this particular job site?
> MR. SAIA: Objection to form.
> A. I understood as indicated in my report, that they had a safety oversight role of Conti and the work being done at this site.
> . . . .
> A. ...A lot of deposition testimony says that Jacobs had the responsibility to oversee the work, to make sure it was done safely in compliance with OSHA.

[1] Numerous other standards recognize the importance of using a backup device when a vehicle is reversed without the use of a spotter. (*Exhibit S - Expert Report of Vincent Gallagher* at 10-11) (*Exhibit T - Expert Report of Keith Bergman* at 25-26). Vehicles without backup alarms kill and seriously injure workers. (*Exhibit Y - Safety Articles, Safety & Health Magazine,* Fatal Injuries at Road Construction Sites among Construction Workers, Nov. 2018, at 1) (*Exhibit Z - OSHA - Preventing Backover Injuries and Fatalities*) (*Exhibit Y - Safety Articles, Tailgate/Toolbox Safety Training,* Topic 343: Driving Company Vehicles, CONTI 04749). Gallagher's opinion the vehicle should have been equipped with a backup alarm is not a net opinion and takes into account these serious risks of injury and death to workers.

Q. Would that include making sure that the contract for the work being performed, the safety rules and the contract for work being performed was complied with as well?
A. Yes, sir.

Q. So before I think you were asked a question about the Site Health & Safety Plan...One of the provisions is under 2.0 3, it says, "Absence of an applicable standard or regulation does not preclude the contractor from providing appropriate controls within a safe work plan, SWP," and then it says, "Such occurrences may be governed by OSHA. Specific reference in the safe work plan to codes and standards and regulations are not necessary." Do you see that part?
A. Yes, sir.
....

Q. Is it your understanding that it would be Jacob's responsibility as the entity in charge of safety on the job site to ensure that this contract was complied with by the contractors?...
A. Yes, sir.

Q. That would include contractors such as Conti, correct?
A. Yes, sir.

Q. That they were following the safety rules as envisioned under the contract?
A. Right.

(*Id.* at 171:22-173:6). Indeed, a litany of documents produced in discovery and deposition testimony[2] support Mr. Gallagher's opinion Jacobs had a responsibility to enforce job site safety.

First, Jacobs' engagement letter, which accurately describes their role on the job sites represents they will supervise the project and act as construction manager. (*Exhibit AA, Dep of Hogan at 23*) (*Exhibit A- Deposition of Kelly Herlihy at 21-37*) (*Exhibit R- Contract Documents*). In this capacity, as per Jacob's contractual agreement, it is Jacobs' role to review, approve and enforce Conti's safety plans and control the means and methods - including safety - with which Conti

[2]It is worth noting the record shows we had to fight very hard to get this discovery. We were road blocked at every turn which was the subject of several motions, letters and court orders.

performs its work. (*Exhibit R at CONTI 00686, 687*) (*See also Exhibit A at 75-76, 81-82*) (*Exhibit R at CONTI 01397-98*) (*Exhibit L Olcott dep. at 31-33, 54*) (*Exhibit AA, Hogan dep. at 25-26*). Indeed, as pointed out in Mr. Gallagher's report, Jacobs' Health, Safety and Environmental Requirements state:

> 2.0. **Subconsultant Health, Safety and Environmental Requirements**. It is the policy of Jacobs to select, contract with, and oversee subconsultants and subcontractors with the same priority and emphasis on health, safety and the environment (HSE) as we practice for our own employees.

(*Exhibit S - Expert Report of Vincent Gallagher* at 15) (underline added) (*Defense Exhibit K - Deposition of Vincent Gallagher* at 171:8-13) ("I understood, as indicated in my report, that [Jacobs] had a safety oversight role of Conti and the work being done at this site.").

Likewise, Jacob's safety representative testified:

> Q. And the idea is that control on the job goes from the top down; is that right?
> A. Yes.
> Q. So Jacobs has control over Conti consistent with the chart and the way the job progressed, correct?
> THE WITNESS: Yes.

(*Exhibit L Olcott dep. at 84-85*) (*Exhibit D- Job Organization and Jacobs Hierarchy Charts*). Olcott further stated:

> Q. So on this job, there was an overlap of work progress, considerations and work safety concerns, correct?
> THE WITNESS: Yes.
> Q. And Jacobs had a responsibility to supervise the work of Conti?
> THE WITNESS: Yes.
> Q. And a safety issue such as an injury or death to a worker could result in slowing down the progress of the work, right, and cause a job stoppage?
> A. Absolutely.
> Q. And, in fact, in this case...the one incident report...says that the brass had come down and...halted the job, do you recall that?
> A. Yes.

(*Exhibit L Olcott dep. at 85-86*). Likewise, Jacobs was responsible for ensuring Conti followed established safety rules and inspected their work for same. (*Exhibit A- Deposition of Kelly Herlihy at 93*) (*Exhibit B, Decasas dep at 25-26, 28, 38-41, 84-87, 110, 195-197*) (*Exhibit L Olcott dep. at 79*) (*Exhibit AA, Hogan dep. at 25-26, 45-46* ) (*Exhibit P, Purificacao dep at 11-12*). Moreover, Jacobs conducted safety meetings which Conti was required to attend and performed safety inspections, identifying and correcting issues with Conti's work. *Exhibit N, Safety Meeting Minutes*) (*Exhibit B, Decasas dep at 36-38*).

Based on deposition testimony and documents produced in discovery, Jacobs had the power, authority and obligation to correct Conti employees working in unsafe conditions/in unsafe ways. (*Exhibit L Olcott dep. at 31-33, 54*) (*Exhibit AA, Hogan dep. at 25-26*). Mr. Gallagher reviewed these materials. (*Defense Exhibit K - Deposition of Vincent Gallagher* at 168:5-169:6) (*Exhibit S - Expert Report of Vincent Gallagher* at 1-2). Defendants' claim Mr. Gallagher's opinion Jacobs had a responsibility for job site safety qualifies as a "net opinion" is specious at best. Especially considering Bergman concludes and Jacobs does not challenge, "the lack of proper site inspection procedures and adherence to the New Jersey Turnpike Authority (NJTA) - *Site Safety and Health Plan* by Jacobs Engineering was a cause of this accident." (*Exhibit T - Expert Report of Keith Bergman* at 22). The record is abundantly clear Jacobs had a responsibility for job site safety and Defendant's motion should be denied and plaintiff's cross-motion granted.

## V. The Record Is Clear Jacobs Had a Responsibility to Manage Safety, it Knew the Truck Was Being Used for Two Years with No Backup Alarm, and Plaintiff's Cross-motion for Partial Summary Judgment on the Issue of Breach Should Be Granted

*Rule* 4:46-2 reflects the Court's decision in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995), which held that a trial court should make the same type of evaluation of evidential

materials in ruling on a motion for summary judgment as in ruling on a motion for judgment under *Rule* 4:37-2(b) or *Rule* 4:40-1 or a motion for judgment notwithstanding the verdict under Rule 4:40-2. The standard is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Id.* at 523. That is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Brill*, 142 N.J. at 536. Summary judgment is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This means that a summary judgment motion cannot be defeated if the non-moving party does not "offer ... any concrete evidence from which a reasonable juror could return a verdict in his favor." *Id.* at 256.

> Moreover, Rule 4:46-2(c) provides that:
>
> > [S]ummary judgment or order, interlocutory in character, may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages).

Accordingly, it is clear that a trial court is permitted to grant summary judgment as to a discrete issue rather than the entirety of an action. *Haelig v. Mayor & Council of Bound Brook Borough*, 105 N.J. Super. 7 (App. Div. 1969); see also, *Harrison Riverside v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470 (App. Div. 1998), *cert. denied* 156 N.J. 384 (1998)(summary judgment granted as to method of calculating damages although issue of amount of damages remained in dispute).

As set forth throughout this submission, there can be no material issue of fact that Jacobs breached its duty to manage safety, including its duty to enforce the very rules that prohibited the operation of this truck with no backup alarm nor spotter. As such, plaintiff's cross-motion for partial

summary judgment on the issue of breach of that duty should be granted. Jacobs simply argues it had no duty. It ignores the controlling precedent of *Carvalho v. Toll Brothers*, 143 N.J. 565 (1996). It is clear under the law it has a duty. It does not and cannot contest it breached that duty. It had the obligation, it knew for two years the hazard was in place, and it did nothing about it until after the fact. There is simply nothing upon which any reasonable juror could conclude it did not breach its duty.

Accordingly, the cross-motion for partial summary judgment on this issue can and should be granted.

## CONCLUSION

For the foregoing reasons, plaintiff respectfully requests the motion for summary judgment of Jacobs Engineering be denied and plaintiff's cross-motion for partial summary judgment on the issue of breach be granted.

Respectfully submitted,

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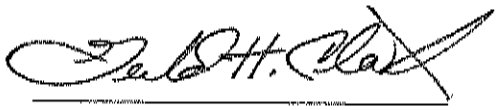

**GERALD H. CLARK**

Dated: March 14, 2019

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