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PRELIMINARY STATEMENT

This appeal involves errors as a result of both inappropriate and inconsistent rulings by the trial court and misapplication of the law regarding the non-delegable duty of a commercial contractor to maintain a safe work site.

Plaintiff Ruben Coronel was injured when he fell 17 feet from a scaffold that did not have any fall protection. The matter was tried on liability only. Defendant Perin Corporation ("Perin Corp.") was hired by the residential property owner, Salvatore Brigatti ("Brigatti"), to do the roofing and siding on a new home. Darcy Perin ("Perin"), principal of defendant, in turn contracted out both the roofing and siding work. As he had done on at least twenty to thirty previous jobs, Perin hired plaintiff's direct employer, LNC Construction ("LNC"), to do the siding.

Despite evidence that Perin Corp. had significant control over its subcontractor and ongoing knowledge that LNC did not use fall protection or otherwise follow work safety rules, at the close of evidence the judge granted a directed verdict in favor of Perin Corp. on plaintiff's assertion that it violated its non-delegable duty to maintain a safe workplace.

Over objection by defendant's counsel that plaintiff had not plead negligence in the selection of its subcontractor, and that there was no evidence to support such a claim, the trial court properly permitted the jury to decide whether defendant was

negligent in its selection of LNC. The record established that defendant's counsel conceded plaintiff's trial brief had specifically asserted, and he was previously aware, that plaintiff's claims involved the negligent selection of a safety incompetent subcontractor. Indeed in the midst of the trial as to LNC the parties stipulated and the jury was instructed, "They weren't safety competent." Moreover there was clear proof defendant was aware from its 15 year contracting relationship with the principal of LNC, Norge Giron, that LNC never used fall protection.

The jury returned a verdict finding Perin Corp. 100% responsible for negligently hiring LNC. Following, the trial court erred in reversing its previous rulings and granting a new trial, despite the proofs and stipulations of counsel that LNC was safety incompetent and defendant's lack of surprise.

It is respectfully submitted that the reversible error committed by the trial court in granting a new trial to retry the issues of negligence in selecting a safety incompetent contractor, renders its error in refusing to permit the jury to determine if defendant violated its duty to maintain safety at the job site, harmless error. The matter should therefore be remanded for trial on damages only. However should the Appellate panel determine a retrial on liability is in order, then it should direct that both issues of negligent hiring and negligence in permitting an unsafe

job site should be submitted to the jury.

CASE FACTS

This is a safety rules violation construction project injury case. The job was a residential subdivision in Wayne, N.J. (*Pa74-75, 81-84, 117-118*). Brigatti was both the owner and general contractor of the project. Brigatti subcontracted the roofing and siding work to Defendant Perin Corp. whose Principal is Darcy Perin ("Perin").(Pa76-78)(4T, 45-46) (3T, 159, 160-61) Perin Corp. in turn subcontracted the siding work to Plaintiff's direct employer, LNC, whose Principal is Norge Giron ("Giron"). (4T, 47-49) (3T, 159, 160-61) As the roofing and siding contractor on the project, Perin Corp., among other things, installed the roof, drew up the job specifications, coordinated with the owner, scheduled LNC on the project, visited the project while the workers were on the dangerous scaffolding, invoiced and was paid for the work. (Pa97, 100, 108-110) (2T 190-191) (3T 66-67) (4T 112, 119, 132-134)

Under well-settled construction law and industry standards, tiered contractors like Perin have a non-delegable responsibility to select only safety competent contractors, maintain a safe workplace, and otherwise require compliance with industry safety rules. A*lloway v. Bradlees Inc.,* 157 N.J. 221, 237 (1999); 29 *C.F.R.* §1926.16.(Pa122-137)(Pa140-148) (4T 98, 122-134, 149) (3T, 166-69, 187, 190-91, 196-98, 203, 219-22, 226-27, 242-43, 246-253) This includes that all employees that use scaffolding receive

proper training and fall protection. 29 CFR §1926.451; 454 (Pa122-137)(Pa140-148) (4T 98, 122-134, 149). During their 15 year relationship, Giron did "a lot" of jobs for Perin. (Pa93-95, 3T 52-53, 109-110, 3T 73) (3T, 53) Perin knew it was LNC's customary practice during all that time (and continuing) to ignore these basic work safety rules. (Pa116-139)(Pa140-148)(Pa92,3T 51-52, 95-96, 3T 54-56, 98,3T 61-64, 109-110, 3T 70-77) (3T, 99-100, 249) (4T, 71-72, 134-138) (4T 98, 122-134, 149) (5T, 51)

As the contractor dolling out jobs to "a lot of people that needed work," Perin had the opportunity, capacity and power to enforce safety standards. (Pa94,3T 53-54, 108, 3T 69-70)(Pa 98, 3T 61-64, 99, 3T 65-66, 109, 3T 73, 110 3T 73-74)(2T 190-193, 208-210, 212, 214-215, 227-228) (3T 221, 271-272) (4T, 71-72, 111-116, 119, 132-134, 149) Perin had significant control over LNC and its workers which he referred to as "my employees." (Pa94, 3T 53, 99, 3T 65, 108-109, 3T 69-70)(4T, 71-72) (3T, 65, 220-221) Perin admitted if they performed badly, "Then it would be my responsibility." (Pa99, 108) (3T 65-66)(4T, 70, 112) Brigatti confirmed that if he had an issue with the installation, he would go to Perin. Perin explicitly admitted:

Q. Did you control any of the work that was being done by Norge Giron of LNC Construction on the Brigatti home?
A. Yes.

Q. In what way?
A. Through subcontracting.

(Pa108) (3T 70) Yet Perin never did anything to select safety competent subcontractors or otherwise require compliance with basic safety rules. (Pa94,3T 53, 96, 3T 56-58, 98-99, 3T 61-66, 107,3T 67-69, 110, 3T 74) (3T 62-65) (4T 98, 122-134, 149) (3T, 166-69, 187, 190-91, 196-98, 203, 219-22, 226-27, 242-43, 246-253)

Plaintiff-Appellant/Cross-Respondent Ruben Coronel was an inexperienced siding helper employee of LNC. This worker never received any instruction on workplace hazards, fall protection or scaffolding. Even if he had the training, he was not allowed to complain or he would be replaced by, "a lot of people that needed work." (Pa94, 3T 53) (3T, 53, 99-100) (4T 127-134)

The unsafe scaffolding at issue had been used on this project over the course of two weeks. (Pa109, 3T 70-73) (3T 71) (5T, 20, 33-34) It had also been used on at least 20-30 other Perin Corp. siding jobs. Perin had actual knowledge of the men working on the unsafe scaffolding without fall protection, including on this project, but did nothing. (Pa98, 3T 62-64, 99, 3T 64-65, 109, 3T 71-73, 110, 3T 73-74) (3T 65-66, 70-75) (2T 190-193, 208-210, 212, 214-215, 227-228) (3T 221, 271-272) (4T, 71-72, 111-116, 119, 132, 149) In fact, at one point while high on the unprotected scaffolding, Coronel asked Norge Giron of LNC if it was dangerous. Giron responded that he always works like that and has been doing it for a long time. (3T, 99-100) Perin confirmed his awareness that LNC, and all his subcontractors, regularly engage in this

dangerous practice. (4T, 71-72)

On September 21, 2006, as per the standard practice of Perin Corp. and LNC, Plaintiff Ruben Coronel had been directed to work on OSHA non-compliant scaffolding 17 feet high with no fall protection. While performing his assigned tasks, he fell off and sustained serious injuries.(Pa74-75, 81-83, 117-118,137-148) (3T, 166-168, 249-252) Had Perin Corp. and LNC followed basic work safety rules, this would not have happened. (Pa74-75, 117-118, 137,139, 148) (4T 127) (3T, 166-168, 249-252) (3T, 166-69, 187, 190-91, 196-98, 203, 219-22, 226-27, 242-43, 246-253)

PROCEDURAL HISTORY

The Complaint was filed on September 16, 2008. (Pa1)

In or about September 2011, Perin Corp. moved for summary judgment arguing that it had no responsibility for worker injuries arising from OSHA and other safety violations on the project. (Pa15-18). In denying that motion, the Hon. Rachel Davidson, J.S.C. wrote:

> [A] reasonable jury could conclude from Perin's informality in hiring subcontractors, in the hiring structure being created for purposes of insurance coverage and from Darcy Perin being called immediately after the accident and his immediately coming to the injury site, **and his many experiences in hiring Geron,** that Perin had some responsibility for plaintiff's safety, that he could foresee the harm and had the opportunity and capacity to take corrective action.

(Pa18) (emphasis added)

On July 15, 2013, the trial was assigned to the Honorable Francine H. Schott, J.S.C. (1T, 3) On that date, Plaintiff's counsel submitted a comprehensive trial brief which discussed in detail Perin Corp's. liability for having hired a safety incompetent contractor. (Pa48-51). Plaintiff also submitted detailed jury charges and, on July 17, more briefing on this same issue. (Pa52-54)(Pa61-71).

Judge Schott *sua sponte* bifurcated the matter (T1, 15, 30-31) which was tried on liability only on 16, 17, 18 and 22 of July, 2013. Plaintiff's witnesses included Salvatore Brigati (T2, 146), Officer Peter Ferschman (3T, 24), Ruben Coronel (3T, 85) and

Plaintiff's OSHA safety expert, Vincent Gallagher (3T, 113). Deposition testimony of Darcy Perin was also read into evidence. (3T, 44)

On July 18 Plaintiff's counsel moved for a directed verdict on liability, and renewed that motion on July 22. (T4, 161) (T5, 102) The Court had previously ruled on summary judgment that Perin Corp. had a safety duty under *Alloway* and the unrebutted evidence was that Perin did nothing to meet this responsibility. Judge Schott denied the directed verdict motions. (T5, 102-103)

On July 22 Judge Schott disregarded the law, ignored and mis-stated the evidence, and reversed the November 11, 2011 decision of Judge Davidson, in granting Perin Corp.'s motion for a directed verdict finding it had no responsibility to itself follow, nor require its subcontractors to follow, any safety rules. (5T, 34).

However, the Court permitted the negligence issue to go the jury on the basis of Perin Corp.'s hiring a safety incompetent subcontractor. (4T, 43-62) In seeking a directed verdict on this issue, Perin Corp. argued there was no evidence to support the claim and that it was surprised. Both arguments were properly rejected:

MR. KEARNS: ...Your Honor the other thing I'd like to point out also is...that claim was never plead. There's never been in a complaint any claim of negligent hiring and I object to -- to the --

THE COURT: Well, it's not negligent hiring, it's -- it's the ALLOWAY issue of if you can't prove you had a duty to make a safe workplace...maybe you have a duty

to...refrain from hiring a non-safety competent person. You're telling me you didn't know that was in here?...How did I know it was in here the whole time if you didn't?

MR. KEARNS: There's -- there's contrary evidence, Your Honor.

THE COURT: I understand that, that's why juries are picked. I'm asking you the question, **are you trying to tell me you didn't know that one of the claims here by the plaintiff was that Perin hired a safety incompetent contractor?**...That's a yes or a no. **Did you know he was making such a claim in this case?**

MR. KEARNS: **That could be inferred, Your Honor**, based on the fact that he was relying on OSHA to say under OSHA you have to make sure all --

THE COURT: Counsel, please, I don't have time for this infer argument. Did you know that one of the claims the plaintiff was making in this case was, you know what, Judge, if I lose on the whole you have a duty to make it safe with all this non-delegable duty and OSHA regulations, and this and that, that my argument is going to be you did ten to 20 jobs with this guy, you always knew he used the bad scaffolding, you should have known that on this job too. That's my claim. Did you know he was making such a claim?

MR. KEARNS: Based on the proofs he provided in this -- in this courtroom, **yes**, I --

THE COURT: Okay. And at no time in the presentation of these proofs did you ever say to me, by the way, Judge, I just want to make clear that if there's no duty to provide a safe workplace he can't come after me on this theory of, you know, that third part of ALLOWAY where it says that there's, you know, no directing the means and methods then you can go the third route and say negligent hiring? You never said that to me, right?

MR. KEARNS: That's correct, Your Honor.

THE COURT: And in his submissions and his original pretrial did you put this incompetent contractor hiring bit in there?...

MR. CLARK: Yes, the answer is yes, Your Honor....It begins on Page 28 of our trial brief.

THE COURT: All right. So now, do you have any motions on the hiring of the incompetent contractor claim, Mr. Kearns?

MR. KEARNS: Yes, Your Honor. I -- I believe that that should be dismissed as a matter of law by way of a directed verdict as well because there's insufficient proofs in this regard. ...

THE COURT: I need to save you some time. You agree there was some testimony here that this was not the first job that Perin and LNC did together, that the plaintiff testified that Perin had hired LNC -- had given other work to LNC and that on all the jobs that he gave that the plaintiff was involved with it was the same scaffolding, no guardrails, no nothing, and that on some of those other job sites Mr. Perin had -- had been on the site and see it?

MR. KEARNS: No. Plaintiff's testimony, Judge, was that he only met Darcy on one job which was another job, not the Brigati, for a roofing project. That was his trial testimony.

THE COURT: Okay. Well, then we'll -- you guys can fight about that later. But you would agree that the testimony was they always did jobs -- they did a lot of jobs together and whether it was the plaintiff or Mr. Perin said and that was the equipment they used, and that's the way they used it. Mr. Perin's view was this is none of my business what he uses. Pretty much that was his testimony, right?

MR. KEARNS: They did testify that they did business with each other in the past besides Brigati.

THE COURT: And there is evidence that LNC always uses that kind of scaffolding, right, without any guardrails, lanyards, anything that was what he did, right?

MR. KEARNS: Well, that kind of scaffolding, but we don't know whether -- in other words, scaffolding could come in various forms and -- and I don't know whether or not that there was –

THE COURT: All right.

MR. KEARNS: -- guardrails or not.

...

THE COURT: All right. I'm going to deny the motion. I think there are factual issues, particularly in the area of, you know, did he know or have reason to know. I think that, you know, there are factors that would weigh in Perin's favor. ...But there is some testimony from which a jury could infer that this same unsafe scaffolding was used in other jobs where Perin and LNC had a relationship and Mr. Perin would have known that. I think that is the classic jury question. So the motion for a directed verdict on that is denied.

(5T, 46-49)

In closing argument counsel for Perin Corp. argued that LNC, "is not incompetent...in fact,...LNC had the necessary safety equipment to use on this project..." Defense counsel also argued, "Perin testified that he had a relationship over five or six years of referring work to...Norge Geron at LNC [which] "used scaffolds." (5T, 81).

Plaintiff's closing recalled the deposition testimony that Perin had worked with Norge Geron of LNC on numerous jobs over the course of 15 years. Counsel related the testimony that the OSHA non-compliant scaffolding had been previously used on numerous Perin-LNC jobs and in fact all of Perin's contractors continue to use the same thing. (5T, 87). Despite defense counsel arguing in closing LNC was safety competent (5T, 81), Plaintiff's counsel was barred from meeting that argument or talking about trial evidence which shows that LNC was not safety competent. (5T, 87-91) The

following colloquy and stipulation ensued:

THE COURT: Counsel...Are you willing to stipulate in front of this jury that – on this job here in Wayne, New Jersey LNC did not conduct itself as a safety competent contractor?

MR. KEARNS: Yes.

THE COURT: Yes. Hence you have an agreement LNC did not conduct itself as a safety competent contractor on that day – on that job, and so indeed the comments are irrelevant [sic] given that that is now agreed to.

THE COURT: The issue, ladies and gentlemen, is if Perin – no one disagrees LNC did not comply with OSHA, or whatever it is they had to comply with. They didn't do that. They weren't safety competent. The issue is whether or not Perin is responsible for LNC not having done a safety competent job. Limit your comments accordingly.

(5T, 89-91) (underline added) Plaintiff's counsel was thereafter **barred** from making any comments about the failure of Perin and LNC to follow safety rules and LNC's safety incompetence. (5T, 91)

Thereafter, defense counsel objected to Plaintiff's counsel talking about the evidence that Perin Corp. knew or should have known LNC was safety incompetent (i.e. their 15 year custom and practices of using unsafe scaffolding with no fall protection, all Perin subcontractors doing the same thing, etc.), on the basis that, "there is no stipulation that LNC is an incompetent contractor..." (5T, 95-96) (underline added).

At the conclusion of the summations, Plaintiff moved:

MR. CLARK: I would just like to renew my motion at this time for a directed verdict on an issue of liability given the stipulation that they were in fact an incompetent contractor on this job.

(5T, 102). After having imposed the above stipulation, and thereafter preventing Plaintiff's counsel from discussing facts regarding the safety incompetence of LNC because of this, the Court denied the motion on the baffling basis that, "the stipulation was...merely to the fact that they...broke the safety regulations on this job at that location. But that's just one element." (5T, 103).

After limiting the evidence and arguments of Plaintiff's counsel based upon the following stipulation:

> Hence you have an agreement LNC did not conduct itself as a safety competent contractor... no one disagrees LNC did not comply with OSHA... **They weren't safety competent**....Limit your comments accordingly.

(5T, 89-91)– Judge Schott then charged the jury:

> Now, in this case, the plaintiff has the burden of establishing that Perin was negligent. And more specifically they have to establish that in the hiring of ..LNC...first **plaintiff has to prove that LNC was not a safety competent contractor**. ... **Plaintiff has to prove LNC was not a safety competent contractor**.

(5T, 116) (emphasis added)

> [T]he plaintiff has to prove that the defendant Perin was negligent in its decision to give work to LNC. ...plaintiff must prove; number one, that LNC was not a safety competent contractor, okay, that they were not competent in the areas of safety; number two, the plaintiff has to prove that Perin either knew or should have known at the time they made the decision to give this job to LNC that LNC was not a safety competent contractor...

(5T, 126)(emphasis added) Despite these and other obstacles[1], the jury rendered its unanimous verdict on July 22 correctly finding that Perin Corp. was 100% negligent in hiring LNC Construction. (Pa 159-160)

On or about August 8, 2013, Perin Corp. filed a "Renewed Motion for Directed verdict, alternatively new trial and J.N.O.V." Among other things, Perin argued that negligence about hiring a safety incompetent contractor was, "never pled in his complaint." (Pa 173) and that:

> [T]his issue of negligent hiring was not even officially made a part of the case until after both parties had rested...

(Pa 174). Perin Corp. further argued there was no evidence to support the jury verdict on that claim. (9/16/13 Tr. at 29-30)

Although Judge Schott had already rejected the surprise and no evidence arguments when the motion for directed verdict was made at trial (5T, 46-49), on September 17, 2013 she ruled Defendant was in fact surprised by the incompetent contractor negligence claim. Judge Schott also ignored the evidence and disavowed the prior stipulations and her statement to the jury about LNC that, "They

[1]The trial transcripts reveal that 76% of defendant's 100 objections were sustained. All but three of plaintiff's 11 objections were overruled. Judge Schott granted 100% of defendant's seven applications, whereas she denied all but one of the 24 applications plaintiff made. In a trial that lasted less than 5 full days, Judge Schott *sua sponte* interrupted plaintiff's counsel an astounding 343 times- nearly four times that of defense counsel.

weren't safety competent" (5T 91) in finding, "the Court agrees there was absolutely not a scintilla of evidence that LNC was safety incompetent." (9/17/13 Tr. at 6) Instead of dismissing the case which would have triggered an appeal as of right, Judge Schott granted Perin Corp. a new trial. (Pa190)

By Order of December 16, 2013 this Court granted Plaintiff's Motion for Leave to File an Interlocutory Appeal of the October 10, 2013 Order of Judge Schott granting Defendants a new trial on the issue about whether Perin Corp. knew or should have known it hired a safety incompetent subcontractor. The Court also granted Defendant's Cross-Motion for Leave to File an Interlocutory Appeal of that same Order.

Plaintiff-Appellant/Cross-Respondent now submits this merits brief and maintains the jury verdict on liability should be reinstated and the matter very simply should be remanded for a damages trial.

LEGAL DISCUSSION

I. The Order Granting Perin Corp. a New Liability Trial Should Be Reversed and the Matter Remanded for a Damages Trial

A. There Was Sufficient Evidence to Support the Jury Verdict That Perin Corp. Hired a Safety Incompetent Contractor; in Fact the Issue Was Stipulated

Liability for hiring an unsafe contractor is derived from basic negligence principles. *Restatement (2nd) of Torts §411* (1965) *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 575-76 (2006) is the seminal case on the issue. It states in pertinent part:

> *The Restatement (Second) of Torts section 411* (1965) states:
>
> > An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.
>
> Comment a to *section 411*, in turn, defines a competent and careful contractor as "a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others." Comment b to *section 411* further explains:
>
> > The employer of a negligently selected contractor is subject to liability under the rule stated in this Section for physical harm caused by his failure to exercise reasonable care to select a competent and careful contractor, but only for such physical harm as is so caused. In order that the employer may be subject to liability it is, therefore, necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work

to him.

Puckrein at 575-76 (underline added). In other words, to prevail against the principal for hiring an incompetent contractor, a plaintiff must show that the contractor was incompetent or unskilled to safely perform the job for which he was hired, that the harm that resulted arose out of that safety incompetence, "and that the principal knew or should have known of the incompetence." *Puckrein* at 576 (underline added).

The purpose behind the basic requirement to hire a safety competent contractor is to prevent unnecessary injury to anyone affected by a contractor's operations. *Puckrein* involved an unsafe truck that overturned and injured and killed several people. *Id.* at 567-68. The Court noted key safety facts that led to its application of the incompetent contractor exception including, "Registration, concomitant to inspection, is a method of insuring the safety of vehicles that place the public at risk and insurance is the guarantee that innocent victims of errant truckers will be compensated." *Id.* at 578-79 (underline added). To satisfy the unsafe contractor standard, the principal is required, at a minimum, to make "reasonable inquiry" at the time of the hiring that the contractor is competent to safely and carefully perform the work. The principal must "exercise ...reasonable care [to ascertain]" that the contractor is safety competent. *Puckrein* at 579-80. Further, the principal has a "continuing duty to inquire"

that the contractor is carrying out the work in a safety competent manner. *Puckrein* at 580-81; *citing* Reuben I. Friedman, *When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor,* 78 *A.L.R.*3d 910, 920 (1977) (explaining that although originally unaware contractor was incompetent, employer who acquires or should have acquired knowledge of incompetence thereafter may be liable for inaction); *See also Basil v. Wolf*, 193 N.J. 38, 70 (2007) ("We explained [in *Puckrein*] that there was a question of fact regarding whether the principal made a reasonable inquiry of the trucker initially and that a continuing duty of inquiry existed.")

There is no dispute Perin Corp. hired LNC on this project (as it had on numerous others- Pa93-95,3T 52-56, 109-110, 3T 70-73). Perin Corp. made no safety competence inquiry before hiring LNC, nor during the job. (Pa94, 3T 52-53, 96, 3T 56-58, 98-99, 3T 61-65, 98-99, 3T 61-65, 107, 3T 67-69, 110, 3T 73-74) (3T 70-75) *Puckrein* at 580-581 (principal has a "continuing duty to inquire"); *Basil*, 193 N.J. at 70 ("We explained [in *Puckrein*] that there was a question of fact regarding whether the principal made a reasonable inquiry of the trucker initially and that a continuing duty of inquiry existed.")

In reality, Perin knew LNC ignored the rules. Perin preferred it because it enabled him to get a leg up on scrupulous contractors that play by the rules. (3T, 242) Indeed, the evidence of its

safety incompetence was so overwhelming (4T 127-134) (3T, 166-69, 187, 190-91, 196-98, 203, 219-22, 226-27, 242-43, 246-253) it was ultimately stipulated and the jury instructed:

> Hence you have an agreement LNC did not conduct itself as a safety competent contractor...ladies and gentlemen...no one disagrees LNC did not comply with OSHA, or whatever it is they had to comply with. They didn't do that. They weren't safety competent.

(5T, 89-91) And it was earlier recognized and agreed:

> Judge Schott: [T]here's no factual dispute between the plaintiff and Perin Construction that the scaffolding wasn't compliant, the safety (sic) protections weren't there, and various other OSHA regulation aimed at preventing this type of accident were not complied with. Everybody agrees with that, right?
> Mr. Clark: Correct.
> Judge Schott: Yes?
> Mr. Kearns: Correct, but - -
> Judge Schott: Okay.

(4T, 153-154) Finally, at a minimum there was a jury question as to whether Perin Corp. "knew or should have known" of that safety incompetence. *Puckrein* at 576. Perin had been sub-contracting siding installation work to LNC for 15 years. (Pa93-95,3T 52-55, 109-110, 3T 70-74) (Pa18) The testimony was clear it was the custom and practice of LNC to use scaffolding without fall protection and was otherwise safety incompetent as stipulated above. (Pa116-139)(Pa140-148)(Pa92,3T 51-52, 95-96,3T 54-58, 98,3T 62-64, 109-110, 3T 70-74) Ruben Coronel testified:

> Q. When you first were working at those heights with Norge, did you ever say to him anything about the height and any dangers?

A. Yes, I did tell him that it – it looked dangerous, I did tell him, yes, I did comment that to him.

Q. And what did he say to you in response?
A. He said that he always works like that and – and he's been doing this for a long time.

(3T, 99-100) (underline added) And in fact Darci Perin himself admitted that not only does LNC do it this way, but so do all his subcontractors:

Q. You knew that this scaffolding was being used throughout this entire job. You knew that, right?
A. Everybody uses the same thing.

Q. [W]hen you say everybody you mean the companies that work for you?
A. And other companies as well.

Q. But all the companies that work for you use scaffolding like it's shown in P-20[2]. Is that right?
A. Yes.

(4T, 71-72) Perin also testified that despite this catastrophic incident, "We continue business the same way." (underline added) (Pa110) (*See also* 4T, 71-72, Perin testifying all his subcontractors continue to use unsafe scaffolding without OSHA required fall protection like shown in P20)

Plaintiff's OSHA work safety expert, Vincent Gallagher, testified:

[2]P-20 is an incident scene photograph taken by OSHA. (Pa80) It shows the dangerous scaffolding without the required fall protection, mud sills (to prevent collapse), etc. A close up showing the OSHA measuring tape of the 17 foot height is at Pa81. Both experts agreed this scaffolding was dangerous and violative of OSHA safety rules. (3T, 247, Gallagher) (4T, 107-110, Lorenz)

Q. Based on your review of the case, was this an isolated incident?
A. No. Based on Mr. Coronel's deposition testimony, that was the common practice for him to work on Pump Jack Scaffold without fall protection.

Q. All right. And how, if at all, does that affect your opinions and conclusions in this case?
...
A. That it was not a[n] isolated incident, it was common practice, it was more likely that an injury would occur, the more exposure time you had, the more likely something will happen, the more dangerous it is.

Q. And the testimony that it had been used on this project for one to two weeks before the fall, how does that affect your opinions in this case?
...
A. That's evidence that there was a fundamental abdication of safety responsibility. It wasn't just this one time where they didn't realize it, it wasn't an unusual thing. It was the way business was.

(3T, 249) Defendant's engineering expert, Bernard Lorenz, similarly testified:

Q. All right. And you understand that LNC did approximately 20 to 30 other jobs for Perin before this incident. You're aware of that?
A. That's my understanding.

Q. And are you also aware that the testimony is that the scaffolding existed on this job site in this unsafe condition for about one to two weeks before the fall. Are you aware of that as well from the record?...you're aware that it was on the job site for one to two weeks before, right?
A. That's my understanding.

Q. And you're also aware of the testimony from Mr. Coronel from his deposition where he said at one point I asked, you know, Norge Giron, hey, isn't this a little bit dangerous, and he said we always do it this way. Do you recall that testimony?
A. I do.

Q. All right. And do you also recall Plaintiff's testimony that he was concerned that if he raised the issue or kind of pressed the issue about hey, this is unsafe, do you recall he testified that he was concerned they wouldn't pick him up for work the next day?
A. Yes.
...
Q. Based on the 20 to 30 prior jobs that you spoke about, based upon this scaffolding being on this job for one to two weeks, based on the indication about Norge Giron saying we always do it this way, and based upon the other things we spoke about LNC Construction in your view, your opinion is that they were not a safety competent contractor. Would you agree with that?
A. Based upon my understanding of how they erected the scaffold involved in the accident on that date, they were not performing their work safety.

(4T, 134-138) (underline added) There was more than enough evidence to support the jury verdict that Perin Corp. was negligent in hiring LNC Construction.

As set forth above, the evidence was so overwhelming LNC was not safety competent that it was ultimately stipulated to. (5T, 89-91) And clearly Perin Corp. knew or should have known about it. In reality Perin Corp. and LNC had a long standing business practice of ignoring the safety requirements to get an unfair advantage over scrupulous contractors that play by the rules. (3T, 242) (Pa116-139)(Pa140-148)(Pa92,95-96,98,109-110) (3T, 99-100, 249) (4T, 71-72, 134-138) (5T, 51) (Pa18) Rewarding this conduct places economic pressure on others to cut the same corners, thereby endangering even more people.

The jury verdict was supported by substantial credible

evidence in the record. Indeed, the evidence was so overwhelming the trial judge should have granted plaintiff's motion for a directed verdict on liability. In fact, at the close of evidence Perin Corp. moved to dismiss the incompetent contractor claim arguing there was no evidence to support it. The trial judge correctly denied that application the first time:

THE COURT: All right. So now, do you have any motions on the hiring of the incompetent contractor claim, Mr. Kearns?

MR. KEARNS: Yes, Your Honor. I -- I believe that that should be dismissed as a matter of law by way of a directed verdict as well because there's insufficient proofs in this regard. Just because someone is incompetent as to one particular project--

THE COURT: I need to save you some time. You agree there was some testimony here that this was not the first job that Perin and LNC did together, that the plaintiff testified that Perin had hired LNC -- had given other work to LNC and that on all the jobs that he gave that the plaintiff was involved with it was the same scaffolding, no guardrails, no nothing, and that on some of those other job sites Mr. Perin had -- had been on the site and see it?

MR. KEARNS: No. Plaintiff's testimony, Judge, was that he only met Darcy on one job which was another job, not the Brigati, for a roofing project. That was his trial testimony.[3]

THE COURT: Okay. Well, then we'll -- you guys can fight about that later. But you would agree that the testimony was they always did jobs -- they did a lot of jobs together and whether it was the plaintiff or Mr.

---

[3]Whether or not plaintiff had met Darci Perin in the past is entirely irrelevant to the fact that is was standard practice for Perin's subcontractors, including for 15 years with LNC, to not follow basic work safety rules, including to use unsafe scaffolding with no fall protection. (Pa116-139)(Pa140-148)(Pa92,3T 51-52, 95-96,3T 54-58, 98, 3T 62-64, 109-110, 3T 70-74) (3T, 99-100, 249) (4T, 71-72, 134-138) (5T, 51) (Pa18)

Perin said and that was the equipment they used, and that's the way they used it. Mr. Perin's view was this is none of my business what he uses. Pretty much that was his testimony, right?

MR. KEARNS: They did testify that they did business with each other in the past besides Brigati.

THE COURT: And there is evidence that LNC always uses that kind of scaffolding, right, without any guardrails, lanyards, anything that was what he did, right?

MR. KEARNS: Well, that kind of scaffolding, but we don't know whether -- in other words, scaffolding could come in various forms and -- and I don't know whether or not that there was...guardrails or not.

...

THE COURT: All right. I'm going to deny the motion. I think there are factual issues, particularly in the area of, you know, did he know or have reason to know. I think that, you know, there are factors that would weigh in Perin's favor.... But there is some testimony from which a jury could infer that this same unsafe scaffolding was used in other jobs where Perin and LNC had a relationship and Mr. Perin would have known that. I think that is the classic jury question. So the motion for a directed verdict on that is denied.

(5T, 49-51) (underline added) There is far more evidence in the record than recounted by the Court here upon which the jury rightfully based its decision that Perin Corp. negligently hired LNC. The motion for directed verdict on the issue was rightfully denied. The renewed motion on the same basis should also have been denied. This matter should be remanded for a damages trial.

B. There Was No Ambush or Surprise in the Claim about Hiring an Incompetent Contractor; in Fact Defense Counsel Admitted as Much

Perin Corp. argued the jury should not have been charged negligence in connection with hiring a safety incompetent

contractor because, "it was never plead in his complaint."(Pa173) And, "this issue of negligent hiring was not even officially made a part of the case until after both parties had rested..." (Pa174). Judge Schott erred in adopting these arguments on the motion for a new trial. She read the complaint too narrowly and disregarded New Jersey's notice pleading standard. (Pa1-8) Judge Schott also disregarded the litigation facts, defense counsel's admission of no surprise, and her own prior finding on the issue. (Pa116-139)(Pa140-148) (Pa48-54, 61-71) (Pa149-158)(Pa58-60) (2T, 121, 122, 237) (4T, 8, 137-140)(5T 48)

Under New Jersey's notice-pleading standard, the complaint needs only a short, concise statement of the claim, without requiring any technical forms of pleading. *R.* 4:5-7; *see Grobart v. Soc'y for Establishing Useful Mfrs.,* 2 N.J. 136, 150-52 (1949). Moreover, *Rule* 4:5-7 requires that "[a]ll pleadings shall be liberally construed in the interest of justice." Even where certain keywords are not used or "more by way of facts regarding the [cause of action] would have been enlightening," a complaint will survive provided it fairly apprises the adversary of the claims and issues in dispute. *Dewey v. R.J. Reynolds Tobacco Co.,* 121 N.J. 69, 76-77 (1990).

In Evesham Twp. Bd. of Ed. v. Vietta Group, 2008 WL 4735883 (App.Div. 2008), a construction defect case, the lower court held that since the complaint did not specifically allege negligence in

connection with faulty HVAC and mold, that the subsequent assertion of these claims should be dismissed. *Id.* *1. The Appellate Division reversed because, like here, the lower court read the complaint too narrowly. The Appellate Division found that although the HVAC and mold claims were not expressly pled, the complaint was broad and satisfied New Jersey's notice pleading standard. And defendants further had fair notice of those claims because they were referenced in expert reports. *Id.* *5, *8-10.

The complaint here fairly placed Perin Corp. on notice of the negligence claims against it. It alleges, among other things, that Perin Corp.:

- had a duty for safety on the job site; (Pa1-2)
- failed to ensure that the construction proceeded in compliance with applicable codes and standards, failed to comply with ordinary and customary safety procedures common in the industry and/or otherwise breached other duties as shall become known in the future. (Pa1-2)[4]
- maintained, supervised, operated and/or controlled the job site. (Pa1-4)
- caused Plaintiff to fall from the scaffolding and sustain serious injury due to its negligence and;
- is liable to Plaintiff under common and statutory negligence and work site safety laws. (Pa1-4).

Liability for selecting a safety incompetent contractor is simply a negligence claim. *(Supra. §I A)* At a minimum, the duty for

[4]Among the most basic industry safety standards is to select only safe contractors. (Pa116-139)(Pa140-148) (3T, 187, 190-91, 196-98, 203-06, 214-219, 242-43, 246-253)

safety under *Alloway* includes the most basic requirement to select safe contractors. *See Section II, infra.* The Complaint sufficiently pleads negligence, including for violation of these standards.(Pa 1-4).

And like in *Evesham Twp. Bd. of Ed.*, discovery and expert disclosure further placed Perin Corp. on notice, years before trial. (Pa116-139)(Pa140-148). The reports of Vincent Gallagher discuss the business practice of Perin Corp. and LNC to ignore the safety rules. He notes that siding work had been done unsafely on this job for several weeks prior to the incident with untrained workers with no fall protection. (Pa138-139)(Pa118, 122) He discusses how compliance with the safety rules required Perin Corp. to "pre-qualify as acceptable bidders, contractors who meet the predetermined safety history requirements" (Pa131) and, "only utilize subs who have effective safety and health programs." (Pa126, 128-129). He discusses, "the importance of selecting subcontractors by evaluating their safety performance when evaluating bids" (Pa132) and that a contractor like Perin has to make sure that the subcontractor's employees are trained, "before they are allowed to work on the job site."(Pa133) Defendant's own expert report also discusses the safety incompetence of LNC. (Pa151-152, 154-155)

Among others, Gallagher cites to an industry publication, "How to Hire and Supervise Subcontractors". (Pa124) (3T, 177-78, 187,

196-97) He also writes, "If Mr. Perin was proactive [in safety], he would have had a written safety program. **He would have hired safe contractors**." (Pa140)(emphasis added).

While "pre-trial practice is designed to eliminate the element of surprise at trial by requiring a litigant to disclose the facts and theories upon which a cause of action or defense is based" *Humenik v. Gray,* 350 *N.J.Super.* 5, 18, 19 (App.Div.) *certif. denied,* 174 *N.J.* 194 (2002), one cannot simply state that they were unaware of a claim in order "to preclude a party from presenting its case *when the evidence neither surprises, misleads or prejudices the opposing party*." *Plaza 12 Associates v. Carteret Borough*, 280 N.J. Super. 471, 477 (App. Div. 1995) (emphasis added). In *Humenik*, a plaintiff challenged the fact that a defendant waited until trial to raise the issue of apportionment of injury in respects to causation. *Humenik*, 340 N.J.Super. at 18. The court found that this tactic did in fact constitute a trial by ambush, since:

> [Defendant] did not raise the issue of apportionment of injury prior to trial nor did its medical experts address the issue in their pretrial submissions or their trial testimony. At the very least, [the defendant] was required to give some advanced indication that it would rely on a rational explanation of an expert that plaintiff's injury was severable based upon a causal analysis.

Id. at 19. In the instant matter Perin Corp. was long on notice of this aspect of the negligence claim, including among other things, specific references in expert reports and an entire pretrial brief

section devoted to the issue. There is simply no real surprise here. *See also, e.g. Bacon v. American Ins. Co.,* 131 N.J.Super. 450, 455 (Law Div. 1974) (purpose of pleadings is to avoid undue surprise); *Faul v. Dennis,* 118 N.J.Super. 338, 342 (Law. Div. 1972) ("[T]he requirement of specificity in the pleadings...is to put adverse parties on notice of claims to be met.")

Perin Corp.'s arguments about surprise and ambush were properly rejected by the trial court when it made its motion at the close of evidence. In fact Perin Corp.'s counsel specifically admitted it knew about the claim and there was no such surprise:

MR. KEARNS: As our -- and Your Honor the other thing I'd like to point out also is that was --that claim was never plead. There's never been in a complaint any claim of negligent hiring and I object to -- to the –

THE COURT: Well, it's not negligent hiring, it's -- it's the ALLOWAY issue of if you can't prove you had a duty to make a safe workplace, well then you -- one of the -- if you don't have a duty to make a safe workplace maybe you have a duty to hire a competent -- a non -- maybe you have a duty to refrain from hiring a non-safety competent person. You're telling me you didn't know that was in here?

MR. KEARNS: In what?
THE COURT: In this case?

MR. KEARNS: He put forth evidence, Your Honor --
THE COURT: No, no.
MR. KEARNS: But -- but --
THE COURT: I mean before we started the trial.
MR. KEARNS: But --

THE COURT: How did I know it was in here the whole time if you didn't?
MR. KEARNS: There's -- there's contrary evidence, Your Honor.

THE COURT: I understand that, that's why juries are picked.

I'm asking you the question, **are you trying to tell me you didn't know that one of the claims here by the plaintiff was that Perin hired a safety incompetent contractor?**

MR. KEARNS: Well, what -- what plans --

THE COURT: That's a yes or a no. **Did you know he was making such a claim in this case?**

MR. KEARNS: **That could be inferred**, Your Honor, based on the fact that he was relying on OSHA to say under OSHA you have to make sure all --

THE COURT: Counsel, please, I don't have time for this infer argument. Did you know that one of the claims the plaintiff was making in this case was, you know what, Judge, if I lose on the whole you have a duty to make it safe with all this non-delegable duty and OSHA regulations, and this and that, that my argument is going to be you did ten to 20 jobs with this guy, you always knew he used the bad scaffolding, you should have known that on this job too. That's my claim. Did you know he was making such a claim?

MR. KEARNS: Based on the proofs he provided in this -- in this courtroom, yes, I --

THE COURT: Okay. And at no time in the presentation of these proofs did you ever say to me, by the way, Judge, I just want to make clear that if there's no duty to provide a safe workplace he can't come after me on this theory of, you know, that third part of ALLOWAY where it says that there's, you know, no directing the means and methods then you can go the third route and say negligent hiring? You never said that to me, right?

MR. KEARNS: That's correct, Your Honor.

THE COURT: And in his submissions and his original pretrial did you put this incompetent contractor hiring bit in there?...

MR. CLARK: Yes, the answer is yes, Your Honor....It begins on Page 28 of our trial brief.

THE COURT: All right. So now, do you have any motions on the hiring of the incompetent contractor claim, Mr. Kearns?

MR. KEARNS: Yes, Your Honor. I -- I believe that that should be dismissed as a matter of law by way of a directed verdict as well because there's insufficient proofs in this regard.

(5T, 46-49) Later Perin Corp. filed a "Renewed Motion for Directed verdict, alternatively new trial and J.N.O.V." It essentially made the same arguments, including that:

> [T]his issue of negligent hiring was not even officially made a part of the case until after both parties had rested...

(Pa 174). Judge Schott erred in adopting Perin Corp's. fallacious arguments about surprise in throwing out the verdict.

The plain record shows that this aspect of the negligence claim was asserted in plaintiff's trial brief (Pa48-54, 61-71) (Pa149-158), discussed in expert reports long before trial (Pa116-139)(Pa140-148), proposed jury charges (Pa58-60) and several times during the proceedings, including well before the close of evidence (2T, 121, 122, 237) (4T, 8, 137-140). In fact, plaintiff's counsel very clearly discussed the claim in opening statement:

> Let me tell you who we're suing and why. We're suing two parties in this case. We are suing Mr. Brigati, who is basically the general contractor on this job that hired various subcontractors and coordinated their work. We are suing Mr. Brigati because the OSHA safety rules and the industry standard safety rules on this job were not followed and caused this scaffolding to be on this job for weeks, one to two weeks without the basic, basic safety requirements. We are also suing Mr. Brigati <u>because he hired a safety incompetent subcontractor, Perin Construction, Inc.</u> <u>We are also suing Perin Construction, Inc. for basically the same reason we're suing Mr. Brigati</u>, because the evidence will show Perin Construction, Inc. ignored the basic safety rules for basic worker safety on a job like this.

(2T 120-121, lines 19 to 11) (underline added)

> What Perin Construction and Brigati should have done instead of not following the rules very simply is they should have just followed the rules. They should have required that there was training on the site. They should have required that LNC and Giron was a safety competent contractor. They should have required them, before they're allowed to work on the site, that they require that they follow the safety rules and that they follow them up. That wasn't done in this case. Perin Construction was a safety incompetent contractor and LNC Norheg Giron the evidence we expect will show in this case they were not safety competent. They didn't follow the basic safety rules that all of the other companies that do this type of work have to follow.

(2T 122, lines 2 to 16) (underline added) (2T, 121, 122) Judge Schott erred in adopting the fallacious argument of Perin Corp. that the issue about hiring a safety incompetent contractor was not raised in the case, "until after both parties had rested." (Pa 174) The claim is at a minimum inferred in the broad scope of the complaint, and most certainly born out in expert reports exchanged in discovery. (Pa116-139)(Pa140-148) There was no ambush or surprise whatsoever, as defense counsel himself admitted on the record. (5T, 47-48)

II. Alternatively, if The New Trial Order is Affirmed, the Directed Verdict on Perin Corp.'s Duty for Safety Should be Reversed Because, as Another Judge Previously Found, it had a Responsibility to Manage Safety and Enforce OSHA with Respect to its Portion of the Work

There was sufficient evidence to support the jury verdict that Perin Corp. selected a safety incompetent contractor. There was also no surprise or ambush in the jury being charged this claim. As such, this appeal is very simply and properly disposed of by reversing the October 10, 2013 Order of the Court which granted Perin Corp. a new liability trial and remanding the matter for a damages trial. As such, the Court need not reach the issue of the Court dismissing the negligence claim arising from Perin Corp.'s failure to maintain a safe worksite. We nevertheless address this issue as follows.

A. Perin Corp. Had a Responsibility to Enforce OSHA with Respect to its Portion of the Work

1. State and Federal Law and Industry Standards Are Clear Perin Corp. Is Required to Make Sure its Subcontractor Follows Safety Rules

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 penalties, as well as criminal sanctions, 29 *U.S.C.A.* § 666. *Gonzalez, supra.*

Each tier of subcontractor down the chain also has a responsibility to the OSHA Regulations. Specifically, the OSHA regulations provide:

> [N]o 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. As such, contractors cannot delegate away their duties to maintain a safe workplace under the federal OSHA regulations. Rather, each respective tier of contractor maintains responsibility for his part. 29 *C.F.R.* §1926.16; *see Alloway v. Bradlees*, 157 N.J. at 237-38. (a sub-contractor on a work site has a non-delegable duty to maintain a safe workplace); *Kane v. Hartz Mountain Industries*, 278 N.J.Super. 129, 141-44 (App.Div. 1994)

(joint liability among general and interim subcontractor).

This principle was discussed in great detail by the Supreme Court in *Alloway v. Bradlees*, 157 N.J. 221, 236-37 (1999). The Court recounted the development of the principle about the non-delegable duty of contractors beyond *Bortz,* through *Meder* and *Kane*, and stated, "We find the reasoning of those decisions to be sound..." *Id.* at 236. Thus under well-settled construction law in New Jersey, professional subcontractors like Perin Corp. 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) Perin is responsible for failing to see to it that safety was managed and OSHA enforced with respect to its sub-contractor on the site, LNC Construction, Plaintiff's direct employer. (Pa118-137)*see also, e.g. Carvalho v. Toll Bros.*, 143 N.J. 565 (1996) (contractor with control over sub-contractor responsible for job site OSHA violations); *Dawson v. Bunker Hill Assoc.*, 289 N.J.Super. 309, 321 (App.Div. 1996) ("OSHA regulations impose a duty to maintain a safe workplace upon the "employer" which is defined as 'contractor or subcontractor.'"); *Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999) (same); *see also* 29 CFR

§1926.32(k) (defining "employer" for purposes of OSHA safety training, compliance and enforcement under §1926.20(b)(1) as "contractor or subcontractor.") As such, professional contractor enforcement is a key component of the federal workplace safety scheme embodied in OSHA.

Defendant's own expert, Bernard Lorenz, testified he agrees with these concepts:

> Q: [Y]ou agree...that the purpose of OSHA is..., "The Congress declares it to be its purpose and policy through the exercise of its powers to provide for the general welfare to assure so as -- so far as possible every working man and woman in the nation's safe and helpful working conditions and to preserve our human resources"? Would you agree that...is in its essence the purpose of the OSHA work safety rules?
> A: Yes.
>
> Q: And that's basically to prevent needless injury to workers, right?
> A: Yes.
>
> Q: Now, in connection with meeting that purpose of preventing needless injury to workers there are certain rules that are recognized that need to be followed, right?
> A: Yes. ...based upon the passing of OSHA...there were mandated to come up with standards and regulations...in the industry for the safety of construction workers.
>
> Q: ...And on a construction job like this there has to be pre-job planning, right?
> A: There should be pre-job planning on every construction project, that's correct.

(4T 122-123)

> Q: ...It's true that under OSHA in order to have a safe workplace to prevent injury to workers that there have to be periodic inspections of the work

site to make sure that it's being done safely in accordance with the safety rules, right?
A: Yes.

Q: Okay. And it's also required under OSHA that anyone working on a construction site or any contractor that the people in charge have training in workplace safety, right?...Is training required, safety training required to prevent injury to workers on job sites like this?
A: Yes.

Q: ...And that's not only training...of the workers at the bottom [but] everyone on the chain should be trained in workplace safety and preventing accidents, right?
A: Yes.

(4T 124-126) Defendant's own expert also testified that Perin Corp. in fact has safety responsibility with respect to its subcontractors:

Q. Well, you would agree, would you not, that...any contractor that hires a subcontractor would have an obligation relative to safety? You agree with that, right?
A. Yes, I do.

Q. And in this case Perin was essentially a contractor that hired a subcontractor, LNC construction, right?
A. Yes.

(4T, 132-133)

Perin failed to meet it responsibility under OSHA and the other workplace safety standards. It failed to see to it that its sub-contractor employees were properly trained in OSHA and scaffolding safety; negligently selected a safety incompetent contractor that ignored OSHA safety rules and would replace any worker who complained; failed to see to it the proper equipment

was on site to safety complete the work and; failed to properly supervise and manage safety. (4T 127-134) (3T, 166-69, 187, 190-91, 196-98, 203, 219-22, 226-27, 242-43, 246-253) (Pa116-148)

Defendant's own expert agrees with this:

> Q: And we've now stipulated that none of the safety principles that we talked about were done in connection with this case, right?
> A: In that document that you're holding?

THE COURT: No, no, no, no. Okay. What safety undertakings, specific, whether it be guardrails, lanyards, inspections, meetings, advising, training, what specific safety actions did you assume anyone had taken on this site prior to the accident?
THE WITNESS: I don't know if I assumed that anyone took any safety actions with regard --

THE COURT: Okay. So it would be accurate to say you had assumed that Perin didn't undertake it because your opinion is they didn't have to, but is it safe to say or accurate to say you did not assume that anybody else did any safety stuff? For lack of a better word, I know that's not very judicious. But, you know, did any safety precautions on the site --
THE WITNESS: I didn't assume that anyone took any safety precautions. Your Honor, I reviewed the photographs that depict the scaffold involved in the accident. Somebody attempted some safety precautions on there, they were improper.

THE COURT: Okay. I -- I'm trying to cut to the chase here. Did you come to any conclusions that somebody involved in this job site did anything to comply with OSHA?
THE WITNESS: I believe that someone attempted to comply with OSHA, but --
THE COURT: I didn't ask you that. Did they succeed?
THE WITNESS: They did not.

THE COURT: Okay. <u>So your testimony is to your knowledge there was not OSHA compliance here</u> and there might be a couple other things that these various treatises talk about that weren't complied with either, even though you have an opinion they may not apply?
THE WITNESS: <u>Correct</u>.

(4T 132, 18-25; 133, 1-25; 134, 1-14) As such the worker was needlessly caused to fall from unguarded scaffolding, sustaining serious injuries. (3T, 166-168, 249-252) Defendant's own expert agrees:

> Q: [H]ad there been a guardrail on this job this incident never would have happened, right?
> A: In all probability that's correct.

(4T 127)

Pertinent industry standards are equally clear Perin Corp. had a responsibility to enforce safety among its subcontractor. In determining liability against a contractor in an OSHA workplace safety injury case, the Court and/or jury may also consider industry standards. *See, e.g., Model Jury Charge 5.10H*, "Standards of Construction, Custom and Usage in Industry or Trade." It states, among other things:

> Some evidence has been produced in this case as to the standard of construction in the industry. Such evidence may be considered by you in determining whether the defendant's negligence has been established. If you find that the defendant did not comply with that standard, you may find the defendant to have been negligent.

Model Jury Charge 5.10H. As the Appellate Division explained in *Constantino v. Ventriglia*, 324 N.J.Super. 437 (App.Div. 1999), a workplace safety injury case:

> Plaintiff was entitled to have the jury consider plaintiff's expert's reliance on the OSHA standards to demonstrate the construction industry standard of care, even though Ventriglia may not have been subject to OSHA regulations or jurisdiction.
> ...
> This conclusion is consistent with established precedent

allowing industry standards as evidence of a standard of care. *See McComish v. DeSoi,* 42 *N.J.* 274 (1964) (manuals properly admitted as safety codes):

> [A] safety code ordinarily represents a consensus of opinion carrying the approval of a significant segment of an industry. Such a code is not introduced as substantive law, as proof of regulations or absolute standards having the force of law or of scientific truth. It is offered in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care.

Constantino, 324 N.J.Super. at 442, 443. Plaintiff's expert discussed how these industry standards were not followed here. (3T, 166-69, 187, 190-91, 196-98, 203, 219-22, 226-27, 242-43, 246-253)

Defendant's own expert similarly agreed:

Q: And also, the purpose of these safety rules that we're talking about is also essentially so that ...if a worker has a concern about safety that there's somewhere that he can go to express that concern, right?
A: I don't understand your question.

Q: Well...assuming the worker has the training to recognize the hazards there should also be like a place that the worker can go like to a foreman or someone above him where he can go and express that concern without fear of being basically fired for complaining, right?
A: The OSHA regulations don't set forth that scenario, if you will, but it is custom and practice in the industry that if a worker has a concern for his safety he is supposed to go to his superior and -- and voice that concern.

Q: Custom and practice in the industry you said?
A: Yes.

Q: All right. Such as, for example, from the Accident Prevention Manual from the Associated General Contractors of American? ...It says here in the Section 1-2, Planning and the Accident Prevention Program. ...it says planning begins with management's...written commitment to accident prevention objectives. Management personnel should meet and agree on the need for an effective accident prevention program. Do you agree with that?
A: Yes.

Q: All right. And was that done in this case as far as you could tell?
A: No.

Q: And it also says that it is imperative that management be dedicated to the accident prevention program. Do you agree with that?
A: I do.

Q: All right. And that wasn't done in this case either, right?
A: Right.

Q: And it says that areas of responsibility should include preplanning, the employee supervisory training, establishment of minimum safety standards, liaison with local medical facilities, accident investigation, inspections, and record keeping. Do you agree with that?
A: I do.

Q: And that wasn't done in this case either, right?
A: That's my understanding.

THE COURT: Counsel, can we have a stipulation that these various things that Mr. Clark is going through were not done. As I understand the disagreement between the parties it's not a disagreement over whether something was or wasn't done, the disagreement was who had the responsibility to do it. Am I correct?
MR. KEARNS: That's correct. And we're not done, but --
THE COURT: All right. So could I have a stipulation that these various things he's going to go through that these things were not done to this witness's knowledge.

Q: The purpose for all these things that are now

stipulated were not done in this case, the purpose is to basically protect workers and also the general public who may be impacted by construction operations. Do you agree with that?

A: You're talking about that specific document that -- that we're referring to. Is that accurate?

Q: Yes.

A: Again, in my opinion that document is not applicable in --

THE COURT: Okay, that's not what he asked you.

THE WITNESS: Okay. Then --

THE COURT: He just asked you if the purpose of workplace safety is to make sure workers stay safe and the public isn't impacted by construction delays.

THE WITNESS: Based -- based upon that document --

THE COURT: Lets have another question, counsel.

THE WITNESS: -- he's referring to, yes.

THE COURT: Well, do you agree that's generally the theory behind all workplace safety?

THE WITNESS: Absolutely.

(4T 127-131)

Perin Corp. and LNC were safety-dysfunctional. There was simply no safety management or oversight. There was no planning. There were no safety inspections. There were no safety meetings or safety mechanism set up whatsoever. Ruben Coronel was provided no safety equipment or training to even recognize workplace hazards. And if he did have a safety concern, there was nowhere for him to go. He was simply expected to do his job the best and fastest way he could, or find another job. Complaint was not allowed. (4T, 134-138)

Perin Corp. had a duty to manage safety down the chain. It failed in this regard. The record reflects Perin Corp. and LNC

have had a long business practice of ignoring these rules. (3T, 242) (Pa116-148)(Pa140-148)(Pa92,95-96,98,109-110) (3T, 99-100, 249) (4T, 71-72, 134-138) (5T, 51) (Pa18) There was never any safety planning, instruction, inspections, nor any safety mechanism whatsoever. Fall protection was non-existent and complaint was not allowed. After the incident there was no investigation and nothing done to prevent a reoccurrence. And Perin even testified, "We continue business the same way." (Pa110)(See also 4T, 71-72)

Judge Schott erred in adopting Perin Corp.'s "ostrich defense," about ignoring safety (which had been correctly rejected by Judge Davidson over 2 years prior) (Pa15). As this Court held:

> Plaintiff testified that he was not instructed to avoid the scaffolding. Moreover, he noted that all the other workers that used the scaffolding were similarly unwarned. Plaintiff also testified that he did not have any workplace safety training that could have helped him recognize the hazard.
>
> The Gacciones and Copeland admitted that the job site had no safety supervision or express safety rules. Gaccione testified that safety was not discussed, that there was no written safety policy, that there were no rules relating to the scaffolding, that he was never instructed or certified by OSHA, and that he did not investigate plaintiff's accident.

Costa v. Gaccione, 408 N.J.Super. 362, 366-67 (App.Div. 2009) (summary judgment in favor of contractor that ignored safety rules reversed.). Just like the plaintiff in *Costa,* Ruben Coronel was injured because he was directed to work on a residential construction project on a dangerous, unguarded scaffold that was not OSHA compliant. (Pa74-75, 117-118, 137,139, 148) (4T 127) (3T,

166-168, 249-252) (3T, 166-69, 187, 190-91, 196-98, 203, 219-22, 226-27, 242-43, 246-253) Plaintiff was provided no safety training, equipment, oversight nor enforcement, just like the situation in *Costa*. As a result Deone Costa, like Ruben Coronel here, was caused to fall off the scaffold and sustain severe injuries.

Perin Corp. should not have been granted a directed verdict on the issue. However, as stated, the Court need not reach this issue if the October 10, 2013 new trial Order is reversed (as it should be) and the matter simply remanded for a damages trial.

2. The Lower Court also erred in adopting Perin Corp.'s "Manner and Means" Argument

Judge Schott also erred in disregarding the motion judge who properly rejected Perin Corp.'s argument that it is not liable because it did not get involved in the "manner and means" of the work. (Pa15-18) Tiered contractors that sub-contract out work typically they do not get involved in the manner and means of completing the job; that is left up to the subcontractor it hires for that purpose. *Meder, supra,* 240 N.J.Super. 470 ("Resorts concedes that it hired the various contractors on the job and assumed the responsibility of coordinating their work, but asserts that it did not attempt to direct or control the manner in which they performed their contracts."). This does not somehow vaporize their duty to follow established safety rules. In fact the

Appellate Division most recently rejected these defenses in *Costa v. Gaccione*:

> Gaccione allegedly performed many of the general contractor functions; he hired various subcontractors and an architect, scheduled their work, and purchased building materials which the contractors requested. Gaccione frequented the job site, oversaw the work and performed some managerial tasks; however, he maintains that he did "not retain control over the means or methods of work ... or [] work-site safety," but rather relied on the contractors' "professional experience" to perform the work correctly and safely. ... Indeed, for the purposes of summary judgment, the trial court [correctly] assumed Gaccione was in fact the general contractor. *Id.* at 366.
>
> ***
>
> He may have placed Copeland's name on the permits as general contractor as a personal convenience, but there is sufficient factual evidence in the record to support the conclusion that Gaccione, on his own volition, acted as the de facto general contractor and could at least **be found jointly liable with others sharing control of the locus of the accident**.

Costa v. Gaccione, 408 N.J.Super. 362, 374-375 (App.Div. 2009) (emphasis added). As such, the Court erred in adopting these same manner and means arguments.

Furthermore, even if plaintiff did have to prove defendant got involved in the manner and means of the work, which is not the law, summary judgment would still be denied. Indeed, there is evidence in the record that Perin Corp. in fact got involved in the manner and means issues, including that it provided safety harnesses to LNC. (3T 63-64, 221-22) (4T 96) *See, e.g. Pfenninger v. Hunterdon Central Regional High School*, 167 N.J. 230, 238-39 (2001) (owner liable for providing non-conforming drainage pipe on a job, thus

requiring worker of contractor to enter an unsecured trench); *Sanna v. Nat'l Sponge Co.*, 209 N.J. Super. 60, 68-69 (1986)(involvement in means and methods shown where owner furnished unsafe scaffold); *Piro v. PSE&G*, 103 N.J. Super. 456, 462-63 (responsibility imposed on owner that supplied a saw to a worker)

Regardless, Defendant's "manner and means" argument is of no real legal relevance. The directed verdict on this issue was clearly in error.

B. Perin is Further Liable under General Negligence Principles and a "Fairness Analysis"

Perin is further liable under the general negligence principles discussed in *Alloway* and *Carvalho v. Toll Brothers*, 143 N.J. 565 (1996) (summary judgment denied for daily project manager site engineer that oversaw construction project). Under those principles liability can also attach irrespective of the formal labels of the parties and instead by consideration of several factors- the foreseeability of harm, the relationship between the parties, and the opportunity and capacity to take corrective action. *Alloway* at 230-233; *citing Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 439 (1993).

This fall 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."). It is clearly foreseeable that an untrained laborer directed to work on an OSHA non-compliant scaffolding that lacks guard rails, lanyards or any other fall protection can foreseeably result in a fall injury of the type plaintiff sustained.

As a "helper" worker on this site, Mr. Coronel was in the weakest possible position. In essence, his choice was to work under unsafe conditions or not work at all. Perin Corp. effectively acted to take advantage of this weakness for its own advantage/profit, ease, and benefit. Perin shirked its responsibility. Critically needed safety equipment was not provided, no safety meetings or instructions were undertaken, and there was not even the most minimal concern for enforcement with respect to site safety. Under these circumstances, it is hardly surprising that a worker on this project was seriously injured.(4T 127-134) (3T, 166-69, 187, 190-91, 196-98, 203, 219-22, 226-27, 242-43, 246-253) (Pa116-148)

Ruben Coronel had no power to address dangerous conditions on

the job site. He was given his directions and expected to complete the job without complication or complaint. He was provided no fall protection or other safety equipment, he had no power or authority to demand same, and those who did have power, authority, and responsibility for overall site safety under OSHA pointedly ignored their responsibilities. Mr. Coronel was not expected or permitted to complain, and if he refused to work under these conditions he risked losing his job. A fall of this type was entirely predictable under the circumstances and should have been avoided by proper, normal, accepted and legally mandated job site safety.

The attendant risk of a 17 foot fall of this kind is severe. Fall-related incidents are the primary cause of fatalities in the U.S. construction industry. A NIOSH analysis of fatality data from the Bureau of Labor Statistics Census of Fatal Occupational Injuries (CFOI) indicated that from 2004 to 2008, a total of 5,844 construction workers were killed from all causes (annual average 1,169) (BLS, 2005, 2006, 2007, 2008, 2009). During the same period, 2055 construction fatalities occurred due to falling (annual average 411). Workers falling accounted for more than 35 percent of all fatalities that occurred in construction from 2004 to 2008. OSHA has found that, between 1985 and 1989, the leading cause of fatal injury in the construction industry has been falls from elevation. Falls account for 33 percent of all construction fatal injuries in the United States and 45 percent in New Jersey

according to research done recently by the New Jersey Department of Health. (Pa 118-121)

Falls in the construction industry are not a new phenomena. Dr. Steward Beyer, Ph.D. reported in Industrial Accident Prevention in 1916 the following: "Contracting is generally considered a hazardous industry, and accident statistics support this impression; 97, or slightly more than 20 percent of the total of 474 fatal accidents occurring in Massachusetts during one year, were in the contracting industry. Thirty-one (31) percent of the 97 involved falls." "Falls are the leading non-automotive cause of accidental death in America, accounting for something over 15,000 fatalities per year." William English, *Pedestrian Slip Resistance: How to Measure It and How to Improve It*, Second Edition, 2003, p. vii. "Falls from elevation are the leading cause of disabling and fatal injury in construction." D. Herbele, *Construction Safety Manual* (1998), p. 263.

OSHA has estimated that compliance with the current residential fall protection standards will prevent 22 fatalities and 15,600 injuries annually, while saving employers over $200 million in wages and productivity losses, medical costs, administrative expenses and other costs associated with accidents. Joseph Dear, Assistant Secretary of Labor, in correspondence to Congressman John Linder, May 8, 1995. "The three leading causes of death for construction workers were falls (25 percent),

electrocutions (15 percent), and motor vehicle-related accidents." S. Kisner and D. Fosbroke, "Industry Hazards in the Construction Industry," Journal of Occupational Medicine [Volume 36, No. 2], February 1994, pp. 137, 140.

The reality however is that it does not take government statistics and studies to determine that exposing unprotected workers to the risk of 17 foot fall from unprotected scaffolding will foreseeably result in serious injury or death. This incident was clearly foreseeable and the attendant risk was severe.

The relationship of the parties was such that Perin had the "opportunity and capacity ... to have avoided the risk of harm." *Alloway* at 231. The risk of harm here was Perin Corp.'s failure to follow basic safety rules, including selecting a safety incompetent contractor. As the professional contractor on the project, Perin had the ability to set the rules of the road for its subordinate subcontractor, LNC. Perin had the power to hire and fire its subcontractors and could have, and in fact had the legal obligation, to enforce the safety rules. 29 *C.F.R.* §1926.16 ("With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.... regardless of tier."); *Carvalho v. Toll Bros.*, 143 N.J. 565 (1996) (contractor with control over sub-contractor responsible for job site OSHA violations); *Kane*, 278 *N.J.Super.* at 142-43 (subcontractor has a non-delegable duty to make sure its

subcontractor follows OSHA); *Alloway*, 157 N.J. at 237-38 (1999) (same)

Perin was in a position such that it had the ability to require and enforce safety compliance among its subcontractors. Perin is an experienced contractor that normally would have 6-7 jobs going on at any given time. (3T 55) As an experienced siding installer, Perin knew scaffolding would be used and was aware the dangerous, unguarded scaffolding had been used on numerous jobs in the past. (3T 52-58, 70-73, 99-100) (4T, 71-72) As the contractor dolling out jobs to "a lot of people that needed work," Perin had the opportunity, capacity and power to enforce safety standards. (Pa94,3T 53, 108, 3T 70)(Pa 98, 3T 61-64, 99, 3T 65, 109, 3T 71-73, 110, 3T 73-74)(2T 190-193, 208-210, 212, 214-215, 227-228) (3T 221, 271-272) (4T, 71-72, 111-116, 119, 132-134, 149) Perin had significant control over LNC and its workers which he referred to as "my employees." (Pa94, 3T 53, 99, 3T 65, 108-109, 3T 69-70)(4T, 71-72) (3T, 220-221) Perin admitted if they performed badly, "Then it would be my responsibility." (Pa99, 108)(4T, 70, 112) Brigatti confirmed that if he had an issue with the installation, he would go to Perin. Perin explicitly admitted:

> Q. Did you control any of the work that was being done by Norge Giron of LNC Construction on the Brigatti home?
> A. Yes.
>
> Q. In what way?
> A. Through subcontracting.

(Pa108, 3T 70)

In the instant matter there was actual knowledge. (Pa98, 3T 61-64, 99, 3T 65, 109, 3T 71-73, 110, 3T 73-74)(2T 190-193, 208-210, 212, 214-215, 227-228) (3T 220-221, 271-272) (4T, 71-72, 111-116, 119, 132, 149) Judge Schott on the other hand absolved Perin Corp. of any duty because the safety violations were "obvious." (T5, 41-42) Judge Schott erred in finding, "[G]iving the plaintiff the benefit of all inferences...Perin had no involvement on this job site." (5T, 36) and "There is no evidence that Mr. Perin was present on that job site except on the day of the accident." (5T 37, 40) Contrary to these arguments, the record is clear Perin Corp. was on the job, knew this non-compliant scaffolding was being used, and otherwise had the opportunity and capacity to require LNC to follow the safety rules.

Indeed if he was on the job site just one day, that in itself could be considered by the jury as not fulfilling his safety responsibilities considering his ongoing knowledge of how LNC operated, including not using the safety equipment he had provided. At a bare minimum there was a question for the jury and neither a directed verdict nor new trial was justified. (Pa98, 99, 109, 110)(2T 190-193, 208-210, 212, 214-215, 227-228) (3T 221, 271-272) (4T, 71-72, 111-116, 119, 132, 149) Among other things, Salvatore Brigatti testified:

> Q. And what was your understanding- was it your understanding that Perin was going to be doing the work on the job, his company?
> A. Correct.
> ...

Q. As of September 21, 2006 how long had Perin been on that job?
A. About a week, that's about right. Yes.

(2T 190-191)

Q. Mr. Brigati, you left – you believe that Perin was left in charge of this siding installation part of the work, right?
...
Judge Schott: The man said over and over he had no idea that LNC was even there, he thought Perin – he hired Perin, he thought Perin was there. That's what you said. Am I right?
The Witness: Correct.
...
Judge Schott: ...He thought Perin was there and Perin was doing the job.

(2T 227-228) Yet Defendant falsely maintains there is "no evidence" Perin had knowledge the workers were using this dangerous scaffolding. Indeed, Darci Perin himself testified:

Q. Can you tell from looking at Perin-4[5], or just from your own knowledge, what stage was the siding job [at], was it halfway done, was it almost done, when the accident happened?
A. I think it was almost toward the end.

Q. And had they used scaffolding the whole time throughout that job?
A. Yes.

Q. Were you ever on the job site when they were using that scaffolding?
A. Yes.

Q. When was that?
A. While they were working...

(Pa109) (3T 71-72) (underline added) Vincent Gallagher

[5]Perin-4 is the deposition marking of trial exhibit P-20, the photo of the scaffolding at issue taken by the OSHA investigator. (Pa80)

testified:

> ...I'm reading other facts related to the deposition testimony of Mr. Perin. He – when he was on the job, they were using scaffolds, but he doesn't know when. And that's important, because I understand from Mr. Coronel that there wasn't any protection on the scaffolds at any time. So he should have been aware of that.

(3T, 220-221)

The facts about control are also compelling. Darci Perin specifically testified he controlled LNC and its workers which he referred to as "my employees." (Pa94, 3T 53, 99, 3T 65-66, 108-109, 3T 69-74)(4T, 71-72) (3T, 220-221) Perin specifically admitted if LNC performed badly, "Then it would be my responsibility." (Pa99, 3T 65-66, 108, 3T 69-71)(4T, 70, 112) Salvatore Brigatti testified:

> Q. If Ruben Coronel...had come to you prior tho this accident and said I don't believe this scaffolding is safe, what would you have done about it?
> A. I would have basically called Darci, which is Perin Construction Company, and just tell them not to do anything until he gets there.

(2T, 209-210) Defendant's liability expert, Bernard Lorenz, testified:

> Q. All right. And...did you take into account that Brigati swore under oath..., "Perin Construction was left in charge to complete the work." ...Did you take that into account?
> A. Yes.
>
> Q. And you don't have any reason to dispute that Perin was in fact left in charge to complete that work as Mr. Brigati swore under oath, do you?
> A. I don't have any reason to challenge Mr. Brigati's answers to interrogatories.

(4T, 119) Darci Perin specifically testified:

Q. Did you control any of the work that was being done by Norge Giron of LNC Construction on the Brigatti home?
A. Yes.

Q. In what way?
A. Through subcontracting.

(Pa108, 3T 70-71)

Combining and weighing these factors--the foreseeability of the nature and severity of the risk of injury based on the defendant's actual and/or implied 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 Perin Corp. to meet its obligations under the law. Falls are notorious for causing serious harm and death on construction jobs. But they are preventable. Had the OSHA rules been followed, this fall never would not have occurred. As the Law Division previously found on summary judgement (Pa 15-18), Perin Corp. had a duty to avoid the risk of injury to employees of its subcontractor, LNC.

Judge Schott ultimately granted Perin Corp. a directed verdict on the claims under *Alloway* because she believed public policy favors the avoidance of liability by contractors like Perin Corp. that get a leg up on scrupulous competitors by utilizing subcontractors that disregard both basic employment laws (paying

workers cash, expired workers compensation insurance, utilizing unauthorized labor, etc.) and, in the same vein, ignore basic work safety rules. (3T 241-242) Judge Schott ruled the, "[P]ublic interest is in saying, well, how does one avoid liability...if a duty is to be imposed?" (5T, 41)[6] (underline added)

Judge Schott simply misapplied the law. When basic rules are ignored, 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); *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). Judge Schott's granting Perin Corp. a pass on its dangerous practices, contrary to law and common sense policy, encourages bad behavior. Indeed Perin testified, "We continue business the same way." (Pa110)(*See also* 4T, 71-72, Perin testifying all his subcontractors continue to use unsafe scaffolding without OSHA required fall protection like shown in P20 (Pa81))

Unsafe construction projects endanger anyone who comes in or near them. (4T 127-131) Judge Schott's rulings place economic pressure on Perin Corp.'s competitors to cut the same corners. (3T 241-42) The Court should not have granted a directed verdict on

[6]One avoids liability by following the rules and not endangering the public.

this issue.

CONCLUSION

For all these reasons, Plaintiff-Appellant/Cross-Respondent Ruben Coronel respectfully requests this Court reverse the October 10, 2013 Order of the Court which granted Perin Corp. a new liability trial and remand this matter for a damages trial.

Respectfully submitted,
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By: _____
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Dated: January 22, 2014
Appeal-brief7.wpd