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I. Perin Corp.'s "Manner and Means" Arguments Are Misplaced and Based on Outdated Law from the 1950s that Predates OSHA and the Strong Public Policy for Safe Worksites

Perin Corp. ("Perin") incorrectly argues that it can not be held liable because it is merely an "independent contractor" or "broker" that did not get involved in "the manner and means of the work." (Db1-2, 9, 14) These labels are not factually accurate. The record is clear Perin Corp. was hired as the roofing and siding subcontractor on this project which in turn sub-subcontracted the siding portion to LNC, as it had done numerous times over the previous 15 years. (2T 190-193, 208-210, 212, 214-215, 227-228) (Pa98, 3T 62-66, 71-75, 99, 109, 110, 221, 271-272) (4T, 71-72, 111-116, 119, 132, 149) (5T 47-51) Perin Corp.'s own expert very clearly agreed, "Perin was a subcontractor on this job..." (4T, 132) Furthermore, Perin's "manner and means" argument is based on an outdated legal principle.

A. OSHA Was Passed to Prevent the Kind of Needless Job Site Injury Plaintiff Sustained

In the United States, about a million workers have been killed on-the-job since the 1920's. Our country's prior industrial history is even more compelling. The United States Bureau of Labor Statistics estimated annual workplace fatalities at 30,039 in the early 1920's. 75,000 railroad workers died in the quarter century before World War I alone. The construction industry was just as dangerous, if not more so. The International Association of Bridge

and Structural Steel Workers (Iron Workers), for example, lost a full one percent of its membership to workplace accidents in fiscal year 1911-12. A leading skyscraper construction firm admitted at the end of the 1920's that one worker died for every 33 hours of employed time during the previous decade. The United States led the world in casualty rates. Coal worker fatality rates were triple those in the United Kingdom, to cite one example. Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994).

Shamefully high fatality and injury rates continued beyond the early twentieth century. Into the 1990's, the Iron Workers continued to report losing about 100 members a year to workplace accidents. 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." At the time of OSHA's passage, the country was losing more men and women to workplace accidents than to the war in Vietnam. Today, according to OSHA's own numbers, 6,000 American workers per year die from workplace accidents, 6 million American workers per year suffer injuries due to such accidents, and 50,000 American workers per year die from illnesses related to

occupational hazards. *Bureau of Labor Statistics, State Occupational Injuries, Illnesses and Fatalities*, available at http://www.bls.gov/iif/oshstate.htm; *see also* Linder, 20 J. Legis. 99; *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents.* 101 Harv. L. Rev. 535 (1987) (Pa118-121) Death and disability due to unsafe or unhealthy workplaces remain America's hidden epidemic.

Hispanic workers like Ruben Coronel disproportionately suffer workplace injury and death. In 2009 the following headline appeared in *USA Today*, "Hispanic worker deaths up 76%, [while] U.S. job fatalities fall in same span." Rick Jervis, *Hispanic Worker Deaths Up 76% Since 1992*, USA Today, July 20, 2009 (attached). Workplace safety violations of the kind this case is about disproportionately maim Hispanic workers in America. "[R]ecent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths." Mark LeWinter, *Dying for a Paycheck: Body Count Rises as Workers Fall*, N.J. Law J., Oct. 28, 2008. (attached) A New Jersey Law Journal article discusses this problem:

> A casual drive past a residential construction site in New Jersey on any given day will reveal that the framers and roofers are working at elevations where they are exposed to significant risk of catastrophic injury or death. The problem, however, is not limited to New Jersey; it is industry wide. The National Association of Homebuilders (NAHB) recently completed the most comprehensive analysis of fatalities in the residential homebuilding industry. Falls from elevation continue to

> be the leading cause of fatalities and the highest proportion of those killed worked for small contractors with less than 10 employers.
> . . . .
> While injury on residential work-sites certainly occurs across all demographics, recent statistics reveal an ethnic fatality trend evidenced by an alarming increase in Hispanic worker deaths. The NAHB concluded that 28 percent of all fall fatalities were Hispanic workers and 29 percent were foreign born. Between 2003–2006, 34 percent of all Hispanic worker deaths occurred in residential construction—an increase of 370 percent over prior periods. These statistics do not include the number of workers that suffer career-ending or catastrophic spinal or brain injuries as a result of falls.

LeWinter, *Supra.* The federal government recently 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.

OSHA was implemented with these systemic inadequacies, as well as our country's bloody industrial history, in mind. OSHA was enacted to provide prevention. However, as discussed earlier, a high incidence of occupational injury and illness persist. When construction site leaders ignore OSHA, 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). Application of tort law is particularly important in this case where Perin Corp. continues to boast about its ongoing practice of ignoring basic work safety rules to outbid the competition. (4T, 71-72)

B. New Jersey Construction Law Has Evolved Away from the "Manner and Means" Standard to Comport with the Public Policy Embodied in OSHA

New Jersey construction injury law dealing with a commercial contractor's duty to enforce worker safety standards has evolved over time. Prior to the passage of the New Jersey Construction Safety Act and the case of *Bortz v. Rammel*, 151 N.J.Super. 312 (App.Div. 1977), the controlling precedent on the issue was *Wolczak v. National Electric Products Corp.*, 66 N.J.Super. 64 (App.Div. 1961). The antiquated rule under *Wolczak* included the principle Perin today relies upon:

> Absent...direction of the manner in which the delegated tasks are carried out, the[] contractor is not liable for injuries to employees of the subcontractor resulting from either the condition of the premises or the manner in which the work is performed.

Wolczak, 66 N.J.Super. at 71. As stated however, with the enactment of the New Jersey Construction Safety Act (and later OSHA) and the case of *Bortz v. Rammel* and its offshoots, *Meder v. Resorts International*, 240 N.J.Super. 470 (App. Div. 1989), *cert. den.* 121 N.J. 608, *Kane v. Hartz Mountain*, 278 N.J.Super. 129

(App. Div. 1994) and the seminal case of *Alloway v. Bradlees Inc.*, 157 N.J. 221 (1999), the law changed away from the *Wolczak* non-liability rule in favor of the non-delegable duty down the construction chain. *Alloway*, 157 N.J. at 236-237; *Kane*, 278 N.J.Super. at 140-143; *Meder*, 240 N.J.Super. at 473-477.

The Appellate Division in *Bortz* recognized that the common law non-liability of the general contractor could no longer remain viable in the face of the Construction Safety Act which imposed a non-delegable duty for safety down the chain to prevent injuries to construction workers. The *Bortz* court found the *Wolczak* rule to have been "substantially qualified by subsequent legislative action." *Bortz*, 151 *N.J.Super.* at 319. The Court there took note of the adoption, following the "restrictive decision" in *Wolczak*, of the Construction Safety Act, *N.J.S.A.* 34:5-166 *et seq.*, which was:

> [E]xpressly designed to protect the health and safety of all construction employees as well as the public in general by requiring all construction employers to comply with all safety rules and regulations promulgated under the act.

Id. (Underline Added) Of "primary importance," the *Bortz* court held, was *N.J.A.C.* 12:180-3.15.1, part of the Construction Safety Code promulgated pursuant to the Act, which mandated that

> [W]here one contractor is selected to execute the work of the project, he shall assure compliance with the requirements of this Chapter from his employees as well as all subcontractors.

Given the legislation and regulations, the *Bortz* court held the professional contractor could be found to have "a statutory obligation to take the necessary steps to insure the safety of [the subcontractor's] employees and that he failed to do so." *Bortz*, 151 *N.J.Super.* at 320.

The Appellate Division in *Bortz* thus nullified the *Wolczak* "manner and means" rule which Perin basis its appeal on. The *Bortz* Court found that the legislation and regulations had "a substantial impact on the continued viability of our quoted holding in *Wolczak.*" *Bortz* at 320. Invoking the rule that deviation from a statutory standard of conduct is a "relevant circumstance to be considered by the trier of fact in assessing tort liability," as well as the principle of *Restatement, Torts* 2d, § 874A that a legislative provision may justify the court's granting a right of action to a member of the class sought to be benefitted, the court held that:

> It was obviously the legislative intention 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. The assurance of prospective and continuing compliance by that repository with his responsibility demands, in our view, a right of tort action in those who are injured when there is a failure of compliance.

Bortz, at 320-21. Indeed, even Perin Corp.'s own expert had to agree:

Q. [Y]ou 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) Thus Perin Corp.'s reliance upon the outdated "manner and means" rule to argue it owed no duty to plaintiff as an employee of its subcontractor is misplaced.

In 1975 New Jersey repealed implementing regulations of the Construction Safety Act, whereupon jurisdiction was vested with the United States Department of Labor for the regulation of occupational safety and health under the Federal Occupational Safety and Health Act of 1970, 29 *U.S.C.* § 651 ("OSHA") The Construction Safety Act itself, however, remained in effect. As a result of this legislative change, the Law Division in *Meder v. Resorts International*, 240 N.J.Super. 470 (App. Div. 1989), *cert. den.* 121 N.J. 608 incorrectly decided that the non-delegable duty set forth in *Bortz* was no longer applicable and that instead the *Wolczak* rule of no duty on the part of the general contractor was again controlling. The Law Division incorrectly reasoned:

> I am now back at Point A with *Wolczak.* The statutory right, the cause of action created by the provisions of the regulations as interpreted [in *Bortz*], it is my judgment, is no longer applicable.

Meder, 240 N.J.Super. at 476. The Appellate Division reversed finding a misapplication of the law as follows:

We find that analysis flawed. The OSHA regulations direct 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(a). The regulations also impose upon "the employer" the responsibility "to initiate and maintain such programs as may be necessary" to comply with OSHA's prohibition on "[t]he use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of [OSHA regulations]." 29 *C.F.R.* § 1926.20(b)(1), (3). The "employer" is also "responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions." 29 *C.F.R.* § 1926.28(a).

Under 29 *C.F.R.* § 1926.50(j) the term "employer" means "contractor or subcontractor." That a []contractor bears responsibility for all OSHA violations on the job is made clear by 29 *C.F.R.* § 1926.16:

> ...
> (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 the 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.

...We are satisfied that the OSHA regulations imposed obligations upon Resorts essentially comparable to those imposed on general contractors by the regulations relied on in *Bortz.* The fact that New Jersey has ceded regulation of occupational safety and health to OSHA does not in any way affect the public policy expressed and applied by *Bortz.* In our view, violation of the obligations imposed by the federal regulations supports a tort claim under state law.

> Since a jury could properly find that Meder's death was proximately caused by Resorts' negligent failure to assure compliance with OSHA regulations, the dismissal of plaintiff's complaint must be reversed.

Meder v. Resorts International, 240 N.J.Super. at 476-477 (App. Div. 1989). Thus it is clear the *Wolczak*-based "manner and means" rule no longer represents the state of the law in New Jersey and Perin Corp.'s arguments to the contrary should be rejected. *See also Alloway v. Bradlees Inc.,* 157 N.J. 221, 229-230(1999); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 140-143 (App. Div. 1994) (reiterating the *Wolczak* rule has been replaced with the contractor's non-delegable duty to enforce safety standards); *Izzo v. Linpro Company*, 278 N.J.Super. 550, 555-556 (App.Div. 1995) (same).

The Supreme Court took the opportunity to speak on the issue of a contractor's non-delegable duty to enforce OSHA and industry worker safety standards in *Alloway v. Bradlees Inc.,* 157 N.J. 221 (1999). The Court recognized with favor the change in the law away from the *Wolczak* "manner and means" rule brought about by *Bortz. v. Rammell*:

> [The *Bortz* court] determined that the Construction Safety Act and its implementing regulations, primarily *N.J.A.C.* 12:180-3.15.1, "substantially qualified" the common-law rule by imposing a non-delegable duty on a general contractor to "assure compliance with the requirements of this Chapter from his employees as well as all subcontractors," and that those legislative mandates gave rise to a duty on the part of a general contractor "to take the necessary steps to insure the safety of [the subcontractor's] employees." *Id.* at 319-20.

> In *Meder, supra,* the court observed that OSHA regulation 29 *C.F.R.* § 1926.16 imposed the same non-delegable duty for workplace safety on a general contractor as had the Construction Safety Act. 240 *N.J.Super.* at 476.

Alloway, 157 N.J. at 236-237. The Court then recounted the development of the non-delegable duty principle beyond *Bortz*, through *Meder* and *Kane*, and stated, "We find the reasoning of those decisions to be sound..." *Id.* at 236. The Court reaffirmed the calculus the lower court ignored, that as the professional contractor, Perin Corp. had the non-delegable responsibility to manage safety with respect to its portion of the work on the project:

> The Appellate Division in *Kane, supra,* considered the effect of OSHA regulations on the existence and scope of a duty of care, and stated that general and subcontractors 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." 278 *N.J.Super.* at 142-43

Alloway v. Bradlees, 157 N.J. at 237-38. Thus in this case, as the professional contractor for the roofing and siding portion of the project, Perin Corp. had a duty under the law to require basic work safety rules be followed.

Perin Corp. thus incorrectly argues it had no duty to the plaintiff because it did not get involved in the "manner and means" of the roofing work. However, this is simply not the standard under the current state of New Jersey law. 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 recently rejected these "manner and means" 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 lower 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 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 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 the issue of Perin Corp.'s non-delegable duty to enforce safety was clearly in error.

C. *Tarabokia v. Structure Stone* Involved a Narrow Set of Circumstances Dealing with a Repetitive Stress Injury from a Power Tool and the Case Did Not Overturn 30 Years of Construction Site Safety Law

On appeal, for the first time, defendants cite *Tarabokia v. Structure Stone,* 429 N.J.Super. 103 (App.Div. 2012) to argue it has no liability for its overt and continued decision to disregard the OSHA rules and industry standards for safe workplaces. *Tarabokia v. Structure Stone* did not overturn some 30 years of construction site OSHA negligence law, and it certainly did not overturn *Alloway*. Instead, *Tarabokia* addressed a very narrow set of facts

whereby a worker on a highly OSHA compliant worksite 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.

Tarabokia v. Structure Stone involved the fit out of five floors of a large office building in Plainsboro, New Jersey. The owner of the project was Novo Nordisk, Inc. ("Novo"). Novo hired Structure Stone as the general contractor, which in turn hired plaintiff's employer, Hatzel & Buehler ("H&B"), as the electrical subcontractor. *Id.* at 107.

Unlike Perin Corp. and LNC here, in *Tarbokia* both the plaintiff's direct employer, H&B, and the general contractor, Structure Stone, took seriously their workplace safety obligations under OSHA and industry standards. As such, far from the instant matter, the plaintiff in *Tarabokia* had extensive worksite safety training, including in the use of the very tool which allegedly caused his repetitive stress injury. H&B had and enforced a comprehensive workplace safety manual which plaintiff Tarabokia was trained in, learned and understood. *Id.* at 107-111.

In the instant matter defendants knew long before the work began that employees would be exposed to serious injury or death associated with falling from the 17 foot high unprotected scaffolding. Yet the record is clear Perin Corp. did absolutely nothing to meet its obligations under the law to take the necessary

steps to prevent those injuries. No safety measures whatsoever were taken. In *Tarbokia* on the other hand, before plaintiff was allowed to use the powder actuated tool (known as a "Hilti gun"), defendants required he received the appropriate training and demonstrated his ability to safely handle the tool. The court noted:

> Before plaintiff started work, H & B arranged for a Hilti representative to train plaintiff on the proper and safe operation of the tool at the job site. Plaintiff received a card from Hilti signifying his completion of that training. Additionally, plaintiff attended safety meetings conducted by H & B roughly once a week throughout the duration of his work on the project.

Tarabokia at 108. Here Ruben Coronel was an inexperienced siding helper. He had no training to recognize hazards in the workplace nor take appropriate steps to deal with them. In fact, even if he did have such training, he was working in an environment where if he spoke up about safety issues, he could be fired. (Pa94) (3T, 53, 99-100) (4T 127-134)

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 defendants in any event took all reasonable steps to manage safety, including specifically with respect to this tool. As the Law Division in *Tarabokia* noted:

> [T]here's nothing here to indicate that, somehow, there was some blatant misuse of a tool or the manner in which they were doing their work, which would call to the attention of [defendant]...

Tarabokia at 111-112. In the instant matter however, plaintiff and the other workers were exposed to the imminent risk of severe injury and death which knew Perin about. 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. (2T 190-193, 208-210, 212, 214-215, 227-228) (Pa98, 3T 62-66, 71-75, 99, 109, 110, 221, 271-272) (4T, 71-72, 111-116, 119, 132, 149) (5T 47-51) Perin confirmed his awareness that LNC, and all his subcontractors, regularly engage in this dangerous practice. (4T, 71-72)

In *Tarabokia* on the other hand, there was a comprehensive safety management plan in place. Proactive measures were taken to prevent needless worker injury. Defendants played by the rules:

> [D]efendant appointed one of its representatives, Mike Pebley, as the site safety manager (SSM), and prepared a site-specific safety management plan (SSMP) for the project, available for review on site by all subcontractors, including H & B. The stated goal of the SSMP was "to provide for the systematic identification, evaluation and prevention or control of general workplace hazards, specific job hazards and potential hazards that may arise from foreseeable conditions on the Novo Nordisk project." The SSMP's declared policy was to "[p]rovide a safe working environment" and to "[n]ever accept any unsafe working condition for any reason and to take immediate corrective action when any safety violation is observed."
> ...
> To this end, the SSMP required all subcontractors to,

> among other things, designate a person with "the responsibility and full authority to enforce the [safety and loss prevention] program[,]" "assum[e] responsibility for complying with all applicable standards, regulations, rules or guidelines" to ensure safety, "establish safety methods and good practices to be carried out by [their] workers[,]" and make at least weekly inspections and report any unsafe practices or conditions. Furthermore, because "[r]ules cannot be written to cover every possible situation that may arise at the ... job site[,]" the SSMP placed certain responsibilities upon the site employees, "namely the protection of themselves and protection of fellow workers."
>
> Additionally, all project subcontractors were required to hold their own safety meetings, known as "toolbox talks." H & B held these meetings weekly, which plaintiff attended. H & B was also responsible for appointing a competent person who "has the ability to stop the work, and that person is responsible for their employees, [and is] responsible for the training of their employees while working on site."

Tarabokia at 108-111. No such structure existed on this project. There was no safety mechanism in place whatsoever, and to this day Perin boasts nothing has changed. (4T, 71-72) This verdict should not have been taken away. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 448 (1993) (the imposition of liability through tort law is essential to discourage irresponsible conduct and create incentives to minimize risks of harm.); *Weinberg v. Dinger*, 106 N.J. 469, 494 (1987) (same); *see also Prosser and Keeton on Torts* § 4 (5th Ed.1984) (noting that "prophylactic" factor of preventing future harm is a primary consideration in tort law)

Rather, the instant matter is far more analogous to the *Costa v. Gaccione* decision where summary judgment in favor of a contractor was reversed on appeal. In *Costa* the plaintiff was

injured when he fell from makeshift scaffold with no fall protection on a residential construction site. In applying the "fairness factors" the Court took particular note that:

> 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). The lack of safety enforcement which was pivotal to the court's decision in *Costa* is present here. In fact, Ruben Coronel faced a far more dangerous situation.

Indeed, as the Court in *Tarabokia* noted, "This case presents a very different factual scenario [than *Alloway* and *Carvalho*]." *Tarabokia* at 117. Unlike in *Alloway, 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 was no real forseeability. Here however, it is highly foreseeable that injury would result from requiring workers to utilize 17 foot high OSHA non-compliant scaffolding 17 feet high with no fall protection. As the 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, 675 *A.*2d 209, something less in the way of constructive notice may also suffice.

Tarabokia at 117-118 (underline added). In the instant matter there was evidence to support a finding of actual knowledge. (3T, 71-72) (2T 190-193, 208-210, 212, 214-215, 227-228)(Pa98, 3T 62-66, 70-75, 99-100, 109, 221, 271-272) (4T, 71-72, 111-116, 119, 132, 137-138, 149)(Pa110) This actual knowledge should alone end the inquiry and the claim against Perin Corp. for failure to enforce work safety rules should not have been dismissed. *Id.*

Perin Corp. relies upon several unpublished opinions including *Knopka v. Schiavone*, 2013 WL 2359701 (App.Div. 2013) and *Corker v. Pershad*, 2013 WL 1296271 (App.Div. 2013). 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 are also of little applicability to this case. The *Knopka* and *Corker* are unpublished short-shrift opinions on a factually dissimilar matters. 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 (App.Div. 2005) or *Escobar v. Laumar Roofing Services,* 2012 WL 6049120 (App.Div. 2012) (both attached)

In *Analuisa v. Richards, et al.*, A-6669-03T1 (App.Div. 2005), plaintiff was standing on a ladder supplied by his employer when he fell and sustained multiple injuries. Plaintiff argued that the 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 contractor is responsible to

ensure that the work site is safe. *Id.* at 2. The Appellate Division held the contractor owed a duty to the plaintiff since obligations imposed against 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.

The limited nature of the *Tarabokia* decision is exemplified by *Escobar v. Laumar Roofing Services,* 2012 WL 6049120 (App.Div. 2012). The plaintiff in *Escobar* was an employee of a roofing subcontractor on a renovation project at a school in Bridgewater, New Jersey. While he was working on the roof without fall protection, like the plaintiff in the instant matter, he fell through a skylight and suffered serious injury. Like in the instant matter, OSHA safety rules were not followed on the project. As such, the roofers were neither provided with nor trained in the use of appropriate fall protection.

The Appellate Division reversed summary judgment in favor of the defendant contractor. The court recognized the general contractor's joint obligation with subcontractors to manage safety and enforce the OSHA rules on the project, including OSHA's fall protection standards. The Court took into account the defendant's failure to do so, the forseeability of the risk of falling from the height and the power of the general contractor for that portion of

the work to enforce the fall protection rules and otherwise take preventative measures. Finally, the Court noted the uniquely distinguishing features of *Tarabokia v. Structure Stone* which involved a repetitive stress injury that develops over time from using a hand tool. *Escobar,* 2012 WL 6049120 at 2-5 (App.Div. 2012)

II. There Was Sufficient Evidence to Support the Jury Finding That Perin Corp. Knew or Should Have Known LNC Was a Safety Incompetent Contractor

Perin and LNC had a 15 year history of not following basic work safety rules. It was standard practice to utilize scaffold without the necessary fall protection and supporting devices to prevent collapse. This is dangerous for not only workers, but anyone that comes near it, including, for example, people who might live in the house or prospective buyers. Undeterred, Perin readily admits, "We continue business the same way." (Pa110) (*See also* 4T, 71-72) New Jersey law discourages this kind of conduct by allowing for liability for the hiring of safety incompetent subcontractors like this that needlessly place the public at risk. *Restatement (2nd) of Torts §411* (1965) *and Official Comment* (setting forth duty to hire "careful" contractor that does its work "without creating unreasonable risk of injury to others."); *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 578-79 (2006) (incompetent contractor rule applied to "insur[e] the safety of vehicles that place the public at risk...") (underline added);

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) (same)

The whole point of liability for hiring safety incompetent contractors is to encourage safe conduct and prevent needless public danger. *Id.* Perin however pushes for a new rule that says no matter how incompetently dangerous a contractor like Perin or LNC operate, so long as the final siding product is acceptable, there can be no liability. (Db27-28). It even goes so far to argue the jury should only have been charged whether or not LNC did a satisfactory job installing the siding. (Db 53) It makes the ridiculous argument that the incompetent contractor rule should only apply when it comes to hiring "safety consultants." (Db 53) This is no different than saying, for example, in *Puckrein v. ATI Transport*, 186 N.J. 563 (2005), so long as the delivery ultimately got to the final destination as contracted for, regardless of how many people were killed in the process, there can be no liability. This is simply not the law and this new untenably dangerous rule should be rejected.

Perin argues for the <u>first time on appeal</u> that there was no "expert testimony" with regard to the safety incompetence of LNC, and that therefore Perin should have no liability for having selected them as a subcontractor. This fallacious argument should also be rejected. First, Perin <u>stipulated</u> below, "They weren't

safety competent..." (5T, 89-91) (See also 4T, 153-154) Second, there is no need to prove safety incompetence through expert testimony.

Regardless, the evidence about the dangerous work practices of these contractors, including their standard practice to ignore basic work safety rules (including the most basic rule which is to hire safety competent contractors) was testified to extensively by both experts. (3T, 113-280) (4T 81-150) Among other things, Vincent Gallagher discussed:

- that the siding work of Perin had been ongoing for a week prior to the fall and before that they did the roofing work (3T, 162);
- that the scaffolding used during that time never had the required safety provisions and resulted in the fall (3T, 164-166);
- various industry standards and publications he relied upon including, "How to Hire and Supervise Subcontractors" (3T, 187-190; 196-198);
- that he measured the safety conduct of Perin Corp. against the pertinent industry safety standards (3T, 190);
- basic safety things a contractor like Perin Corp. must do with regard to hiring a subcontractor such as LNC, including requiring that subcontractor follow fundamental work safety rules (3T, 203-206, 214-219) this includes that before the contractor is hired, that the contractor's safety competence and compliance to safe work practices is determined and made part of the bid process and that before hiring, the contractor "[R]equest information on the safety programs and recent history of subcontractors. Requirements for the safe performance of subcontractors work should be included in each contract." (3T, 218-219)
- Perin does not follow any of these fundamental safety practices. Perin does not follow OSHA or industry safety standards. Perin did not require Norge Giron of LNC to follow

any safety rules. Perin was on the Brigatti job while they were using scaffolding (3T, 219-222)

- Perin had no safety program whatsoever and took no steps to prevent job site accidents. Perin did not require its subcontractor to have any safety program or to have its workers trained in safety and fall prevention. Perin did not verify that LNC scaffolding workers were trained as required by OSHA.[1] Perin did not require the scaffolding comply with basic safety standards. (3T, 226-227, 243-248)

- Perin and LNC cut corners on safety to get an unfair advantage over contractors that play by the rules; by skirting safety rules and hiring contractors like LNC, Perin's bid is lower and they are more likely to get the work. (3T, 242)[2] [3]

- It was common practice for Perin siding installers to work unprotected from scaffolding. "[T]here was a fundamental

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[1]Both Judge Schott and Perin incorrectly state plaintiff's position is that Perin should have been required to train the workers of LNC. (Db 16, 67) No such claim has ever been made. Rather, Perin was required to select a safety competent subcontractor that knew it must, and does in fact, follow the rules applicable to its work. Vincent Gallagher specifically testified Perin is <u>not</u> expected to train LNC workers. (4T, 246-248)

[2]Common sense tells us this places pressure on the competitors to do the same thing, thereby increasing the overall level of danger to the public.

[3]There can also be no real dispute that at the time of the fall, LNC did not maintain workers compensation insurance on its workers. This was the subject of extensive litigation in both the Law Division and workers compensation court. There is also no serious dispute that LNC hired undocumented workers which it paid cash. (T1 13-14) The reality of the situation here is that Darci Perin and LNC/Norge Giron (who absconded to Equador, T29-30), simply did not follow the rules that legitimate contractors have to follow- this includes payroll taxes, workers compensation insurance, authorized labor, etc. In the same vein they ignore the federal work safety rules, as this case so poignantly demonstrates. By cutting these corners, they are able to reduce their price and displace legitimate businesses. In the process they endanger workers and anyone else that comes near their jobs.

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);

- The safety rules Perin made it a practice to disregard are designed, "To prevent catastrophic injury and death, when you're exposed to a hazard as high as Mr. Coronel was." (3T, 250-253)

Defendant's own expert, Bernard Lorenz, similarly testified:

- Perin Corp. was hired to perform roofing and siding work on the construction project and they hired contractors on behalf of themselves to do the work (4T, 95);

- OSHA requires all contractors to follow the work safety rules (4T, 98);

- The photograph of the incident scaffolding shows it has no fall protection and was prone to collapse (4T, 107-110);

- Perin had direct involvement with the job including, among other things, he measured the job specifications and scheduled his subcontractors on the job. If his subcontractors performed badly on the job, it would be "his responsibility." (4T, 112)

- Perin was left in charge to complete the work (4T, 119);

- The purpose of industry safety standards and OSHA is to prevent needless injury to workers and members of the public that come in or near work sites (4T, 120-123, 130-131)

- These safety rules require taking proactive steps to prevent injury before work begins. These rules also require pre-job safety planning, safety inspections, safety training of the workers and job leaders. The proper safety equipment must also be provided. None of these rules were followed in this case. (4T, 123-130, 146) The purpose of these rules is to protect workers and the public. (4T, 130-131)

- Perin Corp. had safety responsibility with respect to its subcontractors on the project. (4T, 132-133, 149)

- OSHA and industry safety standards were ignored on this project. (4T, 133-134)

- LNC did 20-30 other jobs for Perin prior to the Brigatti job.

(4T, 134-135)

- The unsafe, OSHA non-compliant scaffolding was in place on this job for 1-2 weeks prior to the fall. (4T, 135)

- It was common practice for Perin siding installers to work high on scaffolding without any protection and if the workers complained, they risked being terminated (4T, 135-136)

- 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, 137-138)

Perin's argument that there was no "expert testimony" with regard to the safety incompetence of LNC is false.

There was sufficient evidence in the record to support the jury finding that LNC was a safety incompetent contractor and that Perin knew or should have known about it. (See Plaintiff's Opening Brief at 16-24) Perin ignores this reality and its own stipulations in favor of empty conclusions and personal attacks on counsel.[4] It says LNC was not incompetent because Perin required

[4]New York counsel hired to handle this appeal makes a number of uncalled for personal attacks suggesting plaintiff's counsel is aloof, poorly plans, and inexperienced. (Db 17, 29, 31) Some of this may be due to the fact that these lawyers were never actually in the courtroom at the trial. Regardless, these new attorneys concoct these sideshow issues to distract the Court from the simple issue that there was sufficient evidence to sustain the verdict, there was no unjustified surprise and this matter should very simply be remanded once and for all for a damages trial.

LNC to "acknowledge two safety forms," that it signed an agreement delegating safety responsibility to LNC, that LNC knew OSHA regulations and that Perin had previously purchased "safety equiptment" for LNC. These arguments should be rejected and in fact only further show why Judge Schott erred in taking away the jury verdict.

First, there is simply no evidence in the trial record about LNC agreeing to take on Perin's safety responsibilities. Instead Perin cites to Pa18, which is a summary judgment decision from two years before trial. No such agreement was proffered at trial.[5] Even if there were, Perin's duty is "non-delegable." It can not avoid its duty to enforce basic safety rules by having a subordinate contractor sign a form that says it in fact does not have any such duty. That would defeat the whole top-down enforcement purpose of the non-delegable duty rule. *See, e.g., Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999) (contractor has non-delegable duty to maintain a safe workplace and enforce OSHA compliance "without regard to contractual...obligations."); *Carvalho v. Toll Bros.*, 143 N.J. 565 (1996) ("We conclude it would be unfair to exonerate Bergman from its liability to decedent on the basis of its exculpatory agreement...[such] does not overcome the public policy that imposes a duty of care and ascribes liability [for OSHA violations]."); 29 C.F.R. §1926.16.

[5]Defendant entered no exhibits into evidence.

Even if such were part of the trial evidence, it is the sole province of the jury to determine what weight it will give to evidence about the safety incompetence of LNC. The existence of "safety forms" or Perin's vague and unspecified conclusion that Giron "knows OSHA" or that Perin bought Giron "safety equipment" would in no way vaporize the substantial evidence and stipulation that LNC was a safety incompetent contractor and that Perin knew or should have known about it. If anything, that Perin bought LNC "safety equipment" only further shows the control Perin had over its subcontractor.

Similarly, the unsupported vague statement by defendant's expert that LNC performed their work safely on 10-15 prior Perin jobs also does not somehow nullify the substantial evidence to the contrary which supported the jury verdict.[6] Among other things, exhibit P-20 (marked as Perin 4 at Deposition) (Pa81) shows the dangerous scaffolding without the required fall protection, mud sills (to prevent collapse), etc. This same dangerous scaffolding was used on those previous jobs and Perin admits his subcontractors still use it today. (3T, 99-100)(Pa110) (4T, 71-72, 137-138) As to this dangerous scaffolding Perin specifically testified:

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[6]The expert had absolutely no basis to conclude this. In fact, Perin Corp. had numerous past OSHA citations for violation of fall protection rules. Judge Schott would not permit the expert to be cross examined on these to challenge his fantasy conclusion that Perin Corp. was a safety conscious contractor. (4T 138-144)

Q. Can you tell from looking at Perin-4, 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) On appeal counsel attempts to do what Darci Perin himself never did- to explain this away by saying he actually meant something else. Most notably, Darci Perin was never asked by his counsel at trial to explain this deposition testimony to the jury.

Perin's counsel argues on appeal that Perin testified "unequivocly" that he was on the job on only one occassion, after the fall. (Db 38) This is belied by the evidence. (T2, 190-193, 208-210, 212, 214-215, 227-228) (3T, 62-67, 70-75, 99, 109, 221, 271-272) (4T 71-72, 111-116, 119, 132-134, 149) (5T, 20, 33-34) (Pa 71-73, 97, 98, 100, 108-110) Among numerous other things, Salvatore Brigatti specifically testified Perin had been on the job "for a while" doing the roof and then had come back for "about a week" doing the siding, prior to the fall. (T2, 190-191). In fact, even the court pointed out that Brigatti, "thought Perin was there and Perin was doing the job." (T2, 227-228)

Perin's counsel ignores the record in asserting there is "absolutely no evidentary basis for plaintiff's bald assertions" that Perin knew or should have known LNC made it a standard practice to ignore basic work safety rules. There was substantial evidence in the record to support the jury verdict. (See Plainitff's opening brief at 4, 7, 18-24). In fact, Perin's counsel more or less conceded the point:

> THE COURT: [Y]ou 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: <u>And there is evidence that LNC always uses that kind of scaffolding, right, without any guardrails, lanyards, anything</u> 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.[7]

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[7]This argument is without merit. Ruben Coronel testified he was told by LNC that they have been working at those heights without fall protection for a long time. (3T, 99-100) When shown the photograph taken by OSHA at the scene to document the dangerous, non-compliant scaffolding (Pa81, 82), Darci Perin himself admitted: 1) he knew that scaffolding was being used throughout the entire job; 2) not only does LNC do it this way, but so do <u>all</u> his subcontractors and; 3) they continue to do so to this day. (4T, 71-72) (Pa110) This was also testified to by <u>both</u> experts: Gallagher- "that was the common practice for him to work on Pump Jack Scaffold without fall protection. ...it was not a[n] isolated incident, it was common practice...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

> ...
> 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. ... Mr. Perin's testimony was kind of like, hey, I hire LNC, that's up to them. 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, 50-51)

The fact of the matter is these were all proper jury questions, or as the Court referred, "the classic jury question." (T5, 51) It was up to the jury to determine who is to be believed, what weight is to be given the respective evidence and issues of actual and constructive notice. There was sufficient facts to support the verdict and the court erred in taking it away.

III. Settling Defendant Salvatore Brigatti Was Properly Excluded from the Jury Verdict Sheet

There was no basis for Savatore Brigatti to go on the jury verdict sheet because Perin did not meet its burden of proving

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thing. It was the way business was." (3T, 249) Lorenz- "[My understanding is] that LNC did approximately 20 to 30 other jobs for Perin before this incident. ...[My understanding is] that the scaffolding existed on this job site in this unsafe condition for about one to two weeks before the fall." He further recalled that Norge Giron said, "we always do it this way." (4T, 134-138) Even if the jury decided Perin did not know, an untenable conclusion under these facts, the jury verdict is still properly supported because the scaffolding existed in this condition for 1-2 weeks before the fall and thus Perin Corp. should have known and/or had constructive knowledge of it. These are classic jury questions.

liability as to this settling defendant. Perin introduced no evidence, including no expert testimony, upon which a jury could rightly find any liability in this workplace safety OSHA violation case. In fact, Perin did not enter a single exhibit into evidence and no expert even made mention of any liability on the part of Salvatore Brigatti. This was quite clearly discussed at trial. (**3T, 253-263**)

In order for a remaining defendant to apportion liability to a settling defendant, the remaining defendant has the burden to prove the settling defendant was negligent. *Shatz v. TEC Technical Adhesives*, 174 N.J. Super. 135, 145-46 (App. Div. 1980); *Model Civil Jury Charge*, 1.17 ("The burden of proving that the settling defendant was at fault is on the remaining defendant."). The fault of a settling defendant "must be proven" before the trier of fact can be asked to assess that party's responsibility. *Mort v. Besser Co.*, 287 N.J. Super. 423, 431-432 (App. Div. 1996), certif. den. 147 N.J. 577 (1997). *See also Johnson v. American Homestead Mortg.*, 306 N.J. Super. 429, 437 (App. Div. 1997), stating that the fault of a settling defendant is subject to allocation by the trier of fact only if the issue of the settling party's liability is adjudicated at trial; *Young v. Latta*, 233 N.J. Super. 520, 526 (App. Div. 1989), aff'd 123 N.J. 584 (1991), observing that "if no issue of fact is properly presented as to the liability of the settling defendant, the fact finder cannot be asked . . . to assess

any proportionate liability against the settler." This promotes the strong public policy in favor of settlements, especially in multi-party litigation, and avoids an advantage on defendants that elected to not settle. *See generally, Kiss v. Jacob*, 138 N.J. 278 (1994); *Theobald v. Angelos*, 44 N.J. 228 (1965); *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548 (1980).

Mort v. Besser Co., supra, was a product liability case in which the plaintiff sued the manufacturer of a machine, an engineering company that designed its control panel, the manufacturer of the control panel, and the electrical contractor who installed the control panel. The engineering company and the electrical contractor settled with the plaintiff prior to trial. Over the plaintiff's objection, the trial judge permitted the jury to assign fault percentages to the two settling parties.

The Appellate Division reversed, holding that the lack of evidence at trial demonstrating the fault of the two settling defendants precluded an allocation of fault to them. *Id.* at 433. With respect to the engineering company, the court noted that it was a member of the chain of distribution of the control panel. Thus, although it could be held strictly liable in tort, the only fault attributable to it on that basis would be identical to the fault assigned to the manufacturer of the control panel on the same theory. In response to a specific interrogatory, the jury had determined that the control panel manufacturer was liable on a

negligence theory, but not on a strict liability theory. *Id.* at 427. Therefore, the court reasoned, the engineering company could be subject to a separate fault allocation only if it had been guilty of negligence beyond that attributed by the jury to the panel manufacturer. Since none of the expert witnesses had identified any independent negligent conduct by the engineering company, the court concluded that there was no factual basis supporting the jury's allocation of fault to it. *Id.* at 433. Similarly, the court decided that the issue of the electrical contractor's fault should not have been sent to the jury because there was no testimony that it had performed its services negligently. *Id. See also Sullivan v. Combustion Engineering*, 248 N.J. Super. 134, 144 (App. Div.), cert. den. 126 N.J. 341 (1991), an asbestos exposure case in which the court held that the non-settling defendants could not introduce the interrogatory answers of settling codefendants to support an allocation of fault to the settlers. The court reasoned that the answers provided no basis from which an assessment of percentages could be derived because they failed to indicate the length of time the plaintiff had been exposed to each defendant's products.

There was simply no basis to place Salvatore Brigatti on the jury verdict sheet and Perin Corp’s. arguments to the contrary should be rejected.

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,
Clark Law Firm, PC

By: _____
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Dated: May 15, 2014

Appeal-reply-brief3.wpd