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PRELIMINARY STATEMENT

In 1970 President Richard Nixon signed into law the Occupational Safety and Health Act of 1970 ("OSHA") "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." The comprehensive legislation was in response to decades of death and disability that marked the industrial age in America.[1] New Jersey has incorporated OSHA and its prevention principles into its statutory law and extensive body of workplace safety case law.

OSHA, New Jersey law and industry safety authority rests on the bedrock principle of top-down safety enforcement. As such, a general contractor and each respective tier of subcontractor on a work site has a non-delegable, down-the-chain 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. 221, 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994); (*Exhibit A, Expert Report of Vincent Gallagher at 3-22*). As a matter of public policy and federal law, the general contractor is the single repository of responsibility for the safety of all employees on the job. As such, the general contractor bears responsibility for all OSHA violations on the job site. *Meder v. Resorts International*, 240 N.J.Super. 470, 473-77 (App. Div. 1989), *cert. den.* 121 N.J. 608; *Kane*, 278 N.J.Super. at 142-43; *Dawson v. Bunker Hill Plaza Assocs.,* 289 N.J.Super. 309, 320-21 (App.Div.1996).

The instant workplace injury case involves the construction of a large house in Wayne, New

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[1] Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994); *See also, Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents.* 101 Harv. L. Rev. 535 (1987).

Jersey. Defendant Salvatore Brigatti was the developer and general contractor. Brigatti subcontracted the roofing and siding work to Defendant P&T Sons Construction Corp. / Perin Construction Corp. ("Perin"). Perin in turn sub-sub contracted the siding work to Defendant Norge Giron / LNC Construction Corp., Plaintiff's direct employer.

Defendants Brigatti and Perin failed in their obligations to manage safety and enforce OSHA. As such, plaintiff received no safety training to learn how to recognize or address workplace hazards. There was no safety oversight nor inspections. There was simply no safety mechanism in place whatsoever and complaint was not permitted. The siding installation work took place over the course of two weeks during which time Ruben Coronel, a non-experienced "helper," was directed to use OSHA non-compliant scaffolding that lacked fall protection. Toward the end of the job he fell 20 feet and suffered catastrophic injuries. Defendants did nothing in response and admit they "continue business the same way."

Brigatti's reliance upon *Slack v. Whelan* is entirely misplaced. As the Appellate Division made clear in *Costa v. Gaccione,* 408 N.J.Super. 362, 373 (App. Div. 2009), "*Slack* represents a narrow exception and is factually quite different from the case before us." Indeed, "*Slack* represents an exceptional situation" which simply does not apply here. *Id.* at 365. Furthermore, the OSHA Regulations unambiguously require Brigatti and Perin to manage safety and enforce the OSHA standards. Their arguments to the contrary conflict with federal law and are preempted. Their motions for summary judgment should be denied.

STATEMENT OF MATERIAL FACTS

I. THE PROJECT

1. This is a safety rules violation construction project personal injury case.

2. The job was a subdivision and construction of a new large home at 30 Smith Lane in Wayne, New Jersey. (*Exhibit A, Expert Report of Vincent Gallagher at 2-3*) (*Exhibit C, Police Report*) (*Exhibit D, Site Progress Photos*) (*Exhibit E, OSHA Investigation Photos*) (*Exhibit F, Building Permits*)

3. The general contractor for the subdivision construction project was defendant Salvatore Brigatti ("Brigatti"). (*Exhibit H, Statement of Salvatore Brigatti at 2-4*) (*Exhibit A, Expert Report of Vincent Gallagher*) (*Exhibit B, Supplemental Expert Report of Vincent Gallagher*) (*Exhibit H, Statement of Salvatore Brigatti at 3, 4, 14*)

4. Brigatti subcontracted the roofing and siding work to Defendant P&T Sons Construction Corp. / Perin Construction Corp. ("Perin"). (*Exhibit I, Discovery Responses of Reynaldo Construction, S10*) (*Exhibit J, Discovery Responses of Perin Construction, S1*) (*Exhibit Q, Perin-Brigatti Job Invoices*) (*Exhibit G, Deposition of Salvatore Brigatti* at 44-45)

5. Perin in turn sub-sub contracted the siding work to Defendant Norge Giron / LNC Construction Corp. *See sec. II C, infra.*

6. The total value of the development was about $750,000 and the construction project itself was well in excess of $350,000. (*Exhibit G, Deposition of Salvatore Brigatti* at 78)

II. THE PARTIES

A. Salvator Brigatti is a Real Estate Developer

1. Since about 1990, Salvatore Brigatti has been in the business of real estate development whereby he purchases and improves properties for profit. (*Exhibit G, Deposition of Salvatore Brigatti* at 12-27)

2. As part of his real estate development business, Brigatti has developed and/or invested in numerous properties including 100 Raritan Avenue in Patterson, 27 Lookout Lane in West Patterson, 29 Smith Lane and 30 Smith Lane in Wayne, Goodwin Street in Patterson, 49 Jasper Street and 112 Fourth Avenue in Patterson, New Jersey. (*Exhibit G, Deposition of Salvatore Brigatti* at 12-27)

3. Brigatti testified:

Q. You know, it appears that you bought and sold a number of houses. Would you consider yourself to be a real estate investment type person?
A. Now, yes.

(*Exhibit G, Deposition of Salvatore Brigatti* at 17)

4. In describing his real estate development business he further testified:

Q. And then you also, I take it, over the, say, in the past five years have had income from real estate investments?
A. I wouldn't say income, but some yes. Some good, some bad.

Q. All right. In any event, is that another business of yours? ...
A. I would say investment. Is it a business? It's an investment, yes, like to invest, you know, on the side. I guess you'd consider that a business, yes.

Q. Okay. Your tax returns over the last, say, five or ten years would reflect these various business investments and these business ventures that you've been involved in, correct ?
A. Yes.

(*Exhibit G, Deposition of Salvatore Brigatti* at 18)

5. Brigatti serves as his own general contractor on these projects. He hires and coordinates the work of various subcontractors to complete the construction or renovation projects including, for example, plumbers, electricians, landscapers and masons. (*Exhibit G, Deposition of Salvatore Brigatti* at 27-36, 42-48)

6. As stated, one such Brigatti real estate development project was 29 Smith Lane in Wayne, New Jersey which Brigatti purchased with the intent to subdivide it. (*Exhibit G, Deposition of Salvatore Brigatti* at 22-24, 48) (*Exhibit H, Statement of Salvatore Brigatti at 2*)

B. Brigatti was the General Contractor and Perin Construction/P&T Construction Was the Interim Sub-Contractor Hired to Perform Roofing and Siding Work

7. As stated, the general contractor on the project was defendant Salvatore Brigatti. (*Exhibit H, Statement of Salvatore Brigatti at 2-4*) (*Exhibit A, Expert Report of Vincent Gallagher*) (*Exhibit B, Supplemental Expert Report of Vincent Gallagher*) (*Exhibit H, Statement of Salvatore Brigatti at 3, 4, 14*) (*Exhibit G, Deposition of Salvatore Brigatti at 29-30, 42-48, 50-51, 53-54, 69-70, 90-97, 107-108, 113-115*) (*Exhibit P, Deposition of Perin at 41, 57*) (*Exhibit I, Discovery Responses of Reynaldo Construction, S10*) (*Exhibit J, Discovery Responses of Perin Construction, S1*)

8. Brigatti stated:

Leo Alright did you have a general contractor
A No

Leo Only yourself so you controlled the things
A Correct

Leo Did you have a project manager
A No

Leo Do you know what they are
A Yes
...
Q. And you took out permits for all the construction
A. Exactly

(*Exhibit H, Statement of Salvatore Brigatti at 3, 4*) (*Exhibit G, Deposition of Salvatore Brigatti* at 38-39)

9. As such, Brigatti handled many of the traditional general contractor functions. Among other things, he directly hired the various sub-contractors, provided materials, scheduled the sub-contractors and the progression of the work, reviewed the work of subcontractors to approve it for payment, in fact paid the subcontractors, and otherwise ran the job. (*Exhibit G, Deposition of Salvatore Brigatti at 29-30, 42-48, 50-51, 53-54, 69-70, 90-97, 107-108, 113-115*) (*Exhibit P, Deposition of Perin at 41, 57*)

10. Brigatti decided from the outset he would purchase the property, sub-divide it and serve as his own general contractor on the construction project. (*Exhibit G, Deposition of Salvatore Brigatti* at 50)

11. It was not a situation where Brigatti hired a separate general contractor that abandoned the project and forced him to complete it on his own. (*Exhibit G, Deposition of Salvatore Brigatti* at 50-51)

12. Rather, Brigatti decided from the outset to serve as his own general contractor in order to save the money of hiring a separate general contractor. (*Exhibit G, Deposition of Salvatore Brigatti* at 50)

13. He testified:

Q. So you made a decision on your own from the beginning that you would essentially do this on your own, correct? That decision was made from the outset?...
A. Yes.

Q. It wasn't a situation where you hired a general contractor and halfway through the project the general contractor abandoned you and you were left building the house on your own? That's not the situation here, correct?
A. No.

(*Exhibit G, Deposition of Salvatore Brigatti* at 50)

14. In fact Brigatti lived next door to the construction project. (*Exhibit G, Deposition of*

Salvatore Brigatti at 88-89)

15. He was on the job site on a daily basis overseeing and managing the progress of the work. (*Exhibit G, Deposition of Salvatore Brigatti* at 88-91)

16. While inspecting the progress of the work on the project, Brigatti would have seen the scaffolding, which lacked the OSHA mandated and industry standard fall protection. (*Exhibit G, Deposition of Salvatore Brigatti* at 90-91, 94-95, 115) (*Exhibit R, Deposition of Ruben Coronel at* 73)

17. In fact, Brigatti was on site watching the unsafe scaffolding being erected. (*Exhibit R, Deposition of Ruben Coronel at* 73)

18. Brigatti also observed the siding work being performed. (*Exhibit G, Deposition of Salvatore Brigatti* at 94-95, 115)

19. Brigatti even gave the workers direction as to how he wanted the siding installed. (*Exhibit G, Deposition of Salvatore Brigatti* at 94-95)

20. Brigatti purchased siding and other materials for the job. (*Exhibit G, Deposition of Salvatore Brigatti* at 43, 107-108) (*Exhibit P, Deposition of Perin at 41*)

21. Brigatti had the power to hire and fire subcontractors. He testified:

Q. Did you also have the authority to fire any subcontractors who you hired?
A. Yes. ...I want to make sure it's clear. Whoever contracted I hired. If I didn't like the way he was doing it, did I have the authority to fire him? Yes.

(*Exhibit G, Deposition of Salvatore Brigatti* at 96-97)

22. Brigatti maintained ultimate control over the project. (*Exhibit G, Deposition of Salvatore Brigatti* at 38-39, 96-97)

23. He could even unilaterally reset the price he would pay Perin after the fact. (*Exhibit P, Deposition of Perin at 90-91*)

24. In answers to interrogatories Defendant Perin Construction certified Salvatore Brigatti was the general contractor on the project. (*Exhibit J, Discovery Responses of Perin Construction, S1*) (*See also Exhibit I, Discovery Responses of Reynaldo Construction, S10*)

25. Furthermore, Brigatti represented under oath on official town construction documents that he was the general contractor. (*Exhibit F, Building Permits*) (*Exhibit G, Deposition of Salvatore Brigatti* at 34-35, 39-40)

26. Brigatti subcontracted the roofing and siding work to defendants P&T Sons Construction

Corp./Perin Construction Corp. ("Perin") (*Exhibit G, Deposition of Salvatore Brigatti* at 44-45)

C. Perin/P&T Construction was the Interim Sub-Contractor for the Siding and Roofing Work

27. Perin is an experienced contractor. On any given day in 2006 Perin would have 6-7 jobs going on. (*Exhibit P, Deposition of Perin at 37*)

28. Perin never looked into the safety competence of the people it hired to perform its installations. Rather, it chose its subcontractors by random calls from "a lot of people that needed work." (*Exhibit P, Deposition of Perin at 32, 33*)

29. Norge (George) Giron/LNC Construction was a subcontractor of Perin and did "a lot" of jobs for him. (*Exhibit P, Deposition of Perin at 31-32*)

30. Although Plaintiff believed he worked directly for Norge Giron, at times it was unclear. (*Exhibit R, Deposition of Ruben Coronel at 49-50, 165-166, 171*)

31. At one point he was under the impression that Perin was the boss and he may have been working for him. (*Exhibit R, Deposition of Ruben Coronel at 165-166, 171*)

III. Total Failure to Manage Safety, Enforce OSHA and Prevent Injuries to Workers

1. Under well-settled construction law in New Jersey and under OSHA, general contractors and each respective tier of subcontractors like Brigatti and Perin here, have a non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." *Alloway v. Bradlees Inc.,* 157 N.J. at 237-38 (1999); *Kane*, 278 N.J.Super. at 142-43; 29 *C.F.R.* §1926.16. As such the general and sub-contractors are required to actively manage safety on this job site and see to it the subcontractors comply with the federal safety regulations and other safety standards in the construction industry. *Id.*; (*Exhibit A- Expert Report of Vincent Gallagher*) (*Exhibit B- Supplemental Expert Report of Vincent Gallagher*) (*Exhibit K, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*) (*Exhibit L, OSHA Fact Sheet- "Fall Protection in Residential Construction"*)

2. As the general and interim sub-contractor respectively, Brigatti and Perin were required under the law to comply with OSHA's general health and safety provisions. This required them to implement and enforce a safety and health management system ("SHMS") *Id.*

3. The critical elements of an effective SHMS are: management commitment and employee involvement; worksite analysis; hazard prevention and control; training for employees, supervisors and managers. In short, Brigatti was required to implement and enforce a safety program, require safety training of all workers and take proactive measures to manage safety and prevent accidents.

(*Exhibit A- Expert Report of Vincent Gallagher at 7-22*) (*Exhibit B- Supplemental Expert Report of Vincent Gallagher*) (*Exhibit K, OSHA Fact Sheet- "Effective Workplace Safety and Health Management Systems"*)

4. As part of his requirement to enforce the OSHA regulations on his project, Brigatti and Perin were also required to make sure its subcontractors do the same. *Id.*

5. Brigatti and Perin were also required to comply with OSHA's fall protection and scaffolding safety regulations, and enforce same among the subcontractors, including LNC Construction. *Id.*

6. OSHA's fall protection and scaffolding safety regulations require, among other things, that all employees who perform work on a scaffold receive appropriate and qualified training and that they be protected with fall protection such as lanyards, nets and/or guard rails. 29 CFR §1926.451; 454 (*Exhibit A- Expert Report of Vincent Gallagher at 19-22*) (*Exhibit B- Supplemental Expert Report of Vincent Gallagher*)

7. There are also numerous pertinent construction industry safety standards that similarly require general health and safety management and specific steps to prevent falls from scaffolding and other heights. (*Exhibit A- Expert Report of Vincent Gallagher at 7-19*) (*Exhibit B- Supplemental Expert Report of Vincent Gallagher*)

8. None of these precautions were taken on this job site. (*Exhibit A- Expert Report of Vincent Gallagher; Exhibit B- Supplemental Expert Report of Vincent Gallagher*) (*Exhibit G, Deposition of Salvatore Brigatti at 52-57, 64-65, 78, 82-83, 92-93*)

A. General Contractor- Salvatore Brigatti

9. Contrary to his legal duty as the general contractor, Brigatti has no OSHA training or certifications and he knows next to nothing about OSHA construction safety principles. (*Exhibit G, Deposition of Salvatore Brigatti* at 52, 56)

10. Brigatti never looked into the safety history or practices of Perin or the other subcontractors to determine they were safety competent before allowing them to work on the project:

Q. Did you ever interview any of the subcontractors about their safety history and safety procedures prior to hiring them on the job?
A. No.

(*Exhibit G, Deposition of Salvatore Brigatti* at 55, L10-14)

11. A simple internet search would have revealed numerous serious OSHA violations of Perin. (*Exhibit O- Perin OSHA Violation Records*)

12. Brigatti never held any safety meetings nor required its subcontractors to hold them. (*Exhibit G, Deposition of Salvatore Brigatti* at 56) (*Exhibit R, Deposition of Ruben Coronel at 53-54, 56-58, 62-68*)

13. Brigatti did not require that any employees have safety training. (*Exhibit G, Deposition of Salvatore Brigatti* at 56-57)

14. Brigatti never did anything to foresee job site dangers and prevent accidents. (*Exhibit A- Expert Report of Vincent Gallagher; Exhibit B- Supplemental Expert Report of Vincent Gallagher*) (*Exhibit G, Deposition of Salvatore Brigatti* at 52-57, 64-65, 78, 82-83, 92-93)

15. Brigatti never performed safety inspections, nor required its sub-contractors to do so. (*Exhibit G, Deposition of Salvatore Brigatti at 55, 57*)

16. In fact, despite Brigatti being on site watching the unsafe scaffolding being erected and used, and at times giving the siding workers directions, he never said anything about the scaffolding being dangerous. (*Exhibit G, Deposition of Salvatore Brigatti* at 94-95, 115) (*Exhibit R, Deposition of Ruben Coronel at* 73, 77)

17. Brigatti did not require Perin have, and it never asked it for, a safety manual or whether it had an occupational safety and health program. (*Exhibit G, Deposition of Salvatore Brigatti* at 56-57)

18. Zero dollars were spent on safety. Brigatti testified:

Q. All right. So the total cost of the job was well in excess of $350,000, correct?
A. It was over 350,000, yes.

Q. What part of that was devoted to safety and preventing accidents?
A. They didn't put anything towards it.

(*Exhibit G, Deposition of Salvatore Brigatti* at 78)

19. Brigatti's lack of safety management and OSHA enforcement is further shown in his discovery responses. Brigatti was unable to produce any of the following basic safety documents it is required to maintain under the OSHA regulations:

Minutes of any and all pre-job safety conference meetings.
Safety/monitoring reports.
Follow-ups of hazards found during safety inspection/ monitoring.
Written job descriptions of the superintendent, supervisors, and foremen.
Any letters, memos, or any documents transmitted between general contractor, contractor and subcontractors relative to safety.
Safety inspection reports.

(*Exhibit M, Brigatti Discovery Responses, Response to Notice to Produce*).

20. Contrary to responsibility, Brigatti conducted no investigation of the incident and he never determined what caused it, so as to prevent it from happening in the future; he simply did nothing to prevent a reoccurrence. (*Exhibit G, Deposition of Salvatore Brigatti* at 64-65) (*Exhibit P, Deposition of Perin at 91*) (*Exhibit R, Deposition of Ruben Coronel at* 170-171)

21. Brigatti didn't even so much as mention the incident to Perin. (*Exhibit P, Deposition of Perin at 91*)

22. In fact, despite knowing the severity of the nearly 20 foot fall and having seen the blood coming out of Coronel's ears (*Brigatti dep at 70-71*), to this day Brigatti claims to know nothing about how it happened and did nothing to prevent a reoccurrence:

Q. After the accident -- well, do you know how the accident happened?
A. No.

Q. Did you ever conduct any sort of investigation to look into it?
A. No.

Q. Did you ever take any steps to prevent a similar accident from happening again on the job site?
...
A. No.

(*Exhibit G, Deposition of Salvatore Brigatti* at 64-65)

23. Brigatti did not enforce the OSHA regulations with respect to scaffolding and fall protection safety on the job. (*Exhibit G, Deposition of Salvatore Brigatti* at 57, 65)

24. Brigatti testified:

Q. You did not require Darci Perin to follow OSHA's scaffolding regulations on the job; is that correct?
...
A. No, I didn't.
...
Q. I have here a copy of an OSHA publication called "A Guide To Scaffolding Use In The Construction Industry." It's publication number 3150, 2002 revised. Do you have any knowledge or understanding of these regulations?
A. No.

Q. Did you do anything to enforce these regulations on this job site?

A. No.

(*Exhibit G, Deposition of Salvatore Brigatti* at 57, 65)

25. Brigatti did next to nothing to comply with federal OSHA regulations nor industry standards for construction site safety; he simply did business as though OSHA did not exist. (*Exhibit A- Expert Report of Vincent Gallagher; Exhibit B- Supplemental Expert Report of Vincent Gallagher*) (*Exhibit G, Deposition of Salvatore Brigatti* at 52-57, 64-65, 78, 82-83, 92-93)

26. Brigatti admitted:

Q. You didn't really do anything to enforce the OSHA regulations on this job; is that correct?
MR. KELLEY: Objection. You can answer.
A. No.

Q. No, you didn't?
A. No, I didn't, yes.

(*Exhibit G, Deposition of Salvatore Brigatti* at 56)

27. When asked if he was concerned about Perin completing the job in a safe manner, Brigatti admitted, ""I really didn't think about that. I was more concerned about the quality of the work." (*Exhibit G, Deposition of Salvatore Brigatti* at 82-83)

B. Interim Sub-Contractor- Perin/P&T Construction

28. Darci Perin, the principal of Perin/P&T Construction and the person designated as the most knowledgeable in safety at the company, had no real OSHA training to speak of. (*Exhibit P, Deposition of Dari Perin at 24*)

29. The only thing he knows about OSHA is that "they inspect jobs [for] safety."[2] (*Exhibit P, Deposition of Dari Perin at 24*)

30. Apparently after these prior encounters with OSHA investigators, Perin put together a rudimentary documents purporting to put the safety management onus on its subcontractors that

[2]Most likely because his businesses were the subject of so many prior OSHA violations. (*Exhibit O- Perin OSHA Violation Records*)

would thereby make the Perin company "have safety."[3] (*Exhibit P, Deposition of Dari Perin at 24-25*)

31. However, Perin made no real commitment to safety and continued to do business without any real regard for managing safety and enforcing the OSHA and industry standards among its subcontractors. (*Exhibit A- Expert Report of Vincent Gallagher; Exhibit B- Supplemental Expert Report of Vincent Gallagher*) (*Exhibit P, Deposition of Perin at 94*)

32. Perin did nothing to make sure his workers were competent in construction safety compliance. (*Exhibit P, Deposition of Perin at 32, 33, 94*)

33. He has no idea whether Norge Giron had any safety qualifications and nor who the OSHA competent person was on site (in reality there was none). (*Exhibit P, Deposition of Perin at 94*)

34. When Perin needed work done he would simply give his subcontractor employees the address for the job, have them sign the "safety agreement" form and send them on their way. (*Exhibit P, Deposition of Perin at 39*)

35. Perin has no real safety and health management program. (*Exhibit P, Deposition of Perin at 48*)

36. No safety meetings took place on the project. (*Exhibit P, Deposition of Perin at 92*) (*Exhibit R, Deposition of Ruben Coronel at 53-54, 56-58, 62-68*)

37. Perin performed no safety inspections on its jobs. (*Exhibit P, Deposition of Perin at 76*)

38. Darci Perin was on the project at times while his workers were using the scaffolding without the OSHA mandated fall protection. (*Exhibit P, Deposition of Perin at 93*)

39. Perin did not even ask, much less require, that the laborers be protected by fall protection. (*Exhibit P, Deposition of Perin at 85*)

40. As the interim sub-contractor dolling out jobs to "a lot of people that needed work," Perin had the opportunity, capacity and power to enforce safety standards. (*Exhibit P, Deposition of*

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[3]A contractor like Perin can not discharge its non-delegable duty to manage safety by drafting a document that says it in fact does not have any such duty. That would defeat the purpose behind the non-delegable duty rule. *See, e.g., Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999) (contractor duty for safety is "non-delegable"); *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].")

Perin at 32, 33, 89)

41. Perin 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.

(*Exhibit P, Deposition of Perin at 89*)

42. Perin also admitted that if his men were doing a bad job on the projects, "Then it would be my responsibility." (*Exhibit P, Deposition of Perin at 52*)

43. He did nothing to see to it its subcontractor employees were properly trained, followed safety standards or were using safe equipment. He just told his workers "go to work." (*Exhibit P, Deposition of Perin at 48, 50-51*)

44. Perin testified:

Q. Did Perin do anything to -- strike that. How would you ensure that the equipment your subcontractors brought to jobsites were in good condition?
MR. KEARNS: Objection. You're assuming that he has such a duty.
MS. DELAHANT: Now you're coaching the witness. Your objection is noted and you can answer the question.
THE WITNESS: I hadn't seen it. I just told George to go to work.
...
Q. What, if anything, did Perin do to ensure that George or any of its subcontractors were using scaffold safety equipment that you just referenced?
MR. KEARNS: Objection.
MR. THORNTON: I join that.
THE WITNESS: That would depend on their will. They were my employees. They were subcontractors. So they would basically do what they wanted to do.
BY MS. DELAHANT:

Q. Okay. Did you require them to give you any sort of -- strike that. Do you know whether or not the employees that worked for George or any of your subcontractors had training?
A. No. I have nothing to do with them.

(*Exhibit P, Deposition of Perin at 48, 50-51*)

45. After the incident Perin took a dismissive view. He conducted no real investigation and took no steps to prevent a reoccurrence. (*Exhibit P, Deposition of Perin at 47, 91, 94*)

46. In fact four years after this needlessly tragic incident, Darci Perin still does not even know who Ruben Coronel is. (*Exhibit P, Deposition of Perin at 78*)

47. And perhaps most disturbing:

Q. Following the Brigatti job did Perin change any of its procedures or practices as a result of it?
A. No. We continue business the same way.

(*Exhibit P, Deposition of Perin at 94*) (emphasis added)

IV. The Inevitable Result

1. Brigatti and Perin ignored the OSHA regulations and pertinent construction industry safety standards on this project. *Supra. section III.*

2. As such, neither the supervisors nor the employees, including Ruben Coronel, received any safety training, including about how to recognize hazards and take appropriate measures to address them. (*Exhibit R, Deposition of Ruben Coronel at 45, 48, 51-54, 61-65, 168-171*)

3. Coronel never received any training in how to safely use scaffolding. (*Exhibit R, Deposition of Ruben Coronel at 45, 48*, 51-54, 61-65, 78, 168-171)

4. Even if he had the training to enable him to recognize hazards, he was not allowed to complain or he would just be replaced by, "a lot of people that needed work." (*Exhibit R, Deposition of Ruben Coronel at 168-169*) (*Exhibit P, Deposition of Perin at 32, 33*)

5. This was the reality for Ruben Coronel on the Brigatti-Perin job:

Q. ...Do you see the scaffolding that is shown on 1B has no such guard?
A. No, it doesn't. It doesn't have it.

Q. Did this scaffolding that you used on all those other Norge jobs, did it ever have any guard like that?
A. No. No. No. Never. We never had it.

Q. All right. And you were also -- you had no lanyard or rope to protect you in the event you fell, correct?
A. No.

Q. On any of those other Norge jobs did you ever have any rope or lanyard to protect you from falling?
A. No. Never.

Q. Did you ever complain to anyone that the scaffold had no guard and there was no protection to prevent you from falling?...Did you ever complain to anyone about that?
A. I told him once, but he said, well, that's the way it is. That's the way the job is.

Q. If you said to Norge that I'm not going to work on the scaffolding until you get the guards up and until you make it safe, what do you expect would have happened to you?
...
A. He wouldn't have given me the job. He -- he would have said there are other people that need a job, you know, this is the way you work.

Q. And on this project you never had any safety training, correct?
A. Never.

Q. Did anyone talk to you about OSHA's scaffolding regulations?
A. I had never heard of OSHA before. I knew nothing of it.

Q. Did anyone on this job ever say to you that if you had an issue about safety, or if you thought the job site was unsafe, did they ever say to you that there's someone that you can go to and talk freely about that?
A. No. No one.

Q. Was there any chain of command on the job site that you could have gone and voiced your safety concerns if you had any?
...
A. No, not that I knew of, no.

Q. Did anyone ever talk about safety and preventing accidents on this job?
A. No.

Q. Did you ever receive any instruction as to how to safely erect scaffolding in accordance with OSHA's scaffolding regulations?
A. No.

(*Exhibit R, Deposition of Ruben Coronel at 168-170*)

6. There were no safety meetings, inspections, controls nor preventative measures in place. *See sec. II, Supra.*

7. At the time he was injured, Ruben Coronel had no prior experience in siding installation and never before worked on scaffolding. He had only been working with LNC/Norge Giron for about 3 weeks. (*Exhibit R, Deposition of Ruben Coronel at 45, 48, 51-54, 62-68*, 157-158)

8. He worked on this project as a "helper" who took orders directly from Norge Giron. (*Exhibit R, Deposition of Ruben Coronel at 53, 75, 158*)

9. The siding installation process, which required the use of scaffolding, took place every day over the course of about two weeks on this project. (*Exhibit P, Deposition of Perin at 92*) (*Exhibit R, Deposition of Ruben Coronel at 159*)

10. And in fact the same unsafe scaffold was used on at least 20-30 Perin siding jobs prior to this one. (*Exhibit R, Deposition of Ruben Coronel at 53-54, 56-58, 62-68*)

11. Both Brigatti and Perin were on site at various times it was being used and therefore knew it lacked the required guards and fall protection, yet they did nothing about it. They were only concerned about "the quality of the work" and getting the job done. (*Exhibit P, Deposition of Perin at 48, 50-51, 93, 94*) (*Exhibit G, Deposition of Salvatore Brigatti at 73, 82-83, 94-95, 115*) (*Exhibit R, Deposition of Ruben Coronel at 53-54, 56-58, 62-68*, 73)

12. At no time were the siding installers protected by any fall protection. (*Exhibit R, Deposition of Ruben Coronel at 53-54, 56-58, 62-68*) (*Exhibit E, OSHA Investigation Photos*) (*Exhibit N, OSHA Investigation Documents*) (*Exhibit C, Police Report*)

13. In fact, safety was never discussed- they only talked about getting the job done. (*Exhibit R, Deposition of Ruben Coronel at 65*)

14. The first time Coronel was directed to go on the unprotected scaffolding, he was a little afraid of the height so he asked Norge Giron if it was dangerous. Giron responded, "No, we always work like this." (*Exhibit R, Deposition of Ruben Coronel at* 62, 64)

15. As the project was near completion, as plaintiff was performing his assigned tasks of installing the siding, he fell from the unprotected scaffolding about 20 feet to the ground. (*Exhibit C, Police Report*) (*Exhibit A- Expert Report of Vincent Gallagher at 2-3, 22-24*) (*Exhibit B- Supplemental Expert Report of Vincent Gallagher*) (*Exhibit N, OSHA Investigation Documents*) (*Exhibit R, Deposition of Ruben Coronel at* 91-92) (*Exhibit S at 2*) (*Exhibit E, OSHA Investigation Photos*)

16. Salvatore Brigatti was on site at the time and saw Ruben Coronel bleeding on the ground. (*Exhibit G, Deposition of Salvatore Brigatti* at 70)

17. Darci Perin was called immediately. (*Exhibit P, Deposition of Perin at 43*)

18. Due to the severity of the matter, the police notified OSHA. (*Exhibit C, Police Report*)

19. As it had in the past (*Exhibit O- Perin OSHA Violation Records*), OSHA conducted an investigation of this Perin job and found numerous violations of the above cited scaffolding safety and fall protection regulations. (*Exhibit N, OSHA Investigation Documents*) (*Exhibit E, OSHA Investigation Photos*)

20. Ruben Coronel was in a comatose state and on a mechanical ventilator for about a week. He suffered catastrophic injuries. (*Exhibit V- Medical Reports*)

21. Had the regulations and industry standards been followed, Ruben Coronel would not have been injured. (*Exhibit A- Expert Report of Vincent Gallagher at 2-3, 22-24*) (*Exhibit B- Supplemental Expert Report of Vincent Gallagher*) (*Exhibit E, OSHA Investigation Photos*) (*Exhibit N, OSHA Investigation Documents*) (*Exhibit C, Police Report*)

22. Given Brigatti and Perin's decision to disregard established safety rules, an incident like this, was sooner or later inevitable. (*Exhibit A- Expert Report of Vincent Gallagher*) (*Exhibit B- Supplemental Expert Report of Vincent Gallagher*)

RESPONSE TO BRIGATTI'S STATEMENT OF MATERIAL FACTS

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted. Please also see Responses to #9 and 12 below.

6. Admitted. Please also see Responses to #9 and 12 below.

7. Admitted. Please also see Responses to #9 and 12 below.

8. Admitted. Please also see Responses to #9 and 12 below.

9. He did far more than that. Brigatti handled many of the traditional general contractor functions of running the job. Among other things, he directly hired the various sub-contractors, provided job materials, scheduled the sub-contractors and the progression of the work, reviewed the work of subcontractors to approve it for payment, in fact paid the subcontractors and otherwise performed traditional general contractor functions. (*Exhibit G, Deposition of Salvatore Brigatti at 29-30, 42-48, 50-51, 53-54, 69-70, 90-97, 107-108, 113-115*) (*Exhibit P, Deposition of Perin at 41, 57*) Brigatti decided from the outset he would purchase the property, sub-divide it and serve as his own general contractor on the construction project. (*Exhibit G, Deposition of Salvatore Brigatti* at 50) It was not a situation where Brigatti hired a separate general contractor that abandoned the project and forced him to complete it on his own. (*Exhibit G, Deposition of Salvatore Brigatti* at 50-51) Rather, Brigatti decided from the outset to serve as his own general contractor in order to save the money of hiring a separate general contractor. (*Exhibit G, Deposition of Salvatore Brigatti* at 50) Brigatti was on the job site on a daily basis overseeing and managing the progress of the work. (*Exhibit G, Deposition of Salvatore Brigatti* at 88-91) Brigatti would have seen the scaffolding, which lacked the OSHA mandated and industry standard fall protection. (*Exhibit G, Deposition of Salvatore Brigatti* at 90-91, 94-95, 115) (*Exhibit R, Deposition of Ruben Coronel at* 73) In fact, Brigatti was on site watching the unsafe scaffolding being erected and gave the workers direction as to how he wanted it installed. (*Exhibit R, Deposition of Ruben Coronel at* 73) (*Exhibit G, Deposition of Salvatore Brigatti* at 94-95, 115) He had the power to hire and fire subcontractors and maintained ultimate control over the project. (*Exhibit G, Deposition of Salvatore Brigatti* at 38-39, 96-97) He could even unilaterally reset the price he would pay Perin after the fact. (*Exhibit P, Deposition of Perin at 90-91*) Furthermore, Brigatti represented under oath on official town construction documents that he was the general contractor for this project. (*Exhibit F, Building Permits*) (*Exhibit G, Deposition of Salvatore Brigatti* at 34-35, 39-40) Please also see response to #12 below.

10. Please see response to #9 above.

11. Please see response to #9 above.

12. Objection, this is not a material fact and not properly included in a *R.* 4:46-2 Statement of Material Facts. Whether or not a general contractor intends to live in the house he builds or considers his doing so a profit making venture is simply not relevant under the law to the general contractor's duty to manage and enforce established safety rules. Death and disability from safety violations occurs on "small" jobs just as easily as larger projects and workers on such jobs are no less entitled to the safety protections of the law. And in any event, the suggestion that this was somehow not a business of Brigatti is denied. In fact, Brigatti has been developing properties since about 1990. (*Exhibit G, Deposition of Salvatore Brigatti* at 12-27) As part of his real estate development business, Brigatti has developed and/or invested in numerous properties. (*Exhibit G, Deposition of Salvatore Brigatti* at 12-27) Brigatti specifically testified:

> Q. You know, it appears that you bought and sold a number of houses. Would you consider yourself to be a real estate investment type person?
> A. Now, yes.

(*Exhibit G, Deposition of Salvatore Brigatti* at 17) In describing his real estate development business he further testified:

> Q. All right. In any event, is that another business of yours? I mean you have your career as a firefighter, but you also have a business dealing with investing in residential real estate over, say, over the last five years or so? MR. KELLY: Objection to form. You can answer.
> A. I would say investment. Is it a business? ... I guess you'd consider that a business, yes.
>
> Q. Okay. Your tax returns over the last, say, five or ten years would reflect these various business investments and these business ventures that you've been involved in, correct ?
> A. Yes.

(*Exhibit G, Deposition of Salvatore Brigatti* at 18) Brigatti serves as his own general contractor on these projects. He hires and coordinates the work of various subcontractors to complete the construction or renovation projects including, for example, plumbers, electricians, landscapers and masons. (*Exhibit G, Deposition of Salvatore Brigatti* at 27-36, 42-48) As stated, one such Brigatti real estate development project was 29 Smith Lane in Wayne, New Jersey which Brigatti purchased with the intent to subdivide it. (*Exhibit G, Deposition of Salvatore Brigatti* at 22-24, 48) (*Exhibit H, Statement of Salvatore Brigatti at 2*) See also response to #9 above.

13. Objection, this is not a material fact and not properly included in a *R.* 4:46-2 Statement of Material Facts. Sympathy is not relevant. *Model Jury Charge* 1.12P Notwithstanding

objection, as a result of Brigatti and Perin's decision to totally disregard mandatory safety rules in order to maximize profits, plaintiff suffered catastrophic injuries and has difficulty meeting basic sustenance needs of his family, much less live in a $750,000 mansion and send his children to top schools.

14. Admitted. Pursuant to the controlling law of *Costa v. Gaccione*, Plaintiffs have no objection to the claims against Kelly Brigatti (sic)[4] being dismissed. *See Costa v. Gaccione*, 408 N.J.Super. at 375-76 ("Slack represents an exceptional situation...due to the specific factual circumstances [which] do not exist here relative to [Salvatore] Gaccione. ...To the best of everyone's knowledge, however, Mariella Gaccione remained uninvolved with the actual construction process... Therefore, the summary dismissal of claims against her is affirmed.")

Fifteenth paragraph (no number in original). This is a non-meritorious argument and not properly included in a *R.* 4:46-2 Statement of Material Facts. It has in any event been addressed throughout this brief.

RESPONSE TO PERIN'S STATEMENT OF MATERIAL FACTS

1. Admitted.

2. Admitted.

3. Admitted.

4. Like all Perin's Statement of Material Facts, this contains multiple factual assertions contrary to R. 4:46-2. Notwithstanding, the duty of a sub-contractor like Perin is non-delegable. This means it can not avoid its duty to manage safety and protect the workers by having a subordinate contractor sign a form that says it in fact does not have any such duty. That would defeat the purpose behind the non-delegable duty rule. *See, e.g., Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999) (contractor duty for safety is "non-delegable"); *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. The fact that it could have its sub-contractor sign this agreement is just another indicator of the measure of control it maintained.

5. Norge had no safety training either and when Coronel asked him if it was dangerous to work from the scaffolding, Norge responded, "No, we always work like this." (*Exhibit R, Deposition of Ruben Coronel at* 62, 64) Norge had no safety training or knowledge himself and as such showed plaintiff a highly dangerous way to install siding that Perin as the superior contractor never should have permitted.

[4]"Brigatti" is the correct spelling, not "Brigante."

6. The suggestion that Norge was in total control of the plaintiff is not correct. Darci Perin was on the project at times while his workers were using the scaffolding without the OSHA mandated fall protection. (*Exhibit P, Deposition of Perin at 93*) As the interim sub-contractor dolling out jobs to "a lot of people that needed work," Perin had the opportunity, capacity and power to enforce safety standards and set the rules to be followed. (*Exhibit P, Deposition of Perin at 32, 33*, 89) (*Exhibit Y, Deposition of Vincent Gallagher at 47-49, 61, 71-75*) Perin testified that he controlled the work of Norge/LNC and that if his men were doing a bad job on the projects, "Then it would be my responsibility." (*Exhibit P, Deposition of Perin at 89, 52*). Perin at times referred to Norge and Plaintiff as, "They were my employees." (*Perin dep at 51*) And Norge told Coronel that Norge was "not the boss" and, "I'm an employee, just like you." (*Exhibit R, Deposition of Ruben Coronel at 166*)

7. Norge had no training or knowledge to know if it was safe or not, nor what the proper safety equipment would be. And in any event, there is no dispute the scaffolding was grossly unsafe with no guard rail or other fall protection and had been on the job for days if not weeks.

8. Not relevant but admitted for purposes of this motion.

9. Admitted.

10. Denied. Perin was clearly in fact and admitted he was in control. He and Brigatti both frequently inspected the site as to the progress of the work. See response to #6 above on these issues.

11. Admitted.

12. This is not a material fact and not appropriate for a *R*. 4:46-4 Statement of Material Facts. A contractor's liability does not hinge on whether or not OSHA investigated this accident or issued a citation. OSHA has limited resources and can not be on all jobs all the time. Probably more accidents go unreported than OSHA knows about and were liability to turn on the resources allocated to that federal agency then the purpose and intent behind law for the protection of workers would never be met. The Supreme Court in *Alloway* could not have been any more clear:

> In sum, although OSHA issued a violation to Bernhard Excavating, and not to Pat Pavers, the failure by OSHA to find a violation against a particular party does not preclude a determination that the party nevertheless was subject to a duty imposed by OSHA regulations and that the standards prescribed by OSHA were violated.

Alloway v. Bradlees, 157 N.J. at 240; *See also Constantino v. Ventriglia*, 324 N.J.Super. 437 (App.Div. 1999) (OSHA standards pertinent even if defendant could not receive OSHA citation.). Not withstanding objection, admitted.

13. Straw man argument. The allegations and basis for liability is set forth at length in the complaint and this brief and speak for themselves itself.

14. Perin adopts the opposition to Brigatti's summary judgment motion. However, that opposition is based upon the same law and reasoning which also compels denial of Perin's summary judgment motion. In fact Perin's brief relies upon general negligence cases and does not cite a single construction injury case. Even a cursory review of basic construction negligence law shows Perin's motion should be denied.

LEGAL DISCUSSION

I. COMPLIANCE WITH OSHA IS NECESSARY TO ERADICATE THE SCOURGE OF JOB SITE DEATH AND INJURY FOR WHICH THE LAW WAS ENACTED

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. Linder, 20 J. Legis. 99; *see also Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents.* 101 Harv. L. Rev. 535 (1987).

Death and disability due to unsafe or unhealthy workplaces remain America's hidden epidemic. In 1994, there were 6.8 million job-related injuries and illnesses in the private sector alone, an average of more than 18,000 injuries and/or illnesses each and every day of the year. U.S. Department of Labor, Bureau of Labor Statistics, *Annual Survey of Occupational Injuries and Illnesses*, 1994. The cost of these injuries and illnesses has been estimated at $120 billion for 1994 alone. *National Safety Council, Accident Facts*, (1995 Edition). Researchers at Mt. Sinai Medical School have estimated that 50,000 to 70,000 workers die each year as a result of major occupationally acquired diseases like cancer, lung disease and coronary heart disease. Landrigan PJ, Baker DB, "The recognition and control of occupational disease," *Journal of the American Medical Association* 1991;266:676-80. In 1998, the number of confirmed deaths due to occupational injuries in the U.S. was 6,026, approximately one-tenth the estimated number of deaths due to occupational illnesses. U.S. Department of Labor, Bureau of Labor Statistics, "National Census of Fatal Occupational Injuries," 1998, U.S. Department of Labor, August 4, 1999.

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 the following was typical of the defendants' collective reaction to the needless catastrophe that resulted from their conduct:

> Q. Following the Brigatti job did Perin change any of its procedures or practices as a result of it?
> A. No. We continue business the same way.

(*Exhibit P, Deposition of Perin at 94*) (emphasis added) Tort law provides the bite to work in conjunction with OSHA's bark. It provides real economic incentive for firms to invest in safety for their workers, rather than turn a profit on the potential for injury.

Brigatti and Perin's motions for summary judgment, which are based upon the incorrect argument that they had no duty to enforce safety among the subcontractors, are the antithesis of these principles and controlling New Jersey law. Brigatti and Perin are perfectly content with the entire lack of OSHA enforcement and the grossly unsafe siding installation procedures plaintiff was required to work under. Their motions should be denied because they are factually and legally off the mark.

II. THE SUMMARY JUDGMENT MOTIONS OF DEFENDANTS BRIGATTI AND PERIN SHOULD BE DENIED BECAUSE EACH HAD A RESPONSIBILITY UNDER NEW JERSEY AND FEDERAL LAW AND INDUSTRY STANDARDS TO MANAGE SAFETY AND ENFORCE OSHA

A. The Law is Clear Brigatti and Perin are Required to Manage Safety

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

part:

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

29 *C.F.R.* §1926.16 (emphasis added); *see Alloway v. Bradlees*, 157 N.J. at 237-38. (a general and 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 Supreme Court in *Alloway* cited with favor the discussion of this principle in *Bortz v. Rammel*, 151 N.J.Super. 312 (App.Div. 1977) as follows:

> [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 *Alloway* Court reaffirmed the principle advanced by plaintiffs in the instant matter, that as having assumed the general and subcontracting contracting roles, Brigatti and Perin had the down-the-chain non-delegable responsibility to manage safety on the work site and enforce the OSHA regulations:

> 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 (citation omitted).
>
> **...**
>
> The court in *Bortz, supra,* concluded that the State's statutory imposition of a duty on the general contractor expressed a clear 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." 151 *N.J.Super.* at 321, 376 *A.*2d 1261; *cf. Dawson v. Bunker Hill Plaza Assocs.,* 289 *N.J.Super.* 309, 320-21, 673 *A.*2d 847 (App.Div.1996) (reaffirming state public policy favoring general contractor as single repository of responsibility of safety of all employees on job but declining to extend liability to landowner, upon whom OSHA imposes no affirmative duties).

Alloway v. Bradlees, 157 N.J. at 237-38.

Thus under well-settled construction law in New Jersey, general and interim subcontractors like Brigatti and Perin 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." *Alloway v. Bradlees Inc.,* 157 N.J. at 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994) State public policy and OSHA impose a duty on the general contractor to ensure the protection of all of the workers on a construction project, irrespective of the identity and status of their various and several employers, by requiring, either by agreement or by operation of law, the designation of a single repository of the responsibility for the safety of them all. *Alloway*, 157 N.J. at 238, *citing Bortz v. Rammel,* 151 *N.J.Super.* 312, 321 (App. Div. 1977), *cert. den.* 75 N.J. 539. As a matter of public policy and federal law, the general contractor is the single repository of responsibility for the safety of all employees on the job. As such, the general contractor bears responsibility for all OSHA violations on a project. *Meder v. Resorts International*, 240 N.J.Super. 470, 473-77 (App. Div. 1989), *cert. den.* 121 N.J. 608; *Kane*, 278 N.J.Super. at 142-43; *Dawson v. Bunker Hill Plaza Assocs.,* 289 N.J.Super. 309, 320-21 (App.Div.1996). This was also discussed at length in plaintiff's liability expert report. (*Exhibit A, Report of Vincent Gallagher*).

Furthermore, the interim sub-contractor that hired plaintiff's employer, Perin, shares joint and several responsibility for failing to see to it that safety was managed and OSHA enforced with respect to its sub-contractors on the site. As the Appellate Division explained in *Kane*:

> We found [in *Meder*] that "violation of the obligations imposed by the federal regulations supports a tort claim under state law." 29 *C.F.R.* § 1926.16 and 29 *C.F.R.* § 1926.20 dictate that the prime contractor and any subcontractors are responsible jointly for any failure to comply with OSHA safety standards such as are at issue in the present case. Because of these provisions, the trial judge charged the jury that both Howell [interim sub-contractor that hired plaintiff's employer] and the Hartz defendants [general contractor/developers that hired Howell] were responsible for any OSHA violations.
> ...

> We hold that Hartz Mountain, as the general contractor, and Howell, as the subcontractor for the erection of the structural steel, each had a non-delegable duty to maintain a safe workplace. This duty is imposed to ensure "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. *Bortz, supra,* 151 *N.J.Super.* at 321.

Kane v. Hartz Mountain Industries, 278 N.J.Super. 129, 141-44 (App.Div. 1994); *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.")

In this case, as has been exhaustively set forth above, both defendants Brigatti and Perin failed to meet their responsibilities under OSHA and the other workplace safety standards. Both defendants failed to see to it that the sub-contractors were properly trained in OSHA and scaffolding safety; negligently allowed on site an employer that did not adhere to OSHA 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. As such plaintiff was needlessly caused to fall from unguarded scaffolding, sustaining serious injuries. Their summary judgment motions should be denied.

Indeed, the law recognizes the realities of construction sites, that it is the general and tiered contractors that have the power and position to enforce workplace safety rules and to generally foster an environment where workplace safety and the well being of the workers on the job are given high priority. The law recognizes that the workers at the bottom of the hierarchy are powerless to take

any real enforcement role and will in fact often times be pressured to work in unsafe conditions without complaint, or risk losing their job. *See generally e.g., Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150 (1979) (recognizing that workers of have "no meaningful choice" but to work in unsafe conditions; they either do so "or [be] subject to discipline or being labeled as a troublemaker." *Cavanaugh v. Skil Corporation*, 331 N.J.Super. 134, 185 (App. Div. 1999) (workers on construction sites often have no real choice about working under known unsafe conditions.); *Tirrell v. Navistar Intern., Inc.,* 248 N.J.Super. 390 (App.Div. 1991) (same- construction site worker who was not paying attention was killed when tractor trailer backed up over him). Vincent Gallagher similarly articulated this reality:

Q. But the worker has a choice; right? If he says I'm not going to go up on the scaffold unless you have a side rail or a guardrail to protect me, doesn't he have that option?

A. Sir, safety begins at the top. The worker should not be telling his boss, and in this case his boss' boss, and boss' boss, where they failed to require something to be done. It's dangerous to work in construction environments where there's no fall protection. It's also dangerous to tell your boss that he's making a mistake and violating the law when the boss has already decided that that's the way the work was going to be done. OSHA was passed so workers aren't put in the position between risking their job or risking their lives. And that's what it would be here. When you have a worker who's building the scaffold with his boss, and there's no fall protection, for him to say I'm not going up there would be probably a ticket to walk down the road and not get work. I've talked to hundreds of workers about this question, and...the great majority of the time say that they would be putting their job at risk if they started to tell their boss to do things that their boss has already decided not to do, which involves money.

(*Exhibit Y, Deposition of Vincent Gallagher at 47-48*)

As such, general and sub-contractor enforcement is a key component of the federal workplace safety scheme embodied in OSHA. Brigatti and Perin's arguments about no duty to the plaintiff contradicts long-standing workplace safety law in the State of New Jersey.

B. Pertinent Industry Standards Are Equally Clear There Must Be Top-down Enforcement of Safety on a Construction Project

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. Defendants Brigatti and Perin violated virtually every pertinent industry standards as far as safety management goes on this $750,000 project. Their summary judgment motions should be denied.

Vincent Gallagher is a former OSHA official and an industry recognized expert in the field of occupational health and safety. He has been extensively published. He writes:

> For decades, both industry authorities and government authorities have been in agreement with regard to the steps that a general contractor should take in order to ensure that work performed on their behalf is done safely and in compliance with OSHA.

(*Exhibit A- Expert Report of Vincent Gallagher at 7*) Among the safety principles recognized in the industry are the following:

- Safety begins at the top.
- Assignment of specific responsibility and accountability are key to successful construction safety management.
- Safety begins in the design stages - on the drawing board.
- Safety is a shared responsibility.
- A proactive rather than reactive approach is best.
- Accidents are foreseeable and predictable.
- Controls can be anticipated and put in place before exposure to the hazard takes place.
- Planning is essential.
- It is irresponsible to allow the evolution of a hazard and hope that safety inspection discovers the hazard before injury results.

(*Exhibit A- Expert Report of Vincent Gallagher at 7*) Gallagher explains:

> I have applied these principles and techniques of injury prevention for thirty-five years. I have evaluated over 200 construction safety programs, investigated over one thousand construction injury incidents and have applied the techniques of hazard identification, evaluation and control for thirty-five years. Likewise, over 36,000 members of the American Society of Safety Engineers, that is, representatives from the construction industry, general industry, the insurance industry, government and labor are also in agreement with these principles and techniques of safety management and have been applying them for decades. I have written on the subject of the appropriate methodology of evaluation in construction industry cases in peer-reviewed articles in the Journal of the American Society of Safety Engineers. <u>There is no disagreement regarding these principles and techniques of construction safety management among construction safety experts</u>.

(*Exhibit A- Expert Report of Vincent Gallagher at 7-8*) (emphasis added). On this safety-dysfunctional project, 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.

Defendants Brigatti and Perin had a duty to manage safety down the tier. They failed in that regard. After the incident there was no investigation and nothing done to prevent a reoccurrence. In fact, long after this tragic incident defendants did not even know who Ruben Coronel was and continued "business as usual." The record reflects they made a conscious decision to disregard safety rules and standards because they thought it would be cheaper to do so.

III. BRIGATTI AND PERIN SHARE RESPONSIBILITY FOR THE ABYSMAL WORK SITE SAFETY PRACTICES AND THE OSHA VIOLATIONS WHICH RESULTED IN PLAINTIFF'S INJURIES

A. Brigatti is Liable in his Capacity as General Contractor

As such, as mandated by the Supreme Court in *Alloway v. Bradlees*, 157 N.J. 221, 236-38 (1999), as the general contractor on the job site, Brigatti, and each tier of subcontractor, including Perin, had a non-delegable, down-the-chain responsibility to manage safety on the work site and enforce the OSHA regulations. According to their clear admissions, they did nothing to meet this duty. Their "ostrich defense" of asserting that they did nothing to manage safety and therefore this should somehow absolve them of liability for these failures is not legally sustainable in New Jersey:

> 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, 367 (App.Div. 2009) (summary judgment in favor of owner serving as a de facto general contractor 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. Plaintiff was provided no safety training, equipment, oversight nor enforcement, just like the situation in *Costa*:

> 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, 408 N.J.Super. at 366-367. As a result Deone Costa, like Ruben Coronel here, was caused to fall off the scaffold and sustain severe injuries. Essentially the same occurred on this job site and Defendants' summary judgment motions should be denied.

While it is true Salvatore Brigatti was also a landowner as it relates to this project, the same was true of Salvatore Gaccione in *Costa,* and this is not a basis to grant summary judgment. In the construction accident context, a landowner has a non-delegable duty to use reasonable care to protect workers on the jobsite from known or reasonably discoverable dangers. However, absent certain exceptions, a landowner is not responsible for injuries to workers which are incidental to the very work that employee was hired to perform. Absent interference by the landowner in the performance of the contractor's work, the joint, non-delegable duty to insure the job is performed in a safe manner is that of the general and subcontractors. *Bozza v. Burgener*, 280 N.J.Super. 583, 586-87 (App. Div. 1995)

However, as occurred in this case, when the landowner chooses to serve as its own general contractor, then that landowner/general contractor is liable to the same extent, and with the same force and effect, as any other general contractor on a work site. That is, when the owner acts in the role of general contractor, then that landowner/general contractor too has a non-delegable duty to maintain a safe workplace and will bear responsibility for all OSHA violations. *Bozza v. Burgener*, 280 N.J.Super. 583, 586-87 (App. Div. 1995); *Meder v. Resorts International*, 240 N.J.Super. 470 (App. Div. 1989), *cert. den.* 121 N.J. 608; *see also Kane*, 278 N.J.Super. at 134-35, 142-43 (owner serving as general contractor had non-delegable duty for safety on jobsite). As the Appellate Division explained in *Bozza*:

> In *Meder v. Resorts International,* 240 N.J.Super. 470 (App.Div. 1989), *cert. den.* 121 N.J. 608, we held the landowner liable because the owner was also acting as the general contractor and, as such, had failed to provide a safe workplace. We concluded the landowner was responsible for injuries sustained by an employee of a sub-contractor because the landowner had failed to comply with the applicable regulations of the Occupational Health and Safety Administration (OSHA). *Id.* at 477. A similar situation existed in *Kane.* There, the landowner, Hartz Mountain Industries, Inc., was also the general contractor and, as such, had a non-delegable duty to maintain a safe workplace including compliance with applicable OSHA regulations. 278 *N.J.Super.* at 142-43.

Bozza, 280 N.J.Super. at 586-87 (App. Div. 1995) (citations abridged) In the instant case Salvatore Brigatti served in this dual capacity, just as did Salvatore Gaccione in *Costa*.

Defendants' arguments that somehow they are not liable because they did not get involved in the "manner and means" of the work is totally without merit. First of all, there is testimony that Brigatti did in fact get involved in the manner and means. (*Exhibit P, Deposition of Perin at 41, 92*) (*Exhibit R, Deposition of Ruben Coronel at 159*) (*Exhibit G, Deposition of Salvatore Brigatti* at 38-39, 43, 88-97, 107-108, 115) More importantly however, the role of the general contractor is just that- general. Typically they do not get involved in the manner and means of completing the job;

that is left up to the various subcontractors specifically hired 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."); see also N.J.A.C. 5:23-2.15(b)(3) Indeed, as indicated in *Meder*, at a bare minimum, general contractors are characterized by their hiring of subcontractors and coordinating their work. As shown above, Salvatore Brigatti performed all of these functions and responsibilities of a general contractor on the construction project.

And most recently, in response to the same kind of arguments both Brigatti and Perin make in this case, the Appellate Division in *Costa* decided:

> 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**.
>
> Another difference between *Slack* and this case is that the property owners in *Slack* did not oversee the workplace or themselves become involved in the construction. Although Gaccione may not have taken direct control at the job site, he did visit the site daily and oversaw operations. He purchased materials requested by builders and actively discussed the building plans with the workers that he hired. As such, he performed many of the duties of a general contractor.

Costa v. Gaccione, 408 N.J.Super. 362, 374-375 (App.Div. 2009) (emphasis added). Brigatti and Perin make the same failed arguments in this case. Summary judgment should be denied.

B. Defendants Are Further Liable under General Negligence Principles and a "Fairness Analysis"

Defendants' motions for summary judgment should also be denied 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 accident 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 construction project on unsafe 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. Brigatti and Perin effectively acted to take advantage of this weakness for their own advantage/profit, ease, and benefit. Each of these entities was charged with the responsibility, under normal and accepted construction

site practice and OSHA regulations, to manage safety for the protection of the workers. They shirked this responsibility. It is simply unacceptable that no entity with any measurable level of overall site control accepted even the smallest level of responsibility for worker safety on this job site. 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.

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. Ruben Coronel would not have been injured if Brigatti and Perin in the chain of command on the job site and charged with safety responsibility had even minimally done their job. Safety cannot be left to luck or even operator discretion. An 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 20 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. (*Exhibit A, Report of Vincent Gallagher at 2-5*) (*Exhibit W, OSHA "Top Four" Quick Card*)

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 20 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 both Brigatti and Perin had the "opportunity and capacity ... to have avoided the risk of harm." *Alloway* at 231. The risk of harm here was defendants' wholesale failure to manage safety and enforce OSHA. As the general contractor and interim subcontractor on the project, both had the ability to set the rules of the road for the subordinate subcontractors on the project. Both had the power to hire and fire the down-the-chain contractors and could have- and in fact had the legal obligation to- enforce the safety rules and standards. 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 (*"*general and subcontractors have a joint, non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with [OSHA regulations]"); *Alloway v. Bradlees Inc.*, 157 N.J. at 237-38 (1999) (same)

Salvatore Brigatti was on the job site on a daily basis overseeing and managing the progress of the work. (*Exhibit G, Deposition of Salvatore Brigatti* at 88-91) He personally observed and gave direction as to how he wanted the siding installed, a process which took place over the course of two weeks prior to the fall. (*Exhibit P, Deposition of Perin at 92*) (*Exhibit R, Deposition of Ruben Coronel at 159*) . (*Exhibit G, Deposition of Salvatore Brigatti* at 94-95, 115) He purchased siding materials and had the power to hire and fire his subcontractors. (*Exhibit G, Deposition of Salvatore Brigatti* at 43, 96-97, 107-108) (*Exhibit P, Deposition of Perin at 41*) He maintained ultimate

control over the project and he could even dictate the price he would pay after the fact. (*Exhibit G, Deposition of Salvatore Brigatti* at 38-39, 90-91)

Perin was also 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. (*Exhibit P, Deposition of Perin at 37*) 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. (*Exhibit P, Deposition of Perin at 93*) (*Exhibit R, Deposition of Ruben Coronel at 53-54, 56-58, 62-68*) As the interim sub-contractor dolling out jobs to "a lot of people that needed work," Perin had the opportunity, capacity and power to enforce safety standards. (*Exhibit P, Deposition of Perin at 32, 33*, 89) He 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.

(*Exhibit P, Deposition of Perin at 89*) Perin also admitted that if his men were doing a bad job on the projects, "Then it would be my responsibility." He also referred to Norge and Coronel as "my employees" and Norge to Coronel that Perin was the real "boss" (*Exhibit P, Deposition of Perin at 52*) *(Exhibit R at 166)*

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 Brigatti and Perin to meet their obligations under the law. They had a duty to avoid the risk of injury to employees of its subcontractors. Viewing all facts in the light most favorable to plaintiff's contentions, defendants' motions for summary judgment should be denied. *See Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520 (1995).[5]

In the instant matter plaintiff will present evidence at trial that Brigatti and Perin abrogated their duty under the law to manage safety and enforce OSHA on this project. In the construction industry, everyone recognizes quickly that "time is money." The quicker you get done the work, the more money you can make. If you cut corners related to safety and no injury occurs, you can save money. That is why OSHA was passed. (*Exhibit Y, Deposition of Vincent Gallagher at 47-49, 61, 71-75*) As Vincent Gallagher explained:

> The hazard to which Ruben Coronel was exposed was a fall hazard. There was no guardrail on this scaffold. Fall protection was never installed on pump jack scaffolds at this site. If there had been a guardrail installed in compliance with OSHA regulations, he would not have been able to fall from the scaffold because he would have been automatically protected. He testified that the customary practice at this site was to install scaffolds without standard guardrails. He testified that Mr. Brigatti was aware of the condition of the scaffolds. It was accepted that workers work on pump jack scaffolds without fall protection.
> ...
> It is my opinion that both Perin Construction and Salvatore Brigatti violated the principles and practices of safety management because they failed to take reasonable steps to make sure that the work done on pump jack scaffolds was done safety and in compliance with OSHA regulations. Both contractors permitted the work to be done unsafely with untrained workers in violation of OSHA standards. It is my opinion that the above failures were the cause of Ruben Coronel's injury.

(*Exhibit A- Expert Report of Vincent Gallagher at 22-24*) Indeed, falls on construction sites are notorious for causing serious harm and death on construction jobs. But they are preventable. Had the OSHA regulations been followed, this fall never would not have occurred.

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[5]Given the callous egregiousness of defendants' safety failures, even if the facts were viewed in the light most favorable to the moving party, its motion should still be denied.

V. BRIGATTI'S RELIANCE UPON *SLACK V. WHALEN* TO ARGUE THAT ALTHOUGH HE WAS THE GENERAL CONTRACTOR, HE HAD NO DUTY FOR SAFETY, IS MISPLACED

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

Brigatti was the general contractor on this project. Nevertheless he cites *Slack v. Whalen*, 327 N.J. Super. 186 (App. Div. 2000) to argue he is somehow not liable. *Slack v. Whalen* did not overturn some 30 years of construction site OSHA negligence law, and it certainly did not overturn *Alloway*. Instead, *Slack* addressed a very narrow set of facts whereby a husband and wife who were abandoned by the general contractor they hired to build the home they intended to live in and as such were thrust into having to complete the construction job on their own. *Slack* did not involve the more common situation presented here where a general contractor engaged in the business of real estate development consciously and voluntarily decides from the outset to serve as his own general contractor on an construction project.

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

opportunity or capacity to exercise control over the manner or means by which plaintiff chose to perform the spackling work. *Id.* at 194.

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

Here Brigatti is in the business of real estate development. This is not even remotely close to a situation where a private homeowner has been abandoned by a general contractor and was forced to complete the project on his own. Instead Brigatti has been involved in numerous construction projects. *Slack v. Whelan* is simply completely inapplicable to the facts of this case.

Furthermore, the case of *Slack v. Whalen* has been largely nullified by *Costa v. Gaccione,* 408 N.J.Super. 362 (App. Div. 2009). *Costa v. Gaccione* involved a construction accident case where the plaintiff too suffered injuries when he fell from unsafe, OSHA non-compliant scaffolding. *Id*. The Law Division dismissed all claims against the homeowner who was also serving as his own general contractor, on the basis that he had no duty to manage safety or enforce the OSHA regulations on the project. The Court reasoned that under the case *Slack v. Whalen*, 327 N.J. Super. 186 (App. Div. 2000), as a residential landowner Gaccione had no duty to enforce OSHA or mange safety.

The *Costa* decision highlights the "quite limited" nature of the *Slack* decision and further shows why *Slack* has no precedential value to the issues before this Court. *See also, Gerald H. Clark, "Loosening the Slack on Slack*", 198 N.J. Law Journal 274 (2009)(discussing the import of the *Costa* decision on *Slack*). The Appellate Division in *Costa v. Gaccione* distinguished *Slack* which did not involve the more common situation presented in *Costa* (and presented here) where a person makes an affirmative choice from the outset to serve as his own general contractor on a residential construction project. The Court stated:

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

Costa v. Gaccione,408 N.J.Super at 365. Taking into account the volitional act of Gaccione in *Costa* to serve as his own general contractor, the obligations imposed under the OSHA federal workplace regulations, and the particular facts of the case, the Court found under a fairness analysis that the defendant should be held accountable and the summary judgment decision of the trial court was reversed.

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

C. Brigatti and Perin's Arguments– That Although They Were the General and Interim Sub-contractors, Respectively, They He Had No Duty for Safety- Is in Direct Conflict with the Federal Workplace Safety Statutory Scheme and its Implementing Regulations, and Is Thus Preempted

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 OSHA 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, supra* at 359-60. Violators of specific OSHA standards or OSHA's general duty to provide a safe workplace face civil monetary penalties, as well as criminal sanctions, 29 *U.S.C.A.* § 666. *Gonzalez, supra.*

Specifically, the OSHA regulations provide that "no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety." 29 *C.F.R.* § 1926.20. The general and sub-contractors cannot delegate the duty to maintain a safe workplace under the federal OSHA regulations to another; but rather must maintain overall responsibility for the project.

> (a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite

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

29 *C.F.R.* §1926.16 (emphasis added); *see also see Alloway v. Bradlees*, 157 N.J. at 237-38. (a general and 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). Here, defendants argue that although they performed the general and interim sub-contracting roles on the job site, they had no duty for safety. However, the federal OSHA regulations preempt defendants' arguments because it is in direct conflict with the federal workplace safety statutory scheme and its implementing regulations. OSHA unambiguously places the non-delegable duty for safety on the general and each respective tier of subcontractor and it is a violation of the Supremacy Clause of the United States Constitution for states to adopt any contrary law, whether by statute or case law. Brigatti and Perin's arguments to the direct contrary of this basic OSHA principle can not be accepted by this Court.

Preemption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, the United States Supreme Court has recognized at least two types of implied preemption: field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it; and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade v. Nat'l Wastes Mgmt. Ass'n,* 505 U.S. 88, 98 (1992)(internal citations and quotations omitted).

Under conflict preemption, the federal Occupational Safety and Health Act (OSHA) preempts any state common-law claims that are contrary to the purposes and objectives of Congress in enacting OSHA. *See Gonzalez v. Ideal Tile Importing Co., Inc.*, 184 N.J. 415 (2005). In *Gonzalez*, the plaintiff, Armando Gonzalez, was seriously injured when he was struck by a forklift operated by a co-worker. Plaintiff sued the forklift's first-stage manufacturer contending that it should have installed additional warning devices on the machine in order to make its operation safe. *Id.* at 418. The defendant manufacturer moved for summary judgment on the grounds that the state tort claims for workplace injuries were preempted as in conflict with federal law. *Id.*

The New Jersey Supreme Court in *Gonzalez* held that the federal regulations regarding warning devices on the forklift pre-empted the plaintiff's common-law products liability claim against the manufacturer of the forklift, based on the conflict preemption theory, since plaintiff's product liability claims suggested a standard that was in direct conflict, and not merely supplemental, to the American National Standards Institute (ANSI) standards under the federal OSHA regulations. *Id*. at 423. The ANSI standards under the OSHA regulations did not merely set a mandatory

minimum for forklift safety devices, but regulated the universe of the forklift warning devices. As such, plaintiff's application of a product liability standard regarding "other" warning devices stood "as an obstacle to the accomplishment and execution of" the important means-related federal objectives of the OSHA regulations. *Id*. Therefore, the Court held that plaintiff's product liability claim was pre-empted since his application of a product liability standard conflicted with the federal OSHA regulations regarding additional warning devices. *Id*. at 424.

Here, the federal OSHA regulations impose a non-delegable duty on Brigatti as the general contractor and Perin as the interim sub-contractor to maintain a safe workplace. As such, Brigatti and Perin's defense that he as the general and sub-contractor they had no duty for site safety, must be rejected as in complete conflict with federal law which explicitly mandates to the contrary. *Gonzalez v. Ideal Tile Importing Co., Inc.,* 371 N.J. Super. 349, 359 (App. Div.), *judgment aff'd* 184 N.J. 415 (2005). Therefore, the summary judgment motions of Brigatti and Perin should be further denied because the argument they had no duty for safety is in direct conflict with the federal workplace safety statutory scheme and the federal OSHA Regulations, and thus preempted.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request the summary judgment motions of defendants Salvatore Brigatti and Perin Construction/P&T Construction be denied.

Respectfully submitted,
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By: _____
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