III. DEFENDANT SHOULD BE PRECLUDED FROM MAKING ANY ARGUMENTS OR CLAIMS THAT PLAINTIFF, HIS EMPLOYER (LNC/Norge Giron) OR REYNALDO CONSTRUCTION IS AT FAULT FOR THIS WORKPLACE SETTING ACCIDENT

A. No Comparative Negligence

i. There Is No Evidence Upon Which the Jury Could Reasonably Conclude Ruben Coronel Deliberately and Unreasonably Proceeded in the Face of Danger

Under the law, for plaintiff to be held comparatively negligent, defendant has the burden of proving:

> [P]laintiff deliberately and knowingly acted in such a way as to create or materially increase a risk of injury and that such action was a proximate cause of the accident.

Model Jury Charge, 5.40J, "Comparative Fault." Stated another way, defendant has to prove the plaintiff voluntarily and unreasonably proceeded in the face of a known danger. *See, e.g., Cavanaugh v. Skil Corporation*, 331 N.J.Super. 134, 178-190 (App. Div. 1999); *see also Restatement (Second) of Torts* § 402A cmt. n (1965) ("[T]he form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk..."). To establish contributory negligence, it is defendant's burden to prove plaintiff's conduct was improper and was a substantial factor in causing his injury. *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150 (1979).

In this case there is simply no evidence upon which any reasonable juror could conclude plaintiff knowingly, deliberately and unreasonably proceeded in the face of danger. Under the circumstances of this case plaintiff can not be found to have unreasonably proceeded in the face of a known danger. Coronel had no safety training to know about nor act upon violations of OSHA's safety requirements. These facts simply could not sustain a finding of comparative negligence and

the issue should be removed from the case.

ii. General knowledge about work dangers is not enough to Submit Comparative Negligence to the Jury

New Jersey law is clear:

> [W]hen the evidence discloses that the plaintiff was not guilty of any negligence which contributed to the happening, it is improper and unwarranted to submit the issue of contributory negligence to the jury.

Massotto v. Public Service, 71 N.J.Super. 39, 45 (App.Div. 1961); *See also, e.g. Kuen v. Pub Zone*, 364 N.J. Super. 301 (App. Div. 2003) (insufficient evidence to submit the issue of comparative negligence to jury in bar fight case); *Jones v. Bennett*, 306 N.J. Super. 476 (App. Div. 1998) (affirming removal of comparative negligence in auto accident trial).

For example, in *Kuen v. Pub Zone*, 364 N.J. Super. 301 (App. Div. 2003), plaintiff Karl Kuen was severely injured when he was attacked in the defendant pub by members of the Pagans biker gang. Defendant argued the issue of comparative negligence should go to the jury because plaintiff urged the admission of the biker gang into the bar, he knew about the Pagan's dangerous reputation and he therefore should have stayed clear. The trial judge found these facts were simply insufficient to charge comparative negligence. The Appellate Division reasoned the key question was whether the plaintiff did anything improper to contribute to the incident. The Court found he did nothing beyond what would be expected of any other tavern patron. General knowledge that the Pagans were known to engage in random acts of violence was simply insufficient to hold the plaintiff comparatively negligent. *Id. at 315-318*.

Similarly in the instant matter, under the facts of this case, Plaintiff's general knowledge that working from roofs can be dangerous is insufficient to rise to the level that plaintiff unreasonably

proceeded in the face of danger at his assigned job task. Under these circumstances New Jersey law requires the trial judge remove the issue from the jury, and Judge Vena correctly did so. *Id.*

General knowledge of one's occupational hazards does not equate with comparative negligence.

In *Handschuh v. Albert Dev.*, 393 Pa. Super. 444 (Super. Ct. 1990) the trial court was affirmed in not charging comparative negligence in a construction site death case. 393 Pa. Super. at 444. The Court found the evidence insufficient to support a jury instruction on assumption of risk even though the victim was aware that trenches could cave in, that trench in question was particularly "delicate" because of presence of water, and that small amounts of dirt had fallen into trench prior to the collapse. *Id*. at 449. The Court reasoned that although decedent was aware of the general dangers associated with his job, general knowledge about occupational hazards does not equate with employee negligence:

> [T]here are many practical endeavors in life that have foreseeable dangerous consequences attached to them. Every time that an individual takes a seat in an automobile or an airplane, for instance, he should be aware that there exists a possibility that the vehicle may collide with another or that the plane may crash to the ground. Every time that an individual undergoes surgery he should be aware that there is a risk of lapsing into a coma or dying. However, the law has never taken cognizance of these facts and relied upon them to excuse an individual who negligently causes a motor vehicle collision from liability for the resulting injuries, or likewise excusing a negligent surgeon or anesthesiologist or the negligent airline from resulting injury or death.

Id. at 448-49. Similarly here, Defendant's arguments that Coronel was an "experienced" roofer who generally knew his job could be dangerous, is insufficient under the facts of this case to rise to the level of a finding that plaintiff deliberately exposed himself to danger. Similarly, Karl Kuen's general knowledge the Pagans are a dangerous biker gang did not make him comparatively negligent

for not staying away from them at the bar. *Kuen,* 364 N.J. Super at 315-318. Defendants made a conscious decision to have no safety on the project whatsoever.

iii. Public Policy Would in Any Event Preclude Holding the Worker Responsible for Management's Wholesale Decision to Disregard its Mandatory Safety Obligations

As discussed above, OSHA was landmark legislation intended to curb decades of catastrophic injury and death that underscored the industrial progress of this nation. OSHA and the industry standards universally recognize that in order to have effective workplace safety, there must be top down enforcement by a management structure that takes it obligations seriously. These principles are recognized in the controlling law. *See, e.g. Alloway,* 157 N.J. at 237-38 (1999) (general contractor has non-delegable duty to manage safety and enforce safety regulations); 29 *C.F.R.* §1926.16.

To this end, it is the general contractor, not the low end laborer, that must enforce compliance with OSHA's health and safety regulations including establishing a safety management structure that includes training, prevention, oversight and investigation of accidents to prevent reoccurrence. Workers must be trained and know there is a place they can go if they have a legitimate safety concern, without fear of reprisal. It is the general contractor, not the worker, that is required to enforce OSHA's trench safety regulations.

In this case there was no real dispute that defendants did not meet its responsibilities. The evidence and record is overwhelmingly clear defendant made the conscious decision to simply disregard its safety obligations and risk the lives of workers to save money. There was absolutely no safety management, oversight nor enforcement. To the contrary, the workers felt constrained to keep quiet about any safety or other concerns they might have for fear of losing their jobs. Under

the particular facts of this case, public policy and justice preclude defendants from taking refuge in a comparative negligence claim.

Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150 (1979) solidified a bright line rule that a worker injured while performing his assigned tasks on a factory machine can not be found comparatively negligent in a products liability case. The essence of the *Suter* holding is that the employee had no meaningful choice. He either worked at his assigned task or was subject to discipline or being labeled a troublemaker. *Crumb v. Black & Decker Inc.,* 204 N.J. Super. 521, 527-28 (App. Div. 1985). The *Suter* Court held:

> [A]n employee engaged at his assigned task on a plant machine, as in *Bexiga v. Havir Mfg. Corp.,* 60 *N.J.* 402 (1972)], has no meaningful choice. Irrespective of the rationale that the employee may have unreasonably and voluntarily encountered a known risk, we hold as a matter of policy that such an employee is not guilty of contributory negligence.

81 *N.J.* at 167. *Suter* has consistently been interpreted in broader terms, encompassing workplace injuries in general. In fact, the Supreme Court in *Green* found comparative negligence may be disregarded on policy grounds alone in ordinary negligence cases. *Green v. Sterling Extruder Corporation*, 95 N.J. 263 (1984); *Ramos v. Silent Hoist and Crane Co.*, 256 N.J.Super. 467 (App.Div. 1992); *see also Cavanaugh*, 331 N.J.Super. at 185, *citing, Grier v. Cochran Western Corp.*, 308 *N.J.Super.* 308, 324 (App. Div.1998) ("a plaintiff who sustains an injury from a defective product in a work setting will not have his or her recovery diminished under comparative negligence principles for having allegedly encountered a known risk"); *Congiusti v. Ingersoll-Rand Co.,* 306 *N.J.Super.* at 134 ("no question that the comparative negligence of a plaintiff is generally disregarded in a workplace setting"); *Fabian v. Minster Mach. Co., Inc.,* 258 *N.J.Super.* at 278 (comparative negligence not applicable where employee is injured at "workplace task"); *Tirrell v. Navistar*

Intern., Inc., 248 *N.J.Super.* 390 (App.Div. 1991) (comparative negligence defense unavailable where construction site worker who was not paying attention was killed when tractor trailer backed up over him); *Mettinger v. W.W. Lowensten, Inc.,* 292 *N.J.Super.* 293, 301, 312 (App.Div.1996), *aff'd,* 153 *N.J.* 371 (1998) (comparative negligence not appropriate where plaintiff-employee lacerated his hand when he slipped and fell emptying a trash can.).

This Court need not extend the bright line "*Suter* rule" to all workplace cases (as it was asked to do in *Kane*) to find the underlying public policy reasons set forth in *Bexiga, Suter* and *Green* should in any event (separate and apart from there being no underlying evidence that plaintiff deliberately proceeded in the face of danger) bar the comparative negligence claim. Indeed, the *Suter* decision was based upon underlying policy considerations enunciated in a series of prior decisions involving negligence claims. The Court in *Suter* based its holding heavily on the reasoning in *Bexiga*, where there was insufficient evidence to charge comparative negligence when a factory worker injured his hand on a hole press. The *Bexiga* Court observed:

> Contributory negligence may be a defense to a strict liability action as well as to a negligence action. However, in negligence cases the defense has been held to be unavailable where considerations of policy and justice dictate … [T]his Court [has also] said that undoubtedly this defense will be unavailable in special situations within the strict liability field. We think this case presents a situation where *the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or strict liability claims*.

60 *N.J.* at 412 (citations omitted) (emphasis added). The policy reasons supporting the *Bexiga* principle are clear. A worker is economically compelled to complete his assigned tasks as best he can. The practicalities of the working world are such that in the vast majority of cases, the employee works "as is" or he is without a job. *Green v. Sterling Extruder Corp.*, 95 N.J. 263, 271 (1984). Moreover, *Suter* and *Bexiga* both stated, "it would be anomalous to hold that defendant has a duty

to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against." 81 N.J. at 167; 60 N.J. at 412. The reasons are even more compelling in the instant matter where complaint was simply not allowed.

Tirrell v. Navistar International Inc., held the defense of comparative negligence was unavailable where a construction worker who was not paying attention was killed when a tractor-trailer backed up over him. 248 N.J. Super. 390 (App. Div. 1991). The court stated:

> Even if decedent had known that he was working with a trailer without a back-up alarm, and the *Suter* employer comparative fault rule were inapplicable, *it would be against public policy, as expressed in Bexiga, Suter, and their progeny, for decedent to be barred by a finding that he had proceeded in the face of a known danger under the circumstances of this case.*

Id. at 402 (emphasis added). As such, the Court in *Tirrell* found the defense of comparative negligence unavailable because it would be inconsistent to hold the employer had a duty to provide a safe workplace, but a breach of that duty results in no liability for the very injury that duty was meant to protect. Precisely the same reasoning is applicable here; it would be inconsistent to find defendants may use comparative negligence to avoid liability for its wholesale, volitional and admitted failure to follow worker safety rules.

Similarly, in *Green* the Court held that plaintiff's comparative fault could not be used as a defense to a negligence action by a factory worker whose hand was crushed in a molding machine. 95 N.J. at 263. In refusing to charge comparative negligence, the Court approved of the reasoning in *Bexiga* and held:

> [o]nce it is established that the defendant has a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct.

95 N.J. at 272. In the present case, beyond there simply being no facts upon which any juror could

reasonably conclude Ruben Coronel deliberately and unreasonably proceeded in the face of danger, public policy precludes such a finding as a matter of law. Management made a wholesale decision to disregard safety on the job. Workers were regularly directed to work on dangerous roofs with no fall protection.

B. Neither Plaintiff's Employer (LNC/Norge Giron) nor Reynaldo Construction Go on the Jury Verdict Sheet

Furthermore, defendants should be barred from making any arguments or claims that plaintiff's employer, LNC Construction Corp., is substantively at fault for this accident. It is well settled that the Workers' Compensation Act bars any direct or indirect substantive claims to be made against the employer. In *Ramos v. Browning Ferris Indus. of South Jersey, Inc.*, 103 N.J. 177 (1986) the Court held that a jury could not assign fault to an employer immune from suit under the Workers' Compensation Act, thereby requiring fault to be apportioned entirely between the plaintiff and third-party defendant tortfeasor. *Id.* at 193-94. That result followed because the Workers' Compensation Act bars a plaintiff employee from suing a negligent employer for damages. The Workers' Compensation Act removes the employer from the operation of the Joint Tortfeasors Contribution Law. Because the employer cannot be a joint tortfeasor, it is not subject to the provisions of the Joint Tortfeasors Contribution Law, and a third-party tortfeasor may not obtain contribution from an employer, no matter what may be the comparative negligence of the third party and the employer. *Id.* at 184. Stated differently, an employer cannot be a party to a negligence action and thus can never be considered a joint tortfeasor subject to the Comparative Negligence Act.; *Id.; see also Bahrle v. Exxon Corp.*, 279 N.J.Super. 5, 22 (App.Div.1995) (The remaining defendants were precluded from using the "empty-chair" defense to argue to the jury that De was negligent.), *aff'd*

on other grounds, 145 N.J. 144 (1996).

For the same reasons, Reynaldo Construction should not go on the verdict sheet because that entity was granted summary judgment as having no liability.

Motion.No_.Compartive-no-point-at-employer-or-dismissed-parties.wpd