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MARC J. COMER, as administrator ad prosequendum of the ESTATE OF ADALTO DE LIMA; MARC J. COMER, as administrator ad prosequendum of the ESTATE OF ALEXANDRE MARTINEZ, **PLAINTIFF(S),** **vs.** **CILENE CAIXETA d/b/a US HARDWOOD FLOORS; CILENE CAIXETA; CEASER SOUZA; AMILTON DOS SANTOS; SPEEDWELL DESIGN; SPEEDWELL DESIGN CENTER; SPEEDWELL DESIGNS d/b/a BFK ENTERPRISES; BFK ENTERPRISES, INC. t/a SPEEDWELL INTERIORS; BFK ENTERPRISES; BFK ENTERPRISES, LLC; JOHN DOES 1-10; ABC CORPORATIONS 1-10;** **DEFENDANT(S).**	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY** **DOCKET NO.: MON-L-5838-07** **Civil Action** **Proposed Jury Charges**

STANDARD JURY CHARGES

Plaintiff requests the standard applicable Model Civil Jury Charges including the following:

5.10 NEGLIGENCE AND ORDINARY CARE - GENERAL

5.11 FORESEEABILITY (AS AFFECTING NEGLIGENCE)

6.10-6.11 - PROXIMATE CAUSE

8.10 DAMAGES -- EFFECT OF INSTRUCTIONS (12/95)

8.11 DAMAGES - PERSONAL INJURIES

8.11C DAMAGES - PAST LOSS OF EARNINGS

8.42 SURVIVAL ACTION

8.43 WRONGFUL DEATH

1. VIOLATION OF STATUTE-EFFECT OF OSHA- SUB-CONTRACTORS' NON-DELEGABLE DUTY FOR OSHA COMPLIANCE AND STANDARDS OF CONSTRUCTION, CUSTOM AND USAGE IN INDUSTRY

(After Model Jury Charge - 5.10H and 5.30D)

Evidence has been produced in this case as to the standard of construction in the industry under various safety standards including from the federal Occupational Safety and Health Administration ("OSHA"). In determining the scope of the duty owed by defendants BFK Enterprises, Inc.; Speedwell Paint & Design, Inc. (hereinafter "Speedwell") to Adalto DeLima and Alexandre Martinez and the breach of such duty, the applicability of federal safety regulations, specifically OSHA regulations, is highly relevant.[4] Under OSHA, as the subcontractor for the delivery and installation of the hardwood flooring material on the Holly Ridge project, Speedwell had non-delegable duty to maintain a safe workplace. If you find that Speedwell did not comply with these standards, you may find it to have been negligent.[5]

As a sub contractor on the delivery and installation part of the work, Speedwell may be

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[4] *Alloway v. Bradlees, Inc.*, 157 N.J. 221, 233-234 (1999)

[5] *Alloway v. Bradlees, Inc.*, 157 N.J. 221, 233 (1999); *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994) *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).

liable for its lower tier subcontractor's violations of OSHA regulations as well as its own by the terms of 29 *C.F.R.* § 1926.16. That construction rule states that "[b]y 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." 29 *C.F.R.* § 1926.16(b). It further provides that "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." That is, "[T]he subcontractor assumes responsibility with respect to his portion of the work." 29 *C.F.R.* 1926.16(c).[6] Thus, federal OSHA regulations require that Speedwell, as the subcontractor for the flooring delivery and installation part of the project, is responsible jointly for any failure to comply with OSHA safety standards with respect to that portion of the work.[7]

Furthermore, you heard some evidence in this case that OSHA did not investigate, nor issue any fines to Speedwell in connection with the crash of November 4, 2005. However, under the law, "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."[8]

In this case, in support of the charge of negligence made, it is asserted that the Speedwell defendants are responsible for violations of various provisions of the federal workplace safety laws

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[6] *Alloway*, 157 N.J. at 238; *Meder v. Resorts International*, 240 N.J.Super. 470, 476 (App.Div. 1989).

[7] *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 140-43 (App. Div. 1994)

[8] *Alloway*, 157 N.J. at 240.

known as OSHA. Among these provisions are the following:

Keep in mind that "*Employer*" as referred to in these OSHA regulatory provisions is defined as "contractor or subcontractor" **29 C.F.R. §1926.32** and furthermore, under OSHA, the subcontractor assumes all obligations prescribed as "*employer*" obligations under the OSHA construction safety law as it pertains to that subcontractor's work.[9]

29 C.F.R. §1903.1 Purpose and Scope

The [OSHA law] requires, in part, that every employer covered under the Act furnish to his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. …

29 C.F.R. §1926.20 General Safety and Health Provisions

(b) Accident prevention responsibilities.

(1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

(2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

(3) The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited.

29 C.F.R. §1926.21 Safety Training and Education

(a) General requirements. The Secretary [of Labor] shall … establish and supervise programs for the education and training of employers and employees in the recognition, avoidance and prevention of unsafe conditions in employments covered by the act.

(b) Employer responsibility.

(1) The employer should avail himself of the safety and health training programs the Secretary [of Labor] provides.

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[9]"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. ...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." "[T]he subcontractor assumes responsibility with respect to his portion of the work." **29 C.F.R. §1926.16 (b) (c)**

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The statute in question has set up a standard of conduct in the workplace for subcontractors such as the Speedwell defendants. If you find that Speedwell violated that standard of conduct, such violation is evidence to be considered by you in determining whether negligence, as I have defined that term to you, has been established. You may find that such violation constituted negligence on the part of the defendant, or you may find that it did not constitute such negligence. Your finding on this issue may be based on such violation alone, but in the event there is other or additional evidence bearing upon that issue, you will consider such violation together with all such additional evidence in arriving at your ultimate decision as to defendant's negligence.[10]

Non-Compliance with an OSHA regulation is not, by that fact itself, negligence, but such evidence may be considered by you in determining whether defendant's negligence has been established.[11] Conversely, compliance with an OSHA regulation by the defendant does not in and of itself preclude a finding of negligence.[12] The defendant must still exercise reasonable care under all the circumstances, and if you find that the prevailing practices in the

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[10] *Philips v. Scrimente*, 66 *N.J. Super*. 157 (App. Div. 1961). The above may be modified to cover violations of certain other statutes or ordinances which set up a standard of conduct to be observed in given circumstances for the benefit of the class to which plaintiff belongs. *Evers v. Davis*, 86 *N.J.L*. 196 (E. & A. 1914); *Moore's Trucking Co. v. Gulf Tire & Supply Co*., 18 *N.J. Super*. 467 (App. Div. 1952).

[11] *Kane v. Hartz Mountain*, 278 N.J.Super. at 142-43.

[12] *Kane v. Hartz Mountain*, 278 N.J.Super. at 142-43.

industry do not comply with that standard, the defendant may be found negligent by you notwithstanding compliance with an OSHA regulation or any other custom or standard of the industry.

2. JURY CHARGE ABOUT HIRING AN INCOMPETENT CONTRACTOR

In addition to what I have already explained to you, in determining whether Speedwell was negligent, you may also consider whether Speedwell hired an incompetent contractor, in this case US Hardwood Floors/Cilene CAIXETA.[13]

A principal or contractor is subject to liability for physical harm to third persons caused by its failure to exercise reasonable care to employ a competent and careful contractor to do work which will involve a risk of physical harm unless it is skillfully and carefully done.[14]

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[13]*Majestic Realty Associates v. Toti Contracting Co.,* 30 N.J. 425 (1959); *Dawson v. Bunker Hill Plaza Assocs.,* 289 *N.J. Super*. 309, 318 (App.Div. 1996). *citing Cassano v. sAschoff,* 226 *N.J. Super.* 110, 113 (App. Div. 1988); *see also Gibilterra v. Rosemawr Homes, Inc.,* 19 *N.J.* 166, 171 (1955); *Wolczak v. Nat'l Elec. Prods. Corp.,* 66 *N.J. Super.* 64, 73 (App.Div. 1961); *see also Puckrein v. ATI Transport, Inc*., 186 *N.J.* 563, 565 (2006); *Barnard v. Trenton-New Brunswick Theatres Co.,* 32 *N.J.Super*. 551, 558 (App.Div. 1954) (where work to be done is not per se nuisance and injury results from negligence of independent contractor or his servants in execution of it, contractor alone is liable unless owner is in default in employing unskilled or improper person as contractor); *Terranella v. Union Bldg. & Const. Co.,* 3 *N.J.* 443, 447-48 (1950); Reuben I. Friedman, Annotation, When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor, 78 A.L.R. 3d 910, 916 (1977) ("An employer may be charged with negligence in hiring an independent contractor where it is demonstrated that he should have known, or might by the exercise of reasonable care have ascertained, that the contractor was not competent."); *see also* J.D. Lee & Barry A. Lyndahl, Modern Tort Law § 8.03 (1991)("An employer may be liable for the negligent acts of an independent contractor if the employer fails to exercise due care in the selection of a competent independent contractor."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 71 (5th ed. 1984)(same).

[14]The Restatement (Second) of Torts section 411 (1965)

A competent and careful contractor is "a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others."[15]

The employer of a negligently selected contractor may be subject to liability for physical harm caused by its failure to exercise reasonable care to select a competent and careful contractor, but only for such physical harm as is so caused. In order that the employer may be subject to liability it is, therefore, necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him.[16]

In other words, for plaintiffs to prevail against the principal, in this case Speedwell, for allegedly hiring an incompetent contractor, in this case US Hardwood Flooring, plaintiffs must show that US Hardwood Flooring was, in fact, incompetent or unskilled to safely perform the job for which it was hired, that the harm that resulted arose out of that safety incompetence, and that the principal knew or should have known of the incompetence.[17]

As such, in considering whether Speedwell was negligent, you may also consider whether or not US Hardwood Floors was an incompetent contractor and if so, whether Speedwell knew or should have known of US Hardwood Floors' incompetence, particularly as it

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[15]Restatement of Torts, 2nd, Comment a to section 411.

[16]Restatement of Torts, 2nd, Comment b to section 411; *see also Bergquist v. Penterman*, 46 N.J. Super. 74, 84 (App. Div. 1957), certification denied 25 N.J. 55 (1957).

[17]*Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 575-76 (2006); *citing Mavrikidis,* 153 N.J. at 136-37.

relates to safely delivering the flooring material. If you find that Speedwell knew or should have known that US Hardwood Floors was not competent to safety perform the work, then you may find that Speedwell was negligent and liable for plaintiff's injuries.

3. COMMON LAW DUTY TO NOT OVERLOAD THE TRUCK

A corporation that loads trucks with material for transport on our highways has a legal duty to load the trucks in such a manner that they are not overloaded and that the load is secure.[18] Duty involves the concept of foreseeability, that is, whether a reasonably prudent person should have anticipated that injury to the plaintiff, or to those in a like situation, would probably result. A legal duty arises to take some action if harm to another is reasonably foreseeable in the event that it is not taken, or to refrain from taking some action if harm to another is reasonably foreseeable in the event it is taken. You should consider whether it was reasonably foreseeable under the circumstances of this case that the US Hardwood Flooring truck, which was loaded by Speedwell, would cause the truck to overturn due to being overloaded and/or the load not being secure, and whether this condition would pose a threat of injury to plaintiffs and others similarly situated. If you so find, then you may find that Speedwell was negligent as I have defined that term to you.[19]

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[18] *Mavrikidis,* 153 N.J. 117, 136-37 (1998), *citing DeBonis v. Orange Quarry Co.,* 233 *N.J.Super.* 156, 164 (App.Div.1989)

[19] *Mavrikidis,* 153 N.J. 117, 136-37 (1998).

4. JURY CHARGE AS TO SETTLING DEFENDANT US HARDWOOD FLOORS

As discussed in the accompanying briefing, Speedwell has the burden of proving the claims against the settling defendant. US Flooring does not go on the verdict sheet simply because there has been a settlement. Defendant still has to prove liability against this party. *Shatz v. TEC Technical,* 174 N.J.Super. 135 (App.Div. 1980); *Model Jury Charge* 1.17. As plaintiff has not yet rested, it remains to be seen if an "intent to injure" claim will be made by Speedwell.

The Workers' Compensation system has been described as an historic "trade-off" whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries. *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 174 (1985). However, not all conduct by an employer is immune from common-law suit. The Legislature has declared that certain types of conduct by the employer and the employee will render the Workers' Compensation bargain a nullity. *Laidlow v. Hariton Machinery Co., Inc.*, 170 N.J. 602, 606-7 (2002). One of these examples is where an employer who causes the death or injury of an employee by committing an "intentional wrong" will not be insulated from common-law suit. *N.J.S.A.* 34:15-8 ; *Millison, supra*, 101 N.J. at 169. The court in *Millison* established a two-prong test for courts to determine when an employer's acts satisfy this exception: the conduct prong and the context prong. *Id. at 179.* Thus it is required that one, "examine not only the conduct of the employer, but also the context in which that conduct takes place." *Id.* An intentional wrong "includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm. " *Laidlow v. Hariton Machinery Co., Inc.*, 170 at 606-7.

Thus, in order to overcome the exclusivity bar under the Worker Compensation Act, it must be shown "in light of all surrounding circumstances" that his or her employer was "substantially certain" that harm would occur. *Id.* at 622. If the employer knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result; thus committing an "intentional wrong." *Id* at 613*; Restatement (Second) of Torts* § 8A.

In addition to the "substantial certainty" test relative to the employer's conduct, the Courts must also examine the context in which that conduct takes place, that is, may the resulting injury or disease, and the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the Legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act. *Laidlow, supra,* at 614-15; *Millison*, *supra,* at 179. As such, the context prong requires an assessment, not only whether the employer acted with knowledge that injury was substantially certain to occur, but also whether the injury and the circumstances surrounding it were part and parcel of everyday industrial life or plainly outside the legislative grant of immunity. *Laidlow*, *supra* at 614-15. The context prong requires, "a showing that the employer encouraged such [self-damaging] conduct or concealed its danger" in order to impose a duty on an employer to prevent such conduct. *Tomeo v. Thomas Whitesell Construction Co.*, 176 N.J. 366, 377 (2003).

As such, in order for an employer to be held liable in a common-law suit: (1) the employer's conduct must be such that it is "substantially certain" that the an employee would eventually be injured; and (2) the context in which that conduct takes place and the circumstances surrounding it were not part and parcel of everyday industrial life or demonstrates

that the employer encouraged the damaging conduct or concealed its danger. *Laidlow, supra,* at 614-15; *Millison*, *supra,* at 179; *Tomeo v. Thomas Whitesell Construction Co.*, 176 N.J. at 377.

5. PUNITIVE DAMAGES MAY BE AWARDED IF YOU FIND DEFENDANT'S CONTACT WAS WANTONLY RECKLESS OR MALICE

In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

(1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;

(2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;

(3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and

(4) The duration of the conduct or any concealment of it by the defendant.

N.J.S.A. 2A:15-5.12(b). Punitive damages may be awarded to the plaintiff if plaintiff proves, by clear and convincing evidence, that defendant's conduct was wantonly reckless or malicious.

In order to award punitive damages, there must be an intentional wrongdoing in the sense of an "evil-minded act" or an act accompanied by a wanton and willful disregard of the rights of another. *N.J.S.A.* 2A:15-5.12; *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 49 (1984); *see also Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997)(noting that to justify punitive damages award defendant's conduct must be willfully and wantonly reckless or malicious); *DiGiovanni v. Pessel*, 55 N.J. 188, 190 (1970)(noting punitive damages may be

justified by defendant's "conscious and deliberate disregard of the interests of others")(quoting William Prosser, *Handbook on the Law of Torts* § 2 (2d ed. 1955)). As such, plaintiff must prove by clear and convincing evidence a "deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences." *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962), codified at *N.J.S.A.* 2A:15-5.10.

"The defendant, however, does not have to recognize that his conduct is 'extremely dangerous,' but a reasonable person must know or should know that the actions are sufficiently dangerous." *Parks v. Pep Boys*, 282 N.J. Super. 1, 17 (App. Div. 1995)(*citing McLaughlin v. Rova Farms, Inc.*, 56 N.J. 288, 306 (1970)). Willful and wanton misconduct signifies something less than an intention to hurt. *McLaughlin, supra*, 56 N.J. at 306. The standard can be established if the defendant knew or had reason to know of circumstances which would bring home to the ordinary reasonable person the highly dangerous character of his or her conduct. Id.

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Jury Charge1- 287 trial.wpd