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.

The trial court granted summary judgment to De in February 1997, dismissing the complaint for want of proof that De had deviated from the standard of care. The remaining defendants were precluded from using the "empty-chair" defense to argue to the jury that De was negligent. *See Bahrle v. Exxon Corp.*, 279 N.J.Super. 5, 22 (App.Div.1995), *aff'd on other grounds,* 145 N.J. 144 (1996).

IN LIMINE MOTIONS

I. DEFENDANTS SHOULD BE PRECLUDED FROM MAKING ANY ARGUMENTS OR CLAIMS THAT PLAINTIFF OR HIS EMPLOYER IS AT FAULT FOR THIS WORKPLACE SETTING ACCIDENT

A. No Comparative Negligence

I. No Meaningful Choice

As indicated above, this is a workplace setting accident. For plaintiff to be held comparatively negligent, defendant has the burden of proving plaintiff voluntarily and unreasonably encountered the known risk of working on poorly excavated job site roof that should have had a proper rough grade or an intermediate grade performed to get rid of the holes, rocks, shale and debris in the areas where the laborers would be performing their assigned job duties. *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...").

Under the seminal case of *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150 (1979) and its progeny, the comparative negligence defense is largely, if not entirely, unavailable in cases where a worker is injured in a workplace setting. To establish contributory negligence, it is defendant's burden to prove that plaintiff's conduct was improper and was a substantial factor in causing his injury. *Suter*, 81 N.J. 150 (1979). The "essence of the *Suter* rule is that the employee had no meaningful choice." *Ibid.* "He either worked at his assigned task or was subject to discipline or being labelled as a troublemaker." *Cavanaugh v. Skil Corporation*, 331 N.J.Super. 134, 185 (App. Div. 1999)

While the *Suter* decision itself involved an injury in a factory setting where the worker was assigned a task on a factory machine, it has consistently been interpreted in broader terms,

encompassing workplace injuries in general, including construction site accidents. *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.* at 390 (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) (trial judge correctly declined to charge comparative negligence where plaintiff-employee lacerated his hand when, as he was emptying a trash can, he slipped and lost his balance. Court held that comparative negligence "is not applicable to a workplace setting where the worker has no meaningful choice."); *Ramos v. Silent Hoist and Crane Co.*, 256 N.J.Super. 467 (App.Div. 1992); *Green v. Sterling Extruder Corporation*, 95 N.J. 263 (1984); *Grier v. Cochran Western Corp.,* 308 *N.J.Super.* at 313-14, 325 (trial judge properly instructed the jury that the "plaintiff's conduct was irrelevant to the question of whether the product was defective, and that plaintiff's conduct was to be considered only on the issue of proximate cause" where the plaintiff-employee was injured when he stepped off a conveyor belt leading from the cargo hold of a plane and fell thirteen to fourteen feet below.)

In this case, plaintiff was injured because all defendants failed to take any steps to satisfy their duties under OSHA to maintain a safe workplace and ensure compliance with OSHA. Clearly

Jose Gualberto had no meaningful choice in using the scaffolding. He either used them or he would be labeled a troublemaker or risk termination. Under the reasoning and case law set forth herein, clearly there is no basis upon which this jury should be charged comparative negligence. Indeed, as the Appellate Division most recently held in *Cavanaugh v. Skil Corporation*, 331 N.J. Super 134, "it would be ludicrous to allow a factory employee to recover but not a construction worker solely because the former works inside a building on the factory floor."

Accordingly, plaintiff respectfully requests the jury not be charged comparative negligence in this case.

ii. There is Nothing Upon Which it Could be Fairly Concluded Plaintiff Knowingly and Unreasonably Encountered a Known Risk

As has been set forth herein, this accident occurred because the lot on which this house was being constructed was not properly graded off before the trades were allowed on the site. The soil conditions were so rocky, that the general contractor had blasting done on the site. Gualberto was instructed to go on the site and install joist hangers. He placed the ladder he was required to use in the best position possible. The ladder he was provided was not fit for this work, it slid out and he and the ladder slid down. His ankle got caught in the rungs on the way down, snapping when he hit the ground. The defendant has the burden to prove the comparative negligence defense; they have to prove Gualberto voluntarily and unreasonably encountered the known risk. *See, e.g., Suter*, 81 N.J. at 158 (1979); *Cavanaugh*, 331 N.J.Super. at 178-190 (App. Div. 1999); *Restatement,* § 402A ("[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..."). There is simply no evidence of this under the facts. Therefore, the Court can and should bar any comparative negligence

claim for this additional reason.

B. Plaintiff's Employer Can Not be the Sole Proximate Cause of the Accident Under These Facts Given the General Contractor's Non-Delegable Duty

Furthermore, defendants should be barred from making any arguments or claims that plaintiff's employer 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. However, generally, the conduct of the employer can be considered for the limited purpose of showing it was the sole proximate cause of the accident. *See, e.g.*, *Fabian v. Minster Mach. Co., Inc.*, 258 N.J.Super. 261 (App.Div.), *certif. denied,* 130 N.J. 598 (1992); *Congiusti v. Ingersoll-Rand Co., Inc.* 306 N.J.Super. 126, 135 (App. Div. 1997); *Straley v. United States*, 887 F.Supp. 728, 743 (D.N.J. 1995)

However, in this case, it would be legally impermissible for defendants to make any arguments, and thus for the jury to conclude, that any negligence of the employer was the sole proximate cause of the accident because under well-settled construction law in New Jersey, the general contractor on a work site has 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. 221, 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994) State public policy and OSHA[1] impose a duty on the general contractor to ensure the protection of all of the workers on a construction project, irrespective

[1]"OSHA" herein generally refers to the federal workplace safety regulations promulgated by the United States Department of Labor, Occupational Health and Safety Administration pursuant to the federal Occupational Safety and Health Act of 1970. For more general information about OSHA visit www.osha.gov.

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 the jobsite. *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 decision of the New Jersey Supreme Court in *Ramos v. Browning Ferris Indus. of South Jersey, Inc.*, 103 N.J. 177 (1986) provides additional support to the plaintiff in the case at bar. In *Ramos*, a plaintiff employee was moving a drum of solid waste on the premises of his corporate employer when he tripped over a rut and was severely injured. *Id.* at 181. The rut was made by a third-party defendant tortfeasor, a solid waste hauler. *Id.* The plaintiff in Ramos received a worker's compensation award from his employer and then sued the solid waste hauler, which in turn filed a third-party complaint against the employer. *Id.*

The Court in *Ramos* observed that the Workers' Compensation Act removes an employer from the operation of the Joint Tortfeasors Contribution Law N.J.S.A. 2:A:53A-1 to -5. *See* 103 N.J. at 184. According to *Ramos*, "[b]ecause 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." 103 N.J. at 184 (citations omitted).

Importantly, the Court in *Ramos* noted that according to the New Jersey Comparative Negligence Act, a party to a negligence action who is compelled "to pay more than such party's percentage share may seek contribution from the other joint tortfeasors." *Id.* at 194 (quoting N.J.S.A. 2A:15-5.3). However, the Court explained that because the employer could not be a join tortfeasor, it was "not subject to contribution liability under the Comparative Negligence Act." 103 N.J. at 194. Therefore, the Ramos court concluded that whether or not the employer was a party to the plaintiff's action against the third party defendant tortfeasor, the employer was not subject to contribution liability. *Id. See also Schweizer v. Elox Division of Colt Industries*, 70 N.J. 280, 288 (1976) (holding that a third party defendant tortfeasor may not obtain a contribution from the employer, regardless the percentage of fault shared between two of them).

The plaintiff in the case at bar anticipates that the defendants will attempt to use the "empty-chair" defense, i.e. to shift liability for a plaintiff's injuries to a non-party, specifically - to the plaintiff's employer. Indeed, in *Fabian v. Minster Mach. Co., Inc.*, 258 N.J.Super. 261, 276-277 (App. Div. 1992), a product liability action, the Appellate Division found that the defendant manufacturer could assert the "empty chair" defense against the plaintiff's employer. However, the Appellate Division specifically emphasized that the "empty chair" defense in *Fabian* was proper because the manufacturer claimed that "the employer's conduct was the sole proximate cause of the accident." *Id.* (emphasis added). Therefore, based on the logic of *Fabian*, it is not appropriate for a tortfeasor to invoke the "empty chair" defense, if it is not alleged that a plaintiff's employer is the sole proximate cause of the accident.

Applying those principles here, since Kara Homes has a non-delegable duty, there is no possibility that plaintiff's employer could be the *sole* proximate cause of the accident under these

facts. As the intermediate sub-contractors, JM Framing Corporation too has a down-the-chain duty to enforce OSHA as it relates to their sub-contractors. JM Framing Corporation admits however, it did next to nothing to do so, and was entirely ignorant of OSHA and its mandates. Therefore, since no reasonable juror could conclude the employer was the sole proximate cause of the accident under these facts, it would be irrelevant and legally impermissible for defendants to make any arguments to the contrary and they should not be permitted to do so.

Moreover, according to the straightforward conclusion of the New Jersey Supreme Court in *Ramos*, the plaintiff's employer here can be neither joint tortfeasor, nor subject to contribution liability in the present action, without regard to whether or not the employer is a party to the case at bar.

Finally, the defendants here should be precluded from using the "empty chair" defense, specifically because they are not alleging that the plaintiff's employer is the sole proximate cause of the accident.

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