

JOSE GUALBERTO,

Plaintiff(s),

vs.

**KARA HOMES, INC.; KARA HOMES
DEVELOPMENT CORP.; K&W
BUILDERS, INC.; STERLING ACRES AT
MONROE, LLC.; JM FRAMING CORP.;
F.M. ITUANA COMPANY; SEBASTIO
FERREIRA COMPANY; ABC CORPS. 1-20;
JOHN DOES 1-20**

Defendant(s).

**SUPERIOR COURT OF NEW JERSEY LAW
DIVISION: MIDDLESEX COUNTY**

Docket No.: MID-L-6145-05

Civil Action

**PROPOSED JURY CHARGES OF
JOSE GUALBERTO
(revised as to OSHA law)**

**2. VIOLATION OF STATUTE-EFFECT OF OSHA- 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)

Some evidence has been produced in this case as to the standard of construction in the industry under various safety standards such as those set forth under the federal workplace safety law known as OSHA as well as by the National Safety Council. In determining the scope of the duty owed by defendants Kara Homes, Inc., and/or JM Framing Corp. to Mr. Gualberto and the breach of such duty, the applicability of federal safety regulations, specifically OSHA regulations, is highly relevant.⁴ Under OSHA, defendant Kara Homes as the general contractor on the Sterling Acres at Monroe site, together with its subcontractor, JM Framing Corporation, have a joint, non-delegable duty to maintain a safe workplace that includes “ensur[ing]

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

{KB124011.1 000061-07575}

‘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.” Defendant Kara Homes as the general contractor is the single repository of responsibility for the safety of all employees on the job, and bears responsibility for all OSHA violations on the job site. Moreover, defendant Kara Homes as the general contractor along with its subcontractor defendant JM Framing Corp. have a joint, non-delegable duty to maintain a safe workplace under OSHA. If you find that the defendants Kara Homes, and/or JM Framing Corp. did not comply with these standards, you may find any or both of these defendants to have been negligent.⁵

The law that imposes a duty on the general contractor is meant “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.”⁶ The general contractor, in this case the Kara Homes corporation, is single repository of responsibility of safety of all employees on job. ⁷

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).

⁶*Alloway*, 157 N.J. at 238, citing, *Bortz v. Rammel*, 151 N.J.Super. at 321

⁷. [*Dawson v. Bunker Hill Plaza Assocs.*, 289 N.J.Super. 309, 320- \(App.Div.1996\)](#) (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).

As a general contractor or prime contractor, the Kara Homes Corporation may be liable for any of its subcontractor's violations of OSHA regulations as well as its own by the terms of [29 C.F.R. § 1926.16](#). That regulation 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 “[w]ith respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.” [29 C.F.R. 1926.16\(c\)](#). And, “Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to enforcement provisions of the Act.” 29 CFR 1926.16(d). It also states: “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.” [29 C.F.R. § 1926.16\(a\)](#).⁸ Thus, federal OSHA regulations dictate that the general contractor, the Kara Homes Corporation, and its subcontractor, the JM Framing Corporation, are responsible jointly for any failure to comply with OSHA safety standards such as are at issue in the present case. ⁹

In this case, in support of the charge of negligence made, it is asserted that the defendants Kara Homes Corporation and JM Framing Corporation are responsible for violations of various provisions of the federal workplace safety laws known as OSHA. Among these provisions are the following:

⁸*Alloway*, 157 N.J. at 238; *Meder v. Resorts International*, 240 N.J.Super. 470, 476 (App.Div. 1989).

⁹*Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994)

Keep in mind that “Employer” as referred to in these provisions is defined as “contractor or subcontractor” **29 CFR §1926.32**

29 CFR §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 CFR §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 CFR §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.

(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.

29 CFR §1926.1060 [Ladder] Training Requirements

(a) The employer shall provide a training program for each employee using ladders..., as necessary. The program shall enable each employee to recognize hazards related to ladders ... and shall train each employee in the procedures to be followed to minimize these hazards.

(1) The employer shall ensure that each employee has been trained by a competent person in the following areas, as applicable:

- (i) the nature of fall hazards in the work area;
- (iii) The proper construction, use, placement, and care in handling of all ... ladders;
- (v) the [ladder safety] standards in this subpart.

“Competent Person” under OSHA “means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” **29 C.F.R. §1926.32**

The statute in question has set up a standard of conduct for general contractors such as Kara Homes Corporation and subcontractors such as JM Framing Corporation on a construction site. If you find that the defendants have 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 defendants, 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 that 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.

Cases:

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).

The duty of a general contractor such as Kara Homes to assure the safety of its subcontractor's employees is not necessarily identical to the duty that arises from a general contractor's duty to comply with an OSHA regulation.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 the defendants' negligence has been established..¹¹ Conversely, compliance with an OSHA regulation by any or all of the defendants does not in and of itself preclude a finding of negligence.¹² The defendants must still exercise reasonable care under all the circumstances, and if you find that the prevailing practices in the industry do not comply with that standard, the defendant may be found negligent by you notwithstanding compliance by any of the defendants with an OSHA regulation or any other custom or standard of the industry.

KEEFE BARTELS
Attorneys for Plaintiff

By: _____

—

GERALD H. CLARK

¹⁰*Alloway*, 157 N.J. at 447.

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

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

Dated: March 14, 2008