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ROLANDO FERNANDES

Plaintiff,

vs.

DAR DEVELOPMENT CO., DAR CONSTRUCTION CO., ABC CORP #1-10 and JOHN DOES #1-10

Defendant.

:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO.: ESX-L-7138-06

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

8.11A DAMAGES- PAST MEDICAL EXPENSES– *modified to reflect the agreed upon stipulation that past medical bills in the amount of $31,593.07 were reasonable, necessary and related to the accident.

8.11 I DAMAGES- FUTURE MEDICAL EXPENSES - *Dr. Reiber testified the knee prosthesis will last 10-20 years and then have to be replaced. It was implanted in July, 2008, so will need to be replaced some time between 2018-2028. The estimated cost in today's dollars is $50,000. Dr. Wu testified...

8.60 PUNITIVE DAMAGES

1. 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)

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, the National Safety Council, the National Association of Home Builders and the Associated General Contractors of America. In determining the scope of the duty owed by defendants DAR to Mr. Fernades and the breach of such duty, the applicability of federal safety regulations, specifically OSHA regulations, is highly relevant.[4] Under OSHA, defendant DAR as the general contractor on the 46 Hillcrest Road, Warren, New Jersey job, 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." Moreover, defendant DAR the general contractor has, non-delegable duty to maintain a safe workplace under OSHA. If you find that the defendants DAR did not comply with these standards, you may find this defendant to have been negligent.[5]

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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).

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 DAR corporation, is single repository of responsibility of safety of all employees on job. [7]

As a general contractor or prime contractor, the DAR 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

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[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).

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 DAR, is responsible 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 DAR is responsible for violations of various provisions of the federal workplace safety laws 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 CFR §1926.32** and furthermore, under OSHA, the prime or general contractor assumes all obligations prescribed as "*employer*" obligations under the OSHA construction safety law.[10]

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.

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[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)

[10] "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." **29 CFR §1926.16**

(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 §1926.650

(a) This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches.

29 CFR §1926.651

(j) Protection of employees from loose rock or soil.

Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

(k) Inspections

(1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other

hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

29 CFR §1926.652 Requirements for Protective Systems

(a) Protection of employees in excavations.

> **(1)** Each employee in an excavation shall be protected from cave-ins by an adequate protective system [such as shoring, benching or angling the trench walls to prevent a collapse], ... [unless] examination of the ground by a competent person provides no indication of a potential cave-in.

"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; §1926.650**

The statute in question has set up a standard of conduct for general contractors such as DAR 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 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 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.[11]

The duty of a general contractor such as DAR 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

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[11] *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).

comply with an OSHA regulation. [21]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..[13] Conversely, compliance with an OSHA regulation by any or all of the defendants does not in and of itself preclude a finding of negligence.[14] 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.

Finally, in considering whether DAR was negligent, you may also consider the language of New Jersey Administrative Code 5.23-2.21 "Construction Control." This state regulation defines the construction controls required for all buildings in New Jersey and building services that are the responsibility of the contractor during construction. Under this regulation, the actual construction of the work shall be the responsibility of the contractor as identified in the approved construction permit. In this case that contractor is DAR and the construction permit has been admitted into evidence. Thus under *N.J.A.C.* 5.23-2.21, DAR's responsibility involved execution and control of all methods of construction in a safe and satisfactory manner.

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[12]*Alloway*, 157 N.J. at 447.

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

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

2. DAR MAY ALSO BE FOUND LIABLE IF YOU FIND THAT IN HIRING C. FREITAS, DAR HIRED A NEGLIGENT CONTRACTOR

Engaging an incompetent contractors is an exceptions to ordinary rule that one who engages contractor who conducts independent business by means of his own employees to do work is not liable for the negligent acts of the contractor. *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) (stating that there are three exceptions to the general rule that principals are not liable for the actions of independent contractors: (1) where the principal retains control of the manner and means of doing the work subject to the contract; (2) where the principal engages an incompetent contractor; or (3) where the activity constitutes a nuisance per se.); *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) (holding that where injury results from negligence of independent contractor or his servants in the execution of work which is not a nuisance per se, the contractor alone is liable, unless owner is in default in employing an unskillful or improper person as contractor).

As such, in considering whether DAR is liable for plaintiff's injuries, you must consider if C. Freitas was incompetent contractor and if so, whether DAR knew or should have known of C.

Freitas' incompetence, particularly in digging trenches. If you find that DAR knew or should have known that C. Freitas was not a competent contractor, you may hold DAR liable for plaintiff's injuries.

3. 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.

In this instant matter plaintiff presented sufficient evidence for punitive damages

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By: _____
GERALD H. CLARK

Dated: February 1, 2011