HENRY ALVARADO-MORALES, **Plaintiff(s)** **v.** **CARLOS CARPENTRY, HOMEWOOD SUITES BY HILTON, GV CLEANING SERVICE, BRIAD CONSTRUCTION SERVICES, SESLEY OLIVEIRA-BRUM, APOGEE BUILDERS EDGEWOOD CONTRACTING CORPORATION, ABC MAINTENANCE COMPANY (Unknown corporate entity, Said name being fictitious) John Doe #1 and John Doe #2, (Unknown person or persons, Said name being fictitious, Individual, jointly, Alternative).** **Defendant(s).**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **ESSEX COUNTY** **DOCKET NO.: ESX-L-6139-16** **Civil Action**
BRUNO DOS SANTOS, **Plaintiff(s)** **v.** **HILTON HOMEWOOD SUITES; BRIAD CONSTRUCTION SERVICES; BRIAD CONSTRUCTION SERVICES, LLC; THE BRIAD GROUP; BRIAD LODGING GROUP BRANCHBURG II, LLC; EDGEWOOD CARPENTRY & CONTRACTING; EDGEWOOD CONSTRUCTION; EDGEWOOD CONTRACTING CORPORATION; APOGEE BUILDERS, LLC; SOUSA CONSTRUCTION, LLC; VINICIOS TOMAS DBA SOUSA CONSTRUCTION; NEVILSON DE SOUSA JOHN DOES 1-20; ABC CORPORATIONS 1-20,** **Defendant(s).**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **ESSEX COUNTY** **DOCKET NO.: ESX-L-478-18** **Civil Action**

BRIEF ON BEHALF OF PLAINTIFF BRUNO DOS SANTOS IN OPPOSITION TO DEFENDANT BRIAD'S MOTION FOR SUMMARY JUDGMENT ON PUNITIVE DAMAGES AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF BREACH

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TABLE OF CONTENTS

Page:

PRELIMINARY STATEMENT 1

STATEMENT OF MATERIAL FACTS 2

I. The Project and the Incident 2

II. Briad Did Not Take its Safety Responsibilities Seriously 3

III. Workers Put in Job Made Boxes to Reach Heights was Among Many Ongoing Safety Hazards on the Project 4

IV. Briad Rushed the Work at the Expense of Safety So They Could Open the Hotel Fast 6

V. Concealment, Denials, Continued Conduct and Obfuscation 7

VI. No Remorse, No Responsibility and Nothing Done to Prevent a Reoccurrence 14

RESPONSE TO BRIAD'S STATEMENT OF FACTS 17

LEGAL DISCUSSION 19

I. OSHA Was Enacted to Prevent the Very Kind of Thing That Happened Here 19

II. As the Prime Contractor, Briad Had a Top-down Responsibility to Manage Safety and Follow OSHA Rules on this Project 20

VI. The Cross-motion for Partial Summary Judgment on the Issue of Breach Should Be Granted Because No Reasonable Juror Could Conclude Other than Briad Breached its Responsibility to Manage Safety and Enforce the OSHA Rules on the Project as it Relates to this Incident 25

V. There Is Sufficient Evidence to Submit the Punitive Damages Claim to the Jury 28

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Alloway v. Bradlees, 157 N.J. at 237-38 . . . . . 22, 23, 24, 26

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) 27

Arroyo v. Scottie's Prof'l Window Cleaning, Inc, 120 N.C. App. 154 (N.C. Ct. App. 1995) 32

Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962) 28

Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) 27

Carvalho v. Toll Brothers, 143 N.J. 565 (1996) 22, 23

Costa v. Gaccione, 408 N.J.Super. 362, 367 (App.Div. 2009) 25

Dawson v. Bunker Hill Plaza Assocs., 289 N.J.Super. 309, 320-21 (App.Div.1996) 22

DiGiovanni v. Pessel, 55 N.J. 188, 190 (1970) 28

Dong v. Alape, 361 N.J. Super. 106 (App. Div. 2003) 29

Fernandes v. DAR, 222 N.J. 390, 411-415 (2015) 23, 24

Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997) 28

Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 359 (App. Div. 2004). . . . 19, 21

Haelig v. Mayor & Council of Bound Brook Borough, 105 N.J. Super. 7 (App. Div. 1969) 27

Harrison Riverside v. Eagle Affiliates, Inc., 309 N.J. Super. 470 (App. Div. 1998) 26, 27

Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 448 (1993) 20

Kane v. Hartz Mountain, 278 N.J.Super. 129, 142-43 (App. Div. 1994) 22-24, 26

McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 306 (1970)) 28

McMahon v. Chryssikos, 218 N.J. Supra. 572, 580 (Law Div. 1986) 29

Meder v. Resorts International, 240 N.J.Super. 470, 473-77 (App. Div. 1989), *cert. den.* 121 N.J. 608 . . . . . 22, 26

Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49 (1984) 28

Parks v. Pep Boys, 282 N.J. Super. 1, 17 (App. Div. 1995) 28

People Express Airlines, Inc. v. Consolidated Rail Corporation, 100 N.J. 246, 266 (1985) . . . 20

Santillan v. Sharmouj, 289 F. App'x. 491, 496 (3d Cir. 2008) 32

Smith v. Whitaker, 160 N.J. 221, 241 (1999) 28

Weinberg v. Dinger, 106 N.J. 469, 494 (1987) 20

RULES

Rule 4:46-2(c) 27

Rule 4:37-2(b) 27

Rule 4:40-1 27

Rule 4:40-2 27

Rule 4:46-2 (c) 26

OTHER AUTHORITIES

29 *C.F.R.* § 1926.16. . . . . 21, 22

29 *C.F.R.* § 1926.16(b) 27

29 *C.F.R.* § 1926.20. 21

29 *C.F.R.* § 1926.32 26

29 *U.S.C.A.* § 651(b) 19, 21

29 *U.S.C.A.* § 654(a) 21

29 *U.S.C.A.* § 666. 21

Death on the Job: The Toll of Neglect, 2021, AFL-CIO 20

Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents. 101 Harv. L. Rev. 535 (1987) 20

Handbook on the Law of Torts § 2 (2d ed. 1955)) 28

Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994) 19

Model Jury Charge 8.60. 29

National Safety Council 1

N.J.A.C 25

N.J.A.C. 5:23-2.15(b)(3) 24

N.J.A.C. 5:23-2.21 24

N.J.A.C. 5:23-2.21 25

N.J.A.C. 5:23-2.21(b)(4) 24

N.J.S.A. 2A:15-5.10. 28

N.J.S.A. 2A:15-5.12 28

N.J.S.A. 2A:15-5.12a 29

N.J.S.A. 2A:15-5.12a. 29

N.J.S.A. 2A:15-5.12b(4) 29

Occupational Safety and Health Act in 1972 . . . . . 1, 19

Prosser and Keeton on Torts § 4 (5th Ed.1984) 20

Punitive Damages Act ("PDA") 29

PRELIMINARY STATEMENT

This is a workplace safety construction injury case. The project at issue was the construction of a new Hilton Homewood Suites hotel in Branchburg, N.J. The Briad Defendant movants were the owners, developers and general contractors of the project.

The industrial revolution of the early 1900s brought about large numbers of dead and mangled workers on construction projects. In the following decades, groups like the National Safety Council emerged to deal with this social crisis. These efforts culminated in President Nixon signing the Occupational Safety and Health Act in 1972. A substantial section of OSHA is devoted to preventing death and injury from falls. The lynchpin of this legislation, which is consistent with corresponding industry safety standards, is that there has to be top-down safety management. The general contractor has to make sure each tier down the construction chain follows the OSHA safety rules so that workers at the bottom are not harmed.

The general contractor/developer on this project, the Briad Defendants, ignored these rules and did business as though there was no OSHA. Following the safety rules and protecting workers takes a bit more time and effort and according to their project manager, "[D]elays will cost Briad money on the job." (*P14- Honigfeld II, 10-2-19 Deposition at 130-131*) And therefore, "[Y]ou always want them to push more." (*P15- Honigfeld Comp I, 7-13-17 Testimony at 16*)

Briad's reckless disregard for the safety rules and well being of the workers resulted in plaintiff Bruno Dos Santos falling 12 feet from a job made box sitting on top a forklift. This was a clear and ongoing violation of OSHA safety rules. Briad immediately took steps to conceal their conduct, including knowingly giving false information to OSHA officers. They continued through this litigation. They did nothing after to prevent a reoccurrence. In fact they continued the same kind of fall protection violations, including the use of job made boxes, after the incident. Their

motion for summary judgment to dismiss the punitive damages claim should be denied.

OSHA and New Jersey case law are clear that as the general contractor, Briad had a non-delegable duty to manage safety and enforce the OSHA rules on the project. The evidence is so overwhelming that Briad failed to meet this duty, that plaintiff's cross-motion for partial summary judgment on the issue of breach should be granted. The jury can decide proximate cause and damages.

STATEMENT OF MATERIAL FACTS

I. The Project and the Incident

1. This is a workplace safety construction injury case. The project at issue was the construction of a new Hilton Homewood Suites hotel in Branchburg, N.J. (*P3*) The Briad Defendant movants were the owner, developer and general contractor of the project. (*P26- Pagnotta deposition at 22, 28*) (*P36- Construction Permits*). This includes Briad Construction Services, LLC, The Briad Group and Briad Lodging Group Branchburg, LLC, hereinafter collectively referred to as "Briad" or "Briad Defendants."

2. Briad hired defendant Edgewood Contracting Corporation ("Edgewood") as a subcontractor to do rough framing, install windows, and install rubber sealant around the windows referred to as tyvek or vycor wrap. (*P13- Honigfeld I, 4-23-19 Deposition at 21-23, 27-31*).

3. Edgewood in turn sub-subcontacted much of that work to Apogee Builders whose principal is Wesley Brum. (*P26- Pagnotta deposition at 129*) (*P32- Carvalho Deposition at 34, 40, 42, 85-86, 121, 138*) (*P34- Apogee Sub-Contract*).

4. However, Edgewood was still on site and maintained responsibility for its obligations under its contract with Briad. (*P26- Pagnotta deposition at 26, 68*) (*P32- Carvalho Deposition at 119-120, 129*).

5. At the time of the incident, plaintiff Bruno Dos Santos was an unskilled laborer employee of Apogee Builders. (*P32- Carvalho at 34, 40, 42, 81,85-86, 121, 138*).

6. On Friday, October 10, 2014, Bruno and a co-worker had been directed to install the tyvek/vycor wrap around windows on the second floor of the project. (*P38- Dos Santos, July 3, 2018 at 20, 49*) (*P40- Dos Santos, Oct 8, 2015 at 22*).

7. They had been directed to get into a job made wooden box sitting on top of a forklift lull about 12 feet high to reach the window area. (*P38- Dos Santos, July 3, 2018 at 20, 49*) (*P40- Dos Santos, Oct 8, 2015 at 22*).

8. The supervisor and project manager of the site for Briad was Jason Honigfeld. (*P-12 Eyewitness Statement at 1*) (*P-11 Branchburg Police Incident report*).

9. At the end of the day, Honigfeld called to the workers in the box to tell them the job was wrapping up for the day. In response their weight shifted and they fell 12 feet down with the box landing on Bruno. (*P13- Honigfeld I, 4-23-19 Deposition at 16-17, 37, 71-73, 101, 104, 107-108*) (*P14- Honigfeld II, 10-2-19 Deposition at 12, 86-88, 120-121*) (*P33- Honigfeld- Comp II Testimony at 18-19, 34*) (*P25, incident scene photos*) (*P6, investigation report and photos*) (*P12, incident report*) (*P16, Violation Notice*) (*P35- Gallagher Expert Reports, 1/14/20 report at 2-3*) (*P41- Dos Santos, July 16, 2018 at 77*) (*P38- Dos Santos, July 3, 2018 at 19*) (*P40 Dos Santos, Oct 8, 2015 at 14*).

10. Bruno Dos Santos sustained serious injuries. (*P37- Dr. Markbreiter Reports*).

II. Briad Did Not Take its Safety Responsibilities Seriously

1. Briad was in control of the project and had a non-delegable responsibility to manage safety and enforce OSHA rules. (*P35- Gallagher Expert Reports at 6-13*) (*P 13- Honigfeld I at 43-45, 50, 62-66, 89-90*) (*P33 at 9, 36*) (*P26- Pagnotta at 22, 28, 52, 128*) (*P32- Carvalho at 55-57*).

2. Jason Honigfeld was produced as the Briad corporate designee most knowledgeable in job safety on the project. (*P13- Honigfeld I, 4-23-19 Deposition at 50*)

3. But he has no safety qualifications nor training. (*P13- Honigfeld I, 4-23-19 Deposition at 50*).

4. He does not know if Briad has a safety manual and if they do he does not know the last time he saw nor read it. (*P13- Honigfeld I at 46, 49, 133-34*).

5. Honigfeld does not know if Briad required Edgewood to employ an OSHA competent person as is required; they never asked and did not care. (*P13- Honigfeld I- 52, 53*) (*P35- Gallagher Expert Reports at 7-13*).

6. Honigfeld's safety duties were not evaluated by his employer and his job description did not specify safety. (*P13- Honigfeld I- 57-58*).

7. Safety has to be considered before work starts, not just deal with it as it comes up. (*P26- Pagnotta at 32*) (*P35- Gallagher Expert Reports at 6*).

8. Briad had no plan to make sure the Edgewood/Apogee work was done safely and in accordance with OSHA rules. (*P13- Honigfeld I- 73-74*).

9. Yet they knew long before job started this had to be done. (*P13- Honigfeld I- 98-99*)

10. Edgewood did not know of any rules from Briad to do this work safely and Briad never had any discussions with them about it. (*P32- Carvalho at 92*).

11. Prior to the incident Briad never enforced safety rules as to Edgewood. (*P32- Carvalho at 66*).

12. Briad also had its contractors install sheathing using ladders which is another OSHA violation. (*P13- Honigfeld I- 75-76*) (*P35- Gallagher Expert Report at 17*).

13. All of this was in violation of basic job safety rules from OSHA and other industry standards. (*P35- Gallagher Expert Reports*).

III. Workers Put in Job Made Boxes to Reach Heights was Among Many Ongoing Safety Hazards on the Project

1. Briad was in control of the project and had a non-delegable responsibility to manage safety and enforce OSHA rules. (*P35- Gallagher Expert Reports*) (*P 13- Honigfeld I at 43-45, 50, 62-66, 89-90*) (*P33 at 9, 36*) (*P26- Pagnotta at 22, 28, 52, 128*) (*P32- Carvalho at 55-57*).

2. If Briad sees a safety violation, they are supposed to rectify it. (*P35- Gallagher Expert Reports*) (*P13 at 98*).

3. Directing workers into job made boxes sitting on forklifts to reach heights is a clear violation of both the OSHA safety rules and the manual of the forklift itself. (*P35- Gallagher Expert Reports, 1/14/20 report at 15*).

4. Briad at all times knew this. (*P 13- Honigfeld I at 83-85*) (*P14- Honigfeld II- 12, 14*).

5. Briad had no rules against using the forklift lull and box for workers to access heights. (*P13- Honigfeld I- 84, 92*).

6. Briad did nothing to make sure use of the lull was safe and in compliance with OSHA. (*P13- Honigfeld I- 128, 130*).

7. In fact, there was a conscious decision made to not rent an approved man lift to save money. (*P41- Dos Santos, July 16, 2018 at 67, 70*).

8. Briad had no plan in place to see to it workers were not injured or killed installing the window wrap on their hotel project. (*P13- Honigfeld I- 86, 100-101*).

9. Briad had no discussions with Edgewood about how to do this work safely, even though they did discuss the details of the work. (*P13- Honigfeld I- 100*) (*P14- Honigfeld II- 96, 98, 121*).

10. The incident happened on October 10, 2014. (*P-11 Branchburg Police Incident report*).

11. Job progress photos, daily reports, and witness testimony show the exposure to a fall hazard at the time of this incident was not an isolated incident. It was a customary practice at this site to raise workers and materials in boxes on the forks of forklift trucks. (*P35- Gallagher Expert Reports, 1/14/20 report at 15*) (*P4, 9, 10, 19, 20, 21, 22, 23, 24, 25*) (*P18, Daily Reports*) (*P41- Dos Santos, July 16, 2018 at 67*).

12. For example, progress photos spanning 8/14/14 through 10/9/14 show numerous safety violations including workers in job made boxes installing windows, workers on unguarded scaffolding with no fall protection, and open fall hazards. (*P19, 10*).

13. Progress photos spanning 8/14/14 through 10/1/14 show workers 35 feet high on the roof with no fall protection, 30 foot high scaffolding with no fall protection, and masonry work being done on unprotected scaffolding. (*P22*).

14. Other photos show more clear safety violations including workers in unprotected trenches well above their heads at risk of collapse. (*P24*) (*P35- Gallagher Expert Reports, 1/14/20 report at 19*).

15. The Daily Reports correspond with the job photos and further document these ongoing safety violations. (*P18, Daily Reports*) (*P13- Honigfeld I- 109*) (*P14- Honigfeld II- 24-30, 33-36, 46-49*).

16. Briad full well knew about all of this; they were the ones who took those photos. (*P13- Honigfeld I- 109*) (*P14- Honigfeld II- 46-49*).

17. Briad typically had 2-3 management representatives on site at all times while work was on going. (*P13- Honigfeld I- 18, 31-32, 35, 37*).

18. Jason Honigfeld was walking around the site all the time and he saw Bruno in the box. (*P41- Dos Santos, July 16, 2018 at 81*).

19. When Honigfeld saw Bruno working from the box he did not do anything to stop the work. (*P41- Dos Santos, July 16, 2018 at 85*).

20. Wesley Brum of Apogee would always talk with the job super who would give him orders and instructions. (*P41- Dos Santos, July 16, 2018 at 107*).

21. Briad project managers were conducting constant and regular inspections of the

ongoing work. (*P13- Honigfeld I- 61-63, 85) (P26 at 29, 30*).

22. In fact, Briad project managers are the ones who took the job progress photos showing those violations. (*P13- Honigfeld I- 109*) (*P14- Honigfeld II- 46-49*).

23. The workers had been using the box at issue in plain view throughout the day in question, Briad was on site, witnessed the fall, and took the incident scene photos. (*P13- Honigfeld I- 80-81*) (*P14- Honigfeld II- 86-88, 120-121*) (*P25*).

24. Bruno Dos Santos received no safety training nor instructions, including nothing about forklift nor fall protection safety and he knew of no job safety meetings. (*P41- Dos Santos, July 16, 2018 at 99, 100, 106*).

IV. Briad Rushed the Work at the Expense of Safety So They Could Open the Hotel Fast

1. Jason Honigfeld was produced as the Briad corporate representative with substantial knowledge of its duties and responsibilities on the project, including as to job safety. (*P13- Honigfeld I, 4-23-19 Deposition at 93-94*) (*P37- Briad Deposition Notice*).

2. He testified, "[D]elays will cost Briad money on the job." (*P14- Honigfeld II, 10-2-19 Deposition at 130-131*) And therefore, "[Y]ou always want them to push more." (*P15- Honigfeld Comp I, 7-13-17 Testimony at 16*).

3. Daily job reports and witness testimony shows they did just that, including as to the very window installation work Bruno Dos Santos and Edgewood were doing at the time of the incident. (*P27, 28, 30*) (*P32- Carvalho Deposition at 37-40, 43-45*).

4. In the weeks leading up to the October 10th incident, meeting minutes from mid-late September show Briad was pushing Edgewood, demanding:

- "*know your schedule- don't wait on approvals know your lead times".
- "*The schedule is not being met by many trades."
- "schedule is key"
- "Task durations must be met...failure to do so will result in...assessment of liquidated damages."
- "The lack of approved submittals cannot delay the project at any time."

- "Edgewood continues to run behind schedule"
- "*window install must move faster"
- "JOB FLOW! TWO WEEK LOOK AHEADS MUST BE FOLLOWED!

(*P27 at 3, 4, 6*) (*P30 at 1, 3, 5, 7*) (emphasis in original)

5. Briad has a history of rushing its jobs and disciplining sub contractors for not working fast enough, including termination. (*P21- Bar-Mac termination letter, noting delays cost Briad money*) (*P14- Honigfeld II at 104*).

6. However there is not a single instance of Briad citing anyone for the clear and ongoing safety hazards before the incident. (*P14- Honigfeld II- 20*).

7. Meeting minutes from just two days before the incident state, "Edgewood continues to run behind schedule." "*Window installation must move faster." (*P28 at 3, 4*).

8. Van Carvalho, the Principal of Edgewood, testified:

A. I believe that there was a time we had to work Saturdays because Briad was pressuring us to get this job going, get the job done.

Q. Tell me about that. Why was Briad pressuring?
A. They kept saying they were behind schedule and they needed to, you know, work every day, including Saturday.

Q. Who was behind schedule?
A. Briad.

Q. Okay. When did they begin saying that to Edgewood?
A. From the very beginning of the project.
...
Q. So, after these meetings...what would you do[?]
A. I would talk to the foreman about the meeting and see if there is a way to pick up the pace because they were claiming they were behind and they wanted to push the job along.

(*P32- Carvalho Deposition at 37, 39-40, 43-45*)

V. Concealment, Denials, Continued Conduct and Obfuscation

1. Immediately after the incident Briad gave false information to OSHA investigators to avoid getting a ticket and conceal their knowledge of this ongoing hazard they knowingly permitted. Vincent Gallagher, a former OSHA official, writes:

> The OSHA inspector reported that before this incident, the incident box was used for weeks. The OSHA inspector also reported that the Briad representative told him/her that at the time of this incident, the workers who were in the box were doing so against Briad's safety rules. Note: According to deposition testimony, it was a common practice for workers to be in boxes in violation of OSHA and ANSI standards as well as the safety guidance of the manufacturer. Apparently, OSHA was given false information by the Briad representative. This apparently led to Briad not receiving a citation. It is a criminal violation to give false information to OSHA. The OSHA representative also wrote that the box was only to be used for trash. That was not true.

(*P35- Gallagher Expert Reports, 1/14/20 report at 20-21*) (underline added)

2. Progress photos from after the incident still show the use of job made boxes to reach heights, workers on unprotected scaffolding, and workers standing on open roofs with no fall protection. (*P23*)

3. Meeting minutes from November show Briad was still pushing its subcontractors to work faster noting, "Edgwood continues to run behind schedule" and "Window installation must move along faster." (*P29 at 5*)

4. The testimony of Briad's corporate designee, Jason Honigfeld[1], shows Briad continued to try to conceal its conduct of ignoring the OSHA rules and failing to manage safety on the project. (*See below*).

5. He claims Briad conducted safety inspections and issued warnings and violations prior to the incident. However, although documenting virtually everything that happened on the project, they had no evidence of any such violations issued. (*P13- Honigfeld I- 60, 140*).

6. Honigfeld claims there was an OSHA approved lift with harness on site, but that is nowhere to be found in the thousands of progress photos. (*Honigfeld I- 99-100, 130*).

7. Despite his testimony the workers always accessed heights in an OSHA approved lift with harness, there is not a single progress photo showing this. (*Honigfeld II- 28-30*).

8. There is also not a single progress photo showing OSHA safe scaffolding. (*P26- Pagnotta at 34*).

9. As set forth above, the record is clear Briad managers were on the project at all times while work was ongoing conducting constant and regular inspections. (*P13- Honigfeld I- 18, 31-32, 35, 37, 61-63, 85*) (*P26 at 29, 30*).

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[1]Jason Honigfeld is also the son of Briad's owner, Brad Honigfeld. (*P26 at 6-7*).

10. Briad testified that if they ever saw workers in job boxes they should and would stop it by telling them or their foreman, or kicking them off the site. (*P13- Honigfeld I- 82-83*) (*P26- Pagnotta at 53*).

11. Despite the clear photos, work reports and testimony to the contrary, Jason Honigfeld swore up and down this incident was the first time he or anyone else at Briad saw workers using job made boxes on forklifts to reach heights. (*P13- Honigfeld I- 95-96, 119, 124*) (*P14- Honigfeld II- 12-13, 14*).

12. He also denied windows were installed from boxes on lifts. (*P14- Honigfeld II- 14*)

13. This seemed incredible, among other reasons, because photos and job reports showed just that. (*P19, 20*) (*P14- Honigfeld II- 24-28, 33-36*) (*P26- Pagnotta at 80*) And despite them being there every day, he claimed to not know how window wrap was installed before this incident. (*P13- Honigfeld I- 122*).

14. Honigfeld testified:

> Q. Tell me everything Briad did to see to it that workers were not exposed to fall hazards from utilizing the box to access heights including installing the weatherproofing around the windows. Tell me everything Briad did to prevent that.
>
> ...
>
> A. Again, this was the first time that we saw anyone utilizing it in the form of installing Tyvek -- installing the Vicor. This was not something you're accustomed to seeing every day.
>
> ...
>
> A. ...I can tell you and I can be 100 percent -- almost 100 percent positive that those lifts were never utilized as actual lifts. This was the first time that I...saw somebody doing that.
>
> ...
>
> A. Again, we can go through the same question over and over again. [T]hat was the first time that I saw them utilizing a box as a lift.

(*P13- Honigfeld I- 95-96, 119, 124*). Honigfeld further testified:

> Q. Okay. Prior to the time of this incident, prior to October 10 of 2014, were workers ever standing in man-made job boxes on forklift lulls to reach heights on the job site?
>
> A. Not that we authorized them to.
>
> Q. [W]hat do you mean not that you authorized? The question is did it ever happen before on this job?

A. Not that I know of, no.

Q. Okay. Was Briad ever aware of workers utilizing man-made job boxes on forklift lulls to reach heights above six feet prior to October 10 of 2014?
A. No.
...
Q. Isn't it true that the workers utilized man-made job boxes on forklift lulls to install windows on this job site at heights above six feet; isn't that true?
A. No.

(*P14- Honigfeld II- 12-13, 14*)

15. Briad resisted turning over the progress photos and we had to obtain court orders. (*P39*).

16. Jason Honigfeld was deposed twice. We got the progress photos after his first deposition, but before his second.

17. The progress photos showed the above testimony from Honigfeld was all false; this was a common practice on the project that Briad permitted. (*P13- Honigfeld I- 95-96, 119, 124*) (*P14- Honigfeld II- 12-13, 14, 28-30, 82-83*) (*P35- Gallagher Expert Reports, 1/14/20 report at 15*) (*P4, 9, 10, 19, 20, 21, 22, 23, 24, 25*) (*P18, Daily Reports*) (*See also P13- Honigfeld I at 103- referring to OSHA rules against this practice as "Construction 101"*).

18. At his first deposition he testified progress photos would not show workers at heights with no fall protection; they will show them wearing fall protection. *(P13- Honigfeld I- 88, 112, 113*).

19. But the truth is there was not a single photo showing workers in OSHA approved lifts with harnesses, despite him saying he saw it. (*P14- Honigfeld II- 28-32, 82-83*).

20. Honigfeld was then confronted with this photo from before the incident showing him and the other Briad project manager, Anthony Luccia, looking directly at workers in a job made box on a forklift installing windows:

(*P21*) (*P14- Honigfeld II- 15-18*)[2]

21. Because of his difficulty with the truth, before showing Honigfeld the full P21 photo, we showed him a close up of just himself and Anthony Luccia from the same 2 photographs (*P17*) to establish that was in fact him and Luccia. Had we shown him the full photo first showing them looking at the workers in the box, he would have tried to deny it all further. (*P14- Honigfeld II- 15-16*) (*See also, P26- Pagnotta at 72-73, identifying Honigfeld and Luccia in P17/P21*).

22. Despite P21, Honigfeld testified:

Q. ...Did either you or Anthony Luccia ever see workers reaching heights above six feet on this job site by standing in a job-made box hoisted up by a forklift or lull?

A. ...I did not see anything, no.

Q. How about Anthony Luccia, did he ever see workers in job made boxes on this job site at heights above six feet?

A. ...I'd say no...we can go through 100 different ways, no, the answer is no. ...let's not beat a dead horse over the same question.

Q. If Anthony Luccia did see workers in job made boxes on forklift lulls above

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[2]Briad's corporate designee testified, "A picture tells 1000 words." (*P13- Honigfeld I- at 90*)

six feet on this job site, what should he have done about that?
A. ...Require them to stop and issue a safety violation.

(P14- *Honigfeld II- 17, 18*)

22. Yet no such safety violations were ever issued before. (*P14- Honigfeld II- 20*).

23. But Briad did fine subs for delays. (*P14- Honigfeld II- 130-131, 134-135*).

24. When confronted with P20 and 21, this is how Honigfeld responded:

Q. Isn't it true that a job-made box on a forklift lull was utilized to install the windows with the workers standing in the box, isn't that true, prior to the incident of October 10 of 2014?
A. ...No

Q. How do you explain Photo No. 10 from P-20...?
A. ...That is not the proper way to install one.

Q. And you testified several times that that never happened before the incident. Do you remember that testimony?
A. ...Okay, yes.

BY MR. CLARK:

Q. ...well, okay. You already said you don't want to change any of your prior testimony so I guess we'll stick with that.
A. Okay, yes. None that I saw and none that I can remember specifically.

Q. But you already testified the progress photos would have been taken by either yourself or Anthony Luccia, right?
A. Yes.

Q. Were they cited for this?
A. You have to look at the reports. I have no idea.

Q. So what are you saying, you're saying that you never saw any workers, what did you say?
A. Do you want to repeat what my response was?

Q. No. Did you, yourself, ever see any workers in job made boxes on lull forklifts on this job site prior to the incident?
A. ...No.

Q. So how do you explain then P-21? ...Which is a two-page exhibit depicting a Briad worker looking right at a job-made box on a forklift with workers in it?
A. How do I explain that?

Q. Yeah. How do you explain that given your sworn testimony here today and the last time --we were here?
A. It shows that in the picture, but that is highly illegal or not OSHA approved.

Q. It's tough to get around that picture, right? I mean, that shows yourself... actually looking at workers on September 30, 2014 some 10 days before the incident here actually looking at workers in a job-made box at heights well above six feet on the forklift.

MS. ROHAN:

Objection to form. Foundation. He has not established this witness was in this picture.

MR. CLARK:

That was the first part of the deposition. ...That was P-17.

MS. ROHAN:

Then I'll object on the grounds it's an argumentative question.

MR. CLARK:

Remember P-17? That's a close-up of those. He already identified himself.
...
Q. I'll just ask a new question. Can you reconcile P-21 with your prior testimony in that regard?
A. Again, I don't recall 100 percent. ...

Q. But when we asked you previously you didn't say I can't recall or I don't recall, you said no, it never happened several times today and last time.
A. Yes.

Q. So can you explain that?
A. Was there a safety violation issued? That would be my next question.

Q. So you're not able to explain it; is that right?...Are you able to explain it?
A. What do you want me to explain?

Q. Are you able to reconcile your prior testimony in that regard with P-21?
A. None that I can recall.

Q. Okay, great. It's true, isn't it, that workers utilized man-made boxes on lulls to reach heights above six feet on this job site prior to the incident of October 10, 2014 with the knowledge of Briad, correct?
A. According to this photo?

Q. According to this photo, yes.
A. According to this photo it shows that there was a worker in a box on a lull.

Q. At heights above six feet, correct?
A. Yes.

Q. With no fall protection, right?
A. No fall protection, yes.

Q. With the actual knowledge of Briad Management, correct?
A. ...Who is to say that we didn't go tell them to take that down immediately?

Q. You already testified here today and last time that that never happened?
A. None that I recall had...

(*P14- Honigfeld II- 37-42*)

25. But then Honigfeld finally gave up:

Q. When you testified at your prior deposition that you can tell me 100 percent, almost 100 percent positive that the lifts were never used ...with the job-made box in there prior to this incident, were you wrong in that testimony?...Or do you still stand by that?
A. From the picture you showed me I was wrong.

(*P14- Honigfeld II- 80*)

VI. No Remorse, No Responsibility and Nothing Done to Prevent a Reoccurrence

1. The record shows that after this incident Briad still permitted the same use of job made boxes on forklifts. (*P23*) (*P14- Honigfeld II- 59-61*).

2. Several times during the depositions, Briad's corporate representatives demonstrated cavalier attitude about the hazard, injury to these workers, and this case. There was no remorse, no

acceptance of any responsibility, and nothing done to prevent the same kind of thing from happening again. (*P14- Honigfeld II- 56-57, 60-62, 77, 90-91*) (*P26- Pagnotta at 10, 47-48, 49, 70, 123*).

3. When asking him about job photos showing workers exposed to the imminent risk of serious injury or death from falls and other violations, Honigfeld actually laughed, several times:

Q. How about the workers on Photo No. 3 of 22 P-22, where is their fall protection?
A. Did you ask them? Don't know.

Q. They should have fall protection on, right?
A. ...Yes, they should.

Q. And why should they have fall protection on?
A. 'Cause they are working on a roof.

Q. How about this mason on Page 5 of P-22, why doesn't he have fall protection on?
A. Did you ask him?

Q. When I asked that question it appeared you chuckled. Did you chuckle when I first asked that question?
A. I did.

Q. Why did you chuckle?
A. Because I don't know.

Q. And in answering the question where you just said I don't know, it appears you chuckled again. Is that true?
A. Yes.

Q. And why did you chuckle there?
A. I don't know.

(*P14- Honigfeld II- 56-57*) And again:

Q. How about Photo No. 1 of P-23, do you see Photo No. 1 of P-23?
A. Yes.

Q. It looks like they are still using the job made boxes...on October 13 of 2014 on top of lulls at heights. Do you see that?...Doesn't it appear they are still permitting the use of job made boxes on lulls as depicted in P-23 for Photo No. 1?
A. For what specifically? For installation, for trash? What specifically so that I

can answer for you?
...
Q. And how about Photo No. 2 of P-23, what is the job-made box on the lull there being used for?
A. ...Trash. Have to be trash.
...
Q. Do you know that or are you just guessing?
A. I don't know. ...

Q. Why are you laughing again?
A. Because this is just like taking so much time. It's exhausting, but don't worry I enjoy being here.

(*P14- Honigfeld II- 60-62*)

4. When asking him about photos showing workers over their head in unprotected trenches at risk of being buried alive, the Briad designee showed no concern and instead quipped:

Q. Isn't it true that Briad permitted workers in trenches deeper than five feet without protection on this job site?
A. ...I don't recall. And, no, we did not permit anyone.

Q. Doesn't P-24 help to refresh your recollection that they did, in fact, permit workers in trenches deeper than five feet with no protection on this job? And P-24 is seven progress photos from this job which depicts workers in trenches over their heads with no protection.
A. Maybe they were very small people. I don't know honestly.

(*P14- Honigfeld II- 77*)

5. Briad's Senior Vice President of Construction, Charles Pagnotta, demonstrated a similar mind set, quipping "I must not be as intelligent as you" and belittling questioning about his company's undeniable disregard of its safety duty, calling such "smug." (*P26- Pagnotta at 47-48, 49*).

6. Pagnotta gave other flippant responses to important questions about Briad's job safety practices. (*P26- Pagnotta at 47-48, 49*).

7. Briad accepts no responsibility and says there is nothing they could have done to prevent it. (*P13- Honigfeld II- 90-91*).

8. To this former OSHA official Vincent Gallagher responded:

[Honigfeld says] there wasn't anything he could have done that would have prevented this incident. (Note: He does not understand that planning is essential. Briad did not

plan to control the fall hazards associated with installation of Tyvek. He does not know if any plans were made. He could have planned. Even after this incident, he does not recognize the failure of planning led to this incident.)

(*P35- Gallagher Report at 19*)

9. Briad did not change any of its policies or procedures nor the way it does business after this incident. (*P26- Pagnotta at 10, 123*).

10. And it pretty much learned nothing from the incident. (*P26- Pagnotta at 70*).

11. To this Gallagher commented, "Apparently, even after this incident, Briad has not learned that injuries can be prevented by planning, monitoring and ensuring that subcontractors work safely." (*P35- Gallagher Report at 20*)

12. Beyond that, Briad continually obfuscated discovery, requiring motions and orders, and still continued to conceal important documents and information. (*Honigfeld I- 41, 46-47, 130-132, 142*) (*P39*).

13. Furthermore, Briad and/or its carrier, CNA "lost"an important witness statement. Judge Petrillo reviewed the record and permitted an amended complaint for spoilation and denied a motion to dismiss that claim. This is the subject of a separate motion and is dealt with in a separate filing, which we incorporate by reference herein.

RESPONSE TO BRIAD'S STATEMENT OF FACTS[3]

1-4. Admitted.

5. Admitted in part; Bruno Dos Santos moved because Briad's project manager, Jason Honigfeld, called to him. (*P41- Dos Santos, July 16, 2018 at 77*) (*P38- Dos Santos, July 3, 2018 at 19*) (*P40 Dos Santos, Oct 8, 2015 at 14*) Also, the membrane wrap was referred to as both Tyvek and Vycor. (*P13- Honigfeld I, 4-23-19 Deposition at 21-23, 27-31*)

6. Admitted.

7. Objection. This factual assertion is not material to this summary judgment motion and thus not properly included in a *R.* 4:46-2 statement of materials facts. Under clear New Jersey and federal law, Briad, as the general contractor on the project had a non-delegable duty to manage safety and enforce the OSHA rules on the project; it cannot pass that responsibility down the chain to others. (*See P35- Gallagher Reports and Legal Discussion Section II*

[3]We only response here to Briad's factual statements that are relevant to the summary judgment motion on punitive damages, numbers 1 through 15. Numbers 16 through 22 only relate to the spoliation type claims and are responded to in a separate filing.

infra.)

8. Admitted.

9. Admitted and he did so with full knowledge and approval of Briad. (*Statement of Facts, Section III above*)

10. Admitted.

11. Denied. There is no question two Briad job managers, wearing Briad vests, are in those photos which were taken by another Briad job manager. The two are Anthony Luccia and Jason Honigfeld. (*P14- Honigfeld II- 15-16*) (*See also, P26- Pagnotta at 72-73, identifying Honigfeld and Luccia in P17/P21*) (*P13- Honigfeld I- 109*) (*P14- Honigfeld II- 46-49*)

12. The record, including other testimony from Honigfeld, shows his repeated testimony he never saw workers in lulls on forklifts to reach heights before this incident was knowingly false. (*P35- Gallagher Expert Reports, 1/14/20 report at 15*) (*P4, 9, 10, 19, 20, 21, 22, 23, 24, 25*) (*P18, Daily Reports*) (*P41- Dos Santos, July 16, 2018 at 67*). (*P13- Honigfeld I- 95-96, 119, 124*) (*P14- Honigfeld II- 12-13, 14, 28-30, 80, 82-83*)

13. Objection. This factual assertion is not material to this summary judgment motion and thus not properly included in a *R.* 4:46-2 statement of materials facts. Whether or not a untrained non-English speaking immigrant laborer lodges a complaint is immaterial to the general contractor's non-delgable duty to manage safety and enforce the OSHA rules on the project. And beyond that, not only is the record clear Briad well knew about this practice, they knowingly preferred it that way to make the project move faster.

14-15. The broad notice pleading allegations, which are made before any discovery, speak for themselves.

LEGAL DISCUSSION

I. OSHA Was Enacted to Prevent the Very Kind of Thing That Happened Here

In the United States, about a million workers have been killed on-the-job since the 1920's. Our country's prior industrial history is even more compelling. The United States Bureau of Labor Statistics estimated annual workplace fatalities at 30,039 in the early 1920's. 75,000 railroad workers died in the quarter century before World War I alone. The construction industry was just as dangerous, if not more so. For example, according to the International Association of Bridge and Structural Steel Workers, iron workers like Don Hoiland here, lost a full one percent of its membership to workplace accidents in fiscal year 1911-12. A leading skyscraper construction firm admitted at the end of the 1920's that one worker died for every 33 hours of employed time during the previous decade. The United States led the world in casualty rates. Coal worker fatality rates were triple those in the United Kingdom, to cite one example. Linder, Marc. *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield.* 20 J. Legis. 99 (1994).

Shamefully high fatality and injury rates continued beyond the early twentieth century. Into the 1990's, the Iron Workers continued to report losing about 100 members a year to workplace accidents. Responding to National Safety Council statistics suggesting that 14,000 Americans are killed and 2.5 million permanently injured in the workplace every year, the United States Congress passed the Occupational Safety and Health Act of 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 *U.S.C.A.* § 651(b); *Gonzalez v. Ideal Tile Importing Co., Inc.,* 371 N.J. Super. 349, 359 (App. Div. 2004).

At the time of OSHA's passage, the country was losing more men and women to workplace accidents than to the war in Vietnam. Linder, Marc. *Fatal Subtraction: Statistical MIAs on the*

Industrial Battlefield. 20 J. Legis. 99 (1994); *see also Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents.* 101 Harv. L. Rev. 535 (1987). Death and disability due to unsafe workplaces persist:

> Workplace hazards kill and disable more than 100,000 workers each year—5,333 from traumatic injuries and an estimated 95,000 from occupational diseases. The job fatality rate remains stagnant, and job injuries and illnesses continue to be severe undercounts of the real problem.

(*Death on the Job: The Toll of Neglect, 2021*, AFL-CIO, available at: https://aflcio.org/reports/death-job-toll-neglect-2021). OSHA was implemented with these systemic inadequacies, as well as our country's bloody industrial history, in mind. OSHA was enacted to provide prevention.

When construction site leaders ignore basic work safety rules like happened hin this case, the imposition of liability through tort law is essential to discourage irresponsible conduct, compensate the injured and create incentives to minimize risks of harm. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 448 (1993); *People Express Airlines, Inc. v. Consolidated Rail Corporation,* 100 N.J. 246, 266 (1985); *Weinberg v. Dinger*, 106 N.J. 469, 494 (1987); *see also Prosser and Keeton on Torts* § 4 (5th Ed.1984) (noting that "prophylactic" factor of preventing future harm is a primary consideration in tort law). Tort law provides the bite to work in conjunction with OSHA's bark. It provides real economic incentive for firms to invest in safety. Application of tort law is particularly important in this case where the general contractor made a conscious decision to disregard the welfare of workers so it could open its hotel as soon as possible.

II. As the Prime Contractor, Briad Had a Top-down Responsibility to Manage Safety and Follow OSHA Rules on this Project

Congress enacted OSHA to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 *U.S.C.A.* §

651(b); *see Gonzalez supra,* 371 N.J. Super. at 359. The OSHA Act requires "employers" to comply with specific standards and also imposes a general duty on "employers" to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 *U.S.C.A.* § 654(a); *Gonzalez, supra,* 371 *N.J. Super.* at 359-60. Violators of specific OSHA standards or OSHA's general duty to provide a safe workplace face civil monetary penalties, as well as criminal sanctions, 29 *U.S.C.A.* § 666. *Gonzalez, supra,* 371 *N.J. Super.* at 359-60.

Specifically, the OSHA regulations provide that "no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety." 29 *C.F.R.* § 1926.20. While it is recognized that the subcontractors have a responsibility to the OSHA Regulations, it is ultimately the prime contractor at the top of the job hierarchy that must enforce these Regulations and make sure they are being followed by the subcontractors. 29 *C.F.R.* § 1926.16. As such, a general contractor cannot delegate its duties to maintain a safe workplace under the federal OSHA regulations to another; but rather, the prime/general contractor must maintain overall responsibility for the project.

> (a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually. Thus, for example, the prime contractor and his subcontractors may wish to make an express agreement that the prime contractor or one of the subcontractors will provide all required first-aid or toilet facilities, thus relieving the subcontractors from the actual, but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility). ***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***.
>
> (b) 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.***
>
> (c) 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. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. ***With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.***
>
> (d) Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.

29 *C.F.R.* §1926.16 (emphasis added); *see Alloway v. Bradlees*, 157 N.J. at 237-38 (a prime contractor on a work site has a non-delegable duty to maintain a safe workplace); *Carvalho v. Toll Brothers*, 143 N.J. 565 (1996) (summary judgment denied for daily construction manager site engineer that oversaw construction project). Briad was the general contractor on this project.

Under well-settled construction law in New Jersey, prime/general contractors like Briad here have 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. at 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994) State public policy and OSHA impose a duty on the general contractor 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. *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 a project. *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). As such, while it is recognized that lower tier contractors have a responsibility to comply with OSHA Regulations, it is ultimately the general contractor that must enforce these Regulations down the job hierarchy chain. This was also discussed at length in plaintiff's liability expert reports. (*P35*).

As such, general contractor enforcement is a key component of the federal workplace safety scheme embodied in OSHA. Defense arguments to the contrary have time and again been rejected by our Supreme Court. *Fernandes v. DAR*, 222 N.J. 390, 411-415 (2015) (contractor at the top of the job hierarchy has a non-delegable duty to manage safety and prevent injuries to workers on the job); *Alloway v. Bradlees*, 157 N.J. at 237-38 (same); *Carvalho*, 143 N.J. 565 (resident engineer overseeing job has duty to manage safety).

Indeed, this duty to enforce job site safety is non-delegable, meaning it cannot be contracted away by either the general or sub-contractor. New Jersey law is clear on this top-down requirement to manage safety on the project. *Fernandes v. DAR*, 222 N.J. 390, 411-415 (2015) (contractor at the top of the job hierarchy has a non-delegable duty to manage safety and prevent injuries to workers on the job); *Alloway v. Bradlees, 157* N.J. at 237-38 (prime and lower tier contractors "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.'"); *Kane v. Hartz Mountain*, 278 N.J.Super. 129, 143 (App. Div. 1994) ("[T]he paramount consideration of a worker's safety is more clearly placed in focus by a more comprehensive rule which makes the primary contractor and each tier of subcontractor responsible for the safety of the workers under them[.]"); *Dawson v. Bunker Hill Assoc.*, 289 N.J.Super. 309, 321 (App.Div. 1996) ("OSHA regulations impose a duty to maintain a safe workplace upon the "employer" which is defined as 'contractor or subcontractor.'"); *see also*

Carvalho v. Toll Brothers, 143 N.J. 565 (1996) (resident engineer overseeing job has duty to manage safety and enforce OSHA safety rules). As the general contractors responsible for this project, Briad had this joint, non-delegable duty under well settled law in New Jersey. *Fernandes*, 222 N.J. at 411-415 (2015); *Alloway*, 157 N.J. at 237-38; *Kane*, 278 N.J.Super. at 143.

Beyond that, under the New Jersey Administrative Code, the application for a construction permit shall contain the name and address of the responsible person as the principal contractor who will be in charge of the work and who is responsible to the owner for ensuring that all work is installed and completed in conformity with the regulations. *N.J.A.C.* 5:23-2.15(b)(3). Furthermore, under *N.J.A.C.* 5:23-2.21, the owner on a construction permit shall designate a person to be in charge of the work who shall be responsible for the necessary services and be present on the construction site on a regular and periodic basis to determine that, generally, the work is proceeding in accordance with the code and any conditions of the construction permit. *N.J.A.C.* 5:23-2.21(b)(4). Briad was that entity so listed on the construction permit documents. (*P36, Permitting Documents*)

Moreover, New Jersey law requires as follows:

> **5:23-2.21 "Construction control"**
>
> (a) Responsibilities: The provisions of this section shall define the construction controls required for all buildings involving professional architecture/engineering services and delineate the responsibilities of such professional services together with those services that are the responsibility of the contractor during construction.
> ...
> (e) Construction contractor services: <u>The actual construction of the work shall be the responsibility of the contractor(s) as identified on the approved construction permit and shall involve</u>:
> ...
> 2. <u>Execution and control of all methods of construction in a **safe** and satisfactory **manner**</u>;
> ...
> 4. In general, <u>render all such construction services as required to effect a **safe** and satisfactory installation of the project</u>;

N.J.A.C. 5:23-2.21 (emphasis added). Briad was the contractor so listed on the construction permit

documents. As such, it is bound by the applicable Code provisions. *Id.*; *See also Costa v. Gaccione*, 408 N.J.Super. 362, 367 (App.Div. 2009) (referencing with favor lower court denial of summary judgment in favor of contractor who agreed to be listed as general contractor on town building permits, but did not actually perform general contractor functions.)

As set forth in the statement of facts section and below, there is no question Briad breached this duty to manage safety and enforce the OSHA rules as it relates to the prohibition against workers in job boxes sitting on forklifts to reach heights above 6 feet. There is a mountain of undisputable evidence Briad knew about this ongoing practice, not the least of which are photos of their two job managers looking directly at it 10 days before the incident. Summary judgment on the issue of breach of this non-delegable duty should be granted.

VI. The Cross-motion for Partial Summary Judgment on the Issue of Breach Should Be Granted Because No Reasonable Juror Could Conclude Other than Briad Breached its Responsibility to Manage Safety and Enforce the OSHA Rules on the Project as it Relates to this Incident

As set forth above, as the developer and general contractor on this project, Briad had a clear duty under the law to manage safety, enforce OSHA and job specific rules, including under the N.J.A.C. As it relates to OSHA rules about forklifts and fall protection, which prohibit workers standing in job made boxes sitting on forklifts with no fall protection, there is simply no question Briad full well knew about this ongoing practice. While Briad's corporate representative testifies he did not know, that testimony has no measure of credibility sufficient to raise a jury issue. The photos, job reports and other evidence are all clear he did know. There is a photo showing him and Anthony Luccia looking directly at this very practice less than 10 days before this incident. And in fact when confronted with the overwhelming evidence, he had no choice but to finally admit:

Q. When you testified at your prior deposition that you can tell me 100 percent,

> almost 100 percent positive that the lifts were never used as -- with the job-made box in there prior to this incident, were you wrong in that testimony? ...Or do you still stand by that?
>
> A. From the picture you showed me I was wrong.

(*P14- Honigfeld II- 80*) It is clear Briad knew about this ongoing dangerous practice and let it go on. The evidence of breach is overwhelming and there is nothing for a jury to decide on it. Briad let it happen because a proper man lift costs money and would have delayed the opening of the hotel.

We will not repeat the facts section here. But applying those facts to the law leads to the result there is simply no jury question of fact on this issue. Partial summary judgment on breach should be granted. This Court should find as a matter of law that Briad breached its duty to mange safety and enforce OSHA on this job site with respect to the incident at issue. The question of proximate cause to be left to another day to perhaps be decided by a jury. *See, e.g. Rule* 4:46-2 (c) ("[S]ummary judgment ... may be rendered on any issue in the action..."); *Harrison Riverside v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470 (App. Div. 1998) But as to the question of whether Briad breached its duty as the general contractor, there is simply nothing for a jury to decide.

As set forth above, the OSHA regulations speak in terms of things the "employer" is supposed to do. The general contractor's requirement to comply with the regulations *vis a vis* the employees of its subcontractors is derived from 29 *C.F.R.* § 1926.32 where the term "employer" means "contractor or subcontractor." *See also Meder*, 240 N.J.Super. at 476 (declaring the reasoning that the OSHA definition of "employer" does not include general contractors as "flawed."); *Kane,* 278 N.J.Super. at 142-43 (stating that general and subcontractors 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."); *Alloway*, 157 N.J. at 238 ("'the prime contractor assumes all obligations prescribed as employer obligations under the [OSHA] standards...'") *citing,* 29

C.F.R. § 1926.16(b) Briad failed to meet its safety management responsibility as the prime contractor and "employer" under OSHA.

The present version of *Rule* 4:46-2(c) reflects the Court's decision in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995), which held that a trial court should make the same type of evaluation of evidential materials in ruling on a motion for summary judgment as in ruling on a motion for judgment under *Rule* 4:37-2(b) or *Rule* 4:40-1 or a motion for judgment notwithstanding the verdict under *Rule* 4:40-2. The standard is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Id.* at 523. That is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Brill*, 142 N.J. at 536.

Summary judgment is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This means that a summary judgment motion cannot be defeated if the non-moving party does not "offer ... any concrete evidence from which a reasonable juror could return a verdict in his favor." *Id.* at 256. Moreover, *Rule 4:46-2(c)* provides:

> [S]ummary judgment or order, interlocutory in character, may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages).

Accordingly, it is clear that a trial court is permitted to grant summary judgment as to a discrete issue rather than the entirety of an action. *Haelig v. Mayor & Council of Bound Brook Borough*, 105 N.J. Super. 7 (App. Div. 1969); see also, *Harrison Riverside v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470 (App. Div. 1998), *cert. denied* 156 N.J. 384 (1998)(summary judgment granted as to method of

calculating damages although issue of amount of damages remained in dispute).

Since there is simply nothing upon which Briad can contest the indisputable facts about its breach of its duty to the plaintiff, the Court should grant this Cross Motion for Partial Summary Judgment on the Issue of Breach. Jason Honigfeld's naked denials that he did not know are so patently and self-evidently false, that they cannot raise a question of fact.

V. There Is Sufficient Evidence to Submit the Punitive Damages Claim to the Jury

The facts of this case can support a punitive damages claim as to Briad and it should not be dismissed on summary judgment. Punitive damages may be awarded if plaintiff proves, by clear and convincing evidence, that defendant's conduct constitutes reckless indifference to the consequences of harm to others. *N.J.S.A. 2A:15-5.12; Smith v. Whitaker*, 160 N.J. 221, 241 (1999); *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)(to justify punitive damages award defendant's conduct must be reckless); *DiGiovanni v. Pessel*, 55 N.J. 188, 190 (1970)(punitive damages 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)). 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 conduct. *Id.*

Aggravating circumstances must be evaluated on a case-by-case basis. *McMahon v. Chryssikos,* 218 N.J. Supra. 572, 580 (Law Div. 1986). And there are of plenty in this case. Such circumstances must demonstrate a reckless disregard of persons who foreseeably might be harmed by defendant's conduct. *N.J.S.A.* 2A:15-5.12a. The Appellate Division in *Dong v. Alape*, 361 N.J. Super. 106 (App. Div. 2003), examined the non-exclusive list of circumstances prescribed by the Punitive Damages Act, *N.J.S.A.* 2A:15-5.12a, to determine whether the plaintiff was entitled to punitive damages. These circumstances include the *likelihood*, at the relevant time, that serious harm would result from the defendant's conduct, the defendant's *awareness* of reckless disregard of the likelihood that serious harm would arise from his conduct, and the conduct the defendant upon learning its conduct would likely cause harm, *N.J.S.A.* 2A:15-5.12b(4)(*emphasis added*).

When compared to the standard under the Punitive Damages Act ("PDA") and Model Jury Charge, it is clear the punitive damages claim as to Briad should be submitted to the jury. Under this standard, the following non-exclusive factors should be considered:

> (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; *Model Jury Charge* 8.60. There are plenty of facts in this case sufficient to have the jury pass on the issue of punitive damages. There is no question the dangerous condition at issue violated OSHA and a whole host of other safety standards digested in the facts section above. The Briad Defendants knew this, but chose to do nothing, because they did not want to

increase the cost and wanted to push the job as fast as possible. This all started and ended with one thing- placing profits over worker safety.

Again, we will not repeat all the facts above. But applying them to this standard shows the jury should decide punitive damages. As to (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct, safety research shows construction falls cause thousands of deaths each year. (*P35- Gallagher report at 4-5*). This is well known. There are a whole host of fall protection standards designed to prevent this very thing. These workers were 10, 20 and 30 feet high on this site in job made boxes sitting on a forklifts with no fall protection, in violation of these standards.

Briad knew this. The progress photos they took and circulated to the management team show it. They documented everything and there is nothing showing they ever stopped nor fined anyone for this practice. In fact the evidence suggests they preferred it this way because, "[D]elays will cost Briad money on the job." (*P14- Honigfeld II, 10-2-19 Deposition at 130-131*) And therefore, "[Y]ou always want them to push more." (*P15- Honigfeld Comp I, 7-13-17 Testimony at 16*).

Briad never fined any sub for a safety violation, even though their photos and records show so many. But they did fine them for delays and even terminated a contractor for it. (*P21- Bar-Mac termination letter, noting delays cost Briad money*) (*P14- Honigfeld II- 104, 130-131, 134-135*) Meeting minutes from just two days before the incident state, "Edgewood continues to run behind schedule." "*Window installation must move faster." (*P28 at 3, 4*).

Briad is a major hotel developer. It full well knows the risk of injury and death from falls on construction sites when OSHA rules are disregarded like happened here. The likelihood that serious injury would result from permitting this practice was well known by Briad. (*P26- Pagnotta at 51*) (*P13- Honigfeld I- 83-85*) (*P14- Honigfeld II- 12, 14*). Briad was also certainly aware of

its reckless disregard of the likelihood that the serious harm at issue would arise from its refusal to follow the OSHA rules generally on the site, and specifically as to fall protection. This is well documented in the progress photos, daily reports and testimony. In fact, when confronted with photos he took of workers at risk of being buried alive in unprotected trenches over their heads, a clear violation of OSHA's trench safety rules (*P35 at 19*), Briad's corporate representative expressed zero concern and instead quipped, "...Maybe they were very small people." (*P14- Honigfeld II- 77*)

Punitive damage are meant to punish and deter dangerous conduct. As such, a key factor is what the defendants did after learning about the harm their conduct caused. Did they show remorse and learn from their mistakes? If so they are less likely to repeat it. If not, they are a danger to the community and must be deterred. *N.J.S.A.* 2A:15-5.12; *Model Jury Charge* 8.60 Here defendants did none of this. As set forth in the facts above, they essentially doubled down on their conduct. The evidence shows even after this incident, they still permitted ongoing fall protection violations, permitted the use of these dangerous job made boxes, and continued to push Edgewood to move faster.

Concealment of one's conduct is another important factor in determining punitive damages. *N.J.S.A.* 2A:15-5.12; *Model Jury Charge* 8.60. As set forth in the facts above, Briad has been doing that from the beginning, and through this litigation. They gave false information to OSHA telling them this was an isolated incident they did not know about. Their corporate representative has given admitted false testimony about several important issues in the case. Even plaintiffs OSHA expert noted multiple times in summarizing his testimony, "Note: that testimony contradicts prior testimony." and "There are many comments he makes that contradict prior testimony." (*P35 at 17, 18*) Briad also worked hard to thwart discovery of the project and hide its conduct, requiring several motions and did not even conduct a corporate sweep to comply with the discovery demands.

(*P39*) (*P26- Pagnotta at 98, 111-112*)

There are numerous other examples set forth in the facts section above.

The motion to dismiss the claim for punitive damages should be denied. In *Santillan v. Sharmouj*, 289 F. App'x. 491(3d Cir. 2008) the Third Circuit upheld a jury award of punitive damages in a construction injury OSHA case involving a worker who fell from a building. Like the facts of the instant matter, the Court in *Santillan* found it compelling that the developer ignored the OSHA regulations and knew no safety precautions were enforced. The Court found the developer was reckless in retaining a foreman that took no steps to comply with the safety law. The conditions at the construction site were extremely poor as there was no safety equipment of any kind provided to the workers. Taken as a whole, this was sufficient to demonstrate the developer's reckless indifference towards the safety of the workers. *Santillan v. Sharmouj,* 289 F. App'x. 491, 496 (3d Cir. 2008).

In *Arroyo v. Scottie's Prof'l Window Cleaning, Inc,* 120 N.C. App. 154 (N.C. Ct. App. 1995) a window washer was inured when he fell while cleaning building windows. The Court permitted a punitive damages claim because the defendant had a practice of ignoring OSHA safety rules. Like in this case, there was no OSHA training nor oversight and safety protection was neither provided nor enforced. There was a history of safety non-compliance. The Appellate Court held that plaintiff had presented sufficient allegations of reckless conduct to state a claim for punitive damages. *Id. at* 155-60.

For all these reasons, the motion for summary judgment on the punitive damages claim should be denied.

CONCLUSION

For all these reasons, it is respectfully requested the Court deny the motion for summary judgment of the Briad defendants on the punitive damages claim and grant plaintiffs' cross motion for partial summary judgment on the issue of breach of its non-delegable duty to manage safety vis a vis the incident at issue. Plaintiff opposes summary judgment on spoliation in a separate filing.

Respectfully submitted,
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By: _____
GERALD H. CLARK

Dated: October 10, 2022
SJ opp-pun. and cross on breach- brief5.wpd