KEMAL BECIRAGIC and ALICJA M. KOCHANSKA BECIRAGIC, his wife, Plaintiffs-Appellants, v. BLUE BLADE CORP., J.H. SHAW REALTY, FENTON CONSTRUCTION CO., INC., UNITED SAFETY, LLC., ABC CORPORATIONS 1-5 and JOHN DOES 1-5, Defendants.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-000863-24** CIVIL ACTION On Appeal from the Law Division, Union County Docket No. UNN-L-000431-22 Sat Below: Hon. Mark P. Ciarrocca, P.J.Cv.

BRIEF IN SUPPORT OF THE APPEAL

On the brief and of counsel:

Salvatore Imbornone, Jr., Esq.
(Attorney ID #000801984)
Bryan R. Gavin, Esq.
(Attorney ID #132662014)
McHUGH & IMBORNONE, P.A.
29 Columbia Turnpike, Suite 101
Florham Park, New Jersey 07932
Telephone: (973) 966-1520
Email: b.gavin@minjlaw.com

Counsel for Plaintiffs-Appellants

Sherry L. Foley, Esq.
(Attorney ID #009821988)
Timothy J. Foley, Esq.
(Attorney ID #042741990)
FOLEY & FOLEY
600B Lake Street, Suite 2
Ramsey, New Jersey 07446
Telephone: (973) 304-6003
Email: tfoley@appealsnj.com

Co-counsel for Plaintiffs-Appellants

TABLE OF CONTENTS – BRIEF

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF TRANSCRIPT DESIGNATIONS

1T – Transcript of Motion Hearing dated August 2, 2024

TABLE OF CONTENTS – APPENDIX

(Volume 1 of 3 – Pa1 to Pa190)

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

In October 2020, the building owned by defendant, J.H. Shaw Realty (Shaw), and occupied by defendant, Blue Blade Steel Corporation (Blue Blade), was severely damaged by fire. Blue Blade hired several trades and subcontractors to restore the building, including defendant, Fenton Construction Co., Inc. (Fenton), to replace the roof. When the insurance investigation revealed the presence of asbestos, Blue Blade hired defendant, United Safety, LLC, to remediate portions of the roof containing asbestos. On April 8, 2021, while in the course of his employment for United Safety, plaintiff, Kemal Beciragic, was caused to fall approximately eighteen feet onto a concrete slab when a portion of the roof collapsed beneath him.

Plaintiffs, Kemal Beciragic and Alicja M. Beciragic, appeal from the order granting summary judgment in favor of Blue Blade and Shaw. In ruling on the motion, the trial court held that defendants owed no duty to Mr. Beciragic as an employee of an independent contractor because the inherent danger exception to liability applied. The ruling confused the risk of asbestos contamination and remediation, the condition that plaintiff's employer was engaged to address, with the risk of catastrophic failure of the roof. Blue Blade and Shaw chose not to retain a construction manager or general contractor for the restoration project, instead hiring a series of contractors and subcontractors directly. They also failed

to obtain a structural integrity survey required by the Occupational Safety and Health Association (OSHA) before demolition work may commence. By cutting corners, Blue Blade and Shaw failed to identify and to anticipate the dangers of the work site. As a result, no party obtained an analysis of the structural integrity of the roof, leading to an unexpected failure and severe and permanent injuries to Mr. Beciragic.

The prevailing presumption of tort liability is that an occupier of land owes a duty to his invitee to use reasonable care to make the premises safe. That duty includes the obligation to make reasonable inspection to discover dangerous conditions and to warn an independent contractor. United Safety's expertise is in asbestos removal and remediation, not structural engineering or analysis. Blue Blade and Shaw failed to act reasonably in omitting to ascertain the structural integrity of the building post-fire. It placed itself in the position of general contractor for the demolition and restoration of the building but did nothing to satisfy the regulatory requirements and industry standards to ensure a safe working environment.

The court below found that Blue Blade and Shaw did not exercise control over the contracted work. Consequently, no one did. Under the totality of the circumstances, considering the relationship of the parties, the nature of the risk, the opportunity to exercise reasonable care and the public interest in recognition of a

duty of care, Blue Blade and Shaw had an obligation under the law, regulations and industry standards to investigate and to warn of the dangerous condition of its property and to ensure a safe workplace. Summary judgment should have been denied.

PROCEDURAL HISTORY

In February 2022, plaintiffs sued J.H. Shaw Realty and Blue Blade Steel Corporation as the owners and occupiers, respectively, of the premises on which Mr. Beciragic was injured and as general contractors for the restoration project. Pa140. Plaintiff also named United Safety, LLC, Mr. Beciragic's employer, for discovery purposes. Pa141. In March 2022, plaintiff filed an amended complaint adding Fenton Construction Co., Inc., as a defendant. Pa17. The matter proceeded through discovery.

In June 2024, Blue Blade and J.H. Shaw moved for summary judgment. Pa64. In August 2024, the trial court granted summary judgment to Blue Blade and J.H. Shaw, issuing a written opinion. Pa1; Pa3. The court reasoned that regardless whether movants were viewed as owners and occupiers of the premises or as general contractor for the restoration work, they were relieved of any duty owed to plaintiffs because they disclosed the defect and foreseeable danger on the property to United Safety, Mr. Beciragic's employer. Pa13-14. In October 2024, the court entered an Amended Order granting summary judgment in favor of Blue

Blade and J.H. Shaw. Pa15. In October 2024, plaintiff resolved his claims against the remaining defendants. Pa514-15. Plaintiff now appeals from the Orders dismissing his claims against defendants Blue Blade and J.H. Shaw. Pa517.

STATEMENT OF FACTS

Mr. Beciragic's fall and injuries occurred on the premises of Blue Blade Steel Corporation, 123 North 8th Street in Kenilworth, New Jersey. Pa69 (#9). The Blue Blade Building was damaged by a fire on October 25, 2020, and required restoration. Pa67 (#1 & #2). The overall project involved demolition and construction to restore the fire damaged existing building. Blue Blade hired defendant, Fenton Construction Co., Inc., a roofing contractor, to repair the roof and support structures. Pa68 (#5). During the insurance investigation, Blue Blade was informed that the existing roof contained asbestos. Pa67 (#3). Blue Blade then hired Mr. Beciragic's employer, United Safety, LLC, to perform asbestos remediation. Pa67 (#4). Blue Blade also independently and directly retained other subcontractors and trades to complete the restoration of the building. Pa351 (#2).

The fire damage to the existing roof and structure was extensive. The demolition and restoration included asbestos containing material removal within the existing building including the roof; removal and replacement of the roofing system; structural steel roof work; and new mechanical systems, including electrical, plumbing and HVAC. However, Blue Blade determined to keep its

operations going while the restoration of the building was being performed. Pa218. Blue Blade hired, coordinated, scheduled, and paid for all aspects of the work. Pa109-10. According to Michael Mulcahy, Fenton's owner, "there was a lot of coordination that was necessary to keep Blue Blade's operations going." Pa219-20.

Blue Blade engaged Fenton, whose responsibilities included bringing in an engineer to review the structure and to recommend additional support steel to replace the damaged support steel, providing a new metal roof system and providing new wall panels. Pa211-12. Fenton's owner described Fenton as a construction manager for the project. Pa215. Fenton hired a subcontractor to remove damaged steel and to install new structural steel and roof members. Pa214. Fenton also engaged a supplier for the new roof system. Ibid. Fenton did not hire United Safety, however. According to Mr. Mulcahy, Don Lindewirth, the Blue Blade employee coordinating the restoration work, "wanted to hire United Safety directly." Pa215. As a result, Fenton was not overseeing United Safety's work.

On April 8, 2021, plaintiff, Kemal Beciragic, was in the course of his employment when he was caused to fall approximately eighteen feet onto the concrete slab below, sustaining catastrophic, life-altering injuries. Pa351 (#1 & #3); Pa353-54 (#10). Plaintiff did not fall through an opening in the roof (there was none); rather the surface of the old roof on which he was walking suddenly

collapsed out from under him. Pa351 (#3). Later that day, another United Safety worker fell through the same roof surface. Pa351 (#4).

The Blue Blade building had multiple roofs of varying heights. At the suggestion of Fenton, a temporary platform was created on a bridge crane below the highest section of the roof and above the equipment that Blue Blade was operating. Pa233-34. The platform served as both fall protection for Fenton and United Safety employees and a loading and removal deck for work on the upper roof section. Pa234. The platform served only a portion of the building. Pa235. Mr. Beciragic's fall occurred in a different area of the building with an eighteen-foot roof. Ibid. There was no similar fall protection discussed or installed in that section of the building. Pa239.

Blue Blade chose to act as its own general contractor. Blue Blade performed all the customary functions of a general contractor, except for having done absolutely nothing to ensure worker safety. Blue Blade was aware of the extent of the damage to the roof of the structure. Pa102-03. It was aware that the roof was "compromised." Pa103. However, Blue Blade failed to require either Fenton or United Safety to have a safety plan in place. Pa111. In violation of OSHA and industry standards, Blue Blade failed to have a demolition engineering survey performed on the structural integrity of its roof before directing construction work to begin. Pa111. Nor did it request Fenton or United Safety to have a demolition

engineering survey performed. Pa112. Blue Blade took no steps to ensure that the work being performed by Fenton or United Safety complied with OSHA standards. Pa113. Blue Blade's failure to secure an engineering survey of the structural integrity of the roof surface exposed plaintiff and others to an unforeseen roof collapse.

Plaintiff retained Cheryl Scanlon-Zinner, CSP, who issued reports dated July 31, 2023, February 7, 2024, and June 13, 2024. Pa357; Pa423; Pa434. In those reports, plaintiff's expert identified several OSHA safety regulations and standards adopted by professional organizations that evidence the duty Blue Blade owed to plaintiff, and all those on the work site, as construction project owner and general contractor. Pa367-71. Plaintiff also retained Jason Randle, P.E., who issued reports dated November 20, 2023, and January 2, 2024. Pa439; Pa464. Those reports identify Blue Blade's failures from a structural engineering perspective, further detailing how Blue Blade's actions, or lack thereof, violated the duty of care under the totality of the circumstances for a reasonable construction project owner and general contractor. Pa443-47.

Pursuant to relevant OSHA regulations and policies, Blue Blade was a controlling employer as defined under OSHA's Multi-Employer Citation policy. Pa367-69. It had both the right and obligation to control the work and to ensure a safe workplace. Regardless, Blue Blade made no effort to ensure a safe workplace

and also failed to engage anyone else to fulfill that requirement. Blue Blade was responsible for oversight and coordination of the project and did nothing. Pa109-10. Blue Blade hired various subcontractors to perform the demolition and construction work for the project. Blue Blade's project coordinator, Don Lindewirth, was asked if at any time Blue Blade ever assigned specific safety responsibilities to Fenton or United Safety. Pa109-10. He responded no. Pa110. Mr. Lindewirth was asked if Blue Blade had a policy in effect at the time of this project to ensure that the contractors on the project complied with any safety responsibilities or regulations. Ibid. His answer was "I believe it was part of their purchase order." Ibid. However, no purchase orders are part of the motion record, nor is there any evidence of what, if anything, the agreements indicated regarding the requirement to ensure a safe workplace. Mr. Lindewirth acknowledged that Blue Blade did not require a safety plan of either Fenton or United Safety. Ibid.

Initially, there was no scaffolding used under the roof work because Blue Blade was continuing to operate in the building. During the project, Fenton suggested to Blue Blade that a way to save a substantial amount of money would be for Fenton to construct a temporary platform on top of the Blue Blade bridge crane to act as a "catch platform" to reduce the fall distance in the event that a worker would fall while working on the roof. Using the Blue Blade bridge crane saved Blue Blade the cost of the construction of a scaffold under the highest

section of the roof to reduce the risk of falling and also offered less interruption of Blue Blade's operations. Despite recognizing that the work presented a fall hazard, Blue Blade took no steps to address that hazard throughout the rest of the work site. There were no precautions elsewhere, including but not limited to the lower roof where plaintiff's fall occurred. Blue Blade made a conscious decision to participate in providing fall protection for some of the work done on the roof, but not on the roof where plaintiff and other United Safety workers were required to work. Pa106.

Jason Randle, P.E., in his report dated November 20, 2023, identified and outlined the OSHA standards that were disregarded by Blue Blade. Those standards state "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(a)(1); Pa443. As noted by Mr. Randle, OSHA recognizes falls as the number one killer in construction. Pa443. OSHA standards assign prevention responsibilities to a controlling employer, i.e., in this case, Blue Blade, which include that "an engineering survey take place prior to starting construction work to determine the possibility of unplanned collapse." Pa443.

> 29CFR1926.501(a)(2). The employer shall determine if the walking/working surfaces on which its employees are required to work have the strength and structural integrity to support employees safely. **Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity**.
>
> 29CFR1926.850(a). Preparatory operations. **Prior to permitting employees to start demolition operations**, an engineering survey shall be made, by a competent person, of the structure **to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure**.
>
> **29CFR1926.850(b). When employees are required to work within a structure to be demolished which has been damaged by fire, flood, explosion, or other cause, the walls and floors shall be shored and braced**.
>
> [Pa443-44 (emphasis in original Randle report.]

Blue Blade failed to fulfill any of those regulatory requirements and also failed to ensure that any other party complied with those requirements, leading directly to Mr. Beciragic's fall and catastrophic injuries.

On April 8, 2021, with United Safety nearing the end of the project, Mr. Beciragic and three co-workers were returning to the roof from a break. Pa183. None of them were wearing safety harnesses or equipment. Pa183. As Mr. Beciragic was walking across the roof, it collapsed beneath him, causing him to fall to a concrete floor approximately eighteen feet below and suffer severe and permanent injuries. Pa154; Pa351.

LEGAL ARGUMENT

POINT I

THE ORDER BELOW MUST BE REVERSED BECAUSE THERE WERE DISPUTED ISSUES OF MATERIAL FACT THAT NEEDED TO BE RESOLVED BY A JURY. (Pa1; Pa3; Pa15)

A. Standard of Review.

In reviewing an order granting summary judgment, an appellate court uses the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); see Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) ("we review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court"). The trial court must not decide issues of fact; it must decide only whether any such issues exist. Brill v. Guardian Life. Ins. Co., 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); R. 4:46-5.

Summary judgment should not be granted where the decision of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211-12 (App. Div. 1987). Summary judgment is not a substitute for a full plenary

trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961). Accordingly, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Sisselman, 215 N.J. Super. at 212.

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)." Brill, 142 N.J. at 538. Moreover, courts are "not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

B. Whether Blue Blade breached its duty and caused the fall is for a jury.

The trial court erred by usurping the function of the jury and deciding as a matter of law that Blue Blade owed no duty to Mr. Beciragic. In dismissing the case on summary judgment, the trial court made determinations of fact that were not undisputed on the record presented. Fortunately, this Court is not bound by that reasoning but rather is compelled to examine the record de novo for admissible

evidence and reasonable inferences that would support the position of the non-movant. Templo Fuente, 224 N.J. at 199.

In 1776, New Jersey adopted its first Constitution. Included among the rights and privileges established was the following: "the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever." N.J. Const. of 1776 art. XXII. In 1844, the State of New Jersey adopted a new constitution that affirmed that the "right of trial by jury shall remain inviolate." N.J. Const. of 1844 art. I, ¶7. In 1947, the State of New Jersey again adopted a new constitution and again affirmed that "[t]he right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons." N.J. Const. art. I, ¶9. Under the New Jersey Constitution, whether the facts impose liability is for a jury, not the court.

Whether defendants breached their duty to plaintiffs and whether their negligence was the proximate cause of plaintiffs' damages are factual questions for a jury to decide. "[W]hether the duty was breached is a question of fact." Jerkins v. Anderson, 191 N.J. 285, 305 (2007). "[I]issues of proximate cause are considered to be jury questions." Perez v. Wyeth Labs. Inc., 161 N.J. 1, 27 (1999). Furthermore, the determination of whether a duty is owed, although generally an issue of law for the court, is "fact specific" and "must satisfy 'an abiding sense of basic fairness under all of the circumstances.'" Alloway v. Bradlees, Inc., 157 N.J.

221, 230 (1999) (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). When facts remain in dispute, the determination of whether a duty exists may not be amenable to resolution on motion.

Contrary to defendants' contentions, the material facts regarding duty, breach of duty and proximate cause are disputed. The determinations of control of the work, ability to control the work, coordination of the trades with Blue Blade's ongoing operations, the extent of the danger presented by the fire-damaged roof, and the safety obligations and perceived dangers of United Safety's scope of work are inappropriate for resolution by the court on summary judgment. Respectfully, the record does not clearly support the factual conclusions made below, particularly in light of the Constitutional right to trial by jury and the summary judgment standard of review. They constitute the resolution of factual disputes in favor of the movant and disregard of competent evidence and reasonable inferences favoring the non-movant. Those issues are all disputed on a full review of the record. Summary judgment was improvidently granted and should be reversed.

POINT II

UNDER GENERAL NEGLIGENCE PRINCIPLES, BLUE BLADE HAD A DUTY TO MR. BECIRAGIC AND BREACHED THAT DUTY. (PA1; PA15)

A claim of negligence requires a showing of: (1) a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty by defendant, and (3) an injury to plaintiff proximately caused by defendant's breach. Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div. 1997).

The existence of a duty is a legal question, Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991), and plaintiff has the burden of proving by competent, credible evidence that the defendant was negligent, and that defendant's negligence was a substantial contributing factor in causing plaintiff's loss. Scafidi v. Seiler, 225 N.J. Super. 576, 580 (App. Div. 1988), aff'd as modified, 119 N.J. 93 (1990).

The question of negligence turns on "the reasonableness of the action in relation to the foreseeable risks," which is "an essentially objective determination to be made on the basis of the material facts." Weinberg v. Dinger, 106 N.J. 469, 484 (1987). In making that determination, the Court must compare the defendant's conduct with that of a hypothetical person of reasonable vigilance, caution, and prudence in the same or similar circumstances. McKinley v. Slenderella Sys. of Camden, 63 N.J. Super. 571, 577 (App. Div. 1960). As the Court stated in Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968):

> It is well-settled law that a recovery for damages cannot be had merely upon proof of the happening of an accident. Negligence is never presumed; it, or the circumstantial basis for the inference of it, must be established by competent proof presented by plaintiff.

[Id. at 588.]

A. Landowner Liability.

A business invitee is one who is "invited on the premises for purposes of the owner that often are commercial or business related." Hopkins, 132 N.J. at 433. Generally, a landholder owes to business invitees a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered. Id. at 434. That standard of care encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions." Ibid. (citing Handleman v. Cox, 39 N.J. 95, 111 (1963)). In Monaco v. Hartz Mountain Corporation, the Court stated:

> [A] landowner must exercise reasonable care for an invitee's safety. That includes making reasonable inspections of its property and taking such steps as are necessary to correct or give warning of hazardous conditions or defects actually known to the landowner. The landowner is liable to an invitee for failing to correct or warn of defects that, by the exercise of reasonable care, should have been discovered.
>
> [178 N.J. 401, 414-15 (2004).]

Conversely, a landowner "generally is not liable for injuries caused by defects of which he had no actual or implied knowledge or notice, and no reasonable opportunity to discover. Whether a reasonable opportunity to discover a defect existed will depend on both the character and the duration of the defect." Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984) (internal citations

omitted). As such, a landowner would presumably not be held liable "where a defective condition was found not to be discoverable by reasonable inspection, or where a latent defect, undiscoverable except by extraordinary investigation, caused an injury shortly after a new owner bought a building." Ibid. In other words, a landowner "breaches his duty where he either has actual notice of a dangerous condition or if the condition existed for such a length of time that the owner should have known of the condition and fails to remediate the problem." Romeo v. Harrah's Atl. City Propco, LLC, 168 F. Supp. 3d 726, 732 (D.N.J. 2016). Notably, however, "[t]he mere existence of an alleged dangerous condition is not constructive notice of it." Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013) (internal quotation marks and citations omitted).

Furthermore, If the risk of danger to an invitee is reasonably foreseeable, then the scope of duty shall be determined in light of the actual relationship between the landowner and the invitee under the totality of the circumstances, i.e., the relationship of the parties, the nature of the risk, the opportunity to exercise reasonable care, and the public interest in recognition of a duty of care. See Schwartz v. Accuratus Corp., 225 N.J. 517, 518 (2016) (citing Hopkins, 132 N.J. at 439).

B. General Contractor Liability.

Ordinarily, a general contractor "is not liable for injuries to employees of the [sub]contractor resulting from either the condition to the premises or the manner in which the work is performed." Wolczak v. Nat'l Elec. Prods. Corp., 66 N.J. Super. 64, 71 (App. Div. 1961); see Muhammad v. N.J. Transit, 176 N.J. 185, 199 (2003). "The premise underlying that approach is that a general contractor 'may assume that the independent contractor and [its] employees are sufficiently skilled to recognize the dangers associated with their task and adjust their methods accordingly to ensure their own safety.' Tarabokia v. Structure Tone, 429 N.J. Super. 103, 113 (App. Div. 2012) (quoting Accardi v. Enviro-Pak Sys. Co., 317 N.J. Super. 457, 463 (App. Div. 1999)).

A general contractor's immunity "'[is not] disturbed by the exercise of merely such general superintendence as is necessary to [e]nsure [sic] that the subcontractor performs his agreement.'" Muhammad, 176 N.J. at 199 (quoting Wolczak, 66 N.J. Super. at 71). However, certain exceptions to the general principle have come to be accepted. Thus, a general contractor may be liable for a subcontractor's negligence where he retains control of the manner and means of doing the work contracted for. Id. at 198. A general contractor also may be liable where he knowingly engages an incompetent subcontractor or where the work contracted for constitutes a nuisance per se, namely, is inherently dangerous.

Tarabokia, 429 N.J. Super. at 113 (citing Majestic Realty Assocs., Inc. v. Toti Contracting Co., 30 N.J. 425, 431 (1959)).

"Although a foreseeable risk is the indispensable cornerstone of any formulation of a duty of care, not all foreseeable risks give rise to duties." Dunphy v. Gregor, 136 N.J. 99, 108 (1994). "Ultimately, [determining] whether a duty exists is a matter of fairness," ibid., and involves a complex analysis that "weigh[s], and balance[es] several factors - the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Alloway, 157 N.J. at 230 (quoting Hopkins, 132 N.J. at 439) (internal quotation marks omitted).

The issue has been posed as whether "a reasonable jury weighing the evidence in plaintiff's favor could determine the existence of facts that, based on the foreseeability of the risk of injury, the relationship of the parties, and the opportunity to take corrective measures, would support the determination that there was a duty of care owed to plaintiff that was breached by defendant[s]." Alloway, 157 N.J. at 240. "The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct." Hopkins, 132 N.J. at 439.

There is no duty of care based solely on a finding that OSHA regulations have been violated. Alloway, 157 N.J. at 236; Costa v. Gaccione, 408 N.J. Super.

362, 372-73 (App. Div. 2009); Slack v. Whalen, 327 N.J. Super. 186, 195 (App. Div.), certif. denied, 163 N.J. 398 (2000). Rather, a general contractor's duty of care is determined under "general negligence principles." Alloway, 157 N.J. at 230. OSHA violations are a factor in that analysis. Tarabokia, 429 N.J. Super. at 112; Costa, 408 N.J. Super at 372-73. In fact, evidence of the violation of OSHA regulations, though it may not be dispositive, is sufficient to defeat a motion for summary judgment. Alloway, 157 N.J. at 240-41 ("Facts that demonstrate an OSHA violation constitute evidence of negligence that is sufficient to overcome a motion for summary judgment.").

C. Independent Contractor – Inherent Danger.

"[T]he law carves out an exception to the requirement that premises be made safe for an independent contractor when the contractor is invited onto the land to perform a specific task in respect of the hazard itself." Olivo v. Owens-Illinois, Inc., 186 N.J. 394, 406-07 (2006). "[T]he duty to provide a reasonably safe working place for employees of an independent contractor does not relate to *known hazards* which are part of or incidental to the very work the contractor was hired to perform." Id. at 407 (quoting Muhammad, 176 N.J. at 199) (emphasis in original).

Specifically, the duty "does not entail the elimination of operational hazards which are obvious and visible to the invitee upon ordinary observation and which are part of or incidental to the very work the contractor was hired to perform."

Sanna v. Nat'l Sponge Co., 209 N.J. Super. 60, 67 (App. Div. 1986); see Wolczak, 66 N.J. Super. at 75; Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 318 (App. Div. 1996). That exception exists because "[tjhe landowner may assume that the worker, or his superiors, are possessed of sufficient skill to recognize the degree of danger involved and to adjust their methods of work accordingly.'" Muhammad, 176 N.J. at 199 (quoting Wolczak, 66 N.J. Super. at 75).

`"[T]he general principle is that the landowner is under no duty to protect an employee of an independent contractor from the very hazard created by the doing of the contract work,' provided that the landowner does not retain control over the means and methods of the execution of the project." Muhammed, 176 N.J. at 198 (quoting Gibilterra v. Rosemawr Homes, 19 N.J. 166, 170 (1955)).

Moreover, the exception does not cover the circumstance "where the land occupier fails to warn of a hazardous condition that the independent contractor is not there to repair, but only to traverse in order to reach another location to be addressed by the service the independent contractor has agreed to provide." Nielsen v. Wal-Mart Store #2171, 429 N.J. Super. 251, 265 (App. Div. 2013).

D. The Alloway Factors.

In Alloway v. Bradlees, Inc., 157 N.J. 221 (1999), the Court held that "the imposition of a duty of reasonable care is 'both fact-specific and principled,' and must satisfy 'an abiding sense of basic fairness under all of the circumstances in

light of consideration of public policy.'" Id. at 230 (internal citations omitted). In determining whether a duty exists under general negligence principles, courts should consider the foreseeability of the risk of injury and weigh the following additional factors: "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Ibid. (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). The Alloway Court also held that when "determining the scope of the duty owed * * * to plaintiff and the possible breach of such a duty, the applicability of federal safety regulation, specifically OSHA regulations, is highly relevant." Alloway, 159 N.J. at 234.

Significantly, the New Jersey Supreme Court explicitly held that "[f]acts that demonstrate an OSHA violation constitute evidence of negligence that is sufficient to overcome a motion for summary judgment." Id. at 240-41. In ultimately imposing a duty on the defendant in Alloway, the Court ruled that "[a] reasonable jury weighing the evidence in plaintiff's favor could determine the existence of facts that, based on the foreseeability of the risk of injury, the relationship of the parties, and the opportunity to take corrective measures, would support the determination that there was a duty of care owed to plaintiff that was breached by defendant." Id. at 240.

E. Discussion.

Applying those general negligence legal principles to this case favors imposing a duty on Blue Blade. The first factor, the foreseeability of the risk, is clearly present. Blue Blade was aware of the danger presented by the compromised, fire-damaged roof. It hired Fenton to replace the decking and, as necessary, support structure. A reasonable conclusion or inference is that the danger presented by the fire-damaged roof was both foreseeable and foreseen by Blue Blade.

> Q: Prior to the time that United Safety began removing asbestos-containing material from the building, did Blue Blade have a demolition engineering survey performed?
>
> A: No.
>
> Q: Did Blue Blade ask United Safety to have a demolition engineering survey performed?
>
> A. No.
>
> [Pa111 at 34:17-35:6.]

With respect to the relationship of the parties, the Court in Alloway found that [t]he relationship of the parties * * * created both the opportunity and capacity on the part of * * * [the defendant] to exercise authority and control over the equipment * * * if safety concerns were implicated." Id. at 233. The Court found that the defendant could be liable even if the injured contractor was using his own

equipment. Here, defendant, Blue Blade, undeniably had the ability to exercise authority and control over the work. When the insurance investigation disclosed asbestos, Fenton's work was placed on hold so that remediation could be performed. Blue Blade insisted on hiring the various trades – roofing and structural, asbestos remediation, electrical and plumbing – directly, creating a direct owner-contractor relationship with each of them and with it a duty to coordinate the work. Blue Blade failed to ensure that the work site was OSHA compliant while making it freely available to outside vendors, including but not limited to United Safety employees like Mr. Beciragic. Blue Blade continued to operate, despite the fire damage to its building, and was present through the restoration project. Blue Blade had the capacity to control the work and failed to do so.

With regard to the nature of the attendant risk, in this case, the vendor, Mr. Beciragic, was an asbestos remediation laborer. He did not contract asbestosis; he fell through an unsafe structure, a structure that Blue Blade's project coordinator described as obviously compromised but yet allowed its vendors to traverse at will. Blue Blade's reliance on United Safety to do all that was necessary to perform asbestos removal did not reasonably extend to a structural analysis of the building. Blue Blade obtained the results of the insurance investigation of the structure, which authorized removal, remediation and replacement of large sections of the

roof. Blue Blade remained in operation in the building, requiring both Fenton and United Safety to work around it. Blue Blade was in the best position to identify the potential hazards of the work as the OSHA regulations required.

Alloway also recognized that OSHA regulations are pertinent in determining the nature and extent of any duty of care. "The violation of a legislated standard of conduct may be regarded as evidence of negligence if the plaintiff was a member of the class for whose benefit the standard was established. J.S. v. R.T.H., 155 N.J. 330, 349 (1998); Carrino v. Novotny, 78 N.J. 355, 359 (1979); cf. Eaton v. Eaton, 119 N.J. 628, 636 (1990) (holding the violation of careless driving statute was negligence *per se* because statute specifically incorporated common-law standard of care)." Alloway, 157 N.J. at 236.

Applying that principle to workplace settings, "proof of deviation from a statutory standard of conduct, while not conclusive on the issue of negligence in a civil action, is nevertheless a relevant circumstance to be considered by the trier of fact in assessing tort liability." Bortz v. Rammel, 151 N.J. Super. 312, 320 (App. Div. 1997). In Bortz, the court determined that the Construction Safety Act and its implementing regulations, primarily N.J.A.C. 12:180-3.15.1, "substantially qualified" the common-law rule by imposing a non-delegable duty on a general contractor to "assure compliance with the requirements of this Chapter from his employees as well as all subcontractors," and that those legislative mandates gave

rise to a duty on the part of a general contractor to take the necessary steps to ensure the safety of all employees on the site. Id. at 319-20; see Alloway, 157 N.J. at 236-37 (quoting Bortz with approval).

Finally, in light of the specific facts of this case, public policy dictates the imposition of a duty on Blue Blade. Courts are "required to draw on notions of fairness, common sense, and morality in order to fix the limits of liability as a matter of public policy." Hopkins, 132 N.J. at 443. The default duty is that a party should act reasonably under the totality of the circumstances. Ibid. Defendant seeks to place all responsibility on United Safety for the safety of Mr. Beciragic's work. In this case, not only would it be wholly unfair for Blue Blade, the occupier of the building and the *de facto* general contractor based on its decision to hire each trade independently, to have no responsibility for the safety of the work site. It essentially would absolve Blue Blade from ignoring OSHA regulations and the obligations of its role as self-appointed general contractor. Although not dispositive of negligence, Blue Blade's failures are the very type of conduct that is "evidence of negligence that is sufficient to overcome a motion for summary judgment." Alloway, 159 N.J. at 240-41. Whether that conduct was reasonable under general notions of fairness as a matter of public policy is a fact-specific inquiry that should have been presented to a jury. Sisselman, 215 N.J. Super. at 211-12. Summary judgment is not permitted as a substitute for a full plenary trial

where the facts and circumstances require one. United Advertising Corp., 35 N.J. at 195-96.

POINT III

THE TRIAL COURT ERRED BY FINDING THAT BLUE BLADE DID NOT EXERCISE CONTROL OVER THE RESTORATION PROJECT. (PA1; PA3; PA15)

Blue Blade employee, Don Lindewirth, testified that he was the point person for Blue Blade for the restoration project. He located and hired the contractors, in particular Fenton and United Safety. Pa93. "I think the people gave me suggestions or something like that, but I coordinated the contractors." Pa93. Asked if Blue Blade considered hiring a general contractor for the remediation project, Mr. Lindewirth responded "We hired Fenton to repair and replace the roof." Pa94. Asked if he was the employee of Blue Blade that was responsible for overseeing the project of repairing and replacing the damaged roof, Mr. Lindewirth stated "I was responsible for coordinating the project through Fenton and through United Safety. Pa109.

> Q. Did you ever direct any work completed by Fenton?
>
> A. I directed them to repair and replace the roof.
>
> Q. Did you ever direct any work completed by United Safety?
>
> A. I directed them to – you know, take care of the remediation of the asbestos.

[Pa109-110.]

Mr. Lindewirth also acknowledged that Blue Blade did not assign any specific safety responsibilities to Fenton or to United Safety. Pa110-111. Blue Blade did require Fenton or United Safety to have a safety plan in place or take any steps to ensure compliance with OSHA, but Mr. Lindewirth acknowledged that had he seen United Safety personnel working without a safety harness, he would have said something. Pa111-14.

On those facts, Blue Blade's control of the project was an open question of fact to be resolved by a jury. Blue Blade acknowledged coordinating the project and the ability to address safety concerns if observed. It did not assign any safety obligations for the work to the hired contractors. Blue Blade continued to operate in the building and required coordination between its ongoing operations and the sequencing of the hired contractors. Notably, it claimed to have a written contract with United Safety, but there is no contract in the record. Asked if Blue Blade had a policy in effect to ensure that its hired contractors complied with any safety responsibilities, Mr. Lindewirth responded "I believe it was part of their purchase order." Pa111. There are, however, no purchase orders in the record. Who was responsible for safety and control of the work given what Mr. Lindewirth described as an obviously compromised roof structure, Pa103, is at best unclear from the

motion record. Given the movant's burden on a motion for summary judgment, the finding as an undisputed material fact that Blue Blade did not exercise control over the restoration project was erroneous.

POINT IV

THE TRIAL COURT ERRED BY HOLDING THAT THE INHERENT DANGER EXCEPTION TO LANDOWNER LIABILITY APPLIED. (PA1; PA3; PA15)

There is a glaring discrepancy in the record concerning whether the remediation of asbestos materials being performed by United Safety presented an inherent danger of a sudden roof collapse. According to the testimony, United Safety was months into the project, in fact, toward the end of the project when Mr. Beciragic fell. There is no record of any prior falls, although there was an arrested fall without major injuries after Mr. Beciragic's fall. According to United Safety's supervisor, Mr. Robert Stajic, United Safety personnel **never** went up to the roof without a safety harness. Pa312 ("Every time without fail. Otherwise if they didn't put their harness on, they wouldn't go up on the roof."). Yet, when Mr. Beciragic fell through the roof, he was not wearing a harness. Pa183. Nor were any of his co-workers. Ibid. Mr. Beciragic testified that most workers and most of the time the harnesses were not worn because they interfered with the work being done. Pa179 ("That is actually hindering and blocking us from doing our job

properly because when we are wearing that, we can get entangled in it and then have greater problems."). "[T]here were two, maybe three, maybe four harnesses, protection gear up there, but nobody was wearing them." Ibid. The fall occurred when returning to the roof from a break, and none of the four United Safety employees were wearing a harness as they returned to the roof. Pa183.

The record suggests that only sections of the roof were compromised and considered to be inherently dangerous. Mr. Beciragic's co-worker, Vanco Petkov, testified that Mr. Beciragic was walking across the roof to get his harness when he fell. The lack of use of the harnesses in favor of keeping up with the schedule suggests that the workers did not perceive a danger across the entirety of the scope of work. They are not, however, engineers or structural designers. They are laborers, which is why OSHA regulations and the Construction Safety Act, with its implementing regulations, exist. Summary judgment should have been denied.

CONCLUSION

For the foregoing reasons, dismissal of plaintiffs' Complaint was error. Plaintiffs had indisputably come forward with evidence to establish that defendants owed a duty, breached that duty and that the breach proximately caused Mr. Beciragic's injuries, in whole or in part. On summary judgment, the court is not concerned with the weight of the evidence, only its existence. Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). Plaintiffs produced sufficient evidence, even if disputed, to

preserve their constitutional right to a trial of issues of fact before a jury. Plaintiffs respectfully request that the trial court's order granting judgment to defendants be reversed and the matter remanded.

Respectfully submitted,

/s *Timothy J. Foley*

Timothy J. Foley, Esq.
Co-counsel for Plaintiffs-Appellants,
Kemal Beciragic and Alicja M.
Kochanska Beciragic

Dated: May 14, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-000863-24

KEMAL BECIRAGIC and ALICJA M. KOCHANSKA BECIRAGIC, his wife, *Plaintiffs-Appellants,* vs. BLUE BLADE CORP. and J.H. SHAW REALTY, *Defendants-Respondents,* FENTON CONSTRUCTION CO., INC., UNITED SAFETY, LLC., ABC CORPORATIONS 1-5 and JOHN DOES 1-5, *Defendants.*	:	CIVIL ACTION ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY Docket No. UNN-L-000431-22 Sat Below: HON. MARK P. CIARROCCA, P.J.CV.

BRIEF FOR DEFENDANTS-RESPONDENTS

PETER J. DAHL – ID# 062402013
LAW OFFICE OF JAMES H. ROHLFING
Attorneys for Defendants-Respondents
445 South Street, Suite 200
Morristown, New Jersey 07960
(973) 631-7358
pdahl2@travelers.com

Date Submitted: July 14, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (383336)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Blue Blade Steel Corporation ("BBS") engaged Fenton Construction Co. ("Fenton") to repair its factory roof, which had been damaged by an unexpected fire. Before repairs could commence, it was discovered that asbestos in the roof required remediation. Consequently, BBS contracted United Safety, LLC ("United Safety"), an asbestos remediation specialist, to remove the affected sections of the roof. No other contractors were involved in the roof work. Plaintiff, employed by United Safety as a laborer, was tasked with removing asbestos from the fire-damaged roof.

Being aware of the roof's compromised condition, United Safety instructed all of it laborers to wear fall protection gear, which United Safety provided. Plaintiff, however, refused to wear the fall protection gear and was not secured when he fell through the damaged roof, resulting in personal injuries.

Plaintiff acknowledged his awareness of the fire damaged roof and confirmed he was performing his assigned duties at the time of the fall, using tools supplied by United Safety. Testimonies from United Safety's owner, field supervisor, project manager and even the Plaintiff corroborated that United Safety operated independently, without direction from BBS. A BBS representative further confirmed that BBS did not oversee United Safety's work,

given the specialized nature of asbestos remediation, which requires expertise beyond BBS's capabilities.

Ultimately, the trial court correctly determined that BBS was not liable for the plaintiff's injuries, in accordance with established New Jersey law as Plaintiff was performing the very work he was hired to perform when he was injured.

PROCEDURAL HISTORY

BBS adopts the procedural history as outlined in Plaintiff Plaintiff's Appellate Brief. (*See* Plaintiff's Brief, pages 3-4).

STATEMENT OF FACTS

A. Background

On October 25, 2020, a fire occurred at 23 North 8th Street in Kenilworth, New Jersey. (*See Pa92*, 15:10-16). As a result of the fire, repairs needed to be made to the roof located at 23 North 8th Street in Kenilworth, New Jersey. (*See Id*. at 15:10-16). During an insurance investigation, it was discovered that the roof at 23 North 8th Street in Kenilworth, New Jersey contained asbestos that needed to be removed before a new roof could be installed. (*See Pa135*, 58:22-25 – 59:1-5).

As a result, Blue Blade Steel Corporation ("BBS") hired United Safety to conduct asbestos remediation on the fire damaged roof at 23 North 8th Street in

Kenilworth, New Jersey. (*See Pa136,* 59:15-20). BBS also hired Fenton Construction ("Fenton") as a roofing contractor. (*See Pa93,* 16:20-22).

As part of the hiring process, BBS researched both United Safety and Fenton, looked at their safety records and the safety policies on their respective websites:

> Q: What steps did you take or Blue Blade take to ensure that Fenton complied with OSHA standards?
> A: When we researched both companies, we looked at their safety records and their safety policies that were on their website.

(*See Pa112,* 35:15-20).

B. The Accident

On April 8, 2021, Plaintiff was working as an asbestos laborer for United Safety on the roof at 23 North 8th Street in Kenilworth, New Jersey. (*See Pa141*, Plaintiff's Complaint, count 1, paragraph 3; *Pa154*, Plaintiff's Answers to Interrogatories, #2; *Pa182,* 50:14-25 – 51:1-3). While working on the roof, Plaintiff was aware that it was fire damaged:

> Q. Now, the building where you were working when this accident occurred, had it had a fire before this? Had the building been burned or been on fire before this?
> A. Yes.
> Q. Okay. And what was your understanding as to what United Safety would be doing at this building?
> A. What was burned needed to be removed.
> Q. So you were removing debris, right, garbage, debris?
> A. Yes.

> Q. Were you also removing asbestos roof materials and wall materials from this material?
> A. Yes

(*See Pa182*, 50:19-25 – 51:1-3).

Plaintiff confirmed that he was in the process of removing the fire damaged roof and throwing it into a container, as he was hired to do, when he fell through the roof:

> Q. So tell me, right before you fell, what job were you doing? What were you doing?
> A. Lifting off the roof and throwing it in a container.
> Q. So you were removing roof material and then throwing it into a dumpster?
> A. Yes.

(*Id*. at 56:12-21).

While working on roof, Plaintiff broke through the fire damaged roof and fell to the ground. (*See Pa183*, 56:22-25 – 57:1). Despite being instructed to wear fall protection gear by his employer, United Safety, Plaintiff chose not to wear fall protection gear:

> Q. Did someone tell you to use fall protection when you worked for United Safety?
> A. Well, yes, I mean he may say that we should put that, but we are not putting it.
> Q. Who is "he," is that your supervisor that told you you should use it?
> A. Yes, supervisor.
> Q. And even though he told you to use it, you didn't obey him?
> A. That is actually hindering and blocking us from doing our job properly because when we are wearing that, we can get entangled in it and then have greater problems.

(See Pa179, 38:14-25 – 39:1).

Other United Safety employees confirmed that they always wore fall protection gear while on the roof, even when leaving to take a break and that fall protection gear was required at all times while on the roof. (*See Pa330*, 16:9-12; 60:13-17).

C. BBS informs United Safety and Fenton about the roofing condition.

Michael Mulcahy, Fenton's Construction Manager for the work at 23 North 8th Street in Kenilworth, New Jersey, testified that BBS, Fenton and United Safety held safety meetings prior to the start of the project:

> Q: Prior to the start of United Safety's work at this project, were there any project meetings held where Fenton Construction and Blue Blade and United Safety got together and talked about the project?
> A: Yes.
> Q: Were there minutes taken of those meetings?
> A: Not that I'm aware of.
> Q: Was safety discussed at the meetings?
> A: At some of them.
> Q: Was it generally understood by Fenton Construction that there were going to be individuals involved in the asbestos abatement that were going to be working up on the roof that had been damaged by the fire?
> A: Yes. United Safety's responsibility was to advise us and Blue Blade the areas that they were going to be working, because they had to prep and install plastic to seal off the areas. So there was a lot of coordination that was necessary to keep Blue Blade's operations going.

(*See Pa219-Pa220*, 28:2 – 29:1).

Further, John Dalessio, a structural engineer hired by Fenton, inspected the roof and pointed out to United Safety and Fenton where wood members were charred or burned through:

> Q: So my question, which I'm trying to make it as focused as possible, is during those meetings, before any work was begun, any asbestos abatement was done, was there a discussion among the three companies, Fenton Construction, United Safety, and Blue Blade, that there may be areas of the roof that were damaged by the fire and might not be amenable to walking on them?
> A: So I can tell you that the engineer, John Dalessio, structural engineer, when he did his assessment and determination, there were members of -- wood members that have been charred or burned through. And they were pointed out to United Safety. They were pointed out to us.

(*See Pa221-Pa222*, 30:15-25 – 31:1-3).

Vanko Petkov, the owner of United Safety, testified that he was aware that the roof at 23 North 8th Street in Kenilworth, New Jersey was damaged by the fire and compromised:

> Q. And what was your understanding of the work that needed to be done?
> A. To be done, roof. To remove the roof.
> Q. Do you know why the roof needed to be removed?
> A. Because from the fire.
> Q. Did you ever go up and look at the roof?
> A. No. There was fire on that time and -- no, I wasn't --
> Q. Okay.
> A. -- on the roof.
> Q. Did you know that the roof had been damaged?
> A. Yes.
> Q. Did you know that the roof had been compromised?
> A. Yes.

(*See Pa*292, 10:24-25 – 11:1-17).

Robert Stajic was the field supervisor for United Safety and was involved with the project at 23 North 8th Street in Kenilworth, New Jersey. (*See* Pa309, 10:6-15). Mr. Stajic testified that he was informed that the roof was fire damaged before he even came onto the jobsite by United Safety:

> Q. Okay. No one ever told you that there was a fire at Blue Blade that caused the damage to the roof?
> A. Yeah. No, I was -- I was informed of that, yes.
> Q. Okay. Who informed you of that?
> A. My employer.
> Q. When did they inform you of that?
> A. Before I even came to that jobsite.

(*See Pa318,* 46:7-15).

D. United Safety performs the work without control from BBS or JHS.

Vanko Petkov, United Safety's owner testified that no one from BBS ever provided United Safety with any tools or with a schedule for work or when it should be done. (*See Pa297,* 32:11-19). Vanko Petkov was not even familiar with JHS. (*Id*. at 33:13-17).

Robert Stajic, United Safety's field supervisor, testified that BBS did not direct the work of United Safety. (*See Pa311,* 18:18-21). Boban Verigikj worked as United Safety's Project Manager for the work done at 23 North 8th Street in Kenilworth, New Jersey. (*See Pa330,* 8:13-15). Boban Verifikj also confirmed that no one from BBS directed or controlled the work of United Safety:

> Q. Would you agree with me that asbestos remediation and asbestos removal, that's a very specialized field, isn't it?
> A. Yes.
> Q. Did anybody tell United Safety how to do that work, how to do the asbestos remediation or removal or demolition?
> A. No.
> Q. Did anyone from Blue Blade ever give any instruction to you about how the work should be done?
> A. No. We know our job, what we need to do because we follow regulations, not just the safety regulations, the safe -- the people around us.

(*See Pa333*, 18:17-25 – 19:1-6).

Plaintiff confirmed that all of the tools he used were provided by United Safety:

> Q. Who supplied your tools and equipment so that you could work at this job site?
> A. Our firm.
> Q. Would that be United Safety?
> A. Yes

(*See Pa181*, 47:13-17).

Plaintiff also confirmed that he did not take direction from anyone other than his employers at United Safety:

> Q. When you were on the job site where the accident happened, did you take instructions from anybody other than your supervisor from United Safety?
> A. We don't mix with the other groups or other workers.
> Q. Okay. I understand your answer, but I have to make sure it is clear for the record. Is it fair to say that you did not take any instructions on the job site from anybody else, other than your supervisor at United Safety?
> A. No.

> Q. No, you didn't take any instructions or no, that's not fair to say?
> A. No, I did not take any instructions from anybody else. I don't know anybody else

(*Id*. at 81:17-25 – 82:1-7).

Lastly, Don Lindewirth, of BBS, testified that the details of the repair of the roof were contracted to Fenton and United Safety as they had the expertise:

> Q: When he testified, and you can tell me, "I agree or disagree," but when he testified back on March 7th, he said that Don Lindewirth was the person overseeing this project for Blue Blade. Do you agree or disagree with that?
> A: I think I'm hung up on the definition of overseeing the project. What I oversaw was we gave the purchase orders to the guys who were responsible for repairing the roof and replacing the roof, and we gave the contract to the guys that were responsible for the asbestos remediation. As far as details below that, you know, those responsibilities were contracted to our contractors who had the expertise.

(*See Pa108-Pa109*, 31:11-25 – 32:1-2).

LEGAL ARGUMENT

The overwhelming evidence in this case demonstrates that Plaintiff fell while performing the very specialized task that he was hired to perform. Every employee of United Safety, including Plaintiff, confirmed that nobody directed or controlled the work of United Safety. Therefore, summary judgment was appropriate.

I. NEITHER J.H. SHAW REALTY, AS A LANDOWNER, NOR BLUE BLADE STEEL CORPORATION, AS A TENANT, OWED A DUTY TO THE PLAINTIFF TO PROTECT HIM FROM THE VERY WORK WHCH HE WAS HIRED TO PERFORM

The Plaintiff's brief opens by providing an overview of New Jersey law concerning landowners, general contractors, inherent dangers, and the *Alloway* factors, as detailed in Points A, B, C, and D of Plaintiff's brief. Subsequently, the Plaintiff endeavors to amalgamate these diverse legal principles into a liability theory against BBS and JHS. However, as will be demonstrated below, the Plaintiff's disjointed collection of cases fails to establish a coherent legal theory that would impose a duty on BBS or JHS.

BBS and JHS hired United Safety to perform repairs to the fire damaged roof. Neither BBS nor JHS retained any control over the work performed by United Safety. Judge Michels writing for the Appellate Division in the case of

Dawson v. Bunker Hill Plaza Associates, 289 N.J. Super 309 (App. Div. 1996) encapsulated the state of the law in New Jersey on this issue when he wrote:

> As a general rule, a landowner has a on-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers. Kane v Hartz Mountain Indus. 278 N.J. Super 129, 140 (App.Div. 1994) affd, 143 N.J. 141 (1996). (Remaining citations omitted) However, an owner is not responsible for harm which occurs to an employee as a result of the very work which the employee was hired to perform. Kane, supra, 278 N.J Super, at 140. Under this well recognized exception to the general rule, "[t]he duty to provide a reasonably safe place to work is relative to the nature of the invited endeavor and does not entail the elimination of operational hazards which are obvious and visible to the invitee upon ordinary observation and which are part of or incidental to the very work the contractor was hired to perform." *Sanna v National Sponge Co*, 209 N.J. Super. 60, 67 (App.Div.) 1986 (citing *Wolczak v National Electric Products Corp*., 66 N.J. Super 64 (App.Div. 1961)).

Stated differently, "[t]he landowner is under no duty to protect an employee of an independent contractor from the very hazard created by doing the contract work." *Ibid*; see also *Wolczak*, supra 66 N.J.Super, at 75. Further, "[t]he landowner may assume that the worker, or his superiors, are possessed of sufficient skill to recognize the degree of danger involved and to adjust their methods of work accordingly." *Wolczak*, supra 66 N.J. Super at 75. A landowner, of course, will not escape liability if the landowner retains control "over the manner and means by which the work is to be performed, [or] where the work constitutes a nuisance per se or where one knowingly engages an

incompetent contractor." *Cassano v. Aschoff,* 226 N.J. Super. 110,113 (App.Div. 1998).

The New Jersey Supreme Court has repeatedly upheld the *Wolczak* line of cases, most recently in *Muhammad v. New Jersey Transit,* 176 N.J. 185, 198–99 (2003), which has a nearly identical fact pattern to the case at bar.

i. United Safety was hired to repair the damaged roof.

United Safety's owner and Plaintiff both testified that United Safety was hired to repair the roof which had been damaged by a fire. In fact, Plaintiff's own description of the work he was going to perform demonstrates that he was there to repair a damaged roof:

> Q. Now, the building where you were working when this accident occurred, had it had a fire before this? Had the building been burned or been on fire before this?
> A. Yes.
> Q. Okay. And what was your understanding as to what United Safety would be doing at this building?
> A. What was burned needed to be removed.
> Q. So you were removing debris, right, garbage, debris?
> A. Yes.
> Q. Were you also removing asbestos roof materials and wall materials from this material?
> A. Yes

(See *Pa182*, 50:19-25 – 51:1-3). Additionally, Vanko Petkov, the owner of United Safety, testified that United Safety's job was to repair the roof that was damaged and compromised by the fire:

> Q. And what was your understanding of the work that needed to be done?
> A. To be done, roof. To remove the roof.
> Q. Do you know why the roof needed to be removed?
> A. Because from the fire.
> Q. Did you ever go up and look at the roof?
> A. No. There was fire on that time and -- no, I wasn't --
> Q. Okay.
> A. -- on the roof.
> Q. Did you know that the roof had been damaged?
> A. Yes.
> Q. Did you know that the roof had been compromised?
> A. Yes.

(*See Pa292*, 10:24-25 – 11:1-17).

Plaintiff, both directly, and through his employer, knew that the roof was damaged by fire, needed to be replaced and that it was the job of United Safety to remove the damaged roof. As such, the first element is met. United Safety was hired to repair the damaged roof.

ii. Plaintiff was carrying out the job he was hired to perform when the accident occurred.

Plaintiff was not in process of traversing the jobsite to get to the roof when the accident occurred as Plaintiff's brief insinuates. Plaintiff very clearly testified that he was lifting off the roof and throwing it into the dumpster right before he fell:

> Q. So tell me, right before you fell, what job were you doing? What were you doing?
> A. Lifting off the roof and throwing it in a container.
> Q. So you were removing roof material and then throwing it into a dumpster?

A. Yes.

(*See* Pa183 at 56:12-21).

Plaintiff's testimony is unambiguous, and nothing has been cited in the record that indicates Plaintiff was merely traversing the jobsite when the fall occurred. Further, the exception would apply even if Plaintiff was traversing the jobsite as his work required him to perform his tasks amongst the hazard, specifically the roof. The general rule that a landowner has no duty to protect an employee of an independent contractor from the very hazard created by doing the work extends to those tasks that must be performed "amidst the visible hazards." (*Wolczak v. Nat'l Elec. Products Corp.*, 66 N.J. Super. 64, 75 (App. Div. 1961). Here, Plaintiff had to traverse the roof to do his job. He was aware that the roof was damaged by fire and he was in the process of removing it as a result. (*See Pa182*, 50:19-25 – 51:1-3).

iii. Neither BBS nor JHS maintained any control over the work performed by United Safety.

Each one of United Safety's employees confirmed that they did not take any direction from BBS or JHS. This is further bolstered by BBS's employee Don Lindewirth confirming that other than hiring United Safety, everything beyond hiring was left up to United Safety because it had the expertise in asbestos remediation. (*See Pa108-Pa109*, 31:11-25 – 32:1-2).

Vanko Petkov, United Safety's President testified that no one from BBS ever provided United Safety with any tools or with a schedule for work or when it should be done. (*See Pa297,* 32:11-19). Vanko Petkov was not even familiar with JHS. (*Id*. at 33:13-17). Robert Stajic, United Safety's field supervisor, testified that BBS did not direct the work of United Safety. (*See Pa311*, 18:18-21). Boban Verigikj, United Safety's Project Manager for the work done at 23 North 8th Street in Kenilworth, New Jersey, testified that no one from BBS directed or controlled the work of United Safety:

> Q. Would you agree with me that asbestos remediation and asbestos removal, that's a very specialized field, isn't it?
> A. Yes.
> Q. Did anybody tell United Safety how to do that work, how to do the asbestos remediation or removal or demolition?
> A. No.
> Q. Did anyone from Blue Blade ever give any instruction to you about how the work should be done?
> A. No. We know our job, what we need to do because we follow regulations, not just the safety regulations, the safe -- the people around us.

(*See Pa333*,18:17-25 – 19:1-6). Even the Plaintiff confirmed that nobody other than United Safety provided him with any equipment or tools for the work he was performing:

> Q. Who supplied your tools and equipment so that you could work at this job site?
> A. Our firm.
> Q. Would that be United Safety?
> A. Yes

(*See Pa181*, 47:13-17).

Plaintiff also confirmed that he did not take direction from anyone other than his employers at United Safety:

> Q. When you were on the job site where the accident happened, did you take instructions from anybody other than your supervisor from United Safety?
> A. We don't mix with the other groups or other workers.
> Q. Okay. I understand your answer, but I have to make sure it is clear for the record. Is it fair to say that you did not take any instructions on the job site from anybody else, other than your supervisor at United Safety?
> A. No.
> Q. No, you didn't take any instructions or no, that's not fair to say?
> A. No, I did not take any instructions from anybody else. I don't know anybody else

(*Id*. at 81:17-25 – 82:1-7).

Lastly, Don Lidewirth confirmed that BBS and JHS relied on United Safety and Fenton to perform their respective duties as they had the expertise:

> Q: When he testified, and you can tell me, "I agree or disagree," but when he testified back on March 7th, he said that Don Lindewirth was the person overseeing this project for Blue Blade. Do you agree or disagree with that?
> A: I think I'm hung up on the definition of overseeing the project. What I oversaw was we gave the purchase orders to the guys who were responsible for repairing the roof and replacing the roof, and we gave the contract to the guys that were responsible for the asbestos remediation. As far as details below that, you know, those responsibilities were contracted to our contractors who had the expertise.

(*See Pa108-Pa109*, 31:11-25 – 32:1-2).

As evidenced from the above, Plaintiff was hired to remove a fire damaged roof and was in the process of doing same when the fall occurred. BBS and JHS did not retain any control over United Safety or Fenton. Instead, BBS and JHS hired United Safety for their expertise in asbestos removal and allowed them to complete the job based on that expertise.

Plaintiff has cited nothing that raises a genuine issue of material fact that would show that BBS or JHS had control of the project or acted as a general contractor. In fact, the only thing that Plaintiff relies on is the testimony of Don Lindewirth who specifically stated that BBS did not control or direct the work of United Safety or Fenton because their work was specialized, and the contractors had the expertise. (*See Pa108,* 31:11-25 – 32:1-2). Mr. Lindewirth specifically stated that all BBS did was hire United Safety and Fenton and that "[a]s far as details below that, you know, those responsibilities were contracted to our contractor who had the expertise. (*See Id*. at 31:19-25 – 32:1-2). This is also corroborated by the testimony of Plaintiff who confirmed BBS and JHS never provided him with any tools, United Safety's Foreman who confirmed BBS and JHS never directed United Safety's work and United Safety's President who confirmed BBS and JHS never provided United Safety with a schedule for work or when it should be done. Nothing in the record has been cited that creates a genuine issue of material fact in this regard.

Further, in an effort to make the work that was performed sound like it was part of a larger construction project that would need a general contractor, Plaintiff argues that BBS hired various contractors to perform demolition and construction work for the project. (*See* Plaintiff's Brief, Page 8). However, Plaintiff only cites to two other contractors, neither of which are even identified. One an unnamed electrical contractor and the other an unnamed plumbing contractor. Neither of these contractors had anything to do with the roof repair that the Plaintiff was working on:

> Q. Did Blue Blade also hire plumbing companies?
> A. Not in context of the roof, no.
> Q. Did Blue Blade hire any electrical companies in the context of the overall roof repair project?
> A. I don't think the electrics were -- I don't think they were part of the roof.

(*See Pa108*, at 33:5-12). In fact, the plumbing and electrical contractors were not even present on the same days as United Safety and Fenton. (*See Id*. at 40:9-25 – 41:1-19). Instead, the plumbing and electrical contractors were part of an office renovation that was being done at Blue Blade's offices unrelated to the roof repair necessitated by the fire. (*See Pa219,* 70:3-4).

This was not a massive construction project that required a general contractor. BBS hired Fenton to repair a fire damaged roof and when they discovered asbestos, they had to hire a second contractor to remediate the asbestos before the roof could be repaired. This project did not require a general

contractor and nothing in the record shows that BBS or JHS acted as the general contractor.

II. *ALLOWAY* IS NOT APPLICABLE TO THIS CASE.

Plaintiff next relies on *Alloway v. Bradlees, Inc.*, 157 N.J. 221, 227 (1999). However, *Alloway* would only apply if BBS/JHS acted as the general contractor, and if the accident was caused by something other than the very hazard created by the doing of the contract work. Under the circumstances of this case, where Plaintiff was injured by the very hazard created by doing the contract work, *Wolczak* and *Muhammad* are applicable, and it is unnecessary to go over the *Alloway* factors.

However, even if the Court were to strain and ignore the utter lack of evidence that BBS or JHS acted as the general contractor and ignore the fact that *Wolczak* and *Muhammad* apply to this case, *Alloway* would still not impose a duty on either BBS or JHS because the factors identified by *Alloway* are missing in this case.

i. BBS/JHS Did Not Act as The General Contractor.

Alloway would only apply to this case if the Court were to find that BBS or JHS acted as the general contractor. However, nothing in the record shows that BBS or JHS acted as the general contractor on the site. The Appellate

Division examined this exact situation in *Costa v. Gaccione*, 408 N.J. Super. 362 (2009).

In *Costa v. Gaccione*, 408 N.J. Super. 362 (2009), defendant Gaccione and his co-defendant daughter purchased a property for the purpose of demolishing the existing structure to rebuild a residence for Gaccione's two daughters. *Id*. at 365. While at the site, plaintiff, an employee of a subcontractor, fell from a makeshift scaffolding structure and sustained serious injury. *Id.* Plaintiff argued that Gaccione and his daughter, who owned the property, acted as the general contractor on the project, and therefore owed the Plaintiff a duty. *Id*. at 364 (App. Div. 2009).

The Appellate Division found that Gaccione, but not his co-owner daughter, acted as the de facto general contractor on the site based on the facts of the case. These were the factors the court found that established Gaccione was the de facto general contractor: Gaccione hired subcontractors, scheduled their work, purchased materials, and frequently visited the job site to oversee operations. *Costa v. Gaccione,* 408 N.J. Super. 362, 366 (App. Div. 2009). Gaccione also applied for the permits relative to the work being performed. *Id*. at 367. Additionally, the owner of one of the contractors on the site also testified that he believed Gaccione was the general contractor for the project. *Id*. at 366.

Lastly, Gaccione had previously worked in the construction field which provided him experience in overseeing construction projects. (*Id*.).

As a result, the Court held that Gaccione could be considered the de facto general contractor, but that his daughter, who "remained uninvolved with the actual construction process" *Id.* at 375-76, was not, and was properly dismissed from the lawsuit.

In this case, BBS/JHS did not hire any subcontractors. Instead, they hired Fenton to repair the roof and later, after learning asbestos was present, hired United Safety to remediate same. BBS/JHS did not apply for the permits relative to the jobsite. No party ever testified that they believed either BBS or JHS was the general contractor. In fact, Robert Stajic, United Safety's foreman, testified that he believed Fenton was the general contractor:

> Q. You said at that time the lift might have been the GC's. Who do you mean by the GC?
> A. General Contractor.
> Q. Right. Who would that have been, in your mind?
> A. I believe it was Fennimore --Fennimore Construction.
> Q. Okay. When you say Fennimore, do you8 mean Fenton Construction?
> A. I'm sorry, yes. Fenton. Fenton, yes.

(*See* PA309, 24:24-25 - 25:3-10). This was echoed by the President of United Safety who also testified that Fenton was the general contractor:

> Q. How do you know Fenton?
> A. From the jobsite.

> Q. What is your understanding of what Fenton's role at the jobsite was?
> A. He was GC.
> Q. And when you say GC, you mean general contractor?
> A. Yes.

(*See* Pa292, 30:11-18). Lastly, BBS/JHS do not have construction experience. BBS is a steel manufactory and JHS simply owns the subject property.

None of the facts of this case would lead to the conclusion that BBS or JHS acted as the general contractor on the site. Nothing in the record shows that BBS or JHS had any control over the work being performed. BBS is simply a tenant who hired a contractor with specialized knowledge to remediate the asbestos in the fire damaged roof so it could be replaced. JHS is simply the owner of the building. Nothing in this case would lead to the conclusion that either JHS or BBS acted as the general contractor. Therefore, *Alloway* is not applicable and summary judgment must be granted.

ii. The Factors Identified in *Alloway* are not Met.

Even if the Court were to determine that BBS or JHS acted as the general contractor, none of the factors present in *Alloway*, that would allow the court to impose a duty on BBS or JHS, are present here. In *Alloway*, a paving contractor was contractually responsible for constructing a special exterior ramp for loading purposes on a construction site for a new Shop Rite Supermarket. The paving contractor had engaged an excavating contractor to deliver paving

materials using the excavating contractor's truck and driver. The principal of the excavating contractor, who was also a foreman for the paving contractor, undertook to supervise the paving crews because he had direct knowledge of the work requirements. *Alloway*, *supra*, 157 *N.J.* at 226, 233, 723 *A.*2d 960. The plaintiff was the truck driver for the excavating contractor. The day before the plaintiff was to deliver crushed stone to the site, she noticed a mechanical problem with the dump truck she was operating. *Id.* at 226–27, 723 *A.*2d 960. After relaying the problem to both her supervisor and the paving contractor foreman, the foreman notified her that a defect had been found and would be repaired by the next day. *Id.* at 227, 723 *A.*2d 960. Plaintiff was unaware that the defect had not been repaired, and as a result, she was seriously injured while attempting to use the truck. *Id.* at 227–28, 723 *A.*2d 960.

Based on the foregoing facts, the Court determined that the risk of injury was "clearly foreseeable" because the paving contractor "knew that the truck was defective and had attempted to correct the defect." *Id.* at 232, 723 *A.*2d 960. The Court also noted the "substantial and close relationship" between the paving contractor and the excavating contractor. *Ibid.* That relationship, the Court observed, "created both the opportunity and capacity" on the part of the paving contractor "to exercise authority and control over the equipment" of the excavating contractor if safety concerns were implicated. *Id.* at 233, 723 *A.*2d

960. Since the paving contractor had actually "undertaken remedial measures" to correct the defect in the truck prior to the accident, the Court concluded that **"**fairness and policy" impelled the imposition of a duty of reasonable care on the paving contractor to assure the safety of the excavation contractor's employee at the worksite. *Ibid.*

None of those are factors are present in this case. BBS and JHS did not control the jobsite as BBS and JHS do not have construction expertise. Rather, BBS is a steel manufacturer and JHS is simply the owner of the building. There was no close relationship between BBS/JHS and United Safety. In fact, United Safety's foreman on this jobsite as well as the Plaintiff confirmed that nobody directed the work of United Safety as asbestos remediation is specialized work. There was no contractual agreement between BBS/JHS and United Safety, rather a simple invoice was used for payment. Plaintiff also confirmed that he did not receive tools from anyone other than United Safety. Unlike the contractor in *Alloway* who attempted to fix the defect, BBS and JHS did not undertake any remedial measures related to the fire damaged roof. Instead, BBS/JHS relied on the expertise of the contractors they had hired.

Lastly, JHS/BBS did not provide the Plaintiff with any safety equipment. Instead, all safety equipment and training were provided by United Safety. United Safety conducted a safety meeting and fall protection training with their

employees on April 5, 2021, in preparation for their work at Blue Blade Steel. *See* Da1-2 and Da 3-4. Plaintiff signed and acknowledged attendance at the safety meeting with United Safety, where potential trip and fall hazards were identified, and signed the certification acknowledging that he received training on fall protection from heights 6 feet and above specifically for Rooftop Operations and Construction Sites by an OSHA certified supervisor.

The facts of this case are more similar to *Slack v. Whalen*, 327 N.J. Super. 186, 196 (App. Div. 2000). In *Slack*, plaintiff was an employee of a contractor (Quality) hired by the homeowners (the Whalens) who fell approximately ten feet while spackling the ceiling in the new home being constructed by the Whalens. The Whalens did not have a written contract with plaintiff's employer Quality, or any other contractor, to oversee the work or OSHA compliance. *Id*. at 190. Additionally, the Whalens were not at the construction site on the date of plaintiff's accident, and did not learn of it until some point thereafter, *Id.* Much like in the present case, the Plaintiff in *Slack* attempted to paint the Whalens, who owned the property, as the general contractor.

The *Slack* court held: "applying general negligence principles, we hold that no tort duty can be imposed for injuries sustained on a construction site by a contractor's employee solely because violations of OSHA regulations have occurred. Even if defendants could be viewed as "general contractors" for the

project, because the risk of injury to plaintiff was not objectively foreseeable by defendants, and because no relationship implicating safety concerns existed between plaintiff and defendants, "fairness and policy" preclude imposing a tort duty on defendants." *Id.* at 196. (Emphasis added). The *Slack* court pointed out that, like in the present case, the defendants had no opportunity or capacity to exercise control over the manner or means which plaintiff choose to do his work and that the defendant had no contractual agreement with the contractor for which the plaintiff worked; they did not agree to supervise the work or ensure safety. *Id*. At 194. The court in *Slack* found that the defendants did not have a reasonable opportunity or capacity to exercise control over the manner or means by which plaintiff chose to perform his work. To the contrary, the control of plaintiff's work fell squarely within [the contractor's] expertise, knowledge, and experience as a professional. *Id*.

Much like in the present case, Plaintiff's employer in *Slack* provided the equipment utilized by plaintiff and the defendants were completely unaware of the methods plaintiff was utilizing to do his work *Id.* Therefore, like the case at bar, the general contractor was found to have no duty to plaintiff because "the risk of injury to plaintiff was not objectively foreseeable by defendants, and because no relationship implicating safety concerns existed between plaintiff

and defendants, 'fairness and policy' preclude imposing a tort duty on defendants." *Id*. at 199.

The Slack court also held that the mere failure to hire a general contractor is not enough to impose liability on a property owner:

> Lastly, and for essentially the same reasons, we reject plaintiff's contention that defendants had a legal duty to retain an experienced "general contractor" who would have been responsible for safety oversight on the project. Even if defendants had replaced Trident with another "general contractor" to coordinate the construction project, such hiring would not automatically give rise to a tort duty on the part of that contractor to safeguard plaintiff from the risk of harm present in this case.

Slack v. Whalen, 327 N.J. Super. 186, 196 (App. Div. 2000). Even if the Court were to find that BBS or JHS were somehow the general contractor, despite the mountain of evidence to the contrary, *Slack* supports the trial court's decision to grant summary judgment.

III. THIS IS A CLASSIC INHERENT DANGER CASE.

This accident occurred while Plaintiff was in the process of performing the very work he was hired to perform, in the very area where the work had to take place. This is a classic inherent danger case. Plaintiff's argument that the inherent danger exception would only apply if Plaintiff had contracted asbestosis was already rejected by the New Jersey Supreme Court in *Muhammad*

v. New Jersey Transit, 176 N.J. 185, 188 (2003). *Muhammad* had an identical fact pattern to the case at bar:

> New Jersey Transit (NJT) hired S & W Contracting Services, Inc. (S & W) to remove asbestos from a roof and other portions of a garage that NJT owned and intended to demolish. It is uncontested that NJT advised S & W's president of the unstable and unsafe condition of the roof before his employees began working on the project. Plaintiff Abdush Shahid Muhammad, an S & W employee, suffered injuries when he fell through the roof while removing asbestos.

Muhammad v. New Jersey Transit, 176 N.J. 185, 188 (2003).

Although *Muhammad* involved a public entity and there were considerations involving the Tort Claims Act, the Court noted that the legislative history of the Tort Claims Act "makes clear that the Legislature did not intend to nullify common-law actions for landowner liability in enacting the TCA. It is anticipated that this section [*N.J.S.A.* 59:4–2] will be developed to the extent possible in accordance with common law principles of landowner liability." Comment to *N.J.S.A.* 59:4–2; *Muhammad v. New Jersey Transit*, 176 N.J. 185, 197 (2003). Therefore, the Supreme Court analyzed the case using general principles related to landowners who have hired a contractor to repair a condition on the property. The Court upheld the decades old president that a landowner is under no duty to protect an employee of an independent contractor from the very hazard created by the doing of the contract work, provided that the landowner does not retain control over the means and methods of the

execution of the project. *Muhammad v. New Jersey Transit*, 176 N.J. 185, 198 (2003).

The Plaintiff in *Muhammad* was removing asbestos, he did not contract asbestosis, rather he fell through a hole in the roof. Despite same, the Supreme Court still applied the inherent danger exception and held that the landowner had no duty to the employee of the independent contractor.

In *Wolczak*, the plaintiff worked as an ironworker for the Elbert Lively Company, primarily constructing industrial monorail systems. While drilling an overhead steel beam, he fell 12 feet into an empty steel tank. *Wolczak v. Nat'l Elec. Products Corp.*, 66 N.J. Super. 64, 68 (App. Div. 1961). Notably, the *Wolczak* plaintiff's injuries did not result from hot iron striking his skin or from a collapsing iron beam. Nor was he injured by the monorail system he was helping to construct. Instead, similar to the plaintiff in the present case, his injuries stemmed from a fall from height—an incident peripheral to his primary work activities.

This is a classic inherent danger case, and the trial court properly held that BBS and JHS had no duty to the Plaintiff.

IV. STANDARD OF REVIEW

Trial court decisions granting summary judgment are subject to *de novo* review. *Seals v. County of Morris*, 210 N.J. 157, 162 (2012) (citing *Henry v.*

New Jersey Dept. of Human Servs., 204 N.J. 320, 330 (2010)). While legal conclusions are reviewed *de novo*, the Appellate Division should "defer to the trial court's factual findings so long as they are supported by sufficient, credible evidence in the record."[1] *30 River Court East Urban Renewal Co. v. Capograsso*, 383 N.J. Super. 470, 476 (App. Div. 2006).

In this case, the trial court's factual determinations and legal conclusions are supported by the evidence as well as long established New Jersey president and should be upheld.

CONCLUSION

For the foregoing reasons, Defendants, Blue Blade Steel Corporation and J.H. Shaw Realty respectfully request that this Court uphold the trial court's dismissal of the Plaintiff's Complaint.

Dated: August 14, 2025

Respectfully submitted,

/s/ Peter J. Dahl
Peter J. Dahl, Esq.
Law Office of James H. Rohlfing
445 South Street, Suite 200
Morristown, New Jersey 07960
(973) 631-7358
Attorneys for Defendants-Respondents Blue Blade Corp. and J.H. Shaw Realty

KEMAL BECIRAGIC and ALICJA M. KOCHANSKA BECIRAGIC, his wife,

Plaintiffs-Appellants,

v.

BLUE BLADE CORP., J.H. SHAW REALTY, FENTON CONSTRUCTION CO., INC., UNITED SAFETY, LLC., ABC CORPORATIONS 1-5 and JOHN DOES 1-5,

Defendants.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-000863-24

CIVIL ACTION

On Appeal from the Law Division, Union County

Docket No. UNN-L-000431-22

Sat Below:

Hon. Mark P. Ciarrocca, P.J.Cv.

REPLY BRIEF IN SUPPORT OF THE APPEAL

On the brief and of counsel:

Salvatore Imbornone, Jr., Esq.
(Attorney ID #000801984)
Bryan R. Gavin, Esq.
(Attorney ID #132662014)
McHUGH & IMBORNONE, P.A.
29 Columbia Turnpike, Suite 101
Florham Park, New Jersey 07932
Telephone: (973) 966-1520
Email: b.gavin@minjlaw.com

Counsel for Plaintiffs-Appellants

Sherry L. Foley, Esq.
(Attorney ID #009821988)
Timothy J. Foley, Esq.
(Attorney ID #042741990)
FOLEY & FOLEY
600B Lake Street, Suite 2
Ramsey, New Jersey 07446
Telephone: (973) 304-6003
Email: tfoley@appealsnj.com

Co-counsel for Plaintiffs-Appellants

TABLE OF CONTENTS – REPLY BRIEF

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF TRANSCRIPT DESIGNATIONS

1T – Transcript of Motion Hearing dated August 2, 2024

TABLE OF CONTENTS – APPENDIX

(Volume 1 of 3 – Pa1 to Pa190)

TABLE OF AUTHORITIES

LEGAL ARGUMENT

POINT I

DEFENDANTS' RECITATION OF FACTS OMITS EVIDENCE CONTRARY TO ITS POSITION AND SO FAILS TO ADDRESS THE STANDARD FOR SUMMARY JUDGMENT REVIEW.

Defendants, Blue Blade Steel Corporation (Blue Blade) and J.H. Shaw Realty (Shaw) (collectively defendants), recite the evidence in the record as if summing to a jury rather than arguing a summary judgment motion. From the very first page, defendants assert factual conclusions that are at best disputed and in some cases glaringly misleading. The standard of review requires that the evidence and all reasonable inferences from the record evidence must be viewed in the light most favorable to the non-movant. R. 4:46-2. Defendants make no effort to argue in accord with the standard, undermining their position and rendering their arguments ineffective because they are based on a view contrary to this Court's review.

For example, defendants claim that plaintiff, Kemal Beciragic, "refused to wear the fall protection gear," as if he were some rogue employee. Db1. The record indicates that no one was wearing their harnesses as the workers returned to the roof from break. Pa183. Mr. Beciragic testified that most workers and most of the time the harnesses were not worn because they interfered with the work being

done. Pa179 ("That is actually hindering and blocking us from doing our job properly because when we are wearing that, we can get entangled in it and then have greater problems."). "[T]here were two, maybe three, maybe four harnesses, protection gear up there, but nobody was wearing them." Ibid.

Defendants claim that Mr. Beciragic "acknowledged his awareness of the fire damaged roof" and "confirmed that he was performing his assigned duties at the time of the fall." Db1. The record reflects that the fall occurred not while working but rather when returning to the roof from a break. Pa183. Although a representative of United Safety, LLC, Mr. Beciragic's employer, claimed rather emphatically that its employees never went on the roof without a safety harness, Pa312, the record reflects that none of the workers returning from break were wearing a harness, and, in fact, the harnesses had been left on the roof when they took their break. Pa183; Pa301. The record reflects that only portions of the roof were fire-damaged and considered inherently dangerous, raising the issue of whether Mr. Beciragic fell in an area where a harness would be necessary.

Defendants claim that United Safety "operated independently, without direction from [Blue Blade]." Db1. The record reflects that the work was coordinated between defendant Blue Blade, Fenton Construction Co., the contractor hired by defendants to repair and to replace the roof, and United Safety, the contractor hired by defendants to remediate and to remove asbestos found in

the damaged roof. The work was coordinated because defendant Blue Blade continued to operate in the building. There was a schedule for the work of Mr. Beciragic's employer provided by defendant Blue Blade and/or Fenton so that the roof work did not expose defendant Blue Blade's continuing operations and equipment. Pa297; Pa299. According to Michael Mulcahy, Fenton's Construction Manager, "there was a lot of coordination that was necessary to keep Blue Blade's operations going." Pa219-20. Defendants' claim is contrary to the record.

Defendants claim that Mr. Beciragic "was performing the very work he was hired to perform when he was injured." Db2. As set forth above, Mr. Beciragic was not working when he fell. Pa183. He was returning from a break, walking to get his gear over a section of roof that may or may not have been part of the work space that United Safety was remediating. Pa324. Notably, plaintiff testified that his work involved removing "debris, right, garbage." Pa182. The work was not removing the entire roof. Pa301.

Defendants claim that other United Safety employees confirmed that they "always" wore fall protection gear while on the roof. Db5. That claim is contradicted by testimony that defendants choose to ignore. The use of the safety gear is not undisputed. Moreover, the evidence indicates that United Safety requested safety equipment and support from both Blue Blade and Fenton during

the course of the work. Pa303. Again, defendants' claims do not accord with the required view of the record.

Defendants claim that "no one from [Blue Blade] ever provided United Safety with any tools or with a schedule for work or when it should be done." Db7. Defendants cite Vanko Petkov, an employee of United Safety. Ibid. Mr. Petkov testified that a schedule for United Safety's work was provided, and Mr. Mulcahy confirmed that there was a coordination of the work between Blue Blade, Fenton and United Safety specifically to facilitate Blue Blade's continuing operations. Pa299; Pa219-20. United Safety "had to remove everything and clear it from OSHA and then [Fenton] can come in, and they could only do a portion enough that we can close up at night. They couldn't leave the place exposed to weather, the facility." Pa274. By testimony and inference, Blue Blade controlled the work progress to allow its continued operation in the building during the project. There also was testimony that a scissor-lift or boom elevator was provided to allow United Safety employees to get on the roof. Pa183; Pa323. Blue Blade also provided a crane and platform under the high point of the building. Pa323. The platform served to protect Blue Blade's equipment from falling debris and "would be much like a catch net." Ibid.; Pa233-35 ("it saved Blue Blade quite a bit of expense and also provided a safety platform for United Safety's crew as well as

Fenton's and Star Brothers' crew"). Defendants' claims again are contrary to the record as it must be viewed on summary judgment.

Defendants claim that they did not retain any control over the work performed by Mr. Beciragic's employer. That argument fails factually in at least two ways. First, there was coordination, i.e., control, to facilitate Blue Blade's continuing operations and protection of its equipment. This is not a situation with an absent owner. Blue Blade was present and operating and involved in the sequencing of the work for the specific purpose of facilitating Blue Blade's ongoing operations. Second, Blue Blade's determination to continue operating necessitated working from above, i.e., that is on the compromised roof that was being remediated. United Safety had to proceed in a manner that accomplished the work while also protecting Blue Blade's equipment and operations, with the roof access being provided by Blue Blade. The reasonable inference from that coordination requirement is that Blue Blade did retain the ability to control the work regardless of whether and to what extent that it did, which would be a factual determination to be left to a jury.

Finally, in perhaps the most egregious misrepresentation of the record, defendants assert that "Plaintiff was not in process [sic] of traversing the jobsite to get to the roof when the accident occurred as Plaintiff's brief insinuates." Db13. Defendants then cite to testimony taken out of context that allegedly supports their

position. Db13-14. The citation is deliberately misleading. As defendants are fully aware, Mr. Beciragic clearly testified that the fall occurred when returning to the roof from a break.

> Q. About what time of day did the accident occur, sir?
>
> A. We were coming back from a pause, a rest. I'm not sure if it was a break during breakfast or a break during lunch. We were coming back and we went up there.
>
> Q. How did you get up on to the roof?
>
> A. There is a so-called boom elevator, and we did use one when we go up.
>
> Q. And how many employees from United Safety were up on the roof when the accident occurred?
>
> A. Four of us.
>
> * * * *
>
> Q. Were any of the other three wearing fall protection?
>
> A. I believe at that moment nobody was wearing it.
>
> [Pa183.]

Robert Stajic from United Safety corroborated that testimony:

> Q. From your observation and knowledge, did this accident occur after Mr. Beciragic finished his coffee break, got back up on the roof, and was walking towards the area where he was going to work?
>
> A. That's correct. That's actually how it happened.
>
> [Pa324.]

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 538 (1995). Moreover, courts are "not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). On the record presented, there is a clear dispute of material facts that precludes resolution by motion. The order granting summary judgment should be reversed, and the matter remanded to the trial court.

POINT II

THERE IS SUFFICIENT EVIDENCE TO FIND THAT BLUE BLADE ACTED AS THE DE FACTO GENERAL CONTRACTOR FOR THE PROJECT.

Defendants attempt to compartmentalize the asbestos remediation work as a separate contract should be rejected. The project was to repair Shaw's fire-

damaged building while allowing Blue Blade to continue to operate. Blue Blade and Shaw chose not to retain a construction manager or general contractor for the restoration project, instead hiring a series of contractors and subcontractors directly and coordinating the work themselves. Defendants' claim that they "did not hire any subcontractors" is a matter of semantics. Db21. Whether designated contractors or subcontractors, defendants acknowledge that in fixing the damage from the fire, they hired Fenton to repair and to replace the roof, United Safety to remediate the asbestos from the roof, an electric contractor to repair damaged wiring and a plumbing contractor ostensibly for plumbing work. Pa259-60. All of those contractors performed, with extensive coordination according to Mr. Mulcahy, while Blue Blade continued to occupy and to operate its business in the facility.

Notably, defendants claim that "the plumbing and electrical contractors were part of an office renovation that was being done at Blue Blade's offices unrelated to the roof repair necessitated by the fire. (*See Pa219*, 70:3-4)." Db18. The citation contains no such support for the claim, and, in fact, does not actually seem to exist. Nor does the preceding citation for the claim that the plumbing and electrical contractors were not even present on the same days as United Safety and Fenton. Db18 (citing to Pa108, at 40:9-25 – 41:1-19). Blue Blade's representative, Don Lindewirth, did testify that "we may have had a plumbing

contractor at some point during the repair of the whole facility. I don't know if it was – if he was there that day." Pa117. Mr. Mulcahy testified that "Blue Blade hired their own electrician, they. Had an excellent outfit, Fergus Electric. They were on site from – well, they worked there almost continuously." Pa258-59.

Defendants claims, therefore, are at best erroneous and also directly contradicted by the motion record. According to Blue Blade's own representative, there was one project – "repair of the whole facility" – and Blue Blade was in charge of it all. Trying to parse the roof work from the balance of the facility repair is a factual argument unavailing on summary judgment.

Defendants attempt to evade Alloway v. Bradlees, Inc., 157 N.J. 221 (1999), and Costa v. Gaccione, 408 N.J. Super. 362 (App. Div. 2009), suffers from the same restrictive analysis of the record. In Costa, the court found that Gaccione acted as the de facto general contractor, citing factors such as hiring subcontractors, scheduling their work, purchasing materials and frequently visiting the job site. Id. at 366. The facts that defendants choose to ignore support the same conclusion here. Defendants hired the contractors, dictated their schedule to coordinate with their ongoing operations and were ever-present on the site because they continued to operate their machinery. The testimony was that the schedule revolved around during only as much as could be done in a day while protecting the facility from the weather. Defendants claim that they did not apply for any

permits, but there is no actual evidence either way in the record. Defendants claim that they did not control the work, yet the work revolved around their operations. Moreover, Occupation Safety and Health Association (OSHA) regulations required defendants to perform a pre-remediation assessment. Defendants' argument confuses controlling the work with the ability to control the work, which defendants had and had an obligation to perform under OSHA.

Even defendants' claim that they provided no safety equipment is misleading. Blue Blade provided the crane and platform, both for its own purposes to avoid interference with its continued operations and as a "catch net" for debris and/or a falling worker. Blue Blade's obligation for safety at the site goes beyond equipment. Because Blue Blade chose to continue using the facility, United Safety was required to protect its equipment. United Safety's whole process was scheduled and sequenced to work around Blue Blade. Mr. Beciragic was not injured by faulty equipment; he was injured while being required to work on a compromised job site.

The prevailing presumption of tort liability is that an occupier of land owes a duty to his invitee to use reasonable care to make the premises safe. That duty includes the obligation to make reasonable inspection to discover dangerous conditions and to warn an independent contractor. United Safety's expertise is in asbestos removal and remediation, not structural engineering or analysis. Blue

Blade and Shaw failed to act reasonably in omitting to ascertain the structural integrity of the building post-fire. It placed itself in the position of general contractor for the demolition and restoration of the building but did nothing to satisfy the regulatory requirements and industry standards to ensure a safe working environment. They also failed to obtain a structural integrity survey required by OSHA before demolition work may commence. Under the totality of the circumstances, considering the relationship of the parties, the nature of the risk, the opportunity to exercise reasonable care and the public interest in recognition of a duty of care, Blue Blade and Shaw had an obligation under the law, regulations and industry standards to investigate and to warn of the dangerous condition of its property and to ensure a safe workplace.

As noted by Jason Randle, P.E., OSHA recognizes falls as the number one killer in construction. Pa443. OSHA standards assign prevention responsibilities to a controlling employer, i.e., in this case, Blue Blade. One such obligation is that "an engineering survey take place prior to starting construction work to determine the possibility of unplanned collapse." Pa443.

> 29CFR1926.501(a)(2). The employer shall determine if the walking/working surfaces on which its employees are required to work have the strength and structural integrity to support employees safely. **Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity**.

> 29CFR1926.850(a). Preparatory operations. **Prior to permitting employees to start demolition operations**, an engineering survey shall be made, by a competent person, of the structure **to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure**.
>
> **29CFR1926.850(b). When employees are required to work within a structure to be demolished which has been damaged by fire, flood, explosion, or other cause, the walls and floors shall be shored and braced**.
>
> [Pa443-44 (emphasis in original Randle report.]

Blue Blade failed to fulfill any of those regulatory requirements and also failed to ensure that any other party complied with those requirements, leading directly to Mr. Beciragic's fall and catastrophic injuries. Whether defendants breached their duty to plaintiffs and whether their negligence was the proximate cause of plaintiffs' damages are factual questions for a jury to decide. "[W]hether the duty was breached is a question of fact." Jerkins v. Anderson, 191 N.J. 285, 305 (2007).

Contrary to defendants' contentions, the material facts regarding duty, breach of duty and proximate cause are disputed. The determinations of control of the work, ability to control the work, coordination of the trades with Blue Blade's ongoing operations, the extent of the danger presented by the fire-damaged roof, and the safety obligations and perceived dangers of United Safety's scope of work are inappropriate for resolution by the court on summary judgment. Respectfully,

the record does not clearly support the factual conclusions made below, particularly in light of the Constitutional right to trial by jury and the summary judgment standard of review. They constitute the resolution of factual disputes in favor of the movant and disregard of competent evidence and reasonable inferences favoring the non-movant. Those issues are all disputed on a full review of the record.

The issue has been posed as whether "a reasonable jury weighing the evidence in plaintiff's favor could determine the existence of facts that, based on the foreseeability of the risk of injury, the relationship of the parties, and the opportunity to take corrective measures, would support the determination that there was a duty of care owed to plaintiff that was breached by defendant[s]." Alloway, 157 N.J. at 240. The analysis is "very fact-specific." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993). A detailed consideration of the facts and the Alloway factors has already been provided and will not be reiterated here. See Pb21-27. Under a thorough analysis, the record does not support a finding that defendants owed no duty to Mr. Beciragic as a matter of law.

POINT III

THE RECORD IS IN DISPUTE REGARDING THE APPLICABILITY OF THE INHERENT DANGER EXCEPTION.

There is a glaring discrepancy in the record, again unaddressed by defendants because of their refusal to recognize the standard of review, concerning whether the remediation of asbestos materials being performed by United Safety presented an inherent danger of a sudden roof collapse. According to the testimony, United Safety was months into the project, in fact, toward the end of the project when Mr. Beciragic fell. There is no record of any prior falls, although there was an arrested fall without major injuries after Mr. Beciragic's fall. When Mr. Beciragic fell through the roof, he was not wearing a harness. Pa183. Mr. Beciragic testified that most workers and most of the time the harnesses were not worn because they interfered with the work being done. Pa179 ("That is actually hindering and blocking us from doing our job properly because when we are wearing that, we can get entangled in it and then have greater problems."). "[T]here were two, maybe three, maybe four harnesses, protection gear up there, but nobody was wearing them." Ibid. The fall occurred when returning to the roof from a break, and none of the four United Safety employees were wearing a harness as they returned to the roof. Pa183.

The record suggests that only sections of the roof were compromised and considered to be inherently dangerous. Only portions of the roof were being removed. According to Mr. Stajic, Mr. Beciragic was returning from a coffee break and "was walking towards the area where he was going to work." Pa324.

He did not have on his safety harness, which was found after the fall on a parapet wall across the roof. Pa317; Pa321. Mr. Beciragic's co-worker, Vanco Petkov, testified that Mr. Beciragic was walking across the roof to get his harness when he fell. The lack of use of the harnesses in favor of keeping up with the schedule suggests that the workers did not perceive a danger across the entirety of the roof. On the record presented, there was a material factual dispute regarding the circumstances of the fall such that summary judgment should have been denied.

CONCLUSION

For the foregoing reasons, and those set forth in plaintiffs' opening brief, dismissal of plaintiffs' Complaint was error. Plaintiffs had indisputably come forward with evidence to establish that defendants owed a duty, breached that duty and that the breach proximately caused Mr. Beciragic's injuries, in whole or in part. Because dismissal before trial implicates the denial of a constitutional right, summary judgment has been described as "an extraordinary measure to be taken only with extreme caution." Kisselbach v. Cnty. of Camden, 271 N.J. Super. 558, 569 (App. Div. 1994). Plaintiffs respectfully request that the trial court's order granting judgment to defendants be reversed and the matter remanded.

Respectfully submitted,

FOLEY & FOLEY

/s *Timothy J. Foley*

By: Timothy J. Foley, Esq.
Co-counsel for Plaintiffs-Appellants,
Kemal Beciragic and Alicja M.
Kochanska Beciragic

Dated: August 19, 2025