SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000917-24

JOHN SCHMIRSKY and KIMBERLY SCHMIRSKY, husband and wife,

Plaintiffs/Appellants,

v.

TOWNSHIP OF WINSLOW; GARRISON ARCHITECTS, PC; and JOHN DOE AND/OR JOHN DOE CORPORATION 1-10 (JOHN DOE and/or JOHN DOE CORPORATION 1-10 being fictitious names), jointly, severally and in the alternative,

Defendants/Respondents,

ON APPEAL FROM ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAMDEN COUNTY DOCKET NO. CAM-L-1460-22

SAT BELOW: THE HONORABLE MICHAEL J. KASSEL, J.S.C.

PLAINTIFF/APPELLANT's AMENDED BRIEF IN SUPPORT OF APPEAL FROM ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT/RESPONDENT TOWNSHIP OF WINSLOW

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PRELIMINARY STATEMENT

This matter is a personal injury case. The accident happened on July 6, 2020 at the Winslow Township Senior Center. Pa14-Pa26. On that date, Plaintiff, John Schmirsky, was working for Aliano Brothers General Contractors, Inc. ("Aliano"). Pa14-Pa26 & Pa158:12-Pa158:22; Pa168:11-Pa169:4; Pa171:22-Pa180:13; Pa184:-Pa185:7; Pa14-Pa26; Pa839-Pa859 & Pa860-Pa872. Mr. Schmirsky was fire-taping the drywall joints up with in the roof truss area while on an extension ladder approximately 10 – 12 feet above the ground. Pa14-Pa26 & Pa839-Pa859 & Pa860-Pa872. Mr. Schmirsky was not provided with a lift, scaffolding or fall protection. Id. While working on the ladder, the rubber shoe on the left foot of the ladder came off, which exposed the steel bottom of the ladder foot to the smooth concrete floor, and the ladder slipped/kicked out and the fall occurred. Id. As a result, Mr. Schmirsky fell to the ground and sustained serious and permanent injuries. Id.

Plaintiff has alleged that the Winslow Township property was in a dangerous condition by virtue of the nature and circumstances of the work being performed on the property. Id. Additionally, Plaintiff has alleged that Winslow Township was contractually bound to provide a safe workplace, and that considering the contract and the specifications, the Township shared jobsite safety responsibilities. Id.

Below the Defendant, Winslow Township, filed a motion for summary judgment arguing that (1) Plaintiff cannot establish a claim for a dangerous condition

of public property pursuant to N.J.S.A. 59:4-2 and that (2) Winslow Township did not control the means and methods of Plaintiff's work. Pa68-Pa72. Winslow Township also alleged in its Summary Judgement moving papers below that Plaintiff did not comply with the Tort Claims Act notice requirement under N.J.S.A. 59:8-9; however, that portion of the motion was withdrawn. Pa82-Pa83.

For the reasons set forth herein, Winslow Township's motion for summary judgment should have been denied. N.J.S.A. 59:4-2 provides that a public entity may be liable for a dangerous condition of public property. However, the dangerous condition need not be an actual defect. Rather, it need only be a circumstance at the public property that makes it unsafe for its anticipated use. In the instant case, Winslow Township's permitted work to be performed without proper equipment in violation of OSHA safety requirements. Pa839-Pa859 & Pa860-Pa872. Winslow Township also failed to meet its contractual obligations concerning workplace safety. Pa839-Pa859 & Pa860-Pa872. These omissions by Winslow Township created a dangerous and hazardous condition of public property. Pa839-Pa859 & Pa860-Pa872.

At the very least there are factual questions that should be submitted to a jury. For example, it is for a jury to decide whether Winslow Township was involved in construction/safety to such an extent that it could not claim that it truly hired an independent contractor. Here the trial Court usurped the role of a jury. Accordingly,

the Trial Courts' dismissal of the case without submitting factual issues to the jury was an error and should be reversed. Pa1 & T1-T43.

PROCEDURAL HISTORY

Appellants, John and Kimberly Schmirsky, filed a Complaint in the Law Division of the Camden County Superior Court against Respondent, Township of Winslow and Garrison Architects, on June 10, 2022. Pa14-Pa26. While the Defendant Garrison Architects Answered the Complaint, this Defendant was voluntarily dismissed from the case on October 6, 2022. Pa 48-Pa59 & Pa60-Pa67. The Defendant Winslow Township Answered the Complaint on August 2, 2022. Pa27-Pa36. In turn on May 1, 2023, the Defendant Winslow Township filed a Third-Party Complaint against the Plaintiff John Schmirsky's employer Aliano which was subsequently dismissed. Pa37-Pa47 & Pa184-Pa1085. The only Defendant that remains on this Appeal is Defendant Winslow Township. Pa2-Pa12. Pretrial discovery was conducted. Pa84-Pa1072. The Defendant Respondent Winslow Township filed a motion for summary judgement on September 13, 2024. Pa.68-Pa72. On October 29, 2024, Appellant filed opposition to Respondent's motion. Pa73-Pa81. On November 8, 2024, the Trial Court issued an Order granting Respondent's motion. Pa1 & T1. This Appeal followed.

Appellant filed a Notice of Appeal on December 2, 2024. Pa2-Pa12. This matter has been docketed under A-00091724.

STATEMENT OF MATERIAL FACTS

As stated above on July 6, 2020, the Plaintiff John Schmirsky was injured at the Winslow Township Senior Center. Pa14-Pa26. On that date, Plaintiff was working for Aliano. Pa14-Pa26. He was fire-taping the drywall joints up with in the roof truss area while on an extension ladder approximately 10 – 12 feet above the ground. Pa14-Pa26 & Pa839-Pa859 & Pa860-Pa872. Mr. Schmirsky was not provided with a lift, scaffolding or fall protection. Id. While working on the ladder, the rubber shoe on the left foot of the ladder came off, which exposed the steel bottom of the ladder foot to the smooth concrete floor, and the ladder slipped/kicked out and the fall occurred. Id. As a result, Mr. Schmirsky fell to the ground and sustained serious and permanent injuries. Id.

The ladder was improperly being used as a work platform. Pa155:6-Pa156:17 & Pa839-Pa859 & Pa860-Pa872.

LEGAL ARGUMENT

I. The Standard of review requires the reversal of the Trial Court's summary dismissal of the case. (Pa1 & T1-T43)

"In an appeal of an order granting summary judgment, appellate courts employ the same standard of review that governs the trial court." W.J.A. v. D.A., 201 N.J. 229, 237 (2012) (internal quotations omitted); Townsend v. Pierre, 221 N.J. 36, 59 (2015) ("We apply the same standard that governs the trial court, which requires denial of summary judgment when 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")(citation and internal quotations omitted). The same standard applies to motions for failure to state a claim. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002). As only a legal issue is involved in the absence of a genuine factual dispute, that standard is *de novo*. Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). Thus, the appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), *certif. denied*, 154 N.J. 608 (1998). Of course, the reviewing court owes no deference to the trial court's legal conclusions. Tonic v. American Cas. Co., 413 N.J. Super. 458, 467 (App. Div. 2010).

Respondent filed a motion for summary judgment, which the trial court below granted. Therefore, under the applicable standard, a determination of whether there exists a genuine issue of material fact that precludes summary judgment requires the court to consider whether the materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational finder of fact to resolve the disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540, (1995).

All inferences of doubt are drawn against the moving party and in favor of the opponent of the motion. Judson v. People's Bank & Trust Co. of Westerfield, 17 N.J. 73, 74-75 (1954). If there is the slightest doubt as to the existence of a material fact, the motion should be denied. Stanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211 (App. Div. 1987).

Here, at the very least, there are factual questions that should be submitted to a jury. For example, it is for a jury to decide whether Winslow Township was involved in construction/safety to such an extent that it could not claim that it truly hired an independent contractor. The Standard of review dictates a reversal of the Trial Court's decision dismissing the case without a jury considering the evidence.

II. There is evidence that the construction project where the Plaintiff suffered a traumatic brain injury because he was not provided with a safe ladder or a safe work platform was a joint enterprise by and between the Defendant Winslow Twp. and the Plaintiff's nonparty employer Aliano, and a result, the Defendant Township owed duties to the Plaintiff concerning worksite safety, and accordingly, the Trial Court's summary dismissal of the case is reversible error. (Pa1 & T1-T43)

Initially, while the Plaintiff's employer bears responsibility, the employer will not be on the verdict sheet. The New Jersey Supreme Court in Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102 (2004) succinctly described the law relating to the effect of the potential fault of an employer:

> In [Ramos v. Browning Ferris Industries, 103 N.J. 177 (1986)], we held that a jury could not assign fault to an employer immune from suit under

> the Workers' Compensation Act, thereby requiring fault to be apportioned entirely between the plaintiff and third-party defendant tortfeasor.... That result followed because the Workers' Compensation Act bars a plaintiff employee from suing a negligent employer for damages. The Workers' Compensation Act removes the employer from the operation of the Joint Tortfeasors Contribution Law. Because the employer cannot be a joint tortfeasor, it is not subject to the provisions of the Joint Tortfeasors Contribution Law, and a third-party tortfeasor may not obtain contribution from an employer, no matter what may be the comparative negligence of the third party and the employer.... Stated differently, an employer cannot be a party to a negligence action and thus can never be considered a joint tortfeasor subject to the Comparative Negligence Act.

An employer cannot be a party to a negligence action and thus can never be considered a joint tortfeasor subject to the Comparative Negligence Act. It cannot be established as a matter of law that the actions of the Plaintiff's nonparty employer, or the actions of the Plaintiff himself, for that matter[1], are the sole and one and only cause of the accident. To the contrary, here, the Township was negligent, and its actions were a cause of the accident.

[1] The fact that the Plaintiff had no real choice but to encounter the dangerous work because he had to get the job done for his employer is significant. See, Del Tufo v. Township of Old Bridge, 147 N.J. 90 (1996) observing:

> We have in the past recognized that under certain circumstances for reasons of policy and fairness, a plaintiff's failure to engage in self-protective measures may not constitute contributory negligence. The health care provider cases are an example. Another example involves some products liability cases in which injured workers have failed to follow safety procedures with the approval of supervisors in an effort to enhance quality, production, or both. See, e.g., Green v. Sterling Extruder Corp., 95 N.J. 263, 272, 471 A.2d 15 (1984) (denying contributory negligence defense when blow molding machine was used for reasonably foreseeable purpose); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 167, 406 A.2d 140 (1979) (denying contributory negligence defense when workman's injuries were caused by failing to install safety devices). The fairness and policy considerations in the Suter line of cases that compelled that result were based on the notion that a worker engaged in his or her assigned task of working on a dangerous plant machine for its intended purpose had no meaningful choice….

A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances. N.J.S.A. 59:2-2. The New Jersey Tort Claims Act does not affect liability based on contract. N.J.S.A. 59:1-4. The Defendant is responsible for dangerous conditions on its property. N.J.S.A. 59:4-2. The burden is placed upon the entity to both plead and prove immunity. Maison v. NJ Transit Corp., 245 N.J. 270 (2021).

What is critical here is that the Township was directly involved in the work that was being done. Pa102:23-25-Pa103:22 & Pa120:2-Pa127:13 & Pa134:9-Pa134:17 & Pa135:14-Pa138:4 & Pa141:7-Pa141:12 & Pa145:9-Pa145:23 & Pa839-Pa859 & Pa860-Pa872. For example, the Township attended safety construction meetings. Id. The Township cannot argue that it hired an "independent contractor" because it exercised an element of control over the work. Id. The Trial Court was over the top in efforts to protect the government. T22-T32:22. Several comments made by the Trial Court support this position. Id. Below, there was not enough consideration given to the Plaintiff worker who was horribly injured on the Township's construction project, where the Township was directly involved in construction of its project. T1-T43.

There are issues of fact on the question of whether the Township was sufficiently involved in the work to prevent it from seeking the protection from

liability afforded to parties who hire a truly "independent contractor." The trial court should be reversed. Pa1 & T:1-T43.

The Defendant Township agreed contractually to undertake obligations in connection with the construction and the Township is responsible for its negligence in performing the ministerial function it agreed to perform. See, N.J.S.A. 59:3-2 d.

The project was a joint project. The Township was acting as a co-general contractor. The following is the evidence supporting the Defendant's involvement in the construction and the Defendant's negligence:

1. Mr. Schmirsky was working on the ladder. The bottom of the ladder was on a smooth concrete surface. The rubber shoe on the foot of the ladder came off exposing the metal bottom of the ladder foot with several screw heads to the smooth concrete floor and thus the ladder slipped/kicked out and the fall occurred. Pa158:12-Pa158:22; Pa168:11-Pa169:4; Pa171:22-Pa180:13; Pa184:-Pa185:7; Pa14-Pa26; Pa839-Pa859 & Pa860-Pa872.

2. Winslow Township's owed duties to Mr. Schmirsky pursuant to the Contract which included the Contract specifications. Pa101:1-Pa103:22; Pa114:24-25-Pa117:18; Pa120-:2-Pa127:13; Pa839-Pa859 & Pa860-Pa872 &Pa109:23-Pa116:13 & Pa117:3-Pa117:22.

3. Under the Contracts, which included the required specifications the Township had on-site responsibilities. Pa102:23-25-Pa103:22 & Pa120:2-Pa127:13 & Pa134:9-Pa134:17 & Pa135:14-Pa138:4 & Pa141:7-Pa141:12 & Pa145:9-Pa145:23 & Pa839-Pa859 & Pa860-Pa872.

4. Under the Contracts, which included the required specifications the Township had the right to and did attend daily construction meetings that included the topic of safety. Id.

5. Winslow Township failed by not internally sharing the observations of their trained code officials making their required inspections with the Township's

project representatives, in their observations of site conditions such as safety. Id.

6. Winslow Township failed by not exercising their contractual right to visit the site more often than just every two weeks and did not discuss specifically safety concerns as an item on the bi-weekly agenda. Id.

7. A dangerous activity occurred on Winslow Township's property at the time of Mr. Schmirsky's fall. Pa186:2-Pa186:12; Pa188:4-Pa188:10; Pa839-Pa859 & Pa860-Pa872.

8. Winslow Township's property was in a dangerous condition. Pa839-Pa859 & Pa860-Pa872.

9. It is the construction experts' opinion that the Township which had the direct experience of safety and had the right to exercise their rights to flag safety concerns, should have alerted Aliano and its foreman in charge, Tom H, that there was an imminent safety risk as being performed by Schmirsky working unsafely on behalf of Aliano. Id.

10. Schmirsky climbing around within the trusswork on loose-laid planking without a safety harness while using two hands to perform his task, and then stepping off and then back on his ladder which was tricky to position so that it would not kick out, all are grossly unsafe. Id.

11. Winslow Township was aware of the dangerous activity and aware of the dangerous condition. Pa839-Pa859 & Pa860-Pa872.

12. The dangerous condition and dangerous activity were caused by and created by Winslow Township, and it thereby had notice of the dangerous condition and dangerous activity. Id.

13. Scaffolding (rolling or motorized) should have been provided. Id.

14. The worker was required to work off an unsafe ladder, and even worse to work off of planking up within the roof trusswork, all while unprotected without a safety harness, and while his support planking was not tied off and thus free to move or fall. Id. & Pa155:6-Pa156:17.

15. Winslow Township failed to ensure that OSHA safety requirements were followed. Id.

16. Winslow Township's failed to ensure that the ladder Aliano equipment was in safety working condition. Id.

17. Winslow Township failed to ensure that a safe ladder (unused equipment per the Contract Specifications) was provided to the workers. Id.

18. Winslow Township failed to ensure that Aliano had an on-site OSHA competent person and a person as required by the Contract dedicated to construction safety. Id.

19. Winslow Township failed to ensure that Aliano provides daily construction reports, which should have included safety concerns including the use of safe ladders and fall protection. Id.

20. Winslow Township failed to meet its Contractual obligations. Id.

21. Winslow Township failed to enforce Aliano's Contractual obligations. Id.

22. Winslow failed to meet the standards in the industry as a property owner. Id.

23. Winslow Township's failure to meet its contractual obligations, failure to meet the standards in the industry and its failure to ensure that Aliano met its contractual obligations was a cause of the accident involving John Schmirsky. Id.

24. The Worker Mr. Schmirsky had no real choice but to encounter the hazard, and his actions were reasonable because he stated he felt secure. Id.

25. Winslow Townships actions and inactions as described were palpably unreasonable. Id.

See the report of David Schoenhard AIA Pa839-Pa859 & the report of fall protection expert John T. Whitty Pa860-Pa872.

The Defendant Township agreed contractually to undertake obligations in connection with the construction and the Township is responsible for its negligence in performing the ministerial function it agreed to perform. See, N.J.S.A. 59:3-2 d. Summary judgement was not appropriate.

III. There is evidence that the Winslow Twp. Senior Center was in a dangerous condition at the time of the accident, and therefore, the Trial Court's summary dismissal of the case is reversible error. (Pa1 & T1-T43)

N.J.S.A. 59:4-2 provides that a public entity may be liable for a dangerous condition of public property. N.J.S.A. 59:4-1(a) defines a "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Under that provision, "[a] dangerous condition… refers to the 'physical condition of the property itself and not to activities on the property.'" Levin v. County of Salem, 133 N.J. 35, 44 (1993). To determine whether something is a dangerous condition, "it must be considered together with the anticipated use of the property." Buddy v. Knapp, 469 N.J. Super. 168, 197 (App. Div. 2021) (quoting Atalese v. Long Beach Township, 365 N.J. Super. 1, 5 (App. Div. 2003)).

However, the dangerous condition need not be an actual defect. Rather, it need only be a circumstance at the public property that makes it unsafe for its anticipated use. For example, in Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 452 (2009), the plaintiff was walking in a cemetery park and became locked inside

when a city employee "locked the gates several hours before the park was scheduled to close." Prior to locking the gates, the city employees were required to check the interior of the park and make sure that no one was inside. Id. In this case, the plaintiff had to climb over a brick wall to exit the park, and she was injured when she dropped to the ground and fractured her tibia. Id. The New Jersey Supreme Court reasoned that "if plaintiff had not been in the park, the employee's conduct in locking the gates would not have created a dangerous condition of property," but because the plaintiff had been in the park, it was "reasonably debatable that the locking of the gates rendered the park a dangerous condition." Id. at 461. In Ogborne, the plaintiff did not argue that the park had a physical flaw or defect. Rather, it was the fact that the park was locked during its operating hours that created the hazard to the plaintiff.

Additionally, Ogborne has been extended to other factual scenarios. In Bonanata v. State, No. A-1560-19, 2021 N.J. Super. Unpub. LEXIS 1111 (App. Div. June 11, 2021) (Pa1073-Pa1078) an incarcerated plaintiff was assigned to groundskeeping work detail, which included grass cutting and lawn maintenance. The plaintiff was assigned to use a Husqvarna self-propelled commercial mower, which had a one-wheeled platform where the operator would stand, to mow grass between a road and a wooded area. Id. at *2. The corrections officers were aware of the presence of "possible stumps or things of those nature" along the tree line,

nevertheless, instructed the plaintiff to mow in the area. Id. at *2. While the plaintiff was operating the mower, he struck a "a root or stump," fell off the mower, and sustained an injury to his left ankle. Id. at *3. The matter was dismissed on summary judgment. Id. at *4. On appeal and in reversing the trial court, the Appellate Division relied upon Ogborne to find that "it was the alleged action of the corrections officers in ordering plaintiff to use the Husqvarna mower over the area at issue that debatably rendered the area a dangerous condition." Id. at *9. The Appellate Division found,

> The motion judge erred in narrowly predicating the existence of dangerous condition solely on the stump the mower had hit and in failing to consider the role defendants allegedly played in creating the dangerous condition by ordering plaintiff to use the Husqvarna mower in an area where they knew it would be unsafe to do so.
>
> Id. at *9-10.

The Bonanata Court also specifically found that the trial court incorrectly relied upon Levin v. County of Salem, 133 N.J. 35 (1993), which was factually distinct. Id. at *10. In Levin, the plaintiff was injured when he dove off a public bridge. Id. at *10 (citing Levin, 133 N.J. at 37). Unlike Levin, the Bonanata matter did not involve a plaintiff engaged in the "unauthorized use of public property for private recreational activities," but instead involved a plaintiff would was instructed

by a public employee to use a commercial mower in an area where defendants knew or should have known it would be unsafe to do so. Id. at *10.

The instant case is analogous to the facts of Ogborne v. Mercer Cemetery Corp. and Bonanata v. State, which makes clear that the action or inaction of a public entity can create a dangerous condition in otherwise safe property. Here, the Winslow Township property was in a dangerous condition by virtue of the nature and circumstances of the work being performed on the property.

Plaintiff, John Schmirsky, an employee of Aliano, was carpenter and was fire-taping the drywall joints up within the roof trusswork, which started at about 10-12' above the floor and sloped up to its highest point in the middle of the truss span to about 30'high above the floor, when the accident occurred. In order to access the higher areas, Mr. Schmirsky would step off the ladder, without a safety harness or appropriate tie offs, and stand on short sections of wooden planking resting high up between the trusses. The work Mr. Schmirsky was doing essentially changed the ladder he was using into a work platform. The accident occurred when the rubber shoe on the foot of the ladder came off and allowed the ladder to slip or "kick out" when the exposed to the smooth, concrete floor. The "kick out" caused Mr. Schmirsky to fall to the ground.

The ladder in question was provided by Aliano. The contract agreement between Aliano and Winslow Township required that equipment be "unused" and

in safe condition; however, the ladder in question by had been actively used and in view of Winslow Township employees for approximately ten weeks prior to the accident. Pa840 & Pa860-Pa872 & Pa144:11-Pa144:16. Plaintiff's experts have opined that the ladder was deficient and without three-point contact at all times, which was required by OSHA and industry standards. Pa860-Pa872.

Winslow Township allowed the work to be performed in a hazardous manner thus creating a dangerous condition of public property. Specifically, Winslow Township failed to ensure that the ladder was in a safe working condition and failed to comply with OSHA safety requirements. Winslow Township also failed to meet its contractual obligations relating to the safety. Those violations created a hazardous condition of otherwise safe public property much like the facts of Ogborne and Bonanata.

Plaintiff's liability expert, David G. Schoenard, AIA, has opined that Winslow Township should have been on site and immediately flagged the dangerous condition posed. Pa839-Pa859. Mr. Schoenard opined that there was an imminent safety risk as being performed by Mr. Schmirsky working unsafely on behalf of Aliano. Id. This risk may have caused harm to Winslow Township's own personnel, or harm to the construction crew, or as it turned out, the unfortunate and catastrophic harm to Mr. Schmirsky. Id. Importantly, Mr. Schoenard also opined the manner and method of the work violated various OSHA safety requirements. Id.

Additionally, Plaintiff's liability fall protection expert, John Whitty, P.E., has opined that job-site safety is a shared responsibility. Pa860-Pa872. Mr. Whitty opined that the ladder in question was too steep and that fall protection was not adequately provided, which violates OSHA. Id. Mr. Whitty also opined that Winslow Township did not exercise adequate control over the work as it did not enforce the provisions of the contract with Aliano, including ensure that Aliano adhered to the terms of the contract, that Plaintiff was provided with safe equipment for the job, that OSHA safety requirements were followed. Id. Winslow Township had the right and the responsibility for job site safety, which could not be delegated way to Aliano under the terms of the agreement. Id. Winslow Township further had the contractual right and responsibility to stop the dangerous work and put Aliano on notice to ensure that the necessary corrective measures were implemented. Winslow Township did not do this. Id.

In sum, Plaintiff's claim is not that there was an actual, physical defect at the property. Rather, it is alleged, as in Ogborne and Bonanata, that the dangerous nature and circumstances of the job site made it patently unsafe for the anticipated use by Aliano workers, including Mr. Schmirsky.

Consequently, the summary judgment motion should have been denied. Winslow Township's permitted work to be performed without proper equipment in violation OSHA safety requirements and its contractual obligations, which was

hazardous and created a dangerous condition of public property. Pa839-Pa859 & Pa860-Pa872. Summary judgment should not have been entered.

IV. There is evidence that Winslow Twp. created the dangerous condition, and therefore, notice is not required, and accordingly, the Trial Court's summary dismissal of the case is reversible error. (Pa1 & T1-T43)

N.J.S.A. 59:4-2(a) provides that a public entity may be liable for a dangerous condition of public property when "a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment **created the dangerous condition**." (emphasis added). Under such circumstances, notice is not required.

Here, there is evidence that Winslow Township created the dangerous condition by permitting the nature and circumstances of the work, including use of a deficient and dangerous ladder, to be performed on the property. Winslow Township entered into a contract with Aliano. Winslow Township retained certain rights and responsibilities under the terms of the contract, including (1) the right to inspect Aliano's equipment, (2) the right to attend project safety meetings, (3) the right to require that Aliano designate a person who was responsible for safety during the period of the daily construction activities, (4) the right to require that it receive daily construction reports that would include worker safety, (5) the right to stop work that was deemed to be unsafe, take corrective action and to notify Aliano, and (6) the right to fire Aliano for any unsafe actions. Pa102:23-25-Pa103:22 & Pa120:2-

Pa127:13 & Pa134:9-Pa134:17 & Pa135:14-Pa138:4 & Pa141:7-Pa141:12 & Pa145:9-Pa145:23 & Pa839-Pa859 & Pa860-Pa872.

Winslow Township did not exercise adequate control over the work and such failures or "omissions" created a dangerous condition of public property. Id. N.J.S.A. 59:4-2(a). Winslow Township had the authority and ability to identify unsafe conditions and take corrective action, but did not. Id. Winslow Township's code officials did not internally share observations of the work site. Id. Winslow Township did not have representatives visit the site more often than just every two weeks. Winslow Township did not discuss specifically safety concerns as an item on the bi-weekly agenda. Id. Winslow Township was invited to toolbox meetings; however, did not attend. Id. Winslow Township did not receive, review, or approve an Aliano submitted, acceptable OSHA compliance written safety plan, which would have included crucial items including full-time fall protection plan for exposures over 6 feet high. Id. Winslow Township also failed to ensure that Aliano provided daily construction reports, which should have included safety concerns including the use of safe ladders and fall protection. Id. Winslow Township failed to ensure that OSHA safety requirements were followed. Id.

In sum, the collective failures and omissions by Winslow Township created the dangerous condition. Therefore, notice is not required. The Defendant was not entitled to a summary judgment.

V. There is evidence that Winslow Twp. had actual and constructive notice of the dangerous condition of public property under N.J.S.A. 59:4-3, and as a result, the Trial Court's summary dismissal of the case is reversible error. (Pa1 & T1-T43)

a. Actual notice.

Under N.J.S.A. 59:4-3(a), a public entity shall be deemed to have "actual notice" of a dangerous condition "if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."

Here, there is evidence that Winslow Township had actual notice of the dangerous condition of the property and work. Winslow Township's Director of Public Works attended the project meeting on July 2nd – four days prior to the accident – where safety was discussed. Pa165:15-Pa166:20 & Pa188:1-Pa188:10. Winslow Township's representative was able to view the extent of the construction zone at the project meeting on July 2nd just prior to the accident. Pa142:22-Pa143:12. The main floor of the project was open, and the Winslow Township employees could see the Aliano equipment, including the worn ladder. Id. Mr. Schmirsky observed the Winslow Township code official performing code required inspections along with the Aliano foreman. Pa744:17-Pa744:25. Winslow Township near or should have known of the dangerous condition of the property since Winslow Township employees were present when the work was done and attended project meetings in view of the construction zone just four days before the accident. Pa142:22-Pa143:12 & Pa165:15-Pa166:20 & Pa188:1-Pa188:10.

As such, there is evidence that Winslow Township had actual knowledge of the dangerous condition.

b. Constructive notice.

Under N.J.S.A. 59:4-3(b), a public entity shall be deemed to have "constructive notice" of a dangerous condition "if the plaintiff establishes that the condition had existed for a such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

Additionally, there is evidence that Winslow Township had constructive notice of the dangerous condition of the property and work. The project in question consisted of a one-story addition and the complete renovation of the facility, including fire-taping the drywall joints within the roof trusswork as high as 30 feet high. Pa142:22-Pa143:12. No scissor lifts were provided. Winslow Township code officials performed inspections throughout the course of the project. Pa744:17-Pa744:25. A Winslow Township representative attended a project meeting just four days prior to the accident. Pa165:15-Pa166:20 & Pa188:1-Pa188:10. The meeting took place in view of the construction zone. As discussed, contrary to the contract specifications unused equipment was required to be used on the property. The extension ladder in question had been actively and obviously used and was in a observable state of disrepair. Pa1057-Pa1073 & Pa839-Pa859 & Pa860-Pa872.

Importantly, the extension ladder was in view for approximately ten weeks prior to the accident. Pa144:11-Pa144:17.

Therefore, there is evidence that Winslow Township had constructive notice of the dangerous conditions. The dangerous condition created by the unsafe work environment had existed for approximately ten weeks and was of such an obvious nature that Winslow Township should have discovered the condition and its dangerous character. Summary judgement was not available.

VI. There is evidence that Winslow Twp's conduct was palpably unreasonable, and accordingly, the Trial Court's summary dismissal of the case is reversible error. (Pa1 & T1-T43)

N.J.S.A. 59:4-2 requires that a claimant demonstrate that the action or inaction of the public entity in respect to its effort to protect against the condition was "palpably unreasonable." The New Jersey Supreme Court in Kolitch v. Lindedahl concluded that the "term implies behavior that is patently unacceptable under any given circumstance." Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985). The Kolitch Court, quoting the Law Division in Polyard v. Terry, 148 N.J. Super. 2020 (Law Div. 1977), further stated that "it must be manifest and obvious that no prudent person would approve of its course of action or inaction." Kolitch, 100 N.J. at 493.

The burden of proof with regard to palpable unreasonableness of the public entity's action or inaction is on the claimant. Coyne v. State, Dept. of Transp., 182 N.J. 481, 493 (2005). Importantly, however, the **palpable unreasonableness of a**

public entity's conduct is a question of fact for the jury except in cases where reasonable persons could not differ. Brown v. Brown, 86 N.J. 565, 580 (1981). (emphasis added).

Here, a reasonable jury could conclude that the inaction of Winslow Township in failing address a highly dangerous condition of public property (i.e., exposure to an inadequately protected fall from elevation) was palpably unreasonable. As discussed, jobsite safety was a shared responsibility between Aliano and Winslow Township. The dangerous condition went unaddressed by Winslow Township and ultimately resulted in the serious injury to Mr. Schmirsky. Winslow Township failed to adequately exercise control over the work, which was palpably unreasonable. Winslow Township code enforcement officials would walk the project and attend safety meetings, including a meeting just four days before the accident. The extension ladder was in view for approximately ten weeks. Mr. Schmirsky was working at a height of 30 feet without any fall protection. Plaintiff's liability expert, David Schoenhard, opined that having workers, such as Mr. Schmirsky, climb around within the trusswork on loose-laid planking without a safety harness while using the ladder as a platform was grossly unsafe. This was particularly true when the ladder was worn and the rubber shoe was able to come off allowing the ladder to kick out. Pa839-Pa859 & Pa860-Pa872.

Under the provisions of the contract, Winslow Township had the right to stop work at that was unsafe and take corrective action. Winslow Township also had the right to fire Aliano for unsafe actions. Winslow Township should have taken corrective action in light of the above known working conditions. The failure to do so was patently unacceptable. Id.

There is evidence that Winslow Township's conduct was palpably unreasonable**.** As such, the summary judgment motion below should have been denied.

VII. There is evidence that Winslow Twp. undertook certain duties concerning the construction equipment and work site safety and was thereby involved with the means and methods of Plaintiff's work and, thus, owed a duty to provide a reasonably safe job site, and therefore, the Trial Court's summary dismissal of the case is reversible error. (Pa1 & T1-T43)

A landowner has a non-delegable duty to provide a reasonably safe place for business invitees to perform their work. Piro v. Pub. Serv. Elec. & Gas Co., 103 N.J. Super. 456, 463 (App. Div.), aff'd o.b., 53 N.J. 7 (1968). However, when a landowner hires an independent contractor, "the general principle is that the landowner is under no duty to protect an employee of the independent contractor from the very hazard created by the doing of the contract work." Gibilterra v. Rosemawr Homes, 19 N.J. 166, 170 (1955). The exception only applies when "the landowner does not retain control over the means and methods of the execution of the project." Muhammad v. N.J. Transit, 176 N.J. 185, 198 (2003),

In the context of a New Jersey Tort Claims Act, the duty to protect against particular dangers known to the public entity does not extend to employees of independent contractors where the employer is warned. For example, in Muhammad v. N.J. Transit, 176 N.J. 185 (2003), the New Jersey Supreme Court held that it was not palpably unreasonable of NJT to warn only the contractor of the dangerous condition posed by a deteriorating roof and expect that the contractor would warn its individual employees. In Muhammad, the plaintiff, an employee of the contractor, suffered injuries when he fell through a roof while removing asbestos on a building owned and controlled by NJT. Id at 188. Prior to the commencement of the work on the 31,500 square foot roof, NJT advised a representative of the roof's dangerous condition. Id. at 189-190. (emphasis added). Importantly, it was undisputed that both NJT and the contractor were aware of the dangerous condition of the roof. Id. at 190. Rather, the plaintiff alleged that NJT did not discharge its landowner duty to him by the warnings given to his employer and that NJT should have warned him directly of the dangers of the deteriorating roof. Id. at 188. The New Jersey Supreme Court found that there was no evidence that the State's actions were palpably unreasonable and, thus, liability under N.J.S.A. 59:4-2 for the dangerous condition of the roof could not be imposed. Id. at 200. In reaching that conclusion, the Court noted that the "plaintiff's status as an employee of an independent contractor must play an integral role in determining what duty, if any,

NJT owed directly to the plaintiff." Id. at 198. The Court noted that there was no evidence that the State retained control over the means and methods of the plaintiff's work and, "the duty to give warnings to its employees fell to the experienced independent contractor that had the requisite knowledge of the condition of the roof and had undertaken the means and methods" for repair. Id. at 199-200. Under the circumstances, the Court found that it was not palpably unreasonable for NJT to expect that the contractor would inform its employees of the dangers inherent to the project. Id. at 199. The Court noted that NJT had the burden of protecting against a dangerous condition on its property and satisfied that that burden through warnings directly to the contractor. Id. In short, it was not palpably unreasonable for NJT to fail to inform the "tens or hundreds" of individual workers on site. Id. at 200.

Additionally, in the unpublished case of Budnik v. State, Nos. A-4133-08T3, A-4430-08T3, A-4629-08T3, 2011 N.J. Super. Unpub. LEXIS 2868 (App. Div. Nov. 21, 2011) (Pa1084-Pa1094) cited below by Winslow Township, the plaintiff alleged that the State maintained sufficient control over a project to create a triable issue as to whether it breached the common law non-delegable duty to provide a contractor's employees with a safe workplace. In Budnik, the plaintiff was injured when he fell through the roof of a State-owned building. Id at *2. The plaintiff was working for the contractor the State had hired to repair the deteriorated roof. Id. at *2. The Appellate Division found that lability could not attach as the State did not control

the methods and means of the contractor's work. Id. at *27. Specifically, the court noted that the State merely retained "general supervisory power" of the work and not the right to interfere or participate in the day-to-day means and methods. Id. at *28. The court also noted that general contractual authority to monitor or stop work did not rise to the level of control over the means and methods of the contractor's work. Id. at *28. Under those facts, the court declined to impose liability.

Factually, the instant matter is dissimilar to both Muhammad and Budnik. For example, unlike Muhammad, Winslow Township never took action to warn Aliano of the dangerous condition or action to remedy the hazard. In other words, Winslow Township did not discharge its non-delegable duty as a landowner by warning Aliano of the imminent safety hazard posed by the working conditions.

Additionally, unlike the public entities in Muhammad and Budnik, there is evidence that Winslow Township controlled the means and methods of the work that goes beyond a mere general supervisory power or contractual authority alone. Winslow Township representatives were actively participating in and attended safety meetings, including a meeting just days before Mr. Schmirsky's accident. Worker safety was specifically discussed at the meetings. Winslow Township code officials were on site and performing inspections during the project. It was understood by all parties that Winslow Township could stop the work that was deemed unsafe. Pa102:23-25-Pa103:22 & Pa120:2-Pa127:13 & Pa134:9-Pa134:17

& Pa135:14-Pa138:4 & Pa141:7-Pa141:12 & Pa145:9-Pa145:23 & Pa839-Pa859 & Pa860-Pa872.

Of course, these facts are also buttressed by the contractual authority to demand daily construction reports, require an OSHA competent person, stop work at that was unsafe and take corrective action, and to fire Aliano for unsafe actions. Id.

Accordingly, the Defendant's motion for summary judgment should have been denied. Winslow Township had a non-delegable duty to provide a safe worksite**.**

VIII. The Government/Township of Winslow contractually agreed to undertake duties, and Winslow is not immune from failing to meet the duties it agreed to perform, and as a result, the Trial Court's summary dismissal of the case is reversible error. (Pa1 & T1-T43)

As N.J.S.A. 59:1-4 states, "Nothing in this act shall affect liability based on contract…" There is no immunity for violating contracts made by the government. Winslow contractually agreed to a joint construction project. The obligations of the agreed contract imposed duties, which included job site safety. Those contractual obligations/duties were owed to Plaintiff. The contractual obligations/duties inured to the benefit of Plaintiff. Winslow did not meet the duties it contractually agreed to perform and the breach of the duties was a cause of the accident. Summary Judgment was not available.

CONCLUSION

The trial court incorrectly granted summary judgment in favor of Respondent. Therefore, Appellant respectfully requests this Honorable Court to reverse the Trial Court's November 8, 2024, Order granting summary judgment in favor of Respondent and remand this case for further proceedings.

JARVE GRANATO STARR, LLC

Dated: April 21, 2025

Anthony Granato
Anthony Granato

IN THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

NO. A-000917-24

JOHN SCHMIRSKY AND KIMBERLY SCHMIRSKY, husband and wife,

Plaintiffs/Appellants

v.

TOWNSHIP OF WINSLOW, GARRISON ARCHITECTS, PC; and JOHN DOE AND/OR JOHN DOE CORPORATION 1-10 being fictitious names), jointly, severally and in the alternative,

Defendants/Appellees

BRIEF OF DEFENDANT/APPELLEE, TOWNSHIP OF WINSLOW

On Appeal From the Superior Court of New Jersey, Camden County, Law Division, from the November 8, 2024 Order Granting the Motion for Summary Judgment of Township of Winslow entered by The Honorable Michael J. Kassel

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I. PRELIMINARY STATEMENT

The trial court correctly entered summary judgment in favor of Defendant/ Appellee, Township of Winslow ("Township of Winslow" or "Defendant"), the entity who contracted with Aliano Brothers General Contractors ("Aliano Brothers") to perform work on property owned by Defendant. The evidence demonstrated that there was no material issue of fact disputing that Defendant did not control the means and methods of the work performed by Aliano Brothers – the employer of Plaintiff/ Appellant, John Schmirsky ("Plaintiff"). Defendant instead delegated all control of the means and methods as well as safety duties to Aliano Brothers. Aliano Brothers retained control over all aspects of job safety and provided the safety equipment and materials used in the project – including the ladder from which Plaintiff fell. Defendant's authority to visit the site and stop the project, if necessary, was a right rather than an obligation and merely constituted a general superintendence over the project, not control over the means and methods of same. The trial court properly

concluded that Defendant's lack of control over the means and methods of the project absolved Defendant from liability in this matter. In the alternative, Defendant submits that it is entitled to immunity under the Tort Claims Act and this Court should affirm the trial court's Order on that alternative basis.

On appeal, Plaintiffs/ Appellants, John and Kimberly Schmirsky (collectively "Plaintiffs"), allege that the trial court erred in granting summary judgment in favor of Defendant. They argue that Defendant owed duties to Plaintiff concerning worksite safety based upon the allegation that Defendant was involved with the means of methods of Plaintiffs' work, that the property was in a dangerous condition that was either created or known by Defendant, that Defendant's conduct was palpably unreasonable and/or that Defendant was not immune from suit under the Tort Claims Act. The trial court correctly found that none of these arguments has merit.

Instead, the record and the law support the trial court's determination that Defendant owed no duty to

Plaintiff, since Plaintiff's employer controlled the means and methods of the work performed by Plaintiff, who sustained an unwitnessed fall from an extension ladder provided by Plaintiff's employer and inspected by Plaintiff himself just prior to the incident, and since Plaintiff has no recollection of how or why the fall occurred.

In addition, Defendants are entitled to immunity under the Tort Claims Act, as there is no evidence that demonstrates Defendant had actual or constructive notice of any claimed defective condition on the property. In fact, the record demonstrates that neither Plaintiff nor any witnesses saw any defective condition on the property in the area where the incident occurred. For these same reasons, Defendant did not and could not have breached any purported duty of care to Plaintiff.

The trial court correctly granted summary judgment in favor of Township of Winslow. This Court should affirm the trial court's Order on each or all of the bases set forth in this Brief.

II. PROCEDURAL HISTORY

On June 10, 2022, Plaintiffs initiated the underlying negligence action (which arose from a July 6, 2020 workplace incident) by filing a Complaint against Township of Winslow, Garrison Architects, PC,[1] John Doe and/or John Doe Corporations 1-10. Pa14-26. Specifically, Plaintiff asserted negligence claims against Defendant, Township of Winslow, based upon an alleged "dangerous condition of the… property" that Plaintiff alleged caused his fall and injuries. Pa16-19. Plaintiff, Kimberly Schmirsky, asserted a loss of consortium claim. Pa21. Township of Winslow filed an Answer to the Complaint, denying these allegations and asserting affirmative defenses. Pa27-36.

Following the close of discovery, Township of Winslow filed a Motion for Summary Judgment, on the bases that (1) the exception to immunity under N.J.S.A. 59:4-2 does

[1] Defendant, Garrison Architects, P.C., was dismissed from the underlying action via Consent Order entered on October 6, 2022. Pa60-61. Third-Party Defendant, Aliano Brothers General Contractors, was dismissed from the underlying litigation via Stipulation. Pa1084-1085.

not apply because Plaintiff's injuries were not caused by a dangerous condition of Defendant's property; Defendant neither knew of, should have known of, nor caused any dangerous condition leading to Plaintiff's injuries; and/or nothing about Defendant's conduct was "palpably unreasonable;" and/or (2) Defendant did not control the means and the methods of the work of Plaintiff's employer, Aliano Brothers, and was not responsible for jobsite safety. Pa68-72. Plaintiffs opposed the Motion. Pa73-81.

The parties presented argument before The Honorable Michael Kassel, J.S.C. on November 8, 2024. Pa12. Judge Kassel granted summary judgment in favor of Defendant by Order filed November 8, 2024, dismissing all claims against Defendant with prejudice. Pa7.

Plaintiffs filed a timely appeal from the Order granting summary judgment in Township of Winslow's favor with this Court. Pa2-12. Plaintiffs filed their Brief in support of their appeal, along with their Appendix.

Township of Winslow now files this Brief in opposition to Plaintiffs' request for appellate relief.

III. COUNTER-STATEMENT OF FACTS

Plaintiffs' claim arises out of a worksite injury that occurred on July 6, 2020, at the Winslow Township Senior Center located at 33 Cooper Folly Road, Atco, New Jersey 08004. Pa14-26. On March 20, 2020, Defendant entered into a contract with Aliano Brothers for additions and renovations to the Township Senior Center. Pa873-922.

Plaintiff worked as a carpenter since approximately 1986, when he began his apprenticeship and joined the Union "Carpenters and Joiners of America." Pa691. At the time of the incident at issue, Plaintiff was working as a carpenter for Aliano Brothers. Pa923-934. He testified that he worked as a job foreman for Aliano Brothers "many times" prior to the accident. Pa.748.

In approximately the year 2000, Plaintiff obtained a Master Carpentry Certificate through the State of New Jersey. Pa691. He was required to undergo safety training, which included ladder safety, through the

Occupational Safety and Health Organization ("OSHA"). Pa703.

Plaintiff testified that, in accordance with Union Rules, contractors (such as Aliano Brothers) supply "all equipment, all safety equipment, and all power equipment." Pa700. He performed daily inspections of ladders as part of his practice as a carpenter. Pa704. During the inspections, Plaintiff would look for anything broken or out of place. Pa705.

During his ten years working for Aliano Brothers, Plaintiff participated in daily "toolbox talks." Pa719. During those talks, ladder safety was discussed, and Plaintiff was instructed to inspect ladders for damages prior to use. Id.

While at the Township of Winslow project, all of Plaintiff's instructions for carpentry work were issued by Aliano Brothers' foreman, Tom Height. Pa.713. Plaintiff confirmed his belief that Aliano Brothers owned the ladder he was using on the date of the incident at issue. Pa715.

On the date of the incident at issue, Plaintiff had inspected the ten-to-twelve feet tall extension ladder that he was using while applying fire tape at the time of his fall. Pa715. At no point during the project did Plaintiff ever see anything wrong with the ladder he was using. Id. In addition, Plaintiff was not aware of any hazardous conditions that existed on the job site prior to his accident. Pa716.

Plaintiff acknowledged that the ladder he was using at the time of his accident was not tied off, nor did it need to be. Pa705. He also acknowledged that, at times, he would step off the ladder and onto a plank which he would place onto a truss, if he had to access an area where the ladder could not go. Pa736. At other times, Plaintiff would step off the ladder and directly onto trusses. Pa750. Provided that he felt secure, Plaintiff would typically not tie off when stepping off the ladder. Pa737. At the time of the accident, no one was supervising Plaintiff's work other than Aliano Brothers. Pa737-738.

Plaintiff has no recollection of the fall at issue. Pa738. When asked if he had any idea how he ended up on the ground, Plaintiff responded, “No, not a clue.” Pa739. In reviewing a photograph of the ladder involved in his accident during his deposition, Plaintiff testified that the bottom of the ladder was damaged during the fall. Pa754-755.

Michael Aliano, President of Aliano Brothers, testified that Aliano Brothers owned the ladder from which Plaintiff fell. Pa144. Simeon Martello, the Public Works Director for the Township of Winslow, testified, consistent with the testimony of Mr. Aliano, that the Township never provided a ladder to anyone for purposes of this project. Pa1040.

Mr. Aliano further testified that it was the responsibility of Aliano Brothers, not that of the Township of Winslow, to ensure the safety of the worksite and the workers. Pa115-116. This is consistent with the work contract, which states “[T]he Owner assumes no responsibility or liability for the physical condition

or safety of the Project site;" "The Contractor will serve as the overall Project Safety Coordinator and shall be responsible for all issues of safety and protection." Pa862. Following the accident, OSHA conducted an investigation and found no violations present. Pa498-517.

IV. LEGAL ARGUMENT

A. LEGAL STANDARD FOR SUMMARY JUDGMENT

The Appellate Division's review of a grant of summary judgment is *de novo*, and the Court must apply the same Rule 4:46 standard that governs the trial court. LVNV Funding, L.L.C. v. Colvell, 421 N.J. Super. 1, 6 (App. Div. 2011) (citations omitted). Rule 4:46-2(c) provides that summary judgment is appropriate:

> if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

R. 4:46-2(c).

"[T]he determination [of] whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

In reviewing an Order granting summary judgment, this Court first decides whether a genuine issue of material fact existed and then, if not, whether the judge drew the correct legal conclusions. Henry v. N.J. Dep't of Human Serv., 204 N.J. 320, 330 (2010) "[S]ummary judgment should be granted 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'"

Brill, supra, 142 N.J. at 533 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

The trial court correctly applied the law to the facts of record in granting summary judgment in favor of Defendant. Accordingly, the trial court's Order should be affirmed on each or all of the bases set forth by Defendant in this Brief (and raised below).

B. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT WHERE THE EVIDENCE ESTABLISHED THAT TOWNSHIP OF WINSLOW HAD NO CONTROL OVER THE MEANS AND METHODS OF PLAINTIFF'S WORK.

Generally, a landowner is not liable for injuries to a subcontractor resulting from the condition of the premises or the manner in which the hired work was performed. Majestic Realty Assocs., Inc. v. Toti Contracting Co., 30 N.J. 425, 430-31 (1959); Wolczak v. Nat'l Elec. Products Corp., 66 N.J. Super. 64, 71 (App. Div. 1961). The premise underlying this common law principle is that a general contractor "may assume that the independent contractor and her employees are sufficiently skilled to recognize the dangers associated with their task and adjust their methods accordingly to

ensure their own safety." Accardi v. Enviro-Pak Sys. Co., 317 N.J. Super. 457, 463 (App. Div. 1999), certif. denied, 158 N.J. 685, 731 (1999).

A limited exception exists when a landowner retains control over the manner and means of doing the work contracted for. See Muhammad v. N.J. Transit, 176 N.J. 185, 198 (2003). A "general superintendence power," which is necessary to insure that the contractor performs his agreement, does not fall under the exception. Id. at 197.

In Muhammad, which Plaintiffs recognize is the leading authority on this issue (see Pb25-26), the trial court ultimately granted summary judgment in favor of the defendant, based upon its determination that the defendant entity did not control the means and methods of the project, and therefore did not breach any duty towards the independent contractor. In reaching this determination, the court distinguished between control over the project and a general superintendence power. Id. at 197 ("Developing a project and directing that it be

completed within a certain timeframe and within certain specifications do not constitute interference with the project and remain within the 'general supervisory power over the result to be accomplished rather than the means of that accomplishment.'") (citing Mavrikidis v. Petullo, 153 N.J. 117, 136 (1998)).

The Muhammad court explained as follows:

> **The duty to give warnings to its employees fell to S & W, the experienced independent contractor that had the requisite knowledge of the condition of the roof and had undertaken the means and methods for removal of the asbestos. NJT neither directly supervised the project nor interfered with its execution.** In those circumstances, it would be impractical, if not impossible, to require a public entity, which hires an independent contractor with tens or hundreds of employees, to warn each individual worker on the site. NJT fulfilled its duty to plaintiff by warning his employer, S & W, the independent contractor responsible on the worksite, of the danger. Plaintiff was not left without a remedy. He filed for and received a workers' compensation award through his employment with S & W.

Id. at 200 (emphasis added).

Budnik v. State, 2011 N.J. Super. Unpub. LEXIS 2868 (App. Div. Nov. 17, 2010) involved a similar set of circumstances to the instant matter. Pa1086. Plaintiff was an employee of Renaissance Coating, Inc., who was hired as a contractor by the State of New Jersey to repair the roof of a state-owned building. Id. at *2. During the course of performing his contractual duties, he fell through the damaged roof; he subsequently filed suit for his injuries against the State of New Jersey. Id.

The plaintiff in Budnik argued that the State maintained sufficient control over the project to create a triable issue as to whether it breached the common law non-delegable duty to provide a contractor's employees with a safe workplace. Id. at *27. This Court rejected plaintiff's argument, concluding the State did not interfere with the means and methods of the independent contractor's work and did not supply any of the materials used in the project. Id. at *27-*28. Additionally, this Court found that the contractual provisions granting the State the authority to stop the work did not amount to

the State having control over the means and the methods of the work. Id. at *28. Instead, relying upon the Muhammad decision, this Court held, "[t]hese references encompass the general supervisory power of [the State] over the work, but do not establish the right to interfere or participate in the day-to-day means and methods of the work." Id.

Here, the trial court correctly determined that the Township of Winslow likewise had no duty to Plaintiff. The evidence clearly shows that Defendant did not control the means and the methods of the project and, instead, delegated all safety duties to Aliano Brothers. As was the case in Muhammad and Budnick, Aliano Brothers retained control over all aspects of job safety and provided the equipment and materials used in the project. Like the defendants in Muhammad and Budnick, the fact that Defendant here was periodically on site during the course of the project and had the authority to stop work does not establish the right participate in the day-to-day means and methods of the work.

In their Appellant Brief, Plaintiffs allege that Defendant was directly involved in the work that was being done because they claim that Defendant attended (but did not conduct) certain safety construction meetings. Pb8. This argument is contrary to the holdings in Muhammad and Budnick.

Moreover, the Budnick court's decision highlights the similarities between the situation in that case and the circumstances here:

> Our decision is consistent with the Supreme Court's decision in Muhammad. Like Muhammad, the State here issued no orders to plaintiff Roman Budnik. **Budnik took orders from Renaissance and Renaissance provided fall equipment that was available to Budnik.** There is nothing in the record to indicate that Budnik was paid by anyone other than Renaissance, and he ultimately received workers' compensation benefits through Renaissance's workers' compensation Carrier.

Id. at *9 (internal citations omitted) (emphasis added).

In granting Defendant's Motion for Summary Judgment, here, the trial court properly rejected Plaintiffs' contention that Defendant's authority to visit the site

and stop the project, if necessary, was a right rather than an obligation and constituted control over the means and methods of the same. The trial court explained that Plaintiffs were improperly attempting to "impose a duty on [the Defendant] to actively supervise every aspect of the work." Tr. 1/6/25, at 9:1-8. The trial court further correctly noted the evidence in this case shows that "[t]he responsibility for worker safety in this case rests with the plaintiff's employer. Id., at 20:16-18.

The trial court further explained that Plaintiffs' attempt to place liability upon the Defendant under the circumstances of this case was against public policy:

> I]t clearly will disincentivize public entities when they need to basically hire contractors to do work on their property, about getting involved in all, in the process to make sure that it's -- it's safe not just by the way for the workers, but safe for the citizens of -- in this case of Winslow Township. People that might live near the construction, that type of thing. **And I think once you basically tell municipalities that once they stick their little toe into the ocean, that they're in -- you know, in for a pound, in for a penny -- in for a penny, in for a pound, whatever that cliché is.**

> **The lesson that the solicitor or the municipal will learn is that you know what, hire them to do the work and don't do anything.** Don't attend any meetings, don't put any -- don't sign any contracts imposing any duties because when things go wrong, and they will, okay. Somebody gets injured, that's what's gonna be used to bring into the case. And I'm simply noting that **that provides a somewhat perverse disincentive for municipalities to act reasonably to make sure that when they've hired an entity to do some work on their property, that the work be done safely**.

Tr. 1/6/25, at 22:8-23:6 (emphasis added).

In their Brief, Plaintiffs cite extensively to their expert reports (Pb9-10); however, they fail to set forth any actual facts of record to support their allegation that Defendant controlled the means and methods of Plaintiff's work. Instead, the undisputed facts of record show that Plaintiff's employer, Aliano Brothers, controlled the means and methods of Plaintiff's work, was responsible for its employees' safety, and even supplied the ladder from which Plaintiff fell on the date of the incident.

The trial court's Order granting summary judgment in favor of Defendant is consistent with the record and all applicable authority. The trial court's Order should be affirmed.

C. IN THE ALTERNATIVE, PLAINTIFFS' CLAIMS ARE BARRED BY THE TORT CLAIMS ACT.

Under the Tort Claims Act ("TCA"), which "indisputably governs causes of action in tort against governmental agencies within New Jersey," a public entity is immune from liability for an injury unless a specific provision of the TCA authorizes otherwise. N.J.S.A. 59:2-1(a); Gomes v. Cnty. of Monmouth, 44 N.J. Super. 479, 487 (App. Div. 2016). Under N.J.S.A 59:1-3, municipalities, such as Defendant, are clearly defined as "public entities" for the purposes of the Act.

The TCA was enacted to insulate public entities from liability because the legislature recognized that "the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." N.J.S.A. 59:1–2. Accordingly, the

legislature restricted the scope of a public entity's liability in tort by authorizing blanket immunity with very few exceptions and by imposing strict notice requirements upon plaintiffs seeking to file suit. N.J.S.A. 59:2-1.

Here, the trial court Order granting summary judgment in favor of Defendant should be affirmed on the alternative basis that Plaintiffs' claims, which fall under the TCA, should be dismissed as a matter of law because Defendant is entitled to blanket immunity, as liability is not authorized under N.J.S.A. 59:4-2 or any other section of the Act.

1. THE TOWNSHIP OF WINSLOW DID NOT FAIL TO PROTECT AGAINST A DANGEROUS CONDITION UNDER N.J.S.A 59:4-2.

One limited exception to blanket immunity for public entities under tort is codified under N.J.S.A. 59:4-2, which provides that, for a public entity to be liable for injury caused by a condition of its property, the plaintiff must establish: (1) the public entity's property was in dangerous condition at the time of the injury; the injury was proximately caused by the

dangerous condition; and the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred; (2) a negligent or wrongful act or omission of a public employee created the dangerous condition, or a public entity had actual or constructive notice of the dangerous condition; and (3) the public entity acted in a palpably unreasonable manner in protecting against, or failing to protect against, the dangerous condition. N.J.S.A. 59:4-2.

N.J.S.A. 59:4-2 "places the burden squarely on the plaintiff to prove each of its elements," or else public immunity will apply. Carroll v. New Jersey Transit, 366 N.J. Super. 380, 386 (App. Div. 2004). A plaintiff's failure to satisfy any one of the elements under N.J.S.A. 59:4-2 precludes recovery. N.J.S.A. 59:4-2; Polzo v. Cnty. of Essex, 209 N.J. 51, 66 (2012).

Here, Plaintiffs cannot even satisfy a single required element under the statute, let alone all of them.

a. Plaintiff's Injury was not Caused by any Dangerous Condition of Defendant's Property.

Under the TCA, "a public entity is liable for an injury caused by a condition of its property if the plaintiff establishes **that the property was in dangerous condition**," and such condition caused a reasonably foreseeable injury. N.J.S.A. 59:4-2(a) (emphasis added). A "dangerous condition" is defined as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." N.J.S.A. 59:4-1(a).

The statutory language is unambiguous in that the dangerous condition must be part of the public entity's property in order for this exception to blanket immunity to apply. Specifically, the term "dangerous condition," as defined in N.J.S.A. 59:4-1(a), "refers to the physical condition of the property itself and not to activities on the property." Sharra v. Atlantic City, 199 N.J. Super. 535 (App. Div. 1985) (citations omitted).

Here, the record demonstrates that there was no dangerous condition with regard to the physical property itself. Instead, it is undisputed that Plaintiff fell from a ladder that was owned and provided to Plaintiff by his employer, Aliano Brothers – not Defendant.

Although Plaintiff testified that he could not recall how or why the fall occurred, he argues in his Brief that the rubber shoe on the foot of the ladder came off and allowed the ladder to slip when exposed to the concrete floor. See Pb15. It is clear from the evidence and the case law that the ladder was not a condition of Defendant's property.

Seemingly aware of this, Plaintiffs attempt to argue that the ladder in question had been used "in view of" Defendant's employees for weeks prior to the accident and, therefore, appear to claim that Defendant should have seen the claimed dangerous condition of the ladder. See Pb16. Plaintiffs' argument is inconsistent with Plaintiff's own testimony – during which he stated that he inspected the ladder prior to using it on the date of

the fall and found nothing wrong with the ladder. Moreover, all of the testimony of record demonstrates that Aliano Brothers – not Defendant – was responsible for on-site safety.

Plaintiffs' reliance upon Ogborne v. Mercer Cemetery Corp., 197 N.J. 448 (N.J. 2009) and Bonanata v. State, 2021 N.J. Super. Unpub. LEXIS 1111 (App. Div. June 11, 2021) is misplaced. In Ogborne, a city employee had prematurely locked the gate to a public cemetery, causing the plaintiff to get trapped inside. Id. at 453. The plaintiff had to scale a cemetery wall to exit and injured herself in doing so. Id. At issue was whether the confluence of the employee's actions and the physical condition of the public gate being locked created a dangerous condition. Id. at 461. Ultimately, this Court remanded the matter, since the proper legal standard for judging plaintiff's claim against the City should have been the combined dangerous condition of public property and "palpably unreasonable" standard pursuant to N.J.S.A. 59:4-2, and not the ordinary negligence standard Id.

Bonanata involved the distinguishable situation in which the plaintiff's use of a lawnmower, *in conjunction with the presence of possible stumps along the tree line that was known to be a potentially dangerous condition by defendant*, caused the injuries. Id., at *9-*10.

The case law clearly distinguishes between dangerous conditions of property and dangerous activities thereupon. Neither the ladder nor Plaintiff's activities on the ladder constitute a condition of Defendant's property. There is no evidence that any condition of the property contributed to Plaintiff's fall.

b. Even if a Dangerous Condition of Defendant's Property is Found, Defendant Neither Caused nor was on Actual or Constructive Notice of It.

Under N.J.S.A 59:4-3, a public entity has actual notice of a condition where it has "actual knowledge of the existence of the condition and knew or should have known of its dangerous character." Conversely, "constructive notice" of a dangerous condition exists when "the plaintiff establishes that the condition had existed for such a period of time and was of such an

obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." Id.

In order to prevail on a theory of liability in tort, Plaintiffs were required to show that Defendant caused, or was on notice of, a dangerous condition leading to Plaintiff's injury (in addition to proving that said condition was part of Defendant's property). No evidence of the record suggests that Defendants had actual knowledge of any dangerous condition prior to the accident or that any dangerous condition ever existed.

The record in its totality does not create any triable question as to whether any defect in the ladder "had existed for such a period of time and was of such an obvious nature" that it should have been discovered with due care. N.J.S.A 59:4-3. Further, all deposition testimony is consistent that Aliano Brothers, not Defendant, was responsible for jobsite safety and inspection. Plaintiff himself testified that he was trained to perform daily inspections of ladders and that

it was the responsibility of Aliano Brothers to ensure the safety of the worksite. Furthermore, the contract itself dictates that the independent contractor is solely responsible for the safety of all workers on the jobsite.

Plaintiffs argue in their Brief that Defendant should have seen the "worn ladder" that they now claim was in an "observable state of disrepair" several days prior to the incident. See Pb20, 21. This argument conflicts with Plaintiff's own admissions that he inspected the ladder just prior to the incident and found no problems with it.

There is a complete dearth of evidence suggesting that there was a dangerous condition of the premises, let alone one caused by Defendant. Accordingly, Plaintiffs' claims fail.

c. Defendant's Conduct was not Palpably Unreasonable.

In an action under N.J.S.A. 59:4-2, the plaintiff bears the burden of demonstrating that the entity asserting immunity acted in a palpably unreasonable manner. Muhammad v. N.J. Transit, 176 N.J. 185, 195 (2003); Holloway v. State, 125 N.J. 386, 403 (1991). The

"palpably unreasonable" standard "imposes a more onerous burden on the plaintiff" by requiring a showing of an "obvious and manifest breach of duty." Id. (citations omitted).

To prove such conduct, "It must be manifest and obvious that no prudent person would approve of its course of action or inaction." Kolitch v. Lindendahl, 100 N.J. 485, 493 (1985). The "palpably unreasonable" standard is an elevated one that requires "behavior that is patently unacceptable under any circumstance." Muhammad, 176 N.J. at 95-96.

In countless cases, New Jersey courts have granted summary judgment in favor of public entities when the non-moving party has failed to allege palpably unreasonable conduct. For example, in Polzo v. Cnty. of Essex, 209 N.J. 51 (2012), the wife of the plaintiff was fatally injured when the wheel of her bicycle was caught in a groove in the roadway. The New Jersey Supreme Court held that the lower court "erred in suggesting that public entities may have to employ the equivalent of

roving pothole patrols to fulfill their duty of care in maintaining roadways free of dangerous defects." Id. at 56. The court further found that, even if all of the other conditions under the statute were met, the township did not act in a "palpably unreasonable" manner. Id. at 74.

In Carrol v. New Jersey Transit, 366 N.J. Super. 380 (App. Div. 2004), an individual slipped on excrement on the steps of an N.J. Transit train and alleged failure to protect against a dangerous condition under N.J.S.A. 59:4-2. The court granted summary judgment in favor of the defendant public entity, finding that the plaintiff presented no proof that N.J. Transit engaged in palpably unreasonable conduct in failing to sweep the floor before the incident occurred. Id. In granting summary judgment, the court highlighted the plaintiff's failure to present proof on divergence from the standard of care for inspections of subway or rail stations. Id. at 390. See also Muhammad, supra (finding no palpably unreasonable contest where a public entity landowner did not control

the means and methods of its subcontractor's contractual performance).

Here, Defendant's conduct, which does not even constitute ordinary negligence, clearly does not rise to the level of palpable unreasonableness. In Polzo and Carrol, the public entities had a duty to conduct inspections and maintain the premises. Yet courts in both of those cases found that the failure to cure the defects in question, one of which unfortunately led to the death of an individual, was not palpably unreasonable.

Here, no such duty was even present because Defendant was not responsible for the means and methods of Aliano Brother's (and Plaintiff's) contractual performance. In light of the above, there is no jury issue as to whether Defendant's conduct was not palpably unreasonable.

In sum, Defendant is not subject to N.J.S.A. 59:4-2 for failure to protect against a dangerous condition because (1) Plaintiff's injury was not caused by a dangerous condition of Defendant's property; (2) Defendant neither caused nor was on actual/constructive

notice of any dangerous condition leading to Plaintiff's injury; and (3) Defendant's conduct was not palpably unreasonable. Plaintiffs' claims were properly dismissed via summary judgment.

Lastly, Plaintiffs argue that they have a cause of action under contract. Pb28. First, no cause of action was raised under contract in the Complaint and, therefore, any such claim has been waived. Second, the contract between Aliano Brothers and the Township is clear that all safety duties were borne by Aliano Brothers; thus, there was no breach of the contract. Third, Plaintiff does not have standing to assert a breach of contract claim, as he is not in privity of contract with the Defendant. Therefore, this argument should be rejected.

V. CONCLUSION

Based upon all of the foregoing considerations and authorities, Defendant/ Appellee, Township of Winslow, submits that the trial court properly granted summary judgment in its favor. As a result, this Court should

affirm the trial court's Order based upon any or all of the reasons set forth herein.

Respectfully submitted,

POST & SCHELL, P.C.

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Appellee, Township of Winslow

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000917-24

JOHN SCHMIRSKY AND KIMBERLY SCHMIRSKY, husband and wife,
Plaintiff/Appellant,

v.

TOWNSHIP OF WINSLOW, GARRISON ARCHITECTS, PC; and JOHN DOE AND/OR JOHN DOE CORPORATION 1-10 being fictitious names), jointly, severally and in the alternative,

Defendant/Respondent.

ON APPEAL FROM ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAMDEN COUNTY DOCKET NO. CAM-L- 1460 -22

SAT BELOW: THE HONORABLE MICHAEL J. KASSEL, J.S.C.

PLAINTIFF/APPELLANT's AMENDED REPLY BRIEF IN SUPPORT OF APPEAL FROM ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT/RESPONDENT TOWNSHIP OF WINSLOW, GARRISON ARCHITECTS, PC

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I. The Plaintiff Appellant's position is broader than one negligence theory that the Defendant Township was sufficiently involved in the work, which is a jury question, and the Defendant ignores the evidence that Winslow was negligent by failing to ensure that Aliano followed contractual obligations concerning construction safety.

-There are issues of fact on the question of whether the Township was sufficiently involved in the work to prevent it from seeking the protection from liability afforded to parties who hire a truly "independent contractor."

Initially, the Defendant focuses on "method and means" involvement in the construction. However, the Plaintiff's position is broader than the argument that the Defendant Township was sufficiently involved in the work. As argued, there are issues of fact on the question of whether the Township was sufficiently involved in the work to prevent it from seeking the protection from liability afforded to parties who hire a truly "independent contractor." That stance has merit, and the Trial Court should be reversed. Pa1 & T:1-T43. (Pb6-12)

Muhammad v. N.J. Transit, 176 N.J. 185, 198 (2003) is not controlling. In Muhammad, "[New Jersey Transit] **did not supervise or direct the project."** Id. at 196. Here, Winslow was directly involved in the project including attending weekly construction meetings **which included discussions on construction safety**. Pa102:23-25-Pa103:22 & Pa120:2-Pa127:13 & Pa134:9-Pa134:17 & Pa135:14-Pa138:4 & Pa141:7-Pa141:12 & Pa145:9-Pa145:23 & Pa839-Pa859 & Pa860-Pa872.

Equally, not controlling is Budnik v. State, Nos. A-4133-08T3, A-4430-08T3, A-4629-08T3, 2011 N.J. Super. Unpub. LEXIS 2868 (App. Div. Nov. 21, 2011). Concerning the unpublished Appellant Division case, Winslow's involvement in the construction is far beyond the limited involvement by the State in Budnik. For example, in Budnik the State did not attend weekly construction meetings which included construction safety.

There are issues of fact on the question of whether the Township was sufficiently involved in the work to prevent it from seeking the protection from liability afforded to parties who hire a truly "independent contractor." There is a Jury question, and the Trial Court should be reversed. Moreover, the Defendant disregards the theory and evidence that it was negligent by failing to make sure Aliano performed its contractual obligations concerning worker safety.

- The Plaintiff's position is broader than one negligence theory that the Defendant Township was sufficiently involved in the work and the Defendant ignores the evidence that Winslow was negligent by failing to ensure that Aliano followed contractual obligations concerning construction safety.

As much as the Defendant wants to pigeonhole the Plaintiff's claims into one "independent contractor methods and means box," it fails to recognize the separate negligence theory-Winslow was negligent in performing the ministerial functions it contractually agreed to undertake (N.J.S.A. 59:3-2 d.) **by negligently failing to ensure that the construction company it hired to dangerous work on its property performed its contractual obligations concerning construction safety.**

The Plaintiff does not need to prove that Winslow was involved in the methods and means of the construction to establish Winslow's negligence based on this theory.

Winslow was negligent by failing to ensure that Aliano met its obligations concerning construction safety. For example, as argued in the Plaintiff's Brief (Pb11) (Emphasis added):

1. Winslow Township failed to ensure that OSHA safety requirements were followed.

2. Winslow Township's failed to ensure that the ladder Aliano equipment was in safety working condition.

3. **Winslow Township failed to ensure that a safe ladder (<u>unused equipment per the Contract Specifications</u>) was provided to the workers.**

4. **Winslow Township failed to ensure that Aliano had an on-site OSHA competent person and a person as required by the Contract dedicated to construction safety.**

Winslow is on the construction site and putting aside the unsafe way the injured worker was attempting to spackle the confined area high in the air-not on a stable work platform-which should have been apparent to Winslow, it should have been more than obvious to onsite Winslow representatives that the ladder provided to the Plaintiff was unsafe. The pictures show that the ladder was old and in a major state of disrepair. Pa158:12-Pa158:22; Pa168:11-Pa169:4; Pa171:22-Pa180:13; Pa184:-Pa185:7; Pa14-Pa26; Pa839-Pa859 & Pa860-Pa872 & See the report of David Schoenhard AIA Pa839-Pa859 & the report of fall protection expert John T. Whitty

Pa860-Pa872. **Winslow Township failed to ensure that a safe ladder (unused equipment per the Contract Specifications) was provided to the workers.** Id. and (Pb11) (Emphasis added).

The Defendant is attempting to raise defenses to the negligence claims. Accordingly, it is Winslow's obligation to cite legal support for its alleged defenses. No case cited by the Defendant is on all fours with the case at bar-for example, a government attending construction safety meetings-a contract requiring that unused equipment be used where it should have been obvious to the government that the safety equipment, a ladder was not unused, old and in disrepair. A jury should resolve this dispute between a brain injured worker and a government. Summary Judgment was not available.

CONCLUSION

The trial court incorrectly granted summary judgment in favor of Respondent. Therefore, Appellant respectfully requests this Honorable Court to reverse the trial court's November 8, 2024, Order granting summary judgment in favor of Appellee and remand this case for further proceedings.

Respectfully submitted,

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Attorneys for Appellant

Dated: June 6, 2025

Anthony Granato
Anthony Granato, Esquire