ESTATE OF MICHAEL ALEXANDER, deceased, by LORRAINE ALEXANDER as Executrix of the Estate; and LORRAINE ALEXANDER, Individually, Plaintiffs, v. NORTHEAST SWEEPERS; CHRISTOPHER M. HACKETT; TRI-STATE EQUIPMENT REBUILDING; CRISDEL CONSTRUCTION; FERREIRA CONSTRUCTION; ATHEY PRODUCTION CORPORATION; NEW JERSEY TURNPIKE AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY STATE POLICE; HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C., and JOHNSON, MIRMIRAN & THOMPSON, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001486-23 CIVIL ACTION On Appeal from the Orders granting summary judgment in: Law Division, Essex County, Docket No. ESX-L-7229-14 Sat Below: Hon. Thomas R. Vena, J.S.C.

BRIEF OF PLAINTIFFS-APPELLANTS IN SUPPORT OF THE APPEAL

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TABLE OF CONTENTS – BRIEF

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF TRANSCRIPT DESIGNATIONS

1T – Transcript of Hearing dated June 22, 2018

2T – Transcript of Hearing dated July 26, 2019

TABLE OF CONTENTS – APPENDIX

(Volume 1 of 15 – Pa1 to Pa191)

Page

Page

(Volume 15 of 15 – Pa2759 to Pa2905)

TABLE OF AUTHORITIES

Rules of Court **Pages**

Other Authorities **Pages**

PRELIMINARY STATEMENT

This matter arises from the death of Michael Alexander while working on a repaving project on the New Jersey Turnpike. While working in an active uncontrolled construction zone for his employer, defendant Crisdel Construction a/k/a Crisdel Group, Inc. (Crisdel), Michael Alexander was run over and dragged by a street sweeper, causing fatal injuries. His surviving spouse, Lorraine Alexander, filed suit on behalf of the Estate and individually (Plaintiffs). Defendants are parties involved with the milling and repaving project who failed to ensure a safe workplace, including the employer, Crisdel, the construction supervisor, defendant HAKS Engineers, Architects and Land Surveyors, P.C. (HAKS), its subconsultant, defendant Johnson, Mirmiran & Thompson, Inc. (JMT), and Northeast Sweepers and Christopher Hackett, the owner and operator of the sweeper, respectively.

In June 2018, the trial court dismissed with prejudice plaintiffs' claims against Crisdel, holding that the claims were barred by the Workers' Compensation Act (WCA). In July 2019, the trial court dismissed with prejudice plaintiffs' claims against HAKS and JMT, holding that plaintiffs' claims were for professional negligence and required an Affidavit of Merit. Plaintiffs now appeal those orders dismissing Crisdel, HAKS, and JMT.

Plaintiffs contend that the evidence submitted on Crisdel's motion for summary judgment was sufficient for a jury to find that Crisdel was liable for an intentional wrong as that term has been defined under the WCA. Crisdel's many documented failures to comply with laws, regulatory standards, contract and safety requirements and its own company protocols created a work environment in which the exact harm that occurred was substantially certain to occur. Crisdel's failings were so numerous and pervasive that the work site was an accident waiting to happen, the only question was when.

The dismissal of HAKS and JMT is contrary to Supreme Court precedent. The negligent conduct for which plaintiffs claim those defendants are liable was committed by an employee who is not a "licensed person" as that term is used in the Affidavit of Merit (AOM) statute. Plaintiffs' claim against HAKS and JMT is for vicarious liability for the negligence of that employee. Pursuant to controlling precedent, therefore, plaintiff did not and does not require an AOM.

For those reasons, the motions granting summary judgment to Crisdel, HAKS and JMT must be reversed and the matter remanded.

PROCEDURAL HISTORY

Plaintiffs, Estate of Michael Alexander, Deceased, by Lorraine Alexander as Executrix of the Estate and Lorraine Alexander, Individually, filed suit on October 10, 2014. Pa42. Plaintiffs named as defendants Northeast Sweepers (Northeast),

Christopher M. Hackett, Tri-State Equipment Rebuilding (Tri-State), Crisdel Construction, Ferreira Construction (Ferreira), Athey Production Corporation (Athey), New Jersey Turnpike Authority (NJTA), New Jersey Department of Transportation (NJDOT), New Jersey State Police (NJSP), and John Does and ABC Corps, representing fictitious names for as yet unknown entities. On or about March 6, 2015, NJDOT was dismissed without prejudice. On April 22, 2015, plaintiffs filed an Amended Complaint. On or about August 10, 2015, Ferreira was dismissed without prejudice. On January 27, 2016, pursuant to leave granted, plaintiffs filed a Second Amended Complaint, adding as defendants HAKS Engineers, Architects & Land Surveyors, P.C. (HAKS) and Johnson Mirmiran & Thompson (JMT). Pa64; Pa1737.

Plaintiffs contended that the employees of JMT, an agent of HAKS, who were present and responsible for the day-to-day operations at the construction site, were negligent in the performance of their duties. Pa96-99. None of those employees were professional engineers. Specifically, in the Nineteenth Count of Plaintiffs' Second Amended Complaint, ¶147 and 148, Plaintiffs alleged that HAKS and JMT "negligently, carelessly and/or recklessly operated, designed, controlled, supervised, maintained, inspected and/or created a system of oversight." Pa96. In the Twentieth Count of the Complaint, ¶154, Plaintiffs alleged that HAKS and JMT "via their agents, servants, and/or employees,

negligently, carelessly and/or recklessly supervised and/or monitored the construction site." Pa98. HAKS and JMT were vicariously liable for the negligence of their employees and agents. Plaintiffs did not allege a claim of professional negligence. Pa96-99.

This case was assigned, as requested by Plaintiffs in the CIS, to Track II, 605 Personal Injury, with 300 days of discovery. Pa2719. Defendant, JMT, filed their answer on or about April 1, 2016. Pa2723. JMT filed a CIS and answered "no" to "Is this a professional malpractice case?" Pa2756. JMT did not raise an Affidavit of Merit defense in their Answer, despite raising twenty-nine (29) separate defenses. Pa2749-52. Defendant HAKS filed their answer on or about April 21, 2016. Pa1740. No party ever requested a Ferreira Conference, or the reassignment of the case from Track II to Track III.

On or about August 22, 2016, Athey was dismissed without prejudice.

In June 2017, HAKS and JMT each moved for dismissal with prejudice based on failure to provide an Affidavit of Merit. Pa1939; Pa2308. After briefing and oral argument, the trial court granted both motions. Pa2308. Plaintiffs moved to reconsider, which was denied by Order dated September 15, 2017. Pa1944; Pa2309. On April 19, 2018, pursuant to leave granted, the Appellate Division reversed and remanded. Pa2303. The court held that "[a]pplying the law to the

facts of this case, we are constrained to reverse the orders dismissing the claims against HAKS and JMT and remand for further proceedings." Pa2311.

In April 2018, NJSP was dismissed with prejudice. Also in April 2018, defendant Crisdel moved for summary judgment. Pa40. After briefing and oral argument, on June 22, 2018, the trial court granted the motion and dismissed all plaintiffs' claims against Crisdel with prejudice, holding that "a reasonable trier of fact could not find Defendant committed an intentional wrong, thereby forfeiting immunity under the WCA." Pa1; Pa10.

Discovery proceeded through April 2019. In May 2019, defendants HAKS and JMT each moved again for summary judgment based on alleged failure to comply with the AOM statute. Pa1688; Pa2663. Defendant NJTA moved for summary judgment based on the New Jersey Tort Claims Act, N.J.S.A. 59:1-2. After briefing and oral argument, on July 26, 2019, the trial court granted all three motions. Pa12; Pa14; Pa16. The dismissal of NJTA is not contested on appeal. Pa2745. With respect to HAKS and JMT, the trial court reasoned that although "Mr. Edgar is not a licensed professional engineer," "he was supervised by two separate people, both of whom are licensed by the State of New Jersey as professional engineers and that he was performing services that easily fall within 'the practice of engineering.'" Pa29-30. The trial court concluded that the AOM

statute, N.J.S.A. 2A:53A-27, applied and that failure to provide an AOM was fatal to plaintiff's case. Pa30.

As of January 2020, the only remaining defendants were Northeast Sweepers and Christopher Hackett. The case was then delayed due to the COVID-19 outbreak and response and by a declaratory judgment (DJ) action against the commercial general liability carriers for Northeast Sweepers, ESX-L-7133-17. The decision in the DJ action was the subject of an appeal, A-2773-20. In January 2022, the trial court stayed this matter pending resolution of the DJ appeal. The appeal proceedings in the DJ action were resolved in October 2023. On December 7, 2023, plaintiffs dismissed with prejudice the claims against the remaining defendants, Northeast and Hackett. A timely Notice of Appeal was filed in January 2024.

STATEMENT OF FACTS

On July 11, 2014, Michael Alexander was employed by Crisdel as a milling foreman. Pa44. He was assigned by Crisdel, the general contractor, to work on NJTA Contract No. T200.313, a milling and repaving project on the New Jersey Turnpike. Pa44. While in the course of his employment, Mr. Alexander was run over and dragged, suffering fatal injuries, by a sweeper operated by Christopher M. Hackett. Mr. Hackett was employed at the time by Northeast Sweepers, a

subcontractor working for Crisdel on the NJTA project and the owner of the sweeper.

Crisdel Group, Inc.

Based on submission of the lowest bid, NJTA hired Crisdel as the general contractor for the resurfacing of a portion of the turnpike. Pa482. Crisdel represents itself as a provider of "general contracting and an industry leading, self-performed, specialty construction contracting services." Pa395. Pursuant to a Request for Expressions of Interest and responses, Pa 1787, NJTA hired HAKS Engineers, Architects and Land Surveyors, P.C., to provide "professional services" in connection with the resurfacing project. Pa2674; Pa2280. HAKS then entered into an agreement with Johnson, Mirmiran & Thompson, Inc., described as a "subconsultant," to "perform certain Services for [NJTA] for which [HAKS] agreed to perform." Pa2674; Pa1778. The agreement further describes the services to be performed by JMT as "Construction Inspection Services as declared in Exhibit-B," but no Exhibit-B has been provided. Pa1779.

Crisdel, as the general contractor, was required to comply with all the applicable provisions of the Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 et seq., including all OSHA regulations, Safety and Health Regulations for Construction, ANSI, Crisdel Health and Safety Plan (HASP), the New Jersey Turnpike Health and Safety Plan, industry standards and best safety

practices. Pa534. The NJTA-Crisdel contract, under section 801.03 entitled "METHODS OF CONSTRUCTION," reads as follows:

> The safety measures outlined and prescribed shall be considered basic and in certain instances additional safety measures may be appropriate and required. Compliance with the safety measures and precautions prescribed in the Specifications and on the Plans shall not relieve the Contractor of responsibility for taking all additional and appropriate safety measures for all persons and property. Full responsibility for adequate safety measures for the protection of all persons and property on and adjacent to the work site shall rest with the Contractor.

Pa586. OSHA Directive Number CPL 02-01-054, effective October 16, 2012, entitled "Inspection and Citation Guidance for Roadway and Highway Construction Work Zones," cited ANSI/ASSE A10.47-2009, Work Zone Safety for Highway Construction as an example of documentation the Construction Safety and Health Officer should use to establish hazard recognition. Pa315. ANSI/ASSE A10.47-2009, Work Zone Safety for Highway Construction represents the reasonable and customary standards of the industry for the protection of workers within a construction work zone, such as the incident construction. Ibid. ANSI/ASSE A10.47-2009 establishes the minimum requirements for the construction and maintenance of public and private highways and roads. Ibid.

John Ernst, of the NJTA testified that the Turnpike Authority required its general contractors or subcontractors to be OSHA certified. Pa851. "I know that

they're required to comply with all federal, state and local rules and regulations, OSHA, ANSI, and there are several others." Ibid. Crisdel's Site Specific Safety Program and Procedures Manual Section 2.0 (2.4) Multiemployer Worksite acknowledged: "Management understands the safety issues that are generated in a multi-employer worksite environment. When performing work as a Construction Manager on a multi-employer work site, the Project Supervisor will enforce the compliance of all safety regulations in a manner that promotes overall workplace safety." Pa889. Mr. McHugh testified that he and John Nash, Crisdel's foreman, superintendent(s) and Bill Weaver were all responsible for making sure that the standards of the NJTA and Crisdel HASPs were being complied with to the fullest extent. Pa1311. John Nash also testified that one of his responsibilities was oversight of safety. Pa1332. He testified that he oversaw safety for the project, including the date of the incident, "from the time you get onsite to the time your guys get off-site." Pa1340. However, neither McHugh, Nash nor Weaver was present at the job site prior to the accident.

The evidence adduced during discovery identified at least six areas where safety conditions were ignored or overlooked by Crisdel. With respect to lighting, Crisdel's Site Specific Safety Program and Procedures Manual specifically states: "Before beginning the operations demonstrate to the resident engineer the method of meeting the specified luminous levels and visibility requirements for workers

and equipment for each planned operation." Pa1120. "Do not begin night operations until the Resident Engineer approves the method of meeting the specified illuminance levels and visibility requirements." Ibid. "Provide lighting for all areas of the Work." Ibid. "Conventional vehicle headlights do not meet illuminance requirements. Ensure that moving lighting equipment used for night operations has lights directed ahead and behind the equipment." Pa1121.

Mr. Nash, the project manager, testified he did not have any communication with the resident engineer or his assistant or any of his employees relative to the lighting at the scene on the night of the accident. Pa1358. Specifically, he did not speak with Mr. Edgar, the "Resident Engineer," regarding this particular part of the project. Pa1343. Mr. Nash testified that there were no light poles on this area of the turnpike and that the only lighting used by Crisdel on the night in question "were lights that were attached to the equipment." Ibid.

Mr. McHugh, the safety representative of Crisdel, testified he took photographs that represent the conditions as they existed at the scene the night of the accident. Pa1302. As documented by Mr. McHugh's photos, there were no external light towers provided by Crisdel. Pa1367-71. There was no moving lighting equipment or attempt to comply with illuminance levels. On the night that he was run down, Mr. Alexander was using a flashlight to light his way. Pa1409.

With respect to alarms, OSHA regulations states that "(4) No employer shall use any motor vehicle equipment having an obstructed view to the rear unless: (i) The vehicle has a reverse signal alarm audible above surrounding noise level or; (ii) The vehicle is backed up only when an observer signals that it is safe to do so." Pa321-22; CFR §1926.601(b)(4). CFR §1926.602(a)(9), reads as follows: "(9) Audible alarms: (i) All bidirectional machines, such as rollers, compactors, front-end loaders, bulldozers, and similar equipment, shall be equipped with a horn, distinguishable from the surrounding noise level, which shall be operated as needed when the machine is moving in either direction. The horn has to be maintained in operative condition. (ii) No employer shall permit earthmoving or compacting equipment which has an obstructed view to the rear to be used in reverse gear unless the equipment has in operation a reverse signal alarm distinguishable from the surrounding noise level or an employee signals that it is safe to do so." Pa790.

Mr. Pereyra, Crisdel's milling machine operator, testified the backup alarm on the milling machine is loud and so is the ambient noise from the milling machine. Pa1382. When the sweeper backed up on the night Mr. Alexander was hit, he did not see backup lights on the sweeper or hear a backup alarm. Ibid. Mr. Wiltshire, a milling and paving laborer for Crisdel, testified that at the time of the collision the milling machine was in reverse backing up, the engine was running

and the backup alarm was on, all of which were loud. Pa1409. He was working next to Mr. Alexander and did not hear any backup alarm from the sweeper. Ibid.

Mr. Shopp, another milling and paving laborer for Crisdel, testified when the milling machine is backing up "it's loud." Pa1445. Even when it is backing up and not milling "it's loud." Ibid. Mr. Shopp further testified he could not hear any alarm coming from the sweeper because the milling machine was still backing up and that is loud. Pa1448.

John Nash testified that he did not recall hearing the subject sweeper's backup alarm on the night of the collision. Pa1350. He testified that on the night of the collision, preceding when it occurred he saw a sweeper back past a milling machine "countless" times and did not recall hearing the backup alarm of the sweeper that hit Mr. Alexander. Pa1351-52. John Nash was aware of the OSHA requirements and the general and specific specifications for this contract that the backup alarm of the sweeper is required to be heard over the background noise, including other back up alarms. Pa1356. He did nothing about it. Ibid. John Nash, Crisdel's project superintendent, testified that he did not perform an inspection of the sweeper or the backup alarm on Northeast Sweeper sweeping machine prior to work beginning on the date of the incident. Pa1349; Pa1356.

OSHA regulation requires that "[a]ll vehicles in use shall be checked at the beginning of each shift, including "safety devices." Pa786; CFR

§1926.601(b)(14). "All defects shall be corrected before the vehicle is placed in service." Ibid. Christopher Hackett, the operator of the sweeper that ran over Mr. Alexander, testified that no one from Crisdel or any other entity performed an inspection of his vehicle on the night of the incident prior to him beginning work. Pa1476. He testified that on the night of the incident no one from the Turnpike or Crisdel asked him to test the backup alarm on the sweeper. Pa1478.

The safety rules, regulations and specifications also require functioning mirrors on equipment. Pa786. According to Mr. Hackett, the mirrors on the sweeper were not securely attached to the sweeper. The mirrors were duct taped to the body of the sweeper. Pa1493. He described the taped mirrors as a "bandage" to stop the mirrors from shaking. Ibid.

OSHA regulations and ANSI/ASSE A10.47-2009 standards require that if a reverse signal alarm is inaudible above the surrounding noise level, the "vehicle is backed up only when an observer signals that it is safe to do so." Pa785.

Crisdel laborer Mr. Shopp testified "We try to keep a lane open * * * if somebody is backing up. Try and have a spotter." Pa1440. The responsibilities of a spotter are "keeping an eye * * * . Waving them on. Making sure they're not going to run somebody over or run into something else." Ibid. Mr. Edgar, the designated "resident engineer," testified he could not recall making any comment or suggestion to HAKS or NJTA about the need for spotters or flagmen. Pa1593.

As far as he knew, there was no requirement to use observers on the project or for the nighttime operations. Pa1593-94. Mr. Edgar further testified that he was not aware of the safety procedure, protocols or OSHA requirements for spotters on this job but acknowledged that the contract would require compliance. Pa1594.

Kenneth Harold testified that he is a General Superintendent/Project Manager for Crisdel. Pa1601. Mr. Harold testified that spotters are used with sweepers depending on the environment, night or day. Pa1609. "If it getting close to a piece of equipment. If * * * it's a congested work area we would spot." Ibid. John Ernst testified "all work zones on the Turnpike or the Parkway are congested if you can't close all the lanes." Pa853. John Nash testified that there was not a spotter or flag person assigned to the sweeper on the night of the incident. Pa1349. "That's not something that Crisdel has in the closing all the time." Ibid. He could request spotters but did not the night Mr. Alexander was hit. Ibid.

William Weaver, Crisdel's project manager for the NJTA contract, testified that "It was always a practice to try and assign a truck to the sweepers." Pa1561. Trucks are assigned to sweepers so they can dump quicker and work faster and for safety reasons so the sweepers do not have to travel through the work site to find a dump truck, which would create a hazard. Pa1561-62. "Any movement, I guess, would create a hazard." Pa1562. Mr. Wiltshire testified there were no dump trucks assigned to the sweepers the night of the accident. Pa1408. Mr. Hackett

also testified Crisdel did not have an assigned dump truck for the sweeper. Pa1478. "They used to back in the day dedicate a cleanup truck just to the sweeper, but they stopped doing that." Ibid. Most companies dedicate a truck and Crisdel did also prior to the night Mr. Alexander was hit. Ibid. Asked if he knew why they pulled it off this job, Mr. Hackett replied "Money. * * * One less truck. Yes, sir. Milling machine sitting on the side of the road doing nothing except waiting for us to dump." Pa1479.

John Nash, Project Superintendent for Crisdel, testified that his job responsibilities included having to "coordinate with the dump trucks and the sweepers to come to the site when the equipment is in place and we are ready for them. * * * I monitor the work that's going on, the quality of the work. I make sure that everybody is doing what they are supposed to be doing, as far as safety, everybody has their proper PPE on, nobody is walking over a cone line * * * . I coordinate with the milling crew when - - at a point in which they are going to stop milling." Pa1340. He claimed that he oversaw safety for the duration of the project, including the date on which Mr. Alexander was hit. Ibid. Mr. Nash testified "The usual procedure is, there should always be a truck with the sweeper." Pa1351. Mr. Nash, however, was not on site that day.

Mr. Shopp testified that since the fatality, new procedures have been put in place by Crisdel. According to Mr. Shopp, "Sweepers are not allowed around the

trucks. Sweepers do not go in front of the milling machine." Pa1450. "Sweepers do not go in front of a milling machine. Sweepers are always to have a truck to dump in." Ibid. Mr. Alexis Anderson, a Crisdel truck driver, confirmed that Crisdel used to keep a truck assigned to the sweeper so that it would not have to race around the job site. Pa1526. "It used to be before [Mr. Alexander got hit], but it was enforced, you know, more so again after that happened." Ibid. On the night Mr. Alexander was hit, there was no truck for the sweeper. Ibid.

Crisdel also failed to develop and to follow an internal traffic control plan, which was required under the contract and specifications. ANSI/ASSE A10.47-2009, entitled "Work Zone Safety for Highway Construction," offers the following:

> 6.3 Internal Traffic Control Plans (ITCP). Employers shall develop Traffic Control Plans for inside their work zones to minimize backups and other conflicts between workers and work vehicles/equipment and to maximize the separation of vehicles and workers on foot.
>
> 6.3.1 This plan shall be communicated to all workers on the site and all vehicles entering the site.
>
> 6.3.2 The onsite supervisor/safety person shall modify the plan as the work proceeds and as changes in the work site operations or environment dictate. All workers and drivers shall be notified of changes to the plan as they are implemented.
>
> 6.3.3 The ITCP should include the following elements:
> 1. A diagram showing travel routes for construction equipment and workers within the activity space, access and egress points and location of equipment and materials storage and staging areas.

Pa799. "Internal traffic control plan is where the work area is and where things are - - where equipment, people are part of the job." Pa1621. John Nash testified: "It is so that you can communicate to everybody working in that zone what is the anticipated pattern of flow of the equipment and people inside that work zone." Pa1345.

James McHugh testified that there was no written Internal Traffic Control Plan for July 11, 2014, at the subject site. Pa1315. "It would have been communicated based on the layout of the traffic plan that was coordinated between the Turnpike and Bill Weaver, as well as Derrick Wade, who put the lane closures out. * * * I don't believe there was one for that night." Ibid. Mr. McHugh that John Nash was responsible for making sure there was an Internal Traffic Control Plan on July 11, 2014. Ibid. John Nash explained why there was not an internal control plan for the subject work area on the date of the incident this way: "It wasn't part of our daily plan * * * Crisdel's daily plan at that time * * * They have since instituted the policy to do a daily." Pa1344.

Despite the contract requirement, Mr. Shopp testified the communication of the internal traffic control plan shown him was not part of the operating procedure/normal procedure on the night that Mr. Alexander was hit. Pa1455. Now, the internal traffic control plan gets sent out to foremen, supers, and project

managers prior to going out on the job site, and they are communicated down through everybody that's going to be out there. Ibid.

In addition to ignoring contract and regulatory safety requirements, concerns with the operator who ran down Mr. Alexander went unheeded by those charged with ensuring a safe workplace. Patrick Shopp testified that he had worked with Northeast Sweepers prior to July 11, 2014. Pa1425. Mr. Shopp further testified, "He's just a dangerous operator. * * * He moved around a lot faster than other sweeper drivers. And he always had his back broom down when he was backing up, which I wasn't used to. * * * Drove around faster. Backed up faster. Turn around faster." Ibid. Mr. Shopp had heard Mr. Alexander complain about Christopher Hackett approximately three or four times. Pa1425. Mr. Alexis Anderson, a Crisdel truck driver, testified that he had discussed Christopher Hackett's driving with Mike Alexander. Referencing Mr. Hackett, Mr. Anderson testified:

A. The sweeper went up. This guy backed up too fast. On numerous occasions we have told him slow down.

Q. Okay. Who is "we"?

A. Pat, Mike, myself, operators. Everyone has told him it to slow down.

Q. This particular driver?

A. Yes.

Pa1526.

Mr. Anderson stated, "the night of in question of the said accident, Mike [Alexander] told me that he talked to [Bill] Weaver about the situation. And also myself, I spoke to management about, you know, the guy was dangerous." Pa1527. Mr. Anderson identified Mr. Weaver and Mr. Harold as the management people to whom he complained. Ibid. Mr. Anderson testified that did not feel comfortable around Christopher Hackett. He stayed in his truck whenever he was not "tacking" while Christopher Hackett was operating on the job site. Ibid.

Mr. Pablo Pereyra, stated, "A couple of days after this accident I spoke to Mike Terranova. Mike told me that on July 10, 2014, Mike Alexander had yelled at the same driver that ran him over on Friday (July 11, 2014) for driving carelessly and too fast. Mike Terranova told me the sweeper driver was laughing when Mike Alexander yelled at him and Mike Alexander told him he was not laughing and it was not a joke." Pa1382. Mr. Pereyra further testified regarding Christopher Hackett's driving of the sweeper, stating, "Basically, like, when [Christopher Hackett] was behind me I just - - I see him but he's going too close to the back of the machine. * * * he goes too close, which is not - - which is not safe to be too close to the machine because he don't know how fast I'm going back, even if you see the machine in movement." Pa1384.

Thomas Wiltshire testified regarding the nature of Chris Hackett's operation of the sweeper on other job sites. Mr. Wiltshire stated, "He was just a little fast. * * * Faster than a normal operating speed should be. * * * I know that he had been asked to slow down. You know, you got a lot of guys walking around. You know, they could walk out from behind a truck and a lot of stuff can just happen fast." Pa1410. Mr. Wiltshire also testified that he and other laborers had asked Mr. Hackett to slow down a week or two before Mr. Alexander got run over. Ibid.

Not surprisingly, given the lack of attention to site safety requirements, Crisdel was cited with violations of OSHA after an investigation of Mike Alexander's death. Pa1677-78. Specifically, after investigation, OSHA found the following violations were presented on the project site on July 11, 2014, the date that Mr. Alexander was run over:

> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to struck-by and crushing hazards: * * *
>
> Employees were exposed to the hazard of being struck by construction vehicles within a highway construction zone. The employer did not establish a pre-planned traffic pattern for pedestrian and construction traffic and provide a guide/spotter for the construction vehicles when operating in reverse in order to ensure the safety of the employees working and walking within the construction zone.
>
> The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury: * * *

> Employees engaged in highway work zone construction activities were not provided training in the recognition and avoidance of unsafe conditions, such as but not limited to: training employees to not walk and/or work in close proximity to moving construction vehicles, recognizing vehicle and equipment blind areas, instructing sweeper operator(s) and driver(s) on proper communication methond to communicate with workers who are on foot, providing instruction on proper backing procedures and training employees on the employer's traffic control plan.

Pa1677-78.

Finally, regrettably, this was not the first time a Crisdel employee had been run over. Mr. Alexis Anderson testified regarding three prior fatal worksite incidents on Crisdel projects. Pa1521-23. All involved "struck-by and crushing hazards."

In contrast to the pervasive lack of concern for safety requirements, decedent, Mike Alexander, was uniformly described as extremely safety conscious. Patrick Shopp testified, "Mike was the first guy to be pulling on your shirt if there was a truck backing up a mile away." Pa1426. Pablo Pereyra testified that he worked with Mike Alexander "every day" and "nobody was any safer than him." Pa1378. Thomas Wiltshire testified, "He was smart. He - - he 'd been doing it for over 20 years. He was very - - very conscious of things around him. He took care of his guys. He was a - - he was a really good guy to work for. If you didn't know something or something was unsafe he'd be the first one to say it. And he wasn't afraid to say stuff to the bosses." Pa1403. Carmen Lo Re, owner of Northeast

Sweeper, stated that he worked with Mike Alexander on, “a ton of mill and pave jobs,” and, “he is one of the better guys in the industry that we knew of. And, you know, Mike was always the guy that, if there was an issue, Mike would put an end to it immediately." Pa1639. Even Christopher Hackett testified that Mike Alexander’s safety awareness on the job was “excellent.” Pa1472.

HAKS and JMT

Pursuant to its contract with NJTA, HAKS was to provide professional services required for the titled project as set forth in the expression of interest solicitation, dated December 16, 2013. Pa1787. In May 2014, HAKS subcontracted portions of the services for which it was retained, to defendant JMT. Pa1778. Defendant JMT was to perform professional services that were called for under the agreement with HAKS. JMT was to provide the resident engineer for the project. James Edgar of JMT was the “resident engineer” for the work subcontracted.

As per the NJTA’s Request for Expression of Interest for Order for Professional Services T3512, the Consultants, HAKS and JMT would be responsible for “provid[ing] services which will include, but not be limited to, inspecting all work to ensure that it is done in compliance with the Contract Plans and Specifications, inspecting all construction materials to be used at the site to ensure compliance with the Contract Plans and Specifications.” Pa1800. In

addition, the Consultant was to provide a "Resident Engineer for each contract during all periods of construction activity to perform construction inspection and administrative services for cost control and quality control." Pa1801. NJTA did not require that a resident engineer be a licensed engineer. As per the Order for Professional Services, the "resident engineer" could be a technician, i.e., "NICET IV certified." Pa1789.

Mr. Edgar, the resident engineer designated by HAKS and JMT, was not a professional engineer. Pa2717. He was a NICET IV, a "senior grade engineering technician." Pa1581; Pa2717. Mr. James Edgar has no professional engineering degree. Pa2717. Mr. Edgar's highest level of education is "special courses in Construction methods and construction reporting." Ibid.

In the Order for Professional Services (OPS), NJTA specifically indicates that the resident engineer did not have to be a professional engineer and that the project manager or a principal of the firm could be a professional licensed engineer. Pa1801. NJTA indicated that the part-time project manager **or** a principal of the Firm shall be a professional engineer licensed in the state of New Jersey. The project manager was expected only to attend pre-construction meetings and orientation and be available. Ibid. The professional engineer was not required to be on site or even involved. The project manager had to be available. Ibid.

Per the OPS, the resident engineer (Mr. Edgar) was in charge of maintaining the daily records of the numbers and classifications of workers employed by the contractors using the Authority's CapEx management system, preparing daily reports if all construction and engineering field work, reviewing and approving the Contractor's progress scheduled, maintaining daily records of the type and size of all of all equipment used on all construction operations, reviewing protection procedures, reviewing and approving lane closure request forms prepared by the contractor prior to submitting forms for approval by NJTA, ensuring that the contractor complied with all local, state and federal laws, ordinances, regulations, and orders, as provided by the contract. Pa1801-02.

Plaintiffs retained the services of two professional engineers, John A. Nawn, P.E., and Nicholas Bellizzi, P.E., to review this matter. Neither professional engineer retained by plaintiff believed that James Edgar's work constituted professional engineering services. Pa2324-36. In their expert opinion as professional engineers, neither JMT or HAKS performed the act of engineering as it related to this project and the cause of Mr. Alexander's death. Ibid. The services provided also did not fall within the definition of engineering set forth in the New Jersey Administrative Code, N.J.A.C. 13:40-1.3. Pa2326; Pa2840.

Mr. Bellizzi issued a report and was deposed. Pa2365; Pa2185. He also provided an affidavit. Pa2333. After a thorough review of all available

information, he concluded that the on-site representatives of HAKS and JMT were negligent but there was a deviation from the standard of engineering practices because those representatives were not performing professional engineering services and were not professional engineers. Pa2384. Mr. Edgar was responsible for the day-to-day operations at the site. Pa2255. Mr. Edgar did not deviate from any standards of care of engineering practice because Mr. Edgar was not a professional engineer and could not possibly be "doing anything professional engineering." Pa2257. Mr. Bellizzi further testified that the day of the accident the operations that caused the accident was a "non-engineering issue." Pa2257-58. Mr. Bellizzi clarified that the engineering work that was performed by HAKS and JMT were to assure that specifications of the contract were met; however, compliance with OSHA and other regulations is not engineering. Pa2259. The activities of milling and paving that were happening on site were not engineering issues. Pa2260. Mr. Bellizzi testified that Mr. Schweppenheiser was likewise not performing professional engineering services as they relate to the administration of construction of the subject project because there was no deviation from plans and specifications which would require the work of a professional engineer. Pa2264.

Mr. Nawn issued his expert report on January 18, 2018, Pa289, and he was deposed on September 10, 2018. Pa2068. Mr. Nawn testified that HAKS and JMT failed to make sure, among other things, that the proper machinery was used

in the milling work, that they failed to check the lighting, the backup alarms and ensure that OSHA requirements were met. Pa2092. In fact, Mr. Edgar, the resident engineer, acknowledged that he was not familiar with the OSHA standards. Ibid.

Per Mr. Nawn, neither HAKS nor JMT were performing any engineering tasks at the time of the fatality. Specifically, he testified:

> Q. And is it your opinion that the defendant JMT and HAKS in this matter were not only negligent but negligence was basically disregarding health and safety of Mr. Alexander?
>
> A. Not as it relates to engineering. They weren't performing any engineering tasks at the time of the incident. The people in the field weren't engineers under the law. They were negligent in the fact that they failed to ensure that the safety provisions of the specifications and the Turnpike's Health & Safety Program were followed, but it wasn't engineering negligence. They weren't performing any engineering functions.

Pa2094. Mr. Nawn testified that the person responsible for ensuring compliance with the plans and specifications had to be the resident engineer. Pa2115. In this particular case, Mr. Edgar failed to fulfill the obligations for his job, including failing to check whether or not there was a backup alarms, lighting, etcetera. Pa2113.

Mr. Nawn reviewed the scope of services which JMT and HAKS were to provide for the NJTA and concluded that NJTA was not asking specifically for professional engineering services. Rather the NJTA sought for JMT and HAKS to

provide inspection services that may not necessarily be considered professional engineering services. Pa2126-28. "Professional services" is distinguished from "professional engineering services" and inspections fall into the first category. Pa2128-29.

Mr. Nawn further testified that no one from HAKS and/or JMT explained to Mr. Edgar what his duties were. Pa2153. HAKS and JMT had an obligation and responsibility for enforcement of OSHA and ANSI standards, including those for the internal traffic control plan. Pa2156. The New Jersey Administrative Code applies only to people who are professional engineers. Because Mr. Edgar was not a licensed professional engineer, the Code would not apply to him. Pa2165-66. Mr. Edgar did not require any special education, training, knowledge, or experience to recognize that a particular machine such as the street sweeper which had duct tape holding up the mirrors, should not be put into service. Pa2171-72. In Mr. Nawn's experience, he had NICET inspectors who worked for him. However, to sign and to seal as-built drawings an engineer would have to perform inspections personally, not a NICET inspector. Pa2122.

Mr. Nawn concluded that Mr. Shweppenheiser was not performing any engineering duties. Pa2116. He was not on site and had no personal role in the inspection of compliance with the contract. Inspection is not engineering work. Pa2118.

Plaintiff retained the expert services of William Gulya, an expert in construction and OSHA regulations. Mr. Gulya drafted an expert report dated January 4, 2018; he was deposed on July 11, 2018. Mr. Gulya is not a professional engineer. Pa2060. Mr. Gulya testified that JMT's resident engineer, James Edgar, had a responsibility to know the OSHA and ANSI standards, along with the contract requirements and the Health and Safety Plan (HASP). Pa2008-09. HAKS and JMT, who provided the resident engineer, had a duty to know the applicable industry standards. Pa2027. JMT failed to enforce the contract documents, as required by the resident engineer's responsibilities set forth in the RFEOI and the NJTA-HAKS agreement. Pa2028. JMT and HAKS were required to recognize the standards, as per the contract and failed to do so. Among other things, HAKS and JMT failed to ensure that lighting requirements were met, as was required by the HASP, or that adequate dump trucks were assigned to the work site. Pa2029-33.

Generally, JMT and HAKS failed to ensure that the contractor met with industry standard best practices, as required by various organizations governing safety. Pa2033. Mr. Gulya testified, HAKS and JMT failed to ensure that Mr. Edgar was qualified to perform his duties as the resident engineer. Pa2037-38. Mr. Edgar was to provide resident engineer inspection services as a consultant and not in an engineering role. Pa2040. Mr. Gulya further testified that the resident engineer on the site was required to have an understanding of the contract,

applicable standards, OSHA standards, and ANSI standards, specifically those mentioned in the contract with the NJTA and to ensure that these standards were complied with. Pa2046. Mr. Gulya testified that Mr. Edgar had certain responsibilities that he should have known and carried out; however, Mr. Edgar did not in fact enforce the responsibilities he had as they relate to the contractor. Pa2053.

Defendant, JMT, retained the expert services of Keith Bergman. Mr. Bergman prepared a report dated December 22, 2018; he was deposed on April 26, 2019. Pa2504. Mr. Bergman testified that Mr. Schweppenheiser did not have to be a professional engineer to perform his job duties as project manager for this particular project. Pa2511. He testified that as a professional engineer, Mr. Schweppenheiser was supposed to provide oversight of Mr. Edgar. Pa2512. However, Mr. Schweppenheiser did not in fact provide oversight of Mr. Edgar; instead, Mr. Schweppenheiser performed more administrative duties. Ibid.

Mr. Bergman testified that engineering work included putting the right material down, where it's supposed to be, using the right type of striping, and abiding by the plans and specification. Pa2513. He further testified that engineering services included knowing whether the right material was used, whether it is the right temperature, that it is being put in the right place on the

ground, right depths, right dimensions. Ibid. None of those responsibilities belonged to the resident engineer. They belonged to the inspector, Walid Mezareh.

With regard to the resident engineer's responsibilities, Mr. Bergman acknowledged that the resident engineer had to assure that the contractor was complying with all local, state, federal laws, ordinances, rules, regulations. Pa2515. Mr. Bergman acknowledged that the HASP was part of the contract, and that HAKS and JMT had a duty to assure compliance with the HASP. Pa2515-16. Mr. Bergman testified that if the resident engineer saw something that was unsafe he would have to report it. Pa2517. Mr. Bergman agreed that the resident engineer had certain obligations in ensuring the contractor's compliance with the HASP. For instance, if there was not enough lighting on a job site, the resident engineer would have to bring that to the attention of the contractor and the resident engineer had the authority to stop work. Pa2518.

Defendant, HAKS, retained the expert services of Scott Derector. Mr. Derector prepared a report dated December 11, 2018; he was deposed on April 10, 2019. Pa2485. Mr. Derector testified that it was HAKS' responsibility to ensure that the work complied with the requirements of the NJTA and the contract and that the HASP was part of the contract. Pa2490. Mr. Derector agreed with every other expert and testified that Mr. Schweppenheiser did not require an engineering

degree and did not have to be a professional engineer to perform his job duties for the subject project. Pa2492-93.

Mr. Derector testified that he previously served as a project manager in a similar capacity as Mr. Schweppenheiser prior to becoming a licensed engineer and so understand the distinction between a project manager, resident engineer and professional engineer. Pa2501. Mr. Derector testified that the resident engineer's responsibility was to ensure that the HASP is followed by the general contractor and to make sure that there was no imminent danger as per the local, federal, and state laws and the HASP. If there was a danger it was the resident engineer's responsibility to let the contractor know to take corrective action. Pa2495-97.

Defendant, NJTA, retained Craig Moskowitz as an expert witness in this matter. Mr. Moskowitz prepared a report dated, April 19, 2018; he was deposed on April 9, 2019. Pa2805. Mr. Moskowitz opined in his report that "NJTA entered into a contract with HAKS for construction oversight of this project, which sets forth the duties and obligations of HAKS. HAKS, in turn, subcontracted with JMT to have JMT provide some of these construction oversight services." Pa2769. Mr. Moskowitz opined that "NJTA delegated the responsibility of oversight of this project to Crisdel and HAKS." Pa2793. Mr. Moskowitz concluded that "Both HAKS and/or JMT were also responsible for general safety oversight to ensure that the general contractor was abiding by the relevant safety regulations." Pa2795.

Mr. Moskowitz testified that he previously had experience as a project manager and was familiar with similar projects such as the one that is the subject of this litigation. He further testified that in his role as project manager and director of operations he was required to review plans and specifications, although he was not a licensed professional engineer. Pa2835. Mr. Moskowitz additionally testified "it's not a requirement when you're one of the heads of a contract – not one of the owners, but one of the lead managers for a construction company. That's not a requirement, to be a PE." Ibid.

As for Mr. Schweppenheiser, Mr. Moskowitz agreed and testified that Mr. Schweppenheiser did not require a professional engineering degree to do the work that he was performing. Pa2836. Mr. Schweppenheiser did not review any plans or specifications or perform any type of design work that would require a professional engineering license. Ibid.

LEGAL ARGUMENT

POINT I

THE ORDERS ON APPEAL ARE SUBJECT TO DE NOVO REVIEW. (1a; 12a; 14a)

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) (Templo Fuente) ("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., 17 N.J. 67, 75 (1954); R. 4:46-5.

Summary judgment should not be granted where the adjudication 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 serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses; however, it 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, supra, 215 N.J. Super. at 212.

POINT II

THE DISMISSAL OF CRISDEL CONSTRUCTION MUST BE REVERSED BECAUSE PLAINTIFF PRODUCED SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO FIND AN INTENTIONAL WRONG. (Pa1; Pa3; 1T16:4)

The Workers' Compensation system has been described as "an historic trade-off whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries." Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 174 (1985). The New Jersey Supreme Court has recognized that the trade-off is not without limitations. Laidlow v. Hariton Mach. Co., 170 N.J. 602 (2002). In fact, not every worker injured on the job receives compensation benefits and not all conduct by an employer is immune from common-law suit. The Legislature has declared that certain types of conduct by the employer and the employee will render the statutory bargain a nullity. An employer who causes the death or injury of an employee by committing an "intentional wrong" will not be insulated from common-law suit. N.J.S.A. 34:15-8; Millison, supra, 101 N.J. at 169.

Intentional wrongful conduct is excepted from workers compensation coverage because such conduct neither constitutes a natural risk of employment, nor arises out of the employment. Those notions are at the heart of the Workers' Compensation bargain in the first instance. See Laidlow, supra, 170 N.J. at 606. This State has an established public policy favoring full compensation for its injured employees, including injuries that do not arise as a natural risk of the employment. See Lohmeyer v. Frontier Ins. Co., 294 N.J. Super. 547, 555-56 (App. Div. 1996) (describing the "mandatory coverage requirement of N.J.S.A.

34:15-87" and noting "[an insurance] policy which purports to provide workers' compensation coverage is governed by the workers' compensation laws and must conform with its regulatory policy.").

Pursuant to the Employers' Liability Insurance Law, also part of Title 34, employers are required to make "sufficient provision for the **complete payment of any obligation** which [the employer] may incur to an injured employee, or his dependents" for claims prosecuted in the workers compensation courts. N.J.S.A. 34:15-71 (emphasis added). An employer may do so by self-insuring if they have the financial capacity, N.J.S.A. 34:15-77, or by obtaining insurance, N.J.S.A. 34:15-78. Similarly, employers are required to "make sufficient provision for the **complete payment of any obligation** which [the employer] may incur to an injured employee or his administrators or next of kin" for work-related injuries maintained in a common law court. N.J.S.A. 34:15-72 (emphasis added); see Schmidt v. Smith, 155 N.J. 44, 49 (1998) ("Those policies must cover not only claims for compensation prosecuted in the Workers' Compensation court, but also claims for work-related injuries asserted in a common law court.").

The WCA provides

> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

N.J.S.A. 34:15-8 (emphasis added). That comprehensive statutory framework recognizes that not all injuries to employees in the course of their employment will be satisfied through worker's compensation insurance alone.

Our Supreme Court has established the "substantial-certainty test" for determining an intentional wrong under the WCA. See Van Dunk v. Reckson Assocs. Realty Corp., 210 N.J. 449, 461 (2012). "In adopting a 'substantial-certainty' standard," the Court "acknowledge[d] that every undertaking, particularly certain business judgments, involve some risk, but that willful employer misconduct was not meant to go undeterred. The distinctions between negligence, recklessness, and intent are obviously matters of degree, albeit subtle ones." Millison, supra, 101 N.J. at 178. The Court elucidated, "an intentional wrong is not limited to actions taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm." Laidlow, supra, 170 N.J. at 613.

In Van Dunk, the Court held that an employer's reckless conduct at a construction site failed to satisfy the substantial certainty of injury or death required for the commission of an intentional wrong. Van Dunk, supra, 210 N.J. at 471. However, the Court distinguished the salient facts in that case from the more egregious circumstances that it had previously found to defeat an employer's motion for summary judgment:

> What distinguishes Millison, Laidlow, Crippen, and Mull from the present matter is that those cases all involved the employer's affirmative action to remove a safety device from a machine, prior OSHA citations, deliberate deceit regarding the condition of the workplace, * * * knowledge of prior injury or accidents, and previous complaints from employees. * * * In particular, this Court was mindful in those cases of the durational aspect of the employer's intentional noncompliance with OSHA requirements or other demonstrations of a longer-term decision to forego required safety devices or practices.

Id. at 471.

The Court reiterated the two-prong analysis to be used when evaluating under the totality of the circumstance if there has been an "intentional wrong." "First, a court considers the 'conduct prong,' examining the employer's conduct in the setting of the particular case. Second, a court analyzes the 'context prong,' considering whether the resulting injury or disease, and the circumstances in which it is inflicted on the worker, may fairly be viewed as a fact of life of industrial employment, or whether it is plainly beyond anything the Legislature could have contemplated as entitling the employee to recover only under the [WCA]." Id. at 461; see Millison, supra, 101 N.J. at 178-79.

New Jersey courts have sought to define the conduct prong in a number of different cases. For example, in Laidlow, supra, 170 N.J. at 620-21, the Supreme Court, in consideration of evidence that the defendant company kept a safety guard inactive at all times and that plaintiff and another employee had previously experienced "close calls" with the same machine that ultimately caused plaintiff's

severe hand injury, found "that [defendant] knew not only that injury was substantially certain to occur, but also that when it did occur it would be very serious." Thus, the "conduct" prong was deemed satisfied. Ibid. Similarly, in Mull v. Zeta Consumer Prods., 176 N.J. 385, 387-92 (2003), the New Jersey Supreme Court found that the conduct prong was satisfied because plaintiff, whose hand was injured while using an industrial machine, presented evidence that defendant company had disabled the machine's safety device and had also been cited by OSHA for failing to properly train employees for use of the machine. The Court in Mull was influenced by the plaintiff's submission of an export report which concluded that the "hazardous operating conditions created a virtual certainty of injury to the machine's operators." Id. at 389 (internal quotation marks omitted).

To satisfy the "context" prong of the test, a plaintiff must demonstrate that "the resulting injury and the circumstances of its infliction on the worker [were] (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize." Laidlow, supra, 170 N.J. at 617. A review of the New Jersey Supreme Court's application of this prong reveals that it operates as an inquiry into whether the injury occurred as a result of ordinary foreseeable work hazards in the plaintiff's field or as a result of some abnormally unsafe employer practice. For example, in

both Laidlow, supra, 170 N.J. at 622, and Mull, supra, 176 N.J. at 393, the New Jersey Supreme Court determined that an employer's act of removing a safety device on a dangerous industrial machine, in combination with other unsafe practices, was plainly beyond what the Legislature, in enacting the WCA, would have considered a fact of life in industrial employment.

Two things become clear from the Supreme Court's treatment of the analysis. First, it is fact specific and requires a detailed, if not exhaustive, consideration of the **totality of the circumstances**. Prior knowledge, ignorance of known safety requirements, withdrawal of safety practices, and imposition of risks that are both easily avoidable and unnecessary to the work are all factors to be considered. OSHA citations, ignorance of warnings or complaints, failure to ensure understanding and proper use of safety devices and procedures and the potential for catastrophic injury also are all proper considerations in assessing whether the facts justify denying the employee full compensation.

Second, because liability turns on determinations of fact, the viability of a common-law claim against the employer is ill-suited for resolution on motion where sufficient facts have been alleged that could support a finding of intentional wrong by the factfinder. Article I, paragraph 9 of the New Jersey Constitution adopted in 1947 states clearly 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; see also N.J. Const. of 1844 art. I, ¶7 (the "right of trial by jury shall remain inviolate"). The role of the trial court is to determine only whether there exists a genuine dispute regarding a material fact. It has no authority to resolve such a dispute. Suarez v. E. Int'l College, 428 N.J. Super. 10, 27 (App. Div. 2012), certif. denied, 213 N.J. 57 (2013) (motion judge may not abrogate the jury's exclusive role as the finder of fact). Given the constitutional implications of denying a trial by jury, all inferences must be resolved in favor of the non-movant. The trial court below erred by substituting its judgment, its weighing of the facts, both disputed and undisputed, to determine that no reasonable trier of fact could find that Crisdel committed an intentional wrong as defined by the caselaw. Pa10.

The facts here support a finding that Crisdel's conduct was beyond the pale and that the injury was not a fact of life but rather extremely avoidable. As documented by the experts, Crisdel engaged in deliberate and persistent non-compliance with OSHA regulations and ANSI standards, its own site-specific health and safety requirements and contract and industry standards. Plaintiffs' expert noted 27 violations, and the post-death inquiry by OSHA confirmed violations on the night Mr. Alexander was killed. Plaintiffs identified six specific areas of safety protocols and devices that were known and ignored. Required night work lighting, audible backup alarms, properly functioning mirrors, use of a

dedicated dump truck, and use of spotters were all available options at little or no cost. On a larger scale, there was no plan. The contract, specifications, HASP and ANSI all called for an Internal Traffic Control Plan. Crisdel had none.

Crisdel also failed to learn from prior incidents. Although there were no prior OSHA citations, there were three prior backup/crushing incidents. Pa1521-23. Perhaps most egregiously, there were numerous complaints from numerous workers about the unsafe handling of the sweeper by the sweeper driver before Mr. Alexander was rundown. See supra at 18-20. That the driver was known to drive dangerously, too fast and unsafely and that the employer did nothing to stop him are key facts to be considered in the totality of the circumstances analysis. A known dangerous driver and lack of any plan for traffic control created a context in which a horrific injury was substantially certain to occur and did occur.

Contrary to what Crisdel has argued on this point, being crushed, dragged and killed is not an inevitable fact of life on a construction project. It does not have to happen, but rather happens when employers place profits above safety, speed above required safe practices and protocols. That is not the type of conduct or context that the Legislature meant to immunize the employer and to deny full compensation to the injured employee or his survivors. Instead, this case falls squarely in the category were a reasonable jury may find that the employer,

Crisdel, was aware with substantial certainty that an injury would occur and when it did, it would be horrific.

POINT III

THE ORDERS DISMISSING HAKS AND JMT ARE CONTRARY TO THE HOLDING OF HAVILAND V. LOURDES MED. CTR. OF BURLINGTON CTY., INC., 250 N.J. 368 (2022), AND MUST BE VACATED AND REMANDED. (PA12; PA14; PA16; 2T40:19)

HAKS and JMT argued below, and the trial court held, that Mr. Edgar's status as a representative who is not a "licensed person" under the AOM statute did not matter. Because HAKs and JMT are licensed entities and had licensed persons supervising Mr. Edgar, a vicarious liability claim based on Mr. Edgar's negligent conduct required plaintiffs to provide an Affidavit of Merit. That is incorrect as a matter of law.

The cases interpreting and applying the AOM statute recognize that the Legislature did not intend to "create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims." Ferreira v. Rancocas Ortho. Assocs., 178 N.J. 144, 151 (2003). The statute exists to strike a fair balance between preserving a person's right to sue and controlling nuisance litigation. Palanque v. Lambert-Woolley, 168 N.J. 398, 404 (2001). The language of the statute anticipates vicarious liability claims and limits its applicability to such claims. "To establish vicarious liability, a plaintiff must demonstrate '(1) that a

master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment.'" Haviland v. Lourdes Med. Ctr. of Burlington Cty., Inc., 250 N.J. 368, 379 (2022) (quoting Carter v. Reynolds, 175 N.J. 402, 409 (2003)). It is not, per se, a professional negligence claim. To fall under the AOM statute, the claim must be for damages resulting from malpractice or negligence of one of the limited, enumerated licensed persons acting within that person's profession. See Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super. 1 (App. Div. 2010).

In Haviland, the Appellate Division was presented with the issue whether a plaintiff must submit an AOM in support of a vicarious liability claim against a licensed entity, based on the alleged negligent conduct of an employee who is not a "licensed person" under the AOM statute. 466 N.J. Super. 126 (App. Div. 2021). The Appellate Division concluded that "an AOM is not required when a plaintiff's claim against a 'licensed person' is limited to vicarious liability for the alleged negligence of an employee who is not a 'licensed person' under the AOM statute." Id. at 135-36. The Supreme Court affirmed based on "the thoughtful and well-reasoned opinion of the Appellate Division." 250 N.J. 368, 372 (2022).

The AOM statute has very specific and limited applicability. "Under the plain language of N.J.S.A. 2A:53A-27, the AOM requirement applies only where (1) a plaintiff's claim is for personal injuries, wrongful death, or property damages,

(2) the personal injuries, wrongful death , or property damages result from an alleged act of malpractice or negligence, and (3) the alleged act of malpractice or negligence is carried out by a licensed person in the course of practicing the person's profession." Haviland, supra, 250 N.J. at 382. The list of "licensed persons" is explicit. It does not include Mr. Edgar, a "senior grade engineering technician" who is not a professional engineer. In that respect this matter is indistinguishable from Haviland, where the negligence alleged was that of an unlicensed "radiology technician" and not a radiologist. Id. at 374.

Plaintiffs' claim does not trigger the third requirement because Mr. Edgar is not a "licensed person." To require an AOM from a "like-licensed" professional when the negligent actor is not a "licensed person" is not realistic. It is not only contrary to the spirit and purpose of the AOM statute but also its express language. The requirement for an AOM is limited to those licensed professionals expressly enumerated in the statute. No AOM is required to pursue the vicarious liability claims against HAKS and JMT.

To the extent that the trial judge found that Mr. Edgar was performing professional engineering services so that an AOM was required, that reasoning ignores the plain language of N.J.S.A. 2A:53A-27. It also suggests a factual finding inappropriate for the court on a summary judgment motion. The role of the trial court is to determine only whether there exists a genuine dispute regarding a

material fact. It has no authority to resolve such a dispute. Suarez, supra, 428 N.J. Super. at 27 (motion judge may not abrogate the jury's exclusive role as the finder of fact). See Sisselman, supra, 215 N.J. Super. at 211-12 (summary judgment should not be granted where the adjudication of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact). Mr. Edgar failed to do his job. Whether that is because he was not as closely supervised as the trial court improperly concluded, was not informed of his role and responsibilities or simply failed to perform the requirements of his job, he is not a "licensed person" pursuant to the AOM statute and binding Supreme Court precedent. No AOM was required.

CONCLUSION

For the foregoing reasons, dismissal of plaintiffs' claims against Crisdel, HAKS and JMT was error as a matter of law. Plaintiffs respectfully request that the trial court's orders granting judgment to defendants be reversed and the matter remanded.

Respectfully submitted,

/s *John M. Vlasac*

John M. Vlasac, Esq.
Counsel for Plaintiff-Appellant,
Estate of Michael Alexander

Dated: May 28, 2024

ESTATE OF MICHAEL ALEXANDER, deceased, by LORRAINE ALEXANDER as Executrix of the Estate and LORRAINE ALEXANDER, Individually, Plaintiffs-Appellants, v. NORTHEAST SWEEPERS, CHRISTOPHER M. HACKETT, TRI-STATE EQUIPMENT REBUILDING, CRISDEL CONSTRUCTION, FERREIRA CONSTRUCTION, ATHEY PRODUCTION CORPORATION, NEW JERSEY TURNPIKE AUTHORITY, NEW JERSEY DEPARTMENT OF TRANSPORTATION, NEW JERSEY STATE POLICE, HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C. and JOHNSON, MIRMIRAN & THOMPSON, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001486-23 ON APPEAL FROM: LAW DIVISION: ESSEX COUNTY DOCKET NO. ESX-L-7229-14 Sat Below: Hon. Thomas R. Vena, J.S.C. Civil Action

DEFENDANT JOHNSON, MIRMIRAN & THOMPSON, INC.'S BRIEF AND APPENDIX IN OPPOSITION TO PLAINTIFFS' APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

PRELIMINARY STATEMENT

This matter arises out of a tragic accident that occurred on July 11, 2014, on the New Jersey Turnpike, during a roadway resurfacing project. Plaintiffs' decedent, Michael Alexander, an employee of codefendant Crisdel Group ("Crisdel"), was the milling foreman for the project, when he was struck by a sweeper truck operated by codefendant Christopher Hackett of Northeast Sweepers. Defendant Johnson, Mirmiran & Thompson, Inc. ("JMT") is an architectural/engineering firm that was contracted to provide consulting services for the project as a sub-contractor of co-defendant HAKS Engineering, Architects and Land Surveyors, P.C. ("HAKS").

This matter was previously remanded by the Appellate Division with directive that the parties undertake further expert discovery as to the application of the requirements of the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29, to plaintiffs' claims against both JMT and HAKS. As the trial court correctly concluded in granting JMT's motion for summary judgment after that discovery was completed, the record allows for but one conclusion – plaintiffs' claims against JMT arise from its performance of professional engineering services, and thus implicate the requirements of the New Jersey Affidavit of Merit Statute. As the trial court properly recognized, JMT's employment of a non-licensed individual in carrying out some of its responsibilities does not render the Affidavit of Merit Statute

inapplicable, where plaintiffs' claims unquestionably implicate the standard of care applicable to professional engineering. Further, the trial court rightly rejected the efforts of plaintiffs' experts to remove JMT's services from the scope of what constitutes professional engineering, given that the work performed by JMT – the supervision of construction for the purpose of ensuring compliance with plans and specifications – falls directly within the statutory definition of professional engineering.

It is a matter of undisputed fact that plaintiffs have never served an affidavit of merit as to JMT or HAKS. As it was clearly required to do so under the circumstances presented, the trial court's dismissal should be affirmed.

PROCEDURAL HISTORY

On October 10, 2014, plaintiffs filed their original Complaint, arising from a construction site accident that resulted in the death of plaintiffs' decedent, Michael Alexander. By Court Order dated January 22, 2016, plaintiffs were granted leave to file a Second Amended Complaint to add architectural/engineering firms HAKS and JMT as defendants (Pa64). In the Second Amended Complaint, plaintiffs allege that, "As a direct and proximate result of the negligence, carelessness and/or recklessness of [JMT]," the accident "ultimately caused the wrongful death of Mike Alexander."

Id. at ¶ 150.[1] JMT filed its Answer on April 1, 2016 (Pa2723). No Affidavit of Merit was ever filed by plaintiffs.

On June 21, 2017, JMT and HAKS each filed motions to dismiss based on plaintiffs' failure to serve an Affidavit of Merit. Plaintiffs opposed the motions and oral argument was held before the Honorable Thomas R. Vena on August 4, 2017. Judge Vena granted both motions, finding:

> Defendants were clearly hired, as the contract makes clear, to fulfill professional engineering obligations. Any showing of a negligent deviation from those obligations would necessarily implicate professional negligence. Therefore, an affidavit of merit is required. As all parties agree that no affidavit of merit was ever served, the case against HAKS and JMT must be dismissed." (Pa2526-27)

On August 22, 2017, plaintiffs filed a motion for reconsideration. The only "new" evidence offered by plaintiffs were the certifications of two experts who had been retained years earlier, Nicholas Bellizzi, P.E., and John Nawn, P.E. (Pa2324-36). By Order dated September 15, 2017, that motion was denied (Pa1944).

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[1] Notably, plaintiffs' Complaint contains no reference to JMT's employee, James Edgar, nor does it set forth any allegation that JMT was liable under a respondeat superior theory of liability. This stands in stark contrast to plaintiffs' determination to name Christopher Hackett as a defendant, and alleged that Northeast Sweepers, LLC, was liable for his conduct pursuant to the doctrine of respondeat superior. See Pa67-70.

Plaintiffs subsequently sought leave to file an interlocutory appeal, which was granted by Order dated November 8, 2017. On April 18, 2018, the Appellate Division issued a decision reversing and remanding the trial court's dismissal of plaintiffs' claims against JMT and HAKS (Pa2303). The Appellate Division rejected plaintiffs' contention that the affidavit of merit requirement was not applicable to claims brought under a respondeat superior theory of liability (Pa2317-18). Specifically, the Appellate Division concluded that:

> [I]f on remand there is a determination that [JMT employee James] Edgar was acting under the direction and supervision of licensed engineering professionals and that the function he was performing was part of the practice of engineering, plaintiffs cannot contend that the affidavit of merit statute does not apply because they are only suing HAKS and JMT (Pa2318).

The court further rejected plaintiffs' contention that JMT and HAKS were estopped from asserting an affidavit of merit defense (Pa2320).[2]

However, the Appellate Division concluded that a fuller record was required to determine whether plaintiffs' claims implicated the affidavit of merit requirement. The court observed, "Whether Edgar was acting under the supervision of licensed

[2] The Appellate Division went on to observe that plaintiffs' equitable estoppel argument would not impede JMT and HAKS from again seeking summary judgment on the basis of plaintiffs' failure to file an affidavit of merit (Pa2321). Accordingly, to the extent plaintiffs suggest that JMT and HAKS should be precluded from raising the affidavit of merit requirements, any such argument should be rejected.

engineers or acting in a non-engineering capacity is a question of fact that requires more development than exists in the current record" (Pa2315). To that end, the court opined that, "plaintiffs' proposed experts should be deposed," and further suggested that JMT and HAKS retain their own experts (Pa2315-16). The Appellate Division recognized that once this additional discovery was complete, "the question of Edgar's role may be appropriately subject to a future motion for summary judgment or possibly an N.J.R.E. 104 hearing" (Pa2316).

On remand, the parties pursued additional expert discovery pursuant to the Appellate Division's instructions. Plaintiffs produced reports from Bellizzi (Pa2365) and Nawn (Pa289), as well as an additional expert, William Gulya, Jr. (Pa688). The depositions of plaintiffs' three experts were taken on June 12, 2018 (Pa2185), September 10, 2018 (Pa2068), and July 11, 2018 (Pa1947), respectively. JMT produced the report of Keith Bergman, P.E. dated December 22, 2018 (Pa2425); his deposition was taken on April 26, 2019 (Pa2504).

Following the completion of expert testimony, both JMT and HAKS once again moved for summary judgment. By Orders and Opinions dated July 26, 2019, both motions were granted (Pa12-39). The court simultaneously entered an Order

and Opinion granting summary judgment to the New Jersey Turnpike Authority. Plaintiffs now appeal from those determinations.[3]

STATEMENT OF FACTS

A. Background

This matter arises from an accident that occurred during the course of a roadway resurfacing project on the New Jersey Turnpike. On July 11, 2014, plaintiffs' decedent, Michael Alexander, was acting in the course of his employment as a milling foreman for Crisdel, the general contractor on the project, when he was involved in a fatal accident with a sweeper truck operated by codefendant Christopher Hackett of Northeast Sweepers.

On December 16, 2013, the New Jersey Turnpike Authority ("NJTA") issued a Request for Expressions of Interest relating to a project providing for the supervision of construction services (Pa1787). In April 2014, HAKS, an architectural/engineering firm, was awarded a contract by the NJTA to provide the professional engineering service contemplated by the Request for Expressions of Interest. The contract was entitled, "Order for Professional Services No. T3512"

[3] Portions of the lengthy procedural history of this matter unrelated to JMT have been omitted. However, it is noted that the trial court proceedings did not terminate until plaintiffs' claims against Northeast Sweepers and Christopher M. Hackett were resolved in December 2023.

(Pa2280). The NJTA sought the "professional services required to provide supervision of construction services" for three construction projects "to ensure that the subject contracts are constructed in accordance with the Plan and Specifications" (Pa1787). The subject construction work consisted primarily of the resurfacing of portions of the New Jersey Turnpike roadway (Pa1800).

B. Scope of Construction Supervision Services

The Scope of Services prepared by the NJTA provided that the "work shall include engineering services covering all construction supervision of the construction work as described herein," as well as "the necessary personnel" for accomplishing that work. Id. The Scope of Services further required that the contractor's Project Manager, or a Principal, be a professional engineer licensed in the State of New Jersey, to oversee the work performed under the contract (Pa1801). HAKS' employee John Schweppenheiser is a licensed professional engineer and served as Project Manager (Pa1914 at T8:25-9:5; Pa1916 at T15:29-16:2).

The Scope of Services also required the employment of a Resident Engineer, underneath the supervision of the Project Manager. The Resident Engineer was required for all periods of construction activities "to perform construction inspection and administrative services for cost control, progress control and quality control" (Pa1801). Resident Engineers had to meet one of the following criteria: (1) a

licensed professional engineer; (2) ten years of relevant experience, with at least five years in the capacity of resident engineer; or (3) certification by the National Institute of Certification of Engineering Technologies as a Transportation Engineering Technician, Highway Construction Level IV. Id.

In the context of a roadway resurfacing project, construction inspection services include the following:

> [I]t would be part of looking at the milling, make sure that the heights of the milling were properly conforming, make sure that they were performing their work in the proper construction lane and once that work was performed and the millings were properly removed, they'd also look at the work for the asphalt that was coming in. So as an asphalt inspector, what we do is we first receive the tickets to make sure that they're properly using the hot mix asphalt that is required for the contract and specifications. We need to make sure that the temperatures are proper as -- because the temperature at which asphalt is placed is very important. Once it goes out onto the ground, we're therefore required to ensure that the proper height is looked at, to make sure that the asphalt that is there is going down at the proper height.
>
> …
>
> Also then need to look at the compaction. So normal asphalt compaction has to do with usually a three-roller system. We take a look at the rollers on how we're going to compact it, make sure that the temperatures are accurate for us to continue to roll the asphalt pavement. Asphalt needs to be rolled at a specific time because when it comes out of a truck, it has a limited time that it could actually get down to the temperature where it's no longer mobile, so the inspector is also required to make sure that the

> asphalt is compacted properly, make sure that it was put at the right temperatures, make sure that everything is done in conformance with the contract specifications. (Pa2494 at T37:12-39:3)

See also Pa1583 at T24:1-11. Also included would be "administrative services for cost control, progress control and quality control" (Pa2494 at T35:18-36:1, 21-24).

In May 2014, HAKS, as the prime consultant, subcontracted with JMT, also an architectural/engineering firm, to perform "the professional engineering services that were called for under the agreement with HAKS" (Pa1778). The Subconsultant Agreement between HAKS and JMT provided that "[i]f the work to be performed by the Subconsultant is of a professional nature, the work shall be performed under the direct supervision of a licensed professional consultant" (Pa1781). JMT employee Lawrence Fink, a licensed professional engineer, performed that supervisory function (Pa2627). Pursuant to the terms of the Subconsultant Agreement, JMT employee James Edgar served as the Resident Engineer (Id.; Pa1596 at T76:1).

Pursuant to the terms of the Subconsultant Agreement, JMT employee James Edgar served as the Resident Engineer, and was a NICET Level IV Certified/senior grade engineering technician, in accordance with the NJTA's RFEOI, Order for Professional Services (Id.; Pa1581 atT17:21-18:1; Pa1787). As Resident Engineer, Mr. Edgar was providing professional engineering services for JMT, pursuant to

JMT's contract with HAKS, and HAKS' contract with the NJTA (Pa1596 at T76:1-14). Mr. Edgar was responsible for supervising his inspectors, who were on the job site to ensure that the correct materials were used, proper depths of milling were done, compaction was proper, that the milling and paving equipment was in order, etc. (Pa1583 at T24:1-11). He was also responsible for the project paperwork, which included overseeing and keeping track of quantities of materials used and permits needed and issued (Pa1585 at T32:1-5).

Mr. Edgar was on site while milling and paving work was being performed, whether at the actual milling and/or paving, or at the project trailer (Pa1584 at T29:12-31:2). Mr. Edgar's inspectors would be at the paving/milling part of the work site if milling or paving was taking place. The inspectors would furnish daily reports and take photographs with respect to the milling and paving work completed. Those reports would be furnished to Mr. Edgar, who would in turn author and enter daily reports into the NJTA's electronic Cap Ex System. Id. at T44:15-45, T53:13-16. Mr. Edgar reported to Lawrence Fink, P.E., and also to John Schweppenheiser, P.E. (Pa2618 at T30:13-16 and Pa1917 at T19:12-20).

Lawrence Fink is a professional engineer licensed in the State of New Jersey, and project manager for JMT, who works primarily in construction inspection services (Pa2612 at T10:8-11:21). Pursuant to the professional engineering services

agreement between HAKS and the NJTA, he reported to John Schweppenheiser, P.E. of HAKS. Id. at T17:7-17. Mr. Fink's responsibilities included coordinating between HAKS and JMT, monitoring the operation of the project for conformance with contract plans and specifications, documenting quantities of materials placed by the contractor and preparing monthly estimates and progress reports that involved inspection of pavement, material in the pavement, radiation in the asphalt, milling depths and locations. Mr. Fink would also visit the job site. Id. at T19:6-20:2, T25:10-20.

HAKS oversaw all the work done by JMT in connection with the project and would report back to the NJTA engineer (Pa1919 at T29:3-32:7). Specifically, John Schweppenheiser of HAKS ensured that Mr. Edgar was providing full-time construction supervision, that the contract was built per the plans and specifications approved. Id. at T51:11-23, T62:2-10. To that end, Mr. Schweppenheiser was in "constant communication" with JMT on the subject project and would review reports submitted by Mr. Edgar to the Cap Ex system that documented what was done, when it was done, staff performing the work, quantity of work done. Id. at T49:8-23, T53:1-17.

C. Expert Testimony

1. Nicholas Bellizzi, P.E.

Plaintiff's expert Nicholas Bellizzi, P.E., acknowledged that the work performed by JMT and HAKS, including construction supervision services, constituted professional engineering services (Pa2230 at T46:21-47:12; T55:7-13). Mr. Bellizzi specifically confirmed that services ensuring compliance with the Authority's plans and specifications would be considered professional engineering. Id. at T48:10-18. Mr. Bellizzi further acknowledged that a professional engineer's failure to take into consideration the risks associated with the operation of milling machines would reflect a deviation from a professional standard of care. Id. at T53:1-11. He likewise recognized that a professional engineer was ultimately answerable for the services provided by both JMT and HAKS. Id. at T53:12-25.

2. John Nawn, P.E.

Plaintiffs' expert John Nawn, P.E., recognized that every person performing work under HAKS' contract with the NJTA reported to Mr. Schweppenheiser, HAK's Project Manager and a professional engineer (Pa2089 at T22:19-24). Mr. Nawn further acknowledged that Mr. Edgar was among the persons reporting to Mr. Schweppenheiser, who maintained the authority to institute corrective action as deemed necessary. Id. at T23:18-24:13. Mr. Edgar also reported to Mr. Fink, who likewise reported to Mr. Schweppenheiser. Id. According to Mr. Nawn, as Project Manager, Mr. Schweppenheiser was responsible for ensuring that HAKS and its

subcontractors fulfilled its contractual obligations, i.e., confirming that the contractor's work "complied with the plans and specifications of the project." Id. at T22:25-23:10.

3. William Gulya, Jr.

Plaintiffs' expert William Gulya, Jr. recognized that any claim against JMT arises from its alleged negligence in determining the contractor's compliance with the governing plans and specifications. In this regard, Mr. Gulya testified as to JMT:

> [I]f you are the resident engineer on the site, which is what they were, you are gonna have a understanding of the contract documents, as you pointed out, the prime contract, the requirements of those documents, the applicable standards, safety standards, OSHA and ANSI specifically being mentioned in those documents, the health and safety plans, and the requirements of all those documents, and that's your responsibility, to make sure all those things, okay, are complied with (Pa2046 at T100:4-13).

Mr. Guyla testified that he was offering an opinion not simply on whether defendants were negligent, but whether there was a deviation from a standard of care. Id. at T82:4-13.

4. Keith Bergman, P.E.

On behalf of JMT, Keith Bergman, P.E., prepared an expert report dated December 22, 2018 (Pa2425). Based upon his knowledge, education and over twenty-five years of relevant experience, as well as his review of a comprehensive

collection of the documents relating to the resurfacing project, as well as all discovery responses and deposition testimony, Mr. Bergman opined that the employees working under the Project Manager, including Mr. Edgar, were providing professional engineering services as required by the contract, even if the employees were not themselves licensed professional engineers (Pa2463, Pa2477, Pa2479). At his deposition, he testified that in order to perform the specific inspection activities required by the project, Mr. Edgar was required to have engineering knowledge relevant to the contractor's work. Attwood Cert., Exh. N at T59:12-60:10. Mr. Bergman noted that the JMT employees were at all times working under HAKS' Project Manager and/or Principal, who was required to be a licensed professional engineer (Pa2463).

5. Scott Derector, P.E.

On behalf of HAKS, Scott Derector, P.E., prepared an expert report dated December 11, 2018 (Pa2391). Mr. Derector similarly conducted a comprehensive review of the discovery exchanged by the parties in this litigation. With respect to JMT, Mr. Derector opined that "it was the Resident Engineer and his construction inspection team's responsibility to ensure that the work was being performed in accordance with the drawings and specifications" (Pa2413). He therefore concluded, "that the work being performed by JMT's Resident Engineer was deemed

to be engineering services as set forth by the N.J.A.C." Id. At his deposition, Mr. Derector explained that the inspection services required for a roadway resurfacing project included: (1) ensuring that the proper asphalt material was used; (2) confirming the asphalt was laid to a specific height; (3) reviewing the asphalt compaction; (4) ensuring that the asphalt was compacted within a certain amount of time after being removed from the truck; ensuring that the asphalt was maintained at the proper temperature (Pa2494 at T37-12 to T39-3). Administrative services for cost control, progress control and quality control were also part of JMT's responsibilities under the contract. Id. at T35:18-36:1, 21-24. He again opined that the performance of these types of services require engineering education, training or experience (Pa2500 at T58:24-59:6).

6. Craig Moskowitz, P.E.

Defendant New Jersey Turnpike Authority retained Craig Moskowitz as an expert witness in this matter. Mr. Moskowitz echoed the testimony of both Mr. Bergman and Mr. Derector, opining that the work performed by JMT's employees Fink and Edgar constituted the administration of construction for the purpose of determining compliance with the drawings and specifications, and as such, required engineering education, training and experience (Pa2679).

D. Trial Court's Order and Decision of July 26, 2019

By Orders and Decisions of July 26, 2019, the trial court granted summary judgment to both HAKS and JMT based upon plaintiffs' failure to provide a timely affidavit of merit. The trial court rejected plaintiffs' assertion that their claims sounded in simple negligence, and not professional engineering negligence, simply because of Mr. Edgar's role in the project. The court noted that the role of HAKS and JMT in supervising the project to ensure compliance with NJTA's contractual specifications clearly fell within the ambit of "professional engineering" (Pa29). The court further found that the opinions of plaintiffs' experts to the contrary did not raise a material issue of fact since those opinions flatly contradicted unambiguous provisions of the administrative code that expressly define "the practice of engineering" to include such work. Id.

While acknowledging that Mr. Edgar was not a licensed professional engineer, the trial court found that fact alone was not dispositive on the issue of whether plaintiffs' claims against HAKS and JMT implicated professional malpractice and the affidavit of merit requirement (Pa30). Rather, the trial court determined that it was necessary to examine the standard of care at the core of plaintiffs' claims. In this regard, the trial court aptly reasoned:

> Plaintiff's complaint is couched in terms of simple negligence against the Defendants, but it cannot be

> overlooked that the foundation of those allegations require a determination as to what the appropriate action would have been in the provision of engineering services on the project. Plaintiff's claims against Defendants for negligently supervising the project speak directly to their obligations as professional engineers who were hired specifically to oversee the project to ensure Crisdel's compliance with NJTA's contract specifications. There is no feasible way to separate Defendants' standard of care in rendering those professional engineering services from their duties owed to Plaintiff under a simple negligence theory. In other words, the allegations are founded upon the professional engineering HAKS and JMT provided and the standard of care applicable to them at the time of the incident can only be analyzed as a deviation from the standard of care ordinarily applicable to professional engineers.

Id. The trial court concluded that "the inspection and oversight duties of HAKS and JMT fall squarely within 'the practice of engineering,'" as both entities were "tasked with ensuring Crisdel's work adhered to the specifications of the project as set forth in NJTA's contract, and Mr. Edgar provided engineering services on the project, at the direction of two licensed professional engineers" (Pa31). Since plaintiffs' claims necessarily implicated the standard of care applicable to HAKS and JMT in their capacity as professional engineers, the trial court concluded that plaintiffs' failure to file an affidavit of merit was fatal. Id.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY CONCLUDED THAT JMT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN LIGHT OF PLAINTIFFS' FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE AFFIDAVIT OF MERIT STATUTE.

A. Overview of the Affidavit of Merit Statute.

N.J.S.A. 2A:53A-27, the Affidavit of Merit Statute, provides that:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

Accordingly, when a claim is asserted against a licensed professional for negligence in his or her profession, "an appropriate licensed person must submit an affidavit attesting to the suit's merit." Borough of Berlin v. Remington & Vernick Engineers, 337 N.J. Super. 590, 595 (App. Div.), certif. denied, 168 N.J. 294 (2001). The

purpose of this requirement is "to flush out insubstantial and meritless claims that have created a burden on innocent litigants and detracted from the many legitimate claims that require the resources of our civil justice system." Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144, 154 (2003).

Significantly, where a plaintiff fails to timely serve an Affidavit of Merit, "it shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53A-29. "Neglecting to provide an affidavit of merit after the expiration of 120 days . . . requires dismissal with prejudice because the absence of an affidavit of merit strikes at the heart of the cause of action." Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 422 (2010) (citing Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 247 (1998)); see also Levinson v. D'Alfonso & Stein, 320 N.J. Super. 312, 315 (App. Div. 1999) (holding that the negligence-professional malpractice aspects of plaintiff's claim should be dismissed due to plaintiff's failure to serve a timely affidavit of merit). Courts will only excuse plaintiffs for their failure to serve a timely Affidavit of Merit in rare cases involving instances of "substantial compliance [with the statute or] extraordinary circumstances." Ferreira, 178 N.J. at 154. Attorney inadvertence (or advertence) however, does not constitute an "extraordinary circumstance." Ryan v. Renny, 203 N.J. 37, 69 (2010) (citing Palanque v. Lambert-Woolley, 168 N.J. 398, 404-05 (2001)).

The requirements of the Affidavit of Merit Statute may not be avoided merely by labeling a claim as something other than professional negligence/malpractice. See Highland Lakes Country Club and Community Ass'n v. Nicastro, 406 N.J. Super. 145, 151 (App. Div. 2009); Couri v. Gardner, 173 N.J. 328, 340 (2002). Rather, the court is required to focus on the substance of the allegations underlying the claim, not the way that they are characterized by the claimants. Whether the Affidavit of Merit Statute is applicable depends on whether "the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession." Couri, 173 N.J. at 340. Where such proof is required, an affidavit of merit is mandatory. Id. at 341.

Here, it is undisputed that plaintiffs never served an affidavit of merit, which as the trial court correctly concluded, required the dismissal of plaintiffs' claims against JMT.

B. Plaintiffs Were Required to Serve an Affidavit of Merit on JMT and Failed To Do So.

The Affidavit of Merit Statute defines the types of "licensed person[s]" covered by its provisions to include "engineers" licensed pursuant to N.J.S.A. 45:8-27, et seq. See N.J.S.A. 2A:53A-26. The statute governing the licensing of engineers in the State of New Jersey in turn defines the terms "practice of engineering" and "professional engineering" as:

> **any service or creative work the adequate performance of which requires engineering education, training, and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as** consultation, investigation, evaluation, planning and design of engineering works and systems, planning the use of land and water, engineering studies, and **the administration of construction for the purpose of determining compliance with drawings and specifications**; any of which embraces such services or work, either public or private, in connection with any engineering project including: utilities, structures, buildings, machines, equipment, processes, work systems, projects, telecommunications, or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature**, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services**.

N.J.S.A. 45:8-28(b) (emphasis added).

JMT is an architectural/engineering consulting company that was contracted to provide professional services that consisted of:

> engineering services covering all supervision of the said construction work as described herein, together with providing the necessary personnel, equipment, transportation and main office facilities to facilitate in every way the performance of such inspection and coordination of construction and in accordance with the Authority's Construction Manual (Pa1800).

As the statute governing the licensing of professional engineers make clear, the supervision of construction for the purpose of ensuring compliance with plans and

specifications is inherently with the scope of professional engineering services. N.J.S.A. 45:8-28(b).

The Scope of Services further requires that the consultant employ a project manager who is a professional engineer licensed in the State of New Jersey, to oversee the work performed under the contract (Pa1801). The Subconsultant Agreement between HAKS and JMT likewise indicates that "[i]f the work to be performed by the Subconsultant is of a professional nature, the work shall be performed under the direct supervision of a licensed professional consultant" (Pa1790). JMT employee Lawrence Fink, a licensed professional engineer, served that supervisory role for JMT, and reported to John Schweppenheiser, vice president with HAKS, and the Project Manager (Pa2614 at T17:11-24, T66:23-67:6). Both Mr. Fink and Mr. Schweppenheiser are licensed professional engineers and qualify as "licensed persons" under the Affidavit of Merit Statute (Pa1914 at T8:25-9:9; Pa2613 at T13:8-17).

James Edgar, JMT's Resident Engineer on the Turnpike project, worked under the supervision of Mr. Fink, a licensed engineer, in carrying out the requirements of both the Subconsultant Agreement and HAK's professional service contract with the NJTA. As Resident Engineer, Mr. Edgar was responsible for ensuring that the contractor's work complied with the plans and specifications for

the Turnpike project (Pa1801-04). To this end, Mr. Edgar would supervise the inspectors carrying out that function. Id. Work of this nature unambiguously falls within the scope of professional engineering services, i.e., "the administration of construction for the purpose of determining compliance with drawings and specifications." N.J.S.A. 45:8-28(b).

Critically, the Affidavit of Merit Statute is not rendered inapplicable to JMT merely because Mr. Edgar is a NICET IV, a certified "senior grade engineering technician," rather than a licensed engineer. In this regard, plaintiff relies exclusively upon the New Jersey Supreme Court's decision in Haviland v. Lourdes Medical Center of Burlington County, Inc., 250 N.J. 368 (2022). However, the circumstances presented here are readily distinguishable. In Haviland, the plaintiff alleged that he was injured as a result of the negligence of a radiology technician. Specifically, the plaintiff alleged that the radiology technician directed him to hold weights during a radiological examination, contrary to the physician's instructions, resulting in injury to the plaintiff. Id. at 373. The plaintiff brought suit against the medical center, as well as the technician as a John Doe. Id. at 372. As a health care facility, the defendant medical center qualified as a "licensed person" for purposes of the Affidavit of Merit Statute. Id.

The defendant medical center moved for summary judgment on the basis of plaintiffs' failure to serve an affidavit of merit, which was granted. Id. The Appellate Division reversed, in a decision that was upheld by the Supreme Court. Id. The Court held that the statute "does not require submission of an AOM to support a vicarious liability claim against a licensed health care facility **based only on the conduct of its non-licensed employee**." Id. (emphasis added).

In framing the inquiry before it, the Court observed that the "case poses the question of whether an AOM is required to maintain a negligence claim premised solely on a theory of respondeat superior for the alleged conduct of a technician who is not a 'licensed person' under the AOM statute." Id. at 379. Surveying the caselaw applying the Affidavit of Merit statute to vicarious liability claims, the Court observed that the applicability of the statute focused on "'the nature of the underlying conduct' responsible for plaintiffs' injuries." Id. at 381 (quoting McCormick v. State, 446 N.J. Super. 603, 613 (App. Div. 2016)). Applying that principle, and finding that the radiology technician's conduct did not implicate any professional standard of care, the Court concluded that the affidavit of merit requirement did not apply to the plaintiff's claims. Id. at 383-84.

While issued before Haviland was decided, the trial court's decision illustrates how this matter is entirely distinct from the circumstances presented there. In

Haviland, the plaintiff's claims arose from the singular, isolated act of an unlicensed individual. In stark contrast, James Edgar's role as Resident Engineer is inextricably intertwined with JMT's broader responsibility in providing services that unquestionably qualify as professional engineering. As the trial court observed, "the foundation of [plaintiff's] allegations require a determination as to what the appropriate action would have been in the provision of engineering services on the project." Indeed, plaintiffs' own experts confirm how their claims are inextricably tied to JMT's provision of engineering services, for purposes of the Affidavit of Merit Statute. Specially, the opinions offer by John Nawn, and relied upon by plaintiffs, include:

- [NJTA] through its agent and subcontractor **JMT, as Resident Engineer, failed to make the inspection staff aware of the specific contract requirements for the incident contract**.

- [NJTA] through its agent, contractor and subcontractor **HAKS/JMT failed to inspect the incident milling machine for conformance with the Specifications.**

- [NJTA] through its agent, contractor and subcontractor **HAKS/JMT failed to ensure the incident sweeper and its operation were in conformance with OSHA regulations.**

- [NJTA] through its agent, contractor and subcontractor **HAKS/JMT failed to ensure that spotters were utilized in conjunction with the incident sweeper, in violation of the Specifications, including OSHA regulations.**

- [NJTA] through its agent, contractor and subcontractor **HAKS/JMT failed to conduct any illuminance level measurements, consistent with the reasonable and customary standards of the industry, as spelled out in ANSI/ASSE A10.47-2009, to verify the adequacy of the lighting, as required by the Specifications.**

- [NJTA] through its agent, contractor and subcontractor **HAKS/JMT failed to ensure that Crisdel performed a Job Hazard Analysis, consistent with OSHA regulations, and, therefore, the Specifications.** [Pa363-73 (emphasis added)]

The Supreme Court has recognized that, in evaluating whether the Affidavit of Merit Statue applies, "courts should determine if the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession." Couri v. Gardner, 173 N.J. at 340. Where a plaintiff's claims necessarily implicate such a standard of care, an affidavit of merit is required, regardless of how the plaintiff attempts to frame his or her claims. Id. at 341 (where proof of a deviation form a professional standard of care is required, "an affidavit of merit shall be mandatory for that claim").

Notably, the Court's reasoning in Couri has been applied in cases where the Affidavit of Merit requirement was found applicable to engineering firms despite the involvement of unlicensed employees in the underlying work. See Bonnieview Homeowners Ass'n, LLC v. Woodmont Builders, LLC, 2005 WL 2469665 (D.N.J. 2005). In Bonnieview, the court dismissed negligence claims asserted against an

environmental engineering firm because of the plaintiffs' failure to serve a timely affidavit of merit. The court specifically rejected the argument that an affidavit of merit was not required merely because the employees "who performed the activities giving rise to the negligence claim were not 'licensed persons' under N.J.S.A. 2A:53A–26." Id. at *3. In focusing on the "nature of the legal inquiry," in accordance with Couri, the court concluded that an affidavit of merit was necessary where the resolution of the plaintiff's claims required the jury to evaluate whether defendant breached "the professional duty owed by it." Id. at *5. Accord Carter & Burgess v. Sardari, 355 S.W.3d 804, 811 (Tex. App. 2011) (applying Texas' analogous affidavit of merit statute; "So long as the action arises out of the provision of professional services, the statute permits no exception for an action alleging a firm's vicarious liability for the negligence of an unlicensed employee").

The same result is warranted here. Plaintiffs' Complaint alleges that JMT "negligently, carelessly and/or recklessly operated, designed, controlled, supervised, maintained, inspected and/or created a system of oversight" with regard to the Turnpike project and that this alleged negligence directly and proximately caused decedent's death (Pa64 at ¶¶ 147-148; see also ¶ 154 discussing JMT's vicarious liability). JMT's utilization of Mr. Edgar, a certified engineer technician, in the role of Resident Engineer, does not nullify the nature of the services for which JMT was

contracted to perform – professional engineering services. Nor does it alter the fact that plaintiffs' claims rise and fall on their ability to demonstrate that JMT deviated from their contractual responsibilities, which again fall within the statutory definition of professional engineering. Accordingly, this Court should affirm the trial court's rejection of plaintiffs' effort to circumvent the Affidavit of Merit Statute's requirements.

C. Plaintiffs' Experts Uniformly Agree That Plaintiffs' Claims Against JMT Arise From Its Obligation To Ensure the Contractor's Compliance With the Turnpike Authority's Plans and Specifications.

None of the opinions offered by plaintiffs' experts alter the conclusion that the services at issue performed by JMT and Mr. Edgar implicate the Affidavit of Merit Statute. Clearly, none of the experts are qualified to offer an opinion on the ultimate legal issue of whether the claims against JMT trigger the requirements of the statute (Pa2213 at T30:5-8; Pa2075 at T8:7-13, T21:23-22:6). Setting aside their unqualified legal opinions regarding the applicability of the statute, the testimony of plaintiffs' experts in fact bolster the conclusion that an affidavit of merit was required.

Plaintiffs' expert Nicholas Bellizzi, P.E., acknowledged that the work performed by JMT and HAKS, including construction supervision services, constituted professional engineering services (Pa2230 at T46:21-47:12; T55:7-13).

As to the specific events underlying plaintiffs' claims, Mr. Bellizzi further acknowledged that a professional engineer's failure to take into consideration the risks associated with the operation of milling machines would reflect a deviation from a professional standard of care. Id. at T53:1-11. He likewise recognized that under contractual terms established by the NJTA, a professional engineer was ultimately answerable for the services provided by employees of both JMT and HAKS. Id. at T53:12-25.

Despite plaintiffs' efforts to focus on Mr. Edgar, plaintiffs' expert John Nawn, P.E., recognized that every person performing work under HAKS' contract with the NJTA "would essentially report to Mr. Schweppenheiser one way or another" (Pa2089 at T22:19-24). Mr. Nawn further acknowledged that Mr. Edgar, as the on-site presence for HAKS and JMT, would report to Mr. Schweppenheiser, who maintained the authority to institute corrective action as deemed necessary. Id. at T23:18-24:13. According to Mr. Nawn, as project manager, Mr. Schweppenheiser was responsible for ensuring that HAKS and its subcontractors fulfilled its contractual obligations, i.e., confirming that the contractor's work "complied with the plans and specifications of the project." Id. at T22:25-23:10.

Plaintiffs' expert William Guyla, Jr., similarly recognized that any claim against JMT arises from its alleged negligence in determining the contractor's

compliance with the governing plans and specifications. In this regard, Mr. Guyla testified as to JMT:

> [I]f you are the resident engineer on the site, which is what they were, you are gonna have a understanding of the contract documents, as you pointed out, the prime contract, the requirements of those documents, the applicable standards, safety standards, OSHA and ANSI specifically being mentioned in those documents, the health and safety plans, and the requirements of all those documents, and that's your responsibility, to make sure all those things, okay, are complied with (Pa2046 at T100:4-13).

The experts retained by both HAKS and JMT have reached similar conclusions (Pa2463, Pa2477, Pa2479; Pa2413). Moreover, they have further opined that services of this nature require engineering education, training and experience.

Accordingly, there is a consensus among all experts that the claims asserted against JMT arise from its alleged failure to ensure that the contractor was performing in conformance with the NJTA's plans and specifications. New Jersey law makes clear that these types of activities are within the ambit of professional engineering services. See N.J.S.A. 45:8-28(b). As the trial court recognize, any expert's personal views to the contrary are not only trumped by the unambiguous statutory language, they constitute inadmissible net opinion. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 412-14 (2014) (expert's opinions regarding what "a reasonable fire inspector" would have done were impermissible net opinions,

since the expert failed to provide objective evidence to support what amounted to "nothing more than his personal opinion"). As plaintiffs' claims against JMT necessarily implicate a professional standard of care, the trial court correctly dismissed those claims for failure to supply an affidavit of merit. Couri, supra.

CONCLUSION

For all the foregoing reasons, the trial court's dismissal of plaintiffs' claims against JMT should be affirmed.

Respectfully submitted,

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s/ Dawn Attwood
Dawn Attwood

Dated: July 29, 2024

ESTATE OF MIKE ALEXANDER, deceased by LORRAINE ALEXANDER as Executrix of the Estate and LORRAINE ALEXANDER, Individually,

Plaintiff/Appellants,

-vs-

NORTHEAST SWEEPERS, CHRISTOPHER M. HACKETT, TRI-STATE EQUIPMENT REBUILDING, CRISDEL CONSTRUCTION, FERRERIRA CONSTRUCTION, ATHEY PRODUCITON CORPORATION, NEW JERSEY TURNPIKE AUTHORITY, NEW JERSEY DEPARTMENT OF TRANSPORTATION, NEW JERSEY STATE POLICE, HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C., and JOHNSON, MIRMIRAN & THOMPSON and JOHN DOES

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION:
A-1486-23T2

On Appeal From:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. ESX-L-7229-14

Sat Below:
Hon. Thomas R. Vena, J.S.C.

Civil Action

AMENDED BRIEF OF DEFENDANT/RESPONDENT HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

Appellant appeals the dismissal of its claim against two licensed professional engineering entities which resulted from Appellant's failure to file an affidavit of merit. In their pleading, Appellant alleges that defendant HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C. (hereinafter "HAKS") and JOHNSON, MIRMIRAN & THOMPSON ("JMT") "were responsible for the operation, design, control, supervision, maintenance, inspection and/or creation of a system of oversight with regard to the project" (Pa96) Plaintiff further alleges that HAKS and JMT negligently, carelessly and/or recklessly supervised and/or monitored the construction site. (Pa98)

The Trial Court dismissed plaintiff's complaint for failing to serve an affidavit of merit. In its decision, the Trial Court found that the allegations sounded in professional negligence and, as such, an affidavit of merit was required. (Pa2522) Plaintiff appealed the granting of summary judgment. Appellant claimed in its appeal that it did not need an affidavit of merit as it was only suing HAKS and JMT. (Pa2317)

The Appellate Court noted that "plaintiffs who assert malpractice actions cannot avoid the requirements of the affidavit of merit statute by suing on a theory of vicarious liability (Pa2317) (citing McCormick v. State, 446 N.J. Super. 603, 614 (App. Div. 2016) In remanding the matter however, the Appellate Court instructed:

> "if on remand there is a determination that Edgar was acting under the direction and supervision of licensed engineering professional and that the function he was performing was part of the practice of engineering,

> plaintiffs cannot contend that the affidavit of merit statute does not apply because they are only suing HAKS and JMT. (Pa318)

After extensive discovery, expert reports exchanged and depositions taken, HAKS and JMT again renewed their motion to dismiss. In its decision of July 26, 2019, the Trial Court again dismissed plaintiff's complaint. (Pa16) In so holding, the trial court noted that HAKS subcontracted the work for professional engineering services and that the work would be "under the direct supervision of a licensed professional consultant" (Pa19)

After reviewing all the evidence, the Trial Court noted:

> " In examining these provisions as they apply to the work performed by HAKS and JMT, it is clear that their supervision of the project to ensure compliance with NJTA's contractual specifications falls within "professional engineering" ….[and] While it is not contested that Mr. Edgar is not a licensed professional engineer, it remains exceptionally clear that he was supervised by two separate people, both whom are licenses by the state of New Jersey as professional engineers and that he was performing services that easily fall within "the practice of engineering"". (Pa29-30)

Despite the fact that Mr. Edgar was being supervised by two professional engineers and despite the fact that Appellant had previously argued that no affidavit of merit was required by claiming it was **only suing** HAKS and JMT, (Pa2317) Appellant, relying on Haviland v. Lourdes Medical Center, 250 N.J. 368 (2022) now claims that no affidavit of merit is needed as Appellant's claim is against a non-licensed professional.[1] As set forth below, Haviland does not stand for the proposition that no affidavit is merit is required against a professional engineering firm, where the allegations are against the

[1] In Haviland, Plaintiff sued John Doe, a fictitious name used to designate the agent, servant and/or employee of the defendant Lourdes Medical Center at Burlington, Department of Radiology and Imaging and/or Lourdes Health Systems for an injury which occurred when a non-licensed technician, contrary to instructions given by the licensed physician, instructed the plaintiff to hold weights which resulted in Plaintiff's injury.

professional entity and a non-party, non-licensed employee is acting under the direction and control of a professional engineer. In such a case, the Plaintiff's claim arises out of the professional negligence of the professional engineer which had the duty.

PROCEURAL HISTORY

Respondent HAKS notes that Appellants' procedural history is incorrect in that it claims that JMT was an agent of HAKS. The contract between HAKS and JMT clearly states that JMT is an independent Contractor. The procedural history as cited by JMT is accurate. Rather than reciting the procedural history of this case, HAKS hereby adopts the Procedural History as cited by Respondent, JMT.

STATEMENT OF FACTS

Appellant brings this action due to the untimely death of Michael Alexander, an employee of defendant Crisdel Construction. (Pa64) The accident occurred on July 11, 2014, when Mr. Alexander was struck by a street sweeper owned by Defendant, Northeast Sweepers ("Northeast Sweepers") (Pa3). The street sweeper was operated by Christopher Hackett. (Pa3) Plaintiff named Mr. Hackett as a direct defendant in Plaintiff's Amended Complaint. (Pa64) Appellant in their Amended Complaint specifically alleges that Northeast Sweepers was liable under a theory of respondeat superior. Northeast Sweepers "were responsible for the actions of their employee, Christopher Hackett. (Pa69)

A. The Appellant's Second Amended Complaint Allegations Against HAKS

The allegations against HAKs are set forth in the 19th and 20th counts of the

Amended Complaint. (Pa96-Pa97) The 19th count of the Complaint alleges that HAKS was responsible for the "**operation, design, control, *supervision*, maintenance, inspection and/or creation of a system of oversight** with regard to the project located on the northbound lanes of the New jersey Turnpike at mile marker 113". (Pa96) The 20th count of the Appellant's complaint alleges that HAKS "negligently, carelessly and/or **recklessly supervised and/or monitored the construction site**". (Pa98) The allegations in the 19th and 20th count of the Complaint are not claims against an unlicensed employee nor are they claims based **solely** on the acts of the unlicensed individual. Nowhere in the Amended Complaint is Mr. Edgar, JMT's employee even mentioned. [2]

In this matter, HAKS had no "non-licensed" employees working on this project. Further, as set forth below, the work was subcontract to an independent contractor, JMT.

B. The Answer filed by HAKS

HAKS filed its answer on May 24th 2019. (Pa1740) HAKS in its Answer made a demand that the Plaintiff comply with N.J.S.A. 2A:53A-29 and that Plaintiff serve an affidavit of merit. (Pa1773) No affidavit of merit was filed by Plaintiff. More than 120 days passed from the filing of the Answer and HAKS filed a Motion to Dismiss plaintiff's Compliant as no Affidavit of Merit had been served. (Pa1939)

C. The Scope of Services

HAKS Engineers, Architects and Land Surveyors, P.C. ("Hacks") was retained

[2] Appellant's complaint clearly establishes that Appellant's allegations in this matter are against HAKS and JMT as corporate entities. Unlike Appellant's claim against Northeast Sweepers where Appellant named the driver Christopher Hackett, Appellant never named James Edgar as a defendant.

by the New Jersey Turnpike Authority ("NJTA") to provide professional engineering services for the project. (Pa2280) The scope of the professional services was set out in the NJTA Request for Expression of Interest. (Pa1787).

Pursuant to the Scope of Services the Project Manager had to be a professional engineer licensed in the State of New Jersey. The Project Manager was tasked to oversee the work performed under the contract (Pa1801). HAKS' employee John Schweppenheiser was the Project Manager. Mr. Schweppenheiser is a licensed professional engineer. (Pa1914) A resident engineer under the scope of services, was to "perform construction inspection and administrative services. (Pa1801) Mr. Edgar of JMT was qualified to be a resident engineer as he was a NICET IV inspector. (Pa1801) JMT was retained to perform the work under the direct supervision of a licensed professional consultant. (Pa1781) JMT's licensed professional engineer, Lawrence Fink supervised James Edgar and thus Edgar was working under the direction and supervision of a licensed professional. (Pa2627) While HAKS had no employees on site when the accident occurred, Appellant claims that HAKS was negligent, as James Edgar, an employee of JMT was negligent. As noted below, Mr. Edgar is not an employee of HAKS. HAKS, subcontracted the inspection services aspect of the contract to JMT. HAKS retained JMT as an independent contractor. (Pa1783)

D. HAKS/JMT Subcontract

HAKS subcontracted a portion of the work to JMT. (Pa1778) The subcontract

clearly sets forth that JMT is an independent contractor and not an agent of HAKS. (Pa1783) (Article XIV) As noted in the agreement:

> Article XIV. INDEPENDENT CONTRACTOR. Subconsultant agrees that it is an independent contractor and not an agent of Prime and is solely responsible for the means and methods used in performing the services provided herein…." (Pa1783)

As set forth below, HAKS cannot be held liable for the purported negligence of an independent contractor under the facts of this case.

E. Defendant's Initial Motion to Dismiss and Remand by Appellate Division

On August 4, 2017, the Trial Court dismissed plaintiff's complaint for failing to file an affidavit of merit. (Pa2522) Subsequent to same, plaintiff filed motion for reconsideration and provided an Affidavit of Nicholas Bellizzi (Pa333); an Affidavit from John Nawn (Pa2324); and a report from William Gulya (Pa688). Appellant and their experts claimed that no affidavit of merit was required as they were not suing HAKS for professional negligence.

Plaintiff appealed and the matter was remanded by the Appellate Division. (Pa2303) In remanding, the Appellate Division rejected Appellants claim that no affidavit of merit was needed as Appellant was only suing HAKS and JMT. (Pa2317)[3] "We reject plaintiffs' attempt to evade the requirements of the affidavit of merit statute by suing only HAKS and JMT" (Pa2317). The Appellate Division however, remanded for a

[3] HAKS notes that Appellants prior position, that it did not need an affidavit of merit as it was only suing the corporate entities, is inconsistent with their current claim that they are only suing based on the acts of the unlicensed professional. The Appellate Division rejected Appellants arguments that no affidavit was required regarding the corporate defendants and further rejected Appellants claim of estoppel and lack of a Ferreira Conference (Pa2319)

determination of whether "Edgar was acting under the direction and supervision of licensed engineering professionals and that the function he was performing was part of the practice of engineering". (Pa2318) After extensive discovery on said issue, HAKS again moved to dismiss plaintiff's complaint. (Pa688) On July 26th 2019 the Trial Court again granted HAKS's motion. (Pa12).

F. The Order and Decision Appealed From

HAKS renewed its motion to dismiss after extensive discovery took place. Expert reports were exchanged, and all experts were deposed. All of Appellant's experts acknowledged that the services provided were professional engineering services. While Appellant, in their brief, selected certain portion of their experts' testimony to attack the finding of the trial court, said experts, when deposed, Appellants experts, as noted below agreed that the services which by HAK and JMI contracted for, were professional engineering services.

G. Plaintiff's Experts Testimony

1. Nicholas Bellizzi, P.E.

Plaintiff's expert, Mr. Bellizzi, testified that compliance with the plans and specifications falls under what he would consider professional engineering. "The part of the contract that deals with the compliance with the plans and specifications falls under what I would consider professional engineering". (Pa2232) (T48:10-18) Bellizzi was not familiar with the fact that the New Jersey Administrative Code defines engineering as including "the administration of construction for the purpose of determining compliance

with the drawings and specifications" (Pa2242)(T58:7-14) See also N.J.A.C. 13:40-1.8. Bellizzi saw nothing in the contract or documents that indicated that HAKS and JMT were hired for anything other than "professional services" (Pa2243) (T59:21-24) Mr. Bellizzi acknowledged that Mr. Schweppenheiser was a professional engineer.(Pa2228-2229)(T44:24-T45:1) Bellizzi acknowledged that the NJTA was hiring HAKS for engineering services. (Pa 2230) (T46:21-35) As noted by Bellizzi :

> Q. So that based upon your review of the documents that were provided both HAKS and JMT were providing engineering services?
>
> A. That was what the contract required, Yes. (Pa2230)(T46:21-25)

Bellizzi acknowledged that Mr. Schweppenheiser was the person in "Responsible Charge". (Pa 2238)

Pursuant to N.J.A.C 1 13:40-9.1(a)

> A licensee in responsible charge of an engineering project shall be a competent professional engineer who provides regular and effective supervision through personal direction to, and quality control over, the efforts of subordinates of the licensee that directly and materially affect the quality and competence of engineering work rendered by the licensee.

Pursuant to N.J.A.C. 1340-10.2 (f)

> Failure by a licensee in responsible charge to render regular and effective supervision pursuant to N.J.A.C. 13:40-9.1 shall constitute professional misconduct.

Here, Appellant alleges that was ineffective supervision of the project which led to the injury in question. Per the New Jersey Administrative Code, the failure to provide regular and effective supervision constitutes professional

misconduct. The breach of any such licensee and his employer thus requires an AOM.

2. John A. Nawn, P.E.

Appellant's second expert, Mr. Nawn confirmed that HAKS as project manager was required to ensure the plans and specifications were complied with. (Pa2090) (T23:4-10) Mr. Nawn's criticism of the defendants was that JMT and HAKS were "cavalier in ensuring that the contract documents including safety documents were adhered to" (Pa2091-2092) (T24:20-T25:7) Mr. Nawn acknowledged that Mr. Schweppenheiser was a professional engineer. (Pa2087) (T20:20-22) Mr. Nawn's report states "***neither Lawrence Fink, nor John Schweppenheiser, III rendered regular and effective supervision of James Edgar, Sr.***" (Pa314) Nawn further claimed that "**HAKS'/JMT's** complacent approach to the incident project and **their failure to enforce multiple provisions** of the Specifications was negligent and a cause of Michael Alexander's incident" (Pa340) Nawn specifically states that HAKS and JMT were negligent in that **they failed to ensure that the safety provisions of the specifications** were followed. (Pa2094)(T27:11-14) Nawn later claimed that Schweppenheiser was negligent in not ensuring that the plans and specifications were complied with. (Pa2114-2115) (T47:22-T8)

Mr. Nawn further claimed that HAKS did not enforce the specifications in ensuring that the contractor was following the requirements of the specifications. (Pa096) Nawn claims HAKS was required to oversee all the work under the contract and that as

HAKS contracted with the NJTA, they're responsible for the work of the subcontractor as well. (Pa2101) (T44:14-18) Mr. Nawn admitted that Mr. Edgar was being supervised by a professional engineer. (Pa2102) (T35:23-25) Finally Mr. Nawn opines that defendant HAKS and JMT failed to properly provide supervision of construction services in the matter. (Pa2105) (T38:14-18)

3. William Gulya Jr.

Plaintiff's expert Mr. Gulya further confirmed that defendant HAKS was hired by the New Jersey Turnpike Authority to provide engineering services. (Pa2024-2025). (T78:25-T79:1) Mr. Gulya testified that HAKS had an obligation to "enforce applicable industry standards and have an understanding of the applicable industry standards". (Pa2027). (T81:3-9) Mr. Gulya testified that applying the applicable standards, HAKS a professional engineer was required to know those standards. (Pa2027-2028). (T81:24-T82:3) The transcript speaks for itself:

3 Q. As it relates to the Defendant HAKS
4 as it relates to their obligations to, quote,
5 enforce applicable industry standards, is it your
6 position that the Defendant HAKS was required to
7 have an understanding as to the applicable
8 industry standards?
9 A. Yes.
10 Q. And as it relates to the applicable
11 industry standards, is it your understanding in
12 general, and your opinion in this matter, that
13 HAKS as a professional engineer was required to
14 know those standards?
15 A. As it refers to the applicable standards,
16 yes, they should know them. (Pa2027) (T81:3-16)

Simply put, each of the plaintiff's experts when confronted with the actual work contracted for, agreed that ensuring that the plans and specifications were complied with constituted the practice of engineering. The New Jersey Administrative code defines what constitutes the practice of engineering and plaintiff's experts were either unfamiliar with or otherwise simply disagreed with what the Administrative Code clearly states. Judge Vena correctly held that the work being performed constituted the practice of engineering.

H. The Trial Court's Holding in Again Granting Dismissal

On July 16th 2019, the Trial Court again granted HAKS's motion to dismiss the Complaint for failing to serve an affidavit of merit. In granting HAKS's motion to dismiss, the Trial Court found that:

> "Although it is true that Mr. Edgar is not a licensed professional engineer, it remains undisputed that his supervisors, Mr. Fink and Mr. Schweppenheiser, were both licensed professional engineers who consistently monitored, directed and reviewed Mr. Edgar's performance on the project (Pa29-30) ……. Plaintiff's claim against Defendants for negligently supervision the project speaks directly to their obligations as professional engineers" (Pa30)

The Trial Court further noted that the practice of engineering is defined by the New Jersey Administrative Code which includes, as engineering, the administration of construction for the purposes of determining compliance with the drawings and specifications" (Pa28) (N.J.A.C. 13:40-13) The Trial Court stated:

> "In examining these provisions as they apply to the work performed by HAKS and JMT, it is clear that their supervision of the project to ensure compliance with the NJA's contractual specifications falls within

"professional engineering" (Pa29)

Further the court noted:

> "There is no feasible way to separate Defendants standard of care in rendering those professional engineering services from their duties owned to Plaintiff under a simple negligence theory. In other words, the allegations are founded upon the professional engineering of HAKS and JMT provided and the standard of care applicable to them at the time of the incident can only be analyzed as a deviation from the standard of care ordinally applicable to professional engineers." (Pa30)

Further, the court stated:

> "In light of the expert reports of the parties, as well as the deposition testimony, it is clear to this Court that the inspection and oversight duties of HAK and JMT fall squarely within "the practice of engineering…… and Mr. Edgar provided engineering services on the project, at the direction and supervision of two licensed professional engineers." (Pa31)

As Mr. Edgar was providing engineering services under the supervision and control of professional engineers, the Trial court ruled that an affidavit of merit was required. The Trial Court thus again dismissed plaintiff's complaint against HAKS. (Pa12)

I. The New Jersey Supreme Court Decision in *Haviland v. Lourdes Medical Center*[4]

After the dismissal of HAKS from the case, the New Jersey Supreme Court in Haviland v. Lourdes Medical Center, 250 N.J. 368 (2022) held that no affidavit of merit was required to support a vicarious liability claim based **only** on the conduct of its non-

[4] As noted above, in Haviland, plaintiff sued John Doe defendant who was the agent of Lourdes Medical Center. While Appellant in this matter has sued the employee of Northeast Sweepers, Mr. Hackett, at no time has Appellant sued Mr. Edgar which is further evidence of the claim being brought only against the corporate entities.

licensed employee. In said case a radiology technician had the plaintiff, who had undergone a surgical procedure to "hold weights ***contrary*** to the [ordering physician's] instructions. While holding the weighs, the Plaintiff sustained an injury.

Unlike the case at bar, in Haviland, the Plaintiff did not raise any direct claim against the hospital for negligent hiring, training, or supervision of the non-licensed employee. Indeed, plaintiff in Haviland did not dispute that, **had he pursued a direct claim, it would have been properly dismissed for failure to provide a timely AOM.** As noted below, Appellant brings his claim against HAKS and JMT, not Mr. Edgar and the complaint sounds in negligent supervision and design. (Pa64)

POINT I

THE COURT'S HOLDING IN *HAVILAND v. LOURDES MEDICAL CENTER OF BURLINGTON CTY, INC.*, 250 N.J. 368 (2022), IS INAPPLICABLE TO THE CASE AT BAR AND AS SUCH, THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED

A. Appellant has failed to identify any employee of HAKS that worked on the project that was not a licensed professionals.

In the instant matter, the Appellant alleges that the defendant HAKS, a licensed professional engineering company is liable for the accident in question. Appellant maintains that no Affidavit of Merit is required as they claim negligence against a non-licensed professional. Appellant however fails to identify any employee of HAKS that was not licensed. James Edgar is an employee of JMT not HAKS.

Appellant cites the New Jersey Supreme Court Holding in Haviland v. Lourdes Medical Center of Burlington City, Inc., 250 N.J. 368 (2022) in support of its claim that

no affidavit of merit is required. Haviland however, is not applicable to HAKS as no employee of HAKS is alleged to be an unlicensed professional relative to this claim.

In this matter Mr. John Schweppenheiser is a Professional Engineer. (Pa1914) Schweppenheiser is also a Certified Municipal Engineer. (Pa1914) (T9:8-9_ Schweppenheiser began his employment with HAKS on January 1, 2006 (Pa1914)(T9:20-22) Mr. Schweppenheiser administered the project from a financial standpoint and was the direct contact with the NJTA. (Pa1916) (T15:24-25) Mr. Schweppenheiser would keep the NJTA informed of issues that arose and advise of contractor concerns. (Pa1917) (T18:23-25) The resident engineer (JMT) would advise him of any issues that arose. (Pa1917) (T19:12-13) Mr. Schweppenheiser's point of contact with JMT was Larry Fink. (Pa1917)(T21:1-2) Mr. Schweppenheiser would meet with Mr. Edgar approximately once a month and have several phone calls each month. (Pa1920) (T32:17-20)

As noted by the Appellant, to establish vicarious liability, a plaintiff must demonstrate that: (1) that a master-servant relationship existed; and (2) that the tortious acts of the servants occurred within that employment. (See Appellant's Brief at pp. 42-43). Carter v. Reynolds, 175 N.J. 402, 409 (2003).

Mr. Edgar, however, was NOT an employee of HAKS and no master-server relationship existed. The alleged acts of Mr. Edgar were not within the scope of any employment with HAKS. As such Appellants claim against HAKS should be dismissed.

(i) JMT was an independent contractor and as such, HAKS is not liable for the acts of its independent contractor.

In this matter, HAKS subcontracted the work for inspection services to JMT (Pa1778). As noted in the contract between HAKS and JMT, JMT is an independent contractor (Pa1783) (Article XIV). The subcontract clearly sets forth that JMT is an independent contractor and not an agent of HAKS. (Pa1783) (Article XIV)

As noted in the agreement:

> Article XIV. INDEPENDENT CONTRACTOR. Subconsultant agrees that it is an independent contractor and not an agent of Prime and is solely responsible for the means and methods used in performing the services provided herein…."

It is well settled law in New Jersey that one who hires an independent contractor is not liable for the wrongful conduct of those contractors in the performance of their duties and services. Bahrle v. Exxon Corp., 145 N.J. 144, 156 (1996); Baldasarre v. Butler, 132 N.J. 278, 291 (1993).

There are three exceptions to the general rule, none of which apply here; Majestic Realty Associates, Inc. v. Toti Contracting Co., 30 N.J. 425 (1959). There is no evidence that the principal retained control over the manner and means of doing the work the contractor provided. Indeed, the contract specifically states that JMT is "solely responsible for the means and methods used in performing the services provided herein".[5] (Pa1783). There is no evidence that there was the retention of an incompetent contractor.

[5] HAKS while noting that JMT was the independent contractor that performed the work does not in anyway claim that JMT was negligent in this matter.

Finally, the services provided by the contractor do not fall within the third exception of being a nuisance per se. Id.

As Mr. Edgar was not an employee of HAKS, there is no basis for Appellant's argument that vicarious liability should be attributed to HAKS. JMT was an independent contractor who perform the work in question. As such, plaintiff's appeal as it relates to HAKS should be dismissed and the Trial Court decision affirmed.

B. Even if Mr. Edgar was an employee of HAKS, the case of *Haviland v. Lourdes Medical Center*, 250 N.J. 368 (2022) is not applicable to the case at bar.

In Haviland, the New Jersey Supreme Court determined that no Affidavit of Merit was required for a vicarious liability claim against the licensed healthcare facility where the claim arose **only** from the conduct of a non-licensed profession .

As noted by the Court in Haviland, under the Affidavit of Merit statute, an Affidavit is required where (1) a plaintiff makes a claim for personal injury, wrongful death or property damage (2) the personal injury, wrongful death or property damage resulting from an alleged act of malpractice or negligence; and, (3) the alleged act of malpractice or negligence as carried out by the licensed professional during the course of practicing that person's profession. *Id.* at 382. The requirements of the Affidavit of Merit Statute may not be avoided merely by labeling a claim as something other than professional negligence/malpractice. See Highland Lakes Country Club and Community Ass'n v. Nicastro, 406 N.J. Super. 145, 151 (App. Div. 2009); Couri v. Gardner, 173 N.J. 328, 340 (2002).

The Court in Haviland reviewed the legislative history of the Affidavit of Merit statute and emphasized that N.J.S.A. 2A:53A-27 requires the Affidavit of Merit only for claims, "resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation" *Id.* at 382.

In Haviland, a radiology technician allegedly asked the plaintiff to "hold weights ***contrary to the [ordering physician's] instructions."*** The radiology technician was not a "licensed person" as defined by the statute. *Id.* at 383. Plaintiff, in Haviland alleged that the allegations against the medical center were not "founded on the acts of the licensed professional and were based **solely** on the conduct of its non-licensed employee". *Id.* at 383. In Haviland, there was an affirmative act, by a non-licensed professional, not condoned, permitted or suggested by the licensed professional which caused the plaintiff's injury. The act which caused the injury, was unrelated to the acts of the licensed professional. No licensed professional told the technician to have Haviland hold weights.

In the case at bar, there is no affirmative independent act by Edgar which caused plaintiff's injury. As noted by the Trial Court, "Plaintiff's claim against Defendants for negligently supervising the project speak directly to their obligation as professional engineers who were hired specifically to oversee the project to ensure Crisdel's compliance with the NJTA's contract specifications." (Pa30) In addition to the negligent supervision claim, Plaintiff is asserting that Edgar, (who was acting under the direction and control of a licenses professional) failed, to comply with JMT's obligation to ensure

compliance with the Plans and Specifications. The Trial Court determined that the scope of Edgar's work fell within the "practice of engineering and Mr. Edgar was supervised by two separate people, both who are licensed by the State of New Jersey as professional engineers." (Pa30) As found by the Trial Court, Mr. Edgar was performing engineering services while being supervised by the licenses engineer and as such an affidavit of merit would be required as the case would hinge on the applicable standard of care (Pa30-31) As found:

> "Both HAKS and JMT was tasked with ensuring that Crisdel's work adhered to the specifications of the project as set forth in NJTA's contract, and Mr. Edgar provided engineering services on the project, at the direction and supervision of two licensed professional engineers. Accordingly, N.J.S.A. 2A:53A-27 applies to this litigation, rendering Plaintiff's failure to file an affidavit of merit fatal to his case against HAKS and JMT for failure to state a claim upon which relief can be granted" (Pa31)

While Appellant claims that the allegations in this matter are solely against the non-licensed professional, his pleadings and position throughout the underlying case does not support said claim. Mr. Edgar has never been named as a defendant in this matter. Indeed, there are no allegations against Mr. Edgar or even any employee of JMT or HAKS in the Amended Compliant (Pa64) Mr. Edgar at all times was acting at and under the supervision of the licensed professional. He reported to both Mr. Fink a licensed professional engineer and Mr. Scheweppenheiser who also was a licensed professional engineer. Of note, to the extent that Mr. Edgar was not acting as part of the obligations of the licensed professional engineers, HAKS as noted below questions what duty Plaintiff claims that Mr. Edgar owed to the plaintiff but for his obligations based on his

role as an employee of a licensed professional engineering firm.

A review of plaintiff's experts reports further establish that Plaintiff's claims are solely against HAKS and JMT. By way of example, Mr. Gulya's report does not even mention Mr. Edgar. (Pa688) Rather, Gulya refers to "HAKS and JMT failure to enforce to [sic]applicable industry standard best safety practices as noted in this report" (Pa727) HAKS and JMT failure to enforce ANSI and OSHA standards as noted in this report. Including but not limited to……" (Pa727) "HAKS and JMT failure to enforce the applicable contract documents including but not limited to The NJ Turnpike Authority's standards specifications, supplementary specifications, HASP and required form submission" (Pa728) "HAKS and JMT failure to enforce both Crisdel's and the NJ Turnpike Authority's Health and Safety Plans (HASP's) (Pa728) …. "HAKS and JMT failure to review and approval any Internal Traffic control Plan (ITCP), Daily Work Plan (DWP), Pre-Task Plan (PTP, Daily Safety Report (DSR) or a Safe Work Plan (SWP) as noted in this report. (Pa728) … HAKS and JMT failure to exercise authoritative control, management, and oversight……(Pa729)

Similarly, the report of Mr. Bellizzi states "This report was written specifically to focus upon the engineering work or lack thereof performed by HKS and JMT…" (Pa2368) Belllizzi then goes on to opine as to why he does not believe the work was "engineering".

Mr. Nawn opines similarly is directed against HAKS. "HAKS' failure to enforce the provisions…. violated the contract with the NJTA" (Pa349) HAKS failure to ensure

that Crisdel performed a Job Hazard Analysis consistent with OSHA regulations and, therefore, the Specification, violated their contract with the NJTA. (Pa351) "The New Jersey Turnpike Authority through its agent, contractor and subcontractor HAKS/JMT had a responsibility to ensure compliance with the Specifications, including OSHA regulations." (Pa351) "HAKS' failure to conduct any illuminance level measurements, consistent with the reasonable and customary standards of the industry, as spelled out in ANSI/ASSE A10.47-2009, to verify the adequacy of the lighting, as required by the Specifications violated their contract with the New Jersey Turnpike Authority (Pa350)

In McCormick v. State, 446 N.J. Super. 603 (App. Div. 2016), the court recognized that an Affidavit of Merit is required when the plaintiff's claim of vicarious liability hinges upon allegations of deviation from professional standard of care by a licensed individual who worked for the named defendant. Id. at 615. While here Appellant now seeks to couch his claim as against Mr. Edgar, the obligation to ensure compliance with he plans and specification is with the licensed professional engineer, not the employee. Per the Appellant's own brief, "HAKS and JMT, who provided the resident engineer, had a duty to know the applicable industry standards. (Pb28) HAKS and JMT failed to ensure that lighting requirements were met, as required by the HASP (Pb28) JMT and HAKS failed to ensure that the contractors met with industry standard best practices (Pb28) HAKS and JMT failed to ensure that Mr. Edgar was qualified to perform his duties as the resident engineer. (Pb28)

A review of the pleadings and Appellants arguments clearly show that the claim

is against the licensed professional corporation for their failure to supervise which does not arise solely from the acts of an unlicensed professional. This case was filed in 2014. Now some ten years later plaintiff's complaint still has no direct claim against Mr. Edgar and unlike Appellant's claim against Mr. Hackett, no purely vicarious claim is set forth in the pleadings.

C. The New Jersey Supreme Court imposes a duty of care upon licensed professionals based on heightened knowledge and understanding.

In this matter Appellant argues that HAKS and JMT were not acting as engineers and that Mr. Edgar was a not a licensed individual for the purposes of the AOM. As noted in Zielinski v. Professional Appraisal Associates, 326 N.J. Super 219 (App. Div. 1999) our Supreme Court has imposed a duty of care upon a professional in favor of persons who did not engage the professional for the purposes of establishing a duty. Id. citing Carvalho v. Toll Bros. and Developers, 143 N.J. 565, 573-74, 675 A.2d 209 (1996)

In Carvalho v. Toll Bros. and Developers, the Supreme Court imposed a duty of care upon an engineering professional in favor of persons who did not engage the professional.[6] In said case, an engineering firm retained by township to prepare plans for sewer project had contractual responsibility for progress of work, and which was aware of the risk of serious injury to workers that was presented by the potential of a

[6] As Edgar was not a licensed professional the holding of Carvalho should not apply to his actions but only that of the licensed professionals.

collapsing trench owed a duty to the workers employed by a sub-contractor. The New Jersey Supreme Court ruled that said professional owed a duty to avoid the risk of injury through collapse of the trench even though the engineering firm had no contractual responsibility for the safety of the construction site. As noted in Carvalho:

> "The record strongly indicates that the engineer's responsibilities for ensuring compliance with the plans and the rate of work-progress, including the proper handling of utilities that crossed the trench, implicated safety concerns. The contract itself provided that the condition of the trenches was relevant to determining construction procedures. Stonebeck noted when there were unstable trench conditions. The engineer also had to ensure that Toll protected utility lines crossing the trench. Stonebeck and Bergman admit that compliance with the plans and the rate of progress included the proper handling of utilities that crossed the trench. Stonebeck was aware that Toll did not use a trench box because it would interfere with two utility pipes. Using trench boxes to eliminate the risk of a trench collapse would require cutting and restoring utility lines, which would slow down the work. Those circumstances demonstrate the interrelationship between safety and progress. The connection between the engineer's responsibilities over the progress of work and safety measures at the job site is relevant in determining whether it is fair to impose a duty of care addressed to work site safety conditions….

It is not only in the field of engineering that the courts have imposed a duty based upon the professional's expertise and superior knowledge of a risk. For example, in Carter Lincoln-Mercury v. EMAR Group, *supra*, 135 N.J. at 195-204, 638 A.2d 1288 the Court held that an insurance broker's duty to investigate through reasonable inquiry the financial soundness of the insurance carrier with which the broker intended to place insurance extends not only to the insured, but also to other claimants for whose protection the insurance was procured, including the loss-payees who were not yet

identified at the time the broker placed the insurance. In Petrillo v. Bachenberg, 139 N.J. 472, 487 (1995) the court held that an attorney who provided a composite report of some, but not all percolation tests performed on the property to a real estate broker, and then represented the broker as the seller in the sale of the property assumed a duty to the prospective purchaser to provide reliable information regarding the percolation tests since the attorney should have foreseen the use of the report in any attempted sale and that prospective purchasers would rely on the report in deciding whether to purchase the property.

In Rosenblum v. Adler, 93 N.J. 324, 352, 461 A.2d 138 (1983) the Court held that an independent auditor who furnishes an opinion with no limitation in the certificate as to whom the company may disseminate the financial statements has a duty to all whom the auditor should reasonably foresee as recipients of the statements for proper business purposes who would rely on the statements pursuant to those business purposes.

In R.J. Longo Const. Co. v. Schragger, 218 N.J. Super. 206, 209-10, 527 A.2d 480 (App. Div. 1987) the Court held that an attorney for a municipality who prepares contract documents to be used by the public in the bidding process for construction of a sewer facility may be held liable to the successful bidder for economic losses due to the negligent failure adequately to draft the contract or for the negligent failure to obtain easement rights of way on behalf of the municipality. In Albright v. Burns, 206 N.J. Super. 625, 632-33, 503 *A*.2d 386 (App.Div.1986) the Court held that

an attorney owes a fiduciary duty to persons who, not strictly clients, he knows or should know rely on him in his professional capacity. Each of the above cases stand for the proposition that licensed professional owe a duty of care based on the heightened knowledge of the party upon whom the duty is imposed even where there is no contractual obligation to do so.

Per the contract documents, HAKS had no contractual obligations to ensure safety. Per the construction manual (which is incorporated into the Turnpike Contract) (Pa2231-2232)(T47:23-T48:4):

> *"Job safety is the sole responsibility of the contractor. The engineers should remind the contractor whenever it appears that safety has been overlooked, however, it is not intended to shift that responsibility to the engineer at any time."* (Pa2607)

Here, Plaintiff claims that Edgar is an unlicensed professional who was not performing professional engineering work, breached a duty. Assuming Edgar was not performing engineering services, and not acting in furtherance of the licensed professionals' obligations, Edgar would be like any other contractor on the construction site with no specific duty to the Appellant.

D. <u>The accident did not arise out of any act of Edgar but rather the purported failure of HAKS and JMT to ensure compliance with the contract documents and as such, an affidavit of merit was required.</u>

Appellant's Amended Complaint does not name Mr. Edgar individually nor does it allege that Mr. Edgar was negligent. There is no independent action by Mr. Edgar which caused the accident. Mr. Edgar was not driving the street sweeper. Rather, the plaintiff

in the 19th Count of the Complaint (Pa96), alleges that HAKS/JMT negligently, carelessly, and recklessly operated, designed, controlled, supervised, maintained, inspected and/or created a system of oversight with regard to the project located on the northbound lanes of the New Jersey Turnpike at mile marker 113. The Complaint goes on to state that "as a direct and proximate result of the negligence, carelessness and/or recklessness of the defendant, HAKS and JMT, the aforementioned collision allegedly caused the wrongful death of Michael Alexander…".

At the time of the accident, Mr. Edgar was not anywhere near the location where the incident took place. Mr. Edgar was in the company trailer. (Pa1592) (T58:10-11) The trailer was at mile marker 88 or 89. (Pa1585) (T30:17-18) The accident took place at mile marker 113.8 (Pa1601)(T6:7-11) some 25 miles away. There simply is no act of negligence as to Edgar on the night in question to establish vicarious liability as to Edgar. Edgar was merely an employee of the corporate entity that had the obligation. Edgar was not responsible for the contract, JMT and HAKS were.

In Haviland, it is significant that the radiology technician was not acting under the direction or control of a licensed professional and was not acting in conformance with the directions and instructions of the licensed professional. The exact opposite took place; the radiology technician, contrary to the instructions of the physician, required the plaintiff to hold weights and while holding the weights, the plaintiff sustained an injury to his newly repaired left shoulder, requiring a surgical procedure two months later.

HAKS does not argue that the independent negligence of an employee unrelated

to the professional engineering services, requires an Affidavit of Merit. Rather, as noted by the Appellate Division, when it remanded the initial granting of summary judgment (in order to determine a full record) "if Edgar was acting under the direction and supervision of a licensed engineer professional and that the function, he was performing was part of the practice of engineering" an affidavit of merit was required. (Pa2318). By way of analogy, if an attorney instructed a paralegal to serve an expert report and failed to do so, Appellant's argument is that a claim could be made against the law firm without an affidavit of merit. Appellant highlights for this court the fact that its expert Nawn testified that "no one from HAKS and/or JMT explained to Mr. Edgar what his duties were" (Pb27) and that HAKS and JMT had an obligation and responsibility for the enforcement of OSHA and ANSI standards.

In Shamrock, Lacrosse, Inc., v. Klehr, Harrison, Harvey, Branzburg & Eller, LLP, 416 N.J. Super. 1 (App. Div. 2010), the Appellate Division examined as to whether an Affidavit of Merit was required for vicarious liability claims against two unlicensed law firms based upon the conduct of a licensed attorney-employee. The Shamrock Court held that an Affidavit of Merit was required because the underlying action resulted from the licensed attorney's negligence in malpractice. The Court in Shamrock noted that the Affidavit of Merit statute requires and contemplated such potential vicarious liability by making the affidavit requirement applicable to any action for damages "resulting from" a licensed persons' professional malpractice or negligence. The Supreme Court's decision in Haviland, and as noted in Shamrock, recognizes that claims "**resulting from**"

a licensed personal professional negligent practice or negligence require an affidavit of merit.

The New Jersey Supreme Court has set forth the analysis which must be performed in cases where a lawsuit is filed against a professional. The Supreme Court has held that it is not the label to be placed on the action that is pivotal, but rather, the nature of the legal inquiry. Courier v. Gardner, 173 N.J. 328 (2002). As instructed by the New Jersey Supreme Court, regardless of how a claim is presented, rather than focusing on how it is denominated, the Court should determine if the claim's underlying function required proof of a deviation from the professional standard of care acceptable to that specific profession. Courier v. Gardner, 173 N.J. at 340-341. If such proof is required, an Affidavit of Merit is required per that claim unless an exception applies. *Id. citing,* Hubbard v. Reid, 168 N.J. 387 (2001).

Here, Appellant's own experts concede that the work that HAKS and JMT were contracted to perform engineering services. (Pa2230) (T46:21-25)The complaint sounds in professional negligence and is directed against the corporate entities. The New Jersey Administrative Code defines what constitutes the practice of engineering to include ensuring compliance with the plans and specifications. Here, Appellant's claim is that HAKS and JMT failed to ensure compliance with the plans and specifications. There is no independent negligent act of Edgar who was 25 miles away from the accident when it occurred.

As the claim results from the purported failure of HAKS and JMT to ensure

compliance with the contract documents, an affidavit of merit is required and as Appellant failed to provide one, the Court correctly dismissed the Complaint.

CONCLUSION

For the foregoing reasons, the appellant's Appeal should be denied and the ruling of the Trial Court upheld.

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Surveyors, P.C.

By: ***s/Timothy K. Saia***
Timothy K. Saia, Esq.

Dated: July 29, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-001486-23

ESTATE OF MICHAEL ALEXANDER, deceased, by LORRAINE ALEXANDER as Executrix of the Estate; and LORRAINE ALEXANDER, Individually, *Plaintiffs-Appellants,* vs. NORTHEAST SWEEPERS; CHRISTOPHER M. HACKETT; TRI-STATE EQUIPMENT REBUILDING; *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON APPEAL FROM THE ORDERS GRANTING SUMMARY JUDGMENT IN: LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-7229-14 Sat Below: HON. THOMAS R. VENA, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT CRISDEL GROUP, INC. (I/P/A "CRISDEL CONSTRUCTION")

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Date Submitted: July 29, 2024

CRISDEL CONSTRUCTION; FERREIRA CONSTRUCTION; ATHEY PRODUCTION CORPORATION; NEW JERSEY TURNPIKE AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY STATE POLICE; HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C., and JOHNSON, MIRMIRAN & THOMPSON,	:
Defendants-Respondents.	:

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Defendant-Respondent Crisdel Group, Inc. ("Crisdel") submits this brief in opposition to Plaintiff-Appellant Lorraine Alexander's ("Plaintiff") appeal of the June 22, 2018, order granting Crisdel's motion for summary judgment dismissing Plaintiff's claims with prejudice. The trial court concluded that no reasonable trier of fact could find that Crisdel had committed an intentional wrong. This Court should affirm the trial court's Order because Plaintiff failed to adduce evidence establishing that Crisdel committed an intentional wrong that would be sufficient to overcome the immunity provided by the New Jersey Workers' Compensation Act (the "Act"), N.J.S.A. 34:15-8.

This lawsuit arose out of a highway construction accident that resulted in the death of Michael Alexander ("Alexander"), a milling foreman employed by Crisdel. Plaintiff, Alexander's widow, brought suit both individually and on behalf of her deceased husband as executrix of his estate. Plaintiff alleged that Crisdel's actions and/or omissions were a proximate cause of the accident and Alexander's injuries. As Alexander's employer, however, Crisdel is immune from liability under the Workers' Compensation Act, subject only to the very limited exception for "intentional wrongs," which can only be satisfied by a showing that (a) the employer knew that its actions were substantially certain to

result in injury or death, and (b) the injury was more than a fact of life of industrial employment.

Through her experts, Plaintiff set forth a number of liability theories against Crisdel in an effort to overcome the Workers' Compensation bar. Despite the Monday-morning quarterbacking of Plaintiff's experts, there was simply no evidence developed in discovery to support a finding that Crisdel knew that its actions were substantially certain to result in Alexander's accident, injury, or death. Indeed, not even Alexander — a project foreman who was known to have the utmost concern over safety and who was not shy about raising safety concerns with his employer — complained about or sought to correct any of the alleged safety violations identified by Plaintiff's experts.

Moreover, and regardless of Crisdel's alleged actions and inactions, Plaintiff's claims herein still fail because the context and circumstances of Mr. Alexander's injury were not more than a fact of life of industrial employment. Alexander was injured when he was struck by a moving vehicle in an active road construction work zone. There is no affirmative act or additional precaution that Crisdel could have undertaken that would have eliminated the need to have both employees and moving vehicles in that work zone on the night of the accident. Although serious injury and death is thankfully not a frequent consequence of construction work, there is no question that the danger of being struck by a

vehicle is a real and well-known risk in the industry. In her deposition, Plaintiff herself acknowledged that her husband had a dangerous job.

Plaintiff's claims were correctly dismissed by the trial court because, even when viewing the facts in the light most favorable to Plaintiff, none of the documents or testimony adduced demonstrated the knowledge of virtual certainty of severe injury or death required to overcome the Workers' Compensation immunity or that the circumstances of Alexander's injury were plainly beyond anything that the Legislature intended the Workers' Compensation Act to immunize. Accordingly, the trial court properly granted summary judgment in favor of Crisdel, and this Court should affirm that ruling.

PROCEDURAL HISTORY

On October 10, 2014, Plaintiff Lorraine Alexander filed the instant lawsuit, as both the executrix of Alexander's estate and in her individual capacity, against Crisdel and several other defendants. Pa2712a. On or about January 26, 2016, Plaintiff filed a Second Amended Complaint. Pa64a-102a.

On or about February 29, 2016, Crisdel filed its Answer to the Second Amended Complaint. Pa104a-23a. In its Answer, Crisdel denied the allegations plead by Plaintiff and asserted numerous affirmative defenses, including that Plaintiff's claims were barred by the New Jersey Workers' Compensation Act. See id.

On April 26, 2018, Crisdel moved for summary judgment on all of Plaintiff's claims. Pa40a-41a. Judge Vena heard oral argument on the motion, granted summary judgment in Crisdel's favor, and dismissed Plaintiff's claims with prejudice by Order dated June 22, 2018. Pa1a-2a. Judge Vena concluded that Plaintiff had failed to adduce evidence that would allow a reasonable trier of fact to conclude that Crisdel had committed an intentional wrong, or that the context and circumstances of Mr. Alexander's injury were more than a fact of life of industrial employment. Pa10a-11a. Plaintiff filed an amended notice of appeal on January 31, 2024. Pa2874a-78a.

STATEMENT OF FACTS

On the night of July 11, 2014, Crisdel was conducting a routine milling and paving operation for the New Jersey Turnpike Authority ("NJTA") on the eastern spur of the New Jersey Turnpike near mile 113. Pa151a; Pa200a-03a, 210a. Alexander was serving as a milling foreman on the project. Pa151a; Pa200a-03a, 210a, Pa207a. At approximately 11:00pm, a street sweeper owned by Defendant Northeast Sweepers ("Northeast") and operated by Defendant Christopher Hackett ("Hackett"), a Northeast employee, struck Alexander. Pa151a-52a. Alexander was taken to the hospital and passed away approximately one month later without regaining consciousness. Pa188a. At the time that he was struck by the sweeper, Alexander was wearing his reflective

safety vest, boots, and hard hat, and also had a working flashlight that was turned on. Pa151a; Pa209a, 211a; Pa225a; Pa246a; Pa280a; Pa286a-87a. Alexander and/or his Estate received workers' compensation benefits arising out of his employment with Crisdel. Pa142a at No. 17.

Plaintiff, through her experts, asserts that Crisdel is liable for Alexander's accident based on Crisdel's OSHA violations, its failure to establish a pre-planned traffic pattern, its failure to provide a spotter for construction vehicles in the work zone, its failure to comply with ANSI guidelines regarding work zone safety, its failure to provide adequate lighting for the work zone, and its failure to provide adequate staffing and personnel at the scene of the accident. Pa132a at No. 51.

As noted by Crisdel's expert, however, many of Plaintiff's experts' opinions were not supported by applicable regulations, industry standards, or scientific evidence. Pa360a-67a. First, Plaintiffs' experts' reliance on an OSHA standard concerning "hazard assessment" is misplaced, as it pertains only to making a hazard assessment relative to the wearing of personal protective equipment, and there is indisputable evidence that Alexander was wearing PPE on the night of the accident. Pa364a. Additionally, the record contains no evidence that Crisdel received any OSHA citations prior to the accident. After the accident, Crisdel received only one citation for a "serious," but not "willful,"

violation of exposing employees to the hazard of being struck by construction vehicles within a highway construction zone. Pa163a-71a; Pa173a-80a; Pa270a.

Second, ANSI standards do not require that internal traffic control plans be written and do not require spotters where backup alarms are supplemented with additional backing assistive devices, such as backup cameras. Pa362a-63a. Moreover, ANSI standards are not mandatory and, in fact, specifically state that "[t]he use of American National Standards is completely voluntary; their existence does not in any respect preclude anyone, whether he/she has approved the standards or not, from manufacturing, marketing, purchasing, or using products, processes, or procedures not conforming to the standards." Pa361a.

Finally, Plaintiffs' experts' conclusions regarding the illumination levels on the worksite and the sound levels of the backup alarm for the sweeper were based on colloquial testimony instead of scientific measurements, and even more critically, they disregarded that the lighting was adequate and the sweeper's backup alarm was operational and audible. Pa360a. Jim McHugh, Crisdel's former safety supervisor who inspected the sweeper immediately after the accident, observed that its lights, backup camera, and backup alarm were "in full working order" on the night of the accident. Pa271a-74a. There is no evidence contradicting Mr. McHugh's findings.

Plaintiff and her experts further assert that the existence of several prior accidents on Crisdel jobs over the course of fifteen years demonstrates a "conscious, indifferent approach to safety" that was a cause of the accident. Pa352a. The prior accidents, however, are all factually distinct from the July 11, 2014 accident. Pa369a-91a. More specifically, the prior accidents are: (1) a Crisdel employee was fatally injured in September 2003 when a milling machine tipped over onto him during a runway resurfacing project at Newark Airport; (2) a dump truck driver, who was not a Crisdel employee, was fatally injured in October 2004 when he got out of his vehicle and was struck by a water truck driven by a Crisdel employee on a milling/paving project; (3) A New Jersey Department of Transportation inspector was injured in October 2008 when he was struck by a truck driven by a non-Crisdel employee on a milling/paving project; and (4) a nuclear thickness surveyor and non-Crisdel employee was injured in August 2010 when she was struck by a pickup truck driven by a Crisdel employee on a milling/paving project. See id. Notably, none of these incidents involved Northeast, Hackett, a sweeper, or any of the alleged issues cited by Plaintiff and her experts as contributing to the accident (e.g., inadequate lighting, lack of spotters, no assigned dump trucks, no written internal traffic control plans). See id.

Plaintiff further asserts that Crisdel's failure to act regarding Hackett's allegedly unsafe driving practices created a situation that was certain to cause an incident like the July 11, 2014 accident and contributed to the cause of the accident Pa344a. The record, however, is devoid of any evidence of any documented complaints about any allegedly unsafe driving practices by Hackett.

Notably, Hackett admitted in his deposition that the accident "was my error." Pa238a. Even with this admission, there is no dispute that Hackett was an experienced driver, having logged approximately 15,000 hours driving sweepers as of July 11, 2014, and having worked "more than a few" jobs like the job where the incident occurred before that night. Pa230a, Pa1469a. There is no evidence that Hackett was involved in any prior accidents while operating a sweeper.

Mr. Weaver, Mr. Nash, Mr. Leonard, Mr. Terranova, Mr. Shopp, Mr. Wiltshire, and Mr. Soto all testified that they either had not made or received any complaints about Hackett and that they were not aware of any complaints about Hackett or Northeast made to Crisdel. Pa252a-53a; Pa256a; Pa267a; Pa194a-95a, 196a-97a, 216a; Pa244a-45a; Pa284a. In fact, only one Crisdel employee, Mr. Anderson, testified that he told anyone at Crisdel about concerns with Hackett prior to the accident, and he only voiced his concerns

approximately one week before the accident. Pa223a-24a; Pa1473a-74a; Pa1536a.

Additionally, Crisdel had no control over Northeast's selection of sweeper operators/drivers; the Sweeping Vendors Agreement that Crisdel entered into with Northeast, on or about December 10, 2013, provided that "[t]he full cost and responsibility for recruiting, hiring, verifying compliance, training, terminating and compensating employees and/or operators/drivers shall be borne by [Northeast]." Pa156a-61a.

Further, if there was one Crisdel employee who could, and indeed would, have done something about Hackett's purported dangerous operating habits or any of the other safety issues identified by Plaintiff's experts, it was Alexander. Prior to July 2014, Alexander had thirty years of road construction experience, had taken numerous OSHA safety courses, and had attended safety training through his union membership. Pa141a at No. 1; Pa137a at No. 41; Pa184a-185a. Every single witness that knew Alexander testified that he was very safety conscious and that he had no problem correcting perceived safety violations, ensuring that his co-workers did not work unsafely, and/or communicating safety concerns to his employer. Pa187a; Pa226a; Pa230a; Pa241a; Pa277a, 279a. Despite all of this, the record is devoid of evidence that Alexander ever complained about inadequate lighting, not having flagmen on the job or about

insufficient manpower, the internal traffic control plan or lack of a written internal traffic control plan, or about the dump truck and sweeper traffic moving in the work zone. Notably, Plaintiff acknowledged that her husband worked "a dangerous job." Pa191a.

The Conditions of the Worksite Where the Accident Occurred

On the night of the accident, the work zone was lit up by the moon, construction equipment lighting, and car lights in the live lane next to the worksite. Pa152a; Pa233a-34a; Pa225a. Although Crisdel did not use any "light towers" to provide additional illumination of the work zone on the night of the accident, Pa204a, Crisdel employees testified that light towers were not typically used for milling and paving jobs because there is no vehicle to which they can be secured in the moving work zone; it was very common on milling projects to only use lights from the equipment and vehicles on site to illuminate the work zone. Pa205a, 218a; Pa281a. Mr. Shopp testified that Alexander was "lit up" from the lighting emanating from the milling machine in the work zone, and that the lights on the sweeper are "pretty bright." Pa213a-15a. Simply stated, there is no evidence to support Plaintiff's contention that the ambient lighting conditions violated the minimum lighting requirements set forth in Crisdel's contract with the NJTA.

In the work zone, Crisdel did not utilize flagmen or spotters. Pa235a-37a. Hackett testified that having flagmen or spotters in the work zone would not have helped avoid an accident because more people on the ground in the work zone would have been more dangerous. Id. Mr. Anderson testified that on the night of the accident, they had "more than we needed" in terms of manpower for the job. Pa227a. The record does not contain any evidence that Crisdel received any complaints about the lack of flagmen. Pa261a.

On the night of the accident (as was typical on milling and paving jobs), there were twelve pieces of machinery belonging to Crisdel in the work zone, along with two sweepers and at least five dump trucks. Pa199a, 206a, 208a. Crisdel employees testified that prior to going out on a job, the Crisdel employees on the job would meet to discuss what they were "going to go out and do," and that the internal traffic controls for milling and paving jobs were "pretty much the same" every night. Pa243a; Pa217a. Mr. Anderson confirmed that on the night of the accident, the Crisdel workers on the job met "as always" before the job started to discuss where they would be operating and what they would be doing that night. Pa222a-23a. Hackett testified that in the 15,000 hours that he had logged on prior jobs, including a majority on the Garden State Parkway and New Jersey Turnpike, he has never seen or gone over a written internal traffic control plan on any of those jobs. Pa231a-32a. Furthermore, it

was the foremen on the job, including Alexander, who were responsible for enforcing traffic flow rules inside the work zone. Pa207a; Pa278a.

According to both Bill Weaver, Project Manager for Crisdel, and John Nash, the Crisdel superintendent for the worksite where the accident occurred, it was always Crisdel's practice to try and assign a dump truck to the sweepers at the work site both for expediency and for safety reasons. Pa250a-51a. Mr. Weaver also testified, however, that when a dump truck fills up and leaves, there may be a time gap between when that truck leaves and when another truck takes its place. Pa249a. On the night of the accident, a dump truck was assigned to the sweeper at some point. Pa258a. At the time of the accident, however, the sweeper truck had to drive around the milling machine because it did not have a dump truck with it to dump its sweepings into. Pa212a. Mr. Nash testified that that *any* foreman, including the safety-conscious Alexander, could request a dump truck to accompany the sweeper. Pa258a. Indeed, Mr. Nash stated that it is both his responsibility and the responsibility of the foremen on the work site to make sure that there is a truck with the sweeper if possible; a responsibility that Walter Soto, another Crisdel employee working on the jobsite on the night of the accident, confirmed. Pa260a; Pa285a. On the night of the accident, however, Alexander did not complain to Mr. Nash about the truck and sweeper traffic moving in the work zone. Pa1353a-54a. There is no evidence identifying

any applicable standards or contract requirements governing the use of a dedicated dump truck to accompany a sweeper on a road construction work site like the one where the accident occurred.

LEGAL ARGUMENT

STANDARD OF REVIEW

The Appellate Division reviews a trial court's ruling on a summary judgment motion de novo. Conley v. Guerrero, 228 N.J. 339, 346 (2017) (citing Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)). The summary judgment rule, by its plain language, dictates:

> [t]hat a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.
>
> Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

To determine whether a genuine issue of material fact precludes summary judgment, the Court considers 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." Id. at 540. Issues of fact "of an insubstantial nature" will not preclude summary judgment. See id. at 530 (quoting Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 75 (1954)). If there is no

genuine issue of material fact, the Court will "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)).

Although courts evaluating a motion for summary judgment view the facts in the light most favorable to the non-moving party, bare conclusions without factual support will not defeat the motion. See Sullivan v. Port Auth. of NY & NJ, 449 N.J. Super. 276, 279–280 (App. Div. 2017), certif. denied, 232 N.J. 282 (2018). The non-moving party must support its opposition with affidavits or certifications setting out or attaching admissible evidence to defeat the motion. R. 4:46-2(b); R. 4:46-5(a). A plaintiff's self-serving assertions alone will not create a question of material fact sufficient to defeat the motion. See Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002).

POINT I
THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF FAILED TO ADDUCE EVIDENCE SUFFICIENT TO OVERCOME THE IMMUNITY PROVIDED TO CRISDEL BY THE NEW JERSEY WORKERS' COMPENSATION ACT (Pa3a)

The trial court did not err in granting Crisdel's motion for summary judgment on Plaintiff's claims because Crisdel was Plaintiff's employer, and therefore is subject to a qualified immunity from suit pursuant to the Workers' Compensation Act (the "Act"), N.J.S.A. 34:15-8. Plaintiff accepted Workers' Compensation benefits, and therefore elected recovery under the Act, with its

limitations. Pa142a at No. 17. The evidence adduced by Plaintiff in this matter is not sufficient to permit Plaintiff to overcome that immunity, and therefore the trial court correctly concluded that Crisdel is entitled to judgment as a matter of law.

The New Jersey Supreme Court has described the Act as a "historic trade-off whereby employees relinquished their right to pursue common-law remedies in exchange for automatic entitlement to certain, but reduced, benefits whenever they suffered injuries by accident arising out of and in the course of employment." Van Dunk v. Reckson Assocs. Realty Corp., 210 N.J. 449, 458 (2012) (quoting Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 174 (1985)). The immunity provided to employers under the Act can be overcome only if the facts satisfy the statutory exception for an "intentional wrong." N.J.S.A. 34:15-8. That exception may be satisfied upon a showing by a plaintiff employee that (1) the defendant employer knew that its actions were substantially certain to result in injury or death to the employee, ***and*** (2) the resultant injury and circumstances in its infliction on the employee were (a) more than a fact of life of industrial employment and (b) plainly beyond anything the legislature intended the Workers' Compensation Act to immunize. Kibler v. Roxbury Bd. of Educ., 392 N.J. Super. 45, 53 (2007) (citing Laidlow v. Hariton Machinery Co., 170 N.J. 602, 617 (2002)). As shown herein, Plaintiff failed to

present facts or evidence to satisfy the "intentional wrong" exception to the immunity provided by the Act, and thus, the trial court correctly granted summary judgment in Crisdel's favor.

Plaintiff contends that "[t]he trial court below erred by substituting its judgment, its weighing of the facts, both disputed and undisputed, to determine that no reasonable trial of fact could find that Crisdel committed an intentional wrong as defined by the caselaw." Pb40. Plaintiff is wrong. In deciding Crisdel's motion for summary judgment, the trial court, as it was required to do, granted all factual inferences in favor of Plaintiff, the non-moving party, and concluded "that a reasonable trier of fact could not find Defendant committed an intentional wrong, thereby forfeiting immunity under the [Act]." Pa10a ("This Court finds, **accepting all facts and inferences as stated by Plaintiff**, that a reasonable trier of fact could not find Defendant Committed an intentional wrong . . . . Taking all Defendant's conduct, **as stated by Plaintiff**, there is no showing of intentional conduct substantially certain to cause the particular injury suffered by Mr. Alexander.") (emphasis added).

A. The Trial Court Correctly Concluded that Plaintiff Failed to Adduce Evidence Crisdel Knew that any of its Conduct Was Substantially Certain to Result in Alexander's Injury or Death (Pa3a).

The "intentional wrong" exception to the immunity provided by the Act is construed narrowly. Even knowledge of a strong possibility of an injury by

the employer does not satisfy the substantial certainty prong and elevate a claim beyond the exclusive remedy of the workers' compensation scheme; the level of intent required to overcome the workers' compensation bar has been described as a "deliberate intent to injure." See Kaczorowska v. Nat'l Envelope Corp., 342 N.J. Super. 580, 587 (App. Div. 2001) (citing Mabee v. Borden, Inc., 316 N.J. Super. 218, 227 (App. Div. 1998)); see also Van Dunk, 210 N.J. at 470 (explaining that "[a] probability, or knowledge that such injury or death 'could' result, is insufficient"); Tomeo v. Thomas Whitesell Const. Co., Inc., 176 N.J. 366, 376 (2003) (stating that "the mere knowledge and appreciation of a risk — even the strong probability of a risk — will come up short on the substantial certainty prong") (internal quotations and citations omitted). An employer acts with such intent only when he "desires to cause consequences of his act or is substantially certain that such consequences will result from his actions." Kaczorowska, supra, 342 N.J. Super. at 587-88 (quoting Millison, 101 N.J. at 178); see also Van Dunk, 210 N.J. at 472 (explaining that "some level of a 'likelihood' of injury or death is not substantial certainty of injury or death" and the court's review should not shift into an amorphous 'percentage of the risk' analysis"). Even an injury "caused by either gross negligence or an abysmal lack of concern for the safety of employees" is insufficient to satisfy the exception. Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 72 (App. Div. 1997). Reckless

conduct is also insufficient. Pa401a, Dadura v. Yum! Brands, Inc., 2008 WL 926634, *5 (App. Div. Apr. 8, 2008); see also Van Dunk, 210 N.J. at 452 ("even an employer's recklessness and gross negligence . . . falls short of demonstrating [] an intentional wrong.").

Notably, the finding of an OSHA or related safety violation is generally insufficient to overcome the bar on recovery against an employer. "While a single egregiously wrong act by an employer might, in the proper circumstances, satisfy the intentional-wrong standard, not every intentional, or indeed willful violation of OSHA safety requirements constitutes a wrong that is 'plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the [] Act.'" Van Dunk, 210 N.J. at 474 (quoting Millison, 101 N.J. at 179). Indeed, even "the finding of a willful violation under OSHA is not dispositive of the issue of whether [an employer] committed an intentional wrong" because "[t]he existence of an uncontested finding of an OSHA safety violation in the wake of [a] workplace injury does not establish the virtual certainty that Millison demands." Van Dunk, 210 N.J. at 470.

Courts have repeatedly and consistently applied the high standard set by Millison and its progeny to reject employee tort claims against their employers, even cases involving prior injuries, safety violations, and/or serious harm. See, e.g., Pa405a-06a, Brower v. Wirtgen Group, 2012 WL 3030242, *4-5 (App. Div.

Jul. 26, 2012) (affirming grant of summary judgment based on Workers Compensation Act in case involving an injury caused by a milling machine traveling in reverse because certain safety "shortcomings" — such as a failure to require spotters — did not entail a "substantial certainty" of death or serious injury); Pa413a-14a, Mann v. Heil Packer, 2010 WL 98883, *7-8 (App. Div. Jan. 13, 2010) (affirming grant of summary judgment based on Workers Compensation Act despite evidence that plaintiff's employer violated ANSI standards); Pa419a-21a, Bergen v. Able Energy, 2009 WL 222943, *5-7 (App. Div. Feb. 2, 2009) (affirming grant of summary judgment based on Workers Compensation Act despite an "extensive list of regulatory violations of a serious nature found by OSHA and the DCA.").

The case law suggests that "in addition to violations of safety regulations or failure to follow good safety practice, an intentional wrong must be accompanied by something more, typically deception, affirmative acts that defeat safety devices, or a willful failure to remedy past violations." Van Dunk, 210 N.J. at 471; Pa428a, Jarosz v. G & B LLC, 2013 WL 5268926, *6 (App. Div. Sept. 19, 2013) (citing Laidlow, 170 N.J. at 616); Pa434a, Fendt v. Abrahams, 2013 WL 1405096, *5 (App. Div. Apr. 9, 2013); see also Tomeo, 176 N.J. at 374 (lack of deception and deceit by employer evidence that conduct did not fall outside exception to immunity provided by the Act).

By way of example, in Mull v. Zeta Consumer Products, 176 N.J. 385 (2003), the Court reversed the grant of an employer's motion for summary judgment where the plaintiff employee presented evidence of the employer's removal of a safety device from the equipment that caused the plaintiff's injury, the employer's callous and long-standing disregard of OSHA safety requirements, and the employer's decision to ignore repeated complaints by other employees about safety concerns with the equipment that caused the injury. Id. at 392. Similarly, in Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397 (2003), the Court reversed the grant of the employer's motion for summary judgment where the plaintiff employee presented evidence that the employer deliberately failed to correct OSHA violations that were identified approximately eighteen months prior to the accident and, at the same time, intentionally deceived OSHA into believing that the safety issues had been corrected. Id. at 409-10. See also Pa442a, Soto v. ICO Polymers N. Amer., 2017 WL 4530602, *8 (App. Div. Oct. 11, 2017), cert denied, 232 N.J. 94 (2018) (reversing trial court's grant of summary judgment based on defendant employer's repeated failures to remedy accumulation of combustible dust that ultimately caused an explosion that severely injured plaintiff despite the employer's affirmative promises to abate OSHA violations and implement safety protocols).

Here, even when viewing the facts in the light most favorable to Plaintiff, no rational fact finder could find that any of Crisdel's allegedly culpable conduct reflected knowledge of a substantial certainty of Alexander's injury and death. As an initial matter, Plaintiff's experts' conclusions regarding Crisdel's alleged failures are not supported by applicable regulations, industry standards, or scientific evidence. To begin with, Plaintiffs' experts cite voluntary ANSI standards as if they are mandatory. Pa361a-363a. ANSI standards, however, are completely voluntary, and nonconformance does not establish grounds for liability. Pa361a; See also Pa413a, Mann, 2010 WL 98883, at *7 (finding evidence that truck modifications were contrary to ANSI standards failed to establish an intentional wrong where such standards were "undisputed[ly] . . . advisory.").

Plaintiffs' experts also mischaracterize OSHA requirements and make conclusory statements regarding the work zone lighting and the sweeper's backup alarm that are wholly unsupported by objective scientific measurements. Pa360a-67a. Thus, Plaintiffs' experts' reports and the opinions contained therein are not a reliable foundation upon which to base a finding that Crisdel's actions were "certain" to cause serious injury or death.[1]

[1] Although not the subject of this appeal, Crisdel contends that Plaintiff's experts' reports are inadmissible net opinions under N.J.R.E. 703, and reserve the right to move to strike them should the Court reverse the trial court's decision on Crisdel's motion for Summary

Furthermore, none of the conditions of the worksite were so manifestly unsafe as to constitute a substantial certainty of injury or death. Alexander, a milling foreman with thirty years of road construction experience, was wearing safety equipment at the time of the accident. This is undisputed. Pa137a at No. 41; Pa141a at No. 1; Pa151 at 3; Pa184-85a; Pa211a; Pa225a; Pa286a-87a. Although Crisdel did not use "light towers" for additional illumination at the worksite, Hackett testified that the lighting on the site was adequate, and Mr. Shopp confirmed that the lighting on the equipment was sufficiently bright to literally "light up" Alexander and the area where the accident occurred. Pa233a; Pa213a-14a.

Though Crisdel did not circulate a written internal traffic control plan on the night of the accident, testimony confirmed that Crisdel had adequate manpower for the job on the night of the accident, that Crisdel employees were familiar with the traffic controls for milling and paving jobs like the one on the night of the accident because they were "pretty much the same" every night, and that distribution of written plans was almost unheard of. Pa217a; Pa227a; Pa231a-32a. Moreover, foremen such as Alexander — who was described by

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Judgment.

multiple witnesses as safety conscious — were the employees responsible for internal traffic inside the work zone Pa207a; Pa278a.

Finally, although it was Crisdel's practice to always try to have a dump truck assigned to the sweeper (for both expediency and safety), the fluid and mobile nature of milling and paving jobs meant that sometimes there were periods of time when there was no truck moving with the sweeper. Pa249a-51a; Pa259a. This is not evidence of intentional conduct but rather a fact of industrial life in the context of highway paving jobs.

None of these conditions identified by Plaintiff evidence any level of deliberate action by Crisdel to create a hazard greater than would normally be expected on a highway road construction job, let alone the type of unusually life-threatening danger that is required to overcome the immunity provided by the Act.

Plaintiff concedes that there were no prior OSHA citations, and makes no argument of any affirmative action by Crisdel to remove a safety device or deliberate deceit regarding the condition of the workplace. Pb40-41. Rather, Plaintiff argues that two factors, prior accidents and prior complaints, are sufficient to overcome the immunity provided by the Act. Plaintiff is incorrect on both points.

First, Plaintiff attempts to argue that Hackett, the driver of the sweeper, was known by Crisdel employees to drive unsafely and that Crisdel somehow should have foreseen that Hackett's operation of the sweeper on the night of the accident was "substantially certain" to cause serious injury or death. Pb41. Plaintiff is incorrect. Hackett was a licensed and experienced sweeper driver. Pa230a; Pa1469a. He was selected by Northeast — not Crisdel — for the job on which the accident occurred, and there is no evidence that he had any prior accidents. It is thus illogical for Plaintiff to suggest that Hackett represented some kind of clear and present danger about which Crisdel was aware and deliberately ignored in connection with the milling and paving job to be completed on the night of the accident. Furthermore, none of the Crisdel "supervisory" employees (Mr. Weaver, Mr. Nash, and Mr. Leonard) who were asked about whether anyone ever complained about Hackett testified that they received complaints about Hackett prior to the incident. Pa252a-53a; Pa256a; Pa264a. Notably, two of the Crisdel employees who were on the worksite on the night of the accident testified that they never complained to anyone at Crisdel about Hackett's driving, and another testified that he had not heard any complaints about Hackett. Pa194a-95a; Pa244a-45a; Pa284a. Only one Crisdel employee — Mr. Anderson — testified that he told anyone at Crisdel about concerns with Hackett prior to the accident. Pa223a-24a. This one complaint

was made only a few days prior to the accident, further undercutting a finding of "intentional wrong." Pa224a; Pa1473a-74a; Pa1536a. See Van Dunk, 210 N.J. at 471-72 (finding no intentional wrong and distinguishing a short-term safety failure from a long-term decision to forgo required safety devices or practices); compare Mattos v. Barn Bros., Inc., No. A-4187-10T3, 2012 WL 5187975, at *5 (App. Div. Oct. 22, 2012) (finding no intentional wrong where safety violation existed for approximately five days) with Crippen, 176 N.J. at 410 (finding intentional wrong where safety violation existed for approximately eighteen months).

Even if the Court were to accept Mr. Anderson's testimony, reject the testimony of all of the other Crisdel witnesses, and determine that Crisdel had knowledge that Hackett operated his sweeper in an unsafe manner a few days before the accident, Crisdel's actions would still not rise anywhere near the level of intentional misfeasance sufficient to satisfy the narrow exception to the immunity provided by the Act, particularly where Hackett has admitted that the accident was indisputably his fault. At worst, accepting only the facts most favorable to Plaintiff, Crisdel allegedly negligently allowed Hackett to continue working on Crisdel jobs, because his continued operation of sweepers on Crisdel jobs may have presented some slightly heightened probability of injury to a Crisdel employee. That level of culpability and probability of injury is far below

the requisite "deliberate intent" and "substantial certainty" to support a claim made on behalf of an employee against his employer for injuries sustained during the course of his employment.

The cases dealing with similar theories of liability advanced by employees against their employers have consistently rejected these claims, even in the face of evidence of violations of safety standards, failing to utilize spotters, serious OSHA citations, and fatal accidents. Van Dunk, 210 N.J. at 452 (holding that a finding of gross negligence, or even recklessness, fails to satisfy the standard of an intentional wrong); Millison, 101 N.J. at 179 (1985) ("the mere knowledge and appreciation of a risk—even the strong probability of a risk—will come up short of the "substantial certainty" needed to find an intentional wrong"); Pa428, Jarosz, 2013 WL 5268926, at *6 (finding that the knowing failure to take safety precautions may be an "exceptional wrong," but it is "not the type of egregious conduct associated with an intentional wrong"); see also Pa421a, Bergen, 2009 WL 222943, at *7 (finding intentional wrong standard not satisfied where company conduct was likely reckless and company admitted to the negligence of its driver).

Second, Plaintiff's argument that "three prior backup/crushing incidents" satisfy the "intentional wrong" exception to the Act is without merit. Pb41. The

prior incidents are all patently, factually dissimilar to the accident that resulted in Alexander's death. Pa368a-91a. Indeed, the prior accidents were that, in September 2003, a Crisdel employee was fatally injured when a milling machine tipped over onto him during a runway resurfacing project at Newark Airport. See id. In October 2004, a dump truck driver who as not a Crisdel employee was fatally injured when he got out of his vehicle and was struck by a water truck driven by a Crisdel employee on a milling/paving project. See id. In October 2008, a New Jersey Department of Transportation inspector was injured when he was struck by a truck driven by a non-Crisdel employee on a milling/paving project. See id. And in August 2010, a nuclear thickness surveyor and non-Crisdel employee was injured when she was struck by a pickup truck driven by a Crisdel employee on a miller/paving project. See id.

Notably, none of the aforementioned accidents involved Northeast Sweepers or Hackett or any of the alleged issues that Plaintiff and her experts alleged to be contributing causes (e.g., inadequate lighting, lack of flagmen/spotters, no assigned dump trucks, no written internal traffic plans). See id. Where, as here, the prior incidents — the most recent of which was *four years* before Alexander's accident — are factual dissimilar to the circumstances alleged to have caused the employee-plaintiff's injuries, the "intentional wrong" exception to the Act is not satisfied. See Fermaintt ex rel. Est. of Lawlor v.

McWane, Inc., 694 F. Supp. 2d 339, 342 (D.N.J. 2010)(finding no intentional wrong where prior injury caused by falling pipes did not occur as a result of the disabled safety mechanism plaintiff alleged caused his injury); Calavano v. Fed. Plastics Corp., No. A-0353-09T1, 2010 WL 3257784, at *6 (App. Div. Aug. 18, 2010) (finding no intentional wrong where two prior injuries occurred on different machines, and one prior injury occurred on the same machine but while performing a different function).[2]

Stated simply, Plaintiff failed to present evidence of an intentional act that Crisdel knew was substantially certain to result in injury or death to Mr. Alexander. Therefore, the trial court did not err by granting summary judgment in Crisdel's favor, and trial court's decision should be affirmed.

B. Plaintiff Has Failed to Adduce Evidence That the Circumstances Surrounding the Incident Resulting in the Injuries to Mr. Alexander Were More Than a Fact of Life of Industrial Employment and Plainly Beyond Anything the Legislature Intended the Worker's Compensation Act to Immunize (Pa3a).

As set forth above, the evidence in this matter plainly does not support a finding that Crisdel took any intentional act that it knew was substantially certain to result in serious injury or death to Alexander. However, even if

[2] A copy of this unpublished opinion is included with Defendant's appendix, in accordance with R. 1:36-3.

Plaintiff were able to supply such evidence, her claim against Crisdel would *still* fail because the undisputed material facts do not establish that the circumstances surrounding Alexander's injury were more than a fact of life of industrial employment and plainly beyond anything that the Legislature intended the Workers' Compensation Act to immunize. Accordingly, Plaintiff's claims fail as a matter of law.

Milling and paving jobs like the one where the accident occurred involve over a dozen moving vehicles and pieces of heavy equipment in the confined space of the highway closure. Pa199a, 206a, 208a. Indeed, Plaintiff herself recognized and admitted that Alexander's job was dangerous. Pa191a. While certainly serious injury or death are not (and should not) be considered ordinary or usual occurrences in any line of work, it is indisputable that serious injury — particularly serious injury resulting from being struck by a moving vehicle or piece of equipment — is a genuine risk for an individual working in highway construction and maintenance like Alexander. Moreover, Plaintiff's theories of liability against Crisdel are all based on allegations that Crisdel ignored some risk of harm to its employees. Such evidence of ignorance of some risk, however, is not sufficient to overcome the Act's immunity. See, e.g., Van Dunk, 210 N.J. at 455, 471-72 (holding employer conduct failed to satisfy intentional

wrong standard in case involving trench collapse despite evidence that employer ignored a potential risk of trench collapse without installing a trench box).

Furthermore, the evidence of prior incidents cited by Plaintiffs' experts as evidence of Crisdel's complicity in Alexander's accident actually supports a finding that the accident does not satisfy the "context" prong of the intentional wrong exception, because it suggests that such accidents — although not frequent — are indeed a "fact of life" in this line of work. See Pa454a-55a, Estate of Sellino v. Pinto Bros. Disposal, LLC, 2013 WL 5300076, *4-5 (App. Div. Sept. 23, 2013) (affirming grant of summary judgment based on Workers Compensation Act in case involving "run-over" fatal injury in part because evidence of prior fatal accidents in plaintiff line of work supported conclusion that circumstances of plaintiff decedent's death were not "plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act"). Thus, the facts do not provide a basis for a finding for Plaintiff on the context prong of the exception.

Moreover, determining the context prong is "solely a judicial function." Mull, 176 N.J. at 392. In exercising this function, the trial court correctly concluded that, accepting all facts and inferences as stated by Plaintiff, any alleged deficiencies were within the scope of conditions the Legislature intended to immunize. Pa10a ("Lighting, vehicle alarms and vehicle mirrors are all part

of everyday industrial life, and the injury resulting from any alleged deficiencies clearly falls within the legislative grant of immunity.").

Plaintiff has failed to present evidence that the circumstances of the July 11, 2014, accident were more than a fact of industrial employment and plainly beyond anything the Legislature intended the Act to immunize, and therefore her claims against Crisdel must fail.

* * *

Accordingly, Plaintiff's claims are barred by the Act, and Crisdel is entitled to summary judgment as a matter of law.

CONCLUSION

For all of the reasons set forth above, this Court should affirm the trial court's grant of summary judgment.

Respectfully submitted,

CHIESA SHAHINIAN & GIANTOMASI P.C.
Attorneys for Defendant-
Respondent Crisdel Group, Inc.

By *_/s/ Christopher R. Paldino_*
CHRISTOPHER R. PALDINO

Dated: July 29, 2024

ESTATE OF MICHAEL ALEXANDER, deceased, by LORRAINE ALEXANDER as Executrix of the Estate; and LORRAINE ALEXANDER, Individually, Plaintiffs, v. NORTHEAST SWEEPERS; CHRISTOPHER M. HACKETT; TRI-STATE EQUIPMENT REBUILDING; CRISDEL CONSTRUCTION; FERREIRA CONSTRUCTION; ATHEY PRODUCTION CORPORATION; NEW JERSEY TURNPIKE AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY STATE POLICE; HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C., and JOHNSON, MIRMIRAN & THOMPSON, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001486-23 CIVIL ACTION On Appeal from the Orders granting summary judgment in: Law Division, Essex County, Docket No. ESX-L-7229-14 Sat Below: Hon. Thomas R. Vena, J.S.C.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS IN SUPPORT OF THE APPEAL

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TABLE OF CONTENTS – REPLY BRIEF

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF TRANSCRIPT DESIGNATIONS

1T – Transcript of Hearing dated June 22, 2018

2T – Transcript of Hearing dated July 26, 2019

TABLE OF CONTENTS – APPENDIX

(Volume 1 of 15 – Pa1 to Pa191)

Page

(Volume 15 of 15 – Pa2759 to Pa2905)

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Defendant HAKS Engineers, Architects and Land Surveyors, P.C. (HAKS), seeks to avoid responsibility to the Estate of Michael Alexander and Lorraine Alexander (plaintiffs) based primarily on two arguments. First, despite being the construction supervisor hired on this project, HAKS contends that it has no actual responsibility for supervision or safety. Second, HAKS seeks to disregard the clear precedent set forth in Haviland v. Lourdes Med. Ctr. of Burlington Cty., Inc., 250 N.J. 368 (2022), by ignoring the decision's core holding. Neither argument has merit.

Defendant Johnson, Mirmiran & Thompson, Inc. (JMT), HAKS subconsultant, also goes to great lengths to disregard Haviland by relying on cases that pre-date the decision and cases that have no precedential value. Defendants do not get to force plaintiffs to assert a professional negligence claim. From the outset, plaintiffs set forth and steadfastly maintained that their claim was for ordinary negligence by a non-professional. HAKS and JMT hired a "resident engineer" for this project who was not an engineer. HAKS and JMT chose a technician to be in charge of compliance with all local, state, and federal laws, ordinances, regulations and orders, including but not limited to worksite safety, with no instructions or controls. Pa1801-02. Nearly every safety means and

method was compromised in favor of job progress. The cost included the life of Michael Alexander.

The dismissal of HAKS and JMT is contrary to Supreme Court precedent. The negligent conduct for which plaintiffs claim those defendants are liable was committed by an employee who is not a "licensed person" as that term is used in the Affidavit of Merit (AOM) statute. Plaintiffs' claim against HAKS and JMT is for vicarious liability for the negligence of that employee. The statute has been strictly construed not to impose requirements beyond those stated within the AOM statute. The statute applies to licensed persons – period. Pursuant to controlling precedent, therefore, plaintiffs did not and do not require an AOM.

Defendant Crisdel Construction a/k/a Crisdel Group, Inc. (Crisdel), asserts that the Workers Compensation Act (WCA) absolves it from an intentional disregard for workplace safety and that Mr. Alexander being runover, dragged and killed by a street sweeper was just a fact of life on a repaving project. Crisdel's brief argues only those facts and inferences that favor its position while wholly ignoring the contrary facts and misrepresents critical issues, such as a claim that there was no evidence of Mr. Hackett's dangerous propensities or complaints of his reckless conduct. Crisdel's many documented failures to comply with laws, regulatory standards, contract and safety requirements and its own company protocols created a work environment in which the exact harm that occurred was

substantially certain to occur. Crisdel's failings were so numerous and pervasive that the work site was an accident waiting to happen, the only question was when. Mr. Alexander did not have to die. It was not just one of those things that sometimes happen in industry. The motions granting summary judgment to Crisdel, HAKS and JMT must be reversed and the matter remanded.

LEGAL ARGUMENT

POINT I

CRISDEL'S ARGUMENT OF DISPUTED FACTS AND INFERENCES IN ITS FAVOR IS CONTRARY TO THE SUMMARY JUDGMENT STANDARD OF REVIEW.

Defendant Crisdel seeks to justify judgment in its favor as a matter of law on two bases. First, it argues that everything documented at length in plaintiffs' Statement of Facts, Pb6-22, is disputed by contrary evidence and the opinions of Crisdel's hired expert witnesses. It claims that certain supervisory personnel had no notice of the sweeper driver's reckless conduct, Cb24, despite testimony of a half dozen witnesses to the contrary. See Pb18-20. It claims that the back up alarm and back up lights were operational, Cb21, even though the testimony indicates that the alarm was not heard, and the lights were not seen. Pb11-12. It argues that decedent was lit up like a Christmas tree, Cb10, when the evidence indicates there was inadequate (if any) site lighting and decedent was using a flashlight to light his way. Pb10. Crisdel argues that it "usually" had a truck

assigned to the sweeper, Cb23, but the testimony was that a truck was not regularly assigned nor was any type of traffic control plan developed or used as required by the contract and regulations. Pb14-18. Crisdel claims that the prior instances of injuries are both distinguishable and proof that workers getting injured is just part of the job. Cb26-27, Cb29-30. As set forth in plaintiff's statement of facts, each of the three fatal worksite incidents on Crisdel's projects involved the same scenario, i.e., struck by equipment and crushed. Pb21.

Disputes over the facts and what inferences a reasonable jury might find is not a basis for summary judgment. The right to a jury trial in New Jersey is a constitutional right. N.J. Const. art. I, ¶ 9. It may not be denied cavalierly or based on debatable evidence. That is why the summary judgment standard of review requires that all inferences be resolved in favor of proceeding on the merits rather than dismissal. R. 4:46-2. It also is why the court is not authorized to decide issues of fact. The court must decide only whether any such issues exist. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). Because the arguments and opinions of defendant Crisdel serve only to accentuate the dispute of facts, summary judgment should be denied.

Crisdel's second argument is that milling and paving is inherently dangerous work and getting crushed to death is just a fact of life. Cb28-31. That half-hearted claim is substantially disputed. There are at least a dozen devices, procedures,

regulations, rules and plans that exist to ensure that injury and death does not just happen. Traffic control plans, training, lighting requirements, back up alarms, spotters, assigned dump trucks and equipment inspections – required at the beginning of each shift, Pa786 – are just some of the safety measures available that were disregarded in this instance. Injury was not a foregone conclusion; it was a result of deliberate indifference to safety of the worksite. "[A] single egregiously wrong act by an employer might, in the proper circumstances, satisfy the intentional-wrong standard." Van Dunk v. Reckson Assocs. Realty Corp., 210 N.J. 449, 474 (2012). Ignoring nearly every available safety measure in the context of a milling and paving project that Crisdel now argues is inherently dangerous could be found by a reasonable jury to satisfy the substantial certainty requirement for liability of the employer as allowed under the Workers' Compensation Act.

The WCA provides

> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

N.J.S.A. 34:15-8 (emphasis added). Not all conduct by an employer is immune from common-law suit. An employer who causes the death or injury of an employee by committing an "intentional wrong" will not be insulated from liability

outside the workers compensation realm. N.J.S.A. 34:15-8; Laidlow v. Hariton Machinery Co., 170 N.J. 602, 617 (2002).

Our Supreme Court has established the "substantial-certainty test" for determining an intentional wrong under the WCA. See Van Dunk, supra, 210 N.J. at 461. "In adopting a 'substantial-certainty' standard," the Court "acknowledge[d] that every undertaking, particularly certain business judgments, involve some risk, but that willful employer misconduct was not meant to go undeterred. The distinctions between negligence, recklessness, and intent are obviously matters of degree, albeit subtle ones." Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 178 (1985). The Court elucidated, "an intentional wrong is not limited to actions taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm." Laidlow, supra, 170 N.J. at 613.

Defendant Crisdel's proposed context analysis is too forgiving and too dangerous. "[W]illful employer misconduct was not meant to go undeterred." Millison, supra, 101 N.J. at 178. The inquiry must be a detailed, if not exhaustive, consideration of the **totality of the circumstances**. Prior knowledge, ignorance of known safety requirements, withdrawal of safety practices, and imposition of risks that are both easily avoidable and unnecessary to the work are all factors to be considered. OSHA citations, ignorance of warnings or complaints, failure to

ensure understanding and proper use of safety devices and procedures and the potential for catastrophic injury also are all proper considerations in assessing whether the facts justify denying the employee full compensation and, in effect, encouraging risky behavior in the workplace.

The facts here support a finding that Crisdel's conduct was beyond the pale and that the injury was not a fact of life but rather extremely avoidable. As documented by the experts, Crisdel engaged in deliberate and persistent non-compliance with OSHA regulations and ANSI standards, its own site-specific health and safety requirements and contract and industry standards. Plaintiffs' expert noted 27 violations, and the post-death inquiry by OSHA confirmed violations on the night Mr. Alexander was killed. Plaintiffs identified six specific areas of safety protocols and devices that were known and ignored. Required night lighting, audible backup alarms, properly functioning mirrors, use of a dedicated dump truck, and use of spotters were all available options at little or no cost.

On a larger scale, there was no plan. The contract, specifications, HASP and ANSI all called for an Internal Traffic Control Plan. Crisdel had none. That the driver was known to drive dangerously, too fast and unsafely and that the employer did nothing to stop him are key facts to be considered in the totality of the circumstances analysis. A known dangerous driver and lack of any plan for traffic control created a context in which a horrific injury was substantially certain to

occur and did occur. That is not the type of conduct or context that the Legislature meant to immunize the employer and to deny full compensation to the injured employee or his survivors. Summary judgment should be denied.

POINT II

NO AOM WAS REQUIRED BECAUSE LIABILITY IS NOT BASED ON THE NEGLIGENCE OF A LICENSED PERSON IN THE COURSE OF THEIR PROFESSION.

Plaintiffs contended that the employees of JMT, an agent of HAKS, who were present and responsible for the day-to-day operations at the construction site, were negligent in the performance of their duties. Pa96-99. Those employees were not professional engineers engaged in professional engineering services. No party ever requested a Ferreira conference, or the reassignment of the case from Track II to Track III. To the extent that no Ferreira conference was held, enforcing an AOM requirement years after the case was filed fails to fulfill the purpose of the AOM statute and should not be upheld. See Moschella v. Hackensack Meridian Jersey Shore Univ. Med. Ctr., ___ N.J. ___ (July 11, 2024) (slip op. at 16-19).

JMT seeks to invoke the AOM statute as a sword by implication. JMTb28. The cases interpreting and applying the AOM statute have uniformly rejected that type of argument as inconsistent with the statutory intent. The Legislature did not intend to "create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims." Ferreira v. Rancocas Ortho. Assocs., 178

N.J. 144, 151 (2003). The statute exists to strike a fair balance between preserving a person's right to sue and controlling nuisance litigation. Palanque v. Lambert-Woolley, 168 N.J. 398, 404 (2001). The language of the statute anticipates vicarious liability claims and limits its applicability to such claims. "To establish vicarious liability, a plaintiff must demonstrate '(1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment.'" Haviland v. Lourdes Med. Ctr. of Burlington Cty., Inc., 250 N.J. 368, 379 (2022) (quoting Carter v. Reynolds, 175 N.J. 402, 409 (2003)).

A vicarious liability claim against a licensed person is not, per se, a professional negligence claim. To fall under the AOM statute, the claim must be for damages resulting from malpractice or negligence of one of the limited, enumerated licensed persons acting within that person's profession. See Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super. 1 (App. Div. 2010). "Under the plain language of N.J.S.A. 2A:53A-27, the AOM requirement applies only where * * * (3) the alleged act of malpractice or negligence is carried out by a licensed person in the course of practicing the person's profession." Haviland, supra, 250 N.J. at 382.

The AOM statute has very specific and limited applicability. The list of "licensed persons" is explicit. It does not include Mr. Edgar, a "senior grade

engineering technician" who is not a professional engineer. In that respect this matter is indistinguishable from Haviland, where the negligence alleged was that of an unlicensed "radiology technician" and not a radiologist. Id. at 374.

Defendant JMT's reliance on a federal trial court decision from 2005 and a Texas decision from 2011 is misplaced. JMTb26-27. Neither case is precedential and neither case adheres to the holdings of the Supreme Court of New Jersey that the statute must be construed narrowly and literally. Plaintiffs' claim does not trigger the third requirement because Mr. Edgar is not a "licensed person." To require an AOM from a "like-licensed" professional when the negligent actor is not a "licensed person" is not realistic. It is not only contrary to the spirit and purpose of the AOM statute but also its express language. No AOM is required to pursue the vicarious liability claims against HAKS and JMT.

JMT's singular focus on trying to describe the claim against it as professional negligence ignores the holding in Haviland and also ignores that the contract explicitly recognizes that the resident engineer does not have to be an engineer. Pb23; Pa1789. Mr. Edgar did not have to be an engineer because he was not performing engineering services. JMT also misrepresents "a consensus among all experts" that the claim asserted by plaintiff is one for professional negligence. JMTb30. As set forth at length in plaintiffs' opening brief, the experts for plaintiffs and others agree that neither Mr. Edgar, a non-licensed person under the

AOM statute, nor Mr. Schweppenheiser, an engineer handling contract administration, were performing engineering services. Pb24-27; Pb29-32.

POINT III

HAKS CANNOT AVOID ITS RESPONSIBILITY TO PLAINTIFF FOR WORK SITE SAFETY BY BLAMING JMT AND MR. EDGAR.

HAKS claims that JMT is an independent contractor so HAKS cannot be held responsible for the negligence of Mr. Edgar, who was employed by JMT. HAKSb11. Mr. Edgar does not have to be an employee of HAKS to give rise to liability. Ordinarily the existence of an employer-employee relationship, in the past sometimes referred to as a master-servant relationship, is a matter of fact for a jury rather than law for a judge. Bennett v. T. & F. Distributing Co., 117 N.J. Super. 439 (App. Div. 1971), certif. denied, 60 *N.J.* 350 (1972); Gilborges v. Wallace, 153 N.J. Super. 121 (App. Div. 1977), rev'd in part on other grounds, 78 N.J. 342 (1978). Because the agency relationship is a material factual issue in dispute, HAKS contention would not entitle it to summary judgment. R. 4:46-2.

Moreover, the "traditional 'essence' of vicarious liability based on respondeat superior relies on the concept of employer 'control' over an employee." "Under the control test, 'the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be

done, but how it shall be done.'" Pursuant to the Order for Professional Services (OPS), HAKS assumed responsibility for compliance with the plans and specifications, including safety requirements. It may have delegated that obligation to JMT and Mr. Edgar but retained the authority and ability to control the work. As such, it also retained liability for failure to do so. Pa2033.

HAKS cannot contract away its duty to third parties under the contract with the NJDOT. HAKS may be liable via vicarious liability for the negligence of its officers, employees, and agents, and JMT, as HAKS' subconsultant, is an agent of HAKS.

> So, if you find that an officer, employee or agent [*choose appropriate* term] of defendant *[name]* acted negligently while in the scope of his/her duties or authority, that negligence is as a matter of law charged to the principal, here defendant *[name]*. If you so find, defendant *[name]* will be deemed negligent for the wrongdoing to the same extent as the officer, employee or agent.

N.J. Model Jury Charge (Civil) 5.10H Agency (Rev. 08/2011).

This case is not unlike the Supreme Court decision in Carvalho v. Toll Bros. & Developers, 143 N.J. 565 (1996). In Carvalho, an employee of a subcontractor was killed in a trench collapse. The engineering firm claimed that it had no contractual obligation to supervise safety procedures of the construction. It also tried to disclaim responsibility, citing exculpatory clauses in its agreements with the owner and general contractor. The Court held that the engineer has a legal duty to exercise reasonable care for the safety of workers on a construction site even

when the engineer has a contractual responsibility for the progress of the work but not for safety conditions. Id. at 578. The Court also held that although the exculpatory clauses may be enforceable for purposes of indemnification, "[t]heir financial arrangements and understanding do not overcome the public policy that imposes a duty of care and ascribes liability to the engineer in these circumstances." Id. at 579. Applying that reasoning here, HAKS may have grounds for relief under its subconsultant agreement but may not evade responsibility in the first instance to plaintiffs due to the complete breakdown of safety protocols on the project.

Similarly, in Alloway v. Bradlees, Inc., 157 N.J. 221 (1999), the Supreme Court considered the liability of prime or general contractors for the violation of construction safety requirements. The Court held that per OSHA regulations that took the place of the Construction Safety Act, a prime contractor "may be liable for any of its subcontractor's violations of OSHA regulations as well as its own." Id. at 239 (citing 29 C.F.R. § 1926.16). "By contracting for full performance of a contract * * * the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work." 29 C.F.R. § 1926.16(b). Under the OPS with NJTA, HAKS assumed the obligation for all work subsequently performed by its subconsultant, JMT, and its employee, Mr. Edgar. It had the authority to exert

control over the job site and the duty to exercise reasonable care to avoid the risk of injury to workers on the site. Alloway, supra, 157 N.J. at 232.

POINT IV

HAKS AND JMT CONFLATE THE PLEADING REQUIREMENT OF AN AFFIDAVIT OF MERIT WITH THE PROOF REQUIREMENT OF A TRIAL ON THE MERITS.

Finally, HAKS and JMT both argue that because plaintiff's experts are engineers and render opinions regarding defendants' failure to perform in accordance with the relevant standard of care an AOM is required. See HAKSb14-16; JMTb11-15. That argument was raised and dismissed in Haviland. See Haviland, supra, 250 N.J. at 384. Requirement of an AOM and proof of negligence, causation and damages at trial are distinct requirements. An Affidavit of Merit is a pleading requirement of the AOM statute. It is essentially a courtesy afforded certain professionals recognized by the Legislature to deter baseless lawsuits. It is not evidential. It would never substitute for expert reports or discovery. The proposed expert testimony is entirely evidential. It is permitted to "assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702. Expert testimony is evidence used in the vast majority of cases and not limited to claims of professional negligence. That plaintiff has retained experts to testify has no bearing on the specifically limited and delineated requirements of the AOM statute.

CONCLUSION

For the foregoing reasons, dismissal of plaintiffs' claims against Crisdel, HAKS and JMT was error as a matter of law. Plaintiffs respectfully request that the trial court's orders granting judgment to defendants be reversed and the matter remanded.

Respectfully submitted,

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