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SUPREME COURT OF NEW JERSEY
DOCKET NO. 090537

ERWIN CAMPOVERDE, Plaintiff/Appellant/Petitioner, vs. NY-NJ LINK DEVELOPER, LLC, MACQUARIE GROUP LIMITED i/s/h/a Macquarie Group Limited, KIEWIT DEVELOPMENT COMPANY, and THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, Defendants-Respondents, - and - KS ENGINEERS, PC, Defendant.	**APPELLATE DIVISION** **DOCKET NO.** **A-001174-23** **CIVIL ACTION** **Sat Below:** **Hon. Hany A. Mawla, P.J.A.D.** **Hon. Robert M. Vinci, J.A.D.** **Hon. Arnold L. Natali, Jr., J.A.D.** **BRIEF OF AMICUS CURIAE NEW JERSEY DEFENSE ASSOCIATION**

SCIROCCO LAW, P.C.
143 Washington Street
Morristown, NJ 07960
973-691-1188
mark@sciroccoesq.com

MARK R. SCIROCCO, Esq.,
061192013 on the brief

January 16, 2026

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STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Defense Association ("NJDA/Amicus") is an association of managerial level insurance industry personnel and insurance defense counsel throughout the State of New Jersey. NJDA is primarily an educational association organized to encourage the prompt, fair and just disposition of tort claims, promote improvements in the administration of justice, enhance the service of the legal profession to the public and work for the elimination of court congestion and delays in civil litigation. The members of NJDA have a great deal of collective experience in the conduct of jury trials and a high level of expertise in applying constitutional, statutory and common law in such trials. This matter before the Court involves an issue of fundamental concern to NJDA and the thousands of individuals represented on a daily basis by its members.

PRELIMINARY STATEMENT

There are now two lines of inquiry which govern the existence and scope of a duty of care owed by a general contractor in a construction site safety claim. This has given rise to confusion in the lower courts about whether to apply a categorical as opposed to a general negligence analysis when an employee of a subcontractor is injured. Rather than jettisoning one test in favor of another, the Court should clarify that, while it has more recently applied a general negligence standard, the traditional

common law rule still sheds light on the duty of care owed by a general contractor. To this end, the Court can set forth ground rules that will assist lower courts.

The inquiry into a general contractor's duty should be framed by the elements of control and foreseeability. Without a thorough and nuanced application of these factors, the Court would risk imposing a rigid form of liability against general contractors, making them responsible for everything that happens on a jobsite. General contractors may have overarching authority over worksite safety, but that does not make them strictly liable when a subcontractor's employee is injured.

The Court can take what is most useful in both tests – traditional common law and modern general negligence – in a manner that satisfies an "abiding sense of basic fairness" and respects the interests of general contractors and workers alike.

We note that the Appellate Division's opinion in this matter considered the standard of liability as applied to "general contractors." In briefing by the parties, the term "developer" is used to refer to at least one of the defendants. And the caselaw often refers to "general or prime" contractors. NJDA does not comment on party-labeling but uses the term "general contractor" in a manner consistent with the caselaw.

Finally, there is a choice of law dispute in this matter. NJDA takes no position with respect to same, but assumes that New Jersey law applies.

PROCEDURAL HISTORY

NJDA relies upon the procedural history presented by the parties.

STATEMENT OF FACTS

NJDA relies upon the statement of facts presented by the parties.

ARGUMENT

I. The traditional common law rule granted immunity to general contractors for injuries sustained by an employee of a subcontractor, with three exceptions, one of which highlighted the control of a general contractor over its subcontractor

At common law, it was understood that, ordinarily, "an employer that hires an independent contractor is not liable for the negligent acts of the contractor in the performance of the contract." Bahrle v. Exxon Corp., 145 N.J. 144, 156 (1996); see also Majestic Realty Associates, Inc. v. Toti Contracting Co., 30 N.J. 425, 430-31 (1959) (acknowledging as a "long settled doctrine" that when a person engages a contractor who conducts his own business, that hiring party is not liable for the negligent acts of the contractor in the performance of the contract). A general contractor enjoyed "broad immunity" from liability for injuries of an employee of a subcontractor resulting from "the manner in which the hired work was performed." Tarabokia v. Structure Tone, 429 N.J. Super. 103, 112-113 (App. Div. 2012); See also Muhammad v. N.J. Transit, 176 N.J. 185, 198 (2003) quoting Gibilterra v. Rosemawr Homes, 19 N.J. 166, 170, (1955) ("[T]he general principle is that the

landowner is under no duty to protect an employee of an independent contractor from the very hazard created by the doing of the contract work[.]"); Pfenninger v. Hunterdon Cent. Regional High School, 338 N.J. Super. 572, 581 (App. Div. 1999) ("[N]either [a landowner nor general contractor] is under a duty to protect an employee of an independent contractor or subcontractor from hazards created by the performance of the contracted work."). The premise for this rule is that a general contractor "'may assume that the independent contractor and her employees are sufficiently skilled to recognize the dangers associated with their task and adjust their methods accordingly to ensure their own safety.'" Tarabokia, 429 N.J. Super. at 113, quoting Accardi v. Enviro-Pak Sys. Co., 317 N.J. Super. 457, 463 (App. Div. 1999).

There are three recognized exceptions to the above rule, which include (1) when the general contractor retains control of the manner and means of the work which is the subject of the contract; (2) when the general contractor hires an incompetent contractor; or (3) when the activity for which the independent contractor is performing work constitutes a nuisance *per se*, *i.e.*, is inherently dangerous. Majestic, 30 N.J. at 431.

On the question of a general contractor's "control" over the work of its subcontractor, courts have drawn a distinction between the exercise of general supervisory power, as contrasted with specific control over the means and method

of a subcontractor's work. Marion v. Public Serv. Elec. & Gas Co., 72 N.J. Super. 146, 155 (App. Div. 1962) (retention of broad supervisory power rather than "right to direct and control" will not lead to vicarious liability for independent contractor's actions). Whereas control over the means of a subcontractor's work will lead to liability, "supervisory acts" performed by the general contractor "will not give rise to vicarious liability[.]" Mavrikidis v. Petullo, 153 N.J. 117, 135 (1998); Trecartin v. Mahony-Trost Const. Co., 18 N.J. Super. 380, 386 (App. Div. 1952) ("A general contractor who sublets work…exercising only such general superintendence as is necessary to see that the subcontractor performs the contract, ordinarily has no duty to protect an employee of the subcontractor from the very hazards that arise from the doing of the contract work itself[.]"); Wolczak v. Nat'l Elec. Products Corp., 66 N.J. Super. 64, 71 (App. Div. 1961) ("Nor is [the general contractor's] immunity disturbed by the exercise of merely such general superintendence as is necessary to insure that the subcontractor performs his agreement."). This is particularly true when the subcontractor "is an experienced laborer hired either to correct the very danger present or to perform his tasks amidst the visible hazards." Muhammad, 176 N.J. at 199, quoting Wolczak, 66 N.J. Super. at 75.

II. The more modern approach to a general contractor's duty focuses on general negligence principles that weigh and balance a variety of factors, including the four factors set forth in Hopkins v. Fox & Lazo Realtors

The inquiry into a general contractor's duty also involves a more "modern" general negligence approach, as opposed a strict categorical analysis. Tarabokia, 429 N.J. Super. at 113, Kane v. Hartz Mountain Industries, 278 N.J. Super. 129, 143 (App. Div. 1994); Pfenninger, 338 N.J. Super. at 583-584. This includes identifying, weighing, and balancing a combination of factors, specifically, "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Alloway v. Bradlees, Inc., 157 N.J. 221, 230 (1999) quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).

Under this framework, the imposition of a duty of reasonable care is both fact-specific and principled, and must satisfy "an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." Id. "A major consideration in the determination of the existence of a duty of reasonable care under 'general negligence principles' is the foreseeability of the risk of injury." Id. "Foreseeability is generally measured by the general contractor's actual knowledge of dangerous conditions." Tarabokia, 429 N.J. Super. at 114. OSHA is a factor in the analysis, but OSHA itself does not create a duty of care. Id. at 112; Costa v. Gaccione, 408 N.J. Super. 362, 372-73 (App. Div. 2009) ("[N]on-compliance with

[OSHA] standards does not alone create a viable cause of action, nor does it necessarily place a tort duty of care on the general contractor."); Fernandes v. DAR Dev. Corp., Inc., 222 N.J. 390, 406 (2015) ("[N]oncompliance with an industry standard does not conclusively establish negligence.")

The two cases in which this Court has most explicitly applied these principles in the context of construction safety are Cidalina O. Carvalho v. Toll Bros. & Developers and Alloway v. Bradlees. In Carvalho, the Court gave particular emphasis to the issue of foreseeability. 143 N.J. 565, 574 (1996). That case involved a project engineer who was hired to supervise a job site, including compliance with plans and work-safety concerns. Id. at 575. The plaintiff, the employee of another contractor, was killed when the trench in which he was working collapsed. Id. at 569. The danger of collapse posed by the trench, this Court held, was readily apparent, and the facts "point[ed] clearly to the foreseeability of the risk of injury to workers in the circumstances surrounding the decedent's accident." Id. at 574. Most notably, in the days before the accident, trenches in other areas of the site collapsed during construction. Id. The Court imposed a duty of care on the engineer given the foreseeability of the injury, which involved consideration of the nature of the risk, knowledge of the dangerous condition and the ability to correct same. Id. at 577-578.

Meanwhile, in Alloway, the plaintiff was an employee of a subcontractor who had been hired by the general contractor to deliver crushed stone to a jobsite. 157 N.J. at 225. The plaintiff was injured due to a defective mechanical component of a dump truck while attempting to unload the stone. Id. The Court imposed a duty of care on the general contractor, in large part because the plaintiff had prior problems with the dump truck and made the general contractor aware of same. Id. at 226-227, 232. In fact, the general contractor attempted to correct the issue the day before the incident. Id. at 232. Given the circumstances, the Court held that the risk of injury was foreseeable in that the general contractor had "actual knowledge" that the truck was defective. Id.

The element of control was also present in Alloway: there was a "substantial and close relationship between the parties that could and did implicate workplace safety concerns." Id. The general contractor had "both the opportunity and capacity…to exercise authority and control over the equipment of [the subcontractor] if safety concerns were implicated." Id. at 233. Summary judgment in favor of the general contractor was thus not appropriate. Id. at 241.

III. The Appellate Division's opinion in Tarabokia v. Structure Tone provides a thorough and comprehensive analysis of a general contractor's duty of care

In the context of a general contractor's duty of care, the Appellate Division in Tarabokia acknowledged both the traditional common law and general negligence

tests. 429 N.J. Super. at 113. While the court did not explicitly unite the two, its thorough analysis goes a long way toward streamlining the dual approaches.

In Tarabokia, the general contractor hired an electrical subcontractor for a project involving the interior of an office building. Id. at 105-106. The Appellate Division was called upon to decide whether the general contractor "has a duty to assure the safety of an employee of a subcontractor, and, more specifically, whether the scope of that duty encompasses the manner and means of using equipment supplied by the subcontractor at the contractor's work site." Id. at 106. Ultimately, the court concluded that summary judgment was appropriately granted to the general contractor. Id.

Notably, summary judgment was warranted notwithstanding the general contractor's role in overseeing workplace safety. Pursuant to contract between the general contractor and the project owner, the general contractor was required to designate a site safety manager and to be "fully and solely responsible" for jobsite safety. Id. at 108. The general contractor prepared a written safety management plan for the worksite which, among other things, had a declared policy of assuring the safety of the working environment. Id. at 109.

The general contractor hired the plaintiff's employer to perform electrical work. Id. at 107. The plaintiff himself was a trained electrician and had been previously trained in workplace safety. Id. In addition to conducting its own weekly

safety meetings at this jobsite, the electrical subcontractor – plaintiff's employer – controlled all aspects of the plaintiff's daily work, and determined the sequencing, day-to-day activities, and employees assigned to a job. Id. at 108-110. The plaintiff's task, as assigned by his employer, was to set anchors to support light fixtures in a concrete ceiling by means of a gunpowder activated tool. Id. at 107. The employer directed plaintiff where to set the anchors and chose the tool he was to use. Id. at 107-108. The plaintiff also received training from his employer on the safe use of the tool in question. Id. at 108.

Whereas the plaintiff was trained on how to perform the work in question, the general contractor's employees were not. Id. at 110. Instead, the general contractor "had to rely on the proper training and expertise of its subcontractors to use their tools correctly." Id. The general contractor did not direct the manner and means of the subcontractor's performance of its work, and there was no dialogue between the general contractor and its subcontractor as to how the work was to be performed. Id.

In his lawsuit, plaintiff alleged that he developed a wrist condition as a result of his repeated and improper use of the tool, and sued the general contractor for the unsafe condition. Id. at 108. In analyzing the general contractor's duty of care, the court considered the general contractor's control over the plaintiff's work, as well as the foreseeability of the injury.

On the issue of control, the court acknowledged that "the extent of a general contractor's supervision and involvement in the subcontractor's work may be such to allow the inference that the general contractor should have been aware of the risk of harm, and consequently, as a matter of fairness and policy, owed a duty of care to the subcontractor's employees to protect against that risk." Id. at 118. But in Tarabokia, no such control was exercised. The subcontractor electrician directed the work of the plaintiff, supplied him with the tool in question, and provided training and instruction on how to use that tool safely. Id. Control over plaintiff's work fell "squarely" within the subcontractor's expertise. Id. The general contractor was thus entitled to reasonably rely upon the subcontractor to assure its workers' safety while performing its assigned work. Id.

The general contractor undoubtedly had "overall responsibility for enforcing safety rules on the job." Id. at 119. But at the same time, the subcontractor had its own protocol for safety and each sub "was responsible for its own safety equipment and the safety of its employees." Id. When it came to the safe operation of the subcontractor's workers using the subcontractor's own equipment, the general contractor could reasonably defer to the subcontractor's expertise. Id. at 118-119. Were this not the case, the general contractor would have had to become actively involved in the minutiae of its subcontractor's day-to-day business. The court found that there was no basis to impose such a far-reaching duty. Id. at 119.

Finally, on the issue of foreseeability, there was no proof that the general contractor knew that plaintiff was using the tool improperly. Id. at 117. "The very nature of the risk of harm involved in this case was incidental to, and arose out of, the highly specialized work of plaintiff's employer." Id. at 120. As such, notwithstanding the shared responsibility for site safety, "defendant's share of that responsibility should not be enlarged to include prevention of the type of unforeseeable harm suffered by plaintiff." Id.

IV. The Court should utilize the Appellate Division's decision in Tarabokia v. Structure Tone as a means of uniting the general negligence approach with the traditional common law analysis

When it comes to a general contractor's duty of care for a subcontractor's employee who is injured at a construction site, this Court should utilize and expound upon the Appellate Division's analysis in Tarabokia. That opinion is faithful to the modern general negligence approach and retains what is most useful in the traditional common law test.

With respect to the traditional common law rule, two broad principles may be discerned. First, a general contractor is entitled to reasonably expect that its subcontractor is capable of safely performing the work for which it is hired. Second, a general contractor's responsibility for injury to a subcontractor's employee will hinge on the control that the general contractor exercises over the subcontractor's scope of work.

These same principles fit within the modern general negligence approach. As the court in Tarabokia put it, "[D]efendant's expectation that on-site subcontractors use their occupational expertise and knowledge to monitor and ensure their own workers' safety was objectively reasonable." 429 N.J. Super. at 121. Whether such an expectation is, in fact, "objectively reasonable" depends in large part on the general contractor's control over the subcontractor's work. Pfenninger, 338 N.J. Super. at 582 ("[W]here there is evidence of some participation, interference or exercise of some control over the work, a duty of care may fairly be imposed."). The greater degree of control a general contractor exercises, the more likely it is that the harm is foreseeable. For example, in Alloway, liability for the general contractor was appropriate because its control over the work gave it concrete foreknowledge of the alleged hazard. Alloway, 157 N.J. at 232-233; see also Carvalho, 143 N.J. at 573-574. By contrast, in Tarabokia, the general contractor did not control the subcontractor's work, did not affirmatively contribute to the alleged hazard, and had no reason to foresee the alleged harm. Tarabokia, 429 N.J. Super. at 118.

Importantly, the general contractor in Tarabokia "maintained broad, general superintendence over the overall results to be accomplished by its subcontractors," but it did not control "the means and details of that accomplishment, which required discrete occupational skills beyond the scope of [the general contractor's] regular business." Id. at 120. A general contractor's duty to oversee worksite safety –

including the enforcement of OSHA – should not lead to responsibility for every unsafe act that occurs on a worksite. Id. ("[A]ssuring compliance with OSHA regulations simply does not amount to the kind of control over the subcontractor's work sufficient to implicate any duty on defendant's part to protect [the subcontractor's] employees."). Otherwise, a general contractor could be strictly liable for every injury that occurs on a construction project. This would fly in the face of the nuanced factual analysis set forth in Carvalho and Alloway, as well as precedent which holds that the duty to maintain a safe worksite falls to others, including workers themselves. Fernandes, 222 N.J. at 411 ("An employee is required to perform his or her assigned tasks in a manner which is reasonably safe under all the circumstances associated with the task.").

The absence of specific control, lack of expertise in how to safely perform the scope of work in question, and no affirmative contribution to the hazard, should be highlighted as reasons not to impose a duty of care on a general contractor. Such factors are a refinement of the traditional common law test and are also consistent with the modern negligence analysis. This approach would help dispel confusion in the lower courts, bring predictability to this area of law, and leave room for nuance as dictated by the circumstances that confront both general contractors and workers on active construction sites.

CONCLUSION

The Court should apply the general negligence test consistent with the Appellate Division's decision in Tarabokia v. Structure Tone and in a manner that respects the traditional common law analysis.

Dated: January 16, 2026

Respectfully submitted,

Scirocco Law, PC
Attorneys for Amicus Curiae New Jersey Defense Association

s/Mark R. Scirocco
Mark R. Scirocco, Esq.