

## NEW JERSEY SUPREME COURT REJECTS EXTENSION OF STRICT LIABILITY IN WORKPLACE INJURY SUITS AND AFFIRMS RIGHT TO ASSERT CONTRIBUTORY NEGLIGENCE AS AN AFFIRMATIVE DEFENSE IN SUCH SUITS

In Rolando Fernandes v. DAR Development Corp., A-37-13, decided July 28, 2015, the New Jersey Supreme Court reaffirmed New Jersey law that a jury may consider an employee's contributory negligence if that employee sues someone other than his or her employer for personal injuries sustained in a workplace accident. In so ruling, the Court rejected the plaintiff's request to extend the doctrine of strict liability to injuries that do not arise out of an employee's use of defective equipment in the course of his or her employment.

In Fernandes, the general contractor, DAR Development, hired a subcontractor, C. Freitas Plumbing and Heating, to install a sewer pipe in a residential construction site. The plaintiff, an employee of Freitas Plumbing and Heating, connected sections of sewer pipes while Mario Freitas, the president of Freitas Plumbing and Heating, dug the trench for the pipes. The trench collapsed, seriously injuring the plaintiff. The trench lacked any safety devices to prevent a collapse, in violation of OSHA regulations.

The plaintiff sued the general contractor for his injuries. The trial court charged the jury that the general contractor had a non-delegable duty to exercise reasonable care to protect all employees on the jobsite from foreseeable harm and that any violations of OSHA regulations may be deemed evidence of a breach of that duty. The trial court denied the general contractor's request for a jury charge on the plaintiff's comparative negligence. The Appellate Division, applying Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150 (1979), ruled that the jury may not consider the plaintiff's comparative negligence without evidence that the plaintiff "voluntarily and unreasonably proceeded in the face of a known danger."

The Supreme Court reversed, holding that the Suter rule is limited to claims of products liability in which an employee foreseeably used a defective machine in the course of his or her employment. The Court declined to expand Suter into ordinary workplace negligence suits, and held that under Kane v. Hartz Mountain Industries, Inc., 278 N.J. Super. 129 (App. Div. 1994), aff'd o.b., 143 N.J. 141 (1996), an employee's contributory negligence is a valid defense in a liability suit for workplace injuries. The basis for that holding was the Supreme Court's recognition that "employees bear some responsibility for their personal safety on a construction site." To assert the defense of contributory negligence, the defendant must prove that the employee's negligence was a substantial contributing factor to the injuries sustained and that the employee proceeded unreasonably in the face of a known risk, taking into account the employee's expertise, training, ability to assess the risk, and ability to choose, in a "meaningful" way, whether to proceed with the worksite task.

The holding in Fernandes is an important decision for defendants such as general contractors who are being sued for workplace injuries. Should you have any questions concerning this decision, or any of the issues discussed above, please call us.

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