10-1-1978

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Recommended Citation
Donald Feldman and Jose Smith, Workmen's Compensation Immunity: In Search of a Defendant, 32 U. Miami L. Rev. 1311 (1978) Available at: http://repository.law.miami.edu/umlr/vol32/iss5/9

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Workmen’s Compensation Immunity: In Search of a Defendant

DONALD FELDMAN* AND JOSE SMITH**

The authors analyze negligence and related matters in the construction industry. Topics discussed include compensation immunity, violations of law during the construction process and the liability of particular parties.

I. WORKMEN’S COMPENSATION IMMUNITY

A. Basis of Statutory Immunity

The basic proposition of workmen’s compensation immunity has its genesis in the Workmen’s Compensation Law.1 In the imme-

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The authors wish to express their appreciation for the excellent research assistance of Charles M. Levy, Esquire, Miami, Florida.

1. Fla. Stat. §§ 440.10-.11 (1977) provides:
diate employer-employee relationship, immunity, of course, is present if the employer has provided workmen's compensation coverage. It is the statutory or common employer situation, however, with which we will be concerned.

It is noteworthy that the word "contractor" as used in section 440.10 of the Florida Statutes (1977) is not synonymous with the word "contractor" or "general contractor" as used in common parlance, in construction industry jargon, or in other statutes which

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440.10 Liability for Compensation.—

(1) Every employer coming within the provisions of this chapter, including any brought within the chapter by waiver of exclusion or of exemption, shall be liable for and shall secure the payment to his employees, or any physician or surgeon providing medical services under the provisions of s.440.13, of the compensation payable under ss.440.13, 440.15, and 440.16. In case a contractor sublets any part or parts of his contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for and shall secure the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment. A subcontractor is not liable for the payment of compensation to the employees of another subcontractor on such contract work and is not protected by the exclusiveness of liability provisions of s440.11 from action at law or in admiralty on account of injury of such employee of another subcontractor.

(2) Compensation shall be payable irrespective of fault as a cause for the injury, except as provided in s.440.09 (3).

440.11 Exclusiveness of Liability.—

(1) The liability of an employer prescribed in s.440.10 shall be exclusive and in place of all other liability of such employer to any third party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the legal representative thereof in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow servant, that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence or comparative negligence of the employee.

(2) An employer's workmen's compensation carrier, service agent, or safety consultant shall not be liable as a third party tortfeasor for assisting the employer in carrying out the employer's rights and responsibilities under this chapter by furnishing any safety inspection, safety consultive service, or other safety service incidental to the workmen's compensation or employer's liability coverage or to the workmen's compensation or employer's liability servicing contract. The exclusion from liability under this subsection shall not apply in any case in which injury or death is proximately caused by the willful and unprovoked physical aggression, or by the negligent operation of a motor vehicle, by employees, officers, or directors of the employer's workmen's compensation carrier, service agent, or safety consultant.

Id. (emphasis added).
relate to construction matters. In *Hall v. Acme Plasterers, Inc.*, the Industrial Commission said: "The deputy commissioner can only look to the workmen's compensation law in order to ascertain whether an employer is in fact a 'statutory employer.'"

Likewise, in *State ex rel. Auchter Co. v. Luckie,* the court ruled:

It seems clear from the facts in this case that Auchter occupies the position of primary employer and owner of the land and the improvements sought to be constructed thereon. The fact that it is also a licensed general contractor engaged in the construction industry would appear to be of no importance, and has no controlling effect upon the interpretation to be placed upon the pertinent statute under consideration.

Immunity from a personal injury suit brought by a subcontractor's employee is not available to the general contractor unless there exists a primary contractual obligation which the contractor has sublet or subcontracted to another. Only then can there be a "contractor" and hence, a party to and from whom immunity ensues.

This primary obligation must arise out of a contract. The Florida courts have consistently followed the rule originally announced in *Jones v. Florida Power Corp.* It is as follows:

The clear implication in this part of the Act [section 440.10] is that there must be a contractual obligation on the part of the contractor, a portion of which he sublets to another. To "sublet" means to "underlet," Webster's New International Dictionary; in the context in which it is here used, the effect of subletting is to pass on to another an obligation under a contract for which the person so "subletting" is primarily obligated. The Corporation, under the facts here present, had no primary obligation under a contract which it was passing on to another. It was not then, a "contractor" within the meaning of the Act.

Additionally, the contract must pass a rigid legal test in order for it to form the basis of immunity. In *State ex rel. Auchter Co.*, Auchter Company was the owner of a piece of property. It entered

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3. *Id.* at 141.
4. 145 So. 2d 239 (Fla. 1st Dist.), cert. denied, 148 So. 2d 278 (Fla. 1962).
5. *Id.* at 241.
7. 72 So. 2d 285 (Fla. 1954).
8. *Id.* at 289. *See also Conklin v. Cohen*, 287 So. 2d 56 (Fla. 1973); *Smith v. Ussery*, 261 So. 2d 164 (Fla. 1972).
into a contractual agreement with Sav-A-Stop, Inc., for the construction of a warehouse for Sav-A-Stop. The contract was not only for construction, but was also for an eventual leasing of the completed construction by Sav-A-Stop from the Auchter Company. Auchter, in order to carry out its construction functions, entered into a contract with Florida Steel Corporation. In the contract, Auchter was designated as the "general contractor" and Florida Steel was designated as the "subcontractor." An employee of Florida Steel was injured due to the alleged negligence of the Auchter Company. In that plaintiff's suit against the Auchter Company, the latter argued it was a general contractor by virtue of its contract of construction with Sav-A-Stop and its subsequent subcontract with the plaintiff's employer, Florida Steel Corporation.

In rejecting the defense of immunity, the court stated:

In order for Auchter to be considered a contractor within the meaning and intent of the statute it would have to be bound by a contractual obligation to build for some third party the improvements which were in the process of construction at the time plaintiff was injured.

Auchter's obligation to construct the building and warehouse was merely incidental to the primary purpose of the contract. This is not the type of contractual obligation contemplated by the statute.

Even if a so-called "general contractor" takes out a policy of workmen's compensation insurance covering the plaintiff, this would not afford immunity. Immunity is earned by the obligation or duty to carry workmen's compensation insurance, and not by merely providing it. In Jones v. Florida Power Corp., the Supreme Court of Florida made it very clear that:

The fact that the Corporation in its contracts with Grinnell and Burns [independent contractors] required them to provide workmen's compensation for their employees is indeed commendable but is irrelevant to a determination of the question here presented. The question is whether the Workmen's Compensation Act imposed upon the Corporation the duty, as an "employer" and "contractor," to secure compensation for such employees. It is the liability to secure compensation which gives the employer immunity from suit as third party tort-feasor. His

9. 145 So. 2d at 241-42. Accord, Smith v. Ussery, 261 So. 2d 164 (Fla. 1972); Cork v. Gable, 340 So. 2d 487 (Fla. 2d Dist. 1976); C & S Crane Serv., Inc. v. Neilan, 287 So. 2d 108 (Fla. 3d Dist. 1973), cert. denied, 296 So. 2d 49 (Fla. 1974).
immunity from suit is commensurate with his liability for secur-
ing compensation—no more and no less.19

The concept of immunity being commensurate with the duty
to provide compensation might well be the most important aspect
of workmen’s compensation immunity. The 1974 amendment to sec-

tion 440.10 of the Florida Statutes is a direct application of this
principle. The amended section provided that “[a] Subcontractor
is not liable for the payment of compensation to the employees of
another subcontractor on such contract work and is not protected
by the exclusiveness of liability provisions of s. 440.11.”10 The case
law prior to the amendment strained the basic premise that “duty
equals immunity.” Thus, the legislature was forced to articulate
this premise in reference to subcontractors vis-a-vis other subcon-
tractors. This amendment has opened a wide vista of potential de-
fendants, even though it fails to have retrospective application.12

B. Third Party Practice

A discussion of the Supreme Court of Florida’s recent decision
in Seaboard Coast Line Railroad v. West Robinson Fruit Co.13 re-
quires an understanding of sections 440.11 and 768.31 of the Florida
Statutes,14 and their relationship to each other.

Prior to 1971, section 440.11(1) read as follows:

440.11 Exclusiveness of Liability.—
(1) The liability of an employer prescribed in s. 440.10 shall
be exclusive and in place of all other liability of such employer
to the employee, his legal representative, husband or wife, par-
ents, dependents, next of kin, and anyone otherwise entitled to
recover damages from such employer at law or in admiralty on
account of such injury or death . . . .15

In Trail Builders Supply Co. v. Reagan,16 the Supreme Court
of Florida ruled that this section did not preclude the manufacturer
of a truss roll press from suing plaintiff’s employer for indemnity.17

10. 72 So. 2d at 287. Accord, Conklin v. Cohen, 287 So. 2d 56 (Fla. 1973); State ex rel.
Auchter Co. v. Luckie, 145 So. 2d 239 (Fla. 1st Dist.), cert. denied, 148 So. 2d 278 (Fla. 1962).
added).
16. 235 So. 2d 482 (Fla. 1970).
17. The question of contribution was not discussed since the common law rule of no
contribution prevailed until the creation of a statutory right, 1975 Fla. Laws, ch. 75-108, § 1
(current version at Fla. Stat. § 768.31 (1977)).
The court said:

Accordingly, we hold that the Workmen's Compensation Act does not preclude a passively negligent third party tortfeasor from being indemnified by an actively negligent employer who has made payments of compensation and medical benefits to an injured employee, in a suit for damages by such employee against the third party where it is alleged in the claim for indemnity that the employer's active negligence was primarily responsible for the injury.¹⁸

In an effort to abrogate the effect of Trail Builders, the legislature amended section 440.11 as follows:

440.11 Exclusiveness of Liability.—

(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to any third party tortfeasor and to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .¹⁹

The amendment to the statute was tested in Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.²⁰ In Sunspan, the plaintiff sustained injuries when a board fell from a scaffold he was standing on. The plaintiff then sued Spring-Lock. The defendant Spring-Lock, had leased the scaffold to plaintiff's employer, Sunspan; thereafter Spring-Lock sued Sunspan for indemnity.²¹

The Supreme Court of Florida held the statute unconstitutional since it precluded Spring-Lock's day in court without providing a reasonable alternative. It was reasoned that:

The employer and employee are authorized by law to sue the third party tort-feasor for alleged tort but unequally and unreciprocally the tort-feasor is precluded from suing in turn in a third party action the employer who may be primarily liable instead of the tort-feasor for the employee's industrial accident.²²

Thereafter the legislature enacted the Uniform Contribution Among Tortfeasors Act.²³ Consistently, the courts interpreting that Act have held that no right of contribution exists in favor of a third

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¹⁸. 235 So. 2d at 485.
²⁰. 310 So. 2d 4 (Fla. 1975).
²¹. Although the issue of contribution was raised, the court specifically refused to rule on it.
²². 310 So. 2d at 7.
²³. 1975 Fla. Laws, ch. 75-108, § 1 (current version at Fla. Stat. § 768.31 (1977)).
party tortfeasor as against the plaintiff’s employer. The courts have reasoned that since the employer and the third party tortfeasor cannot be under a common liability to the injured plaintiff by virtue of the immunity provisions of section 440.11, they cannot be “jointly or severally liable in tort” as the contribution statute requires.

The supreme court’s decision in Seaboard Coast Line Railroad v. West Robinson Fruit Co. merely reaffirmed that principle and held section 440.11 constitutional insofar as it grants immunity to an employer from suit for contribution by a third party tortfeasor.

The third party tortfeasor in Seaboard admitted active negligence. Accordingly, it was not entitled to indemnity under the traditional active-passive theories. Instead, it sought to create a remedy of “implied indemnification” by arguing that, although it may have been guilty of active negligence, the plaintiff’s employer was guilty of willful and wanton misconduct, and therefore should bear all the loss. As authority, the third party tortfeasor relied on the equitable principles endorsed by the District Court of Appeal, Fourth District, in Stuart v. Hertz Corp. That case, however, was subsequently disapproved by the Supreme Court of Florida. The court in Seaboard so noted and once again refused to permit indemnity where the party seeking it was guilty of active negligence, regardless of how negligent the other party had been.

It should be noted that the court in Seaboard did not even mention Sunspan, which held section 440.11 unconstitutional insofar as it barred a passively negligent tortfeasor from suing a plaintiff’s employer. How the court could find the statute constitutional

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24. See, e.g., Firestone Tire & Rubber Co. v. Thompson Aircraft Tire Corp., 353 So. 2d 137 (Fla. 3d Dist. 1977); United Gas Pipeline Co. v. Gulf Power Co., 334 So. 2d 310 (Fla. 1st Dist.), cert. denied, 341 So. 2d 1086 (Fla. 1976).

25. This rationale, however, did not stop the court in Shore v. Paoli, 353 So. 2d 825 (Fla. 1977), from permitting a tortfeasor’s claim for contribution from the plaintiff’s partially negligent spouse. The court’s perception of the issue (whether interspousal immunity “controls over” the contribution act) ignores the proposition that one cannot qualify as a joint tortfeasor under the Act when he is immune from suit by the plaintiff. Thus, there is a direct conflict between the interspousal immunity and workmen’s compensation immunity situations.


27. The Workmen’s Compensation Immunity statute is silent as far as contribution or indemnity is concerned. FLA. STAT. § 788.31 (1977), which specifically precludes contribution, was perhaps a better subject for constitutional attack.

28. See, e.g., Firestone Tire & Rubber Co. v. Thompson Aircraft Tire Corp., 353 So. 2d 137 (Fla. 3d Dist. 1977).

29. 302 So. 2d 187 (Fla. 4th Dist. 1974).

30. Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977), vacating 302 So. 2d 187 (Fla. 4th Dist. 1974).

31. In Seaboard, the court said that an employer “under the clear language of the Florida Workmen’s Compensation Act is not liable to any third party tortfeasor on account of injury
in *Seaboard* when only three years earlier it had found it unconstitutional in *Sunspan* (while the statute remained unchanged in the interim) was not explained.

II. Defendants

A. The Owner

One of the most difficult tasks the practitioner will face in attempting to find a responsible defendant is to locate the "owner" of the building or property upon which construction has been undertaken. There are various definitions of "owner" that both the law and the numerous building codes use. In addition, most large construction projects involve the combination of investment money, construction and legal expertise. Innovative financing schemes designed to avoid taxation and building code proscriptions, however, are many times utilized as the basis of denoting who is the "owner" or "contractor" by the parties to a construction complex. The result may well be that the principals who "own" the project are the very same principals who are the "contractors" and have pulled the construction permit.\(^3\)

It must also be remembered that the "owner" of property has not only the legal rights and obligations which flow from his status as such; he has, in addition, rights and obligations flowing from his status as an employer of independent contractors. When the owner actively engages in the actual construction, he has the rights and obligations that flow from that posture as well. It has long been recognized that the employee of an independent contractor may maintain an action against the owner of premises for damages suffered as a result of the latter's negligence.\(^3\) In *State ex rel. Auchter Co. v. Luckie*, the court reasoned that:

> Since it has been held that an employee of an owner may maintain an action at law against an independent contractor for injuries sustained as a result of the negligence of such independent contractor, it would follow that an employee of an independent

or death to his employees. The sole and total liability of such employer is that defined in the Act itself." No. 51,650, slip op. at 191 (Fla., filed March 31, 1978). This language, if read literally, would likely preclude a claim for indemnity.

32. In the authors' experience, it is not uncommon for the superintendent of construction to testify that although he was a principal of two closely held corporations, his presence on the job site was only in a singular capacity—which quite expectedly is the one that will defeat liability to the plaintiff. We will not herein discuss the doctrine of "two separate heads on one set of shoulders."

33. *Jones v. Florida Power Corp.*, 72 So. 2d 285 (Fla. 1954); *State ex rel. Auchter Co. v. Luckie*, 145 So. 2d 239 (Fla. 1st Dist.), *cert. denied*, 148 So. 2d 278 (Fla. 1962).
contractor may maintain against an owner an action at law for damages suffered as a result of the latter's negligence. 34

Defining the phrase "as a result of the latter's negligence" opens the whole arena of combat.

1. EMPLOYER OF INDEPENDENT CONTRACTOR

It has often been stated as a general rule that an employer of an independent contractor is not liable for the latter's negligence. This rule, however, has so many exceptions that it is probably now itself the exception rather than the rule. 35

The employer of an independent contractor will be held liable as the result of a breach of his duty. When there is a duty owed to an injured worker, one may proceed to determine whether there has been a breach thereof. It should be recognized at the outset that the acts and omissions giving rise to liability may be those of the contractor, the employer of the contractor, and also those of third parties. The clearest example of liability is for those acts which are the direct acts of the party sought to be charged—unequivocal misfeasance. The most difficult areas encompass the gamut of omissions to act—nonfeasance. These can embrace situations where the employer of an independent contractor fails to act while the independent contractor negligently performs his work. 36

Where the "owner" or the employer of an independent contractor participates directly in the work activity, duty and liability are most easily found. The Supreme Court of Florida, in Conklin v. Cohen, 37 explained that an owner may be held liable "if he has been actively participating in the construction to the extent that he directly influences the manner in which the work is performed." 38 The holding in Conklin was intended to encompass an owner-participation type of case since the supreme court reversed the District Court of Appeal's predication of non-liability on the basis of the owner's active participation in the construction; that is, action in concert with the general contractor. The Conklin court stated that to impose liability, one or more identifiable acts of negligence

34. 145 So. 2d at 242.
36. It would be helpful to have easy access to a definition which clearly explains the distinction between misfeasance and nonfeasance; it would also be useful to have ready guidelines to know when misfeasance and nonfeasance create and do not create liability. Life, like the law, however, does not always offer clear-cut choices.
37. 287 So. 2d 56 (Fla. 1973).
38. Id. at 60.
must be demonstrated—"acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the employee . . . ."39

The holding in Conklin is consistent with the rule stated in the Restatement (Second) of Torts, section 414, which is an alternative avenue of liability predicated on the nonfeasance of an employer.40 It cannot be sufficiently emphasized that, although the Conklin court was dealing with a situation of alleged misfeasance, the decision should not be read as precluding liability for nonfeasance.

2. NON-DELEGABLE DUTY: RESTATEMENT (SECOND) OF TORTS, SECTION 416

The employer of an independent contractor will ordinarily not be vicariously liable to an injured workman solely because of the acts or omissions of the independent contractor. He may, however, be directly liable for those very same acts if they constitute a breach of his non-delegable duty.41

In Florida Power & Light Co. v. Price,42 the supreme court held that the doctrine of non-delegable duty was the law in Florida. This case dealt with the inherently dangerous activities rule as promulgated in Restatement (Second) of Torts, section 416. The Supreme Court of Florida stated: "It may well be that said doctrines [dangerous instrumentality and inherently dangerous work] apply without exception to third party members of the public . . . ."43 The court then stated that the doctrine of vicarious liability for non-delegable duty did not extend to employees of independent contractors who sue the employer of the independent contractor, absent a

39. Id.
40. RESTATEMENT (SECOND) OF TORTS § 414 (1965) provides:
   One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.
41. The authors acknowledge the very difficult problem of trying to separate issues of vicarious liability from those of direct liability when dealing with the nondelegable conceptualization. The cases uniformly show the same inconsistency and lack of distinction between duty and the breach thereof, as do the misfeasance and nonfeasance cases. RESTATEMENT (SECOND) OF TORTS, Introductory Note § 415 (1965); Emelwon v. United States, 391 F.2d 9 (5th Cir. 1968); Florida Power & Light Co. v. Price, 170 So. 2d 293 (Fla. 1964). What is really happening is that the law views the relationship of the owner-employer and the independent contractor and then determines that a duty remains with the owner-employer. It is submitted that there is one basic underlying rationale behind both types of nondelegable duty—the determination that certain types of undertakings are so important that one may not insulate himself from the consequences thereof.
42. 170 So. 2d 293 (Fla. 1964).
43. Id. at 298.
showing of negligence on the part of the employer engaging in a hazardous occupation, who has contracted with the independent contractor to carry out inherently dangerous work. The employer of the independent contractor, however, does himself have a duty to the employees of the independent contractor where the work is inherently or intrinsically dangerous.

It would appear that the general non-delegable duty owed by the employer of the independent contractor is one of due care. In *Mai Kai, Inc. v. Colucci*, the supreme court set forth the general parameters.

Those cases stating exceptions to this doctrine do not, in any instance brought to our attention, involve latent defects or conditions which, as in the present situation, could not have been discovered by reasonable care, whatever conduct that standard may require in a particular case. The duty to exercise that reasonable care is nondelegable in the sense that a contract for its performance by another will not necessarily eliminate an owner's responsibility. The duty, however, remains one of due care or reasonable care in preventing or correcting an unsafe condition, as opposed to absolute liability for a contractor's negligence.

It should be noted that *Colucci* did not deal with dangerous work or with an employee of an independent contractor.

3. BUILDING CODES: GOVERNMENTAL REGULATIONS

The principle of non-delegable duty finds special application—where the duty is imposed by a statute, ordinance or administrative regulation. The rule is well articulated in the Restatement (Second) of Torts, section 424 (1965).

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards.

This principle of law has often led to the imposition of liability on owners of property where contractors fail to observe the provisions

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44. *Id.* One might well feel that for some unexplained reason employees are given the status of last-place citizens.
45. 205 So. 2d 291 (Fla. 1967) (dictum).
46. *Id.* at 293.
47. *Bialkowicz v. Pan American Condominium No. 3, Inc.*, 215 So. 2d 767 (Fla. 3d Dist. 1968) (duty imposed by city building permit nondelegable to a subcontractor).
of building codes. Some discerning minds might view this as vicarious liability in a situation where vicarious liability should exist.

4. INITIAL PRECAUTIONS

Clear nonfeasance can create liability where the employer of an independent contractor should provide for precautions to avoid unreasonable risk of physical harm to others.

The Restatement (Second) of Torts, Section 413 (1965) sets forth this rule:

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

5. KNOWLEDGE OF CONTINUING CONDITION

Finally, where one gains knowledge of a dangerous situation created by his independent contractor, he may incur liability through his failure either to halt the operation or to correct it.

B. The Architect or Engineer

An architect has been defined as one who plans or designs for the erection, enlargement or alteration of buildings and who furnishes supervision over the construction thereof. An architect may incur liability if his plans or designs are negligently prepared and someone is injured as a result. Although he does not warrant his design services, an architect or engineer must exercise the same degrees of care and skill as would other architects or engineers within the community. However, where a statute, ordinance or

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49. Maule Indus., Inc. v. Messana, 62 So. 2d 737 (Fla. 1953); Pearis v. Florida Publishing Co., 132 So. 2d 561 (Fla. 1st Dist. 1961).
administrative regulation requires a minimum standard of design, that standard must be followed.\textsuperscript{53} It is no defense that industry standards are lower than those established by law.\textsuperscript{54}

An architect may also be liable when he fails to exercise reasonable care in connection with his supervisory activities. In \textit{Geer v. Bennett}\textsuperscript{55} a concrete mason, engaged in pouring a floor slab, fell from the second floor while walking along a wooden form. There were no guardrails along the edge of the building as required by regulations of the Florida Industrial Commission.\textsuperscript{56} In holding that an action would lie against the architect, the court observed that the architect: (1) was required to make daily visits to the site to check the progress of construction; (2) was required to assure that the work was progressing in accordance with plans and specifications; and (3) as the owner’s agent, was required to maintain direct supervision over the contractors. The court stated the architect’s duty as follows:

They are under a duty to exercise such reasonable care, technical skill and ability, and diligence as are ordinarily required of architects in the course of their plans, inspections and supervisions during construction for the protection of any person who foreseeably and with reasonable certainty might be injured by their failure to do so.\textsuperscript{57}

The Supreme Court of Florida sought to further clarify the architect’s responsibilities during construction in \textit{Conklin v. Cohen}\textsuperscript{58} and in \textit{A.R. Moyer, Inc. v. Graham}.\textsuperscript{59} In \textit{Conklin}, the Supreme Court of Florida, citing \textit{Geer}, reversed the District Court of Appeal, Third District’s dismissal of a complaint\textsuperscript{60} charging the architect with: (1) failure to advise the owner concerning job safety; (2) failure to provide for safety inspections; and (3) failure to discover and correct a hazardous condition (lack of guardrails), when a reasonable inspection would have revealed it.\textsuperscript{61} In \textit{A.R. Moyer, Inc.}, the supreme court expanded the architect’s liability to general contractors who suffer damage due to the architect’s failure to diligently carry out his supervisory functions. The court carefully distinguished tort liabil-

\begin{itemize}
\item \textsuperscript{53} Henry v. Britt, 220 So. 2d 917 (Fla. 4th Dist. 1969).
\item \textsuperscript{54} \textit{Id.} at 920.
\item \textsuperscript{55} 237 So. 2d 311 (Fla. 4th Dist. 1970).
\item \textsuperscript{56} \textit{Id.} at 314.
\item \textsuperscript{57} \textit{Id.} at 316. \textit{See also} Lee County v. Southern Water Contractors, Inc., 298 So. 2d 518 (Fla. 2d Dist. 1974).
\item \textsuperscript{58} 287 So. 2d 56 (Fla. 1973).
\item \textsuperscript{59} 285 So. 2d 397 (Fla. 1973).
\item \textsuperscript{60} 262 So. 2d 717 (Fla. 3d Dist. 1972).
\item \textsuperscript{61} \textit{Id.} at 718.
\end{itemize}
ity from contractual liability and suggested that although construction workers may indeed be third party beneficiaries of the owner-architect agreement, a distinct tort action may be instituted against the architect without regard to privity. Two different avenues are therefore open to the injured worker.

A discussion of liability based exclusively on owner-architect agreements requires a detailed examination of the standard documents of the American Institute of Architects' (A.I.A.). Most pertinent are the "Standard Form of Agreement Between Owner and Architect" and the "General and Supplementary Conditions of the Contract for Construction."

These documents historically gave the architect considerable authority over the work progress, thus providing plaintiffs with considerable ammunition against him. The documents authorized architects to stop work, "[w]henever, in his reasonable opinion, he considers it necessary or advisable to insure the proper implementation of the Contract Documents."62 Such power led many courts to rule that the architect's contractual right to stop the work carried with it the corresponding duty to stop the work in the face of a hazardous condition.63

Believing that these decisions held the architects liable as a result of a contractual duty, the A.I.A. revised the standard forms by disclaiming any responsibility for construction site accidents. Specifically, the word "supervision" was no longer used, and the provision giving the architect the power to stop the work was stricken. The 1974 editions, moreover, disclaim any responsibility to the worker even if the architect hires a full time project representative whose sole responsibility is to work at the project site.64

If, in fact, the scope of the architect's duty is defined by the contract, as the A.I.A. contends, is the architect absolutely liable or negligent as a matter of law for his failure to abide by all contractual provisions? Stated differently, if the architect agrees to supervise, but fails to do so, should he not be automatically liable on the basis that the contract is the sole consideration defining his duty? The answer should be yes if the A.I.A.'s position is accepted. It is questionable, however, whether in fact the architect's duty is defined solely by the contract, thus allowing him to contractually limit

64. AMERICAN INSTITUTE OF ARCHITECTS, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT § 1.2 (14th ed. 1974).
his liability. The cause of action is generally brought not in contract, but in tort, where courts look upon exculpatory clauses with great disfavor. Thus, although admittedly the contract documents are important factors to consider in determining whether the architect exercised due care under the circumstances, it is not at all determinative of the scope of the architect's duty. "Various factors, . . . such as the capacity of the parties to bear the loss, the foreseeability of the particular injury, the relationship between the parties, the policy of preventing future injuries, and moral turpitude attached to the act are often considered."

As seen in A. R. Moyer, Inc. and Conklin, and more recently in LeMay v. U.S.H. Properties, Inc., Florida courts, in defining duty, do not generally place much emphasis on the architect's contract in a suit by an injured third party. A more appropriate test is whether the alleged duties "fall within the duties ordinarily assumed or placed upon an architect by custom and practice of the business community."

Furthermore, regardless of the specific terms of the contract, any of the following considerations may result in liability being imposed: (1) When the architect in fact exercised control over the job; (2) when the architect signed the application for a building permit (if he did, he may have assumed the duty to comply with all applicable building and safety codes); (3) when the architect filed documentation with state administrative agencies or other agencies having jurisdiction over the project (if he did, he may have assumed certain duties related to building and safety codes); (4) when the architect, as "owner's agent" on the job, failed to safeguard the owner's interest by not insuring that all building and safety codes were complied with; or (5) when the architect was required by statute, ordinance or regulation to enforce compliance with applicable building and safety codes.

68. Comment, supra note 65, at 542.
69. 338 So. 2d 1143 (Fla. 2d Dist. 1976).
71. See RESTATEMENT (SECOND) OF TORTS § 324A (1965).
72. See, e.g., SOUTH FLA. BUILDING CODE § 305.3 (1976).
C. Co-employees

It is unnecessary for a subcontractor's employee to sue the employee of another subcontractor since the 1974 amendment to section 440.10 of the Florida Statutes\(^73\) made it possible to sue a subcontractor directly for the negligence of his employees.\(^74\) Presumably, however, a subcontractor is still immune from suit by an employee of the general contractor.\(^75\) The pre-amendment cases prohibited such a suit,\(^76\) nor does the amendment affect the immunity of the worker's direct employer. Thus, a worker may sometimes be left with no other choice but to sue a fellow employee. The first Florida case to specifically recognize that an employee could be sued for his negligence in injuring a fellow employee was *Frantz v. McBee Co.*\(^77\) The court reasoned that since there is no obligation on the part of an employee to secure workmen's compensation for a co-employee, he is subject to suit as a third party tortfeasor.\(^78\)

More recently, in *West v. Jessop*\(^79\) a worker sued the president of her company for negligence in rendering treatment for a headache. While the court warned that a corporate officer could not be sued individually as a co-employee for a breach of the corporate employer's duty to provide a safe place to work, there are circumstances under which he may incur liability: "there is no reason why a stockholding corporate officer should come under the umbrella of exclusive protection when he negligently injures another employee through an affirmative act. In these circumstances, he should be held personally responsible for his actions in the same manner as any other employee."\(^80\)

D. Suppliers and Materialmen

Suppliers of equipment or materials who are not actually engaged in the construction process have always been subject to suit.\(^81\)

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73. 1974 Fla. Laws, ch. 74-197, § 6 (current version at Fla. Stat. § 440.10 (1977)).
74. This was not permitted prior to the amendment. See Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977).
77. 77 So. 2d 796 (Fla. 1955).
78. Id. at 800.
79. 339 So. 2d 1136 (Fla. 2d Dist. 1976).
80. Id. at 1137 (emphasis added). See also Cromer v. Thomas, 124 So. 2d 36 (Fla. 3d Dist. 1960). For a detailed discussion of this area from another jurisdiction, see Adams v. Fidelity and Cas. Co., 107 So. 2d 496 (La. App. 1959).
81. Hunt v. Ryder Truck Rentals, Inc., 216 So. 2d 751 (Fla. 1968); Goldstein v. Acme Concrete Corp., 103 So. 2d 202 (Fla. 1958); Street v. Safway Steel Scaffold Co., 148 So. 2d
The courts, however, have consistently had difficulty determining whether the defendant was a materialman or a contractor. If the court found the latter, then the defendant was immune from suit. In light of the 1974 amendment to section 440.10, the defendants designation is no longer relevant, except where the plaintiff is employed by a general contractor. If the plaintiff is employed by a general contractor, that plaintiff must still demonstrate that the defendant is a materialman or supplier, and not a subcontractor. The test generally used by the courts is one of the relative value of labor and material.

Suppliers of scaffolds and shoring equipment are among the most notorious defendants in this area. Likewise, suppliers of concrete blocks, bricks, cement, boxes and similar materials may generally be sued, particularly where they provide little or no labor at the project site.

E. The Workmen's Compensation Carrier

In Florida, part of every premium dollar collected by a workmen's compensation insurance carrier is earmarked for job safety. Sometimes with this in mind and sometimes with apparent ignorance the courts have woven a protective veil for the workmen's compensation insurance carrier. The decisions have rested on immunity or the lack of duty. This does not mean, however, that there are no duties owed or that there is always immunity. Although the legislature amended Florida Statutes section 440.11 prior to the cases cited herein, all these decisions construed the section as it existed at the time of the accident, which was prior to the amendment. The section, as amended, reads in part:

38 (Fla. 1st Dist. 1962).
82. 1974 Fla. Laws, ch. 74-197, § 6 (current version at FLA. STAT. § 440.10 (1977)).
85. See Goldstein v. Acme Concrete Corp., 103 So. 2d 202 (Fla. 1958); Cork v. Gable, 340 So. 2d 487 (Fla. 2d Dist. 1977).
88. 1970 Fla. Laws, ch. 70-25, § 1; 1971 Fla. Laws, ch. 71-190, § 1 (current version at FLA. STAT. § 440.11 (1977)).
89. See Mann v. Highland Ins. Co., 461 F.2d 541 (5th Cir. 1972); Conklin v. Cohen, 287 So. 2d 56 (Fla. 1973); Allen v. Employers Serv. Corp., 243 So. 2d 454 (Fla. 2d Dist. 1971).
An employer's workmen's compensation carrier, service agent, or safety consultant shall not be liable as a third party tort-feasor for assisting the employer in carrying out the employer's rights and responsibilities under this chapter by furnishing any safety inspection, safety consultive service, or other safety service incidental to the workmen's compensation or employers' liability coverage or to the workmen's compensation or employer's liability servicing contract. The exclusion from liability under this subsection shall not apply in any case in which injury or death is proximately caused by the willful and unprovoked physical aggression, or by the negligent operation of a motor vehicle, by employees, officers, or directors of the employer's workmen's compensation carrier, service agent, or safety consultant.90

The emphasized words suggest that there appears to be no immunity for those who accept money and then do nothing. Similarly, there appears to be no immunity from third party beneficiary suits. It seems unlikely, however, that the courts will permit any suit except to the extent specifically provided in the statute.

III. Violations of Law

No field of human endeavor is subject to more statutes, ordinances, regulations and administrative decisions than is the construction industry. It is doubtful whether a building can go up without at least some violations of law occurring during construction. These violations often lead to liability.

The largest source of state administrative regulations affecting the construction industry is the Florida Department of Commerce.91 It has the authority "to investigate and prescribe what safety devices, safeguards or other means of protection shall be adopted for the prevention of accidents in every employment or place of employment."92 On the local level, numerous ordinances and building codes govern not only the manner in which a building must be constructed, but also what shall be done to avoid accidents.

Historically, the violation of laws designed to protect construction workers has been deemed at least prima facie evidence of negligence.93 In the wake of deJesus v. Seaboard Coast Line Railroad,94 however, it now appears that the violation of regulations protecting

90. FLA. STAT. § 440.11(2) (1977)(emphasis added).
91. See, e.g., Id. § 440.56.
92. Id. § 440.56(2)(a).
93. Scott v. Midyette-Moor, Inc., 221 So. 2d 178 (Fla. 1st Dist. 1969); Alford v. Meyer, 201 So. 2d 489 (Fla. 1st Dist. 1967); Mastrandrea v. J. Mann, Inc., 128 So. 2d 146 (Fla. 3d Dist. 1961).
94. 281 So. 2d 198 (Fla. 1973).
construction workers is negligence per se. In deJesus, the Supreme Court of Florida said: “[N]egligence per se is [also] a violation of any other statute which establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury.”95 Clearly, these regulations establish standards designed “to protect a particular class of persons [workers] from a particular injury or type of injury.”96 The question which inevitably arises, however, is whether the pertinent statute, ordinances or regulation applies to the particular defendant. Stated differently, what is the scope of the regulation? While building codes generally apply to “owners” and, under the Florida Department of Commerce regulations, to “every employer,” in practice these regulations have much broader application.97

One of the governing principles of law is that a person with control over the activities of another is responsible for the latter’s negligent activities if the activities fall within the scope of the former’s power to control. This proposition has been well articulated by the American Law Institute:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.98

This principle is consistent with numerous California cases construing regulations similar to those in Florida.99

An analogy to the construction industry can be drawn from Tamiami Gun Shop v. Klein,100 where the Supreme Court of Florida established the rule of strict liability for the violation of a statute. The court held the seller of a firearm liable for all injuries occurring as a result of his illegal sale of the firearm to a minor. The defendant charged with strict liability was a person who would have been criminally liable under the express language of a criminal statute. It is difficult to conceive that a wholesaler or other person who supplied a gun to a retailer, knowing it would be sold to a minor, would be held to any lesser standard of liability than the person

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95. Id. at 201 (dictum).
96. Concord Fla., Inc. v. Lewin, 341 So. 2d 242, 246 (Fla. 3d Dist. 1977).
98. RESTATEMENT (SECOND) OF TORTS § 308 (1965).
100. 116 So. 2d 421 (Fla. 1959).
directly responsible for compliance with the literal terms of a criminal statute. The language employed by the District Court of Appeal, Third District, in *Tamiami Gun Shop* supports this contention: “The responsibility rests on all to see that the spirit and letter of the law is observed and kept.”

On the federal level, however, while the applicability of the Occupational Safety and Health Act of 1970 is of current interest, its value remains substantially unsettled. The two crucial questions are: first, whether OSHA creates a cause of action; and second, to whom OSHA is applicable.

The judiciary, considering the first question, has generally concluded that OSHA does not create a new private cause of action. OSHA only creates a duty in the penal, not the civil sense. Although OSHA does not create a legal civil duty, it may set a standard of care for an already existing duty, and a breach of that standard should constitute negligence.

The most hotly contested and unsettled issue presented by OSHA is whether the person against whom the plaintiff seeks to apply OSHA as a standard can be someone other than his direct employer. This issue has been raised in connection with 29 U.S.C. 654 (1970) which requires “employers” to furnish their “employees” with a safe place to work. The United States Court of Appeals for the Second Circuit has considered whether OSHA regulations were violated by a general contractor although only a subcontractor’s employees were endangered by the hazard. The Second Circuit held that a direct employer-employee relationship was not necessary to impose the penalties proscribed by OSHA. In reaching its

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101. 109 So. 2d 189, 191 (Fla. 3d Dist.), cert. discharged, 116 So. 2d 421 (Fla. 1959)(emphasis added).
105. 29 U.S.C. § 654 (1970) provides:
   (a) Each employer—
      (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
      (2) shall comply with occupational safety and health standards promulgated under this chapter.
   (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.
decision, the court interpreted subsection 654(a)(2) as setting a standard of care above and beyond the seemingly limited provision of subsection 654(a)(1). In so holding, the Second Circuit reasoned that the policy of the Act is to protect all workers. In this regard, the court recognized that a construction site is peculiar in that it has many "employers" and "employees," working side by side, and thus requiring the application of OSHA to all employers.\textsuperscript{107}

The question of OSHA's applicability to the employer-employee relationship, however, is far from being a settled area of law. In \textit{Brennan v. Gilles & Cotting, Inc.},\textsuperscript{108} the United States Court of Appeals for the Fourth Circuit accepted the OSHA Commission decision that, under the Act, a general contractor is not jointly responsible with a subcontractor for the safety of the subcontractor's employees. Again, it is important to note that, as in the Second Circuit's decision, the Fourth Circuit dealt with the imposition of penalties as prescribed by OSHA. Whether the reasoning and holdings will be extended to impose civil duties remains undecided. No valid reason exists, however, for treating OSHA regulations differently than state regulations. Both are often identical in language and purpose: adoption of reasonable standards which will promote safety within the construction industry.\textsuperscript{109}

\textsuperscript{107} See also Knight v. Burns, Kirkley & Williams Constr. Co., 331 So. 2d 651 (1976); Dunn v. Brimer, 259 Ark. 885, 537 S.W.2d 164 (1976).
\textsuperscript{108} 504 F.2d 1255 (4th Cir. 1974).
\textsuperscript{109} It should be recognized that there has been some discussion of OSHA in admiralty cases considering the Safety and Health Regulations for Longshoring. See Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Arthur v. Flota Mercante Gran Centro Americana S.A., 487 F.2d 561 (5th Cir. 1973). In examining these maritime cases it is of the utmost importance to recognize that the application of OSHA is directly and peculiarly affected by the policy considerations behind the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. These policy considerations pertain to the peculiar status of the ship owner and render these cases inapplicable to the construction site situation.