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Watch Your Step! Construction Site Safety and Accident Claims Handling/Management

I. Summary/Description:

Construction site safety and accident claims handling impact all types of construction activities (e.g., residential, commercial, and mixed use) in all regions. This panel explores and explains multi-regional rules, regulations, prevailing legal authorities, OCIP implications, action-over claims/defenses, and related OSHA standards/investigations. The discussion will also provide guidance for best practices in the handling of construction accident claims and related OSHA investigations in some of the most populated regions, namely, the West, Midwest, Southeast, and Northeast. Cross-over topics for this panel naturally include discussions related to OSHA, general liability, insurance coverage, and Workers' Compensation. The selected panelists are regionally recognized experts in the field of site safety and construction accident claims handling.

II. A Worker Is Hurt On a Construction Site. Now What Do You Do?

Investigation/Analysis of Exposure

- Retain counsel to tender to relevant insurance policies and pursue coverage. The attorney and a site safety consultant must work together to navigate Cal/OSHA's investigation of the incident.
- Additionally, it is critical to conduct a thorough independent investigation of the site conditions, job site safety documents, OSHA requirements, contract documents, insurance coverages.

What Do You Hope Your Investigation Reveals?

- Perfect records of site safety protocol.
- Regularly updated site safety logs.
- Documented evidence of site safety meetings.
- The absence of anything that would constitute a Cal/OSHA violation.
- Contracts that delegate the duty to maintain control over job safety conditions to the independent contractor (i.e., the sub).

- Evidence that the sub received a credit for its purchase of worker's comp. insurance.
- Provision in subcontract waiving subrogation against you and your related entities.
- Indemnity and defense provision in your favor. The absence of any evidence the injury was caused by: (1) a concealed dangerous condition on the land; (2) defective equipment you supplied; or (3) your negligent exercise of the control you decided to retain over safety conditions at the site.

III. What Are the Authorities by Region That Govern Exposure in Construction Site Accidents and What Do They Mandate?

A. California – *Privette-Toland* Doctrine. *Privette v. Superior Court* (1993) 5 Cal.4th 689, established a general rule that an employee of an independent contractor who is injured in the workplace cannot sue the party that hired the contractor to do the work.

- Back in the dark ages—i.e., any time before 1993—construction sites were thought to be so hazardous that, under the peculiar risk doctrine, hirers were strictly liable for any injuries workers suffered on the site.

- In 1993, we emerged from this darkness when the Cal. Supreme Court issued its decision in *Privette v. Superior Court* (1993) 5 Cal.4th 689, which established a general rule that an employee of an independent contractor who is injured in the workplace cannot sue the party that hired the contractor to do the work. This is known as the Privette Rule or Doctrine.

- Two main policies underlie the *Privette* Rule:
    1) California's Workers' Compensation Act provides an injured employee's exclusive remedy if the employer obtains workers' comp. insurance coverage. It would thus be unfair to allow the employee to obtain full tort damages from the employer's hirer. Additionally: (i) in most cases the hirer indirectly paid for the workers' comp. insurance in the contract price; (ii) the hirer has no right to reimbursement from the employer even if the employer was primarily at fault; and (iii) there is no reason why employees of independent contractors should receive tort damages unavailable to other workers.
    2) Hirers are entitled to delegate to independent contractors the responsibility of ensuring the safety of their own workers.

- There are three major exceptions to the Privette Doctrine:

    1) A hirer may be liable if it knew or should have known of a concealed, preexisting, hazardous condition at the site, the employer did not and should not have discovered the condition, the hirer did not warn the employer, and the condition caused the worker's injury.
    2) The hirer supplied defective equipment that caused the worker's injury; or
    3) The hirer retained control over safety conditions at the site, negligently exercised that retained control, and thereby caused the worker's injury.

- Knowing where to draw the line between ensuring worker safety and appeasing Cal/OSHA on the one hand, and avoiding the appearance that you have retained control over site safety conditions on the other hand, can be a difficult task. Experienced claims professionals can ascertain what it takes to satisfy Cal/OSHA and what actions tend to trigger the retained control of safety conditions exception in the eyes of the Courts.

B. Florida – Protection for Contractors and Owners:

I. Protection for Contractors: *Workers' Compensation Act* – Section 440.10(1)(a), requires contractors to secure workers' compensation insurance for their employees, which includes the employees of their subcontractors. *See* Carter v. Sims Crane Service, Inc., 198 So. 2d 25 (Fla. 1967). Under Fla. Stat. §440.11, when the insurance is secured, workers' compensation benefits are generally an employee's exclusive remedy for injuries sustained in the course and scope of employment. There are two types of Immunities for contractors who secure such insurance: vertical and horizontal.

- Vertical Immunity – In exchange for having to ensure workers' compensation benefits for all of its employees, a contractor is entitled to claim workers' compensation immunity for its statutory employees. *Ramos v. Univision Holdings, Inc*. 655 So.2d 89 (Fla. 1995). The immunity flows vertically, between the contractor and subcontractor. *Carter*, 198 So. 2d at 28.

    - Exceptions to Vertical Immunity – To circumvent employer immunity under the Workers' Compensation Act, an injured employee must prove, by *clear and convincing evidence*, that the employer has committed "an intentional tort and not an accident." Fla. Stat. § 440.11(1)(b). "Intentional tort" is defined as follows:

        - The employer deliberately intended to injure the employee; or
        - The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a

known danger, was *virtually certain* to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.

- Gross negligence on the part of the employer is not sufficient to satisfy the intentional tort exception to workers' compensation immunity. *Turner v. PCR, Inc.*, 754 So. 2d 683, 687 (Fla. 2000).

- Horizontal Immunity – Section 440.10(1)(e), Florida Statutes (2008), extends immunity to a subcontractor working on the same project as the injured employee of another subcontractor when:

  - 1) the subcontractor has secured workers' compensation insurance for its employees (or the contractor has done so on behalf of the subcontractor) and
  - 2) the subcontractor's own gross negligence was not the major contributing cause [1]of the injury.

    - "Gross negligence requires: 1) circumstances constituting an imminent or clear and present danger amounting to a more than normal or usual peril; 2) knowledge or awareness of the imminent danger on the part of the tortfeasor; and 3) an act or omission that evinces a conscious disregard of the consequences." *Id. See also Kline v. Rubio*, 652 So. 2d 964, 965 (Fla. 3d DCA 1995) (defining second element as "chargeable knowledge or awareness of the imminent danger" and noting that third element of conscious disregard must be distinguished from careless disregard).

  - Horizontal Immunity Extends to Fellow Employees -- Fla. Stat. § 440.11(1)(b)2, (2008) *See Stack v. State Farm Mut. Auto Ins. Co.*, 507 So. 2d 617 (Fla. 3d DCA 1987) (recognizing that the immunity extends to fellow employees acting in furtherance of employer's business as long as injury is not caused by a "grossly negligent act").

II. Protection for Owners – Landowners generally do not owe a duty to provide a safe workplace for independent contractors, or their employees, working on their premises. *Florida Power & Light v. Robinson*, 68 So. 2d 406 (1953); *Cecile Resort, LTD v. Hokanson*, 729 So. 2d 446,

[1] A persuasive argument can be made that "major contributing cause" denotes only one cause, meaning only one subcontractor can be held liable.

447-448 (Fla. 5th DCA 1999); *Hall v. Facet Properties, Inc.*, 505 So. 2d 651 (Fla. 2d DCA 1987). There are exceptions to this rule.

- (1) a landowner may be held liable when he actively participates or controls the manner (i.e., the means and methods) in which the independent contractor's employee worked;
- (2) a landowner with actual or constructive knowledge of hidden dangers on his property must warn those without actual or constructive knowledge to avoid liability. *Conklin v. Cohen*, 287 So. 2d 56 (Fla.1973); *Cecil Resort, LTD*, 729 So. 2d at 447-448; *Mozee v. Champion International Corporation*, 554 So. 2d 596 (Fla. 1st DCA 1989); *Lemen v. Florida Power & Light Company*, 452 So. 2d 1107 (Fla. 5th DCA 1984). Note that this applies to owner/contractors who self-perform.
    - Exception to the exception – If the alleged dangers to which the employee was exposed were the ones that his employer was hired to address, the exceptions above would not apply *McCarty v. Dade Division of American Hospital Supply*, 360 So. 2d 436 (Fla. 3d DCA 1978); *see also*, *Green v. Ebsary Foundation Co.*, 920 So.2d 127, (Fla. 3d DCA 2006); *Garrick v. Publix Super Markets, Inc.*, 798 So.2d 875 (Fla, 4th DCA 2001); *Parrish v. Matthews*, 548 So.2d 725 (Fla. 3d DCA 1989); *Lake Parker Mall, Inc. v. Carson*, 327 So.2d 121 (Fla. 2d DCA 1976).
- (3) "If an injury resulting [from an "inherently dangerous activity"] was caused solely through the fault of another, [the landowner] would be held responsible due to its vicarious, constructive, derivative, or technical liability." *Atl. Coast Dev. Corp.*, 385 So. 2d at 679-80 (Fla. 3d DCA 1980).
    - Exception to the Exception – "where the defendant owner contracts with an independent contractor for the performance of inherently dangerous work and the latter's employee is injured by a dangerous instrumentality owned by the defendant which is negligently applied or operated by another employee of the independent contractor but wholly without any negligence on the part of the defendant owner, the latter will not be held liable." *Florida Power & Light*. *Price v. Florida Power & Light Co.*, 170 So. 2d 293 (Fla. 1964).

D. Ohio

In Ohio, when an employee of a subcontractor is injured while performing work for his or her employer that is inherently dangerous, the owner and/or general contractor owes no duty of care to that employee. *Wyczalek v. Rowe Construction Services Co.* (2001), 148 Ohio App.3d 328, 336, 2001 Ohio 3104, 773 N.E.2d 560, citing *Sopkovich v. Ohio Edison Co.* (1998), 81 Ohio St.3d 628, 636-37, 1998 Ohio 341, 693 N.E.2d 233. Engaging in a construction job is an inherently dangerous job, and therefore a general contractor or construction manager has no duty of care to the employees of a subcontractor. *Wyczalek*, 148 Ohio App.3d at 336.

HOWEVER: there is an exception to this rule.

If the construction manager actively participates in the subcontractor's operations by either (1) directing or exercising 'control over the work activities of independent contractor's employees;' or (2) 'retaining or exercising control over a critical variable in the workplace.' *Sopkovich*, 81 Ohio St. 3d at 642-43.

In Michaels v. Ford Motor Co. (1995), 72 Ohio St. 3d 475, 479, 1995 Ohio 142, 650 N.E.2d 1352, HN2 the Ohio Supreme Court stated:

> "supervision of a construction job, i.e., coordinating work and directing contractors to perform tasks in accordance with contract specifications, has never constituted 'active participation' in the work of an independent contractor. The very nature of the construction business requires a general contractor or the owner of a construction site to 'supervise' a construction job.
>
> Similarly, active participation by a construction manager or general contractor requires something more than exercising a supervisory role over the construction project. *Kratzer v. General Motors Corp.* (Feb. 27, 1998), Montgomery App. Nos. 16590, 16593, 16594, 1998 Ohio App. LEXIS 1655, unreported. Active participation is more than just telling the subcontractor where or when to perform the work. It requires instruction or involvement to the subcontractor as to how to perform certain work. *Gross v. Western-Southern Life Ins. Co.* (1993), 85 Ohio App.3d 662, 670, 621 N.E.2d 412.

Reno v. Concrete Coring, Inc., 2005-Ohio-3062 (Ohio Ct. App., Montgomery County June 17, 2005).

Michigan

The right to the recovery of benefits as provided in the Worker's Disability Compensation Act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort.

The elements that a worker needs to prove in order to establish that his employer committed an intentional tort and therefore the worker's remedy for a workplace injury is not limited to the workers' compensation system are: (1) a deliberate act or omission resulting in injury; and (2) that the employer specifically intended the injury or had actual knowledge that an injury was certain to occur and willfully disregarded this knowledge.

"Actual knowledge" in the context of whether a worker's remedy for a workplace injury is limited to the workers' compensation system or whether the worker can recover against his employer for intentional tort, requires that a supervisory or managerial employee have actual knowledge that an injury would follow from what the employer deliberately did or did not do.

Nellessen v. O'dovero Constr. Co., 1998 Mich. App. LEXIS 1856, *1, 1998 WL 1991068 (Mich. Ct. App. July 7, 1998).

Iowa

Where employers violate an OSHA or IOSHA standard, the violation is negligence per se as to their employees. *Koll v. Manatt's Transp. Co*., 253 N.W.2d 265, 270 (Iowa 1977). The per se negligence standard is appropriate because "one of the primary purposes of OSHA standards is to protect a certain class of persons, employees, from the kind of harm the standards are designed to prevent: workplace injuries." *Wiersgalla v. Garrett*, 486 N.W.2d 290, 293 (Iowa 1992). An OSHA violation is some "'evidence of negligence as to all persons who are likely to be exposed to injury as a result of the violation.'" *Wiersgalla*, 486 N.W.2d at 293 (citing Koll, 253 N.W.2d at 270).

Doty v. Olson, 2010 Iowa App. LEXIS 1536, *6, 31 I.E.R. Cas. (BNA) 1139 (Iowa Ct. App. Dec. 8, 2010)

Illinois

Illinois has adopted the Restatement (Second) of Torts § 414 (1965), which 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.

In order to state a cause of action for common law negligence under § 414, a plaintiff must allege (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached that duty, and (3) that the plaintiff suffered a compensable injury proximately caused by the defendant's breach.

Bokodi v. Foster Wheeler Robbins, Inc., 312 Ill. App. 3d 1051, 728 N.E. 2d 756 (1st Dist. 2000).

Section 414 is an exception to the general rule that one who employs an independent contractor is not liable for the acts or omissions of the independent contractor. *Bokodi v. Foster Wheeler Robbins, Inc*., 312 Ill. App. 3d 1051, 728 N.E. 2d 756 (1st Dist. 2000), citing *Gomien v. WearEver Aluminum, Inc.,* 50 Ill. 2d 19, 276 N.E. 2d 336 (1971).

Under § 414, an employer who retains control of any part of the work will be liable for injuries resulting from his failure to exercise control with reasonable care. *Moiseyev v. Rot's Bldg. & Dev*., Inc., 369 Ill. App. 3d 338, 860 N.E.2d 1128 (1st Dist. 2006)

The theory underlying the "retained control" exception to the general rule of non-liability is twofold: first, by retaining control over the operative details of a contractor or subcontractor's work, an owner or general contractor may become derivatively, or vicariously, liable for the contractor or subcontractor's negligence; alternatively, even in the absence of control over operative details, an owner or general contractor may be directly liable for failing to exercise actual control with reasonable care. *Cochran v. George Sollitt Constr. Co*., 358 Ill. App. 3d. 865, 832 N.E. 2d 355 (1st Dist. 2005).