CHAPTER 10

Workers' Injuries*

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¶ 10.01. Introduction

This chapter discusses claims which an injured construction worker may bring against participants in the construction project other than his employer. In

* This chapter was originally prepared by Ira P. Gould, Holleb & Coff, Chicago, Illinois. Revised in 2001 by Kevin R. Sido, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Chicago, Illinois.

virtually every jurisdiction, the injured worker's common law claims against his employer are barred by a Workers' Compensation Act. These acts abolish the worker's common law or statutory tort claims against his employer and grant him instead an administrative mechanism to recover compensation without the burden of proving that the employer's negligence caused his injury. Generally speaking, a worker's compensation recovery depends on little more than proof that the injuries were employment-related. The injured worker need not prove that his employer's negligence led to his injury. However, compensation is usually limited to medical-related costs and a specified portion of the injured worker's income. Thus, the worker often does not receive full compensation for his injuries.[1]

Injured workers have made claims directly against their employers in an attempt to avoid the exclusivity or restrictions of the Workers' Compensation Acts.[2] Certain types of such claims have been successful, the results often depending on a particular jurisdiction's view of the purpose of workers' compensation generally. For example, employers have been sued successfully for breach of a duty unrelated to the employment relationship itself, often called the dual-capacity doctrine. Employers also have been sued for intentionally causing the injury. Further, courts have permitted claims made against an entity affiliated with the employer.

To circumvent the exclusive remedy effect of workers' compensation statutes, injured workers often sue participants in the construction project other than their employer.[3] The defendants in such suits are generally architects, property owners or contractors other than the employer of the injured worker. As discussed in this chapter, these claims may be within a workers' compensation statute and may otherwise have an effect on the injured employee's workers' compensation rights. For instance, employers may be subject to third party claims of contribution or indemnity made by third parties sued directly by the injured worker. The injured worker is generally allowed to recover his full damages against third parties but usually must reimburse his employer an amount equal to sums paid through worker's compensation benefits. These third-party claims are the focus of this chapter.

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[1] However, one saving proposition is that the typical worker's compensation benefit is not subject to state or federal income tax. *See* I.R.C. § 104(a)(2) (2000).

[2] *See generally* Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes,* 96 Harv. L. Rev. 1641 (1983).

[3] *See* Lurie and Stein, *Events After the Start of Construction,* 23 St. Louis U.L.J. 292, 301-302 (1979). The statutes have done little to stem the tide of litigation brought by injured workers. *See* Cutlip v. Lucky Stores, Inc., 22 Md. App. 673, 325 A.2d 432, 434 (1979) ("Pressed by those they represent, members of the legal profession during recent decades have more carefully perused disasters peripheries for contributing acts or omissions by professionals whose conduct might not measure up to an accepted standard.").

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¶ 10.02. Architect's Liability for Workers' Injuries

Construction workers injured on the job often consider their worker's compensation against their employer inadequate, and so they sue one or more third parties for their injuries. Over the past twenty-five years, architects have been among the favorite targets of injured construction workers, in part because of their dual roles in the construction process—creators of plans and supervisors of construction.[1]

As to the architect's role as a creator of plans, it has long been settled that a worker injured as a proximate result of an architect's negligence in drawing up plans is entitled to compensation from the negligent architect.[2]

However, the courts have taken sharply conflicting positions when confronted with an injured worker seeking damages from an architect based on the negligent execution of the architect's supervisory responsibilities.[3] In virtually every case

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[1] The term "architect" as used here is not limited to licensed architects, but encompasses the entire realm of design professionals who are those who design buildings and/or supervise their construction. *See* Caldwell v. Bechtel, Inc., 631 F.2d 989 n.12 (D.C. Cir. 1980). Nonetheless, expert testimony of one design profession is not necessarily applicable to another. Brennan v. St. Louis Zoological Park, 882 S.W.2d 271 (Mo. App. 1994).

[2] *See, e.g.,* Potter v. Gilbert, 130 A.D. 632, 115 N.Y.S. 425, 427, *aff'd,* 196 N.Y. 576, 90 N.E. 1165 (1909), where the court held:

> An architect, in preparing plans and specifications for the construction of a building under employment by the owner, is following an independent calling and is doubtless responsible for any negligence in failing to exercise the ordinary skill of his profession which results in the erection of an unsafe building whereby any one lawfully on the premises is injured. . . .

Wagner v. Grannis, 287 F. Supp. 18, 27 (W.D. Pa. 1968) (design negligently failed to provide support for free-standing wall which collapsed and killed worker). *See also* Transportation Ins. Co. v. Hunzinger Constr. Co., 179 Wis. 2d 281, 507 N.W.2d 136 (1993); Moloso v. State, 644 P.2d 205, 217 (Alaska 1982) (plans for road construction negligently failed to provide for shoring up of cliff face causing fatal rock slides); Evans v. Howard R. Green Co., 231 N.W.2d 907, 913 (Iowa 1975) (negligent design of sewage treatment plant caused death of two workers); Holt v. A.L. Salzman & Sons, 88 Ill. App. 2d 306, 232 N.E.2d 537, 544 (1967) (negligent design of steel beam supports); Mallow v. Tucker, Sadler & Bennett, Architects & Eng'rs, Inc., 245 Cal. App. 2d 700, 54 Cal. Rptr. 174, 176 (1966) (negligently prepared plans failed to note presence of high voltage lines).

For a discussion of the architect's liability stemming from defective plans, *see* Annot., Architect's Liability for Personal Injury or Death Allegedly Caused by Improper or Defective Plans or Design, 97 A.L.R.3d 455 (1980).

However, if the worker cannot demonstrate that the architect's plans were followed, then there can be no recovery. Stated differently, if there has been a deviation from the plans, however negligently the plans themselves might have been drawn, the deviation breaks the chain of causation against the architect. Lake v. McElfatrick, 139 N.Y. 349, 34 N.E. 922 (1893); Bayne v. Everham, 197 Mich. 181, 163 N.W. 1002 (1917); Goette v. Press Bar and Cafe, Inc., 413 N.W.2d 854 (Minn. App. 1987); Covil v. Robert & Co. Associates, 112 Ga. App. 163, 144 S.E.2d 450 (1965).

[3] *Compare* cases cited in ¶ 10.02[1][a], n.16 *infra,* holding for the injured worker *with* the cases cited ¶ 10.02[1][a], n.19 *infra,* holding for the architect.

the conflict has centered on whether the architect has a duty to workers to supervise the construction so as to ensure that the general contractor and sub-contractors perform their operations safely.[4] Where such a duty is found to exist, whether imposed by the common law or created by contract or statute, the injured worker is allowed to present his allegations of the architect's negligence to the jury. Where the duty is found to be absent, the architect is absolutely protected because, in the absence of duty, there can be no negligence.

Thus, any attempt to determine the potential liability of an architect must focus on the question of duty.

[1]—Analysis of Architect's Duty to Workers

[a]—Duty Arising From Contract

An analysis of what duty, if any, an architect owes to construction workers to insure the safety of construction sites must focus on the construction contract, for it is the architect's negligent breach of his contractual responsibilities as supervisor or inspector that lies at the heart of the injured worker's claim.[5] These

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[4] The seminal cases examining the liability of architects to workers characterize the issue not as whether there exists a duty owed to the worker but, rather, the extent of that duty. Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967) (architect liable to injured worker); Day v. National United States Radiator Corp., 241 La. 288, 128 So. 2d 660 (1961) (architect not liable); Erhart v. Hummonds, 232 Ark. 133, 334 S.W.2d 869 (1960) (architect liable to injured worker). In later cases the terminology of a duty/no duty dichotomy came into use when assessing the responsibilities of the architect.

For a discussion of liability based on the architect's failure to supervise, *see* Annot., Liability to One Injured in Course of Construction, Based upon Architect's Alleged Failure to Carry out Supervisory Responsibilities, 59 A.L.R.3d 869 (1974).

[5] Generally, a worker may base his suit on the architect's negligent performance of his contractual duties notwithstanding the fact that the worker was not a party to the contract giving rise to those duties. Swarthout v. Beard, 33 Mich. App. 395 190 N.W.2d 373, 376, *rev'd on other grounds,* 388 Mich. 637, 202 N.W.2d 300 (1971) ("It is not necessary that there be a contractual relationship before a duty of care arises"); Geer v. Bennett, 237 So. 2d 311, 316 (Fla. Dist. Ct. App. 1970) ("Privity of contract is not a prerequisite to liability"); Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630, 637 (1967). *See* Wenzel v. Boyles Galvanizing Co., 920 F.2d 778 (11th Cir. 1991) (architect, acting as both architect and construction manager, had contractually assumed responsibility for site safety when acting in its capacity as construction manager). However, in determining whether any duty exists at all, the architect's contract with his client is examined to determine whether or not a tort duty exists. If the architect never undertook the duty which is claimed to have been breached, then no action will lie. *See* Ferentchak v. Village of Frankfort, 105 Ill. 2d 474, 475 N.E.2d 822, 826 (1985).

Cf. Northern Ind. Pub. Serv. Co. v. East Chicago Sanitary Dist., 590 N.E.2d 1067 (Ind. Ct. App. 1992) (neither architect nor engineer had a contractual obligation in regard to on-site safety and thus neither had a duty to injured workers).

But see Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1208 (9th Cir. 1979) (court held

responsibilities flow not only from the contract between the architect and the owner,[6] but in most cases also from the contract between the general contractor and the owner.[7]

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that the injured worker could not rely on the contract between the owner and the architect unless he could show that the parties intended him to be a third-party beneficiary of the contract); Zukowski v. Howard, Needles, Tammen & Bergendoff, Inc., 657 F. Supp. 926, 928 (D. Colo. 1987) ("[c]onstruction workers on a viaduct construction project . . . are not express or implied direct third-party beneficiaries to the contract between the State of Colorado and the defendant consulting engineering firm"); Sherwood v. Omega Constr. Co., 657 F. Supp. 345 (S.D.N.Y. 1987) (in action by injured worker, facts stated were insufficient to establish third-party liability for project engineers).

See also Conti v. Pettibone Cos., 111 Misc. 2d 772, 445 N.Y.S.2d 943, 945-946 (Sup. Ct. 1981) ("It is well established that the law of New York does not impose liability upon an engineer for an injury sustained by a worker at a construction site unless . . . such liability is imposed by a clear contractual provision, creating an obligation explicitly running to and for the benefit of the worker.").

For a discussion of the extreme protection New York law gives the architect, *see* ¶ 10.02[1][b], n.30 *infra,* and ¶ 10.02[3], n.60 *infra,* and accompanying text. This third-party beneficiary approach, which confers virtual immunity on the architect because workers are usually no more than incidental beneficiaries to the architect-owner contract, does not appear to have gained any widespread acceptance in the context of injured worker cases.

[6] *See also* Pugh v. Butler Tel. Co., 512 So. 2d 1317 (Ala. 1987) (where an engineer's duty under its contract with the owner was to ensure the contractor's compliance with the plans and specifications and the terms of the construction contract for the benefit of the owner, the engineer was not responsible for overseeing the safety on the job and could not be held liable for the death of an employee of the contractor).

[7] Courts frequently refer to the general contractor-owner contract in ascertaining the duties of the architect. *See, e.g.,* Hanna v. Huer, Johns, Neel, Rivers & Webb, 233 Kan. 206, 662 P.2d. 243, 245 (1983) (architect's oral contract with owner to "get it built" incorporated the general contractor-owner agreement); Swarthout v. Beard, 33 Mich. App. 395, 190 N.W.2d 373, 375 (1971), *rev'd on other grounds,* 388 Mich. 637, 202 N.W.2d 300 (1972) (fact that architect was not an "outsider" to general contractor-owner agreement allows the agreement to be used in ascertaining architect's duty); Luterbach v. Mochon, Schutte, Hackworthy, Juerisson, Inc., 84 Wis. 2d 1, 267 N.W.2d 13, 14 (1978) (architect-owner contract made reference to, and required architect to assist in drafting of, general contractor-owner agreement; therefore, "we should consider the owner-contractor agreement together with the owner-architect agreement in determining the architect's duty"); Reber v. Chandler High School Dist. No. 202, 13 Ariz. App. 133, 474 P.2d 852, 855 (1970) (architect's drafting of general contractor-owner agreement renders such agreement relevant to the resolution of ambiguities regarding the architect's supervisory duties under the architect-owner contract); Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630, 635 (1967) (use of general contractor-owner contract to determine architect's duties without comment as to the basis for doing so).

But see Marshall v. Port Auth. of Allegheny County, 106 Pa. Commw. 131, 525 A.2d 857 (1987), *aff'd,* 524 Pa. 1, 568 A.2d 931 (1990); Graham v. Abe Mathews Eng'g, 358 N.W.2d 131 133 (Minn. Ct. App. 1984) ("[The engineer's] duty cannot be inferred from language in a contract to which it was not a party, particularly when language from its contract with [the owner] creates no such duty."); Walker v. Wittenberg, Delony & Davidson, Inc., 241 Ark. 525, 412 S.W.2d 621 (1966), *on reh'g,* 242 Ark. 97, 412 S.W.2d 621, 630 (1967) (rejecting use of general contractor-owner contract because "the presumption is the parties contract only for themselves").

Virtually all construction contracts confer upon the architect, as the owner's representative, the responsibility of generally supervising, observing or inspecting the construction work. For example, the widely used American Institute of Architects contract provides that the architect is responsible for "administration of the Contract" and for periodic on-site visits to "become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed . . . to endeavor to guard the Owner against defects and deficiencies in the Work, and . . . to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents."[8]

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[8] American Institute of Architects Document B141-1997, Clauses 2.6.1.1 and 2.6.2.1 (AIA copyrighted material has been reproduced with the permission of the American Institute of Architects under permission number 85059. Further reproduction is prohibited.). This language is the latest of several attempts the AIA has made to avoid contractual provisions that could be used to impose liability for worker injuries on its members. Prior to the seminal cases that examined the duties of the supervising architect to the injured worker, Day v. National United States Radiator Corp., 241 La. 288, 128 So. 2d 660 (1961) (no duty) and Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967) (duty), the standard form contract published by the AIA used the term "supervision" to describe the architect's responsibilities. In response to the central role the term "supervision" played in these cases, the AIA first replaced "supervision" with "observation," and later with the currently-used "administration."

See Estate of Reyes v. Parsons Brinckerhoff Constr. Servs., Inc., 784 So. 2d 514 (Fla. Dist. Ct. App. 2001), in AIA Citator, *infra*, Digest No. 200110; Fisher v. M. Spinelli & Sons Co., 1999 Mass. Super. LEXIS 60 (Super. Ct. Feb. 5, 1999), in AIA Citator, *infra*, Digest No. 99022; C.L. Maddox, Inc. v. Benham Group, Inc., 88 F.3d 592 (8th Cir. 1996), in AIA Citator, *infra,* Digest No. 96020; Graham v. Freese & Nichols, Inc., 927 S.W.2d 294 (Tex. App. 1996), in AIA Citator, *infra*, Digest No. 96027; Peck & Horrocks Eng'rs, Inc., 106 F.3d 949 (10th Cir. 1997), in AIA Citator, *infra*, Digest No. 97020; Nicholson v. Turner/Cargile, 107 Ohio App. 3d 797, 669 N.E.2d 529 (1995), in AIA Citator, *infra*, Digest No. 95052; Amazon v. British Am. Dev. Corp., 216 A.D.2d 702, 628 N.Y.S.2d 204 (1995); Ivanov v. Process Design Assocs., 267 Ill. App. 3d 440, 204 Ill. Dec. 810, 642 N.E.2d 711 (1993), *modified, reh'g denied*, 1993 Ill. App. LEXIS 1572 (Ill. App. Ct. Oct. 12, 1993), in AIA Citator, *infra*, Digest No. 93015a; Romero v. Parkhill, Smith & Cooper, Inc., 881 S.W.2d 522 (Tex. Ct. App. 1994), in AIA Citator *infra*, Digest No. 94045; Frampton v. Dauphin Distribution Servs. Co., 436 Pa. Super. 486, 648 A.2d 326 (1994), *appeal denied*, 657 A.2d 491 (Pa. 1995), in AIA Citator, *infra*, Digest No. 94034; Juno Indus., Inc. v. Heery Int'l, 646 So. 2d 818 (Fla. Dist. Ct. App. 1994), in AIA Citator, *infra,* Digest No. 94038; Padgett v. CH2M Hill Southeast, Inc., 866 F. Supp. 563 (M.D. Ga. 1994), in AIA Citator, *infra*, Digest No. 94044; Carvalho v. Toll Bros. & Developers, 278 N.J. Super. 451, 651 A.2d 492 (App. Div. 1995), *aff'd, remanded*, 142 N.J. 565, 675 A.2d 209 (1996), in AIA Citator, *infra,* Digest No. 95004; Yow v. Hussey, Gay, Bell & DeYoung Int'l, Inc., 201 Ga. App. 857, 412 S.E.2d 565 (1991), *cert. denied*, 1992 Ga. LEXIS 116 (Ga. 1992), *remanded, sub nom.* Hussey, Gay, Bell & DeYoung Int'l, Inc. v. Clay-Ric, Inc., 212 Ga. App. 53, 441 S.E.2d 274 (1994); Case v. Midwest Mechaical Contractors, Inc., 876 S.W.2d 51 (Mo. Ct. App. 1994), in AIA Citator *infra*, Digest No. 94005; Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450 (Mo. Ct. App. 1993), in AIA Citator, *infra*, Digest No. 93005; Dillard v. Shaughnessy, Fickel & Scott, Architects, 864 S.W.2d 368 (Mo. Ct. App. 1993), *appeal after remand,* 943 S.W.2d 711 (Mo. Ct. App. 1997), in AIA Citator, *infra*, Digest No. 93033.

Injured workers have relied unsuccessfully upon this supervisory responsibility in bringing claims against architects, claiming that it requires the architect to insure that the contractor is complying with his contractual responsibilities to the owner. Since one of the contractor's major responsibilities is to maintain a safe work site,[9] any failure of the contractor to maintain a safe work site, say the workers, is also a failure of the architect to supervise the work site.

The courts have unanimously rejected this type of argument. They have held that the architect's general responsibility of supervision or inspection does not, by itself, impose upon the architect a duty to ensure the safety of the workplace. Rather, as one court has stated: "The general duty to 'supervise the work' merely creates a duty to see that the building when constructed meets the plans and specifications contracted for."[10] The architect's duty to ensure that the project

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[9] *See, e.g.,* American Institute of Architects Document A201-1997, General Conditions of the Contract for Construction, Subparagraphs 10.1.1 and 10.2.1.

> 10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.
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> 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
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> .1 employees on the Work and other persons who may be affected thereby;
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> .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off on the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
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> .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

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See Fisher v. M. Spinelli & Sons Co., 1999 Mass. Super. LEXIS 60 (Super. Ct. Feb. 5, 1999), in AIA Citator, *infra,* Digest No. 99022; Yocum v. City of Minden, 649 So. 2d 129 (La. Ct. App. 1995); Englehart v. OKI Am., Inc., 209 Ga. App. 151, 433 S.E.2d 331 (1993), *cert. denied*, 1193 Ga. LEXIS 1065 (Ga. Ct. App. Nov. 5, 1993), in AIA Citator, *infra*, Digest No. 93034; Henry Roy Portwood, Inc. v. Smith, 207 Ga. App. 338, 429 S.E.2d 143 (1993); Yow v. Hussey, Gay, Bell & DeYoung Int'l, Inc., 201 Ga. App. 857, 412 S.E.2d 565 (1991), *cert. denied*, 1992 Ga. LEXIS 116 (Ga. 1992), *remanded, sub nom.* Hussey, Gay, Bell & DeYoung Int'l, Inc. v. Clay-Ric, Inc., 212 Ga. App. 53, 441 S.E.2d 274 (1994); Busick v. Streator Township High Sch. Dist. No. 40, 234 Ill. App. 3d 647, 175 Ill. Dec. 423, 600 N.E.2d 46 (1992).

[10] Miller v. Dewitt, 37 Ill. 2d 273, 226 N.E. 2d 630, 638 (1967).

Accord Baker v. Sweet Assocs., 278 A.D.2d 615, 717 N.Y.S.2d 426 (2000), in Construction Law Digest, April, 2001, Digest No. D001091; Hanna v. Huer, Johns, Neel, Rivers & Webb, 233 Kan. 206, 662 P.2d 243, 252 (1983); Walsh v. Grant Dev. Co., 120 Misc. 2d 493, 466 N.Y.S.2d 112, 114-115 (N.Y. Sup. Ct. 1983); Vorndran v. Wright, 367 So. 2d 1071 (Fla. Dis. Ct. App. 1979); Luterbach v. Mochon, Schutte, Hackworthy, Juerisson, Inc., 84 Wis. 2d 1, 267 N.W.2d

when completed conforms to the design is owed solely to the owner; it creates no duty inuring to the benefit of the worker.

To avoid this result, workers have argued that when the architect has a right under the contract to directly influence the contractor's operations, the architect's contractual duty to ensure that the contractor complies with his contract imposes a duty on the architect to ensure a safe workplace.[11] This position has been

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13, 15 (1978); Reber v. Chandler High School Dist. No. 202, 13 Ariz. App. 139, 474 P.2d 852, 855 (1970); Day v. National United States Radiator Corp., 241 La. 288, 128 So. 2d 660, 666 (1961).

See also Satterlund v. Murphy Bros', Inc., 895 F. Supp. 240 (D. Minn. 1995); Jones v. James Reeves Contractors, Inc., 701 So. 2d 774 (Miss. 1997), *reh'g denied,* 1997 Miss. LEXIS 685 (Miss. Nov. 20, 1997); Kaltenbrun v. City of Port Washington, 156 Wis. 2d 634, 457 N.W.2d 527 (1990) (subcontractor's employee could not maintain a negligence action against the architect where the architect's contract with the owner did not create a duty to injured workers); Young v. Eastern Eng'g & Elevator Co., 381 Pa. Super. 428, 554 A.2d 77 (1989) (where architect was to make periodic visits to site to familiarize himself generally with the progress and quality of the work and determine that building, when completed, met the plans and specifications, court held that, absent an undertaking by the architect of responsibilities of supervision of construction and maintenance of safe conditions, the architect had no duty to notify workers of hazardous conditions).

Such an interpretation of the general duty of supervision is further supported by the language of the AIA standard form contract which provides that the architect's duty to observe does not require him to make "exhaustive or continuous on-site inspections to check the quality or quantity of the Work." American Institute of Architects Document B141-1997, Clause 2.6.2.1 (AIA copyrighted material has been reproduced with the permission of the American Institute of Architects under permission number 85059. Further reproduction is prohibited.).

[11] *See* Bauer v. Howard S. Wright Constr. Co., 101 Wash. App. 1046, (2000), in Construction Law Digest, November, 2000, Digest No. D000655; LeRoy v. Hartford Steam Boiler Inspection & Ins. Co., 695 F. Supp. 1120 (D. Kan. 1988).

The notion that the architect's duty of supervision to ensure a safe work place arises only when he has some ability to influence the contractor's operations may be analogized to the general rule that an employer who retains control over the work of an independent contractor may be liable to one injured by the negligence of the independent contractor. Restatement (Second) of Torts § 414:

> 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.

Although this section is usually applied only to those cases where the owner or general contractor has control of the sub-contractor, the underlying rationale that the right to control another's actions creates a duty to those who could be injured by the other's action appears to be equally applicable to the architect. However, no court addressing the issue of the supervisory duty of the architect has referred to the Restatement. *But cf.* Weber v. Northern Ill. Gas Co., 10 Ill. App. 3d 625, 295 N.E.2d 41, 50 (1973) (adopting Restatement (Second) of Torts § 414 in a case against the general contractor. In dictum, the court stated, "[T]he rule is applicable to *anyone with authority* who entrusts work to an independent contractor, *e.g.,* an owner, general contractor or architect.") (emphasis in original.)

generally rejected and several courts have harshly criticized the logical leap required to "parlay general duties of supervision into a duty to insure the safety of construction."[12]

However, a minority of courts have agreed with this position, relying on the architect's contractual right to stop the contractor's work.[13] Usually, the architect

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[12] Davis v. Lenox School, 151 A.D.2d 230, 541 N.Y.S.2d 814 (1989). *See* Frampton v. Dauphin Distrib. Servs. Co., 648 A.2d 326 (Pa. Super. Ct. 1994), *appeal denied*, 657 A.2d 491 (Pa. 1995) (where contract only required the architect to design the project, the architect was not responsible for worker safety); Mudgett v. Marshall, 574 A.2d 867 (Me. 1990) (engineer not liable for workers' injuries where workers failed to prove that engineer had a duty to review contractor's computations for errors).

Of course, if the contract explicitly puts the responsibility for work site safety on supervising architect, there is no need to engage in the interpretative gymnastics found in the decisions imposing a duty based on the right to stop work, discussed ns. 13–16 *infra,* and accompanying text.

In finding a supervising engineer liable to an injured construction worker, the court in Simon v. Omaha Pub. Power Dist., 189 Neb. 183, 202 N.W.2d 157 (1972) stated:

> We observe that the primary duty of architects may usually be only to assure to the owner that before final acceptance the work is being completed in accordance with the plans and specifications; and that in this case, by written contract, [the engineer] assumes much more. . . .
>
> It assumed the duties of . . . "inspect[ion] to protect the [owner's] interest in safety."

202 N.W.2d at 168 (quoting contract).

See also Caldwell v. Bechtel, Inc., 631 F.2d 989, 994–995 (D.C. Cir. 1980) (contract required the defendant to provide "safety engineering" services and to ensure that all contractors complied with the safety rules promulgated by the owner); Brooks v. A. Gatty Serv. Co., 127 A.D.2d 553, 511 N.Y.S.2d 642 (1987) (where defendant engineering firm's contract with owner required it to insure that project was "consistent with plans and specifications," summary judgment was properly entered for firm because engineer did not commit an affirmative act of negligence or undertake liability for injuries of owner's employees by a clear contractual provision); Walters v. Landis Constr. Co., 522 So. 2d 1306 (La. Ct. App. 1988) (engineering firm undertook no contractual duty to enforce OSHA, as its job was solely to insure the building was built according to plans and specifications, not to oversee the contractor's safety program); Hamby v. High Steel Structures Inc., 134 A.D.2d 884, 521 N.Y.S.2d 926 (4th Dept. 1987) (engineer had no common law duty to provide a safe work site, and contract did not require engineer to supervise or establish safety procedures); Young v. Eastern Eng'g & Elevator Co., 554 A.2d 77 (Pa. Super. Ct. 1989) (architect has no duty for safety at site unless contractor's conduct indicates the undertaking of that duty); Philo, *Revoke the Legal License to Kill Construction Workers,* 19 De Paul L. Rev. 1 (1969); Comment, *Architects' Liability for Construction Site Accidents,* 30 U. Kan. L. Rev. 429 (1982); Block, *As the Walls Came Tumbling Down: Architects' Expanded Liability Under Design/Build/ Construction Contracting,* 17 J. Marshall L. Rev. 1, 41–43 (1984).

Cf. Smith v. Henger, 226 S.W.2d 425, 430 (Tex. 1950) (Defendant, although labelled general contractor, was hired solely to supervise the work. He testified that the contract provided that it was "my duty to see that everything was as safe as could be. . . . " Thus, the court found him liable to the injured worker.).

[13] Although courts most frequently find duty in the right to stop work, this right is not essential

has the right to stop the work whenever necessary for the proper execution of the construction contract.[14] While this authority does not allow the architect to dictate the actual means of construction that a contractor must utilize, a few courts have interpreted it as giving him the "right to insist upon a safe and adequate use of that method."[15] In other words, the right to stop the work gives the architect the power to influence the contractor's operations which, in turn, gives rise to the duty to exercise that power to protect the worker by stopping the work until all unsafe conditions are corrected.[16]

In sum, most courts have held that the architect is not responsible for workers' safety[17] unless the contract expressly requires the architect either to supervise

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to a finding of duty. Several courts have found the duty in the architect's responsibility to supervise for safety without mentioning the right to stop work. Simon v. Omaha Pub. Power Dist., 189 Neb. 183, 202 N.W.2d 157 (1972) (focusing on contractual responsibility to ensure safety); Geer v. Bennett, 237 So. 2d 311 (Fla. Dist. Ct. App. 1970); *contra* Vorndran v. Wright, 367 So. 2d 1070 (Fla. Dist. Ct. App. 1979), *cert. denied,* 378 So. 2d 350 (Fla. 1979).

[14] The standard form contract clause that the courts have relied upon gave the architect "the authority to stop the work whenever such stoppage may be necessary to ensure the proper execution of the contract." Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630, 638 (1967); Erhart v. Hummonds, 232 Ark. 133, 334 S.W.2d 869, 872 (1960).

[15] Miller v. DeWitt, 37 Ill. 2d 273, 276 N.E.2d 630, 638 (1967).

[16] Miller v. DeWitt, 37 Ill. 2d 273, 276 N.E.2d 630, 638 (1967). ("[T]hey have the right and corresponding duty to stop the work until the unsafe condition has been remedied.")

Accord Associated Eng'rs, Inc. v. Job, 370 F.2d 633, 645 (8th Cir. 1966), *cert. denied,* 389 U.S. 823 (1967) (applying South Dakota law); Swarthout v. Beard, 33 Mich. App. 395, 190 N.W.2d 373 (1971), *rev'd on other grounds,* 388 Mich. 637, 202 N.W.2d 300 (1972); Erhart v. Hummonds, 232 Ark. 133, 134 S.W.2d 869, 872 (1960).

[17] McAninch v. Robinson, 942 S.W.2d 452 (Mo. Ct. App. 1997); Luterbach v. Mochon, Schutte, Hackworthy, Juerisson, Inc., 84 Wis. 2d 1, 267 N.W.2d 13, 15 (1978) (rejecting *Miller v. DeWitt*, ns.14, 15, 16 *supra*); Jones v. Hibbert Corp., No. A–5919–87T5 (N.J. Super. Ct. App. Div. Apr. 21, 1989) (per curiam), *appeal denied sub nom.* Jones v. Grand Court Urban Renewal Assocs., No. 30,504 (N.J. Oct. 17, 1989) (architect could be held liable only if he issued specific instructions concerning the project or if he had been present at the demolition in order to ensure that it was done in a safe and prudent manner).

Likewise, in Reber v. Chandler High School Dist. No. 202, 13 Ariz. App. 133, 474 P.2d 852 (1970), the court attacked *Miller v. DeWitt*, stating:

> In our opinion, these cases have disregarded fundamental contractual principles in attempting to parlay general inspection and supervision clauses which give the owner or architect a *right* to stop observed unsafe construction processes into a *duty* which is neither consistent with generally accepted usage nor contemplated by the contract or the parties.

474 P.2d at 854–855 (emphasis in original).

See also Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630, 643 (1967) (House, J. dissenting) ("[T]o parlay that 'right' [to stop work] into a duty is neither consistent with generally accepted usage nor contemplated by the contract").

for safety purposes[18] or to control the means and methods of the contractor on a day-to-day basis.[19]

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[18] *See* n.12, *supra*; Jones v. James Reeves Contractors, Inc., 701 So. 2d 774 (Miss. 1997), *reh'g denied*, 1997 Miss. LEXIS 685 (Miss. Nov. 20, 1997).

[19] The language most often relied upon by courts espousing the rule that the contract must give the architect control over the means and methods of construction is found in Day v. National United States Radiator Corp., 241 La. 288, 128 So. 2d 660, 666 (1961):

> Under the contract [the defendant] architects had no duty to supervise the contractor's method of doing the work. In fact, as architects they had no power of control over the contractor's method of performing his contract, unless such power was provided for in the specifications.
>
> . . . .
>
> Thus, we do not think that under the contract in the instant case the architects were charged with the duty or obligation to inspect the methods employed by the contractor or the subcontractor in fulfilling the contract or the subcontract. Consequently we do not agree with the Court of Appeal that the architects had a duty to [the deceased worker].

See Makinen v. PM P.C., 893 P.2d 1149 (Wyo. 1995); Rodriguez v. Universal Fastenings Corp., 777 S.W.2d 513 (Tex. Ct. App. 1989) (where contract clearly provided that the engineer was not responsible for the contractor's means, methods or procedures of construction, or the safety precautions and programs incident to them, the court found that subcontractor's employee failed to prove as a matter of law that engineer was negligent).

See also Baker v. Pidgeon Thomas Co., 422 F.2d 744, 746 (6th Cir. 1970) (no duty on architect arose from contract which did "not require the firm to maintain a constant day-to-day superintendence of the general contractor and the sub-contractor"); Hanna v. Huer, Johns, Neel, Rivers & Webb, 233 Kan. 206, 662 P.2d 243, 248 (1983) (quoting contract language that "the architect will not be responsible for construction means, methods, sequences or procedures . . ."); Waggoner v. W & W Steel Co., 657 P.2d 147, 150–151 (Okla. 1983) (no duty on architect because construction methods were "the duty of the contractor, not the architect"); Bozung v. Condominium Builders, Inc., 42 Wash. App. 442, 711 P.2d 1090 (1985) (designer had no reason to know condition of land involved unreasonable risk of harm to subcontractor's employees and had no control or right to control method of work, especially since designer was not knowledgeable about excavating and earth moving business); Vorndran v. Wright, 367 So. 2d 1070, 1071 (Fla. Dist. Ct. App. 1979) ("[The architect] has no control over the method of construction utilized . . . [hence] the architect cannot be held liable for any failure of the contractor to comply with the required safety regulation."); Krieger v. J.E. Greiner Co., 282 Md. 50, 382 A.2d 1069, 1079 (1978) ("[T]he duties of the engineers do not include supervision of construction methods or supervision of the work for compliance with safety laws and regulations. Hence, the Kreigers may not recover from the engineers based on the contract between the owner and its engineer.); Wheeler & Lewis v. Slifer, 195 Colo. 291, 297 577 P.2d 1092 (1978) (architects not liable because "the terms of both contracts are . . . insufficient to support a conclusion that the parties intended that the architects have the duty to supervise the method and manner of construction . . ."); Walers v. Kellam & Foley, 360 N.E.2d 199, 210–211 (Ind. Ct. App. 1967) ("In holding that the various contract provisions do not establish, prima facie, a duty of supervision or control with respect to installation methods, we adopt the reasoning of the Louisiana Supreme Court in a similar case, Day v. National United States Radiator Corp. . . ."); Brown v. Gamble Constr. Co., 537 S.W.2d 685, 687 (Mo. Ct. App. 1976) (no duty on architect because he was not responsible for construction means and methods); Seeney v. Dover Country Club Apartments, Inc., 318 A.2d 619, 624 (Del. Super. Ct. 1974) ("[B]efore an architect can be held liable to the employee of an independent contractor, it must

This lack of unanimity among the courts over whether liability to workers could be imposed on the architect through his contract with the owner brought forth a swift reaction from the American Institute of Architects (AIA). The AIA attempted to reduce the threat of liability to its members by changing the language of its standard form contract. The 1987 edition of the architect-owner contract disclaims architect control over the means and methods of construction, architect responsibility for safety precautions and programs, and architect responsibility for the contractor's acts, omissions or failure to comply with the contract.[20]

In addition to this general disclaimer, the AIA has eliminated the architect's right to stop the work and has replaced it with the "authority to reject Work which does not conform to the Contract Documents."[21] The few cases that have

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be first established that the architect has a duty to supervise the method or manner of doing the details of the work being performed by the contractor."); Parks v. Atkinson, 19 Ariz. App. 111, 505 P.2d 279, 283 (1973) ("[If] the architect has no duty to supervise the procedures to be utilized [by the contractor] to achieve the result, he cannot be held liable."); Reber v. Chandler High School Dist. No. 202, 13 Ariz. App. 133, 474 P.2d 852, 854 (1970) (The contract "must give the [architect] control over the *method or manner of doing the details of the work* over and above the supervision and inspection rights generally reserved to make certain that the *results obtained* conform to the specifications and requirements of the construction contract.") (emphasis in original); Walker v. Wittenberg, Delony & Davidson, Inc., 241 Ark. 525, 412 S.W.2d 621 (1966), *on reh'g,* 242 Ark. 97, 412 S.W.2d 626, 630–631 (1967) (adopting the Day v. National United States Radiator Corp. rule and thus finding no duty because the circumstances surrounding the oral contact between the architect and the owner did not show an agreement to exercise day-to-day control over the contractor).

But cf. Bauer v. Howard S. Wright Constr. Co., 101 Wash. App. 1046 (2000), in Construction Law Digest, November, 2000, Digest No. D000655 (court denied engineer's motion for summary judgment where the design specifications contained means and methods of construction); Gross v. Kenton Structural & Ornamental Ironworks, 581 F. Supp. 390, 397–398 (S.D. Ohio 1984) (applying Ohio law, the court denied summary judgment for the architect and held that it is for the trier of fact to determine, from all the evidence, including the contract, the extent of the architect's supervisory duties).

[20] AIA Document B141, Subparagraph 2.6.6 (1987 ed.); AIA Document B141-1997, Clause 2.6.2.2.

See Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450 (Mo. Ct. App. 1993), in AIA Citator, *infra*, Digest No. 93005.

The sole contractual responsibility for worker safety remains with the contractor. *See* n.9, *supra*.

[21] AIA Document B141, Subparagraph 2.6.11 (1987 ed.); AIA Document B141-1997, Clause 2.6.2.5. *Cf.* AIA Document A201-1997, Subparagraph 4.2.6, which contains the same "right to reject work" language found in AIA Document B141-1997, but adds the following disclaimer:

> However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

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addressed the import of this language have held that it significantly reduces the architect's rights under the contract and, therefore, obviates the corresponding duty. The AIA's current form architect-owner contract, then, greatly reduces the likelihood that even the most ardently pro-worker court will find a contractually-based duty on an architect to provide a safe work place.[22]

An important by-product of the AIA architect-owner contract and, in particular, its deletion of stop-work provisions is that the architect can no longer be as actively involved in the transformation of his ideas from the drawing board into reality.[23] Thus, the architect has lost what has been described as his most effective method of ensuring construction site safety.[24] This is important because, regardless of his contractual responsibilities, the architect may still owe a duty to workers under the common law or statutory theories discussed in the following sections.

See Lurie & Stein, *Events After the Start of Construction,* 23 St. Louis U.L.J. 292, 296–299 (1979). *See also* Diomar v. Landmark Assocs., 81 Ill. App. 3d 1135, 1142, 401 N.E.2d 1287 (1980) ("[W]e do not see how the right to 'reject' work which fails to conform to contract documents can be interpreted as the right to stop work when hazardous conditions, manner or means of construction exist"); Fruzyna v. Walter C. Carlson Assocs., 78 Ill. App. 3d 1050, 398 N.E.2d 60, 66 (1979):

> It is proper to infer the right to stop the work for dangerous construction practices from the right to stop work not conforming to the contract. However, this court may not infer the right to stop work from the right to reject work. The authority to stop work must be clear and not assumed.

[22] The use of AIA form contracts, however, does not guarantee architectural immunity. The architect's oral or written representations may modify the contract so as to impose a duty to the workers upon the architect. *See, e.g.,* Erhart v. Hummonds, 232 Ark. 133, 334 S.W.2d 869 (1960), wherein the architect orally agreed to undertake general supervision and direction of the construction work. This assumption of supervisory responsibility, among other things, led the court to impose liability on the architects.

Moreover, mere conduct on the part of the architect could lead a court to find that the architect's duties have been expanded beyond those which are imposed by the contract. *See* ¶ 10.02[1][b], n.25 *infra* and accompanying text.

[23] "Once towering over the chain of command, demanding authority to control the work of virtually all who breathed life into their designs, architects now have withered into the shadows (or so they allow it to seem), leaving to owners the task of overseeing builders and recasting themselves primarily as advisers." Davidson, *The Liability of Architects,* 13 Trial 20 (June 1977):

For a discussion of the effects of the changes in contractual language on the traditional role of the architect in the construction process, see Sweet, *The Architectual Profession Responds to Construction Management and Design-Build: The Spotlight on AIA Documents,* 46 Law and Contemporary Problems 69, 71 (1983).

[24] J. Acret, Architects and Engineers (2d ed. 1984).

[b]—Duty Arising From The Architect's Conduct, Knowledge or Status

An architect's liability to an injured worker may be based on a duty arising independent of the architect's contractual responsibilities. This duty usually will arise from the architect's activities and conduct on the construction site, and this may involve either nonfeasance or misfeasance. For the most part, the legal theories that create this duty arise from fundamental tort law concepts that are not unique to the construction industry or to architects in particular.

The architect may assume a continuing duty to the worker to ensure workplace safety by voluntarily undertaking supervisory actions related to safety.[25] Even a minimal concern for safety that manifests itself in action may create a duty on the architect to continue undertaking safety responsibilities that are not otherwise contractually required of him.[26] Where such a duty is found, the architect's negligent failure to maintain safety will result in liability to the injured worker. The architect may also owe a duty to workers when he has actual knowledge of a dangerous condition in the workplace.[27] New York is the only

[25] Deyo v. County of Broome, 225 A.D.2d 865, 638 N.Y.S.2d 802 (1996); Giordano v. Seeyle, Stevenson & Knight, Inc., 216 A.D.2d 439, 628 N.Y.S.2d 373 (1995) (engineer not liable in negligence to worker where engineer did not exercise control over the site); Krieger v. J.E. Greiner Co., 282 Md. 50, 382 A.2d 1069, 1081 (1978) (Levine, J. concurring in the result) (worker's allegations that architects halted construction several times to protect workers was sufficient, if true, to show that architects were under no pre-existing legal duty and had voluntarily assumed duty to ensure safety on the job site).

See also Hannah v. Huer, Johns, Neel, Rivers & Webb, 233 Kan. 206, 662 P.2d 243, 253 (1983) (court adopted rule that one who undertakes services is liable for performing them negligently but found that there was no evidence to show that the architect "by its action undertook or could have impliedly assumed responsibility for safety procedures on the job site"); Parks v. Atkinson, 10 Ariz. App. 110, 505 P.2d 279, 284 (1973) (architect did not assume duty towards worker by merely keeping daily safety log); Simon v. Omaha Pub. Power Dist., 189 Neb. 183 202 N.W.2d 157, 168 (1972) (architect owed duty to workers in part because architect had previously directed contractor to correct unsafe conditions); Reber v. Chandler High School Dist. No. 202, 13 Ariz. App. 133, 474 P.2d 852, 857 (1970) (architect not liable because there was neither a contractual duty nor "any evidence which would justify that such supervisory control was voluntarily assumed . . .").

[26] *But see* Conti v. Pettibone Cos., 111 Misc. 2d 772, 445 N.Y.S. 943, 947 (Sup. Ct. 1981) (Although "defendant [engineer] may have exercised a broader degree of supervision then was required by its contract," New York law does not impose a duty on the architect unless there is a clear expression of intent to assume the duty running towards the workers).

[27] Pfenninger v. Hunterdon Central Regional High School, 167 N.J. 230, 770 A.2d 1126 (2001) (school board not liable under retained control theory despite board's agents being on the site daily; summary judgment for architect affirmed on plaintiff's theory of negligent supervision, *distinguishing* Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 675 A.2d 209 (1996) (supervising engineer owed duty of care to construction worker where engineer was contractually responsible to monitor work progress and to order corrective measures, including safety, and was present on the site on the day of the accident and knew the trench was unshored)); Bradford v. Kupper Assocs., 283

jurisdiction in which this otherwise well-settled rule may not apply.[28]

N.J. Super. 556, 662 A.2d 1004 (App. Div. 1995), *cert. denied*, 667 A.2d 759 (N.J. 1996), *relying on* Carvalho v. Toll Bros. & Developers, 248 N.J. Super. 451, 651 A.2d 492 (App. Div. 1995), *aff'd, remanded*, 143 N.J. 565, 675 A.2d 209 (1996), in AIA Citator, *infra*, Digest No. 95004; Balagna v. Shawnee County, 233 Kan. 1068, 668 P.2d 157, 164 (1983) (Supervising engineers "had actual knowledge that the prescribed safety precautions were not being followed by the contractor at the time the tragic accident occurred. In our judgment, this created a duty for the engineer to take some reasonable action to prevent injury to the contractor's employee."); Hanna v. Huer, Johns, Neel, Rivers & Webb, 233 Kan. 206, 662 P.2d 243, 254 (1983) ("As a professional, an architect cannot stand idly by with actual knowledge of unsafe safety practices on the job site and take no steps to advise or warn the owner or contractor."); Swarthout v. Beard, 33 Mich. App. 395, 190 N.W.2d 373, 376 (1971), *rev'd on other grounds,* 383 Mich. 637, 202 N.W.2d 300 (1972) (court rejected architect's claim that even though he "may have notice of a hazard condition in the excavation, he had no duty to take official action to warn workman or to shut down the job."); *accord* Day v. National United States Radiator Corp., 241 La. 288, 128 So. 2d 660, 666 (1960) (No duty on architect because "we do not have here a case where the architects . . . had knowledge of the installations and stood by and permitted the boiler to be tested without having proper safety devices.").

But see Jones v. James Reeves Contractors, Inc., 701 So. 2d 774 (Miss. 1997), *reh'g denied,* 1997 Miss. LEXIS 685 (Miss. Nov. 20, 1997) *relying on* Young v. Eastern Eng'g & Elevator Co., 554 A.2d 77 (Pa. Super. Ct. 1989) (architect has no duty for safety at site unless contractor's conduct indicates the undertaking of that duty); Herczeg *ex rel*. Wagner v. Hampton Township Municipal Authority, 766 A.2d 866 (Pa. Super. 2001) (engineer's presence on a job site with actual knowledge of unshored trench did not give rise to a duty of care to a worker in absence of a contractual obligation or actual control over job site safety); Padgett v. CH2M Hill Southeast, Inc., 866 F. Supp. 563 (M.D. Ga. 1994) (engineer's duty to workers was limited to the contractual obligations regardless of whether engineer had knowledge of hazardous condition); Jones v. James Reeves Contractors, Inc., 701 So. 2d 774 (Miss. 1997) (architect had no duty to workers killed in trench collapse despite knowledge that site contained hazardous, unstable soil); Yow v. Hussey, Gay, Bell & DeYoung International, Inc., 201 Ga. App. 857, 412 S.E.2d 565 (1991) (despite duty of inspection, architect not liable for accident even with knowledge of dangerous condition); Belgum by and Through Belgum v. Mitsuo Kawamoto & Assocs., Inc., 236 Neb. 127, 459 N.W.2d 226 (1990) (despite knowledge of dangerous condition, architect not liable).

[28] *See* n.30 *infra.* An early New York case supports the rule that an architect's actual knowledge of hazardous conditions will create a duty on him to protect the worker from such conditions. Potter v. Gilbert, 130 A.D. 632, 115 N.Y.S. 425, *aff'd,* 196 N.Y. 576, 90 N.E. 1165 (1909). The court found the architect not liable to the injured worker but stated that a supervising architect "who knowingly permits a departure from the plans and specifications will be liable to a party injured thereby and that he would also be liable for failing to condemn any improper work which he discovers. . . ."

Over the years, however, the New York courts have eliminated this exception to their strict, pro-architect rule; absent an express contractual provision, only active misconduct can lead to liability discussed *infra,* ns.29–30 and accompanying text. *See e.g.,* Ortiz v. Uhl, 39 A.D.2d 143, 332 N.Y.S.2d 583, 588 (1972), *aff'd,* 33 N.Y.2d 989 N.Y.S.2d 353, 962 (1974) (refusing to find a duty owed by the engineers to the injured workers notwithstanding the fact that the engineers "may have had actual notice of the improper method" used by the contractor).

Cf. Welch v. Grant Dev. Co., 120 Misc. 2d 493, 466 N.Y.S.2d 112, 116-117 (Sup. Ct. 1983) (architect's actual knowledge of unsafe conditions did not create a duty to injured workers; however, it could be the foundation for owner's indemnification action against architect).

An architect's misfeasance—his active misconduct—will also create a duty to the worker.[29] All jurisdictions accept the misfeasance rule and in one jurisdiction—New York—it is practically the exclusive source of an architect's duty.[30]

The uncertainties and difficulties surrounding the duty analysis have inspired a new theory of architect duty that is based neither on the architect's contractual responsibilities nor on his conduct but rather on the status or role of the architect on the job. It is based on the fact that the architect is participating in a dangerous occupation—construction—and thus should be under a duty to protect his co-participants from harm.[31] Under this theory, all supervising architects are under

[29] *See e.g.,* Pierce v. ALSC Architects, P.S., 890 P.2d 1254 (Mont. 1995); Conti v. Pettibone Cos., 111 Misc. 2d 772, 445 N.Y.S.2d 943, 945-946 (Sup. Ct. 1981) (engineer has duty to worker if engineer's active misfeasance creates danger to worker); Day v. National United States Radiator Corp., 241 La. 288, 128 So. 2d 660, 666 (1961) (architects would owe duty to worker if they had actually inspected and approved installation which was done in a dangerous manner).

[30] New York has developed a rule which effectively provides the architect with an absolute "no duty" defense unless the architect has engaged in active misfeasance. Of course, New York will not immunize the architect from a suit by a worker based on contractual provisions explicitly putting the responsibility to maintain safety on the architect when the provisions are contained in a contract which clearly identifies the worker as a third party beneficiary. Considering the rarity of such contracts, as a practical matter, only active misfeasance will impose a duty on architects in New York.

See Conti v. Pettibone Cos., 111 Misc. 2d 772, 445 N.Y.S.2d 943, 945-946 (Sup. Ct. 1981):

> It is well established that the law of New York does not impose liability upon an engineer, who was engaged to ensure compliance with construction plans and specifications, for an injury sustained by a worker at a construction site unless active malfeasance exists or such liability is imposed by a clear contractual provision, creating an obligation running to and for the benefit of the worker.

See also Hamill v. Foster-Lipkins Corp., 41 A.D.2d 361, 342 N.Y.S.2d 539, 541 (1973) (architect can only be liable to worker for affirmative act of negligence because "it is well settled . . . that failure to perform at all is a nonfeasance which constitutes no more than a breach of contract actionable only by one in privity of contract"); Olsen v. Chase Manhattan Bank, 10 A.D.2d 539, 205 N.Y.S.2d 60, 65 (1960), *aff'd,* 9 N.Y.2d 822, 215 N.Y.S.2d 773 (1961) ("On the evidence presented [the defendants], as architects and engineers, could be charged only with non-feasance. For that it is possible they could be liable to the [owner], but not the [injured worker]."); Clemens v. Benzinger, 211 A.D. 568, 207 N.Y.S. 539 543 (1925) (architect who instructed a worker to shear off bolts, causing collapse of steel column, held liable because "this was not mere non-feasance"); Potter v. Gilbert, 130 A.D. 632, 115 N.Y.S. 425, 428, *aff'd,* 196 N.Y. 576, 90 N.E. 1165 (1909) ("If the architect were guilty of any affirmative act which contributed to the accident . . . he doubtless would be liable.").

[31] This theory was first propounded by Professor Justin Sweet. Professor Sweet has phrased his proposal as follows:

> An architect who has contracted to perform traditional site services owes a duty to construction workers. This duty does not depend upon the architect's having particularly broad power, such as the power to supervise, direct or stop the work, an emphasis mistakenly employed in some

a duty to workers to ensure a safe workplace.[32]

A variation of this so-called "status" theory has been used to impose a duty to construction workers on a supervising engineer. In *Caldwell v. Bechtel, Inc.,*[33] the defendant engineer had contracted to perform "safety engineering services" which included the responsibility of ensuring that all the contractors and subcontractors complied with the project's in-house safety manual and all applicable construction codes.[34] The contract also gave the engineer the power to stop the work for unsafe conditions.[35]

The court found that these contractual provisions were sufficient to create a duty owed to the workers under a traditional contractual duty analysis.[36] The court, however, did not end its analysis with this finding. Rather, it stated that in imposing this duty on the engineer it was relying "to an equal degree" on the special relationship that existed between the engineer and the workers.[37] This relationship was created by the special skills and knowledge possessed by the engineer which enabled him to perceive conditions which might pose hazards to workers. The combination of the architect's special skills and knowledge and his power to rectify the hazardous situations discovered by the use of these special skills and knowledge formed the basis for imposing the duty.

> of the seminal cases. Nor can the duty be completely negated by the architect's contract. The duty arises from the simple fact that the architect and construction worker are co-participants in a dangerous enterprise. They are both physically on the site, often at the same time. Each would expect the other to act when danger surfaces. They are *not* strangers.

Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?,* 28 Emory L. J. 291, 327 (1979) (footnotes omitted) (emphasis in original).

[32] This is not to say, however, that Professor Sweet's theory would drastically swing the pendulum towards architect liability. The injured worker would still have to prove that the architect acted unreasonably. The contract could be used to limit the scope of the architect's required action, thus making it more difficult to prove unreasonableness. The status theory, however, would prevent the contract from conferring immunity in the form of a "no duty" defense. Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?,* 28 Emory L. J. 291, 330-331 (1979).

[33] 631 F.2d 989 (D.C. Cir. 1980).

[34] 631 F.2d at 994. *But see* Case v. Midwest Mechanical Contractors, Inc., 876 S.W.2d 51 (Mo. App. 1994) (architect's review of contractor's safety program did not give rise to duty of care to worker injured on job).

[35] 631 F.2d at 995.

[36] 631 F.2d at 1000-1002.

[37] 631 F.2d at 1002.

The court relied on the reasoning of the line of cases adopting a special relationship analysis, chief among them Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1975), and Caldwell v. Bechtel, Inc., 631 F.2d 989, 1000 (D.C. Cir. 1980).

[2]—The Standard of Care

An injured worker who seeks compensation from an architect must show not only that the architect owes him a duty but also that the duty has been breached. To do so, the worker must prove that the architect has acted unreasonably, that is, he has failed to live up to the standard of care required of architects.[38]

The architect, as a professional, must act in accordance with the level of skill and knowledge possessed by other architects practicing in the same geographic area.[39] The almost universal method of establishing this standard—including its breach—is through the testimony of expert witnesses.[40]

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[38] There is a paucity of case law as to what constitutes architectural negligence in an injured worker case. Courts finding no duty on the part of the architect have no need to address the negligence issue because there can be no negligence without a duty. However, even those courts finding a duty to the worker do not delve into the negligence issue due to its nature as an issue for the jury. Moreover, most appellate cases involving architect's liability to injured workers are appeals from summary judgment; hence, the factual issues are not fully addressed. Thus, most appellate courts' discussion of architectural negligence consist of broad proclamations that have little applicability to the unique facts of the individual case.

[39] Hill Constr. Co. v. Bragg, 291 Ark. 382, 725 S.W.2d 538 (1987); Swarthout v. Beard, 33 Mich. App. 395, 190 N.W.2d 373, 376 (1971), *rev'd on other grounds,* 388 Mich. 637, 202 N.W.2d 300 (1972) ("The responsibility of an architect may be similar to that of a lawyer or physician: the law requires the exercise of ordinary skill and care common to the profession"); A.F. Blair Co. v. Mason, 406 So. 2d 6, 14 (La. Ct. App. 1981) (economic injury case) ("Those practicing learned professions, like architects and engineers, must exercise that degree of professional care and skill customarily employed by others of the same profession in the same general area."); Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 467 P.2d 610, 615 (1970) (to affirm jury verdict against architect "there must be competent and substantial evidence that a condition exists . . . which a reasonably prudent architect practicing in the locality" would have recognized and remedied).

[40] The following jury instruction was approved in Paxton v. County of Alameda, 119 Cal. App. 2d 393, 259 P.2d 934 (1953):

> [I]n determining whether the defendant architect's learning, skill and conduct fulfilled the duties imposed by law, as they have been stated to you, you are not permitted to set up arbitrarily a standard of your own. The standard is that set by the learning, skill and care ordinarily possessed in practice by others of the same profession in the same locality at the same time period. It follows, therefore, that the only way you may properly learn that standard is through evidence presented in this trial by other persons in the field of architecture, called as expert witnesses.

Id., 259 P.2d at 938.

However, the expert witness who testifies against the defendant typically must be of the same licensure as the defendant; for example, an engineer cannot testify against an architect. Brennan v. St. Louis Zoological Park, 882 S.W.2d 271 (Mo. App. 1994); *Cf.* Dolan v. Galluzzo, 77 Ill. 2d 279, 396 N.E.2d 13 (1979) (orthopedic surgeon could not establish standard of care to be followed by podiatrist as they were in different schools of medicine).

Further, the failure to supply proper expert testimony can be fatal to the action. *See, e.g.*, 530 E. 89 Corp. v. Unger, 43 N.Y.2d 776, 373 N.E.2d 276, 402 N.Y.S.2d 382 (1977); Nelson v. Commonwealth, 235 Va. 228, 368 S.E.2d 239 (1988).

There are two situations, however, in which conformity to the standard of care developed through expert witness testimony will not protect the architect from a finding that he acted negligently. The first is the rare instance in which the court decides that the standard of care in the locality, or in the profession as a whole, has lagged behind that which it should be.[41] In such a case, the court will itself set the standard of care expected of architects.

The second situation involves the use of rules and regulations promulgated by local, state or federal government. Some courts have allowed these regulations to be admitted into evidence for the purpose of determining the standard of care required of architects.[42] When rules or regulations are used to establish the

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See Annen v. Trump, 913 S.W.2d 16 (Mo. Ct. App. 1995); National Found. Co. v. Post, Buckley, Schuh & Jernigan, Inc., 219 Ga. App. 431, 465 S.E.2d 726 (1995); Phillips v. Mazda Motor Mfg. (USA) Corp., 204 Mich. App. 401, 516 N.W.2d 502 (1994).

[41] In Holt v. A. L. Salzman & Sons, 88 Ill. App. 2d 306, 232 N.E.2d 537 (1967), where architectural plans did not meet standards set by the municipal code, the court affirmed a judgment against the architect notwithstanding testimony of expert witnesses that the defendant's practices represented "good architectural practice" and were "in accord with what was customarily done in the construction of buildings." *Id.,* 232 N.E.2d at 544. In support of its holding, the court quoted the famous passage of Judge Learned Hand:

> There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves.
>
> . . .
>
> Indeed, in most cases reasonable prudence is, in fact, common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own test, however persuasive be its usages. Courts must in the end say what is required; but there are precautions so imperative that even their universal disregard will not excuse their omission.

Id., 232 N.E.2d at 544-545, *quoting* T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), *quoted in* Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253, 257 (1965).

[42] *See, e.g.,* Simon v. Omaha Pub. Power Dist., 189 Neb. 183, 202, N.W.2d 157, 165 (1972) (admission of State of Nebraska Labor Department rule as evidence of standard of care); Holt v. A. L. Salzman & Sons, 88 Ill. App. 2d 306, 232, N.E.2d 537, 544 (1967) (architect found negligent for designing plans that failed to meet the code of the City of Chicago when such failure was the proximate cause of the structure's collapse and resulting injuries).

Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999, 1000 (E.D. La. 1974) ("plaintiff may, of course, use OSHA standards and evidence that they have been violated as evidence of negligence at trial").

But see Otto v. Specialties, Inc., 386 F. Supp. 1240 (N.D. Miss. 1974) (use of OSHA violation as evidence of negligence rejected on the questionable ground that because OSHA did not create a private right of action, a private individual may not use it to establish the standard of care).

A number of states' occupational safety laws expressly prohibit the use of such laws as evidence in architectural negligence cases. *See, e.g.,* Cal. Lab. Code § 6304.5 ("Neither this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into evidence in any personal injury or wrongful death action arising after the operative date of this section, except as between an employee and his own employer."); N.J. Stat. Ann. § 34:5-177 (Construction Safety Act) ("This act shall not in any way increase the burden of care ordinarily imposed by the common law of the state . . . .").

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standard of care, the trier of fact will usually be permitted to find negligence when the architect has not complied with the regulations, notwithstanding expert testimony that his actions were in accordance with customary standards.[43] However, compliance with governmental standards does not preclude a finding of negligence.[44]

There are certain instances where a court will treat the violation of a rule or regulation as negligence *per se.* In these cases, the only issue involves the narrow question of whether the architect has complied with the regulation. If he did not, the court will find negligence as a matter of law, and the defendant architect will have no opportunity to present evidence of the reasonableness of his conduct.[45] However, before an injured worker can benefit from a finding of negligence *per se,* he must prove that the rule or regulation which the architect allegedly violated was "intended to protect the class of persons to which the plaintiff belongs against the risk of the type of harm which has in fact occurred."[46] This can be a difficult hurdle to overcome.

In addition, the architect's contract with the owner may be used in determining the standard of care. It might incorporate, by reference, safety regulations that must be complied with.[47] Alternatively, the contract may be used to prove what the architect should have known.[48]

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[43] *See, e.g.,* Henry v. Britt, 220 So. 2d 917, 920 (Fla. Dist. Ct. App. 1969) (non-worker case):

> The effect of a violation of a statute or ordinance constituting negligence cannot be avoided by the fact that the act complained of was done in accordance with the custom or practice of other persons engaged in the same type of work in the community.

Allowing regulations to set the standard of care may be useful as a solution to the so-called "battle of the experts" that occurs when the plaintiffs' experts and the defendants' experts disagree on the standard of care applicable in the locality.

[44] Francisco v. Manson, Jackson & Kane, Inc., 377 N.W.2d 313 (Mich. Ct. App. 1985).

[45] *See, e.g.,* Johnson v. Salem Title Co., 425 P.2d, 519, 521 (Or. 1967) (non-worker injury case) (architect liable for injuries caused by falling wall based on architect's failure to comply with the wind resistance specifications of the city building code. The court approved the jury instruction that "if the wall was not designed so as to comply with the code, such a violation would be . . . statutory negligence.").

[46] Melerine v. Avondale Shipyards, Inc., 659 F.2d 706, 709-710 (5th Cir. 1981) (injured worker's action against contractor who was not his employer for violation of OSHA regulations). *See also* Johnson v. Salem Title Co., 425 P.2d 519, 522 (Or. 1967) (violation of statute constituted negligence *per se* because statute enacted for purpose of "provid[ing] minimum standards to safeguard life and limb.").

[47] *See, e.g.,* Caldwell v. Bechtel, Inc., 631 F.2d 989, 995 (D.C. Cir. 1980) (contract incorporated safety regulations of Washington Metropolitan Area Transit Authority); Duncan v. Pennington County Hous. Auth., 283 N.W.2d 546, 549 (S.D. 1979) (contract required compliance with OSHA regulations).

[48] *See, e.g.*, Rosos Litho Supply Corp. v. Hansen, 123 Ill. App. 3d 290, 462 N.E.2d 566, 571 (1st. Dist. 1984); Fence Rail Development Corp. v. Nelson & Assoc., Ltd., 174 Ill. App. 3d 94, 528 N.E.2d 344 (2nd Dist. 1988).

[3]—The Effects of Safety Statutes

In an effort to promote safety in the workplace, the federal government and many states have enacted occupational safety laws. Injured workers who have been unable to establish the architect's duty under the common law have turned to these safety statutes to impose a duty on the architect. Their efforts, however, usually have been to no avail. The majority of these statutes are inapplicable to architects and, therefore, leave injured workers with only the difficulties of the common law. Moreover, even those statutes that are applicable to architects are usually mere codifications of the common law. Thus, the injured worker faces the same difficult task regardless of whether he argues a common law theory of duty or a statutory theory of duty.

The federal Occupational Safety and Health Act (OSHA)[49] was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[50] An employer has two principal obligations under the Act. First, an employer is required to comply with applicable OSHA standards.[51] Second, an employer has a "general duty" to "furnish 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."[52]

OSHA applies only to employers engaged in businesses affecting interstate commerce.[53] The Secretary of Labor has the burden of demonstrating that the business of a cited employer affects commerce. However, the reach of commerce has been defined very broadly to include businesses which merely purchase materials from out of state and businesses not in commerce but performing activities that relate to the flow of commerce.[54]

An employer who fails to meet his obligations may not only be required to abate the noncomplying conditions, but also faces the imposition of monetary penalties.[55] Any employer who willfully violates a standard and that violation

[49] 29 U.S.C. § 651 *et seq. See also* ¶ 19.01[1][c] *infra.*

[50] 29 U.S.C. § 651(b).

[51] 29 U.S.C. § 654(a)(2).

[52] 29 U.S.C. § 654(a)(1).

[53] 29 U.S.C. § 652(3).

Pfenninger v. Hunterdon Central Regional High School, 165 N.J. 230, 770 A.2d 1126 (2001) (school board not liable under retained control theory despite board's agents being on the site daily; jury question existed as to whether owner's supplying of incorrect pipe created a foreseeable risk of harm to worker; school board, as a political subdivision of a state, is not an "employer" under 29 U.S.C. § 652(5) and 29 C.F.R. § 1975.5(e)(1)).

[54] Brennan v. Occupational Safety & Health Review Comm'n, 492 F.2d 1027 (2d Cir. 1974).

[55] 29 U.S.C. § 666.

caused death to an employee faces, upon conviction, criminal sanctions of up to $10,000 in fines and/or up to six months in jail.[56]

Despite OSHA's provisions, workers who have attempted to use OSHA to impose a duty on supervising architects to ensure a safe work place have been rebuffed by the courts.[57] While the purpose of OSHA is indeed to ensure the safety of workers, the statute, by its own terms, cannot be used to impose a duty which is actionable in private civil suits.[58]

Because a violation of OSHA does not give rise to a private cause of action against an employer,[59] many states have enacted their own legislation that does, in effect, give employees a private cause of action against any employer who does not maintain a safe work place. As a result of such legislation, state safety statutes have received a lot of attention in actions instituted by injured workers against architects. At one end of the spectrum lies the New York safety statutes, which set up explicit duties for those involved in construction work, but specifically exempt architects from their coverage.[60]

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[56] 29 U.S.C. § 666(e). For a second conviction, the punishment increases to a fine of up to $20,000 and/or imprisonment for not more than one year.

[57] *See* CH2M Hill, Inc. v. Herman, 192 F.3d 711 (7th Cir. Sept. 23, 1999), in AIA Citator, *infra*, Digest No. 99012; Secretary of Labor v. Simpson, Gumpertz & Heger, Inc., 15 O.S.H. Cas. (BNA) 1851, 1992 O.S.H. Dec. (CCH) ¶ 29,828 (O.S.H.R.C. 1992) (OSHA liability not extended to engineer who gave telephone instructions to contractor where the court found that the engineer did not perform the work).

[58] "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4).

See Walters v. Landis Constr. Co., 522 So. 2d 1306 (La. Ct. App. 1988).

See Duncan v. Pennington County Hous. Auth., 283 N.W.2d 546, 548–549 (S.D. 1979).

[59] Jeter v. St. Regis Paper Co., 507 F.2d 973 (5th Cir. 1975).

[60] N.Y. Lab. Law § 240 imposes duties on, and provides standards for, those involved in maintaining scaffolding and other devices for the use of employees. The statute provides, however, that "[n]o liability pursuant to this subdivision for the failure to provide protection to a person . . . shall be imposed . . . on architects. . . . " N.Y. Lab. Law § 241, pertaining to general standards for construction, excavation, and demolition, provides the same exemption for architects.

These statutes do not, however, confer absolute immunity on the architect. They both provide that "[t]his exception shall not diminish or extinguish any liability of . . . architects . . . arising under the common law or any other provision of law." Nonetheless, this exemption examined in conjunction with the common law nonfeasance/misfeasance rule adopted by the New York courts, *see* ¶ 10.02[1][b], n.30 *supra* and accompanying text, appears to confer immunity on the architect except in the most limited circumstances.

Domenech v. Associated Engr's, 257 A.D.2d 403, 683 N.Y.S.2d 67 (1999); Aubrecht v. Acme Elec. Corp., 262 A.D.2d 994, 692 N.Y.S.2d 544 (1999); Suriano v. City of New York & Manuel

The majority of state safety statutes, while not as explicit as New York in exempting architects, have the same effect. These statutes impose a duty to provide a safe workplace on a statutorily defined "employer." An "employer" is usually defined as a person who would be regarded as such in the common sense usage of that term.[61] Under these statutes, no court has found a supervising architect to be an employer of an injured construction worker. Some state statutes define employer in a much broader sense as anyone who has control of the workplace.[62] These statutes may therefore be useful to workers seeking to impose

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Elken, P.C., 240 A.D.2d 486, 658 N.Y.S.2d 654 (1997); Becker v. Tellamy, Van Kuren, Gertis & Assocs., 221 A.D.2d 1014, 634 N.Y.S.2d 282 (1995), *relying on* Carter v. Vollmer Assocs., 196 A.D.2d 754, 602 N.Y.S.2d 48 (1993), *citing* N.Y. Lab. Law § 241(6); Grant v. Gutchess Timberlands, Inc., 214 A.D.2d 909, 625 N.Y.S.2d 716 (1995) (court rejected contractor's argument that architect's inspection duties made the owner liable under New York statute); Becker v. Setien, 904 S.W.2d 338 (Mo. Ct. App. 1995); Fox v. Jenny Eng'g Corp., 70 N.Y.2d 761, 520 N.Y.S.2d 750, 514 N.E.2d 1374 (1987); Majurowski v. Sverdrup Corp., 212 A.D.2d 443, 622 N.Y.S.2d 713 (1995); Fox v. Jenny Eng'g Corp., 122 A.D.2d 532, 505 N.Y.S.2d 270 (1986); Jaroszewicz v. Facilities Dev. Corp., 115 A.D.2d 159, 495 N.Y.S.2d 498 (1985).

See also Sherwood v. Omega Constr. Co., 657 F. Supp. 345 (S.D.N.Y. 1987) (law also specifically exempts professional engineers who do not direct or control the work, even where resident engineer took part in bimonthly progress meetings at which safety was discussed).

[61] *See, e.g.,* Cal. Lab. Code § 6304 which imposes the duty to maintain a safe work place only on employers as defined in Cal. Labor Code § 3300 ("every person . . . which has any natural person in service"); Fla. Stat. Ann. § 440.56, imposing a duty on "employers" defined as "every person carrying on any employment," Fla. Stat. Ann. § 440.02(4), with "employment" defined as "any service performed by an employee for the person employing him," Fla. Stat. Ann. at § 244.02(1)(a); Ind. Code Ann. § 22–8–1.1–2 imposes a duty on the "employer" to maintain safety, with "employer" defined as anybody or any entity "which has in its employ one (1) or more individuals." Ind. Code Ann. § 22–8–1.1–1.

[62] *See, e.g.,* Ohio Rev. Code. Ann. § 4101.11, requiring employers to provide a safe work place, with "employer" defined as "every person having control or custody of any . . . place of employment". Ohio Rev. Code. Ann. § 4101.01(c); Wis. Stat. Ann. § 101.11(1), requiring that "every employer shall furnish employment which shall be safe . . .," with "employer" defined as "every person . . . having control or custody of any . . . place of employment." Wis. Stat. Ann. § 101.01(2)(b).

Both New Jersey and Texas probably belong in the category of states with safety statutes that are potentially applicable to architects. N.J. Stat. Ann. § 34:5–168 requires any employer engaged in construction activity to comply with all reasonably necessary safety requirements. Employee is defined as "any person suffered or permitted to work by an employer, having a specific regard to any of the activities included in section 3 of this act [§ 34:5–168]. N.J. Stat. Ann. § 34:5–167(g). Tex. Rev. Civ. Stat. Ann. art. 5182, entitled "Protection of Workmen on Buildings," provides that the "owner, or the agent of the owner of such building" has a duty to ensure the contractor's compliance with the Act. Tex. Rev. Civ. Stat. Ann. art. 5182(4).

Thus, it appears that a resourceful plaintiff in a Texas or New Jersey court could proceed under these statutes upon proving an agency relationship between the architect and the owner. To date, no such effort has been reported.

a liability on architects arising from injuries received in the state where such statutes are in force.[63]

Illinois, through its Structural Work Act, imposes duty directly on any person "having charge" of the work.[64] A large body of case law construed the "having charge" language, with the court focusing on various factors typically used to determine duty under the common law: the right to stop work, the architect's actual knowledge of the hazardous condition, and the conduct of the architect in assuming a duty.[65] At best, the result it not likely to differ whether the

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[63] The extent to which these statutes are relied on by injured workers varies widely from state to state. Most of these states' (*e.g.,* Ohio, New Jersey, and Texas) statutes have never been used in an attempt to impose a duty on an architect. On the other hand, the Illinois Structural Work Act has completely subsumed the common law of architect's liability to injured workers and has, therefore, generated the vast majority of cases involving a supervising architect's duty arising under statute. For that reason, the analysis of the "having charge of/control" issue is restricted mainly to Illinois cases. [*Editor's Note*: Although the Illinois Structural Work Act was repealed in 1995, discussion of that Act is retained because cases are still being litigated thereunder.]

See also Williams, Hatfield & Stoner, Inc. v. Malcolm, 687 So. 2d 295 (Fla. Dist. Ct. App. 1997) (immunity under Florida statute extended to design professionals where architect/engineer has not assumed reponsibility for safety).

[64] [*Editor's Note*: Although the Illinois Structural Work Act was repealed in 1995, discussion of that Act is retained because cases are still being litigated thereunder.] The Illinois Structural Work Act, Ill. Rev. Stat. ch. 48, ¶ 60, requires that all scaffolding and the like be erected in such manner as to "give proper and adequate protection to the life and limb" of employees. The Act explicitly creates a private action for injured workers against "any owner, contractor, subcontractor, foreman, or other person having charge . . . ." Ill. Rev. Stat. ch. 48, ¶ 69, § 9.

See Fulton v. United States, 772 F. Supp. 1074 (N.D. Ill. 1991) (government not liable under Illinois Structural Work Act where court found that inspector was not "person having charge" of the work).

[65] [*Editor's Note*: Although the Illinois Structural Work Act was repealed in 1995, discussion of that Act is retained because cases are still being litigated thereunder.] Mahoney v. 223 Assocs., 245 Ill. App. 3d 562, 185 Ill. Dec. 115, 614 N.E.2d 249, *appeal denied*, 152 Ill. 2d 561, 190 Ill. Dec. 892, 622 N.E.2d 1209 (1993); Emberton v. State Farm Mut. Auto. Ins. Co., 71 Ill. 2d 110, 373 N.E.2d 1348 (1978) (architect owed duty to workers under the Structural Work Act based on his right to stop work, his knowledge of unsafe conditions which he pointed out to the general contractor, his attendance at weekly meetings where safety was discussed, and his requiring certain construction methods to be used); Voss v. Kingdon & Naven, Inc., 60 Ill. 2d 520, 328 N.E.2d 297 (1975) (engineer owed duty to workers under Structural Work Act based on his right to stop work, his knowledge of the hazardous condition, and his actual direction of the work); Smith v. Central Ill. Pub. Serv. Co., 176 Ill. App. 3d 482, 125 Ill. Dec. 872, 531 N.E.2d 51 (1988); Bisset v. Joseph A. Schudt & Assocs., 133 Ill. App. 3d 356, 88 Ill. Dec. 420, 478 N.E.2d 911 (1985) (where civil engineer who designed the plans placed a supervisor at the job site every day, and supervisor was authorized to make alterations in the plans and specifications, and was also authorized to stop the work, the civil engineer could be considered "in charge of" the operation under the Structural Work Act); Diomar v. Landmark Assocs., 81 Ill. App. 3d 1135, 401 N.E.2d 1287 (1980) (architect did not owe a duty to workers under the Structural Work Act because he did not have the right to stop work and did not take any overt action in relation to work place safety). *Cf.* cases cited in ¶ 10.02[1][a] and [b].

traditional common law test or the totality-of-the-circumstances test is used.[66] Common law liability often hinges on a requirement of the architect's knowledge and his duty to warn based on same. Otherwise, there could virtually be liability based solely on status. The cases have so noted that issue of knowledge.[67]

¶ 10.03. Liability of the Property Owner for Injuries to the Construction Worker

Like the architect, the owner of the property on which construction takes place is rarely protected by worker's compensation statutes from an injured worker's negligence suit. Most courts have refused to impose liability upon property owners without a finding of fault. Accordingly, a determination of liability generally rests on resolution of the following issues:

1. the legal relationship between the owner and the injured worker's employer;

2. whether the owner had a duty to the worker as to the event which caused the injury; and

[66] The fungibility of the common law and statutory duty tests is further evidenced by the fact that courts analyzing the duty issue under the common law have, explicitly or implicitly, utilized a form of the totality-of-the-circumstances test. *See, e.g.,* Hanna v. Huer, Johns, Neel, Rivers & Webb, 233 Kan. 206, 662 P.2d 243 (1983) (common law case explicitly adopting totality-of-the-circumstances test used under the Illinois Structural Work Act) [*Editor's Note*: The Illinois Structural Work Act was repealed in 1995.]; Swarthout v. Beard, 33 Mich. App. 395, 190 N.W.2d 273 (1971), *rev'd on other grounds,* 388 Mich. 637, 202 N.W.2d 300 (1972) (imposing a duty based on both the architect's contractual responsibilities and his actual knowledge of the hazardous condition).

[67] Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 467 P.2d 610, 615 (1970) (to affirm jury verdict against architect, "there must be competent and substantial evidence that a condition exists . . . which a reasonably prudent architect practicing in the locality" would have recognized and remedied); Welch v. Grant Dev. Co., 120 Misc. 2d 493, 466 N.Y.S.2d 112, 116–17 (1983) (architect's actual knowledge of unsafe conditions did not create a duty to injured workers; however, it could be the foundation for owner's indemnification action against architect); Day v. National United States Radiator Corp., 241 La. 288, 128 So. 2d 660, 666 (1961) (architects would owe duty to worker if they had actually inspected and approved installation which was done in a dangerous manner; no duty on architects because "we do not have here a case where the architects . . . had knowledge of the installations and stood by and permitted the boiler to be tested without having proper safety devices."); Hanna v. Heur, Johns, Neel, Rivers & Webb, 233 Kan. 206, 662 P.2d 243, 254 (1983) ("As a professional, an architect cannot stand idly by with actual knowledge of unsafe safety practices on the job site and take no steps to advise or warn the owner or contractor."); Balagna v. Shawnee County, 233 Kan. 1068, 668 P.2d 157, 164 (1983) (supervising engineers "had actual knowledge that the prescribed safety precautions were not being followed by the contractor at the time the tragic accident occurred. In our judgment, this created a duty for the engineer to take some reasonable action to prevent injury to the contractor's employee.")

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3. whether the owner breached that duty by falling below the standard of care, and, if so, whether the owner has any defenses which may reduce or eliminate liability.[1]

These issues are resolved in light of governing statutes, the common law, and the particular contractual relationship between the owner and the contractor or architect. In particular, regarding the common law, the Restatement Second of Torts in Section 414 (1965) is often cited for the basis of duty.

[1]—The Relationship Between the Property Owner and the Injured Worker's Employer

The property owner's liability to an injured construction worker depends upon his contractual relationship to the worker's employer. If the owner is deemed to have a master/servant relationship with the contractor, the doctrine of *respondeat superior* applies and the owner will be liable for injury caused by the contractor's negligence, although the owner may have a claim for indemnity against the contractor.[2] On the other hand, if the contractor is deemed an independent contractor of the owner rather than a servant, the owner will not be liable for the construction worker's injury unless it was caused by the owner's breach of one of the duties to construction workers imposed on owners by law.[3]

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[1] *See* Storr v. Proctor, 490 So. 2d 135 (Fla. Dist. Ct. App. 1986) (the court also considered the experience of the construction worker in determining the extent of the owner's liability).

[2] *See e.g.,* Coyne v. Marquette Cement Mfg. Co., 254 F. Supp. 380 (W.D. Pa. 1966) (owner had a master/servant relationship with his general contractor and was liable under *respondent superior* for the negligence of the general contractor which caused the death of an employee of a subcontractor); Jamison v. A.M. Byers Co., 330 F.2d 657 (3d Cir. 1964), *cert. denied,* 379 U.S. 839 (1964); Trent v. Atlantic City Elec. Co., 334 F.2d 847 (3d Cir. 1964) (New Jersey law); Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1967); Councell v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955); Stevens v. Frump, 132 W. Va. 366, 52 S.E.2d 181 (1949); Progressive Constr. & Eng'g Co. v. Indiana & Mich. Elec. Co., 533 N.E.2d 1279 (Ind. Ct. App. 1989). Of course, the owner who employs workers directly on the construction site is in the same position as a contractor with regard to liability to injured employees. Lurie & Stein, *Events After the Start of Construction,* 23 St. Louis U.L.J. 292, 300 (1979).

[3] This is the common law "independent contractor rule." As noted in Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 201 Minn. 500, 277 N.W. 226 (1937), the general rule has become merely a preamble to the long list of exceptions imposing duties on the owner. Common law courts usually justified the general rule of nonliability on the fact that the independent contractor and not the owner was in control and should therefore be responsible. *See* Blake v. Ferris, 5 N.Y. 48 (1851); Cunningham v. International Ry. Co., 51 Tex. 503 (1879); Morris, *The Torts of an Independent Contractor,* 29 Ill. L. Rev. 339 (1935). Later courts have reasoned that an employer of an independent contractor should not be subjected to greater liability than he would have if he had used his own employees (who would have been limited to worker's compensation benefits). *See also* Hunter v. Gold Bond Bldg. Prods., Inc., 535 So. 2d 81 (Ala. 1988). *See generally* Note, Harmon v. Atlantic Richfield Co.: The Duty of an Employer to Provide a Safe Place to Work for the Employee of an Independent Contractor, 12 N.M. L. Rev. 559 (1982).

In the independent contractor situation, the owner is protected by the general rule of nonliability for injuries to the contractor's workers. This rule derives from the legal proposition that the owner generally owes no duty to the construction worker.

Several factors determine whether a contractor will be deemed an independent contractor of the owner. These include:

1. whether the owner controls only the result of the work and not the manner in which it is performed;
2. whether the parties characterize their arrangement as an independent contractor relationship;
3. the nature of the work being performed;
4. the skill required to complete the work;
5. whether the contractor supplies its own tools;
6. whether the owner pays by the job as opposed to by time;
7. the relation of the work to the owner's line of business; and
8. the owner's power to terminate employment.[4]

There are no mechanical formulas to use when attempting to apply these factors to a particular situation. The first factor, however, has consistently been viewed by the courts as the most important. When the owner has the right to control only the job results but not the manner in which those results are reached, the contractor is generally held to be an independent contractor and not the owner's servant.[5]

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[4] *See* Hennig v. Crosby Group, Inc., 116 Wash. 2d 131, 802 P.2d 790 (1991); Surowski v. Commonwealth Pub. School Employees' Retirement Sys., 78 Pa. Commw. 490, 467 A.2d 1373 (1983); Johnson v. Workmen's Compensation Appeals Bd., 41 Cal. App. 3d 318, 115 Cal. Rptr. 871 (1974); Ryan v. Associates Inv. Co., 297 Ill. App. 544, 18 N.E.2d 47 (1938); Gill v. Northwest Airlines, Inc., 228 Minn. 164, 36 N.W.2d 785 (1949); Spencer v. Travelers Ins. Co., 148 W. Va. 111, 133 S.E.2d 735 (1963); Hayes v. Board of Trustees of Elon College, 224 N.C. 11, 29 S.E.2d 137 (1944); Magarian v. Southern Fruit Distribs., 146 Fla. 773, 1 So. 2d 858 (1941); King v. Southwestern Greyhound Lines, Inc., 169 F.2d 497 (10th Cir. 1948), *cert. denied,* 335 U.S. 891, 69 S. Ct. 248, 93 L. Ed. 2d 428 (1948) (Oklahoma law); Gillum v. Industrial Comm'n, 141 Ohio St. 373, 48 N.E.2d 234 (1943).

[5] Farmers & Merchants Bank v. Vocelle, 106 So. 2d 92 (Fla. Dist. Ct. App. 1958) (independent contractor has control over results not means); Brownsville & Matamoros Bridge Co. v. Null, 578 S.W.2d 774 (Tex. Civ. App. 1978); Breuleux v. Pentagon Fed. Credit Union, 10 Ohio App. 3d 33, 460 N.E.2d 306 (1983); Schenk v. Packaging Corp. of Am., 267 F. Supp. 439 (W.D. Mich. 1966), *aff'd,* 378 F.2d 367 (6th Cir. 1967); Johnson v. Workmen's Compensation Appeals Bd., 41 Cal. App. 3d 318, 115 Cal. Rptr. 871 (1975) (control is the most important factor; however, several other factors are discussed including whether the work is not normally a part of the regular business of the principal); Hollingberg v. Dunn, 68 Wash. 2d 75, 411 P.2d 431 (1966); Strangi

[2]—Duties Owed by Property Owner to Employees of Independent Contractor

There are several significant exceptions to the general rule that an owner will not be found liable for work injuries where his employer was an independent contractor of the owner. These exceptions apply in three different situations where duties are otherwise imposed on the owner. When these duties are found to exist and are breached, they may render the owner accountable for workplace injuries. It is to be remembered, of course, that the owner can still be found liable by committing some act of negligence, irrespective of the owner/independent contractor relationship.[6]

[a]—Duty With Respect to Control Retained

If an owner carefully selects a general contractor who, as an independent contractor, is delegated the task of construction, ordinarily the owner will not be liable for injuries sustained by workers.[7] Ownership alone is usually not a

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v. United States, 211 F.2d 305 (5th Cir. 1954) (Texas law); Bond v. Harrel, 13 Wis. 2d 369, 108 N.W.2d 552 (1961); Party Cab Co. v. United States, 172 F.2d 87 (7th Cir. 1949), *cert. denied,* 338 U.S. 818, 70 S. Ct. 62, 94 L. Ed. 2d 496 (1949) (Illinois law); Spencer v. Travelers Ins. Co., 148 W. Va. 111, 133 S.E.2d 735 (1963).

[6] General Contractors of Am., Inc. v. Stinson, 524 So. 2d 1148 (Fla. Dist. Ct. App. 1988). *See also* Grahn v. Tosco Corp., 58 Cal. App. 4th 1373, 68 Cal. Rptr. 2d 806 (1997); Wilson v. River Market Venture, I, L.P., 996 S.W.2d 687, 693–694 (Mo. App. 1999); Pfenninger v. Hunterdon Central Regional High School, 165 N.J. 230, 770 A.2d 1126 (2001) (school board not liable under retained control theory despite board's agents being on the site daily; jury question existed as to whether owner's supplying of incorrect pipe created a foreseeable risk of harm to worker).

See also Mark R. Bendure & Robert F. Garvey, *Construction Law—Tort Liability of the Property Owner*, 75 Mich. B.J. 242 (1996).

[7] *California*: Smith v. AC & S, Inc., 31 Cal. App. 4th 77, 37 Cal. Rptr. 2d 457 (1994).

Georgia: Kraft Gen. Foods, Inc. v. Maxwell, 219 Ga. App. 211, 464 S.E.2d 639 (1995), in AIA Citator, *infra*, Digest No. 95040; Pfeiffer v. Georgia Dept. of Transp., 250 Ga. App. 643, 551 S.E.2d 58 (2001), in Construction Law Digest, October, 2001, Digest No. D001569.

Illinois: Nowicki v. Union Starch Refining Co., 54 Ill. 2d 93, 296 N.E.2d 321 (1973); Schoenbeck v. DuPage Water Comm'n, 240 Ill. App. 3d 1045, 180 Ill. Dec. 624, 607 N.E.2d 693 (1993); Rogers v. Envirodyne Indus., Inc., 214 Ill. App. 3d 1025, 158 Ill. Dec. 683, 574 N.E.2d 796 (1991).

Louisiana: Perritt v. Bernhard Mechanical Contractors, Inc., 669 So. 2d 599 (La. Ct. App. 1996), in AIA Citator, *infra*, Digest No. 96009; Touchet v. Estate of Bass, 653 So. 2d 83 (La. Ct. App.), *cert. denied,* 654 So. 2d 1112 (La. 1995); Parker v. Boise Southern Co., 570 So. 2d 6 (La. Ct. App. 1990), *cert. denied*, 575 So. 2d 388 (La. 1991) (owner is not liable to injured employees of an independent contractor unless the work being performed is ultrahazardous or the owner has authorized the work to be done in an unsafe manner); Massey v. Century Ready Mix Corp., 552 So. 2d 565 (La. Ct. App. 1989), *cert. denied*, 556 So. 2d 41 (La. 1990).

Massachusetts: Lyon v. Morphew, 424 Mass. 828, 678 N.E.2d 1306 (1997).

Missouri: Plank v. Union Elec. Co., 899 S.W.2d 129 (Mo. Ct. App. 1995).

basis for liability because "in contrast with a general contractor, the owner typically is not a professional builder . . . and not knowledgeable concerning safety measures."[8] However, New York is an exception to this general rule as

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New Jersey: Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 673 A.2d 847 (1996), *cert. denied*, 683 A.2d 1164 (N.J. 1996).

Oregon: B. King Constr., Inc. v. National Council on Compensation Ins., 120 Or. App. 420, 852 P.2d 927 (1993).

Pennsylvania: Donnelly v. Southeastern Pennsylvania Transp. Auth., 708 A.2d 145 (Pa. Commw. Ct. 1998).

Texas: Koch Refining Co. v. Chapa, 11 S.W.3d 153 (Tex. 1999) (owner, who employed a safety consultant, did not retain control); Coastal Marine Serv. of Texas, Inc. v. Lawrence, 988 S.W.2d 223 (Tex. 1999).

Washington: Smith v. Myers, 90 Wash. App. 89, 950 P.2d 1018 (1998).

Wisconsin: Kaltenbrun v. City of Port Washington, 156 Wis. 2d 634, 457 N.W.2d 527 (1990).

See Davenport v. Amax Nickel, Inc., 569 So. 2d 23 (La. Ct. App. 1990), *cert. denied*, 572 So. 2d 68 (La. 1991) (a contract provision requiring the contractor to comply with the owner's safety rules did not signify the requisite right of operational control necessary to vitiate the independent contractor relationship to hold the owner liable for the consequences of the independent contractor's violations); Jones v. BASF Corp., 689 F. Supp. 723 (E.D. Mich. 1988); Garcia v. Biltmore Court Villas, Inc., 534 So. 2d 1173 (Fla. Dist. Ct. App. 1988); Greg v. Fidelity & Casualty Ins. Co., 528 So. 2d 621 (La. Ct. App. 1988); White v. Golf States Util. Co., 525 So. 2d 145 (La. Ct. App. 1988); Guillory v. Conoco, Inc., Continental Oil Co., 521 So. 2d 1220 (La. Ct. App. 1988); Parker v. Neighborhood Theaters, Inc., 76 Md. App. 590, 547 A.2d 1080 (1988); Corteto v. Shore Memorial Hosp., 138 N.J. Super. 302, 350 A.2d 537 (Law Div. 1975) (general duty to select a competent independent contractor); Tansey v. Robinson, 24 Ill. App. 2d 227, 164 N.E.2d 272 (1960) (general duty on the owner to act as a reasonable person under the circumstances in selecting an independent contractor); Restatement (Second) of Torts § 411 (1965) (An owner who carefully selects a competent independent contractor must also satisfy the other duties imposed by law (discussed *infra*) before enjoying the protection of the "independent contractor rule."); Nationwide Mut. Ins. Co. v. Philadelphia Elec. Co. 443 F. Supp. 1140 (E.D. Pa. 1977); Morris v. City of Soldotna, 553 P.2d 474 (Alaska 1976) (general rule is that employer of an independent contractor owes no duty of care to employees of the independent contractor); Fisherman's Paradise, Inc. v. Greenfield, 417 So. 2d 306 (Fla. Dist. Ct. App. 1982) (in general, employer is not liable for the negligent acts of an indepndent contractor); Washington Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864 (App. D.C. 1982) (although there are several exceptions, the general rule is one of no liability for acts of an independent contractor); St. Paul Cos. v. Capitol Office Supply Co., 158 Ga. App. 748, 282 S.E.2d 205 (1981) (employer of independent contractor is not liable for the negligence of the independent contractor unless an exception to this general rule is applicable).

[8] Funk v. General Motors Corp. 392 Mich. 91, 104–105, 220 N.W.2d 641, 646 (1974), *overruled in part* in Hardy v. Monsanto Enviro-Chem Sys., Inc., 414 Mich. 29, 322 N.W.2d 270 (1982); Clerkin v. Kendall Town & Country Assocs., 535 So. 2d 288 (Fla. Dist. Ct. App. 1988). *See also* Braswell v. Walton, 208 Ga. App. 610, 431 S.E.2d 417 (1993); Matteuzzi v. Columbus Partnership, L.P., 866 S.W.2d 128 (Mo. 1993) (owner not liable under inherently dangerous activity doctrine to employees of independent contractor covered by workers' compensation); Nowicki v. Union Starch & Refining Co., 54 Ill. 2d 93, 296 N.E.2d 321 (1973) (owner not liable to independent

an owner can be liable under the New York Labor Law even though it did not employ the contractor and had no right to supervise the work.[9]

However, if an owner retains the right to control some aspect of the work, he will be held responsible for a failure to exercise that control reasonably to prevent injury.[10] By retaining some control over the construction, the owner has

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contractor's employee where owner did not interfere with actual conduct of the work or retain control of operating details); Gonzales v. Robert J. Hiller Constr. Co., 179 Cal. App. 2d 522, 3 Cal. Rptr. 832 (1960); Hawke v. Brown, 28 A.D. 37, 50 N.Y.S. 1032, 1036 (1898) ("But the mere fact that the employer retains a general supervision over the work, for the purpose of satisfying himself that the contractor carries out the stipulations of his contract, does not make him responsible for the negligence of the contractor.").

See also Owens v. Shop'N Save Warehouse Foods, Inc., 866 S.W.2d 132 (Mo. 1993); Kimberly J. Roberts, *Construction Accident: Who is Liable?*, 15 Construction Law. 3 (1995).

[9] Garcia v. Martin, 285 A.D.2d 391, 728 N.Y.S.2d 455 (2001), in Construction Law Digest, December, 2001, Digest No. D001699; Custer v. Cortland Hous. Auth., 266 A.D.2d 619, 697 N.Y.S.2d 739 (1999), *appeal denied*, 94 N.Y.2d 761, 707 N.Y.S.2d 142 (2000); Melo v. Consolidated Edison Co., 92 N.Y.2d 909, 702 N.E.2d 832 (1998); Coleman v. City of New York, 91 N.Y.2d 821, 689 N.E.2d 523, 666 N.Y.S.2d 553 (1997), *citing* N.Y. Lab. Law § 240(1); Del Vecchio v. State of New York, 246 A.D.2d 498, 667 N.Y.S.2d 401 (1998); Kerr v. Rochester Gas & Elec. Corp., 113 A.D.2d 412, 496 N.Y.S.2d 880 (1985). *See also* Rogers v. Irving, 85 Wash. App. 455, 933 P.2d 1060 (1997).

However, owners of one- and two-family dwellings who contract for, but do not direct or control the construction, are exempt from liability under §§ 240 and 241 of the New York Labor Law. *See* Ennis v. Hayes, 152 A.D.2d 914, 544 N.Y.S.2d 99 (1989), where the court reversed summary judgment for owner where an issue existed as to whether owner had directed or controlled the construction. For more recent cases; Monaco v. Cramer, 172 A.D.2d 986, 568 N.Y.S.2d 252 (1991) (the court held that the New York safety statute did not apply to owners of single-family dwellings because the homeowner did not control the work); McAdam v. Sadler, 170 A.D.2d 960, 566 N.Y.S.2d 130, *appeal denied*, 77 N.Y.2d 810, 571 N.Y.S.2d 913, 575 N.E.2d 399 (1991); Danish v. Kennedy, 168 A.D.2d 768, 564 N.Y.S.2d 217 (1990).

[10] Pfenninger v. Hunterdon Central Regional High School, 165 N.J. 230, 770 A.2d 1126 (2001) (school board not liable under retained control theory despite board's agents being on the site daily); Nowicki v. Union Starch Refining Co., 54 Ill. 2d 93, 296 N.E.2d 321 (1973) (owner not liable as no substantial retention of control); Wilson v. River Market Venture, I, L.P., 996 S.W.2d 687, 693–694 (Mo. App. 1999) (to be liable, the "landowner must control the physical activities of the employees of the independent contractors or the details of the manner in which the work is done"); Fisher v. Lee & Chang Partnership, 16 S.W.3d 198 (Tex. Ct. App. 2000); Tyron v. World Gym, Inc., 736 A.2d 90 (R.I. 1999); Thompson v. Jess, 979 P.2d 322 (Utah 1999); Mullins v. Tyson Foods, Inc., 143 F.3d 1153 (8th Cir. 1998) (where the worker's injury was unrelated to the work performed, the owner was still liable for the injury when the owner controlled the common area where the accident occurred); Tillman v. Great Lakes Steel Corp., 17 F. Supp. 2d 672 (E.D. Mich. 1998); Ramirez v. Alabama Power Co., 898 F. Supp. 1537 (M.D. Ala. 1995), *aff'd without opinion*, 86 F.3d 1170 (11th Cir. 1996), in AIA Citator, *infra*, Digest No. 95044; Torrington Co. v. Hill, 219 Ga. App. 453, 465 S.E.2d 447 (1995), *cert. denied*, 1996 Ga. LEXIS 459 (Ga. Mar. 1, 1996); Noble v. Bartin, 908 S.W.2d 390 (Mo. Ct. App. 1995); Parr v. Champion Int'l Corp.,

(Text continued on page 10–32)

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667 So. 2d 36 (Ala. 1995); Armstrong v. Georgia Marble Co., 575 So. 2d 1051 (Ala. 1991); Grant v. Eastern Airlines, Inc., 556 So. 2d 1135 (Fla. Dist. Ct. App. 1989); McClure v. Strother, 570 N.E.2d 1319 (Ind. Ct. App. 1991) (owner may have retained control over ladder used by the injured contractor by refusing to allow the contractor to fasten the ladder to the gutter); Best v. Energized Substation Serv., Inc., 88 Ohio App. 3d 109, 623 N.E.2d 158 (1993), *jurisdictional motion overruled*, 67 Ohio St. 3d 1488, 621 N.E.2d 410 (1993), *subsequent appeal, remanded*, 1994 Ohio App. LEXIS 3644 (Ohio Ct. App. Aug. 17, 1994), *appeal denied*, 70 Ohio St. 3d 1472, 640 N.E.2d 845 (1994), *application granted*, 71 Ohio St. 3d 1426, 642 N.E.2d 634 (1994), *motion overruled*, 71 Ohio St. 3d 1479, 645 N.E.2d 1259 (1995), *reconsideration denied*, 72 Ohio St. 3d 1408, 6 7 N.E.2d 496 (1995); Parker v. Enserch Corp., 776 S.W.2d 638 (Tex. Ct. App. 1989), *aff'd in part and rev'd in part,* 794 S.W.2d 2 (Tex. 1990); Foster v. National Starch & Chem. Co., 500 F.2d 81 (7th Cir. 1974); Jamison v. A.M. Byers Co., 330 F.2d 657 (3d Cir.), *cert. denied,* 379 U.S. 839, 85 S. Ct. 74, 13 L. Ed. 2d 45 (1964) (under Pennsylvania law, employer of independent contractor who retained right of control of shoring performance had duty to exercise that control reasonably); Alexander v. United States, 605 F.2d 828 (5th Cir. 1979) (under Texas law, employer of independent contractor must exercise reasonable care commensurate with the circumstances and the degree of control retained); Restatement (Second) of Torts § 414 (1965); Spinozzi v. E.J. Lavino & Co., 243 F.2d 80, 82–83 (3d Cir. 1957) ("The Pennsylvania courts have recognized that the employer should be liable where he has retained control of some part of the work, or so interfered with the performance of the job as to have assumed control."); Peairs v. Florida Publishing Co., 132 So. 2d 561 (Fla. Dist. Ct. App. 1961); Johnston v. Orlando, 131 Cal. App. 2d 705, 281 P.2d 357 (1955); Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P.2d 330 (1965) (owner must exercise his retained control prudently); Osgood v. D.W. Winkelman Co., 274 A.D. 694, 87 N.Y.S.2d 110 (3d Dept. 1949); Dowell v. General Tel. Co. of Mich., 85 Mich. App. 84, 270 N.W.2d 711 (1978) (*citing* Restatement (Second) of Torts § 414 with approval); Hersum v. Kennebec Water Dist., 151 Me. 256, 117 A.2d 334 (1955); Everette v. Alyeska Pipeline Serv. Co., 614 P.2d 1341, 1347 (Alaska 1980) ("if the employer has retained control over the work it should be responsible for *all* harmful consequences of its negligent exercise of that control").

See Callahan v. Alumax Foils, Inc., 973 S.W.2d 488 (Mo. Ct. App. 1998) (when worker was injured by carbon monoxide gas emitted from a pipe that was not part of the work, owner was not liable because owner did not control the work).

See also Pollard v. Missouri Pac. R.R., 759 S.W.2d 670 (Tex. 1988); City of Miami v. Perez, 509 So. 2d 343 (Fla. Dist. Ct. App.), *review denied,* 519 So. 2d 987 (Fla. 1987) (an owner may be liable if he interferes or meddles with the job to the extent of assuming the detail direction of it); Life From the Sea, Inc. v. Levy, 502 So. 2d 473 (Fla. Dist. Ct. App.), *review denied,* 509 So. 2d 1118 (Fla. 1987) (although an owner of a construction site ordinarily has no duty to provide a safe work place for an independent contractor to do his work, there is a recognized exception that such a duty will arise where the owner actively supervises and directs the construction site); Gulf States Utils. Co. v. Dryden, 735 S.W.2d 263 (Tex. Ct. App. 1987) (owner who retained right of control over work place was liable for worker's injury caused by fall from scaffold); Mark R. Bendure & Robert F. Garvey, *Construction Law—Tort Liability of the Property Owner*, 75 Mich. B.J. 242 (1996).

Cf. Vincent v. Dresser Indus., 172 A.D.2d 1033, 569 N.Y.S.2d 296, *appeal denied*, 78 N.Y.2d 864, 578 N.Y.S.2d 878, 586 N.E.2d 61 (1991) (owner did not assume control by agreeing to provide contractor's injured employee with a forklift); Rapp v. Zandri Constr. Corp., 165 A.D.2d 639, 569 N.Y.S.2d 994 (1991) (owner's mere knowledge of a subcontractor's unsafe work practice will not impose liability on the owner in the absence of control of the activity).

retained the power to see that safe procedures are observed in the areas in which he has retained control.[11] The law requires the owner to exercise that power with reasonable care.[12] In contrast, if the owner retains only the right to observe the contractor's performance of the construction and to insist on its fulfillment in accordance with their contract, he has not retained enough control to be under a legal duty to ensure safe execution of the construction.[13]

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[11] *See* Bright v. Dow Chemical Co., 1 S.W.3d 787 (Tex. Ct. App. 1999); Ogle v. Shell Oil Co., 913 F. Supp. 490 (E.D. Tex. 1995); Haberer v. Village of Sauget, 158 Ill. App. 3d 313, 110 Ill. Dec. 628, 511 N.E.2d 805 (1987) (question of fact whether owner, through hired safety consulting service, retained sufficient control).

[12] Weber v. Northern Ill. Gas Co., 10 Ill. App. 3d 625, 295 N.E.2d 41 (1973); Gallagher v. United States Lines Co., 206 F.2d 177 (2d Cir. 1953), *cert. denied,* 346 U.S. 897, 74 S. Ct. 221, 98 L. Ed. 2d 398 (1953) (under New York law the reservation of control creates the affirmative duty to exercise control with reasonable care); Restatement (Second) of Torts § 414 comment a (1965); Allen v. Texas Elec. Serv. Co., 350 S.W. 2d 866 (Tex. Civ. App. 1961); Tauscher v. Puget Sound Power & Light Co., 96 Wash. 2d 274, 635 P.2d 426 (1981) (an exception to the rule of nonliability exists where owner retains control over the workplace, although the facts in this case did not render this exception applicable); Erickson v. Pure Oil Corp., 72 Mich. App. 330, 249 N.W.2d 411 (1976), *appeal denied,* 400 Mich. 859, 256 N.W.2d 574 (1977) (owner may be liable if it retains such control as to replace in effect the general contractor as the party in control of the project); *but cf.* Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 28 A. 32 (1893) (the right to control is relevant to determining the difference between an independent contractor and a servant, but once an independent contractor relationship is established, then the liability of the contractee is derived from the fact of actual control).

See also Cook v. Nebraska Public Power District, 171 F.3d 626, 632 (8th Cir. 1999) (Nebraska law).

Although contract provisions vary according to negotiations, the owner typically agrees, at the very least, to control the coordination of his own work and the work of other contractors with the work of the general contractor. *See, e.g.,* American Institute of Architects Document A201–1997, Subparagraph 6.1.3.

[13] Grey v. Milliken & Co., 245 Ga. App. 804, 539 S.E.2d 186 (2000), in Construction Law Treatise, February, 2001, Digest No. D000917; Noble v. United States, 231 F.3d 352 (7th Cir. 2000), in Construction Law Digest, March, 2001, Digest No. D001004; Pfenninger v. Hunterdon Central Regional High School, 165 N.J. 230, 770 A.2d 1126 (2001) (school board not liable under retained control theory despite board's agents being on the site daily); Zamudio v. City & County of San Francisco, 70 Cal. App. 4th 445, 82 Cal. Rptr. 2d 664 (1999), *reh'g denied*, 1999 Cal. App. LEXIS 176 (Cal. App. 1999); Foster v. National Starch & Chem. Co., 500 F.2d 81 (7th Cir. 1974) (in Illinois, the owner's right to add instructions, require additional or altered work, authorize overtime, and inspect work is not sufficient control because independent contractor is still exclusively in control over the manner in which the work is performed); Orr v. United States, 486 F.2d 270 (5th Cir. 1973) (under Florida law, the owner is not liable for the independent contractor's negligence simply because it reserved the right to make safety inspections); Fisher v. United States, 441 F.2d 1288 (3d Cir. 1971) (under Pennsylvania law, an employer of an independent contractor may employ a person to inspect the project and ensure compliance with the contract without being in control); Sullivan v. General Elec. Co., 226 F.2d 290 (6th Cir. 1955) (Ohio law); Univision Holdings, Inc. v. Ramos, 638 So. 2d 130 (Fla. Dist. Ct. App. 1994), *appeal*

The courts of most states impose a duty upon the owner when his general supervision of the work encompasses the right to control the specific manner or operative details of construction.[14] Additionally, in at least one state, if the level of supervision becomes an overall "dominance" of the project and, therefore, tacit control, the owner may be liable for his negligence in failing to require the injured worker's employer to implement safety measures.[15]

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granted, 1994 Fla. LEXIS 1884 (Fla. Nov. 8, 1994), *remanded*, 655 So. 2d 89 (Fla. 1995); American Sec. Life Ins. Co. v. Gray, 89 Ga. App. 672, 80 S.E. 2d 832 (1954) (taking steps to ensure that the independent contractor is faithful to the agreement is not such control as to render the employer liable); Vickers v. Hanover Constr. Co., 125 Idaho 832, 875 P.2d 929 (1994); Riffle v. Knecht Excavating, Inc., 647 N.E.2d 334 (Ind. Ct. App. 1995); Green v. Popeye's, Inc., 619 So. 2d 69 (La. Ct. App. 1993); Hoechst-Celanese Corp. v. Mendez, 967 S.W.2d 354 (Tex. 1998); Ramsey v. Pacific Power & Light Co., 792 P.2d 1385 (Wyo. 1990); Stephenson v. Pacific Power & Light Co., 779 P.2d 1169 (Wyo. 1989); Cook v. Nebraska Public Power District, 171 F.3d 626, 632 (8th Cir. 1999) (Nebraska law) ("Under Nebraska law, the mere presence and minor participation of an [owner's] employee does not suffice to show that [owner] retained control over the [workers].")

See also Simon v. Deery Oil, 699 F. Supp. 257 (D. Utah 1988) (owner did not retain control merely by incorporation of owner's safety rules into contract); Schwab v. United States, 649 F. Supp. 1319 (N.D. Fla. 1986) (estate of crane operator could not recover against federal government for failing to engage in safety inspections and, in addition, because causes of accident were unrelated to site conditions); Hill v. Pacific Power & Light Co., 765 P.2d 1348 (Wyo. 1988); Hewett v. Travelers Ins. Co., 538 So. 2d 952 (Fla. Dist. Ct. App. 1989); King v. Magnolia Homeowner Ass'n, 205 Cal. App. 3d 1312, 253 Cal. Rptr. 140 (1988); Garcia v. Biltmore Court Villas, Inc., 534 So. 2d 1173 (Fla. Dist. Ct. App. 1988) (an owner is not liable for worker's injuries resulting from the negligence of independent contractor's employee on the job site); City of Miami v. Perez, 509 So. 2d 343 (Fla. Dist. Ct. App. 1987) (owner has a right to inspect the work of an independent contractor to determine that work conforms to contract and to reject unsatisfactory work and demand that it be made satisfactory; this reservation is not a usurpation of control and does not change the owner from a passive non-participant to an active participant in the construction); Gentile v. Kehe, 165 Ill. App. 3d 802, 117 Ill. Dec. 476, 520 N.E.2d 827 (1987).

[14] *See, e.g.,* Amacker v. Skelly Oil Co. 132 F.2d 431 (5th Cir. 1942) (oil company which had directed independent contractor to send two employees to clean sediment from oil without foreman or tools exercised control over the details of the operation and, under Texas law, owed employees a duty to see that the work was done by reasonably safe means); Boyette v. Algonquin Gas Transmission Co., 952 F. Supp. 192 (S.D.N.Y. 1997); Peairs v. Florida Publishing Co., 132 So. 2d 561 (Fla. Dist. Ct. App. 1961) (noting that if sufficient control is retained, the "independent contractor" may in effect be the owner's servant, and the owner may be liable under respondeat superior); Maki v. Copper Range Co., 121 Mich. Ct. App. 518, 328 N.W.2d 430 (1982); Parrish v. Omaha Pub. Power Dist., 242 Neb. 783, 496 N.W.2d 902 (1993); Sopkovich v. Ohio Edison Co., 81 Ohio St. 3d 628, 693 N.E.2d 233 (1998); Michaels v. Ford Motor Co., 72 Ohio St. 3d 475, 650 N.E.2d 1352 (1995); Bryant v. Gulf Oil Corp., 694 S.W.2d 443 (Tex. Ct. App. 1985). *See also* Angus v. Doss, 157 Ill. App. 3d 300, 109 Ill. Dec. 562, 510 N.E.2d 430, *appeal denied,* 517 N.E.2d 1083 (Ill. 1987); Cook v. Nebraska Public Power District, 171 F.3d 626, 632 (8th Cir. 1999) (Nebraska law).

[15] Funk v. General Motors Corp., 392 Mich. 91, 220 N.W.2d 641 (1974), *overruled in part*

The concept of control is central to nearly every state's formulation of the legal duty which an owner owes to the employees of his independent contractor.[16] When the owner has not reserved the right to control or alter a particular phase of the construction, the imposition of liability on him for injuries to workers would not be fault-based, and society's interest in safe worksites would not be furthered by imposing liability for injuries to workers. Most courts are hesitant to depart from traditional concepts of liability for negligence, especially in the area of independent contractors.[17] As the comments to Section 414 of the Restatement (Second) of Torts explain, an owner is liable only if he reasonably should have known of the dangerous manner in which his independent contractor was operating and was in a position to prevent it.[18]

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in Hardy v. Monsanto Enviro-Chem Sys., Inc., 414 Mich. 29, 322 N.W.2d 270 (1982) (pervasive ness of the control retained by General Motors represented more than an "isolated occurrence" and justified holding the company responsible for the inadequate safety precautions). *See also* Crawford v. Florida Steel Corp., 478 So. 2d 855 (Fla. Dist. Ct. App. 1985) (the owner is liable where he interferes or meddles with a job to the extent of assuming the direction of it, and is thereby liable for injuries to the independent contractor's employee); Lee v. Junkans, 18 Wis. 2d 56, 117 N.W.2d 614 (1962) (owner held liable for injured workmen because his retention of control and personal involvement justified the imposition of a duty to ensure safety standards); Quinones v. Upper Moreland Township, 293 F.2d 237 (3d Cir. 1961) (Pennsylvania law) (owner whose agent inspected the job two or three times a week and who knew of the unshored worksite retained sufficient control to incur liability for a worker's injuries resulting from the contractor's failure to shore a trench).

[16] Because the independent contractor rule was created at common law to protect employers of independent contractors who lacked the control or power to prevent injuries, most states have linked the retention of control with an imposition of a duty of care. *See generally* F. Harper & F. James, The Law of Torts (1956).

[17] Contrary to this general rule, New York has enacted a rule of absolute liability of owners whose independent contractors deviate from specific standards governing the use of scaffolding and similar devices. *See* Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 493 N.Y.S.2d 102, 482 N.E.2d 898 (1985); Kenny v. George A. Fuller Co., 87 A.D.2d 183, 450 N.Y.S.2d 551 (1982).

[18] Restatement (Second) of Torts § 414 (1965) states:

> 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.

According to the comments to this section of the Restatement, an owner might retain control insufficient for liability under the doctrine of *respondant superior* (applicable to a master/servant relationship) but still be in control of the operation or manner of a specific aspect of the job, so that he would be liable for a failure to exercise that control reasonably. Section 414 of the Restatement (Second) of Torts has been adopted as the law of several states.

See, e.g., Thompson v. Jess, 1999 UT 22, 979 P.2d 322 (Utah 1999); Mullins v. Tyson Foods, Inc., 143 F.3d 1153 (8th Cir. 1998); Tillman v. Great Lakes Steel Corp., 17 F. Supp. 2d 672 (E.D. Mich. 1998); Maders v. Estes Co., 169 Ariz. 458, 820 P.2d 322 (1991); Elkins v. Arkla, Inc.,

If the owner has retained the right to control the manner or means of his independent contractor's operation, his duty of care to use his power to prevent the use of unsafe methods is nondelegable. The owner, by agreement, may assign nondelegable obligations to his independent contractor, but by doing so he cannot affect his own duty to the injured worker.[19] He may be entitled to indemnification from the independent contractor, however.

[b]—Duty To Provide a Safe Place to Work

Another duty typically imposed upon the property owner is the duty to provide the independent contractor with a safe place to work.[20] Often this duty is codified in a state statute[21] and, in most states, the duty is nondelegable. The owner is

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312 Ark. 280, 849 S.W.2d 489 (1993); Castro v. State, 114 Cal. App. 3d 503, 170 Cal. Rptr. 734 (1981); Fris v. Personal Prod. Co., 255 Ill. App. 3d 916, 194 Ill. Dec. 623, 627 N.E.2d 1265, *appeal denied*, 157 Ill. 2d 449, 205 Ill. Dec. 160, 642 N.E.2d 1277 (1994); Pasko v. Commonwealth Edison Co., 14 Ill. App. 3d 481, 302 N.E.2d 642 (1973); Byrd v. Merwin, 456 Pa. 516, 317 A.2d 280 (1974).

[19] Parrish v. Omaha Pub. Power Dist., 242 Neb. 783, 496 N.W.2d 902 (1993); Weber v. Northern Ill. Gas Co., 10 Ill. App. 3d 625, 295 N.E.2d 41 (1973); Pasko v. Commonwealth Edison Co., 14 Ill. App. 3d 481, 302 N.E.2d 642 (1973); Mortgage Guarantee Ins. Corp. v. Stewart, 427 So. 2d 776 (Fla. Dist. Ct. App. 1983) (the job but not the responsibility may be delegated).

[20] *See* Bateman v. Central Foundry Div., General Motor Corp., 992 F.2d 722 (7th Cir. 1993) (owner did not obligate itself through either conduct or contract for the safety of contractor's employees); Derion v. Buffalo Crushed Stone, Inc., 135 A.D.2d 1105, 523 N.Y.S.2d 322 (1987) (roadway, in which worker was injured when dump truck he was driving hit a pothole, was not "place of work" within meaning of relevant statute, notwithstanding the fact that roadway was owned and maintained by property owner).

[21] *See, e.g.,* Ohio Rev. Code Ann. tit. 41, §§ 4101.11–4101.12; N.J. Rev. Stat. Ann. § 34:5–166. An owner who selects more than one contractor to perform the work is, according to New Jersey's statutory Safety Code, responsible for general safeguarding. N.J. Rev. Stat. Ann. § 34:5–168.

See Kelly v. LIN Television of Texas, L.P., 27 S.W.3d 564 (Tex. Ct. App. 2000); Krawiecki v. Cerutti, 218 A.D.2d 323, 639 N.Y.S.2d 554 (1996); Santos v. Bettencourt, 40 Mass. App. Ct. 90, 661 N.E.2d 671 (1996) (state statute does not apply to single family dwellings); Poulin v. E.I. DuPont DeNemours & Co., 883 F. Supp. 894 (W.D.N.Y. 1994); Robinson v. New York City Hous. Auth., 152 Misc. 2d 597, 578 N.Y.S.2d 387 (Sup. Ct. 1991) (owner could not be held liable under N.Y. Lab. Law § 200 for worker's injuries caused by contractor's negligence because owner did not exercise control over the contractor's activities, but factual issue remained as to whether owner was vicariously liable under N.Y. Lab. Law § 241); Kline v. Ohio Univ., 62 Ohio Misc. 2d 704, 610 N.E.2d 1205 (1990); Csaranko v. Robilt Inc., 93 N.J. Super. 428, 226 A.2d 43 (App. Div. 1967); N.Y. Labor Law § 200 (owner has a duty to provide workers with a reasonably safe workplace and to make a reasonably diligent inspection of the premises for dangers).

See also Sperber v. Penn Cent. Corp., 150 A.D.2d 356, 540 N.Y.S.2d 877 (1989); Antunes v. 950 Park Ave. Corp., 149 A.D.2d 332, 539 N.Y.S.2d 909 (1989); Ferra v. County of Wayne, 147 A.D.2d 964, 537 N.Y.S.2d 418 (1989) (violation of New York Labor Law imposes absolute liability on owner); Blair v. Rosen-Michaels, Inc., 146 A.D.2d 863, 536 N.Y.S.2d 577 (1989) (evidence of practice in the industry is immaterial where injury is caused by violation of labor law);

required to exercise reasonable care in making his premises reasonably safe for the employees of the independent contractor. If the duty is breached and an injury results to a worker, the owner may be found liable.[22] An exception to this proposition occurs when the government is the owner of the property.[23] Tort actions are limited by the guidelines established in the Federal Tort Claims Act.[24]

The owner satisfies this "safe place" duty in one of two ways: he may use reasonable care to provide a workplace free from unreasonable risks of harm,

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Koumianos v. State, 141 A.D.2d 189, 534 N.Y.S.2d 512 (1988); Kennedy v. McKay, 86 A.D.2d 597, 446 N.Y.S.2d 124 (1982); Mark R. Bendure & Robert F. Garvey, *Construction Law—Tort Liability of the Property Owner*, 75 Mich. B.J. 242 (1996).

[22] Barry v. Employers Mut. Cas. Co., 2001 WI 101, 630 N.W.2d 517 (2001), in Construction Law Digest, November, 2001, Digest No. D001624; Jordan v. National Steel Corp., 183 Ill. 2d 448, 701 N.E.2d 1092, 233 Ill. Dec. 818 (1998); Adcock v. International Paper Co., 809 F. Supp. 457 (S.D. Miss. 1992); Crane v. Exxon Corp., U.S.A., 613 So. 2d 214 (La. Ct. App. 1992), *cert. granted in part and denied in part, remanded*, 620 So. 2d 858 (La. 1993), *and amended*, 633 So. 2d 636 (La. Ct. App. 1993); Anderson v. Nashua Corp., 246 Neb. 420, 519 N.W.2d 275 (1994), *subsequent appeal*, 5 Neb. 833, 560 N.W.2d 446 (1997); Taylor v. Sears, Roebuck & Co., 190 W. Va. 160, 437 S.E.2d 733 (1993); McKinstry v. County of Cass, 228 Neb. 733, 424 N.W.2d 322 (1988); Agricultural Warehouse, Inc. v. Uvalle, 759 S.W.2d 691 (Tex. Ct. App. 1988); A. Teichert & Son, Inc. v. Superior Court, 179 Cal. App. 3d 657, 225 Cal. Rptr. 10, 13 (1986) (an owner or possessor of land may also be liable for injuries incurred off the premises "as a result of natural or artificial conditions on the land" or for "activities on the land which give rise to hazardous conditions off the premises"); Mullins v. Tyson Foods, Inc., 143 F.3d 1153, 1159 (8th Cir. 1998) (Missouri law).

[23] For cases discussing government immunity, *see* Texas Dep't of Transp. v. Able, 2000 Tex. LEXIS 81 (Tex. 2000), in Construction Law Digest, October, 2000, Digest No. D000567 (Texas Tort Claims Act imposes liability on government for defects in the premises); Westfall v. Irwin, 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988); Johns v. Pettibone Corp., 843 F.2d 464 (11th Cir. 1988).

[24] Bloom v. Waste Management, Inc., 615 F. Supp. 1002, 1007 (E.D. Pa. 1985), *aff'd,* 800 F.2d 1131 (3d Cir. 1986). *See* Phillips v. United States, 956 F.2d 1071 (11th Cir. 1992) (government liable to worker injured in fall from scaffold where neither the discretionary function exception nor the independent contractor exception to the Federal Tort Claims Act applied; specifically, the discretionary function exception did not apply because the government inspectors failed to discharge with ordinary care mandatory responsibilities, and the independent contractor exception—prohibiting vicarious liability against the government—did not apply because the government had assumed responsibility for job site safety); Littlefield v. United States, 927 F.2d 1099 (9th Cir.), *cert. denied*, 502 U.S. 907, 112 S. Ct. 299, 116 L. Ed. 2d 242 (1991); Thompson v. Timpanogos Metals, 762 F. Supp. 927 (D. Utah 1991); Moody v. United States, 753 F. Supp. 1042 (N.D.N.Y. 1990); Pershing v. United States, 736 F. Supp. 132 (W.D. Tex. 1990); Berghoff v. United States, 737 F. Supp. 199 (S.D.N.Y. 1989) (United States could not be held vicariously liable under the Federal Tort Claims Act for any potentially negligent acts of an independent contractor because the safety provisions in the contract did not provide for such day-to-day supervision by the government as would convert the contractor from an independent contractor into a federal agent; government's limited sovereign immunity was thus not waived in regard to a claim by an injured employee of the independent contractor).

or he may warn the independent contractor of danger on the property. As one court has stated:

> [A]n owner or occupier of premises, who, by invitation express or implied, . . . induces, or knowingly permits, a workman to enter the premises for the performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work and to furnish and maintain appliances . . . which are reasonably safe for the purposes embraced therein.[25]

The owner is generally not responsible for injuries caused by latent or unforeseeable defects which in the exercise of reasonable care he could not have discovered.[26]

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[25] Miller v. Pacific Constructors, Inc., 68 Cal. App. 2d 529, 157 P.2d 57, 65 (1945) (employer of independent contractor must use reasonable care to make premises safe); *see also* Kline v. Ohio Univ., 62 Ohio Misc. 2d 704, 610 N.E.2d 1205 (1990); Kafel v. Republic Steel Corp., 30 Ohio St. 2d 55, 282 N.E.2d 350 (1972) (owner owed employee of independent contractor who was injured by sparks emitted from oxygen furnace a duty to furnish a workplace which was safe); Zaborowske v. OES, Inc., 731 S.W.2d 614 (Tex. Ct. App. 1987) (premises owner owes an independent contractor and its employees the duty to use due care to provide a safe place to work); Weber v. Northern Ill. Gas Co., 10 Ill. App. 3d 625, 295 N.E.2d 41 (1973); Kingery v. Southern Cal. Edison Co., 190 Cal. App. 2d 625, 12 Cal. Rptr. 173 (1961) (general duty to provide reasonably safe place to work); Sorrentino v. Graziano, 341 Pa. 113, 17 A.2d 373 (1941). *Cf.* Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, 385 So. 2d 676 (Fla. Dist. Ct. App. 1980) (under Florida law, owner is not normally held responsible to provide a safe workplace after he has turned over control to the independent contractor); Blackwell v. Cities Serv. Oil Co., 532 F.2d 1006 (5th Cir. 1976) (under Texas law, once the employer of an independent contractor has given up control, no duty to see that contractor maintains premises safely); Tilkins v. City of Niagara Falls, 52 A.D.2d 306, 383 N.Y.S.2d 758 (1976) (owner owes a duty of reasonable care to the contractor's employees).

See also Mark R. Bendure & Robert F. Garvey, *Construction Law—Tort Liability of the Property Owner*, 75 Mich. B.J. 242, 244 (1996).

[26] Pulliam v. Southern Reg'l Med. Ctr., Inc., 241 Ga. App. 285, 526 S.E.2d 573 (1999), *cert. denied*, 2000 Ga. LEXIS 352 (Ga. Apr. 28, 2000); McKinney v. Harrington, 855 P.2d 602 (Okla. 1993); Nettis v. General Tire Co., 317 Pa. 204, 177 A. 39 (1935); Ford Motor Co. v. Tomlinson, 229 F.2d 873 (6th Cir.), *cert. denied,* 352 U.S. 826, 77 S. Ct. 38, 1 L. Ed. 2d 49 (1956) (under Ohio law, owner cannot be held to foresee the negligence of the contractor's employees which causes an injury to another worker); Cartee v. Saks Fifth Ave., 277 A.D. 606, 101 N.Y.S.2d 761 (1951) (duty to furnish reasonably safe premises does not make owner an insurer of unforeseeable risks).

See also Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030, 1033 (3d Cir. 1987) ("A possessor of land . . . is also subject to liability for physical harm caused to its business invitees . . . by a condition on the land if, but only if, the possessor . . . knows, or by the exercise of reasonable care would discover the condition and should [have] realize[d] that it involve[d] an unreasonable risk of harm to such invitee.").

But see Caudel v. East Bay Mun. Util. Dist., 165 Cal. App. 3d 1, 211 Cal. Rptr. 222 (1985) (California and several other states hold that non-liability is now the exception, rather than the rule; many cases fall within the "peculiar risk" doctrine, under which the owner is liable for the contractor's failure to exercise reasonable care in certain situations).

Alternatively, the owner may warn the independent contractor of the dangers on the property of which the owner either has actual knowledge or should be aware through the exercise of reasonable care.[27] He need not warn individual employees of the contractor and will not be responsible if the contractor is remiss in conveying the warnings to the workers.[28] If the owner fails to give the contractor warning but the contractor has actual knowledge of the danger, the owner has fulfilled his duty.[29]

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[27] Indian River Foods, Inc. v. Braswell, 660 So. 2d 1093 (Fla. Dist. Ct. App. 1995), *review denied*, 672 So. 2d 542 (Fla. 1996); Hawkins v. Champion Int'l Corp., 662 So. 2d 1005 (Fla. Dist. Ct. App. 1995); Adcock v. International Paper Co., 809 F. Supp. 457 (S.D. Miss. 1992); Kelton v. Gulf States Steel, Inc., 575 So. 2d 1054 (Ala. 1991); Texas Dept. of Transp. v. Guerra, 858 S.W.2d 44 (Tex. Ct. App. 1993); Turner v. West Texas Utils. Co., 290 F.2d 191 (5th Cir.), *cert. denied,* 368 U.S. 920, 82 S. Ct. 242, 7 L. Ed. 2d 136 (1961) (owner has duty under Texas law to warn employees of an independent contractor of hidden dangers of which the owner should be aware); San Felice v. United States, 162 F. Supp. 261 (W.D. Pa. 1958) (duty to warn independent contractor of known or discoverable dangers on the premises); Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979); King v. Morrison Motor Freight Lines, 111 Ohio App. 172, 171 N.E.2d 173 (1959) (employer of independent contractor had a duty to warn of the hazardous nature of the substance to be cleaned from the highway after a spill); Quinnelly v. Southern Maid Syrup Co., 164 So. 2d 240 (Fla. Dist. Ct. App. 1964) (owner must give independent contractor timely warnings of dangers of which it is aware or through the exercise of reasonable care should be aware); DuPont v. Mt. Hope Machinery Co., 3 Mass. App. 791, 338 N.E.2d 356 (1975); Bryant v. Gulf Oil Corp., 694 S.W.2d 443, 446 (Tex. Ct. App. 1985) (under Texas law, the owner may be liable to the independent contractor's employees when the owner is an occupier of land; the owner assumes the "duty to exercise ordinary care to maintain the premises in a reasonably safe condition or warn the invitee of any dangerous conditions which the occupier knows or should know about and which are not reasonably apparet to the invitee").

See also Dube v. Kaufman, 145 A.D.2d 595, 536 N.Y.S.2d 471 (1981) (no evidence that owner had actual knowledge of danger, and owner, in hiring contractor, did not breach duty of care where contractor was negligent); Langley v. R.J. Reynolds Tobacco Co., 92 N.C. App. 327, 374 S.E.2d 443 (1988).

See James A. Burt, *Landowner Liability to Employees of Independent Contractors: A Graphic Restatement,* 53 J. Mo. B. 86, 87 (1997).

[28] Harris v. Atchison, 538 F.2d 682 (5th Cir. 1976) (under Texas law, the "Delhi-Taylor rule" imputes the knowledge of the foreman of the independent contractor to the employees of the contractor); Lowe v. United States, 611 F.2d 76 (5th Cir. 1980) (duty of the owner under Florida law to warn of dangers on premises is satisfied by a warning to supervisory personnel); Ralston Purina Co. v. Farley, 759 S.W.2d 588 (Ky. 1988); Crane v. I.T.E. Circuit Breaker Co., 443 Pa. 442, 278 A.2d 362 (1971); Schwarz v. General Elec. Realty Corp., 163 Ohio St. 354, 126 N.E.2d 906 (1955).

[29] McCarty v. Dade Div. of Am. Hosp. Supply, 360 So. 2d 436 (Fla. Dist. Ct. App. 1978); Hite v. Maritime Overseas Corp., 380 F. Supp. 222 (E.D. Tex. 1974); Dees v. El Paso Prods. Co., 471 S.W.2d 630 (Tex. Ct. App. 1971); Mathis v. Lukens Steel Co., 415 Pa. 262, 203 A.2d 482 (1964); Calvert v. Springfield Elec. Light & Power Co., 231 Ill. 290, 83 N.E. 184 (1907).

See also Mitchell v. Arkney, 396 N.W.2d 312 (S.D. 1986) (invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter; reasonable care

Whether the owner has used reasonable care is a question of fact. The presence of high voltage wires which the owner should be aware of and about which the contractor has not been warned is frequently found to be an unreasonable risk of harm.[30] One court found that an owner failed to exercise reasonable care when it simply provided the contractor with a list of safety regulations and made no further effort to make plain when it was necessary for an employee to wear protective eyeglasses.[31]

There are two generally accepted exceptions to the owner's duty to provide a safe place to work which can serve to relieve the owner of possible liability to an injured workman. The first involves dangers which are open or obvious. In these instances, the law imputes knowledge of the danger to the independent contractor regardless of whether he has actual knowledge.[32] The second exception involves those dangers implicit in the very work for which the independent contractor was hired. For example, an owner who hired an independent contractor to replace deteriorated concrete slabs of an old roof was not liable for the injuries sustained by the contractor's employee who fell when one of

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on the part of the possessor therefore does not ordinarily require precautions or even warning against dangers which are either known to the visitor or so obvious to him that he may be expected to discover them); Storr v. Proctor, 490 So. 2d 135 (Fla. Dist. Ct. App. 1986) (an owner is entitled to assume that the invitee will perceive that which would be obvious to him upon ordinary use of his own sense, and is not required to give invitee notice).

[30] *E.g.,* Raboin v. North Am. Indus., Inc., 57 Conn. App. 535, 749 A.2d 89, *appeal denied*, 254 Conn. 910, 759 A.2d 505 (2000); Louisiana-Pacific Corp. v. Andrade, 1999 Tex. LEXIS 113 (Tex. 1999); Kingery v. Southern Cal. Edison Co., 12 Cal. Rptr. 173, 190 Cal. App. 2d 625 (1961); Northern Ind. Pub. Serv. Co. v. East Chicago Sanitary Dist., 590 N.E.2d 1067 (Ind. Ct. App. 1992); Sopkovich v. Ohio Edison Co., 81 Ohio St. 3d 628, 693 N.E.2d 233 (1998); Beary v. Container Gen. Corp., 368 Pa. Super. 61, 533 A.2d 716 (1987).

But see Wright v. U.S. Gypsum Co., 538 So. 2d 291 (La. Ct. App.), *cert. denied,* 546 So. 2d 166 (La. Ct. App. 1989) (power company did not breach duty of care to worker where a reasonable commercial painter performing foreseeable painting and maintenance could safely perform duties; the court found worker was the sole cause of the accident).

[31] Kafel v. Republic Steel Corp., 30 Ohio St. 2d 55, 282 N.E.2d 350 (1972). *But see* Stanton v. Pomfrey, 95 N.Y. 2d 826, 712 N.Y.S.2d 437, 734 N.E.2d 749 (2000) (owner did not breach a duty of care by simply providing the contractor with bug spray where contractor failed to prove a dangerous condition).

[32] George v. Myers, 169 Or. App. 472, 10 P.3d 265 (2000); Hite v. Maritime Overseas Corp., 380 F. Supp. 222 (E.D. Tex. 1974) (under Texas law, owner has no duty to warn of readily observable defects); Icenogle v. Myers, 167 Ill. App. 3d 239, 521 N.E.2d 163 (1988) (owner had no duty to warn employee of live wire danger because danger was open and obvious); Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 189 A.2d 271 (1963) (no duty to warn of obvious danger); King v. Morrison Motor Freight Lines, 111 Ohio App. 172, 171 N.E.2d 173 (1959); Hammond v. City of El Dorado Springs, 362 Mo. 530, 242 S.W.2d 479 (1951); LeVonas v. Acme Paper Board Co., 184 Md. 16, 40 A.2d 43 (1944) (no duty to warn employees because the presence of dangerous wires was easily observable).

the concrete slabs he was removing broke.[33] Similarly, the law supposes that the independent contractor and his employees are sufficiently aware of the dangers of the specific construction or repairs which they agree to perform.[34] A corollary to these two exceptions is the generally accepted proposition that dangerous conditions created by the independent contractor cannot form the basis for imposing a duty on an owner who relinquishes control.[35]

In a few states, the owner's general duty to provide safe premises may be particularly strict regarding certain types of construction which are notoriously dangerous, such as scaffolding, elevators or shaft openings.[36]

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[33] West v. Briggs & Stratton Corp., 244 Ga. App. 840, 536 S.E.2d 828 (2000), in Construction Law Digest, October, 2000, Digest No. D000617; Ryobi Die Casting v. Montgomery, 705 N.E.2d 227 (Ind. Ct. App. 1999); Rigatti v. Reddy, 318 N.J. Super. 537, 723 A.2d 1283 (1999); Meder v. Resorts Int'l Hotel, Inc., 240 N.J. Super. 470, 573 A.2d 922 (App. Div. 1989); Vest v. National Lead Co., 469 F.2d 256 (8th Cir. 1972) (Missouri law).

See also Sanna v. National Sponge Co., 209 N.J. Super. 60, 506 A.2d 1258, 1262 (1986) ("the [owner] may assume that the worker, or his superiors, are possessed of sufficient skill to recognize the degree of danger involved and to adjust their methods of work accordingly"); Wolczak v. National Elec. Prods. Corp., 66 N.J. Super. 64, 168 A.2d 412 (1961) (duty to provide reasonably safe place to work does not embrace known hazards which are part of or incidental to the work for which the independent contractor was hired).

[34] Rasmussen v. Louisville Ladder Co., 211 Mich. App. 541, 536 N.W.2d 221 (1995), *appeal denied*, 451 Mich. 874, 549 N.W.2d 565 (1996), *reconsideration denied*, 453 Mich. 900, 554 N.W.2d 320 (1996); Blair v. Campbell, 924 S.W.2d 75 (Tenn. 1996); Slater v. Board of Pub. Util., 703 F. Supp. 893 (D. Kan. 1988); Chadwick v. Industrial Comm'n, 179 Ill. App. 3d 715, 128 Ill. Dec. 555, 534 N.E.2d 1000 (1989); Goodwin v. Legionville School Safety Patrol Training Center, Inc., 422 N.W.2d 46 (Minn. Ct. App. 1988); Shell Oil Co. v. Songer, 710 S.W.2d 615, 618 (Tex. Ct. App. 1986) (where the hazards "are incidental to, or part of, the work the independent contractor is hired to perform," the owner is not liable). *See* Celender v. Allegheny County Sanitary Auth., 208 Pa. Super. 390, 222 A.2d 461 (1966) (no duty with respect to risks and defects intimately connected with the work); Michel v. Valdsastri Ltd., 59 Haw. 53, 575 P.2d 1299 (1978).

[35] *See* Slack v. Whalen, 327 N.J. Super. 186, 742 A.2d 1017, *certification denied*, 163 N.J. 398, 749 A.2d 371 (2000), in Construction Law Digest, June, 2000, Digest No. D000309; Baber v. Dill, 531 N.W.2d 493 (Minn. 1995); Rodrigues v. Elizabethtown Gas Co., 104 N.J. Super. 436, 250 A.2d 408 (1969); Kirk v. United States, 161 F. Supp. 722 (D. Idaho 1958), *aff'd,* 270 F.2d 110 (9th Cir. 1959) (no common law duty on owner to enforce a safety program or remedy situations created by the independent contractor in the course of its work in the absence of a nondelegable duty); McHugh v. National Lead Co., 60 F. Supp. 17 (E.D. Mo. 1945), *appeal dismissed,* 154 F.2d 829 (8th Cir. 1946); Trecartin v. Mahony-Troast Constr. Co., 18 N.J. Super. 380, 87 A.2d 349 (1952).

[36] N.Y. Lab. Law §§ 240–241; Tex. Rev. Civ. Stat. Ann. art. 5182; Martin v. Food Machinery Corp., 100 Cal. App. 2d 244, 223 P.2d 293 (1950) (contractor who assumes duty to provide scaffolding must use proper diligence to construct and maintain such structure and contractee's obligation exists independent of the contract); Atkins v. Deere & Co., 177 Ill. 2d 222, 226 Ill. Dec. 239, 685 N.E.2d 342 (1997); Cathey v. Southeastern Constr. Co., 218 N.C. 525, 11 S.E.2d 571 (1940) (duty to use proper care to avoid dangers of "man-trap" scaffolding which the contractee

Scaffolding is one major area where the owner's duties are onerous. New York has disposed of the negligence standard and imposes absolute liability on an owner when specific scaffolding standards are not met. There, an owner is required to compensate the injured worker regardless of whether he or the independent contractor behaved negligently. The owner is liable even when the independent contractor supplies and constructs his own scaffolding and the owner has neither control nor knowledge of the work.[37]

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provides); Bright v. Barnett & Record Co., 88 Wis. 299, 60 N.W. 418 (1894) (implied invitation to use the staging and the dangerous nature of the structure formed the basis for the duty of care); Mulchey v. Methodist Religious Soc'y, 125 Mass. 487 (1878); *see* Thompson v. Jess, 979 P.2d 322 (Utah 1999); Batts v. Cracker Barrel Old Country Store, Inc., 219 Ga. App. 327, 464 S.E.2d 829 (1995); *but cf.* Kittleson v. United Parcel Serv., Inc., 162 Ill. App. 3d 966, 114 Ill. Dec. 195, 516 N.E.2d 350 (1987) (activity of carrying equipment not an integral part of erection operation, thus beyond the scope of coverage under the Illinois Structural Work Act) [*Editor's Note*: The Illinois Structural Work Act was repealed in 1995.]; Cressman v. Wright, 105 Mich. App. 194, 306 N.W.2d 447 (1981) (applying the "simple-tool doctrine," the court held that the owner had no duty to the independent contractor with respect to a defective wash bench which the owner required to be used as scaffolding because the employee is in a better position to observe the defect than the owner).

See also Kimberly J. Roberts, *Construction Accident: Who is Liable?*, 15 Construction Law. 3, 4–5 (1995).

[37] Section 240 of the New York Labor Code states:

> All contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

See Kyle v. City of New York, 268 A.D.2d 192, 707 N.Y.S.2d 445 (2000); Secord v. Willow Ridge Stables, Inc., 179 Misc. 2d 366, 684 N.Y.S.2d 867 (1999); Joblon v. Solow, 91 N.Y.2d 457, 672 N.Y.S.2d 286, *vacated in part, remanded*, 152 F.3d 55 (2d Cir. 1998), *summary judgment denied*, 23 F. Supp. 2d 411 (S.D.N.Y. 1998); Covey v. Iroquois Gas Transmission Sys., L.P., 89 N.Y.2d 952, 655 N.Y.S.2d 854, 678 N.E.2d 466 (1997); Stolt v. General Foods Corp., 81 N.Y.2d 918, 597 N.Y.S.2d 650, 613 N.E.2d 556 (1993) (injured worker's contributory negligence is not a defense to claim based on N.Y. Lab. Law § 240(1)); Hagins v. State, 81 N.Y.2d 921, 597 N.Y.S.2d 651, 613 N.E.2d 557 (1993); Gettys v. Port Auth. of New York, 248 A.D.2d 226, 670 N.Y.S.2d 28 (1998); Duke v. Eastman Kodak Co., 248 A.D.2d 990, 669 N.Y.S.2d 991 (1998); Kanney v. Goodyear Tire & Rubber Co., 245 A.D.2d 1034, 667 N.Y.S.2d 163 (1997); Carpio v. Tishman Constr. Corp. of New York, 240 A.D.2d 234, 658 N.Y.S.2d 919 (1997); Stuffin v. Ithaca College, 240 A.D.2d 989, 659 N.Y.S.2d 555 (3d Dept. 1997); Francis v. Aluminum Co. of Am., 240 A.D.2d 985, 659 N.Y.S.2d 903 (1997); Jastrzebski v. North Shore Sch. Dist., 223 A.D.2d 677, 637 N.Y.S.2d 439, *aff'd*, 88 N.Y.2d 946, 647 N.Y.S.2d 708, 670 N.E.2d 1339 (1996) (owner not liable where worker refused to use scaffold and fell from the ladder he was using); Covey v. Iroquois Gas Transmission Sys., L.P., 218 A.D.2d 197, 637 N.Y.S.2d 992, *motion granted*, 227 A.D.2d 867, 643 N.Y.S.2d 425 (3d Dept. 1996), *aff'd*, *certified question answered*, 89 N.Y.2d 952, 655 N.Y.S.2d 854, 678 N.E.2d 466 (1997); Wensley v. Argonox Constr. Corp., 228 A.D.2d 823, 644 N.Y.S.2d 355 (1996), *appeal dismissed without opinion*, 89 N.Y.2d 861, 653 N.Y.S.2d 282, 675 N.E.2d

(Text continued on page 10–43)

1235 (1996); Watso v. Metropolitan Life Ins. Co., 22 A.D.2d 883, 644 N.Y.S.2d 399 (1996); Guillory v. Nautilus Real Estate, Inc., 208 A.D.2d 336, 624 N.Y.S.2d 110 (App. Div.), *appeal denied*, 86 N.Y.2d 881 (1995); Danaher v. Nortarfrancesco, 219 A.D.2d 444, 623 N.Y.S.2d 630 (1995); Desrosiers v. Barry, Bette & Led Duke, Inc., 189 A.D.2d 947, 592 N.Y.S.2d 826 (1993); Singh v. Barrett, 192 A.D.2d 378, 596 N.Y.S.2d 45 (1993); Madigan v. United Parcel Serv., 193 A.D.2d 1102, 598 N.Y.S.2d 634 (1993); Ali v. Olisa, 194 A.D.2d 578, 599 NY.S.2d 73 (1993) (homeowner's exception to liability would not apply if owner's purpose in making renovations was to prepare the house for commercial rental); Spinillo v. Strober L.I. Bldg. Material Centers, 192 A.D.2d 515, 595 N.Y.S.2d 825 (1993) (homeowner's exception applied); Kelly v. Bruno & Sons, Inc., 190 A.D.2d 777, 593 N.Y.S.2d 555 (1993) (homeowner's exception applied); Chura v. Baruzzi, 192 A.D.2d 918, 596 N.Y.S.2d 592 (1993); Sardella v. City of Schenectady, 193 A.D.2d 914, 597 N.Y.S.2d 827 (1993); Cappiello v. Telehouse Int'l Corp. of Am., 193 A.D.2d 478, 597 N.Y.S.2d 393 (1993); Howell v. Rochester Inst. of Technology, 191 A.D.2d 1006, 594 N.Y.S.2d 513 (1993); DeRock v. Pyramid Co., 190 A.D.2d 1092, 593 N.Y.S.2d 709, *appeal dismissed without opinion*, 81 N.Y.2d 1007, 599 N.Y.S.2d 806, 616 N.E.2d 161 (1993); Ruiz v. 8600 Roll Road, Inc., 190 A.D.2d 1030, 594 N.Y.S.2d 474 (1993); Comes v. New York State Elec. & Gas Corp., 189 A.D.2d 945, 592 N.Y.S.2d 478, *aff'd*, 82 N.Y.2d 876, 609 N.Y.S.2d 168, 631 N.E.2d 110 (1993); Liverpool v. S.P.M. Envtl., Inc., 189 A.D.2d 645, 592 N.Y.S.2d 339 (1993); Dunlap v. United Health Servs., Inc., 189 A.D.2d 1072, 593 N.Y.S.2d 339 (1993); Mosher v. St. Joseph's Villa, 184 A.D.2d 1000, 584 N.Y.S.2d 678 (1992) (injured workercould maintain a § 240(1) action against owner where worker was engaged in site preparation that was incidental and necessary to the erection of the building); Stephens v. Tucker, 184 A.D.2d 828, 584 N.Y.S.2d 667 (1992); Place v. Grand Union Co., 184 A.D.2d 817, 584 N.Y.S.2d 666 (1992) (owner liable under § 240 where ladder was not "constructed, placed and operated as to give proper protection"); Enderby v. Keppler, 184 A.D.2d 1058, 584 N.Y.S.2d 364 (1992); Conforti v. Babad, 182 A.D.2d 1010, 583 N.Y.S.2d 532 (1992); Fitzgibbons v. Olympia & York Battery Park Co., 182 A.D.2d 1069, 582 N.Y.S.2d 870 (1992) (protection of statute extended to worker injured by falling hoist); Smith v. Cassadaga Valley Cent. Sch. Dist., 178 A.D.2d 955, 578 N.Y.S.2d 747 (1991); Walsh v. Baker, 172 A.D.2d 1038, 569 N.Y.S.2d 298 (1991); Colern v. State, 170 A.D.2d 1000, 566 N.Y.S.2d 154 (1991); Amico v. Park Ave. Plaza Co., 168 A.D.2d 391, 563 N.Y.S.2d 81 (1990); Shaheen v. International Business Mach. Corp., 157 A.D.2d 429, 557 N.Y.S.2d 972 (1990); Lockwood v National Valve Mfg. Co., 143 A.D.2d 509, 533 N.Y.S.2d 44 (1988); Kenny v. George A. Fuller Co., 87 A.D.2d 183, 450 N.Y.S.2d 551 (1982) (absolute liability for violation of § 240); Alderman v. State, 139 Misc. 2d 510, 528 N.Y.S.2d 280 (Ct. Cl. 1988).

Cf. Jock v. Fien, 176 A.D.2d 6, 579 N.Y.S.2d 293 (1992), *modified and remanded,* 80 N.Y.2d 965, 590 N.Y.S.2d 878, 605 N.E.2d 365 (1992) (owner not liable under N.Y. Lab. Law §§ 200, 240(1) or 241(6) where injured worker was not engaged in construction work, but owner was liable under N.Y. Lab. Law § 200, which codified the owner's common law duty to provide a safe place to work).

But see Melber v. 6333 Main St., Inc., 91 N.Y.2d 759, 676 N.Y.S.2d 104, 698 N.E.2d 933 (1998) (court found that owner was not liable under N.Y. Lab. Law § 240(1) because the risk of injury could not be avoided by proper placement or utilization of any protective equipment listed in § 240(1); compare with *Carpio v. Tishman Constr. Corp. of New York*, cited above, where, under similar facts, court found owner liable under § 240(1)); Kimball v. Fort Ticonderoga Ass'n, 167 A.D.2d 581, 563 N.Y.S.2d 209 (1990), *appeal dismissed without opinion,* 77 N.Y.2d, 571 N.Y.S.2d 915, 575 N.E.2d 401 (1991); Yaeger v. New York Tel. Co., 148 A.D.2d 308, 538 N.Y.S.2d 526 (1989); Simon v. Schenectady N. Congregation of Jehovah's Witnesses, 132 A.D.2d 343, 522

Other states retain a negligence standard as to scaffolding areas, but place a duty on the owner to see that statutory provisions regarding scaffolding are met if the independent contractor fails to ensure compliance.[38] Illinois law applied its scaffolding act (Structural Work Act) to owners "having charge of" construction or alteration of the structure covered by the Act.[39]

[c]—Owner's Duty Regarding Inherently Dangerous Work

The duties imposed upon an owner to exercise control reasonably, to provide a safe place to work, and to warn of non-obvious dangers are duties which hold the owner accountable only for his own negligence. In some states, however, there are circumstances under which an owner will be held accountable only for the negligence of the independent contractor. This vicarious liability is created when the work to be performed is inherently or peculiarly dangerous and special precautions are required.[40] In this often ambiguous area, the courts have

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N.Y.S.2d 343 (1987) (owner did not fail to provide reas1onably safe work place because it was unforeseeable that the contractor, after insisting on the provision of a helper and securing one, would proceed with the work without utilizing the helper; owner did not breach duty to provide contractor protection from reasonably foreseeable risks of injury at the work place).

[38] *E.g.,* Texas Rev. Civ. Stat. Ann. art. 5182(4) states in part: "The owners, or the agent of the owner of such building, shall see that the general contractor or subcontractors carry out the provisions of this article [Protection of Workmen on Buildings]." *See* Coastal Constr. Co. v. Tex-Kote, Inc., 571 S.W.2d 400 (Tex. Civ. App. 1978) (plaintiff suing on behalf of worker killed in construction of the Houston Astrodome must show that there was violation of the statute and that it was unjustified).

[39] The Illinois Structural Work Act, 740 ILCS 150/1 *et seq.* was repealed in 1995; Section 9 thereof stated that: "Any owner, contractor, sub-contractor, foreman, or other person having charge of the erection, construction . . . of any building or other structure . . . shall comply with all the terms thereof."

[40] Rodic v. Koba, 2000 Ohio App. LEXIS 5715 (Ohio Ct. App. Dec. 7, 2000), *discretionary appeal not allowed*, 91 Ohio St. 3d 514, 746 N.E.2d 615 (2001), in Construction Law Digest, May, 2001, Digest No. D001167; O'Carroll v. Roberts Indus. Contractors, Inc., 119 N.C. App. 140, 457 S.E.2d 752, *review denied*, 341 N.C. 420, 461 S.E.2d 760 (1995); Rice v. Delta Air Lines, Inc., 217 Ga. App. 452, 458 S.E.2d 359 (Ga. App.), *cert. denied*, 1995 Ga. LEXIS 999 (Ga. Sept. 11, 1995) (owner not liable where work was not inherently dangerous); Richmond v. White Mountain Recreation Ass'n, Inc., 140 N.H. 755, 674 A.2d 153 (1996), *relying on* Arthur v. Holy Rosary Credit Union, 139 N.H. 463, 656 A.2d 830 (1995); Massey v. Century Ready Mix Corp., 552 So. 2d 565 (La. Ct. App. 1989), *cert. denied*, 556 So. 2d 41 (La. 1990); Jenkins v. Georgia Power Co., 849 F.2d 507 (11th Cir. 1988), *cert. denied,* 488 U.S. 1007, 109 S. Ct. 789, 102 L. Ed. 2d 780 (1989); Gutierrez v. Exxon Corp., 764 F.2d 399, 402 (5th Cir. 1985); Donovan v. General Motors Corp., 762 F.2d 701, 703 (8th Cir. 1985); Agricultural Warehouse, Inc. v. Uvalle, 759 S.W.2d 691 (Tex. Ct. App. 1988); Bowles v. Weld Tire & Wheel, Inc., 41 S.W.3d 18 (Mo. App. 2001).

For a complete discussion of employer-owner liability for injuries sustained as a result of inherently dangerous work, *see* Annot., Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor, 34 A.L.R. 4th 914 (1984).

consistently looked to Section 416 of the Restatement (Second) of Torts for guidance:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.[41]

The drafters of the Restatement decided to take a neutral position on the question of whether this vicarious liability covered injuries to disinterested third parties only or would apply to injured employees of the independent contractor.[42] The result has been a pronounced division among the courts.

A majority of states have concluded that there should not be vicarious liability on owners "as to injured employees of the independent contractor."[43] Courts

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Although the Restatement (Second) of Torts distinguishes between work which is "inherently dangerous" and work which creates a peculiar risk of harm [see §§ 416 and 427], the courts have treated the ideas as components of a single doctrine. *See, e.g.,* White v. Uniroyal Inc., 155 Cal. App. 3d 1, 202 Cal. Rptr. 141 (1984).

[41] Restatement (Second) of Torts § 416 (1965). *See* Motter v. Meadows Ltd. Partnership, 451 Pa. Super. 520, 680 A.2d 887 (1996).

[42] One tentative draft of the Restatement (Second) of Torts stated that employees of independent contractors should rely on worker's compensation statutes and should not be permitted to take advantage of the exceptions to the general independent contractor rule. The drafters of the Restatement removed this section, however, and decided that it was best for each state to decide whether the exceptions applied to the employees of the independent contractor as well as to the public. Some courts have, however, cited the tentative draft as authority for not extending the exceptions to employees of the independent contractor. *See, e.g.,* Eutsler v. United States, 376 F.2d 634 (10th Cir. 1967) (Utah law); Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P.2d 330 (1965).

[43] Ellis v. Chase Communications, Inc., 63 F.3d 473 (6th Cir. 1995); Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.2d 384 (Mo. 1991) (en banc) (overruling an earlier line of cases, the Supreme Court of Missouri held that landowners will not be vicariously liable for the injuries to an employee of an independent contractor as a result of inherently dangerous activity when such employee is covered by workers' compensation); Matteuzzi v. Columbus Partnership, L.P., 866 S.W.2d 128 (Mo. 1993); Mullins v. Tyson Foods, Inc., 143 F.3d 1153 (8th Cir. 1998) (Missouri law); Welch v. Heat Research Corp., 644 F.2d 487 (5th Cir. 1981) (Texas law); Florida Power & Light Co. v. Price, 170 So. 2d 293 (Fla. 1964); Donch v. Delta Inspection Servs. Inc., 165 N.J. Super. 567, 398 A.2d 925 (Law Div. 1979); Vertentes v. Barletta Co., 392 Mass. 165, 466 N.E.2d 500 (1984); Cleveland Elec. Illuminating Co. v. O'Connor, 50 Ohio App. 30, 197 N.E. 428 (1935); Tauscher v. Puget Sound Power & Light Co., 96 Wash. 2d 274, 635 P.2d 426 (1981); Nelson v. United States, 639 F.2d 469 (9th Cir. 1980) (applying federal Maritime law); Jackson v. Petit Jean Elec. Coop., 270 Ark. 506, 606 S.W.2d 66 (1980); Conover v. Northern States Power Co., 313 N.W.2d 397 (Minn. 1981); Wagner v. Continental Casualty Co., 143 Wis. 2d 379, 421 N.W.2d 835 (1988); Skow v. Department of Transp., 468 So. 2d 422 (Fla. Dist. Ct. App. 1985).

have typically given two justifications for this position. First, the owner who employs an independent contractor will typically pay for the worker's compensation premiums because the amount will be a part of the contract price. Allowing an employee of the independent contractor to recover damages from the owner on the basis of the independent contractor's negligence thus places a double burden on the owner and is unfairly harsh.[44] Second, permitting vicarious liability would cause the employee of the independent contractor to be better off than a direct employee of the owner, who in similar circumstances would be limited to worker's compensation benefits. In addition to this "inequity," vicarious liability would discourage the use of independent contractors whose expertise may be necessary to perform peculiarly dangerous tasks.[45]

Several states, however, allow employees of an independent contractor to recover damages from the property owner when the independent contractor has acted negligently regarding inherently dangerous work.[46] These states have found no persuasive reason for distinguishing between injuries sustained by the general

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See also Corpus v. K-J Oil Co., 720 S.W.2d 672 (Tex. Ct. App. 1986); Cole v. United States, 651 F. Supp. 221, 224 (N.D. Fla. 1986), *aff'd,* 846 F.2d 1290 (11th Cir.), *cert. denied*, 488 U.S. 966 (1988) ("under Florida law, an employer is not liable to an independent contractor's employees even though they are engaged in inherently dangerous activity, absent an act of negligence by the employer independent of his relationship with the independent contractor"); Kimberly J. Roberts, *Construction Accident: Who is Liable?*, 15 Construction Law. 3 (1995). *Cf.* Lewis v. Sims Crane Serv., Inc., 498 So. 2d 573 (Fla. Dist. Ct. App. 1986) (owner/general contractor liable for injury to hoist operator).

[44] Vagle v. Pickands Mather & Co., 611 F.2d 1212 (8th Cir. 1979), *cert. denied,* 444 U.S. 1033, 100 S. Ct. 704, 62 L. Ed. 2d 669 (1980) (Minnesota law); Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P.2d 330 (1965); Redfeather v. Chevron USA, Inc., 57 Cal. App. 4th 702, 67 Cal. Rptr. 2d 159 (1997); Vertentes v. Barletta Co., 392 Mass. 165, 466 N.E.2d 500 (1984).

[45] Vagle v. Pickands Mather & Co., 611 F.2d 1212 (8th Cir. 1979), *cert. denied,* 444 U.S. 1033, 100 S. Ct. 704, 62 L. Ed. 2d 669 (1980) (Minn. law); Vertentes v. Barletta Co., 392 Mass. 165, 466 N.E.2d 500 (1984).

[46] Edwards v. Franklin & Marshall College, 444 Pa. Super. 1, 663 A.2d 187 (1995); Van Arsdale v. Hollinger, 68 Cal. 2d 245, 66 Cal. Rptr. 20, 437 P.2d 508 (1968); Herbst v. Northern States Power Co., 432 N.W.2d 463 (Minn. Ct. App. 1988); Gonzalez v. United States Steel Corp., 248 Pa. Super. 95, 374 A.2d 1334 (1977), *aff'd,* 484 Pa. 277, 398 A.2d 1378 (1979); Warren v. McLouth Steel Corp., 111 Mich. App. 496, 314 N.W.2d 666 (1981); Chesapeake & Potomac Tel. Co. v. Chesapeake Utils. Corp., 436 A.2d 314 (Del. 1981) (Maryland law); Giarrantano v. Weitz Co., 259 Iowa 1292, 147 N.W.2d. 824 (1967); Watson v. Black Mountain Ry. Co., 164 N.C. 176, 80 S.E. 175 (1913).

See also Mark R. Bendure & Robert F. Garvey, *Construction Law—Tort Liability of the Property Owner*, 75 Mich. B.J. 242, 243 (1996).

But cf. Cook v. Nebraska Pub. Power Dist., 171 F.3d 626 (8th Cir. 1999); Central Trust & Sav. Bank v. Toppert, 198 Ill. App. 3d 562, 143 Ill. Dec. 885, 554 N.E.2d 820 (1990) (employee of independent contractor denied recovery against owner where employee had direct physical control over particularly dangerous part of the work at the time of the premature explosion).

public in the course of performing inherently dangerous work and injuries sustained by employees of an independent contractor.[47] Courts in these states have noted that holding the owner liable will increase his incentive to take precautions himself or to supervise more closely the precautions taken by the independent contractor. Because the doctrine applies without regard to the owner's right to control the work setting, an owner will be more inclined to reserve and exercise control, which these courts believe will result in a safer workplace.[48]

Whether the risk of harm involved in a construction project is within this inherently dangerous work doctrine is a decision which varies from state to state. California and other states which have taken an expansive view of the doctrine have ruled that "[t]he fact that an activity involves an ordinary and customary danger of the particular work to be performed is immaterial to the question of whether it may involve a peculiar risk of harm within the meaning of the peculiar risk doctrine."[49] It is necessary only that the risk be one which the owner should recognize as likely to arise in the usual or actual method of performing the work.[50]

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[47] Ortiz v. Ra-El Dev. Corp., 365 Pa. Super. 48, 528 A.2d 1355, *appeal denied*, 517 Pa. 608, 536 A.2d 1332 (1987); Castro v. State, 114 Cal. App. 3d 503, 514, 170 Cal. Rptr. 734, 740 (1981) ("we see no justification for a strict interpretation of the peculiar risk doctrine just because the injured person is the employee of the independent contractor rather than a third person").

For a description of the elements of the "peculiar risk" doctrine, *see* Caudel v. East Bay Mun. Util. Dist., 165 Cal. App. 3d 1, 211 Cal. Rptr. 222 (1985).

[48] *See* Nagel v. Metzger, 103 A.D.2d 1, 478 N.Y.S.2d 737, 740 (1984) (§ 241 of the New York Labor Law imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection to workers making them responsible for a breach of the requirements of the statute irrespective of their control or supervision of the work site); Bowles v. Weld Tire & Wheel, Inc., 41 S.W.3d 18, 23–24 (Mo. App. 2001).

[49] Toland v. Sunland Hous. Group, Inc., 18 Cal. 4th 253, 74 Cal. Rptr. 2d 878, 955 P.2d 504 (1998); Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 587, 591 P.2d 503, 508, 153 Cal. Rptr. 213, 218 (1979). *See also* Lopez v. University Partners, 54 Cal. App. 4th 1117, 63 Cal. Rptr. 2d 359 (1997), *relying on* Privette v. Superior Court, 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721 (1993); Kane v. J.R. Simplot Co., 60 F.3d 688 (10th Cir. 1995).

Compare Ortiz v. Ra-El Dev. Corp., 365 Pa. Super. 48, 528 A.2d 1355, *appeal denied,* 536 A.2d 1332 (Pa. 1987) (general task of working on scaffold did not involve special danger, thus "peculiar risk" doctrine inapplicable).

[50] O'Carroll v. Texasgulf, Inc., 132 N.C. App. 307, 511 S.E.2d 313 (1999), *review denied*, 1999 N.C. LEXIS 804 (N.C. July 22, 1999); Marshall v. Southeastern Pa. Transp. Auth., 587 F. Supp. 258 (E.D. Pa. 1984); Castro v. State, 114 Cal. App. 3d 503, 170 Cal. Rptr. 734 (1981); Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979); General Manufactured Hous., Inc. v. Murray, 233 Ga. App. 382, 504 S.E.2d 220 (1998). *Cf.* Huntley v. Motor Wheel Corp., 31 Mich. App. 385, 188 N.W.2d 5 (1971) (work must be of such a nature that it would inevitably result in damage to others unless great care were taken).

Whether the work during which the injury occurred is inherently dangerous or involves a peculiar risk of harm is a question of fact.[51] The risk of being struck by a dump truck backing up,[52] of falling from an elevated structure,[53] or of being crushed in a cave-in while working in a trench[54] have all been held to be within the doctrine. One court went so far as to hold that the risk of recently constructed warehouse walls collapsing onto workers pouring a concrete floor was a peculiar risk of harm of the work. The court ignored the nature of the work and the forseeability of the accident and focused instead on the fact that "special precautions" were necessary to prevent the injury.[55]

Illinois has analogized the peculiar risk doctrine to the theory of strict liability.[56] Such a comparison, however, can be misleading. The peculiar risk

[51] For discussion of whether working with live electrical wires is an inherently dangerous condition of the premises or whether working with live electrical wires is inherently dangerous work, *see, e.g.,* Annot., Liability for Injury or Death Resulting When Object is Manually Brought into Contact With, or Close Proximity to, Electric Line, 33 A.L.R.4th 809 (1984); Annot., Liability of Owner or Occupant of Premises for Injury or Death Resulting from Contact of Crane, Derrick, or Other Moveable Machine with Electric Line, 14 A.L.R.4th 913 (1982). *See also* Jordan v. National Steel Corp., 183 Ill. 2d 448, 233 Ill. Dec. 818, 701 N.E.2d 1092 (1998).

[52] Anderson v. L.C. Smith Constr. Co., 276 Cal. App. 2d 436, 81 Cal. Rptr. 73 (1969).

[53] Morehouse v. Taubman Co., 5 Cal. App. 3d 548, 85 Cal. Rptr 308 (1970) (risk of falling from a ten-foot high wall upon which work is being done is a peculiar risk of harm); Fonseca v. County of Orange, 28 Cal. App. 3d 361, 104 Cal. Rptr. 566 (1972) (risk of falling off a twenty-foot high bridge is peculiar risk of harm). *But cf.* Crane v. I.T.E. Circuit Breaker Co., 443 Pa. 442, 278 A.2d 326 (1971) (falling from catwalk considered ordinary risk common to any construction work).

But see Johnson v. Tosco Corp., 1 Cal. App. 4th 123, 1 Cal. Rptr. 2d 747 (1991), *review denied*, 1992 Cal. LEXIS 135(Cal. Jan. 15, 1992) (risk of falling from incompletely assembled scaffold only six feet off the ground was not a peculiar risk of harm).

[54] Widman v. Rossmoor Sanitation, Inc., 19 Cal. App. 3d 734, 97 Cal. Rptr. 52 (1971). *But see* Woodson v. Rowland, 92 N.C. App. 38 373 S.E.2d 674 (1988), *aff'd in part and rev'd in part,* 407 S.E.2d 222 (N.C. 1991) (no recovery by worker against his employer in negligence even when employer was grossly negligent and activity of working in a trench was dangerous).

[55] Ryobi Die Casting v. Montgomery, 705 N.E.2d 227 (Ind. Ct. App. 1999); Hargrove v. Frommeyer & Co., 229 Pa. Super. 298, 323 A.2d 300 (1974). *See also* Lorah v. Luppold Roofing Co., 424 Pa. Super. 439, 622 A.2d 1383 (1993). *But cf.* Holt v. Texas-New Mexico Pipeline Co., 145 F.2d 862 (5th Cir. 1944), *cert. denied,* 325 U.S. 879, 65 S. Ct. 1570, 89 L Ed. 2d 1996 (1945) (Texas law holds that work requiring dynamiting in an unpopulated rural area is not intrinsically dangerous).

[56] Central Trust & Sav. Bank v. Toppert, 198 Ill. App. 3d 562, 143 Ill. Dec. 885, 554 N.E.2d 820 (1990) (court distinguished between negligence and strict liability, finding that owner of quarry could not be held strictly liable for death of independent contractor's employee as a result of a premature explosion of dynamite). In Clark v. City of Chicago, 88 Ill. App. 3d 760, 410 N.E.2d 1025 (1980), the court held that once it is determined that the activity was intrinsically dangerous the court may impose liability upon the property owner without regard to anyone's negligence. This is not vicarious liability, but rather a type of absolute liability.

doctrine requires negligence on the part of the independent contractor and then holds the owner accountable only for the resulting injury. Strict liability, in contrast, imposes liability regardless of whether either the owner or the independent contractor was negligent.

Two further limitations are commonly placed upon the peculiar risk doctrine. First, the doctrine does not cover "collateral" acts of negligence by the independent contractor. Collateral negligence is defined as negligence which is unusual or abnormal to the contemplated risk of doing the work.[57] For example, if an owner hired an independent contractor to transport goods for him, the risk that the independent contractor would exceed the speed limit is a risk of abnormal or collateral negligence.[58] The owner is not responsible for collateral negligence of the independent contractor in the absence of some negligence on his own part.

The second limitation is closely related to the first. Some courts have held that an owner is not liable for certain categories of risks which are deemed "unforeseeable."[59] For example, the risk that the independent contractor will

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See also Brown v. Unit Prods. Corp., 105 Mich. App. 141, 306 N.W.2d 425 (1981), *rev'd in part,* 414 Mich. 956, 327 N.W. 2d 254 (1982) (steelworker injured when steel joist fell on him was entitled to recover damages under the inherently dangerous activities doctrine).

But cf. Anderson v. Nashua Corp., 246 Neb. 420, 519 N.W.2d 275 (1994), *subsequent appeal*, 5 Neb. 833, 560 N.W.2d 446 (1997), in which the Nebraska Supreme Court found that the doctrine of strict liability for ultrahazardous activities has not been adopted, nor has it been repudiated, in Nebraska.

[57] Blue v. Louisiana Power & Light Co., 619 So. 2d 726 (La. Ct. App. 1993), *cert. denied*, 625 So. 2d 181 (La. 1993); Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 156 Cal. Rptr. 41, 595 P.2d 619 (1979) (citing to Restatement (Second) of Torts § 426 comment (a) (1965)); Sharkey v. Airco, Inc., 522 F. Supp. 646 (E.D. Pa. 1981), *aff'd,* Airco, Inc. v. Thomas Jefferson Univ., 688 F.2d 818 (3d Cir. 1982); Holt v. Texas-New Mexico Pipeline Co., 145 F.2d 862 (5th Cir. 1944), *cert. denied,* 325 U.S. 879 65 S. Ct. 1570, 89 L. Ed. 2d 1996 (1945) (under Texas law, an owner is not liable to an injured third party unless his injuries resulted directly (not collaterally) from the inherently dangerous work); Garczynski v. Darin & Armstrong Co., 420 F.2d 941 (6th Cir. 1970) (under Michigan law, an employee's negligence which caused a crane to strike another worker was considered collateral negligence); Phillips Pipe Line Co. v. Kansas Cold Storage, Inc., 192 Kan. 480, 389 P.2d 766 (1964); Cook v. Nebraska Public Power District, 171 F.3d 626, 632 (8th Cir. 1999) (Nebraska law).

See also James A. Burt, *Landowner Liability to Employees of Independent Contractors: A Graphic Restatement*, 53 J.Mo. B. 86, 87 (1997).

[58] Restatement (Second) of Torts § 426 comment (a) (1965).

[59] *See* Garczynski v. Darin & Armstrong Co., 420 F.2d 941 (6th Cir. 1970) (applying Michigan law, the court cited comments to the Restatement (Second) of Torts § 426 (1965) and stated that contractor is not required to anticipate abnormal or unusual kinds of negligence); Holt v. Texas-New Mexico Pipeline Co., 145 F.2d 862 (5th Cir. 1944), *cert. denied,* 325 U.S. 879, 65 S. Ct. 1570, 89 L. Ed. 2d 1996 (1945) (under Texas law, an injured third party may recover only where the injury was in the reasonable anticipation of the party); Addison v. Susanville Lumber Inc., 47 Cal. App. 3d 394, 120 Cal. Rptr. 737 (1975); Holman v. State, 53 Cal. App. 3d 317, 124 Cal. Rptr.

supply defective equipment which will cause injury to a worker has been held unforeseeable as a risk peculiar to the work.[60] The owner was justified in assuming that the independent contractor would supply his employees with safe equipment. The unforeseeability limitation tends to ameliorate the harshness of a rule which imposes liability on an owner who may not be in a position to institute adequate precautions.

[3]—The Effect of Worker's Compensation Acts on the Liability of the Owner

The liability of an owner for worker's injuries may be affected by a state worker's compensation statute. Although the owner may not be the direct employer of a contractor's employee, he may nevertheless be classified as a "statutory employer" for purposes of worker's compensation. In a few states, there is no statutory employer provision and the owner's liability will not be affected by the worker's compensation act.[61]

Classification as a statutory employer usually makes the owner liable under the worker's compensation statute to the independent contractor's worker injured in the scope of his employment. Since the owner is treated as the employer, he, like the employer, is given immunity from a common law negligence suit.[62] In

773 (1975); Red Roof Inns, Inc. v. Purvis, 691 N.E.2d 1341 (Ind. Ct. App. 1998); Reed v. Ocella, 859 S.W.2d 242 (Mo. Ct. App. 1993); McDonald v. Shell Oil, 20 N.Y.2d 160, 281 N.Y.S.2d 1002, 228 N.E.2d 899 (1967) (inherently dangerous work rule is applicable only where the danger and the accident are foreseeable); Hargrove v. Frommeyer & Co., 229 Pa. Super. 298, 323 A.2d 300 (1974).

[60] Holman v. State, 53 Cal. App. 3d 317, 124 Cal. Rptr. 773 (1975); McDonald v. Shell Oil Co., 44 Cal. 2d 785, 285 P.2d 902 (1955).

For another example, see Icenogle v. Myers, 167 Ill. App. 3d 239, 118 Ill. Dec. 95, 521 N.E.2d 163 (1988) (possibility that worker would expose himself to the danger of live electrical wire was unforeseeable).

[61] California, Delaware, Iowa, Maine, Rhode Island, and West Virginia do not have "statutory employer" or "contractor under" provisions. *See generally* Note, *Liability to Employees of Indepdendent Contractors Engaged in Inherently Dangerous Work: A Workable Workers' Compensation Proposal,* 48 Fordham L. Rev. 1165, 1186 (1980). Additionally, even in a state with a "statutory employer" provision, an owner who hires an independent contractor may not be within the scope of the provision. *See, e.g.,* W.H. Butcher Packing Co. v. Hixon, 189 Okla. 700, 119 P.2d 1019 (1941); Peterson v. Highland Crate Co-op, 156 Fla. 539, 23 So. 2d 716 (1945).

[62] *E.g.,* Mass. Ann. Laws ch. 152, §§ 15–18; Pa. Stat. Ann. tit. 77, § 52; Ramos v. Univision Holdings, Inc., 655 So. 2d 89 (Fla. 1995); Pendley v. United States, 856 F.2d 699 (4th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989); Chandler v. Hancock Bldrs., Inc., 205 Ga. App. 303, 422 S.E.2d 206 (1992); Yoho v. Ringier of Am., Inc., 263 Ga. App. 338, 434 S.E.2d 57 (Ga. App. Ct.), *on remand*, 210 Ga. App. 579, 438 S.E.2d 196 (Ga. App. Ct. 1993); Dillard v. Strecker, 18 Kan. App. 899, 861 P.2d 1372 (Kan. Ct. App. 1993), *aff'd*, 255 Kan. 704, 877 P.2d 371 (1994); Mathis v. United Eng'rs & Constructors, Inc., 381 Pa. Super. 466, 554 A.2d 96, *appeal denied sub nom.*

a few states, however, the owner who hires an independent contractor is simply an insurer of the contractor's worker's compensation obligation and is not protected from a tort action by the injured worker.[63]

The test for whether an owner is a statutory employer varies from state to state. Generally, the courts have used one of three tests. In several states, an owner is considered a statutory employer if the work contracted for is a part of the owner's regular trade or business.[64] This is ultimately a question of fact determined by whether the work would ordinarily be done by the owner's employees.[65]

Mathis v. Philadelphia Elec. Co., 523 Pa. 637, 565 A.2d 445 (1989); Evans v. Hook, 239 Va. 127, 387 S.E.2d 777 (1990); Garcia v. Pittsylvania County Serv. Auth., 845 F.2d 465 (4th Cir. 1988); Bailey v. Owen Elec. Steel Co., 298 S.C. 36, 378 S.E.2d 63 (1989).

But see Elizabeth Bosek, 57 Fla. Jur. 2d *Workers Compensation* § 29 (1996).

[63] *See* Proctor & Gamble Cellulose Co. v. Mann, 667 So. 2d 338 (Fla. Dist. Ct. App. 1995); Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E.2d 125 (1976) (employees of an uninsured contractor who collected compensation from the owner were not barred from suing owner for violation of the Structural Work Act; set-off is permitted to prevent double recovery) [*Editor's Note*: The Illinois Structural Work Act was repealed in 1995.]; Sweezey v. Arc Elec. Constr. Co., 295 N.Y. 306, 67 N.E.2d 369 (1946); Culbertson v. Kieckhefer Container Co., 197 Wis. 349, 222 N.W. 249 (1928); Crawford v. Florida Steel Corp., 478 So. 2d 855 (Fla. Dist. Ct. App. 1985) (in Florida, the courts also consider whether the employee is a "borrowed servant" in order to determine the scope of worker's compensation benefits). Some states, such as New Jersey, require a *contractor* to pay compensation if the subcontractor fails to carry insurance. *See* N.J. Stat. Ann. § 34:15-79. A property owner who hires an independent contractor to perform work his employees ordinarily do not do, and who relinquishes control, is generally not considered a contractor and is not, therefore, liable for worker's compensation to the employees of the independent contractor. *See* Priby v. Lee, 15 N.J. Misc. 292, 191 A. 105 (1937).

[64] *See* Mass. Ann. Laws ch. 152, §§ 15–18; Va. Code § 65.1-29 *et seq.;* Pa. Cons. Stat. Ann. tit. 77, § 52; Colo. Rev. Stat. § 8-48-101.

Becker v. Chevron Chem. Co., 983 F.2d 44 (5th Cir. 1993); Sorenson v. Goldman, 837 P.2d 266 (Colo. Ct. App. 1992), *cert. denied, en banc*, 1992 Colo. LEXIS 930 (Colo. Sept. 21, 1992); Bain v. Doyle, 807 P.2d 1225 (Colo. Ct. App. 1990); Johnson v. Hames Contracting, Inc., 208 Ga. App. 664, 431 S.E.2d 455 (1993); Boudreaux v. Freeport Chem. Co., 576 So. 2d 615 (La. Ct. App. 1991); Davis v. State Farm Ins. Co., 558 So. 2d 636 (La. Ct. App. 1990); Mays v. Penzel Constr. Co., 838 S.W.2d 1 (Mo. Ct. App. 1992). In Dobson v. New Orleans Pub. Serv., 522 So. 2d 1190 (La. Ct. App. 1988), the court applied a three part test to determine whether the owner was a statutory employer; part two of the test required that the work contracted for be part of the owner's regular trade or business. *But see* Henderson v. Dresser Indus., 674 F. Supp. 519 (D. Md. 1988).

[65] *See* Cannon v. Crowley, 318 Mass. 373, 61 N.E.2d 662 (1945); Shell Oil Co. v. Leftwich, 212 Va. 715, 187 S.E.2d 162 (1972); Battistelli v. Connohio, Inc., 138 Conn. 646, 88 A.2d 372 (1952); Poirier v. Plymouth, 374 Mass. 206, 372 N.E.2d 212 (1978) (job of painting a large water tank was ancillary to principal employer's trade and hence presented no bar to tort action of injured painter).

In other states, the owner is a statutory employer whenever the independent contractor has not obtained worker's compensation insurance.[66] These states often allow the injured worker to choose whether to sue the owner for negligence or treat him as an employer and seek worker's compensation benefits.[67]

Finally, a few states classify the owner as a statutory employer if his purpose in hiring an independent contractor was to avoid worker's compensation liability.[68] If the owner acts in good faith and requires the independent contractor to obtain worker's compensation insurance, he is unlikely to be a statutory employer under this definition.

Of the remaining states, a few have peculiar definitions of a statutory employer. New York, for example, has a statute which requires that the work for which the independent contractor was hired be itself the subject of a contract.[69] Courts in New York have held that the owner is not liable for worker's compensation to the employees of an independent contractor because the owner is not a contractor; that is, he is not operating under a contract with another party for the work at hand.[70]

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[66] *See e.g.,* Ill. Rev. Stat. ch. 48, ¶ 138.1; Colo. Rev. Stat. § 8-48-101 *et seq. See* Brown v. Canterbury Corp., 844 S.W.2d 134 (Tenn. 1992); Fugate v. Industrial Comm'n, 163 Ill. App. 3d 303, 114 Ill. Dec. 832, 516 N.E.2d 987 (1987); Klemetsen v. Stenberg Constr. Co., 415 N.W.2d 887 (Minn. Ct. App. 1987).

See also Wolf v. Kajima Int'l, Inc., 621 N.E.2d 1128 (Ind. Ct. App. 1993), *transfer granted and adopted*, 629 N.E.2d 1237 (Ind. 1994) (owner or contractor may not alter its status concerning tort liability to employees of contractor or subcontractor by directly purchasing workers' compensation insurance on behalf of the employees).

See 1 John P. Ludington, Modern Workers Compensation § 105:17 (1993); *But see* Elizabeth Bosek, 57 Fla. Jur. 2d *Workers Compensation* § 74 (1996).

[67] In Ohio, for example, the Labor Code defines "employee" as:

> Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium . . . for his employment or occupation or to elect to pay compensation directly to his injured . . . employees . . . shall be considered as the employee of the person who has entered into a contract . . . with such independent contractor unless such employees . . . elect, after injury or death, to regard such independent contractor as the employer. Ohio Rev. Code tit. 41, § 4123.01(A)(2).

[68] *See* Neb. Rev. Stat. § 48-116. The general test for whether work is within this section is whether it would ordinarily be done by the owner's employees, considering the practice of owners in comparable businesses as well as the individual owner's usual practice. *See* Rogers v. Hansen, 211 Neb. 132, 317 N.W.2d 905 (1982).

See Rian v. Imperial Mun. Servs. Group, Inc., 768 P.2d 1260 (Colo. Ct. App. 1988).

[69] N.Y. Work. Comp. Law § 56. *See also* N.H. Rev. Ann. § 281:4-a.

[70] Drayton v. First Ave. Holding Corp., 50 A.D.2d 1046, 377 N.Y.S.2d 760 (1975) (owner not liable as "contractor" for compensation for employees of independent contract).

See also Dewey v. Merrill, 124 Idaho 201, 858 P.2d 740 (1993); Sweeney v. Roark, 859 P.2d 1137 (Okla. Ct. App. 1993); Dewhurst v. Simon, 295 N.Y. 352, 67 N.E.2d 578 (1946).

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A complete and careful examination of an individual state's worker's compensation statute is essential to any assessment of an owner's liability to injured employees of an independent contractor.

¶ 10.04. Contractor's Liability For Injuries to Workers Employed by Other Contractors

Contractors other than the employer of an injured worker also are often named as defendants in litigation brought by the injured worker. An analysis of a contractor's potential liability to the injured employee of another contractor depends on a determination of whether that contractor controlled the condition or activity which caused the injury. Because most contractors on a site control only the particular work assigned to them, they are normally responsible only for their own negligence. Ordinarily, they are not liable for dangerous conditions on the project as a whole or the negligence of other contractors.[1]

A contractor may, however, exercise control over the entire premises. If he does, he may be liable for dangerous conditions on the premises created by other contractors.[2] Similarly, a contractor may exercise control over the operative details of another contractor's work and be liable for the latter's negligence in carrying out the work.[3]

Even if the contractor was not in control of the condition or activity which caused the injury, he may still be liable under a common law[4] or statutory[5] exception to the general nonliability rule. The common law exception imposes liability on contractors who subcontract peculiarly or inherently dangerous work. Worker's compensation statutes may deem a contractor a "statutory employer" of another contractor's employee and require him to provide compensation benefits regardless of his control over the condition or activity which caused the worker's injury.[6] At the same time, however, being a "statutory employer" renders a contractor immune from civil suit.

Cf. LaCroix v. Migliour Constr. Co., 142 A.D.2d 980, 530 N.Y.S.2d 401 (1988) (general contractor was not entitled to indemnification from a subcontractor for subcontractor's employee's injury at a construction site which was under the contractor's supervision).

[1] *See* ¶ 10.04[1], *infra.*

[2] *See* ¶ 10.04[2][a], *infra.*

[3] *See* ¶ 10.04[2][b], *infra.*

[4] *See* ¶ 10.04[2][c], *infra.*

[5] *See* ¶ 10.04[3], *infra.*

[6] *See* ¶ 10.04[4], *infra.*

[1]—Contractor Liability For His Own Affirmative Acts of Negligence

A contractor, like any one else, has a duty to use reasonable care to prevent injury to persons whom he reasonably expects to be affected by his work.[7] He will be held liable for his own or his employee's negligence which results in injury to an employee of another contractor.[8] Such negligence usually takes one of two forms: (1) the creation of an unreasonably dangerous condition on the premises;[9] or (2) the use of a method of operation that actively injures another

[7] Axsom v. Apartment House Builders, Inc., 298 Ark. 408, 768 S.W.2d (1989). *See* Szumski v. Lehman Homes, 267 Pa. Super. 478, 406 A.2d 1142 (1979) (A contractor's duty to use reasonable care extends to another contractor's employees whom he had reason to anticipate would naturally and customarily be affected by his work); Chance v. Lawry's Inc., 58 Cal. 2d 368, 190, 24 Cal. Rptr. 209, 374 P.2d 185, 190 (1962) (liability of independent contractor turns, in part, on extent to which transaction intended to affect plaintiff and the foreseeability of harm to him); Cozza v. Culinary Foods, Inc., 311 Ill. App. 3d 615, 723 N.E.2d 1199, 1205–1206 (1st Dist. 2000) ("[subcontractor] had a common law duty to exercise reasonable care to protect [telephone company employee] or other workers from an injury caused by its partially dismantled scaffold").

See also Perkins v. Henry J. Kaiser Constr. Co., 236 F. Supp. 484 (S.D. W. Va.), *aff'd,* 339 F.2d 703 (4th Cir. 1964); Doke v. Dover Elevator Co., 152 Ga. App. 434, 263 S.E.2d 209 (1979); Howell v. Ayers, 129 Ga. App. 899, 202 S.E.2d 189 (1973); Smith v. Brady, 136 A.D. 665, 121 N.Y.S. 474 (1910); Snelling v. Harper, 137 S.W.2d (Tex. Civ. App. 1940).

[8] *See* Tipton v. Barge, 243 F.2d 531 (4th Cir. 1957); Channel 20, Inc. v. World Wide Towers Servs., Inc., 607 F. Supp. 551, 555 (S.D. Tex. 1985) ("a general contractor who is in control of the premises owes a duty to the employees of subcontractors similar to that owed by an owner or occupier of land to his invitees"); Vanigila v. Northgate Homes, 137 A.D.2d 806, 525 N.Y.S.2d 270, *appeal denied,* 72 N.Y.2d 806, 532 N.Y.S.2d 847 (1988) (general contractor and other contractor both liable according to fault for subcontractor's employee's injury); Bryant v. Gulf Oil Corp., 694 S.W.2d 443, 446 (Tex. Ct. App. 1985) (duty to protect employees of an independent contractor is that of a contractor and not of an owner or occupier of land); Hayden v. Paramont Prods., 33 Cal. App. 2d 287, 91 P.2d 231 (1939) (the foundation for a prima facie case against a general contractor is evidence of some wrongful act committed by the general contractor or his employee); Konick v. Berke, 355 Mass. 463, 245 N.E.2d 750 (1969); Fitzgerald v. Andrade, 402 S.W.2d 563 (Tex. Civ. App. 1966); Employers Ins. v. Abernathy, 442 So. 2d 953 (Fla. 1983) (employee of general contractor permitted to maintain an action against the general contractor's subcontractor for negligence of the subcontractor's employee); Briere v. Lathrop Co., 22 Ohio St. 2d 166, 258 N.E.2d 597 (1970) (general contractor found liable where own employee negligently assisted subcontractor's employee in moving scaffold); Chance v. Lawry's Inc., 58 Cal. 2d 368, 190 24 Cal. Rptr. 209, 374 P.2d 185 (1962) (contractor's duty of care extends to other contractors whom he reasonably expects to be affected by his work).

See also Petition of Alva S.S. Co., 616 F.2d 605 (2d Cir. 1980) (independent contractor liable for his own negligence); Titan Steel Corp. v. Walton, 365 F.2d 542 (10th Cir. 1966); Knight v. Burns, Kirkley & Williams Constr. Co., 295 Ala. 477, 331 So. 2d 651 (1976) (general contractor liable for his own negligence that injures a subcontracting worker).

[9] In Szumski v. Lehman Homes, Inc., 267 Pa. Super. 478, 406 A.2d 1142, 1144 (1979), the court found that a contractor who erected a temporary walkway had a duty to do so with due regard to the safety of others whom he "had reason to anticipate would naturally and customarily

worker.[10]

A contractor's liability is premised on his ability to control and correct unsafe conditions that may arise during construction.[11] This ability creates a duty towards the employees of other contractors rightfully on the premises.[12] An

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use it during the progress of the work." Similarly, in Florez v. Groom Dev. Co., 53 Cal. 2d 347, 348 P.2d 200, 1 Cal. Rptr. 840 (1960), the court noted that a general contractor who created a dangerous condition on the premises that resulted in injury to a subcontractor was liable for his failure to take reasonable steps to protect the injured worker.

See also Perkins v. Henry J. Kaiser Constr. Co., 236 F. Supp. 484 (S.D. W. Va. 1964), *aff'd,* 339 F.2d 703 (4th Cir. 1964) (a general contractor has a duty of reasonable care to construct platforms and stairways safely for all anticipated users); Tipton v. Barge, 243 F.2d 531 (4th Cir. 1957) (general contractor liable where his employee removed a ramp in flagrant disregard of the safety of other workers); Redinger v. Living, Inc., 689 S.W.2d 415 (Tex. Ct. App. 1985) (a contractor was held liable for a worker's injury which occurred when the contractor allowed workers to remove dirt while other workers were still in the area); Doke v. Dover Elevator Co., 152 Ga. App. 434, 263 S.E.2d 209 (1979); Fetterman v. Production Steel Co. of Ill., 4 Ill. App. 2d 403, 124 N.E.2d 637 (1954) (suit by injured iron worker against another subcontractor under Illinois Structural Work Act for negligence in constructing scaffold); Johnson v. Fred H. Moran Constr. Co., 289 So. 2d 323 (La. Ct. App. 1973) (action against contractor for negligently creating danger that injured employee of owner); Lommen v. Adolphson & Peterson Constr. Co., 283 Minn. 451, 168 N.W.2d 673 (1969); Stringert v. Lastik Prods. Co., 397 Pa. 503, 155 A.2d 625 (1959) (subcontractors owe each other duty to make their work premises reasonably safe or to give warning of condition and risk involved).

[10] *See* Clark v. Container Corp. of Am., Inc., 936 F.2d 1220 (11th Cir. 1991) (contractor found liable for injury to subcontractor's employee caused by contractor's employees negligent operation of equipment); Gunka v. Consolidated Papers, Inc., 179 Wis. 2d 525, 508 N.W.2d 426 (1993); City of Denton v. Van Page, 701 S.W.2d 831 (Tex. 1986); Briere v. Lathrop Co., 22 Ohio St. 2d 166, 258 N.E.2d 597 (1970) (general contractor has duty to use reasonable care when gratuitously rendering assistance to another subcontractor); Houston Belt & Terminal Ry. Co. v. O'Leary, 136 S.W. 602, 604 (Tex. Civ. App. 1911) (proprietor of premises has duty to "conduct himself [so] as not to injure [one rightfully on the premises] through his active negligence"); Johnson v. Nicholson, 159 Cal. App. 2d 395, 324 P.2d 307 (1958) ("an employee of a subcontractor has a duty to exercise ordinary care for the safety of the employees of other subcontractors"); Knight v. Burns, Kirkley & Williams Constr. Co., 295 Ala. 477, 331 So. 2d 651 (1976); Fisher Constr. Co. v. Riggs, 320 S.W.2d 200 (Tex. 1959) (general contractor has a duty not to injure a subcontractor's worker through active negligence).

[11] Davis v. Esperado Mining Co., 750 S.W.2d 887 (Tex. Ct. App. 1988) (liability for a defective condition on property arises only if the party had ownership, possession, control, or had itself created the dangerous condition).

[12] Handley v. Capital Co., 152 Cal. App. 2d 758, 313 P.2d 918, 920-921 (1957); Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279, 281-282 (1933) (person in charge and control of work has implied duty to see that rights of others rightfully on the premises are not injuriously affected); Elder v. Pacific Tel. & Tel. Co., 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977); *see also* ¶ 10.04[2][a][i], n.29 *infra.*

The court in Reynolds v. John T. Brady & Co., 38 A.D.2d 746, 329 N.Y.S.2d 624 (1972), recognized that implicit in a finding of a duty to maintain safe premises is "the prerequisite that

independent contractor who does not undertake responsibilities of supervision and control beyond his own operations has a duty to use reasonable care only with respect to his own aspect of the construction project. A contractor is not responsible for an injury to a worker that results from a condition on the premises beyond his control or the negligence of another contractor.[13]

A contractor who permits another contractor's employee to use his equipment generally is not liable for injuries caused by the equipment's unsafe condition unless the lending contractor receives some benefit from the loan.[14] A practice

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the party charged with such responsibility have the concomitant authority and degree of control over the activity which produces the injury to enable it to take the action necessary to correct or avoid an unsafe condition."

See, e.g., Shannon v. Howard S. Wright Constr. Co., 593 P.2d 438 (Mont. 1979) (general contractor in control of property held liable for damages incurred by employee of other contractor who fell from ladder).

See also Klovskiv Martin Fireproofing Corp., 363 Mich. 1, 108 N.W.2d 887 (1961) (subcontractor has no duty to make premises safe for all who might work there). *Accord* Restatement (Second) of Torts § 384 comment d, which "subject[s] the particular contractor or subcontractor to liability for only such harm as is done by the particular work entrusted to him."

[13] Davis v. Board of Trustees of the Hicksville Pub. Library, 658 N.Y.S.2d 648 (App. Div. 1997); Conforti & Eisele, Inc. v. John C. Morris Assocs., 199 N.J. Super. 498, 489 A.2d 1233 (App. Div. 1985) (a contractor may adduce evidence to show that subcontractor's actions were negligent and therefore general contractor is not responsible for other contractor's employees); Nowak v. Smith & Mahoney, P.C., 110 A.D.2d 288, 494 N.Y.S.2d 449 (1985) (general contractor was not found liable for injury to electrical worker where general contractor did not have the requisite authority to control the activity which caused the injury); Collins v. J.A. House, Inc., 705 N.E.2d 568, 574 (Ind. App. 1999) (the collapse of the scaffold which the masonry worker was standing upon was an unforeseeable intervening act which relieved the plumbing contractor of liability). *See* Cafferkey v. Turner Constr. Co., 21 Ohio St.3d 110, 488 N.E.2d 189 (1986) (a general contractor is not under a duty of care to a subcontractor engaged in inherently dangerous work).

[14] *See* Kennedy v. U.S. Constr. Co., 545 F.2d 81 (8th Cir. 1976) (prime contractor and subcontractor not liable for injuries incurred by sub-subcontractor's employee, who injured his hand upon an unguarded saw blade, where the subcontractor received no compensation for lending the saw to the sub-subcontractor and the prime had nothing to do with the lending of the saw; further, employee knew the saw had an apparent hazard); Arthur v. Standard Eng'g Co., 193 F.2d 903 (D.C. Cir. 1951) (worker who borrows equipment from another contractor is a mere licensee and contractor is not liable for injury unless the result of active negligence), *cert. denied,* 343 U.S. 964, 72 S. Ct. 1057, 96 L. Ed. 1361 (1952); Scott v. Jobalia Constr. Co., 538 So. 2d 76 (Fla. Dist. Ct. App. 1989); Ridenhour v. Colson Caster Corp., 687 S.W.2d 938 (Mo. Ct. App. 1985) (in seeking to impose liability on subcontractor—who gratuitously lent scaffold to general contractor—for the wrongful death of general contractor's employee, plaintiff has burden to show that the subcontractor-lender had actual knowledge of the defect and failed to give proper warning); Eddy v. John J. Brady Plastering Co., 111 Ohio App. 190, 171 N.E.2d 722 (1959) (implied permission to use scaffold arising out of custom among tradesmen does not create a duty to see that the scaffold was securely constructed as there is no mutual benefit); Bravner v. Levtz, 293 Ky. 406, 169 S.W.2d 4 (1943) (mutual benefit required); Harwell & Harwell, Inc. v. Rodriguez, 487 S.W.2d 388 (Tex. Civ. App. 1972) (subcontractor owed night watchman duty to provide safe

of mutual use may not be a sufficient benefit.[15] On the other hand, some courts have held that where a practice of mutual use is established and the lending contractor can reasonably expect that others will use his equipment, he has a duty to use reasonable care to make the equipment safe.[16]

A contractor is not an insurer of the safety of the employees of other contractors at the job site.[17] He is required only to use reasonable care under the circumstances.[18] Evidence of whether he did so may include the testimony of experts in the field of construction law, national safety standards,[19] local ordinances,[20]

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ladder where subcontractor received benefit of security from watchman's use); Olivier v. Snowden, 426 S.W.2d 545 (Tex. 1968) (permission to use equipment does not confer status of invitee on user and as a mere licensee the lender does not owe the user a duty to provide safe equipment).

[15] Arthur v. Standard Eng'g Co., 193 F.2d 903, 907 (D.C. Cir. 1951), *cert. denied,* 343 U.S. 964, 72 S. Ct. 1057, 96 L. Ed. 1361 (1952) (mutual benefit theory does not extend to reciprocal use of equipment).

[16] *See* Munson v. Vane-Stecker Co., 347 Mich. 377, 79 N.W.2d 855 (1956) (mutual advantage required, but practice of mutual use is of mutual benefit); McGlore v. William Angus, Inc., 248 N.Y. 197, 161 N.E. 469 (1928) ("a contractor has a duty to use reasonable care to construct [scaffold] safely for those whom [he] had reason to anticipate would naturally and customarily use it . . ."). *See also* Richards v. Watson Flagg Eng'g Co., 9 N.J. Misc. 955, 156 A. 113 (1931), *aff'd,* N.J.L. 128, 160 A. 500 (1932).

[17] Gowdy v. United States, 412 F.2d 525 (6th Cir.), *cert. denied,* 396 U.S. 960, 90 S. Ct. 437, 24 L. Ed. 2d 425, *reh'g denied,* 396 U.S. 1063, 90 S. Ct. 750, 24 L. Ed. 2d 756 (1969) (court noted that an occupier is not the insurer of an invitee's safety); Elder v. Pacific Tel. & Tel. Co., 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977); Green v. Sansom, 41 Fla. 94, 25 So. 332 (1899); Maryland Sales & Serv. Corp. v. Howell, 19 Md. App. 352, 311 A.2d 432 (1973); Szumski v. Lehman Homes, Inc., 267 Pa. Super. 478, 406 A.2d 1142, 1145 (1979).

[18] Szumski v. Lehman Homes, Inc., 267 Pa. Super. 478, 406 A.2d 1142, 1145 (1979) (contractor is liable only for his negligence resulting in injury); Dingman v. A.F. Mattock Co., 15 Cal. 2d 622, 104 P.2d 26, 28 (1940) (contractor's liability to invitee held not absolute; he is required only to use ordinary care for safety of persons he invites on premises); Cluett, Peabody & Co. v. Campbell, Rea, Hayes & Large, 492 F. Supp. 67 (M.D. Pa. 1980) (general contractor required to use reasonable care); Tect Constr. Co. v. Frymyer, 146 Ga. App. 300, 246 S.E.2d 334 (1978); Barth v. Downey Co., 71 Wis. 2d 775, 239 N.W.2d 92 (1976).

See Topil v. Hub Hall Co., 230 Neb. 151, 430 N.W.2d 306 (1988) (general contractor not liable for subcontractor's employee who fell from ceiling joist since general contractor had no duty to inspect the work of every person working on the job). *But see* Manhattan-Dickman Constr. Co. v. Shawler, 113 Ariz. 549, 558 P.2d 894 (1976) (general contractor held liable to employee of subcontractor for failing to reasonably carefully inspect acoustical ceiling that had not been securely installed).

But see Cooper v. Carl A. Nelson & Co., 211 F.3d 1008, 1015 (7th Cir. 2000) (Under Illinois law, "duty owed by contractor to worker was greater than reasonable care standard applicable to landowners generally").

[19] Funk v. General Motors Corp., 392 Mich. 91, 220 N.W.2d 641 (1974), *overruled on other grounds,* Hardy v. Monsanto Enviro-Chem Sys., Inc., 414 Mich. 29, 323 N.W.2d 270 (1982) (court

and state and federal statutes.[21]

[2]—Liability of a General Contractor

A general contractor often contractually agrees with the owner to be responsible for the supervision and safety of all the workers on the site,[22] in which case

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permitted testimony of person with considerable national experience with large scale construction although relatively unfamiliar with Michigan construction projects).

[20] *See* Ring, *The Scaffold Act: Its Past, Present and Future,* 64 Ill. B.J. 666 (1976), noting that the "American Standard Association's Safety Code . . . specifies highly detailed safety practices to be followed throughout the construction process" and which could be used to establish recognized industry standards, *id.* at 673-674; Bishop v. Crowther, 92 Ill. App. 3d 1, 415 N.E.2d 599 (1980) (court admitted the Manual of Accident Prevention in Construction prepared by the Associated General Contractors of America, and American National Safety Requirements); Purchase v. Mardian Constr. Co., 21 Ariz. App. 435, 520 P.2d 529 (1974) (violation of the Manual of Accident Prevention is evidence of negligence).

[21] *See* United Pac. Ins. Co. v. Southern Cal. Edison, 163 Cal. App. 3d 700, 209 Cal. Rptr. 819 (1985) (violation of the statute created a presumption of negligence, but compliance does not mean freedom from negligence); Maddox v. City of New York, 108 A.D.2d 42, 487 N.Y.S.2d 354 (1985) (to invoke protections inherent in statute, plaintiff must prove he is member of class statute was designed to protect); Castro v. Hernandez, 694 S.W.2d 575 (Tex. Ct. App. 1985) (if plaintiff proves violation of statute, defendant must adduce evidence of legally acceptable excuse or defense in order to avoid presumption of negligence per se); Coyle v. Alland & Co., 158 Cal. App. 2d 664, 323 P.2d 102 (1958).

[22] *See* ¶ 10.04[3] *infra.* A statute may contain its own specific safety standards, a violation of which is negligence *per se. See also* N.Y. Labor Law § 241(1)–(5). Alternatively, the statute may only constitute evidence of negligence.

See CertainTeed Corp. v. Employers Ins. of Wausau, 939 F. Supp. 826 (D. Kan. 1996), in AIA Citator, *infra*, Digest No. 96019; Erland Constr. Co. v. Park Steel Corp., 41 Mass. App. Ct. 919, 671 N.E.2d 953, *review denied*, 423 Mass. 1113, 674 N.E.2d 246 (1996), in AIA Citator, *infra*, Digest No. 96026; Graham v. Freese & Nichols, Inc., 927 S.W.2d 294 (Tex. App. 1996), in AIA Citator, *infra*, Digest No. 96027; Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 667 N.E.2d 907 (1996), *review denied,* 421 Mass. 1108, 671 N.E.2d 951 (1996), in AIA Citator, *infra*, Digest No. 96029; Baltimore Gas & Elec. Co. v. Commercial Union Ins. Co., 113 Md. App. 540, 688 A.2d 496 (1997), in AIA Citator, *infra*, Digest No. 97004; Best Prod. Co. v. A.F. Callan & Co., 1997 U.S. Dist. LEXIS 1914 (E.D.Pa. Feb. 26, 1997), in AIA Citator, *infra*, Digest No. 97005; Ozinga Transp. Sys., Inc. v. Michigan Ash Sales, Inc., 676 N.E.2d 379 (Ind. Ct. App. 1997), in AIA Citator, *infra*, Digest No. 97019; Unger v. Eichleay Corp., 244 Ill. App. 3d 445, 185 Ill. Dec. 556, 614 N.E.2d 1241 (Ill. App. Ct.), *appeal granted*, 152 Ill. 2d 581, 190 Ill. Dec. 912, 622 N.E.2d 1229 (1993); Massey v. Century Ready Mix Corp., 552 So. 2d 565 (La. Ct. App. 1989), *cert. denied*, 556 So. 2d 41 (La. 1990) (general contractor liable under contract that specifically delegated responsibility for the general management of the construction operation and for safety concerns to the contractor); Johnson v. Turner Constr. Co., 198 Mich. App. 478, 499 N.W.2d 27 (Mich. Ct. App. 1993); Parrish v. Omaha Pub. Power Dist., 242 Neb. 783, 496 N.W.2d 902 (1993); Donaldson v. Commonwealth Dept. of Transp., 141 Pa. Commw. 474, 596 A.2d 269 (Pa. Commw. Ct. 1991), *appeal denied*, 531 Pa. 648, 612 A.2d 986 (1992) (where ctractor contractually assumed the responsibility for safety and supervision of all workers, the responsibility

he exposes himself to possible liability to employees of his subcontractors working there. Absent an express, contractually assumed duty, a general contractor normally has a duty to hire competent subcontractors and to reasonably coordinate the work of the subcontractors so as not to create unreasonably dangerous conditions.[23] When actively directing a subcontractor in the operative

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was nondelegable). Melerine v. Avondale Shipyards, Inc., 659 F.2d 706, 709-710 (5th Cir. 1981); Johnson v. Salem Title Co., 246 Or. 409, 425 P.2d 519, 522 (1967).

But see Teitge v. Remy Constr. Co., 526 N.E.2d 1008 (Ind. Ct. App. 1988) (general works contractor not liable for injuries to another contractor's employee where the contract obligated the general works contractor to provide first-aid personnel for the project and the court interpreted this provision as not imposing the additional responsibility of protecting the safety of all employees on the project during all phases of construction).

[23] The American Institute of Architects has drawn up a standard form document, endorsed by the Associated General Contractors of America, that is frequently used to govern the responsibilities of the parties to a construction project. With respect to the safety responsibilities of a general contractor, AIA Document A201-1997, General Conditions of the Contract for Construction provides, in part:

> 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage.
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> 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.
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> . . . .
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> 3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.
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> 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.
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(Text continued on page 10–60)

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project Site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

. . . .

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

. . . .

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off on the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and

.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

. . . .

10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

. . . .

10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB) encountered on the site by the Contractor, the Contractor shall upon recognizing the condition immediately stop Work in the area affected and report the condition to the Owner and Architect in writing.

10.3.2 The Owner shall retain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly

details of his work, the general contractor must do so with due care for the safety of those employees.[24] A general contractor who supplies equipment to other

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reply to the Owner in writing stating whether or not either has reasonable objection to a person or entity proposed by the Owner. If either the Contractor or Architect has an objection to the persons or entities proposed by the Owner, the Owner shall propose another to whom the Contractor and Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. The Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up, which adjustments shall be accomplished as provided in Article 7.

10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractor, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

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See Lurie and Stein, *Injured Workmen: Loss Allocation Among the Direct Participants in the Construction Process,* 23 St. Louis L.J. 292, 293 (1979). *See also* Fisher v. M. Spinelli & Sons Co., 1999 Mass. Super. LEXIS 60 (Super. Ct. Feb. 5, 1999), in AIA Citator, *infra*, Digest No. 99022; Bauer v. Howard S. Wright Constr. Co., 101 Wash. App. 1046, (2000), in Construction Law Digest, November, 2000, Digest No. D000655; Ramirez v. Alabama Power Co., 898 F. Supp. 1537 (M.D. Ala. 1995), *aff'd without opinion*, 86 F.3d 1170 (11th Cir. 1996), in AIA Citator, *infra*, Digest No. 95044; Dilaveris v. W.T. Rich Co., 39 Mass. App. Ct. 115, 653 N.E.2d 1134, *review granted*, 421 Mass. 1105, 656 N.E.2d 1259 (1995), *remanded*, 424 Mass. 9, 673 N.E.2d 562 (1996), in AIA Citator, *infra*, Digest No. 95030; Kraft Gen. Foods, Inc. v. Maxwell, 219 Ga. App. 211, 464 S.E.2d 639 (1995), in AIA Citator, *infra*, Digest No. 95040; Perritt v. Bernhard Mechanical Contractors, Inc., 669 So. 2d 599 (La. App. 1996), in AIA Citator, *infra*, Digest No. 96009.

[24] Bond v. Howard Corp., 72 Ohio St. 3d 332, 650 N.E.2d 416 (Ohio 1995), in AIA Citator, *infra*, Digest No. 95003; Johnson v. Nicholson, 159 Cal. App. 2d 395, 324 P.2d 307 (1958) (a general contractor who has reasonable grounds to know that a danger would be created by the simultaneous operations of two subcontractors has a duty to warn or remedy the danger); Holdren v. Morris, 190 Misc. 673, 74 N.Y.S.2d 807 (Eric Co. Sup. Ct.), *appeal dismissed* 275 A.D. 996, 91 N.Y.S.2d 344 (1947) (contractor liable for injury to subcontractor's employee where contractor negligently demolished lower floors before subcontractor started work on upper floors); Becker v. Interstate Properties, 569 F.2d 1203 (3d Cir. 1977), *cert. denied,* 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978) (under New Jersey law, a general contractor is responsible for the negligence of an incompetent subcontractor); Cordet v. Robert Christopher Co. 164 Cal. App. 3d 384, 210 Cal. Rptr. 517, 521 (1985); Henderson Bros. Stores v. Smiley, 120 Cal. App. 3d 174 Cal. Rptr. 875 (1981); Pruett v. Precision Plumbing, Inc., 27 Ariz. App. 288, 554 P.2d 655 (1976) (a general contractor may be liable for negligently coordinating the sequence of the subcontractors' work). *See* Eguia v. The Landings, Ltd., 507 So. 2d 134 (Fla. Dist. Ct. App. 1987) (owner-contractor agreement placed duty to provide employee with safe place to work upon general contractor). *See generally* Restatement (Second) of Torts § 411.

contractors has a duty to see that the equipment is reasonably safe.[25]

In addition to potential liability arising from its own affirmative conduct,[26] a general contractor may incur liability arising from the unsafe conditions of the premises and, in some circumstances, the independent negligence of a subcontractor.

[a]—Duty To Provide Safe Premises

[i]—Necessity of Control and Supervision of Premises

A general contractor typically has a duty to provide reasonably safe premises for the employees of subcontractors.[27] A general contractor who subcontracts

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[25] Fenimore v. Donald M. Drake Constr. Co., 87 Wash. 2d 85, 549 P.2d 483, 490 (1976) ("a general contractor who furnishes appliances or materials to a subcontractor is liable if he fails to use reasonable care to assure that they are safe or free from defect, or to warn of dangers"); Johnson v. Guy Frye & Sons, Inc., 253 N.C. 274, 116 S.E.2d 713 (1960) (general contractor's contract to provide a hoist imposed on him the duty to exercise reasonable care to provide a reasonably suitable hoist); Daniel Constr. Co. v. Pierce, 270 Ala. 522, 120 So. 2d 381 (1960) (one who undertakes to furnish an appliance to another's employee has a duty to furnish a safe appliance); Kennedy v. U.S. Constr. Co., 545 F.2d 81 (8th Cir. 1976) (a general contractor may be liable for unsafe equipment supplied to a subcontractor when the general contractor is required to furnish the equipment); Cliburn v. Jeff Drilling Co., 318 F.2d 443 (5th Cir. 1963); Green v. Sansom, 41 Fla. 94, 25 So. 332 (1899); Maguire-Penniman Co. v. Lombard, 195 F. 477 (1st Cir. 1912) (failure to supply proper construction materials).

See Gregory v. General Elec. Co., 131 A.D.2d 967, 516 N.Y.S.2d 549 (1987) (duty on owners and contractors to provide proper equipment may include provision of a hoist to lift heavy materials); Lewis v. Sims Crane Serv., Inc., 498 So. 2d 573 (Fla. Dist. Ct. App. 1986) (owner/general contractor liable for injury to operator of construction hoist; court found that general contractor had ultimate duty to maintain construction hoist rented by him even though he had subcontracted for the structural erection of the building).

See also Andrews v. Benson, 809 F.2d 1537 (11th Cir. 1987) (defendant construction foreman and manager liable to plaintiff for failing to supply him with a lanyard as required by a government safety manual); Seitz v. Zac Smith & Co., 500 So. 2d 706 (Fla. Dist. Ct. App. 1987) (floodlight tower not itself inherently dangerous but became defective by a missing climbing peg; as defect was patent, the owner's acceptance of the tower prevented the contractor's continued liability for negligent performance).

[26] *See* Bianco v. Frank Robino Assoc., Inc., 2001 Del. Super. LEXIS 24 (Del. Super. Ct. Jan. 31, 2001), in Construction Law Digest, June, 2001, Digest No. D001261; Titan Steel Corp. v. Walton, 365 F.2d 542 (10th Cir. 1966) (a general contractor who actively participates in a negligent act will be liable for a subcontractor's injuries); Trecartin v. Mahony-Troast Constr. Co., 18 N.J. Super. 380, 87 A.2d 349 (App. Div. 1952) (a general contractor who "gives specific instructions which necessarily involve the safety of the subcontractor's employees [and] actively interfere[s] with the subcontractor's supplying of safeguards" is liable for any resultant injury); Broderick v. Cauldwell-Wingate Co., 301 N.Y. 182, 93 N.E.2d 629 (1950) (general contractor is liable for directing a subcontractor to proceed under recognizably dangerous circumstances).

[27] *See* Choi v. Commonwealth Edison Co., 217 Ill. App. 3d 952, 160 Ill. Dec. 854, 578 N.E.2d

the construction of a project often places himself in the position of a possessor of land. The Restatement (Second) of Torts, Section 343, states that a possessor of land may be liable for physical injury to an invitee caused by a latent or undiscovered condition of the land that presents an unreasonable risk of harm, if the possessor knew, or should have known, of the dangerous condition.

The courts consider subcontracting workers to be invitees and thus within the scope of a general contractor's duty.[28] This duty arises from the general contractor's control of the project site[29] so, in the absence of this control, it does

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33 (Ill. App. Ct.), *appeal denied*, 584 Ill. 2d 651, 164 Ill. Dec. 915, 584 N.E.2d 127 (1991) (duty to maintain a safe workplace did not include mopping up water that accumulated in the pipes); Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450 (Mo. Ct. App. 1993). *See also* Bellow v. Sloan, 536 So. 2d 917 (Ala. 1988) (subcontractor owes his employee a statutory and common law duty to provide safe working environment).

[28] *See* Montgomery v. Max Foote Constr. Co., 621 So. 2d 90 (La. Ct. App. 1993) (contractor not liable to engineer where engineer was fully aware of the danger and was in the better position to determine the safety of his activities); Revels v. Southern Cal. Edison, 113 Cal. App. 2d 673, 248 P.2d 986, 989 (Cal. 1952) (a general contractor owes a subcontractor's employees the same duty as is owed an invitee); McKee v. Patterson, 271 S.W.2d 391, 393 (Texas 1954) ("A general contractor in control of premises owes a duty to the employees of subcontractors similar to that owed . . . to an invitee."); Wolczak v. National Elec. Prods. Corp., 66 N.J. Super. 64, 168 A.2d 412, 414-415 (1961); Hall v. Moveable Offshore, Inc., 455 F.2d 633 (5th Cir.), *cert. denied,* 409 U.S. 850 93 S. Ct. 60, 34 L. Ed. 2d 93 (1972); Silvas v. Speros Constr. Co., 122 Ariz. 333, 594 P.2d 1029 (1979); Guthrie v. Reliance Constr. Co., 612 S.W.2d 366 (Mo. Ct. App. 1981).

[29] *See* Bokodi v. Foster Wheeler Robbins, Inc., 312 Ill. App. 3d 1051, 245 Ill. Dec. 644, 728 N.E.2d 726 (2000); Parr v. Champion Int'l Corp., 667 So. 2d 36 (Ala. 1995); Mitchell v. W.S. Cumby & Son, Inc., 704 F. Supp. 65 (E.D. Pa.), *aff'd without opinion*, 879 F.2d 858 (3d Cir. 1989) (general contractor need not have actual control; the right to control is sufficient to impose liability for workers' injuries); Massey v. Century Ready Mix Corp., 552 So. 2d 565 (La. Ct. App. 1989), *cert. denied*, 556 So. 2d 41 (La. 1990) (court held that supervision constituted per se control); Wolczak v. National Elec. Prods. Corp., 66 N.J. Super. 64, 168 A.2d 412, 414–415 (1961) (liability of general contractor "founded in part on assumption that owner has placed the general contractor in physical control of the job site").

In Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425 (Tex. 1950) the court considered the liability of a construction "supervisor." Although the supervisor was found not to have assumed the role of general contractor by virtue of his control and supervision over the premises, he had the duty of a general contractor to provide a safe place to work.

See also Rapp v. Zandri Constr. Corp., 165 A.D.2d 639, 569 N.Y.S.2d 994 (1991) (in an action by subcontractor's employee who was injured by coemployee's misuse of a pneumatic staple gun, a factual issue existed as to whether the contractor assumed supervision and control over the construction site to support a claim for failure to furnish a safe workplace); Titan Steel Corp. v. Walton, 365 F.2d 542 (10th Cir. 1966) (general contractor in control of the premises has a duty to keep them in safe condition); Pate v. U.S. Steel Corp., 393 So. 2d 992 (Ala. 1931); Louis v. Barenfanger, 39 Ill. 2d 445, 236 N.E.2d 724, *cert. denied,* 393 U.S. 935, 89 S. Ct. 296 (1968); Shannon v. Howard S. Wright Constr. Co., 181 Mont. 269, 593 P.2d 438 (1979); Sullivan v. George A. Hormel & Co., 208 Neb. 262, 303 N.W.2d 476 (1981); Tsourmas v. Dineff, 161 Ill. App. 3d 897, 515 N.E.2d 743 (1987) (summary judgment in favor of general contractor precluded where

not exist.[30]

The contractor has a duty to provide reasonably safe premises when he takes possession of the premises, has "exclusive control of the supervision and coordination of the construction" under the contract with the owner,[31] or where he is "in charge of the construction project as a whole, and accordingly must

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contractor "could or might" have caused carbon monoxide related injury to workers regardless of contractor's actual exercise of power to inspect to work).

Recognizing that the general contractor's control over the premises creates the duty to provide reasonably safe premises, some courts forego using the "invitee" language as the analytical tool for establishing this duty. The duty, however, remains the same. *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

But see Arias v. MHI Partnership, Ltd, 978 S.W.2d 660 (Tex. App. 1998) (general contractor owed a narrow duty of care to subcontractor to ensure that its rules and regulations were reasonably safe, but, "safety policies did not rise to level of control sufficient to charge general contractor with duty to protect worker"); Whalen v. U.S. West Communications, Inc., 253 Neb. 334, 570 N.W.2d 531, 540 (1997) (general contractor's pre-construction safety meeting in which it directed sub-contractor's employees to follow its safety procedures was not enough to demonstrate retained control over the work site and sub-contractor's employees).

[30] In Reynolds v. John T. Brady & Co., 38 A.D.2d 746, 329 N.Y.S.2d 624 (1972), the court found that a prime contractor who had no power of supervision or control over the method of work or safety precautions taken by other prime contractors had no duty to provide a safe place to work.

See Elliott-Williams Co. v. Diaz, 9 S.W.3d 801 (Tex. 1999); Rangel v. Brookhaven Constructors, Inc., 307 Ill. App. 3d 835, 719 N.E.2d 174, 241 Ill. Dec. 313 (1999); Dilaveris v. W.T. Rich Co., 39 Mass. App. Ct. 115, 653 N.E.2d 1134, *review granted*, 421 Mass. 1105, 656 N.E.2d 1259 (1995), *remanded*, 424 Mass. 9, 673 N.E.2d 562 (1996), in AIA Citator, *infra*, Digest No. 95030; Wheeler v. Wright, 668 So. 2d 779 (Ala. Civ. App. 1995), *reh'g overruled*, 1995 Ala. Civ. App. LEXIS 337 (Ala. Civ. App. June 16, 1995); Daugherty v. Fuller Eng'g Serv. Corp., 615 N.E.2d 476 (Ind. Ct. App. 1993); Adams v. Inland Steel Co., 611 N.E.2d 141 (Ind. Ct. App. 1993); Ramon v. Glenroy Constr. Co., 609 N.E.2d 1123 (Ind. Ct. App. 1993); Downs v. A & H Constr., Ltd., 481 N.W.2d 520 (Iowa 1992); Allison Steel Mfg. Co. v. Superior Court, 22 Ariz. App. 76, 523 P.2d 803 (1974) (absent control, contractor owes no duty to employees of subcontractor to provide a safe place to work); Barth v. Downey Co., 71 Wis. 2d 775, 239 N.W.2d 92 (1976) (liability under safe-place statute conditioned on control of premises). *See also* LaJolla Village Homeowners Ass'n v. Quality Roofing, Inc., 212 Cal. App. 3d 1131, 261 Cal. Rptr. 146 (1989) (subcontractor could not be held liable for hazardous conditions unless subcontractor had control over the project); LaManna v. Colucci, 138 A.D.2d 901, 526 N.Y.S.2d 643 (1988) (subcontractor was independent contractor for purposes of transporting materials; thus, owner not liable). *But see* text accompanying n.36 *infra.*

[31] Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425 (Tex. 1950); Guthrie v. Reliance Constr. Co., 612 S.W.2d 366 (Mo. Ct. App. 1980).

Titan Steel Corp. v. Walton, 365 F.2d 542 (10th Cir. 1966); Hollett v. Dundee, Inc., 272 F. Supp. 1 (D. Del. 1967); Benson Paint Co. v. Williams Constr. Co., 128 Ga. App. 47, 195 S.E.2d 671 (1973); Shannon v. Howard S. Wright Constr. Co., 181 Mont. 269, 593 P.2d 438 (1979); Sankey Bros. v. Industrial Comm'n, 167 Ill. App. 3d 910, 522 N.E.2d 278, 118 Ill. Dec. 823 (1988).

see that the specifications of subcontracts were complied with."[32] This duty is also owed by a general contractor who actively supervises daily construction operations.[33] When the general contractor is responsible for accident prevention or where there is a contractual duty to enforce safety standards, he has a duty to provide a safe place to work.[34]

In some states, a contractor need only assume the role of "general contractor" to have a duty to provide a safe place to work. The Michigan Supreme Court has stated that it is "part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas."[35]

A general contractor is liable for injuries due to dangerous conditions on the premises that are either known to him or are discoverable through the exercise of ordinary care.[36] He is thereby charged with a duty to inspect the premises,

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[32] Kuntz v. Del E. Webb Constr. Co., 57 Cal. 2d 100, 368 P.2d 127, 18 Cal. Rptr. 527 (1961).

[33] Atlantic Coast Dev. v. Napolean Steel Contractors, 385 So. 2d 676 (Fla. Dist. Ct. App. 1980); Summers v. Crown Constr. Co., 453 F.2d 998 (4th Cir. 1972) (general contractor found liable where he had right to prohibit independent contractor from doing work in a dangerous manner and knew of the dangerous condition); Morehouse v. Taubman Co., 5 Cal. App. 3d 548, 85 Cal. Rptr. 308 (1970); Bryant v. First Realty Inv. Corp., 396 So. 2d 1223 (Fla. Ct. App. 1981); Allison v. Huber, Hunt, & Nichols, Inc., 173 Ind. App. 41, 362 N.E.2d 193 (1977).

[34] *See* Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 128 Wash. 2d 745, 912 P.2d 472 (1996), in AIA Citator, *infra*, Digest No. 96007; Bond v. Howard Corp., 72 Ohio St. 3d 332, 650 N.E.2d 416 (1995), in AIA Citator, *infra*, Digest No. 95003; Lewis v. N.J. Riebe Enters., Inc., 170 Ariz. 384, 825 P.2d 5 (1992); Parrish v. Omaha Pub. Power Dist., 242 Neb. 783, 496 N.W.2d 902 (1993); Fluor Corp. v. Sykes, 3 Ariz. App. 211, 413 P.2d 270, 273, *reh'g denied,* 3 Ariz. App. 559, 416 P.2d 610 (1966) (pamphlet distributed to subcontractors indicated that project manager had prime responsibility for accident prevention); Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, 385 So. 2d 676 (Fla. Dist. Ct. App. 1980) (contract put safety responsibility on contractor).

[35] Funk v. General Motors Corp., 392 Mich. 91, 220 N.W.2d 641 (1974), *overruled on other grounds,* Hardy v. Monsanto Enviro-Chem Sys. Inc., 414 Mich. 29, 323 N.W.2d 270 (1982) (general contractor found liable for not requiring safety nets for workers in common areas over thirty feet high); Candelaria v. B.C. Gen. Contractors, Inc., 236 Mich. App. 67, 600 N.W.2d 348 (1999).

In *Funk,* the court imposed an affirmative duty on the general contractor to provide necessary safety equipment in common work areas. This goes beyond a contractor's general duty to provide safe premises through remedying the defect or warning of the danger; it more closely resembles the duty imposed under a theory of retained control over the subcontractor's work. *See* § 10.04[2][b], *infra. Cf.* Kelly v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 582 P.2d 500 (1978) (general contractor with supervisory and coordinating authority for compliance with safety standards had duty to provide safety nets).

[36] Revels v. Southern Cal. Edison, 113 Cal. App. 2d 673, 248 P.2d 986, 985 (1952); Szumski v. Lehman Homes, 267 Pa. Super. 478, 406 A.2d 1142 (1979) (citing Restatement (Second) of Torts § 343; contractor subject to liability if he knows of or, by exercise of reasonable care should discover, the unsafe condition); Kukuruza v. General Elec. Co., 510 F.2d 1208 (1st Cir. 1975)

although a failure to inspect will result in liability only if a reasonable inspection would have disclosed the dangerous condition.[37]

The contractor need not correct potentially dangerous conditions of the premises. His duty to safeguard workers from unreasonably dangerous conditions may be satisfied by warning of the danger.[38] "Generally, there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent to him that he may reasonably be expected to discover them."[39]

Since the general contractor "may reasonably assume that [the worker] will protect himself by the exercise of ordinary care, or . . . voluntarily assume the risk of harm,"[40] the general contractor may, in many states, maintain a defense of contributory negligence, assumption of risk or comparative negligence.[41] If

(under Massachusetts law, employer of an independent contractor owes the contractor a duty to disclose hidden defects which are either known or could have been discovered through reasonable care); Jackson v. Tennessee Valley Auth., 413 F. Supp. 1050 (M.D. Tenn.), *aff'd,* 595 F.2d 1120 (6th Cir. 1976); Lagzdins v. United Welfare Fund-Security Div. Marriett Corp., 77 A.D.2d 35, 430 N.Y.S.2d 351 (1980); Frankovis v. Klug & Smith Co., 275 Wis. 156, 81 N.W.2d 495 (1957); Whalen v. U.S. West Communications, Inc., 253 Neb. 334, 570 N.W.2d 531, 541 (1997).

[37] *See* Kennedy v. McKay, 86 A.D.2d 597, 446 N.Y.S.2d 124, 126 (1982); Kukuruza v. General Elec. Co., 510 F.2d 1208 (1st Cir. 1975); Hogge v. United States, 354 F. Supp. 429 (E.D. Va. 1972) (a negligent failure to inspect will not result in liability unless a reasonable inspection would have disclosed the danger); Brownsville & Matamoros Bridge Co. v. Null, 578 S.W.2d 774 (Tex. Civ. App. 1978).

[38] *See* Lagzdins v. United Welfare Fund-Security Div. Marriott Corp., 77 A.D.2d 585, 430 N.Y.S.2d 351 (1980) (Section 200(1) of Labor Law is codification of common law duty to provide safe premises); Raich v. Aldon Constr. Co., 129 Cal. App. 278, 276 P.2d 822, 827 (1954). *See also* Restatement (Second) of Torts § 343.

The adequacy of the warning is a question for the jury.

[39] George v. Myers, 169 Or. App. 472, 10 P.3d 265 (2000); Sandivg v. A. Dubreil & Sons, Inc., 2000 Conn. Super. LEXIS 834 (Conn. Super. Ct. Mar. 29, 2000), in Construction Law Digest, August, 2000, Digest No. D000433; Longnecker v. Illinois Power Co., 64 Ill. App. 3d 634, 381 N.E.2d 709, 714 (1978); Greenbaum v. United States, 366 F. Supp. 26 (E.D. Pa. 1973) (possessor of land owes duty to keep premises in good repair or to warn of danger); Guthrie v. Reliance Constr. Co., 612 S.W.2d 366 (Mo. Ct. App. 1980) (no duty to warn invitee of dangers which are known or obvious).

But see Deibert v. Bauer Bros. Constr. Co., 141 Ill. App. 3d 430, 152 Ill. Dec. 552, 566 N.E.2d 239 (1990) (contractor was liable to third party for injury caused by stepping into an obvious rut where the court found that third party was distracted by the construction activities going on nearby).

[40] Restatement (Second) of Torts § 343A comment e.

[41] *See* Egan v. A.J. Constr. Corp., 94 N.Y.2d 839, 702 N.Y.S.2d 574, 724 N.E.2d 366 (1999), *reargument granted*, 1999 N.Y. App. Div. LEXIS 6982 (App. Div. 1999); Buchanan v. Mitchell, 741 So. 2d 1055 (Ala. 1999); Becker v. Setien, 904 S.W.2d 338 (Mo. Ct. App. 1995); Huffman v. Walker Jones Equip. Co., 658 So. 2d 871 (Miss. 1995); Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1 (1st Cir. 1994); Siragusa v. New York, 117 A.D.2d 986, 499 N.Y.S.2d 533 (1986)

the contractor can establish that the worker fully appreciated the risk and voluntarily confronted the danger, the general contractor's liability is either nonexistent under contributory negligence or assumption of risk, or is diminished to the extent of the injured worker's own culpable conduct.

[ii]—Limitation to Conditions of the Premises

A general contractor must protect workers from unreasonably dangerous conditions of the premises. He is ordinarily not liable, absent some reserved control over the operative method or details of the work,[42] for the negligent acts of a subcontractor. "The duty to provide a safe place to work is not breached . . . when the injury arises out of a defect in the subcontractor's own methods or through the negligent acts of the subcontractors occurring as a detail of the work."[43]

Dangerous conditions of the premises have included the absence of guard rails in public work areas,[44] improperly installed ceiling supports,[45] submerged gas pipes,[46] unsafe temporary floors,[47] unsafe roads within the construction site,[48]

(comparative negligence applied in case of injuries sustained at construction site); Hardy v. Monsanto Enviro-Chem Sys., 414 Mich. 29, 323 N.W.2d 270 (1982) (comparative negligence available defense in action for failure to provide adequate safety device); Longnecker v. Illinois Power Co., 64 Ill. App. 3d 634, 381 N.E.2d 709, 714 (1978) (no obligation to protect injured worker from condition known and obvious to him); Raich v. Aldon Constr. Co., 129 Cal. App. 2d 278, 276 P.2d 822, 828 (1954). *See also* Jackson v. Van Buskirk, 424 N.W.2d 148 (S.D. 1988) (employer not liable to employee injured at construction site where danger was obvious); Lewis v. Sims Crane Serv., Inc., 498 So. 2d 573 (Fla. Dist. Ct. App. 1986) (award to injured operator of crane reduced by forty percent due to his negligence).

[42] *See* § 10.04[2][b], *infra.*

[43] Lagzdins v. United Welfare Fund-Security Div. Marriott Corp., 77 A.D.2d 585, 430 N.Y.S.2d 351, 354 (1980); *see* Francavilla v. Nagar Constr. Co., 151 A.D.2d 282, 542 N.Y.S.2d 557 (1989) (general contractor not liable for negligent acts of subcontractors); Persichilli v. Triborough Bridge & Tunnel Auth., 16 N.Y.2d 136, 262 N.Y.S.2d 476, 209 N.E.2d 802 (1965); Gallo v. Supermarkets Gen. Corp., 112 A.D.2d 345, 491 N.Y.S.2d 796 (1985) (general contractor not liable for negligence of subcontractor where "hot tar" bucket fell on pedestrian); Cummings v. Hoosier Marine Properties, Inc., 173 Ind. App. 372, 363 N.E.2d 1266 (1977); Barth v. Downey Co., 71 Wis. 2d 775, 239 N.W.2d 92 (1976).

[44] Conner v. Utah Constr. & Mining Co., 231 Cal. App. 2d 263, 41 Cal. Rptr. 728 (1964) (fall from unguarded second floor); Pruett v. Precision Plumbing, 27 Ariz. App. 288, 554 P.2d 655 (1976).

[45] Manhattan-Dickman Constr. Co. v. Shawler, 113 Ariz. 549, 558 P.2d 894 (1976).

[46] Raich v. Aldon Constr. Co., 129 Cal. App. 2d 278, 276 P.2d 822 (1954).

[47] Coyle v. Alland & Co., 158 Cal. App. 2d 664, 323 P.2d 102 (1958).

[48] Wolf v. New York State Elec. & Gas Corp., 142 Misc. 2d 774, 538 N.Y.S.2d 188 (Sup. Ct. 1989) (contractor and owner did not maintain safe work place where injuries were caused by hitting a pothole on a temporary roadway).

protruding roof nails,[49] improper illumination,[50] and objects cluttering the work environment.[51]

While a general contractor is not ordinarily liable for the negligent acts of a subcontractor, a subcontractor's negligence may itself constitute a condition of the premises which violates the employees' right to a safe place to work. For example, in *Kuntz v. Del E. Webb Constr. Co.,*[52] the court held the general contractor liable for injuries sustained by a worker who fell from a scaffold that was in the process of being negligently erected by another subcontractor. The scaffold was in a public work area, the general contractor was aware of the negligent method of construction, and there was sufficient time for the general contractor to warn the injured employee. These factors led the court to hold that the negligent act of the subcontractor constituted a dangerous condition of the premises for which the general contractor was responsible.

The result may have been different if the injured employee was the one negligently constructing the scaffold. In *Lagzdin v. United Welfare Fund-Security Div. Marriott Corp.,*[53] the court found the general contractor not liable for a worker's injury caused when a roof joist fell on the worker. Unlike *Kuntz,* the injured worker had constructed the joist himself the previous day. The court reasoned that the contractor was not liable for the worker's own negligence, applying the principal that a general contractor is not responsible for the worker's own operative methods and immediate work area.[54]

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[49] Schwartz v. Zulka, 70 N.J. Super. 256, 175 A.2d 465 (1961), *modified,* Schwartz v. North Jersey Bldg. Contractors Corp., 38 N.J. 9, 182 A.2d 865 (1962) (general contractor liable for injury to roofing subcontractor who tripped on nail left protruding by another subcontractor).

[50] *See* Morgan v. Stubblefield, 6 Cal. 3d 606, 100 Cal. Rptr. 1, 493 P.2d 465 (1972); Greenleaf v. Puget Sound Bridge & Dredging Co., 58 Wash. 2d 647, 364 P.2d 796 (1961).

[51] Giarrantano v. Weitz Co., 259 Iowa 1292, 147 N.W.2d 824 (1967); Souza v. Pratico, 245 Cal. App. 2d 651, 54 Cal. Rptr. 159 (1966).

[52] 57 Cal. 2d 100, 18 Cal. Rptr. 527, 368 P.2d 127 (1961).

[53] 77 A.D.2d 583, 430 N.Y.S.2d 351, 354 (1980).

[54] *See* Wright v. Belt Assocs., 14 N.Y.2d 129, 249 N.Y.S.2d 416, 198 N.E.2d 590 (1964); Hand v. Rorick Constr. Co., 190 Neb. 191, 206 N.W.2d 835 (1973); Fresquez v. Southwestern Indus. Contractors & Riggers, Inc., 89 N.M. 525, 554 P.2d 986, *cert. denied,* 90 N.M. 8, 558 P.2d 620 (1976); Freeo v. Victor A. Perosi, Inc., 54 A.D.2d 684, 387 N.Y.S.2d 268 (1976); Smith v. Henger, 148 Tex. 456, 266 S.W.2d 425 (1950) (general contractor not responsible for injury to worker when guard rail removed by worker's crew). *See also* ¶ 10.04[2][a][ii], n.44 *supra.*

But see Kuntz v. Del E. Webb Constr. Co., 57 Cal. 2d 100, 18 Cal. Rptr. 527, 368 P.2d 127 (1961), where the court noted that it is "immaterial that the danger . . . may have been due in part to the negligence of plaintiff's employer." *Id.,* 368 P.2d at 130.

[b]—Duty To Reasonably Exercise Power of Retained Control Over Methods Details of Subcontractor's Work

A general contractor who retains control over a part of the subcontractor's work will be held liable for an injury to a worker resulting from the general contractor's failure to exercise this control with reasonable care.[55] This rule may

[55] Leonard v. Commonwealth of Pennsylvania Dep't of Transp., 771 A.2d 1238 (Pa. 2001), in AIA Citator, *infra*, Digest No. 200113; George v. Myers, 169 Or. App. 472, 10 P.3d 265 (2000); Bond v. Howard Corp., 72 Ohio St. 3d 332, 650 N.E.2d 416 (Ohio 1995), in AIA Citator, *infra*, Digest No. 95003; Unger v. Eichleay Corp., 244 Ill. App. 3d 445, 185 Ill. Dec. 556, 614 N.E.2d 1241 (Ill. App. Ct.), *appeal granted*, 152 Ill. 2d 581, 190 Ill. Dec. 912, 622 N.E.2d 1229 (1993) (court did not rely on § 414 where injured worker failed to cite any authority from Illinois or any other jurisdiction interpreting § 414 as imposing a duty upon a contractor who was not an owner or possessor of land); Madler v. McKenzie County, 496 N.W.2d 17 (N.D. 1993); Welch v. McDougal, 876 S.W.2d 218 (Tex. Ct. App. 1994); Byrd v. Merwin, 456 Pa. 516, 317 A.2d 280 (1974) (citing Restatement (Second) of Torts § 414); Allen v. Texas Elec. Serv. Co., 350 S.W.2d 866 (Tex. 1961) (liability where employer of the contractor retains control over the operative details and the right to direct the manner in which employees of the contractor perform their work); Brooks v. Midwest Grain Products of Illinois, Inc., 311 Ill. App. 3d 871, 726 N.E.2d 153,155 (3rd Dist. 2000); Bokodi v. Foster Wheeler Robbins, Inc., 312 Ill. App. 3d 1051, 728 N.E.2d 726, 731–732 (1st Dist. 2000); Morehouse v. Taubman Co., 5 Cal. App. 548, 85 Cal. Rptr. 308 (1970) (*citing* § 414 of Restatement (Second) of Torts); Weber v. Northern Ill. Gas Co., 10 Ill. App. 3d 625, 295 N.E.2d 41 (1973) (court recognized that § 414 and comments thereto are expressions of law of Illinois and apply to a general contractor); Alexander v. United States, 605 F.2d 828 (5th Cir. 1979).

The Restatement (Second) of Torts § 414 states:

> 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.

See also Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 734 P.2d 1258 (1987) (court held that evidence that the general contractor gave detailed instructions concerning contractor's performance, and instructed and supervised subcontractor's employees, raised questions of material fact concerning general contractor's vicarious liability in employees' suit for compensation for injuries on job-site); Caudel v. East Bay Mun. Util. Dist., 165 Cal. App. 3d 1, 211 Cal. Rptr. 222 (1985) (the court held that a jury question arose where an employee of an independent contractor was injured when working in nighttime dirt moving operation).

But see Candelaria v. B.C. General Contractors, Inc., 236 Mich. App. 67, 600 N.W.2d 348, 354 (1999) (no contractor liability where the evidence did not permit a finding of retained control because the contractor did not have "any effect on the environment or manner in which the work was performed").

But cf. Brewster v. Salveson Constr., Inc., 765 P.2d 1350 (Wyo. 1988) (contractor did not have control over subcontractor's employees); Straw v. Esteem Constr. Co., 45 Wash. App. 869, 728 P.2d 1052 (1986) (subcontractor's employee could not recover from general contractor for injuries sustained from falling through spiral staircase opening which had been framed by general contractor, since general contractor's role in coordinating timing of construction did not represent "control" necessary to establish a duty to make premises safe for subcontractor's employee).

impose liability on a general contractor even if the injury was the result of the negligence of the subcontractor in the details of his work.[56]

The retained control theory of liability, however, does not apply if the general contractor has only the right to inspect or supervise a subcontractor's work and reject that which is unsatisfactory or nonconforming.[57] "[T]he employer must have retained at least some degree of control over the manner in which the work is done . . . [so] that the contractor is not entirely free to do the work in his own way."[58]

However, a general contractor who is contractually responsible for ensuring compliance with safety procedures does retain sufficient control to create liability.[59] And where the general contractor has placed a representative at the

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[56] Williamson v. Cox, 844 S.W.2d 95 (Mo. Ct. App. 1992); Morehouse v. Taubman Co., 5 Cal. App. 548, 85 Cal. Rptr. 308, 314 (1970) ("The principle contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others."); Broderick v. Cauldwell-Wingate Co., 301 N.Y. 182, 93 N.E.2d 629 (1950) (general contractor liable for negligence of injured worker's employer when he gave specific instructions which involved safety of subcontractor's men); Fluor Corp. v. Sykes, 3 Ariz. App. 211, 413 P.2d 270, *reh'g denied,* 3 Ariz. App. 559, 416 P.2d 610 (1966) (general contractor liable for acts and omissions of subcontractor if retained control over subcontractor); Kelley v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 582 P.2d 500 (1978) (contractor who retained control liable for subcontractor's failure to use safety nets for its employees).

[57] Rangel v. Brookhaven Constructors, Inc., 307 Ill. App. 3d 835, 241 Ill. Dec. 313, 719 N.E.2d 174 (1999), *appeal denied*, 187 Ill. 2d 591, 244 Ill. Dec. 190, 724 N.E.2d 1274 (2000); Hooper v. Pizzagalli Constr. Co., 112 N.C. App. 400, 436 S.E.2d 145 (N.C. Ct. App. 1993), *review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994); Van Ness v. Independent Constr. Co., 392 So. 2d 1017, 1019 (Fla. Dist. Ct. App.), *petition denied,* 402 So. 2d 614 (Fla. 1981) (owner not liable under theory of retained control where merely reserves right to reject unsatisfactory work); Signs v. Detroit Edison, 93 Mich. App. 626, 287 N.W.2d 292 (1979) (limited type of inspection-checking construction for compliance with blueprints and specifications-not sufficient control to bring a general contractor within rule of § 414); Porter v. Stevens, Thompson & Runyan, Inc., 24 Wash. App. 624, 602 P.2d 1192 (1979) (employer not liable where no daily control and no duty to supervise day-to-day manner and method of work; control was restricted to ensuring job conformity); Chesin Constr. Co. v. Epstein, 8 Ariz. App. 312, 446 P.2d 11, 13 (1968) (contract provision between general and subcontractor providing that " '[a]ll work to be completed . . . shall be done under direct supervision of contractor's representative' " interpreted as not relating to method or manner of work, but to ensuring conformity with contract and does not establish retained control); Everette v. Alyeska Pipeline Serv. Co., 614 P.2d 1341 (Alaska 1980); Walters v. Kellam & Foley, 172 Ind. App. 207, 360 N.E.2d 199 (1977).

[58] Restatement (Second) of Torts § 414 comment c. *See also* Signs v. Detroit Edison, 93 Mich. App. 626, 287 N.W.2d 292 (1979) (*citing* § 414 comment c).

[59] Daugherty v. Fuller Eng'g Serv. Corp., 615 N.E.2d 476 (Ind. Ct. App. 1993); Teitge v. Remy Constr. Co., 526 N.E.2d 1008 (Ind. Ct. App. 1988).

In Kelley v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 582 P.2d 500 (1978), the court held the general contractor liable for injuries to the employees of an independent contractor where

site to see that the subcontractor complies with its obligation "to operate in a safe manner," courts have held the contractor liable for the active negligence of the subcontractor.[60] Similarly, a general contractor who actually instructs a subcontractor's employees as to their method of operation in a particular situation has retained the control necessary to give rise to a duty to protect the worker from the subcontractor's negligent manner of operation.[61]

This duty arises because by retaining control the general contractor alters the traditional status of the independent contractor.[62] A general contractor who retains control over the details of a subcontractor's performance has the power to prevent the subcontractor from conducting his work in a way that is

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the general contractor, by contract, had general supervisory and coordinating authority both for the work and for compliance with safety standards.

Similarly, in Fluor Corp. v. Sykes, 3 Ariz. App. 211, 413 P.2d 270, *reh'g denied,* 3 Ariz. App. 559, 416 P.2d 610 (1966), the general contractor was found to be in control where he assumed the responsibility for project accident prevention. *See also* Stepanek v. Kober Constr., 191 Mont. 430, 625 P.2d 51 (1981) (general contractor liable where responsible for initiating, maintaining and supervising all safety precautions); Holman v. State, 53 Cal. App. 3d 317, 124 Cal. Rptr. 773 (1975) (control found where defendant determined the acceptability of manner of performance of the work and had right to remove contractor's unsafe equipment); Smith v. United States, 497 F.2d 500 (5th Cir. 1974) (prime contractor retained control by guaranteeing that subcontractors would comply with safety requirements); Bokodi v. Foster Wheeler Robbins Inc., 312 Ill. App. 3d 1051, 728 N.E.2d 726, 734 (1st Dist. 2000) (retained control was found where general contractor "established [its] own safety program and appointed an individual whose sole function was to seek out safety hazards").

But see Martinez v. United States, 661 F. Supp. 762 (W.D. Tex. 1987) (limited right to stop work for failure to comply with safety procedures was insufficient degree of control); Arias v. MHI Partnership, Ltd., 97 S.W.2d 660, 665 (Tex. App. 1998) (general contractor's safety policies did not rise to the level of control necessary to impose liability for worker's injuries).

[60] Signs v. Detroit Edison, 93 Mich. App. 626, 287 N.W.2d 292, 299 (1979). *See* German v. Murphy, 146 Or. App. 349, 932 P.2d 580 (1997). *See also* Restatement (Second) of Torts § 414 comment b. (Section 414 usually is "applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job.")

[61] *See* Armoneit v. Elliott Crane Serv., Inc., 2001 Tenn. App. LEXIS 506 (Tenn. Ct. App. July 19, 2001), in Construction Law Digest, December, 2001, Digest No. D001701; Broderick v. Cauldwell-Wingate Co., 301 N.Y. 182, 93 N.E.2d 629 (1970); Morris v. Soldotna, 553 P.2d 474, 480 (Alaska 1976); Chesin Constr. Co. v. Epstein, 8 Ariz. App. 312, 446 P.2d 11, 15 (1968); Trecartin v. Mahony-Troast Constr. Co., 18 N.J. Super. 380, 87 A.2d 349 (1952).

But see Candelaria v. B.C. General Contractors, Inc., 236 Mich. App. 67, 600 N.W.2d 348, 354 (1999).

[62] The independence of a contractor immunizes the employer from the responsibilities that might otherwise flow from a master-servant relationship (*e.g.,* liability under the doctrine of *respondeat superior*). The law ordinarily refuses to require an employer of an independent contractor to ensure that the contractor carries out the details of its work in a non-negligent manner when the employer has no ability to alter or correct the methods of the contractor. *See* Restatement (Second) of Torts § 409.

unreasonably dangerous to others. This ability creates a duty to exercise that power reasonably, and when the general contractor knows, or should know, that the operative details of the subcontractor's work are creating an unreasonably dangerous condition, he is negligent if he fails to correct them.[63]

[c]—Vicarious Liability for Work That Is Peculiarly or Inherently Dangerous

Vicarious liability results from the imposition on a contractor of certain non-delegable responsibilities.[64] At common law, vicarious liability results when a contractor subcontracts work that is intrinsically, peculiarly or inherently dangerous.[65] Non-delegable duties also may be imposed by statute (*see*

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[63] Morehouse v. Taubman Co., 5 Cal. App. 548, 85 Cal. Rptr. 308 (1970) (*citing* Restatement (Second) of Torts § 414 comment b).

See Melchers v. Total Elec. Constr., 311 Ill. App. 3d 224, 243 Ill. Dec. 512, 723 A.2d 815 (1999); Hammond v. Bechtel, Inc., 606 P.2d 1269 (Alaska 1980); Fluor Corp. v. Sykes, 3 Ariz. App. 211, 413 P.2d 270 (1966); Thill v. Modern Erecting Co., 272 Minn. 217, 136 N.W.2d 677 (1965); Basciano v. George A. Fuller Co., 4 Misc. 2d 322, 150 N.Y.S.2d 312 (Bronx Co. Sup. Ct.), *modified,* 3 A.D.2d 14, 157 N.Y.S.2d 534 (1956).

See also Sarmiento v. Stufflefield's Custom Concrete, Inc., 178 Ariz. 440, 874 P.2d 997 (1994) (subcontractor owned a duty to other subcontractors to perform its work with reasonable care so as not to create a dangerous condition).

[64] McDonald v. City of Oakland, 255 Cal. App. 2d 816, 63 Cal. Rptr. 593, 597–598 (1968) ("the nature of the risk makes it imperative that the most responsible party involved in the transaction, that is, the party for whose benefit the work is being undertaken, be charged with the ultimate protection of those who are performing the dangerous work"); Lane v. R.N. Rouse & Company, 135 N.C. App. 494, 521 S.E.2d 137, 139 (1999).

[65] The common law rules of peculiar and inherent risk are embodied in §§ 416 and 427 of the Restatement (Second) of Torts:

§ 416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

§ 427. Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Sections 416 and 427 are essentially a duplication of each other and the courts generally use the language interchangeably. Restatement (Second) of Torts § 427 comment a. *See, e.g.,* Marshall v. Southeastern Pa. Transp. Auth., 587 F. Supp. 258 (E.D. Pa. 1984) (noting similarity of Sections 416 and 427 and referring to both sections as inherently dangerous activity doctrine).

§ 10.04[3]).[66] The contractor is responsible for a subcontractor's negligence regardless of whether the contractor retained control over the subcontractor's work or knew or should have known of the subcontractor's failure to take necessary precautions.

A peculiar risk is one which is "different from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence [and] must involve some special hazard resulting from the nature of the work to be done."[67] Similarly, an inherently dangerous risk is one which "inheres in the instrumentality or condition itself at all times, thereby requiring special precautions to be taken with respect to it to prevent injury."[68] A peculiar risk is not necessarily an abnormal risk,[69] and an inherently dangerous risk need not involve "a high degree of risk of such harm, or . . . [be] one of very serious harm."[70] It is merely a risk that arises out of the ordinary and usual method

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See also Kimberly J. Roberts, *Construction Accident: Who Is Liable?*, 15 Construction Law. 3 (1995); Toland v. Sunland Hous. Group, Inc., 18 Cal. 4th 253, 74 Cal. Rptr. 2d 878, 955 P.2d 504 (1998) (rule in Privette v. Superior Court, 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721 (1993), was extended to Restatement (Second) of Torts § 413 requiring contractor to specify in contract that subcontractor must take special safety precautions); Fry v. Diamond Constr., Inc., 659 A.2d 241 (D.C. 1995); Downs v. A & H Constr., Ltd., 481 N.W.2d 520 (Iowa 1992).

[66] *Cf.* Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873 (Iowa 1996); McCall v. United States Dep't of Energy, 914 F.2d 191 (9th Cir. 1991) (under the Federal Tort Claims Act, when the United States is acting as the contractor, the United States is not liable for the negligent acts of subcontractor's employees).

[67] Marshall v. Southeastern Pa. Transp. Auth., 587 F. Supp. 258 (E.D. Pa. 1984), quoting Restatement (Second) of Torts § 416 comment b. *See, e.g.,* West v. Morrison-Knudsen Co., 294 F. Supp. 1336 (D. Mont. 1969) (injury from slip on oil when unloading trailer not result of inherently dangerous work); Ortiz v. Ra-El Dev. Corp., 365 Pa. Super. 48, 528 A.2d 1355, *appeal denied*, 536 A.2d 1332 (Pa. 1987); Donnelly v. Southeastern Pennsylvania Transportation Authority, 708 A.2d 145, 148–149 (Pa. Commw. 1998) (working on a scaffold to do painting/sandblasting work did not pose a greater risk than the general work of being on a scaffold, and is therefore not a special danger).

See also Peffer v. Penn 21 Assocs., 406 Pa. Super. 460, 594 A.2d 711 (1991) (Pennsylvania statute defines a peculiar risk as a risk that is foreseeable to the employer of the independent contractor at the time the contract is executed and is a risk that is different from the usually and ordinary risk associated with the type of work being done).

But see Hughes v. Atlantic Pac. Constr. Co., 194 Cal. App. 3d 987, 240 Cal. Rptr. 200 (1987).

[68] Dowell v. General Tel. Co. of Mich., 85 Mich. App. 84, 270 N.W.2d 711, 715 (1978) (*quoting* 65 C.J.S. Negligence § 66); Mackey v. Campbell Constr. Co., 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980). *See* Floyd v. Benson, 753 S.W.2d 945 (Mo. Ct. App. 1988).

[69] Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979).

[70] Restatement (Second) of Torts § 427 comment b. *See also* People v. Reagan, 94 N.Y.2d 804, 701 N.Y.S.2d 306, 723 N.E.2d 55 (1999) (contractor not criminally liable to workers for trench cave-in).

of doing the work.[71]

The risk of cave-ins while digging trenches is a peculiar risk which necessitates special precautions, the absence of which will render the employer liable.[72] Working with explosives[73] and volatile substances[74] are also within the doctrine, as are the risks of being hit by an automobile while working on a busy street,[75] the risks involved in demolition work,[76] and the risk of falling from high places.[77]

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[71] Olin v. George E. Logue, Inc.. 119 F. Supp. 2d 464 (M.D. Pa. 2000), in Construction Law Digest, March, 2001, Digest No. D001003; Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979); Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41, 45 (1979) (a peculiar risk "has reference only to special, recognizable danger arising out of the work itself").

[72] Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979). *See also* McDaniel v. Business Investment Group, Ltd., 709 N.E.2d 17 (Ind. Ct. App. 1999); Knight v. Nix, 381 So. 2d 651 (Ala. Civ. App. 1976) (trial court's dismissal of case reversed and remanded to give plaintiff opportunity to show that working in trench was necessarily or intrinsically dangerous); Metter v. Meadows Ltd. Partnership, 451 Pa. Super. 520, 680 A.2d 887 (1996). *But see* Tallman v. City of Hurricane, 1999 Utah 55, 985 P.2d 892 (1999); Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873 (Iowa 1996); Petrassi v. Peter A.H. Jackson, Inc., 50 A.D.2d 768, 377 N.Y.S.2d 59 (1975) (verdict against contractor reversed where subcontractor controlled site and accident resulted from subcontractor's methods of excavation); McDaniel v. Business Investment Group, Ltd., 709 N.E.2d 17, 21–22 (Ind. App. 1999) ("[independent contractor's] failure to use a shoring box was collateral to the risk created by digging trenches, and therefore no liability can attach to [principal] under the 'intrinsically dangerous' exception").

[73] Toole v. United States, 588 F.2d 403 (3d Cir. 1978) (employer liable under Pennsylvania law for failure of independent contractor to provide employee a safe shield when working with antitank explosives); Watson v. Black Mountain Ry. Co., 164 N.C. 176, 80 S.E. 175 (1913) (blasting work intrinsically dangerous).

But see Central Trust & Sav. Bank v. Toppert, 198 Ill. App. 3d 562, 143 Ill. Dec. 885, 554 N.E.2d 820 (1990) (blasting in a quarry is not inherently dangerous work).

[74] Woolen v. Aerojet Gen. Corp., 57 Cal. 2d 407, 369 P.2d 708, 20 Cal. Rptr. 12 (1962) (painting with volatile substances in a confined space is peculiarly dangerous and employer liable for contractor's failure to supply adequate fan to provide fresh air); McDonald v. City of Oakland, 255 Cal. App. 2d 816, 63 Cal. Rptr. 593 (1967) (employer liable for failure to provide painters with adequate ventilation pipe when painting inside of water tank with volatile substance); Chicago Economic Fuel Gas Co. v. Myers, 168 Ill. 139, 48 N.E. 66 (1897) (propelling of explosive gas through pipes intrinsically dangerous).

[75] Van Arsdale v. Hollinger, 68 Cal. 2d 245, 46 Cal. Rptr. 20, 437 P.2d 508 (1968).

[76] Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 56 Cal. Rptr. 41, 45, 595 P.2d 619 (1979) ("the risk that someone may be hurt if precautions are not taken to assure that no one is standing behind a wall that is being knocked over is a special recognizable danger arising out of demolition work").

[77] Stilson v. Moulton-Niguel Water Dist., 21 Cal. App. 3d 928, 98 Cal. Rptr. 914 (1971) (erection of thirty-foot columns and placing girders across the top created high degree of physical harm to workers; employer liable for contractor's failure to take necessary precautions of raising

Note, however, that a significant number of states do not permit a subcontractor's employee to invoke the peculiar or inherent risk doctrine as a basis for recovering against the contractor.[78]

[3]—Statutory Creation of Contractor's Duty To Provide for Safety of Workers

State statutes often affect the liability of a contractor for injuries to the employees of other contractors.[79] Sometimes these statutes merely codify the common law.[80] Statutes may, however, impose liability on contractors where the common law would not.

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scaffolding or safety nets); Giarratano v. Weitz Co., 259 Iowa 1292, 147 N.W. 2d 827 (1967) (fall from eighty-foot roofing deck); Warren v. McLouth Steel Corp., 111 Mich. App. 496, 314 N.W.2d 666 (1981) (fall from steel beam); Rooney v. United States, 634 F.2d 1238 (9th Cir. 1980) (painting of fifty-five-foot high radar dome dangerous in absence of special precautions); Kelly v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 582 P.2d 500 (1978) (fall from high beam); Morehouse v. Taubman Co., 5 Cal. App. 3d 548, 85 Cal. Rptr. 308 (1970) (falling from ten-foot high wall).

But see Guillory v. Conoco, Inc., 521 So. 2d 1220 (La. Ct. App.), *cert. denied*, 526 So. 2d 801 (La. 1988) (court held that installing a roof on an oil storage tank was not inherently dangerous where the use of safety equipment would have cured the dangerous condition).

[78] Arizona, Arkansas, Florida, Indiana, Massachusetts, New Jersey, Ohio and Texas are among the states that do not extend this rule to the subcontractor's employees. *See* Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P.2d 330 (1965); Jackson v. Petit Jean Elec. Coop, 270 Ark. 506, 606 S.W.2d 66 (1980); Florida Power & Light Co. v. Price, 170 So. 2d 293 (Fla. 1964); Johns v. New York Blower Co., 442 N.E.2d 382 (Ind. Ct. App. 1982); Donch v. Delta Inspection Servs., Inc., 165 N.J. Super. 567, 398 A.2d 925 (1979); St. Julian v. Owens-Illinois Co., 59 Ohio Misc. 66, 394 N.E.2d 359 (1978); Nance Exploration Co. v. Texas Employer's Ins. Ass'n, 305 S.W.2d 621 (Tex. 1957). *See also* Angel v. United States, 650 F. Supp. 434 (S.D. Ohio 1986) (wrongful death action dismissed where sandblaster negligently placed metal ladder too close to high voltage electric lines).

California, Pennsylvania and Michigan extend the doctrine of vicarious liability to a contractor's employees. *See* Emery v. Leavesly McCollum, 1999 Pa. Super. 26, 725 A.2d 807 (1999); Ownes v. Giannetta-Heinrich Constr. Co., 23 Cal. App. 4th 1662, 29 Cal. Rptr. 2d 11, *review denied*, 1994 Cal. LEXIS 3286 (Cal. June 16, 1994) (doctrine of vicarious liability covers a contractor's employees); Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979); Dowell v. General Tel. Co. of Mich., 85 Mich. App. 84, 270 N.W.2d 711 (1978); Marshal v. Southwestern Pa. Transp. Auth., 587 F. Supp. 258 (E.D. Pa. 1984).

[79] *See, e.g.,* Ill. Ann. Stat. ch. 48 ¶¶ 60, 69 [*Editor's Note*: Although the Illinois Structural Work Act was repealed in 1995, discussion of that Act is retained because cases are still being litigated thereunder.]; N.J. Rev. Stat. Ann. § 34:5–166; N.Y. Lab. Law §§ 200, 240, 241; Ohio Rev. Code Ann. §§ 4101.11, 4101.12; Texas Rev. Civ. Stat. Ann. art. 5182. Municipal ordinances can also impose a duty on a general contractor to provide for the safety of all workers on a site. *See, e.g.,* Coyle v. Alland & Co., 158 Cal. App. 2d 664, 323 P.2d 102 (1958).

[80] Two examples of states with statutes paralleling the common law are New York and Ohio. New York Labor Law § 200, subd. 1 provides:

First, "safe place" statutes may prohibit a contractor from pleading affirmative defenses otherwise available at common law.[81] At common law a contractor could satisfy his duty to provide a safe place to work by warning workers of latent dangers.[82] An employee who confronted a known danger was held to have assumed the risk and could not recover from the contractor. By precluding these defenses, a contractor's duty to provide safe premises cannot be satisfied by a warning. The contractor must take affirmative action and correct the unsafe condition or face liability for resultant injury.

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.

Section 200 codifies the common law duty of a general contractor to provide a safe place to work. *See* ¶ 10.04[2][a].

Ohio Rev. Code §§ 4101.11 and 4101.12 provide:

> 4101.11 Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes . . . reasonably adequate to render such employment and places of employment safe.

> 4101.12 No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. . . . No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe.

Sections 4101.11 and 4101.12 are "a codification of the common law duty owed by the . . . occupier of premises to business invitees to keep his premises in a reasonably safe condition and to give warnings of latent or concealed perils of which he has, or should have, knowledge."

Wistwood v. Thrifty Boy Super Markets, Inc., 29 Ohio St. 2d 84, 278 N.E.2d 673, 675 (1972); Ford Motor Co. v. Tomlinson, 229 F.2d 873 (6th Cir.), *cert. denied,* 352 U.S. 826, 77 S. Ct. 38, 1 L. Ed. 2d 49 (1956) (Ohio appellate courts regard Sections 4101.11 and 4101.12 as exacting a duty substantially the same as that imposed generally by Ohio law upon an owner of property towards an invitee.) A contractor must have custody and control over the premises before he can be held liable for a failure to provide a safe place to work. Hirschbach v. Cincinnati Gas & Elec. Co., 6 Ohio St. 3d 206, 452 N.E.2d 326 (1983). He will not be liable for the negligence of another contractor absent a retention of control over the methods and manner of that contractor's work. Kelly v. Ford Motor Co., 104 Ohio App. 185, 139 N.E.2d 99 (1957). Similarly, a comparative negligence defense is available. *See* Hirschbach v. Cincinnati Gas & Elec. Co., 6 Ohio St. 3d 206, 462 N.E.2d 326, 3320 (1983). *See also* Stute v. P.B.M.C., Inc., 144 Wash. 2d 454, 788 P.2d 545 (1990).

81 *See, e.g.,* Roedner v. Central Ill. Pub. Serv. Co., 117 Ill. App. 3d 81, 452 N.E.2d 842 (1983); Smith v. Georgia Pac. Corp., 86 Ill. App. 3d 570, 408 N.E.2d 117 (1980); Evans v. Nab Constr. Co., 80 A.D.2d 841, 436 N.Y.S.2d 774, *motion for leave to appeal dismissed,* 54 N.Y.2d 785, 443 N.Y.S.2d 369, 427 N.E.2d 508 (1981).

82 *See* § 10.04[2][a][i].

At common law, a contractor is not liable for injuries to another contractor's employees caused by a dangerous condition of the premises absent control over those premises.[83] Likewise, a general contractor will ordinarily not be held responsible for the negligence of a subcontractor unless he controls some aspect of the manner or method of the subcontractor's work.[84] "Safe place" statutes may discard this requirement of control and thereby impose liability where the common law would not.

For example, under New York Labor Law §§ 240 and 241, respectively, the general contractor, regardless of his control over the work performed, is responsible for providing safe scaffolding[85] and for ensuring that adequate safety

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[83] *See* § 10.04[2][a][i].

[84] *See* § 10.04[2][b].

[85] N.Y. Lab. Law § 240 provides, in part:

> All contractors . . . in the erection, demolition, repairing, altering, painting, cleaning or painting of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

A general contractor will be liable for a violation of this section regardless of his control over the work performed. *See* Holt v. Welding Servs., Inc., 694 N.Y.S.2d 638 (App. Div. 1999); Musselman v. Charles A. Gaetano Constr. Corp., 285 A.D.2d 868, 727 N.Y.S.2d 792 (2001), in Construction Law Digest, December, 2001, Digest No. D001700; Aubrecht v. Acme Elec. Corp., 692 N.Y.S.2d 544 (App. Div. 1999); Haines v. New York Tel. Co., 46 N.Y.2d 132, 412 N.Y.S.2d 863, 385 N.E.2d 601 (1978).

Rubino v. Fisher Reese W.P. Assocs., 243 A.D.2d 620, 663 N.Y.S.2d 237 (1997); Moutray v. Baron, 244 A.D.2d 618, 663 N.Y.S.2d 926 (1997); Felker v. Corning, Inc., 90 N.Y.2d 219, 660 N.Y.S.2d 349, 682 N.E.2d 950 (1997); Sasso v. NYMED, Inc., 238 A.D.2d 799, 656 N.Y.S.2d 509 (1997); Francis v. Aluminum Co. of Am., 240 A.D.2d 985, 659 N.Y.S.2d 903 (1997); Dominguez v. Lafayette-Boynton Hous. Corp., 240 A.D.2d 310, 659 N.Y.S.2d 21 (1997); Clark v. Fox Meadow Builders, Inc., 214 A.D.2d 882, 624 N.Y.S.2d 685 (1995); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82 (1993), *appeal after remand*, 241 A.D.2d 650, 660 N.Y.S.2d 172 (1997); Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 505, 626 N.E.2d 912 (1993); Limauro v. City of New York Dept. of Envtl. Protection, 202 A.D.2d 170, 608 N.Y.S.2d 196 (1994); Carr v. Jacob Perl Assocs., 201 A.D.2d 296, 607 N.Y.S.2d 301 (1994); Carter v. Vollmer Assocs., 196 A.D.2d 754, 602 N.Y.S.2d 48 (1993); Maracle v. DiFranco, 197 A.D.2d 877, 602 N.Y.S.2d 481 (1993); Martin v. Back O'Beyond, Inc., 198 A.D.2d 479, 604 N.Y.S.2d 205 (1993); MacNair v. Salamon, 199 A.D.2d 170, 606 N.Y.S.2d 152 (1993); Perry v. National Structures, Inc., 192 A.D.2d 1136, 596 N.Y.S.2d 284 (1993); Ruiz v. 8600 Roll Road, Inc., 190 A.D.2d 1030, 594 N.Y.S.2d 474 (1993); Liverpool v. S.P.M. Envtl., Inc., 189 A.D.2d 645, 592 N.Y.S.2d 339 (1993); Allman v. Frank L. Ciminelli Constr. Co., 184 A.D.2d 1022, 584 N.Y.S.2d 686 (1992); Enderby v. Keppler, 184 A.D.2d 1058, 584 N.Y.S.2d 364 (1992); Tate v. Clancy-Cullen Storage Co., 171 A.D.2d 292, 575 N.Y.S.2d 832 (1992); Smith v. Cassadaga Valley Cent. Sch. Dist., 178 A.D.2d 955, 578 N.Y.S.2d 747 (1991); Petsch v. Moog, Inc., 156 A.D.2d 1019, 549 N..S.2d 301 (1989) (worker's falling between a cross wall and a scaffold triggered statutory liability); Young v. Casabonne Bros., 145 A.D.2d 244, 538 N.Y.S.2d 348 (1989) (a

measures are taken during construction, excavation and demolition work.[86]

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contractor is liable under N.Y. Labor Law § 240 regardless of fault); Aruck v. Xerox Corp., 144 Misc. 2d 367, 544 N.Y.S.2d 438 (N.Y. Sup. Ct. 1989), *aff'd*, 166 A.D.2d 907, 561 N.Y.S.2d 669 (1990) (worker's falling upon, rather than from, a mobile scissors scaffold triggered statutory liability); Antunes v. 950 Park Ave. Corp., 149 A.D.2d 332, 539 N.Y.S.2d 909 (1989); Brown v. Two Exchange Plaza Partners, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1989); Dick v. John M. Gates Constr. Corp., 146 A.D.2d 953, 537 N.Y.S.2d 82 (1989); LaLima v. Epstein, 143 A.D.2d 886, 533 N.Y.S.2d 399 (1988); Linney v. Consistory of Bellevue Reformed Church, 115 A.D.2d 209, 495 N.Y.S.2d 293 (1985) (for plaintiff to recover under New York Labor Law § 240, plaintiff must establish that statute was violated and that violation was proximate cause of injury); Smith v. Jesus People, 113 A.D.2d 980, 493 N.Y.S.2d 658 (1985) (plaintiff recovered where a defective scaffold fell on him while he was working on site); Horvath v. Niacet Corp., 115 A.D.2d 262, 495 N.Y.S.2d 842 (1985) (a contractor's duty to provide safe scaffolding was breached even though the contractor had provided a safety belt and line for the workers to use; the court held that this breach violated New York Labor Law § 240 as it pertains to worker safety and scaffolding); Kreiger v. Pat Constr., Inc., 112 A.D.2d 10, 490 N.Y.S.2d 393 (1985) (plaintiff brought suit for injuries sustained while working on construction site; suit was filed pursuant to New York Labor Law § 240, subd. 1; defendant construction company argued liability on a theory that plaintiff should have used job site safety devices which were pesent somewhere on job site; the court held that it is the obligation of the contractor to place the safety devices near workers to insure their safety).

See Vanoni v. New York State Gas & Elec. Corp., 141 Misc. 2d 680, 533 N.Y.S.2d 846 (Sup. Ct. 1988), for a discussion of the requirements of New York Labor Law § 240.

See also McGurk v. Turner Constr. Co., 127 A.D.2d 526, 512 N.Y.S.2d 71 (1987); Spose v. Ragu Foods, Inc., 124 A.D.2d 980, 508 N.Y.S.2d 810 (1986) (comparative negligence defense not available due to contractor's statutory liability).

Cf. Gibson v. Worthington Div. of McGraw Edison Co., 78 N.Y.2d 1108, 578 N.Y.S.2d 127, 585 N.E.2d 376 (1991) (engineer was not entitled to protection under N.Y. Labor Law § 240(1) where the court found that the engineer was not a "person employed"); Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 577 N.Y.S.2d 219 (1991) (strict liability was not imposed on contractor under N.Y. Labor Law § 240(1), pertaining to scaffolding and other devices for use of employees, where injured worker was negligent and where the injury did not involve an elevated device).

But see Amedure v. Standard Furniture Co., 125 A.D.2d 912, 512 N.Y.S.2d 912 (1987) (injury resulting from ricocheting nail not actionable because accident unrelated to scaffold).

[86] N.Y. Lab. Law § 241 provides, in part:

> All contractors . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> . . .
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

This section imposes a non-delegable duty on a general contractor to provide reasonable and adequate protection to workers in areas where construction, excavation or demolition work is performed in connection with the construction or demolition of any building. *See* Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 405 N.Y.S.2d 630, 376 N.E.2d 1276 (1978).

Hornicek v. William H. Lane, Inc., 696 N.Y.S.2d 557 (App. Div. 1999) (general construction

Similarly, Illinois' Structural Work Act requires any contractor "having charge of" scaffolding or other support devices to erect and construct them in a safe and suitable manner.[87] Whether a contractor is a person "having charge of" the

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prime not liable to injured employee of electrical prime where general construction prime had no control over the electrical work); Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343, 670 N.Y.S.2d 816, 693 N.E.2d 1068 (1998); Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 493 N.Y.S.2d 102, 482 N.E.2d 898 (1985) (under New York Labor Law § 240 subd. 1, and § 241, strict liability is imposed on a contractor who fails to provide security devices for workers and a worker is injured as a result; this liability is mandated without regard to regulations, customs or usage); Bowen v. Hallmark Nursing Centre, Inc., 244 A.D.2d 597, 663 N.Y.S.2d 933 (1997); Wensley v. Argonox Constr. Corp., 228 A.D.2d 823, 644 N.Y.S.2d 355 (1996), *appeal dismissed without opinion*, 89 N.Y.2d 861, 675 N.E.2d 1235, 653 N.Y.S.2d 282 (1996); Draiss v. Ira S. Salk Constr. Corp., 201 A.D.2d 698, 608 N.Y.S.2d 287 (1994); Figueroa v. Manhattanville College, 193 A.D.2d 778, 598 N.Y.S.2d 77 (1993); Dennis v. Beltrone Constr. Co., 195 A.D.2d 688, 599 N.Y.S.2d 723 (1993); Stark v. Rotterdam Square, 198 A.D.2d 583, 603 N.Y.S.2d 347 (1993); Whalen v. F.J. Sciame Constr. Co., 198 A.D.2d 501, 604 N.Y.S.2d 174 (1993); Mendoza v. Cornwall Hills Estates, Inc., 199 A.D.2d 368, 605 N.Y.S.2d 308 (1993); Murray v. Niagara Frontier Transp. Auth., 199 A.D.2d 984, 607 N.Y.S.2d 506 (1993), *appeal denied*, 1994 N.Y. App. Div. LEXIS 3526 (N.Y. App. Div. Mar. 11, 1994), *subsequent appeal, summary judgment granted*, 229 A.D.2d 1015, 645 N.Y.S.2d 669 (1996); Camillo v. Olympia & York Properties Co., 136 Misc. 2d 315, 518 N.Y.S.2d 702 (Sup. Ct. 1987) (absolute liability of owner and contractor for worker's injury resulting from crane operatio notwithstanding improper operation).

See also Carmody v. ADM Milling Co., 665 F. Supp. 147 (N.D.N.Y 1987) (injury caused by debris falling from material hoist actionable); Wieszchowski v. Skidmore College, 147 A.D.2d 822, 537 N.Y.S.2d 911 (1989); Conway v. New York State Teachers Retirement Sys., 141 A.D.2d 957, 530 N.Y.S.2d 300 (1988); O'Leary v. Raymond LeChase, Inc., 125 A.D.2d 991, 510 N.Y.S.2d 389 (1986).

Compare Nowak v. Smith & Mahoney, P.C., 110 A.D.2d 288, 494 N.Y.S.2d 449 (1985) (general contractor did not possess common law or statutory duty for electrical work on a project and thus was not liable to employee of electrical prime contractor who fell from a ladder).

But see Rarick v. Samal Constr. Co., 137 Misc. 2d 953, 522 N.Y.S.2d 829 (Sup. Ct. 1987) (the court held that violation of New York Labor Law § 241 did not constitute a per se intentional tort).

[87] [*Editor's Note*: Although the Illinois Structural Work Act was repealed in 1995, discussion of that Act is retained because cases are still being litigated thereunder. The repeal of the Act is prospective. Atkins v. Deere & Co., 177 Ill. 2d 222, 226 Ill. Dec. 239, 685 N.E.2d 342 (1997).]

Illinois Structural Work Act, Ill. Rev. Stat. ch. 48, ¶¶ 60 and 69 provide, in part:

> ¶ 60. All scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.

(Text continued on page 10–80)

¶ 69. § 9. Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this act, shall comply with all the terms thereof.

. . . .

For any injury to person or property, occasioned by any wilful violations of this Act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured.

See Delgatto v. Brandon Assocs., Ltd. 131 Ill. 2d 183, 137 Ill. Dec. 36, 545 N.E.2d 689 (1989) (where there was no evidence of industry practice that supports or stays were required in assembling ductwork, worker who was injured when ductwork he had propped against a wall fell on him could not recover under Structural Work Act); Atkins v. Deere & Co., 243 Ill. App. 3d 762, 183 Ill. Dec. 916, 612 N.E.2d 843 (1993), *remanded*, 177 Ill. 2d 222, 226 Ill. Dec. 239, 685 N.E.2d 342 (1997) (the Act's requirement that the scaffold be more than 20 feet from the floor or ground before a safety rail was required was inapplicable where Paragraph 60 could be read to require that scaffolds under 20 feet require a guardrail to be "safe, suitable and proper"); Leschinski v. Forest City Steel Erectors, 243 Ill. App. 3d 124, 611 N.E.2d 1038, 183 Ill. Dec. 390 (Ill. App. Ct.), *appeal denied*, 151 Ill. 2d 565, 616 N.E.2d 336, 186 Ill. Dec. 383 (1993); Pozzi v. McGee Assocs., Inc., 236 Ill. App. 3d 390, 602 N.E.2d 1302, 177 Ill. Dec. 130 (1992); Bolsmo v. Mark V Roofing Co., 190 Ill. App. 3d 334, 546 N.E.2d 634, 137 Ill. Dec. 689 (1989) (although roof or other permanent structure can sometimes function as a scaffold or support within the meaning of the Structural Work Act, roof upon which electrician slipped and injured himself was not "support" within meaning of the Act where electrician used the roof to gain access to exhaust fan rather than as a platform); Overbeck v. Jon Constr. Co., 184 Ill. App. 3d 918, 540 N.E.2d 969, 133 Ill. Dec. 103 (Ill. App. Ct.), *appeal denied,* 136 Ill. Dec. 591, 545 N.E.2d 115 (Ill. 1989) (Structural Work Act not violated when electrician was thrown off a ladder as a result of an explosion where ladder was not alleged to be defective and placement of the ladder did not violate Act because electrician had been able to climb up and down safely); Hughes v. Taylor Elec. Co., 184 Ill. App. 3d 454, 540 N.E.2d 408, 132 Ill. Dec. 668 (1989) (failure to provide proper support was actionable under the Structural Work Act); Wellston v. Levy Org., Inc., 175 Ill. App. 3d 301, 530 N.E.2d 60, 125 Ill. Dec. 142 (1988), *appeal denied*, 124 Ill. 2d 563, 535 N.E.2d 922, 129 Ill. Dec. 157 (1989) (while workers' use of floor as support could not provide basis for Structural Work Act claim, the failure to stay or support stock of heavy doors used in construction could support a Structural Work Act claim); Vuletich v. United States Steel Corp., 117 Ill. 2d 417, 512 N.E.2d 1223, 111 Ill. Dec. 586 (1987) (temporary wooden steps leading from storage trailer to ground was used as pathway rather than support, an activity the Act was not intended to cover); Gannon v. Commonwealth Edison Co., 182 Ill. App. 3d 228, 130 Ill. Dec. 665, 537 N.E.2d 994 (1989) (floor of building under construction not considered support within the meaning of statute); Ryan v. E.A.I. Constr. Corp., 158 Ill. App. 3d 499, 110 Ill. Dec. 924, 511 N.E.2d 1244 (1987); Harper v. Schal Assocs., 159 Ill. App. 3d 542, 110 Ill. Dec. 30, 510 N.E.2d 1061 (1987) (planking covering hole in ground not "support" within meaning of statute); Miller v. Clark Wood Constr. Co., 151 Ill. App. 3d 723, 104 Ill. Dec. 401, 502 N.E.2d 1061 (1986), *appeal denied,* 508 N.E.2d 730 (Ill. 1987) (injuries sustained while dismantling boom of a crane may be actionable); Marine Bank v. Archer Daniels Midland, 156 Ill. App. 3d 516, 108 Ill. Dec. 737, 509 N.E.2d 163 (1987) (adjacent roof, used to gain access to roof needing repair, was not "support" because safer alternative existed); Keyser v. Metropolitan Sanitation Dist., 165 Ill. App. 3d 696, 117 Ill. Dec. 327, 520 N.E.2d 678 (1987), *appeal denied,* 526 N.E.2d 831 (Ill. 1988) (pile of loose rock on mining tunnel floor may be "support" within meaning of Act).

work depends on the facts of the case and the degree of his power to inspect, supervise and control the work.[88] A contractor need not have control over the details or methods of a subcontractor's work to satisfy the "having charge of" language of the Act.[89] Consequently, he may be liable for injuries caused by unsafe support devices even though they were constructed and used exclusively by the subcontractor (*see* § 10.04[2][a]).[90]

Statutes may also set the standard of care. A statutory standard of care is created by a statute which is enacted for the benefit of a particular class of people (*e.g.,* construction workers) to protect them from a particular type of harm and which details specific safety procedures or requirements with which one must comply.[91] A contractor who is found to have violated the statute is deemed to

Compare O'Brien v. Rogers, 198 Ill. App. 3d 341, 144 Ill. Dec. 486, 555 N.E.2d 1005 (Ill. App. Ct.), *appeal denied*, 149 Ill. Dec. 325, 561 N.E.2d 695 (1990) (Structural Work Act extends to workers injured while employed or engaged on scaffold which is still in process of being put into place), *with* Tracy v. Montgomery Ward & Co., 193 Ill. App. 3d 304, 140 Ill. Dec. 333, 549 N.E.2d 984 (1990) (absent evidence of a defect in the scaffold which was moved, the mere moving of a scaffold at a construction site is not an activity covered by the Structural Work Act).

[88] Lurie & Stein, *Events After the Start of Construction,* 23 St. Louis U.L.J. 292, 294 (1979). *See* Cockrum v. Kajima Int'l, Inc., 243 Ill. App. 3d 402, 183 Ill. Dec. 129, 610 N.E.2d 1373 (1993), *aff'd*, 163 Ill. 2d 485, 206 Ill. Dec. 665, 645 N.E.2d 917 (1994); O'Rouke v. Oehler, 187 Ill. App. 3d 572, 135 Ill. Dec. 163, 543 N.E.2d 546 (1989) (the right to reject or stop work is not sufficient basis for holding individual "in charge" of work within the meaning of the Structural Work Act). *See* Cutuk v. Hayes/Gallardo, Inc., 151 Ill. 2d 314, 176 Ill. Dec. 888, 602 N.E.2d 834 (1992) (subcontractor, who was a sole proprietor, could maintain an action against the contractor under the Illinois Structural Work Act if subcontractor could prove that contractor was "in charge" of the work).

See also Fogarty v. Parichy Roofing Co., 175 Ill. App. 3d 530, 124 Ill. Dec. 938, 529 N.E.2d 1055 (1988) (general contractor was not liable under the Structural Work Act for subcontractor's employee's injury because the plaintiff was not able to prove that the defendant contractor had "contractually retained control over the work"); Egizio v. Majetich, 172 Ill. App. 3d 758, 122 Ill. Dec. 641, 527 N.E.2d 13 (1988).

[89] *See* McInerney v. Hasbrook Constr. Co., 62 Ill. 2d 93, 338 N.E.2d 868 (1975) (contractor liable to subcontractor's employee even though ladder belonged to subcontractor); Hausam v. Victor Gruen & Assocs., 86 Ill. App. 3d 1145, 408 N.E.2d 1051 (1980); Molloy v. Santucci Constr. Co., 78 Ill. App. 3d 249, 397 N.E.2d 125 (1979). *See also* Zukauskas v. Bruning, 179 Ill. App. 3d 657, 128 Ill. Dec. 498, 534 N.E.2d 680 (1989) (owner satisfied "in charge of" requirement of the Act where owner owned equipment at the site).

[90] Collins v. J.A. House, Inc., 705 N.E.2d 568 (Ind. Ct. App. 1999); Meyer v. Caterpillar Tractor Co., 179 Ill. App. 3d 268, 127 Ill. Dec. 514, 533 N.E.2d 386 (1988); Wellston v. Levy Org., Inc., 175 Ill. App. 3d 301, 125 Ill. Dec. 142, 530 N.E.2d 60 (1988).

[91] Rick's Elec., Inc. v. California Occupational Safety & Health Appeals Bd., 80 Cal. App. 4th 1023, 95 Cal. Rptr. 2d 847 (2000); Andrews v. Drywall Enter., 569 So. 2d 821 (Fla. Dist. Ct. App.), *review denied*, 581 So. 2d 1307 (Fla. 1991) (in Florida, the statutory standard of care for a contractor who is deemed a "statutory employer" extends to injuries to employees of subcontractors that arise out of or in the course of employment, whether the injury takes place

be negligent *per se*.[92]

Safety codes, ordinances and rules promulgated pursuant to statutory authority may also set forth specific procedures and requirements the violation of which constitutes negligence *per se*.[93] This, however, is not always the case—in some states, safety standards are admissible only as evidence of negligence.[94]

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on or off the site); Aragon v. 233 West 21st St., Inc., 201 A.D.2d 353, 607 N.Y.S.2d 642 (1994); Macutek v. Lansing, 202 A.D.2d 823, 609 N.Y.S.2d 385 (1994) (homeowner exception applied); Jonchuk v. Weafer, 199 A.D.2d 591, 604 N.Y.S.2d 353 (1993) (homeowner exception applied); Bartoo v. Buell, 198 A.D.2d 715, 605 N.Y.S.2d 992 (1993), *appeal dismissed*, 84 N.Y.2d 885, 620 N.Y.S.2d 788, 644 N.E.2d 1344 (1994), *aff'd*, 87 N.Y.2d 362, 639 N.Y.S.2d 778, 662 N.E.2d 1068 (1996); (homeowner exception applied); Rodriguez v. New York City Hous. Auth., 194 A.D.2d 460, 599 N.Y.S.2d 263 (1993); Bain v. First Presbyterian Church & Soc'y, 158 Misc. 2d 570, 601 N.Y.S.2d 535 (1993); Northern Lights Motel v. Sweaney, 561 P.2d 1176, 1183 (Ala. 1977); Barth v. Downey Co., 71 Wis. 2d 775, 239 N.W.2d 92 (1976); Doloughty v. Blanchard Constr. Co., 139 N.J. Super. 110, 352 A.2d 613 (1976); Mula v. Meyer, 132 Cal. App. 2d 279, 282 P.2d 107 (1955); Wyler v. Lilly Varnish Co., 146 Ind. App. 91, 255 N.E.2d 123 (1970).

New York Labor Law §§ 240 and 241(1)–(5) are examples of such a "self-executing" statute. Section 241 requires, *inter alia,* all contractors, when constructing or demolishing buildings, to guard elevator shafts and openings by a barrier of suitable height. It permits two sides to be "used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edges of such shaft or openings." § 241, subd. 5. *See* Joyce v. Rumsey Realty Corp., 17 N.Y.2d 118, 269 N.Y.S.2d 105, 216 N.E.2d 317 (1966) (the duty under § 241(1) is "flat and unvarying" and a violation is "conclusive evidence of negligence); *see also* Juki v. McBride, 150 Mont. 378, 436 P.2d 78, 82 (1967).

[92] Alber v. Owens, 66 Cal. 2d 790 59 Cal. Rptr. 117, 427 P. 2d 781, 784, (1967) (a breach of a statutory duty is negligence *per se*); Mula v. Meyer, 282 P.2d 107 (Cal. Ct. App. 1955); Washington v. East 87th & 83rd Street Contracting Co., 90 Misc. 2d 911, 396 N.Y.S. 2d 596 (N.Y. City Civ. Ct. 1977).

See also Pettie v. Williams Bros. Constr., Inc., 225 Ill. App. 3d 1009, 168 Ill. Dec. 55, 589 N.E.2d 169 (1992) (liability under Illinois Structural Work Act may not be shifted from contractor to subcontractor, even by an express indemnity clause in the subcontract; to hold otherwise would undermine Illinois Indemnity Act).

[93] Arrington v. Arrington Bros. Constr., Inc., 116 Idaho 887, 781 P.2d 224 (1989) (OSHA duties can run from a general contractor to a subcontractor's employee and a breach thereof may establish negligence per se); Mula v. Meyer, 132 Cal. App. 2d 279, 282 P.2d 107 (1955); Brown v. South Broward Hosp. Dist., 402 So.2d 58 (Fla. Dist. Ct. App. 1981) (statute held inapplicable); General Maintenance & Eng'g Co. v. Tobin, 4 Ohio St. 2d 27, 211 N.E.2d 835 (1963); Lossette v. Lepp, 38 Wis. 2d 392, 157 N.W.2d 629 (1968) (court held a violation of Department of Industry Safety Order is negligence *per se*).

[94] Simon v. Omaha Pub. Power Dist., 189 Neb. 183, 202 N.W.2d 157 (1972) (a violation of an administrative rule is evidence of negligence); Brogdon v. Brown, 505 So. 2d 19 (Fla. Dist. Ct. App.), *review denied,* 513 So. 2d 1060 (Fla. 1987) (violation of state building code only evidence of negligence); Bortz v. Rammel, 151 N.J. Super. 312, 320, 376 A.2d 1261 (App. Div. 1977) (proof of deviation from a statutory standard of conduct is relevant, but not conclusive, on issue of negligence).

The Federal Occupational Safety and Health Act (OSHA)[95] does not provide an injured worker a civil remedy and cannot create a duty on the part of a general contractor towards a subcontractor's employees.[96] Nevertheless, if a contractor already has a duty towards another employer's worker, OSHA standards may be admissible as evidence of negligence.[97]

[4]—Liability of a Contractor as "Statutory Employer" of Subcontractor's Employees

The liability of a contractor to the injured employees of a subcontractor may be affected by worker's compensation statutes. A contractor who subcontracts may be a "statutory employer" subject to worker's compensation provisions as if he were the direct employer of the subcontractor's injured employee. A statutory employer will be liable for an injured subcontractor's employees regardless of his own negligence. A contractor's liability as a statutory employer, however, is limited to the compensation mandated by worker's compensation. Furthermore, in many states, because of the contractor's liability or potential

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[95] 29 U.S.C. § 651 *et seq.*

[96] 29 U.S.C. § 653(b)(4). *See* Universal Constr. Co. v. OSHRC, 182 F.3d 726 (10th Cir. 1999); United States v. Pitt-Des Moines, Inc., 168 F.3d 976 (7th Cir. 1999) (subcontractor may be liable for willful violations of OSHA standards which resulted in the death of sub-subcontractor's employee); Irwin v. St. Joseph's Intercommunity Hosp., 236 A.D.2d 123, 665 N.Y.S.2d 773 (1997); Figgs v. Bellevue Holding Co., 652 A.2d 1084 (Del. Super. Ct. 1994), in AIA Citator, *infra*, Digest No. 94032; Horn v. C.L. Osborn Contracting Co., 423 F. Supp. 801 (M.D. Ga. 1976); Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999 (E.D. La. 1974); Cochran v. International Harvester Co., 408 F. Supp. 598 (W.D. Ky. 1975); Jupiter Inlet Corp. v. Brocard, 538 So. 2d 857 (Fla. Dist. Ct. App. 1988).

But cf. R.P. Carbone Constr. Co. v. OSHRC, 166 F.3d 815 (6th Cir. 1998); Kelly v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 582 P.2d 500, 507 (1978), in which the court permitted a violation of OSHA standards to constitute negligence *per se* where a general contractor contractually assumed the duty of complying with safety standards.

[97] *See, e.g.,* Alloway v. Bradlees, Inc., 157 N.J. 221, 723 A.2d 960 (1999); Tallman v. City of Hurricane, 1999 Utah 55, 985 P.2d 892 (1999); Elliott v. S.D. Warren Co., 134 F.3d 1 (1st Cir. 1998); Conie Constr., Inc. v. Reich, 73 F.3d 382 (D.C. Cir. 1995); Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999 (E.D. La. 1974); Knight v. Burns, Kirkley & Williams Constr. Co., 295 Ala. 744, 331 So. 2d 651 (1976); Canape v. Peterson, 878 P.2d 83 (Colo. Ct. App. 1994), *aff'd*, 897 P.2d 762 (Colo. 1995); Toll Bros., Inc. v. Considine, 706 A.2d 493 (Del. 1998); Bishop v. Crowther, 92 Ill. App. 3d 1, 415 N.E.2d 599, 608 (1980); Irwin v. St. Joseph's Intercommunity Hosp., 236 A.D.2d 123, 665 N.Y.S.2d 773 (1997); Sloan v. Miller Bldg. Corp., 119 N.C. App. 162, 458 S.E.2d 30 (N.C. App.), *review denied*, 341 N.C. 652, 462 S.E.2d 517 (1995), *subsequent appeal*, 493 S.E.2d 460 (N.C. Ct. App. 1997); Metter v. Meadows Ltd. Partnership, 451 Pa. Super. 520, 680 A.2d 887 (1996); Richard v. Cornerstone Constructors, Inc., 921 S.W.2d 465 (Tex. Ct. App. 1996). *See also* Wilson v. Goodyear Tire & Rubber Co., 753 S.W.2d 442 (Tex. 1988); Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 734 P.2d 1258 (1987).

liability as a statutory employer, he is immune from tort suit by the injured worker.[98]

In many states, a contractor is a statutory employer when he is primarily or concurrently responsible, along with the subcontracting employer, for securing worker's compensation insurance for the subcontractor's employees.[99] A

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[98] Al-Ameen v. Atlantic Roofing Corp., 151 F.Supp. 2d 604 (E.D. Pa. 2001), in Construction Law Digest, November, 2001, Digest No. D001626; Guerrero v. Harmon Tank Co.,55 S.W.3d 19 (Tex. Ct. App. 2001), in Construction Law Digest, September, 2001, Digest No. D001478; Glasspoole v. Konover Constr. Corp. S., 787 So. 2d 937 (Fla. Dist. Ct. App. 2001), in Construction Law Digest, September, 2001, Digest No. D001479; Anderson v. Demolition Dynamics, Inc., 136 N.C. App. 603, 525 S.E.2d 471, *review denied*, 352 N.C. 356 (2000), in Construction Law Digest, June, 2000, Digest No. D000306; Corley v. Hardaway Co., 905 F. Supp. 923 (D. Kan. 1995); Horner v. Hammons, 916 S.W.2d 810 (Mo. Ct. App. 1995); Bridges v. Carl E. Woodward, Inc., 663 So. 2d 458 (La. Ct. App. 1995), *cert. denied*, 666 So. 2d 674 (La. 1996); Subileau v. Southern Forming, Inc., 664 So. 2d 11 (Fla. Dist. Ct. App. 1995); Romero v. Shumate Constructors, Inc., 119 N.M. 58, 888 P.2d 940 (1994), *aff'd in part and rev'd in part, remanded*, 121 N.M. 657, 916 P.2d 1324 (1996); Taylor v. Broadmoor Corp., 623 So. 2d 674 (La. Ct. App. 1993); State of Missouri, *ex rel.* J.E. Jones Constr. Co. v. Sanders, 875 S.W.2d 154 (Mo. Ct. App. 1994). *See also* Mathis v. Bowater, Inc., 985 F.2d 277 (6th Cir. 1993); Mitchell v. W.S. Cumby & Son, Inc., 704 F. Supp. 65 (E.D. Pa.), *aff'd without opinion*, 879 F.2d 858 (3d Cir. 19 89); Wright v. Douglas N. Higgins, Inc., 617 So. 2d 460 (Fla. Dist. Ct. App.), *review denied*, 626 So. 2d 204 (Fla. 1993); Sykes v. Smolek Grading, Inc., 204 Ga. App. 633, 420 S.E.2d 85 (1992); Selle v. Boenig Co., 17 Kan. App. 2d 543, 840 P.2d 542 (1992), *review denied*, 252 Kan. 1093 (1993); Bradford v. Village Ins. Co., 548 So. 2d 106 (La. Ct. App. 1989), *cert. denied*, 552 So. 2d 396 (La. 1989); Gonzales v. Alman Constr. Co., 857 S.W.2d 42 (Tenn. Ct. App. 1993); Williams v. White Mountain Constr. Co., 749 P.2d 423 (Colo. 1988); Doiron v. Geo Drilling Fluids, Inc., 541 So. 2d 202 (La. Ct. App. 1989); Rogers v. Gervais Favrot Co., 537 So. 2d 381 (La. Ct. App. 1988); Zamudio v. City and County of San Francisco, 70 Cal. App. 4th 445, 82 Cal. Rptr. 2d 664 (1999); Vatterott v. Hammerts Iron Works, Inc., 968 S.W.2d 120 (Mo. 1998); Robinett v. Haskell Company, 270 Kan. 95, 12 P.3d 411 (2000).

See also Betts v. Kempers, 745 P.2d 283 (Colo. Ct. App. 1987) (court held owner to be statutory employer where owner acted as general contractor).

Cf. Norman v. Hartford Ins. Co., 532 So. 2d 355 (La. Ct. App. 1988) (where psychiatrist acted as his own general contractor in the renovation of his house, it was factual determination whether he was a statutory employer); Guidry v. Orgeron, 525 So. 2d 677 (La. Ct. App. 1988) (owner's purchase of worker's compensation insurance does not make owner a statutory employer).

But see Herman v. Lancaster Homes, Inc., 145 A.D.2d 926, 536 N.Y.S.2d 298 (1988); Schaff v. William C. Maung Co., 144 A.D.2d 109, 534 N.Y.S.2d 447 (1988).

[99] *See, e.g.,* La. Rev. Stat. Ann. § 23:1061; Md. Ann. Code art. 101, § 62; Okla. Stat. Ann. tit. 85, § 11; Pa. Stat. Ann. tit. 77, § 52.

The language of the Louisiana statute is "typical of this type and reads in pertinent part:

> When any person, in this Section referred to as the "principal", undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person, in this Section referred to as the "contractor", for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work

contractor will be liable for securing worker's compensation coverage for the subcontractor's employees whenever the work contracted for is in the contractor's regular trade or business.[100] Frequently, these statutes also require that the subcontractor's employees be on premises occupied by, or under the supervision or control of, the contractor.[101]

In certain other states, a contractor is a statutory employer when the subcontractor has failed to provide worker's compensation for his employees.[102] Thus, if

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> or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him.

La. Rev. Stat. Ann. § 23:1061.

Fonner v. Shandon, Inc., 724 A.2d 903 (Pa. 1999); Hernandez v. Chavez Roofing, Inc. 235 Cal. App. 3d 1092, 286 Cal. Rptr. 919 (1991); Neighbours v. Buzz Oates Enters., 217 Cal. App. 3d 325, 265 Cal. Rptr. 788 (1990). *See also* Nick Hagopin Drywall v. Workers' Compensation Appeals Bd., 204 Cal. App. 3d 767, 251 Cal. Rptr. 455 (1988) (court found that the injured employee of unlicensed subcontractor was the employee of the contractor).

[100] *See, e.g.,* La. Rev. Stat. Ann. § 23:1061; Va. Code §§ 65.1–30, 65.1–31; Duncan v. Balcor Property Management, Inc., 615 So. 2d 985 (La. Ct. App. 1993), *cert. denied*, 617 So. 2d 936 (La. 1993); Green v. Popeye's, Inc., 619 So. 2d 69 (La. Ct. App. 1993); Hopkins v. Martin, 185 Ga. App. 752, 365 So. 2d 544 (1988); Hope v. State, 525 So. 2d 353 (La. Ct. App. 1988); Connor v. Frees Constr. Co., 525 So. 2d 241 (La. Ct. App. 1988) (discusses Louisiana's "two contract" statutory employer theory); Williams v. Metal Bldg. Prods. Co., 522 So. 2d 181 (La. Ct. App. 1988); Elizabeth Bosek, 57 Fla. Jur. 2d *Workers Compensation* § 29 (1996).

[101] *See, e.g.,* Conn. Gen. Stat. Ann. § 31–291; Kan. Stat. Ann. § 44–503; Pa. Stat. Ann. tit 77, § 52; Utah Code Ann. § 35–1–42; Emery v. Leavesly McCollum, 1999 PA Super. 26, 725 A.2d 807 (1999); Parker v. Joe Lujan Enters., 848 F.2d 118 (9th Cir. 1988); Mitchell v. W.S. Cumby & Son, 704 F. Supp. 65 (E.D. Pa. 1989) (where the second part of a five part test for determining the statutory employer under Pennsylvania law required that the premises be occupied by or under the control of the contractor).

See also Beers Constr. Co. v. Doyle, 230 Ga. App. 593, 496 S.E.2d 921 (1998); Holley v. Badgerow, 162 Ill. App. 3d 522, 113 Ill. Dec. 950, 515 N.E.2d 1257 (1987), *appeal denied,* 522 N.E.2d 1244 (Ill. 1988) (subcontractor acting as sole proprietor and in charge of work performed was not a protected person under the Structural Work Act). [*Editor's Note*: The Illinois Structural Work Act was repealed in 1995.]

But see Cuffe v. Sanders Constr. Co., 748 P.2d 328 (Alaska 1988).

[102] Fla. Stat. Ann. § 440.10; Ill. Ann. Stat. ch. 48, ¶ 138.1, § 1(a)(3); Mass. Ann. Laws ch. 152, §§ 15, 18; Mich. Comp. Laws Ann. § 418.171; N.J. Rev. Stat. Ann. § 34:15–79; N.Y. Work. Comp. Law § 56; Ohio Rev. Code Ann. § 4123.01(A)(2); Texas Rev. Civ. Stat. Ann. art. 8307, § 6 (limited to subcontracts for the purpose of avoiding worker's compensation requirements); B & V Distrib., Inc. v. Mayo, 613 N.E.2d 499 (Ind. Ct. App. 1993); States Roofing Corp. v. Bush Constr. Corp., 15 Va. App. 613, 426 S.E.2d 124 (1993); Rinaldi v. Worker's Compensation Appeals Bd., 196 Cal. App. 3d 571, 242 Cal. Rptr. 895 (1987); 1 John P. Ludington, Modern Workers Compensation § 105:17 (1993).

See also Wolf v. Kajima Int'l, Inc., 621 N.E.2d 1128 (Ind. Ct. App. 1993), *transfer granted and adopted*, 629 N.E.2d 1237 (Ind. 1994).

a contractor hires a diligent subcontractor who provides worker's compensation coverage, the contractor will not be responsible for providing worker's compensation benefits to the injured employee. The states differ, however, as to whether the injured employee can still maintain a tort suit against a contractor when the employee has received worker's compensation from his immediate employer.[103]

In some states, a contractor's *potential* liability for the subcontractor's failure to secure coverage immunizes the contractor from civil suit.[104] In other states, however, the contractor is immune from suit only if the subcontractor in fact failed to provide coverage and the contractor pays the injured employee worker's compensation benefits.[105] Thus, if a contractor hired a subcontractor who provided compensation coverage, he is a third party subject to tort suit by the injured employee.[106] In a few states, notably New Jersey and Illinois, a worker

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But see Downs v. A & H Constr., Ltd., 481 N.W.2d 520 (Iowa 1992) (Iowa Supreme Court was precluded by statute from imposing workers' compensation liability on a contractor for an employee of an uninsured subcontractor).

[103] Chagolla v. O.T. Dunlap Constr., 838 S.W.2d 943 (Tex. Ct. App. 1992); Estep v. Construction Gen., Inc., 546 A.2d 376 (D.C. App. 1988) (injured employee cannot maintain tort suit against contractor); Meiggs v. Associated Builders, Inc., 545 A.2d 631 (D.C. App. 1988).

See 2A A. Larson, The Law of Workmen's Compensation, § 72.31, at 14–49 to 14–56 (1978), for a detailed discussion of statutory employer statutes and their effect on a civil cause of action against a general contractor.

[104] Fla. Stat. Ann. § 440.10. *See* McCormick v. Premiere Group, Inc., 523 So. 2d 780 (Fla. Dist. Ct. App. 1988); Brickley v. Gulf Coast Constr. Co., 153 Fla. 216, 14 So. 2d 265 (1943) (general contractor who secures worker's compensation either directly or through subcontractor is immune from civil action); Burk v. Cities Serv. Oil Co. of Del., 266 F.2d 433 (10th Cir. 1959) (construing Oklahoma law, court held that immunity attaches even where remote employer does not pay compensation benefits). Professor Larson prefers this rule, concluding that the potential liability of the general contractor establishes the *quid pro quo* creating immunity. 2A A. Larson, The Law of Workmen's Compensation § 72.31, at 14–45 (1978).

[105] Drewes v. Grand Valley State Colleges, 106 Mich. App. 776, 308 N.W.2d 642 (1981) (principal liable for payment of worker's compensation benefits immune from civil suit); Mosley v. Jones, 224 Miss. 725, 80 So. 2d 819 (1955) (immunity from common law suit attaches when statutory employer pays worker's compensation benefits).

See also Hyon-Su v. Maeda Pac. Corp., 905 F.2d 302 (9th Cir. 1991) (under Guam law, a contractor is immune from tort liability only if he obtains worker's compensation insurance for the employees of a subcontractor even though the subcontractor also obtains workers' compensation insurance).

In Ohio, an injured employee can elect to pursue the contractor either in civil suit or as a statutory employer. Ohio Rev. Code Ann. § 4123.01(A)(2).

[106] *See, e.g.,* Vertentes v. Barletta Co., 392 Mass. 165, 466 N.E.2d 500, 507 (1984) (Abrams, J., concurring) (employee of uninsured subcontractor can maintain a cause of action against a negligent general contractor); Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958) (employee of subcontractor permitted to bring negligence suit against general contractor). *But see* Robinett v. Haskell Co., 270 Kan. 95, 12 P.3d 411 (2000), in Construction Law Digest, March, 2001, Digest No. D001005.

can maintain an action against a general contractor notwithstanding the contractor's prior payment of compensation benefits.[107]

¶ 10.05. Construction Manager's Liability for Worker Injuries

Construction managers are relative newcomers to the construction industry. Construction managers may be persons who have gained experience as design professionals or as contractors. Under their contracts, construction managers often perform services for the owner that resemble the duties undertaken by a "supervising architect," as that term was used decades ago,[1] or the coordination duties of a general contractor. The latter is especially prevalent when an owner desires to use prime contractors rather than the traditional general contractor/subcontractor system.

Courts have tended to analogize the liability of construction managers for worker injuries to the duties of contractors.[2] To the extent that construction managers are perceived as having expertise in the construction process, courts will not hesitate to create a duty to prevent worker injuries.[3] If a construction manager undertakes responsibility for safety, the failure to perform that obligation can result in liability.[4]

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[107] *See* Boehm v. Witte, 95 N.J. Super. 359, 231 A.2d 240 (1967) (injured employee who received compensation award from general contractor may maintain third-party action against general contractor); Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 3 Ill. Dec. 715, 359 N.E.2d 125 (1976) (general contractor or owner who becomes statutory employer by actual employer's failure to have worker's compensation coverage still has tort exposure; that amounts to no denial of due process or equal protection as the statutory employer can seek indemnity/contribution and get a set-off for payments against plaintiff's recovery).

But see Miller v. Miller, 167 Ill. App. 3d 176, 118 Ill. Dec. 161, 521 N.E.2d 229 (1988) (the Illinois court dismissed plaintiff's common law negligence action against contractor based on prior lump sum settlement).

[1] *See* Buccini v. 1568 Broadway Assocs., 250 A.D.2d 466, 673 N.Y.S.2d 398 (1st Dept. 1998) (construction manager not liable to injured worker when construction manager's duties were limited to supervising the work to insure compliance with safety regulations).

[2] Lemmer v. IDS Properties, Inc., 304 N.W.2d 864 (Minn. 1980); O'Boyle v. J.C.A. Corp., 372 Pa. Super. 1, 538 A.2d 915 (1988); Casualty Ins. Co. v. Northbrook Property & Casualty, 150 Ill. App. 3d 472, 103 Ill. Dec. 495, 501 N.E.2d 812 (1986).

[3] Juno Indus., Inc. v. Heery Int'l, 646 So. 2d 818 (Fla. Dist. Ct. App. 1994), in AIA Citator, *infra*, Digest No. 94038; Caldwell v. Bechtel, Inc., 631 F.2d 989 (D.C. Cir. 1980).

[4] West v. Briggs & Stratton Corp., 244 Ga. App. 840, 536 S.E.2d 828 (2000), in Construction Law Digest, October, 2000, Digest No. D000617; Collins v. J.A. House, Inc., 705 N.E.2d 568 (Ind. Ct. App. 1999); Wenzel v. Boyles Galvanizing Co., 920 F.2d 778 (11th Cir. 1991); Perryman v. Huber, Hunt & Nichols, Inc., 628 N.E.2d 1240 (Ind. Ct. App. 1994), in AIA Citator, *infra*, Digest No. 94014; Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 556 N.E.2d 1009 (1990) (a genuine issue of material fact existed as to whether construction manager had a contractual duty to warn injured electrician where the contract provided that the construction manager would

At least one decision has held a construction manager subject to the Occupational Safety and Health Act (OSHA) requirements.[5]

For a more detailed discussion of the developing law of construction manager liability, *see* Ch. 5B, *Contractor's and Construction Manager's Rights and Duties*.

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participate and assist, as may be required, in several specific areas, including safety); Caldwell v. Bechtel, Inc., 631 F.2d 989 (D.C. Cir. 1980); Phillips v. United Eng'rs & Constructors, Inc., 500 N.E.2d 1265 (Ind. Ct. App. 1986) (court held that the construction manager assumed duty for the overall safety aspects of the project where the safety coordinator he appointed conducted biweekly safety meetings and conducted tours of the job site where he noted safety violations); Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Johnson, 161 Ga. App. 634, 288 S.E.2d 320 (1982). *See also* Cox v. Turner Constr. Co., 373 Pa. Super. 214, 540 A.2d 944 (1988); Plan-Tec, Inc. v. Wiggins, 443 N.E.2d 1212 (Ind. Ct. App. 1983).

Cf. Brady v. Ralph M. Parsons Co., 82 Md. App. 519, 572 A.2d 1115 (1990), *aff'd*, 327 Md. 275, 609 A.2d 297 (1992) (verdict entered for construction manager who was negligent on the grounds that the injured worker was contributorily negligent and had assumed the risk by not constructing the scaffold with guardrails).

[5] Bechtel Power Corp. v. Secretary of Labor, 548 F.2d 248 (8th Cir. 1977). *Accord* Secretary of Labor v. Kulka Constr. Management Corp., 15 O.S.H. Cas. (BNA) 1870, 1992 O.S.H. Dec. (CCH) ¶ 29,829 (O.S.H.R.C. 1992) (construction manager was subject to OSHA safety requirements where the construction manager "substantially supervised" the construction).

See also Cockrum v. Kajima Int'l, Inc., 163 Ill. 2d 485, 206 Ill. Dec. 665, 645 N.E.2d 917 (1994) (construction manager liable under the now repealed Illinois Structural Work Act).

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