

Construction Litigation Hot Topics: Non-delegable duty, Vicarious Liability, and Direct Claims against Subcontractors and Design Professionals

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NON-DELAGABLE DUTY:

BLACK'S LAW DICTIONARY: Non-Delagable Duty is an obligation that cannot be outsourced to a third party according to the terms of the contract

When “a party is subject to a nondelegable duty, the party subject to the nondelegable duty is directly liable for the breach of that duty, and the assignment of liability based on the tortious acts of another is not a consideration.” *Armiger v. Associated Outdoors Clubs, Inc.*, 48 So. 3d 864, 875 (Fla. 2d DCA 2010).

“Holding a particular undertaking to be nondelegable means that responsibility, i.e., ultimate liability, for the proper performance of that undertaking may not be delegated. The term nondelegable does not preclude delegation of the actual performance of the [nondelegable] task. ‘Nondelegable’ applies to the liabilities arising from the delegated duties if breached.” *Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, Inc.*, 385 So.2d 676, 679 (Fla. 3d DCA 1980).

GENERAL CONTRACTOR HAS A NON-DELAGABLE DUTY???

Florida law establishes a general contractor's non-delegable duty to ensure compliance with the applicable provisions of the Florida Building Code???

Cases recognizing a general contractor's non-delegable duty???

[T]he duty of a general contractor to use due care in repairing the premises of another, insofar as it is applicable to the owner of the premises, is a nondelegable duty which may not be committed to an independent contractor; The contractual responsibility of the general contractor to the owner **cannot be delegated** to a third person in such manner as to relieve the general contractor of liability for a violation of his duty in that behalf.

Mills v. Krauss, 114 So. 2d 817, 820 (Fla. 2nd DCA 1959)

MORE EARLY CASE LAW ON NON-DELAGABLE DUTY

A duty imposed by Statute or Ordinance, such as the building Code involved in this case cannot be delegated to an independent contractor.

Mastrandrea v. J. Mann, Inc., 128 So. 2d 146, 148 (Fla. 3rd DCA 1961)

The duty of care, with respect to the property of others, imposed by a city building permit upon a general contractor **cannot be delegated** to an independent sub-contractor.”

Bialkowicz v. Pan American Condominium No. 3, Inc., 215 So. 2d 767, 771 (Fla. 3rd DCA 1968)

A general contractor has liability to a condominium association for the negligence of the general contractor’s subcontractors.

Bialkowicz v. Pan American Condominium No. 3, Inc., 215 So. 2d 767, 771 (Fla. 3rd DCA 1968)

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Armiger v. Associated Outdoor Clubs, Inc., 48 So. 3d 864, 875 (Fla. 2nd DCA 2010).

BUILDING PERMITS & CHAPTER 489

Building permit applications require the General Contractor to swear or affirm that all the information on the permit is accurate and that **all work will be done in compliance with all applicable laws regulating construction** and zoning.

General Contractor also swears on the permit that it has the legal authority to bind any entity to which the application relates. The statements on the permit is made under oath and subject to the penalties for perjury.

General Contractors have a duty to supervise, manage and direct.

Chapter 489. Qualifying Agent

Obviously, in order to obtain the permits for a project the GC is required to have a qualified license holder.

In *Gatwood* the First District Court of Appeals explained that:

... the negligent performance of the qualifying agent's statutorily-imposed duty of supervision may support a cause of action for damages sustained by subsequent purchasers, such as the appellees, as a result of latent construction defects. **We further hold that the qualifying agent's duty of supervision is nondelegable** in the sense that such agent will not be allowed to evade responsibility for negligent supervision by relying upon one who, even though apparently a competent builder, has not been certified as a qualifying agent for the company pursuant to Chapter 489. **That is to say, the qualifying agent will still be responsible for the negligence of his surrogate regardless of the care which may have been exercised in selecting the latter and regardless of whether the latter is an independent contractor or employee of the qualifying agent's firm**

Under Chapter 489, a qualifying agent "has the responsibility to supervise, direct, manage and construction activities on a job for which he or she has obtained the building permit;..."

Section 489, FLA. STAT.; *see also ABD Construction Co. v. Diaz*, 712 So. 2d 1146, 1147-48 (Fla. 3rd DCA 1998).

THE POINT BEING, FABRE MAY NOT APPLY....NEW CASE LAW

***Defense position on Fabre: Section 768.71 is clear that the allocation of damages applies to both “contracts and torts”

**Under Florida law, “apportionment of fault under *Fabre* does not apply when liability is vicarious in nature.” *Cont’l Florida Materials v. Kusherman*, 91 So. 3d 159, 165 (Fla. 4th DCA 2012) (citing to *Grobman v. Posey*, 863 So.2d 1230 (Fla. 4th DCA 2003); *Suarez v. Gonzalez*, 820 So.2d 342 (Fla. 4th DCA 2002); and *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla.1996)).

THE POINT BEING, FABRE MAY NOT APPLY....NEW CASE LAW

- A Defendant who owes a non-delegable duty is not entitled to seek apportionment of breach of that duty. *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418, 430 (Fla 4th DCA 2014)
- 2022 Trial Court ruling to negate Fabre Defenses:
“Kolter, as the licensed general contractor who pulled the permits for the construction of the Project, had a non-delegable duty to supervise, direct, manage and control the work, including the work performed by its subcontractors.” *Grande Oaks at Heathrow Association, Inc. v. Kolter Signature Homes, LLC*, Case No.: 2020-CA-003188 (Fla. Cir. Ct. 18th Judicial Circuit June 6, 2022)
- Interpreting Section 489.113, the court in *People’s Trust Ins. Co. v. Lamolli*, 352 So.3d 890, 895 (Fla. 4th DCA 2022) stated: By law, a general contractor must subcontract roofing repairs where it does not have a license for such trade, but the GC remains responsible for any roofing construction or alteration. Thus, even if a subcontractor was used to repair the insured’s roof, RRT would remain ultimately responsible for the subcontractor’s work.

VICARIOUS LIABILITY AND NON-DELEGABLE DUTY TIES....

Black's Law Dictionary: Vicarious Liability is the obligation arising from the parties' relationship with each other. Also known as vicarious responsibility.

...sooooo, if the GC has a non-delegable duty, is it also vicariously liable for the subs??

A party subject to the nondelegable duty is directly liable for the breach of that duty, and the assignment of liability based on the tortious acts of another is not a consideration." *Armiger v. Associated Outdoors Clubs, Inc.*, 48 So. 3d 864, 875 (Fla. 2d DCA 2010).

"[T]he vicariously liable party carries the entire burden of fault imputed from the active tortfeasor. The party who is vicariously liable is responsible to the plaintiff to the same extent as the primary actor." *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459,470 (Fla. 2005)(citations omitted).

VICARIOUS LIABILITY vs. INDEPENDENT CONTRACTOR **THOUGHTS / QUESTIONS??**

General Contractors hire subcontractors to perform work during the construction of the Community, and have significant control over the ways in which the subcontractors' work is performed?

Subcontractors are arguably the GC's representatives, and/or agents?

The work performed by various subcontractors is within the scopes of work of those subcontractors' agreements which was intended to further the Contractor's purposes (i.e., the construction of the Community) or to otherwise benefit the Contractor?

Because the subcontractors (i.e., representatives, and/or agents) were performing work within the scopes of the subcontractors' agreements, the General Contractor is vicariously liable for any damage caused by the subcontractors' work?

VICARIOUS LIABILITY vs. INDEPENDENT CONTRACTOR **THOUGHTS / QUESTIONS??**

Contractor has a non-delegable duty to ensure construction was performed in compliance with the Florida Building Code and is responsible to control the work of its subcontractors to ensure said compliance, by which it arguably cannot seek to apportion fault to others for the breach of that duty. And, under Florida law, “apportionment of fault under *Fabre* does not apply when liability is vicarious in nature.”

Cont'l Florida Materials v. Kusherman, 91 So. 3d 159, 165 (Fla. 4th DCA 2012) (citing to *Grobman v. Posey*, 863 So.2d 1230 (Fla. 4th DCA 2003); *Suarez v. Gonzalez*, 820 So.2d 342 (Fla. 4th DCA 2002); and *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla.1996)).

VICARIOUS LIABILITY PRACTICE TIPS AND CONCLUSION

Remember, it is essential to assert a separate cause of action for vicarious liability against the Contractor for the work of the subs, a direct claim for negligence is not enough. A defendant cannot be found liable under a theory that was not specifically pled. Florida law seems clear that in order to pursue a vicarious liability claim, the claimant must specifically plead it as a separate cause of action.

N. Broward Hosp. Distr. V. Kalitan, 174 So. 3d 403, 412 (Fla. 4th DCA 2015).

Also, at perhaps most important, at least one Court recently ruled that a defense and indemnity claim by a contractor against a sub's policy as an additional insured did not invoke coverage because the policy's additional insured coverage only extended to claims of vicarious liability by the contractor, which was not pled in the underlying complaint. Ouch!

Carriers are relying upon this opinion for coverage determination.

Direct Claims against Subcontractors and Design Professionals

- How does the non-delegable duty of the contractor and vicarious liability claims affect the drafting of Complaints.
- Dealing with the construction side of defect litigation, there is almost a need to now bring direct claims against the subcontractors.
- Some plaintiffs were already bringing direct claims against subcontractors, others brought just claims against the developer and general contractor.
- So why would a plaintiff want to take on the extra burden of drafting claims against subcontractors and serving each of the subcontractors?

Subcontractors

- Subcontractor defenses have often revolved around 2 points:
 - We followed the plans
 - We did want the GC told us to do
- Making claims that the GC had a non-delegable duty and there is vicarious liability plays into these defenses.
- However, subcontractors vary and so do the responsibilities.
- Trade subcontractors require specialty licenses which often are not also held by GC.
- At the mercy of the GC to bring in the appropriate subcontractors.

Design Professionals

- Have you looked at a set of plans for a large project recently?
- Specialized design professionals like pitchers in MLB.
- The responsibilities vary with this group also.
- At the mercy of the developer to bring in the correct professionals.

Issues often encountered

- Developer and GC want to push down on liability.
- Ongoing relationships
- OCIP and CCIP
- Bankruptcy, out of business and COVID
- Not having the information
- Subcontractors and design professionals change mid-project.

Options

- Public records requests
- 558 inspections
- 558 documentation
- Work with developer and GC
- Amendments to pleadings