LEGAL FRAMEWORK & PRACTICAL ASPECTS OF CONSTRUCTION ACCIDENTS

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I INTRODUCTION

Civil liability for personal injuries sustained on a construction site is based normally on one or more legal theories primarily embodying common law principles, but modern judicial principles and statutory enactments may apply as well. The typical construction project involves numerous parties carrying out diverse responsibilities who have independent and often overlapping obligations for mutual safety measures, either arising from contract or the attendant circumstances. Consequently, a seemingly clear construction site accident can give rise to a complicated, multi-level liability analysis.

In the prime, independent contractor setting (e.g., a general contractor engaged by a property owner), a legal duty may be imposed upon the contractor for the safety of others via one or more legal theories. Ultimately, these legal theories can be viewed as falling into one of three liability categories: **premises liability, general negligence liability, or statutory liability**. For convenience and analysis purposes, the general negligence category typically is viewed as having various sub-categories, with two broad areas involving activities arising from an **express or implied contract** and those involving a respective party's **affirmative courses of conduct.**

From a torts perspective, what becomes problematic in the construction industry is the fact that although a prime contractor may be imposed with legal duties arising under any one or more liability theories, most of these duties can effectively be shifted to other parties (independent contractors) via

proper and full delegation of the general contractor's underlying obligations. However, there are exceptions to this effective duty shifting, as will be discussed. Furthermore, the legal analysis becomes complex since the separate legal theories tend to overlap in the construction industry setting, especially in light of express contract terms and conditions imposed upon the various parties.

Although statutory law is involved, ultimately, liability for legal damages pursuant to construction accidents arises from common law tort principles. Therefore, appreciating those tort principles are not only enlightening but are critical to a proper analysis, as recent appellate court decisions have emphasized. Accordingly, I review such key elements and principles before delving into more isolated legal principles and some practicalities surrounding construction site accidents.

II LEGAL DUTY, STANDARD OF CARE, AND DEGREE OF CARE EVIDENCE

We all learn in law school the tort law mantra: ***duty, breach of duty, proximate cause, and damages***. Conceptually, every tort liability analysis must scrutinize each of these four elements, as well as underlying elements such as foreseeability. The mantra's first focus on the element of ***duty*** is significant and at the foundation of each and every liability analysis. I emphasize this because in practice our case selection criteria tend to be more broad: *liability, damages, and monetary recovery*. Consequently, we must ensure that we refocus on the tort elements under the liability prong, and not to get distracted by significant damages or a defendant's resources to cover such.

In light of the above, it is important to appreciate the distinctions between a legal ***duty***, the relevant ***care standard***, and, lastly, the ***degree of care*** required to meet the standard. Too often practitioners use these terms interchangeably or in the wrong context which can lead to an improper analysis or legal argument. Specifically, it is best to consider that the common law tort ***duty*** to use **ordinary care** applies the ***standard*** of the **reasonably prudent person under the circumstances then and there existing**. However, the ***degree*** **of care** required to meet the care ***standard*** is normally a jury

determination, and often evidence enlightening such ***degree of care*** becomes significant, especially when the lay person may not be familiar with the specific industry or activities within which the liability issue arose.

A. LEGAL DUTY

A **legal duty** is an ***obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks***. *Davis v. N.C. Department of Human Resources*, 121 N.C. App. 105, 112, 465 S. E. 2d 2, 6 (1995) [quoting W. O. Page Keeton et al., *Prosser and Keeton on The Law of Torts*, *disc. rev. denied*, 343 N.C. 750, 473 S. E. 2d 612 (1996)].

The following are the primary relationships and circumstances out of which legal duties commonly arise not only in the construction site setting but in many typical scenarios. Let's start with perhaps the most basic, yet often overlooked, duty which can form a tort theory of liability: the duty arising from an *affirmative course of conduct*.

(1) DUTY ARISING FROM AN *AFFIRMATIVE COURSE OF CONDUCT*

Generally, there is a legal duty of ***ordinary care*** imposed upon any person or entity engaged in any undertaking, either by an active course of conduct. Accordingly, notwithstanding any duty arising from premises or contractual tort liability theories, it has been well-established by the North Carolina appellate courts that a **legal duty** to protect others from harm is created ***when one undertakes active or positive affirmative conduct:***

> ***[T]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence. Council v. Dickerson's, Inc.*, 233 NC 472, 474, 64 S.E. 2d 551, 553 (1951).**

(2) DUTY TO USE *ORDINARY CARE* IN PERFORMANCE OF CONTRACTUAL OBLIGATIONS

A **legal duty** may arise from an express or implied contract or even a mere gratuitous promise:

> ***A duty of care may arise out of a contractual relationship; the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.***
>
> ***Whether a defendant's duty to use reasonable care extends to a plaintiff not a party to the contract is determined by whether that plaintiff and defendant are in a relationship in which the defendant has a duty imposed by law to avoid harm to the plaintiff. Oates v. Jag, Inc.*, 314 N.C. 276, 333 S.E. 2d 222 (1985).**

Although a plaintiff, in fact, may be a *third-party beneficiary* of an underlying contract, such contractual status, *per se*, is not always required for an imposed tort duty to benefit the plaintiff. In essence, the duty often is based upon the actual ***affirmative courses of conduct*** and activities which the prospective defendant engaged that perhaps resulted in harm to the plaintiff, whether arising from or incidental to the contract. Nevertheless, the contracting parties' intention to benefit a third person (e.g., a lawful visitor as discussed below), as may be construed by the contract, appears to be the touchstone upon which the courts extend the duty.

Regarding contractual obligations, it is important to keep in mind that there is a distinction between *misfeasance* (negligent acts) and *nonfeasance* (the negligent failure to act). In a nutshell, if a contracting party ***fails entirely*** to perform ***any*** contract obligations, then that party may escape liability by the court not imposing any threshold legal ***duty.*** However, if the party ***begins any performance*** then the courts tend to impose the **duty of ordinary care**, and the party may become liable for **any act which creates or increases a hazardous condition.** [See: *Matternes v. City of Winston-Salem*, 286 N.C. 1, 209 S.E. 2d 481 (1974).]

(3) <u>DUTY OWED TO *LAWFUL VISITORS*</u>

Technically, when we speak of ***premises liability*** such is almost exclusively tethered to the concept of ***premises control*** (via ownership or otherwise) and, consequently, involving the duties owed to

lawful visitors. 1

The duty owed to ***lawful visitors*** is one of ***ordinary care***. The duty is more particularly described by **N.C.P.I – Civil 805.55**:

> ***The law requires every [owner] [person in possession] to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from [injury] [damage]. A person's failure to use ordinary care is negligence.***

The common law of North Carolina identifies certain duties arising from what are referred to as ***special relationships***, and, the status of a ***lawful visitor*** is only one example. Custodian/ward, parent/minor, contractor/contractee, and general fiduciary relationships are other prominent examples of special relationships recognized by the courts. In addition, many common law duties related to such special relationships have been codified within various statutes.

One important legal principle that often arises in the construction site setting involves the duty imposed upon certain parties performing activities (primarily including general contractors, subcontractors and similar persons) upon a premises on behalf of an owner, possessor or general controller of said premises. In this context, the North Carolina Supreme Court in ***Broadway v. Blythe Industries, Inc.*, 313 N.C. 150 (1985),** expressly applied the principle espoused by **Section 384 of the *Restatement (Second) of Torts,*** which states:

> *[One] who on behalf of the possessor of land erects a structure* ***or creates any other condition on the land*** *is* ***subject to the same liability*** *and enjoys the same freedom from liability,* ***as though he were the possessor of the land, for physical harm caused to others upon*** *and outside of the land by the dangerous character of the structure or* ***other condition while the work is in his charge.*** [Emphasis

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1. In 1998, the North Carolina Supreme Court abolished the distinction between licensees and invitees as determining the duty of care owed by a landowner/controller, replacing it with a standard of *reasonable care* toward all lawful visitors, via its decision in *Nelson v. Freeland,* 349 N.C. 615, 507 S.E.2d 882 (1998). Consequently, the resultant status dichotomy of *lawful visitor* and *trespasser* was established. With apparent limited practical exception, subsequent judicial decisions have engaged a nearly identical liability analysis as to the lawful visitor status as previously afforded the invitee status.

added.]

Accordingly, the courts have imposed the general duty owed to a lawful visitor by landowners upon any and all effective controllers of the premises.

The above legal duties and tort liability theories, as well as limitations and counter-defenses, are discussed more thoroughly in the attached manuscript, ***General Contractor Liability: Independent Negligence Theories.*** However, a brief discussion of the recognized duty limitations and counter-defenses is helpful within this overview or tort liability concepts.

B. DUTY LIMITATIONS AND COUNTER-DEFENSES

Generally, there is no duty imposed to protect a *lawful visitor* against dangers which are ***otherwise open and obvious under the circumstances then and there existing***. However, there are clear exceptions to this general principle (defense) which are normally referred to as ***counter-defenses***. One counter-defense, the ***Southern Railway doctrine 2***, essentially imposes a duty when a hazardous condition or circumstances otherwise may have been *open and obvious* to the plaintiff. Other counter-defenses provide support for a plaintiff allegation that the hazardous condition was **not open and obvious** specifically ***due to the circumstances then and there existing***. An example of this counter-defense is commonly known as the ***momentary diversion*** principle.3 These counter-defenses are discussed in greater detail within my discussion below regarding direct and independent liability theories.

It should be emphasized that the above principles are more broadly applied exceptions to the *open and obvious* defense which commonly arise in construction site litigation. However, there are other more narrow exceptions (e.g., those involving ***ultrahazardous*** or ***inherently dangerous activities***), which are discussed further below**.**

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2. §343 A (1) of the *Restatement (Second) of Torts* has been adopted with direct reference by the North Carolina courts in *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, *disc. rev. denied,* 307 N.C. 270, 299 S.E. 2d 215 (1982).

3 . This principle was apparently first applied in the landmark North Carolina Supreme Court case of *Walker v. Randolph*, 251 N.C. 805, 112 S.E.2d 551 (1960).

Lastly, on occasion, a particular hazard may have arisen within a **commercial landlord** scenario involving **common area access adjacent to or within the actual construction site**. In those rare instances, it is important to be familiar with the special duty imposed upon **non-residential** landlords, which is similar to the statutory duty imposed upon residential landlords. **N.C.P.I – Civil 805.73** states**:**

> ***Landlords have a duty to exercise ordinary care to maintain in a safe condition those parts of their rental properties over which they retain control. A violation of this duty is negligence.***
>
> ***Landlords have a duty to make reasonable inspections of rental properties remaining under their control and are responsible for knowing what a reasonable inspection would reveal.***
>
> **[Section language regarding additional elements omitted.]**
>
> ***Fourth, that the defendant failed to exercise ordinary care to correct the unsafe condition.* [Emphasis added.]**
>
> ***Footnote 4: This affirmative duty owed by the landlord to the tenant is not a duty to warn of unsafe conditions but to correct unsafe conditions. Brooks v. Francis,* 57 N.C. App. 556, 559 (1982). [Emphasis added.]**

C. ADMISSIBLE EVIDENCE ON THE REQUISITE *DEGREE OF CARE*

Evidence of the ***degree of care*** normally required to be applied in specific settings and circumstances can be shown through evidence of various, respective **industry customs, published standards, and self-imposed policies and procedures.** Nevertheless, such customs, standards, policies and procedures are almost always deemed to be **merely evidence** of the degree care imposed and are not legally dispositive as to whether or not the legally imposed **ordinary care** was engaged. As an aside, normally, the legal ***duty***, per se, is not increased by any specific relationship or circumstances, but rather it is the ***degree of care*** imposed which is ***increased or heightened*** in order to demonstrate that the **ordinary care of a reasonably prudent person** was provided.

III THE LIABILITY MATRIX FOR CONSTRUCTION SITE ACCIDENTS

From a technical standpoint, as discussed above, each party involved in a construction project normally is

imposed with a duty to each and every other party based on the special relationships arising from lawful visitor status or contractual obligations and the courses of conduct flowing from such. For simplicity's sake, I refer to the channels in which such duties flow as the ***duty lines*** between and connecting respective parties.

From a practical perspective, based on the legal theories adopted and applied by the courts, the respective ***duty lines*** *(*i.e., the respectively imposed legal duties and related care standard) can be placed within **one of two** ***liability branches*** and also within **one of two** ***activity categories***, forming a ***liability matrix.*** Virtually all conceivable construction site accidents should be captured within this matrix. These branches and categories ultimately determine the respective duties and standards of care imposed upon a specific party, with the degrees of care imposed flowing from evidence of industry standards, customs, self-imposed policies and procedures, etc. A diagram of this matrix is in the appendix.

A. TWO LIABILITY BRANCHES

As mentioned, there are **two** separate ***liability branches*** which encompass the imposed **duties** as to **any** and **all** parties. One branch imposes what can be referred to as ***independent liability,*** and the second imposes **vicarious liability**[4]**.** Use of the term ***vicarious liability*** conforms to the historical decisions which apply an imputed negligence analysis. However, it should be well-noted that at least one North Carolina Court of Appeals decision has asserted that prior decisions applying a *vicarious* liability analysis more properly should have applied *direct, independent* negligence principles to reach the respective results. 5 Specifically, in the owner/general contractor liability scenario involving inherently dangerous activities, one appellate court emphasized that the real focus should be on the ***direct negligence*** of the **owner,** in that case context, and not on the imputation of any negligence by the **general contractor**

4. "Vicarious liability" refers to the indirect, imputed liability of a specific party. For example, the liability of an employer for the negligent acts and omissions of its employee is vicarious. Similarly, the liability imposed upon a principal for the acts of its agents is not direct but obtained vicariously. Essentially, in this context "vicarious" is used in contrast to "direct" or "independent". But see footnote 5 below.

5. See: *Kinsey v. Spann*, 139 N.C. App. 370 (2000).

pursuant to the specific work being performed. By analogy, that analysis should apply to the general contractor and subcontractor relationship, as well. Normally, in this vein, it appears realistic that liability assessed upon the owner (or a general contractor) actually arises from imposition of either a **non-delegable duty** or other **direct negligence** theories, such as in the inherently dangerous work scenarios, discussed further below, or when control is exerted over the material work or contract obligations. Consequently, once the duty is imposed upon the owner (or general contractor), the true focus becomes whether or not the owner failed to take the necessary precautions to control the attendant risks, and not necessarily the acts or omissions of the party performing the specific work.

Notwithstanding the above, because a majority of important, historical decisions use the term *vicarious liability*, at least nominally, I continue to maintain such a separate analysis category, but refer to such as being ***quasi-vicarious.*** Nevertheless, as discussed below, the most important categorization involves the distinction between the ***types of activities*** involved during which an unfortunate accident arises. The key point is that dramatically different results can occur from a particular fact situation, especially in light of the activity categories described below.

B. TWO ACTIVITY CATEGORIES

There is also an important distinction between two **categories** of **work activities** in which injuries arise in light of the applicable legal principles and court decisions. The **first category** encompasses what is fairly described as the ***specific work being performed*** under contract and **all conditions inherently created by or incidental to the ordinary performance of such work.** For example, trench digging, as we all likely have learned, involves inherent trench wall shoring hazards.

In defined and important contrast, the **second category** includes potentially hazardous activities, conditions, or circumstances which are reasonably considered to be ***collateral* to the specific work being performed.** This second category includes those activities which cannot reasonably be denoted as **not** involving the **direct risks** associated with the specific work being performed. Generally, such

activities would include, but are definitely not limited to, both those which may either occur on or off the job site and also those either within or outside of the scope of the specific work being performed. An illustrative example would be where a subcontractor has a hydraulic hose on a concrete core drill burst spilling fluid on the floor in an adjacent area used by other subcontractors (e.g., a designated room for gang box storage). Consequently, an employee of another subcontractor slips and falls on the fluid which is not open and obvious nor guarded against.

Notwithstanding the categorization, the best practice is first to scrutinize any accident scenarios in light of **agency law** principles, prior to an analysis under premises liability, if there is a threshold issue of whether a party is either an **independent contractor,** an **employee**, or **direct agent** of any other relevant party. These issues are not considered by my discussions below, except where presumptions are made within a specific analysis that a party is, in fact, an **independent contractor** or an **employee (direct agent).**

The above liability matrix accordingly has **four** different analysis blocks which I refer to with abbreviation as follows:

1) direct, **independent liability and specific work**;

2) direct, independent liability and collateral work;

3) (quasi) vicarious liability and specific work; and

4) (pure) vicarious liability and collateral work.

Keep in mind that this matrix is only a template to help focus a liability analysis and to help one remember when considering a quasi-vicarious liability analysis that the general contractor's shield, so to speak, only is pierced via one of the enumerated exceptions IF the harm arises from the subcontractor's **specific work being performed**. In essence, so to speak, this is the real vestigial tail, of the vicarious liability case law evolution, in light of the rebuttable presumption that obligations (and attendant duties) have been delegated to the independent contractor for the specific work being performed. Otherwise, a

pure direct and independent liability analysis should control.

It does not truly matter where one begins with a specific accident analysis in light of the matrix. However, it is best to begin by determining whether or not the personal injury arises from the **specific work being performed (**or an inherently created condition) or from a patently **collateral work** activity. An illustrative example of a specific work hazard would be where an employee of a subcontractor is injured when a trench he is helping dig caves in. However, what if a stone mason leaves a wheel-barrow of mortar unsecured overnight, and a minor child curiously playing on the jobsite overturns the mortar and tragically crushes one of his legs? Is this a condition inherent to stone-masonry? Most probably this incident would be categorized under **collateral work** activities. However, what if the mason had exclusive control of the specific work area?

As will be discussed below, focusing first on the nature of the **work activity** is extremely important because it dovetails with any clear evidence of one of the enumerated exceptions to a liability bar within a quasi-vicarious analysis.

The next step should be to determine whether the **specific party under scrutiny** (often the general contractor) has committed any **independent acts or omissions** giving rise to potential liability. If there is evidence of any such acts or omissions, then not only does the **quasi-vicarious liability** analysis prove to be easier but it possibly could prove less critical.

With limited exception, the specific party's role (i.e., either **architect**, **general contractor**, **subcontractor**, etc.) in the construction project is not strictly controlling. Almost without exception all parties in the construction site setting are performing work pursuant to a **contract**, and, thus, are typically deemed ***first*** or ***second*** parties on one or more relevant levels, and then are either normally viewed as a ***contractor*** or a ***contractee*** from a technical standpoint. In this context, the relative positions of **third-parties** are more easily determined, since parties not deemed in privity of contract are considered typically to be **third-parties**. Consequently**,** the legal duties attached to affirmative courses of conduct

and those arising from contractual obligations usually become the focus. Ultimately, in most scenarios, the traditional analysis based purely on premises liability theories is no longer the driving force.

To reiterate, the typical construction accident scenario does not simply engage one legal theory as to the imposition of a legal duty upon any respective party. In practice, while pure **premises liability** theories invoke duties based on lawful visitor status, as well as defenses (e.g., the effective duty delegation to independent contractors), ***contractual obligations*** imposed on multi-party sites dramatically change the theory dynamics, especially those for **general construction site safety.**

Although there are many surrounding issues, especially in the workers' compensation and employer-employee relationship, our current focus is on the liability of **general contractors, prime contractors, subcontractors, and construction-related parties** to **third-parties** for personal injury. For another illustrative example, consider the hypothetical situation where an employee of an electrician borrows a welding contractor's torch and sets it down while still burning near a drywall subcontractor's equipment. The torch ignites a kerosene heater of the drywall subcontractor, severely burning an employee of the drywall subcontractor. Our focus would be on determining which parties are potentially liable. Setting aside issues of product liability, in addition to the electrician, would we consider liability of the general contractor? The welding company? The project owner? The injured drywall employee is a **third-party** to whom each of these other parties potentially owed a duty for his safety on the job site.

IV DUTIES IMPOSED AND RELATED PRINCIPLES

In a nutshell, the imposition of a legal duty upon a respective party involved in a construction project correlates with not only the specific matrix block analysis but also with each party's position relative to the other based on contract, industry customs and standards, or the attendant circumstances. Accordingly, **each party** must be viewed ***individually*** in light of the **matrix.**

It will become evident that the **overlapping nature** of these parties' **activities** is what breeds the most difficult issues warranting the closest scrutiny. In fact, a root consideration to every analysis will

provide valuable guidance as you meander through the matrix blocks. This involves a seemingly ***blanket principle.*** Simply stated: **Although a party, either an owner, contractor, or subcontractor, may employ another to perform certain work and may possibly escape liability for the negligence of such employed party, they nevertheless are <u>answerable for their own negligence</u>**. [Emphasis added.] *E.K. Cathey v. Southeastern Construction Co.*, 218 N.C. 525 (1940).

To preface, however, a brief discussion of the **master-servant** and **agency principles** may be helpful, especially since one should not always assume that an independent contractor relationship exists.

The **master-servant** principle applies the well-known common law concept of the ***status of the party*** which gave rise eventually to such status terms as **invitee, licensee** and **trespasser,** and, in modern day, the **lawful visitor,** which, along with corresponding legal **duties,** provide the foundation for **premises liability** law.

In the employer-employee setting (which includes the principal-agent and master-servant doctrines), although an employer had a duty to ensure its employees' safety based on **common law**, in modern day this relationship primarily is governed by **statutory enactments.** Most important, the employer-employee concept specifically does **<u>not</u>** include the **owner-general contractor (or the owner-architect, owner-engineer)** relationship**.** This is where *privity of contract* exists, but in contrast to the **employer-employee** relationships, the **non-agent, independent contractor relationships** are established. And, it is with these **independent contractor** and subsequent **third-party relationships** that the issues are most complex. This is especially true when the **injured party** is an **employee** of an **independent contractor** on a **multi-party** construction site**.**

The **employer-employee** relationship is governed directly by **agency law** and the **master-servant** principles at **common law**.

Prior to the advent of workplace statutes, it was well-established at common law that an employer owed its employees the care provided by the reasonably prudent person in similar circumstances. [See:

62 Am Jur 2d §459; 27 Am Jur §30, p. 508; and *E.K. Cathey*, *supra*.] However, through social, economic and legal evolution, workers' compensation acts have created employer immunity in all but the most narrow factual exceptions, and workplace statutes such as federal and state Occupational Safety & Health Acts (OSHA), scaffold laws, etc., have essentially codified most common law duties as they originate from the **master-servant** (employer-employee) relationship.

The concept of the ***independent contractor*** has created significant controversy in the area of construction site litigation. The most dramatic effect has been the imposition of **vicarious liability** (or what I refer to as ***quasi-vicarious*** liability). A common scenario is where the premises or project owner or prime contractor has intended respectively to delegate responsibilities to **independent contractors**, and in the course of the specific work being performed, or during collateral activities, a third-party is injured. Consequently, in this context, the courts find the general contractor liability for the injurious consequences of the subcontractor's work activities.

Cathey is a touchstone case because it emphasizes the specific principle that the mere proper and effective hiring of an independent (sub)contractor does not always shift duties attendant to and surrounding the work activities of the subcontractor. And, most important, the Court's analysis is not on the imposition of quasi-vicarious liability via one of the enumerated exceptions to a liability bar as discussed below, but rather a breach of the **independent and direct duties** imposed upon a prime or general contractor at common law. Incidentally, the *Cathey* decision applied a **premises liability** analysis based on what is now the *lawful visitor* status, but similar general negligence principles could also based on potential contract terms and conditions and any affirmative conduct.

To clarify, the general principle of **independent, direct liability** is the counter-part to the general principle typically asserted by prime or general contractors that they are **not** liable for the **negligence** of an **independent contractor**. Consequently, in turn, prime contractors emphasize the long-recognized legal principle in North Carolina that a **general contractor** is not liable for injuries sustained by an

employee of a **sub-contractor (independent contractor)** or most other third-parties**.** Ultimately, these basic principles form the bar to what the majority of courts refers to as **vicarious liability** but, once again, to what I refer as **quasi-vicarious liability** in the construction accident setting. However, as discussed later below, and most important, this bar to vicarious liability typically is based on harm arising solely from **the specific work being performed by the independent (sub)contractor,** as opposed to harm arising from **collateral work activities or conditions.** Finally, there are several exceptions to the vicarious liability bar.

To summarize, at common law a general contractor had a general duty to use ordinary, reasonable care to ensure the safety of others, including subcontractors and their employees. However, prior to workplace safety statutes, an exception to that liability developed when an injury arose pursuant to the **specific work being performed** by the subcontractor, based on the theory that any and all duties had been delegated to the subcontractor. Nevertheless, in turn, exceptions to this duty delegation and bar to direct or imputed liability stemming from the specific work being performed thereafter were developed.

In light of these potentially confusing concepts, one should first determine whether a seemingly clear **independent act or omission of negligence** was performed by the party under scrutiny, which often is the general or a prime contractor. In addition, and closely connected, it should be determined whether a true independent contractor relationship exists or there is an employer-employee (master-servant) relationship at law based on agency principles. If actionable agency exists, then the **quasi-vicarious liability** analysis may prove to be moot or at least not as critical. Basically, on one level you would have patently **direct and independent negligence** theories to apply and, on the other level, there could be ***pure* vicarious liability** if an employer-employee relationship proved to exist as opposed to an effective delegation to a purported independent contractor.

Because the distinction between **direct negligence** and **vicarious negligence** analyses are blurred (giving rise to my use of the term quasi-vicarious), the main focus of this manuscript is upon the former

theories, and in particular those establishing potential liability upon general contractors and prime contractors. This focus is driven mainly on the fact that the real analysis as to quasi-vicarious liability by modern appellate court decisions is upon direct negligence principles, so a solid grasp of the underlying liability principles, defenses and counter-defenses is paramount. Nevertheless, I first provide an overview of the exceptions to the general principle that a party (general contractor) is not liable for the negligence of an independent contractor (subcontractor), which encompass the quasi-vicarious liability theories and respective exceptions to that rule.

V GENERAL CONTRACTOR (QUASI) VICARIOUS LIABILITY

The duty imposed upon an independent contractor and specifically a general contractor for the safety of subcontractors is similar to that imposed upon the premises or project owner. Basically, the roles of **contractor** and **contractee** are assumed by the **general contractor** and **owner**, respectively, and then, in turn, by the **subcontractor** and **general contractor**, respectively, but some practitioners often flip these terms.

A. *SPECIFIC WORK BEING PERFORMED* LIMITATIONS

Related to the general rule that a person is **not** liable for the **negligence** of an **independent contractor** (see *E.K. Cathey, supra*) is the long-recognized legal principle in North Carolina that a **general contractor** is likewise not liable for injuries sustained by an **employee** of a **sub-contractor** or most third-parties. However, and most important, this analysis is **solely within the context** of injuries arising **pursuant to the specific work being performed by the subcontractor. [See: *Hooper v. Pizzagalli Const. Co.*, 112 N.C. App. 400 (1993); *Woodson v. Rowland*, 329 N.C. 330 (1991);** and ***Denny v. City of Burlington*, 155 N.C. 33 (1911).]** The reason for this work activity qualification is the idea that there is a rebuttable presumption, so to speak, that the general contractor has shifted work obligations (and attendant duties) to the subcontractor, thus absolving any liability of the general contractor.

In contrast, when an injury arises due to ***collateral activities***, the analysis shifts to **pure direct, independent liability** theories, since there is a similar rebuttable presumption that the general contractor has **not** shifted responsibilities, if they hold any, I should note, to the subcontractor for **collateral activity safety.**

Furthermore, it should be emphasized that North Carolina law does not impose an **unconditional duty** upon a **general contractor** to furnish a subcontractor or the subcontractor's employees with a safe place in which to work and proper safeguards against such dangers as might be incident to the specific work being performed. [See: ***Brown v. Texas Co.,* 237 N.C. 738 (1953).]** These obligations are normally viewed as being imposed directly upon the **subcontractor** to its **employees,** or, in general, the employer to its employees, via statutory regulations (e.g. OSHA) and not common law negligence theories.

There are several exceptions to the general rule that a party (owner or general contractor) is not liable for the negligence of an **independent contractor.** These exceptions have evolved over many years. There is no magic to the categorization of the exceptions, and, in fact, some courts and practitioners combine or expand some of the exceptions into different categories. However, below I outline the more predominant categorical exceptions.

(1) <u>Exception One: Retained Control over the Manner and Method of the Independent Contractor's Substantive Work</u>

In a nutshell, a general contractor's, or any contractee's, tort immunity pursuant to quasi-vicarious liability is preserved if they clearly only maintain a ***supervisory role*** in the construction activities which have been contracted. Most critically, the subcontractor must remain free to perform its work according to its own **independent skill, knowledge, training & experience.** ***Hooper* at 405.** However, typically a general contractor will also be imposed with contractual obligations that exceed mere supervisory aspects and actually imposed obligations to proactively prevent or guard against hazardous conditions, so this, too, is a gray area without a bright-line test result.

Such ***retention of control*** need only pertain to a **portion** of the work being performed, if

it relates to both the **time and manner** of executing the work. Furthermore, such ***control*** may be imputed through an ***interference*** of the work being performed, if an injury results which can be traced to such interference. See ***Denny,*** **supra.**

The general theory is that the duties extending from a **master-servant** relationship will be imputed to a general contractor if the requisite ***retention of control*** or an *interference* arises which takes the contractee/general contractor from its limited ***supervisory*** status of the subcontracted work. So, this theory is more purely vicarious in nature than the others discussed below which are more quasi-vicarious.

(2) Exception Two: Inherently Dangerous Activities

What is deemed to be an *inherently dangerous activity* in North Carolina tends to be highly determined on a case-by-case assessment. [Note, however: Only explosive ***blasting*** activities appear to be the sole basis for the courts to impose true **strict liability,** which is imposed because it is reasonably assumed that reasonable care cannot effective prevent harm in such ultra-hazardous activities**.]**

This exception has been succinctly stated in ***Woodson*** as: *One who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others*. [Emphasis added.] ***Woodson*** **at 352.** Accordingly, the theory is that the duty is non-delegable, and, thus the modern courts state the true focus is upon the general contractor's acts or omissions and not on the subcontractors. Consequently, the focus is more on direct and independent liability more so than vicarious liability. However, since the rebuttable presumption is that the general contractor effectively delegated the duty, but for the harm caused by the subcontractor' activity, many historical decisions refer to the liability as being vicarious in nature since there is a focus on the subcontractor's activities.

The often restated definition of what is to be considered as an *inherently dangerous activity* seems to originate from the Supreme Court's opinion in the seminal North Carolina case of ***Davis***

***v. Summerfield*, 133 N.C. 269 (1903)**:

> There is an obvious difference between committing work to a contractor to be executed, from which if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventative measures are adopted. *Davis* at 272.

The inherently dangerous aspect of an activity is actually one prong of a practical two-prong test. The second prong is described in *Woodson*, and holds that the **activity** must be one:

> ...which has a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor which later might take place on a job itself involving no inherent danger [emphasis added]. Woodson at 351.

One important aspect of this second prong is the distinction between the **hazard** being *i**nherent in the work*** as opposed to being ***collateral to the work,*** which is the foundation for the separate categories presented by my liability matrix**.**

To illustrate, if an injury arises from a wrongful act of the **independent contractor (here a sub-contractor) or one of its employees**, while performing an act ***collateral*** to the **contracted work, no (quasi) vicarious liability will be imputed to the general contractor,** absent extraordinary circumstances. This is consistent with the historical North Carolina case law position, and enhances the fact that ***Woodson*** applies to a fairly narrow fact situation. [See: ***Evans v. Rockingham Homes, Inc*. 220 N.C. 253 (1941).]** Nevertheless, and with critical emphasize, this conclusion would not exclude liability for any **independent acts or omissions of negligence** on behalf of the **general contractor** related to the collateral work activity**.**

(3) Exception Three: *Providing the Instrumentality of the Work*

Closely related to the exception involving ***retention of control*** is the principle which holds that a general contractor is potentially liable to an independent subcontractor and its employees for injuries incurred for known or reasonably discoverable defective conditions of equipment, materials, or other

instrumentalities which the **general contractor provides for the use of the subcontractor**.

The historical, relevant cases cite the common law principle of **invitee status,** which are now encompassed within the **lawful visitor** status. These decisions also refer to the common law duties of parties ***to inspect*** and to **warn of *needed reparations***. These principles are inherent in the **master-servant** relationship, and although a technical master-servant relationship may not exist, if the contractor provides the instrumentalities for the work to the subcontractor, then the contractor may be held liable for any resultant injuries. [See ***E.K. Cathey, supra,*** and ***Greer v. Construction Co.,*** **190 N.C. 632 (1925).]**

B. *COLLATERAL WORK ACTIVITIES*

To reiterate, in regard to injuries arising from activities ***collateral*** to the **specific work being performed**, as described above, **absent independent negligence**, the general contractor is **not *vicariously* liable** for the negligence of the subcontractor or the subcontractor's employees. However, naturally this would assume that there is no agency (master-servant) relationship and that an effective independent contractor relationship exists. Nevertheless, I delineate the category **(quasi-)*vicarious liability and collateral work*** in order to properly consider a real fact pattern. Specifically, in this category would fall instances where the injurious activity was collateral and not apart of the inherent specific work being performed by the purported subcontractor, but agency principles compelled a finding of a master-servant relationship and vicarious liability upon the general contractor. Admittedly, however, those scenarios should be highly isolated.

Ultimately, this category is going to blend into that of ***independent liability and collateral work***, which takes us to the next topic and my main focus.

VI GENERAL CONTRACTOR DUTIES AND DIRECT, INDEPENDENT LIABILITY

The legal duty to use **ordinary care** is encompassed by ***general negligence*** theories and specifically within the realm of ***premises liability***, both of which typically are involved in a construction accident analysis. For simplicity's sake, I refer to the several channels through which such broad legal duty may

flow as the ***duty lines*** between respective individuals or corporate parties, which I will discuss briefly below.

In a typical construction accident case, for example, an ***employee*** of an **independent subcontractor** may be injured by a hazardous condition created by ***another subcontractor*** on the project site. Although the subcontractor who created or controlled the hazard may seemingly be exposed more directly to liability, the general contractor potentially could be exposed to liability, as well. And, we should not be blinded by the fact that the general contractor likely delegated the specific work being performed via contract to the hazardous-creating subcontractor who also would be deemed an ***independent contractor***.

As previously discussed, the key legal principle at the core of **independent liability theories** was simply stated by the Court in *Cathey, supra****: Although a party, either an owner, contractor, or subcontractor, may employ another to perform certain work and may possibly escape liability for the negligence of such employed party, they nevertheless are answerable for their own negligence.*** [i]

Perhaps the most important threshold analysis in a construction accident case is to determine whether an ***independent legal duty*** arose from a specific construction activity or condition under scrutiny which was ***directly imposed upon*** the general contractor to the injured party, regardless of whether or not a subcontractor had been delegated the performance of such relevant work. This sounds so simple and basic, but seasoned practitioners can be readily distracted by the general principle that a general contractor is not responsible for the negligence of an independent contract, and, thus, seduced prematurely into a ***vicarious liability*** analysis. This is especially the case when the general contractor's obligations seem remote by practical circumstances. However, as I will discuss below, there often is potent evidence demonstrating the general contractor's independent liability exposure, based on contractual obligations, imposed standards and regulations, and industry custom in light of applicable legal theories. Nevertheless, a thorough accident investigation and proper claim pleading dovetailing

with the material facts are paramount.

A. A PLEADING *CAVEAT*

A salient reminder regarding proper claim pleading was emphasized by a decision recently rendered by the North Carolina Court of Appeals. Specifically, the appellate decision held that the plaintiff failed to support a negligence action against a **general contractor** by pleading a bare allegation that the general contractor had ***failed to comply with several Occupational Safety and Health Administration (OSHA) regulations***. In essence, in material part, the plaintiff specifically failed to allege that a ***legal duty****, per se,* was imposed upon and thereafter breached by the general contractor. [ii]

Despite the relative importance of OSHA regulations in most construction accident claims, the North Carolina courts do not recognize that a general contractor's mere violation of an OSHA regulation gives rise to actionable negligence**.** Too often the basic pleading concepts are overlooked only to catch us off guard at a defendant's summary judgment motion. As the court in *Pike* emphasized, a ***prima facie*** negligence case requires the plaintiff to first show that a defendant owed a particular legal ***duty***. [iii]

To emphasize, a plaintiff must first demonstrate that a defendant ***owes a legal duty*** (under some relevant legal theory) to said plaintiff, and that the defendant ***failed to exercise ordinary care in the performance of such duty*** resulting in proximately caused injuries. Subsequently, a plaintiff can show evidence that the defendant violated relevant industry customs or standards, which could include OSHA regulations, and then argue that abidance to said industry customs or standards represent the proper ***degree of care*** required to meet the ***reasonably prudent person standard*** of the ***ordinary care*** legal duty, as discussed further below.

Incidentally, the 2005 decision in *Commissioner of Labor v. Weekley Homes, L.P.,* 609 S.E. 2d 407, which essentially affirmed that a general contractor has a responsibility under OSHA to protect its subcontractor's employees, should not be construed as being in contradiction of the *Pike* decision. In essence, the Court in *Pike* was focusing on the threshold requirement that a legal duty must be established

as imposed on a particular party before one may proceed to consider the relevance of industry customs such as OSHA standards.

B. NATURE OF DIRECT, INDEPENDENT DUTIES

In the typical construction accident case, the over-arching legal duty ***to use ordinary care*** imposed on the general contractor arises via **two distinct negligence theories**, the first based on **premises liability** principles and the second based on **general negligence** principles which normally govern the performance of relevant **contractual obligations.** The legal duty within the realm of **premises liability** is tethered by the key concept of the ***lawful visitor***. [iv] Once again, the *North Carolina Pattern Jury Instructions* are a great resource to identify and appreciate such the duty arising from such status, and perhaps the best place to start any research. So allow me to revisit the key instruction.

(1) Duties Owed to a *Lawful Visitor*

The broad legal duty owed by a premises controller to ***lawful visitors*** is one of ***ordinary care***. The duty is more particularly described by **N.C.P.I – Civil 805.55**:

> **The law requires every [owner] [person in possession] to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from [injury or damage]. A person's failure to use ordinary care is negligence.**

Most important, the duty owed to lawful visitors has been applied specifically to **general contractors** who take possession of and thereafter maintain at least joint, if not exclusive, control over a certain premises pursuant to construction activities via an express or implied contractual obligation.[v]

Notwithstanding the above, as previously mentioned, keep acutely in mind that there generally is ***no duty*** to protect even a lawful visitor against dangers which are otherwise ***open and obvious***. This becomes problematic in most construction site accident cases because a common but often valid argument by a defendant is that the hazardous activity or condition under scrutiny could be reasonably characterized

as ***open and obvious*** to the plaintiff. However, once again, fortunately for the injured worker whose exposure to such hazards is normally compelled by his or her work duties, there is a highly important exception to this legal principle adopted by the North Carolina Supreme Court which, as previously mentioned, is commonly referred to as the ***Southern Railway*** doctrine:

> **An occupier of land has a duty to take precautions against obvious dangers when a reasonable person would anticipate an unreasonable risk of harm to the visitor notwithstanding the visitor's knowledge, warning, or the obvious nature of the condition.**
>
> ***Southern Railway Co. v. ADM Milling Co.,* 58 N.C. App. 667 (1982)**
> ***disc. rev. denied,* 307 N.C. 270, 299 S.E. 2d 215 (1982).**

As the pattern jury instruction states, ***Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances.*** Accordingly, the ***Southern Railway*** doctrine ***imposes a duty*** upon the premises controller, where one otherwise may not have been required under different circumstances. Furthermore, it effectively ***heightens*** the respective ***degree of care*** to be applied (by whoever may be the ***premises controller***, including a general contractor under a contractual obligation) by requiring **increased or additional precautions or remedies be taken** to meet the imposed duty.

The ***Southern Railway*** doctrine has been construed by the courts to hold that in proper cases it should be a jury's determination whether a certain **warning** may be **inherently inadequate** to provide **hazard notice**, and, consequently, whether the **proper remedy** is either to **correct** or **remove** the **hazard**, or to completely ***prevent exposure of the lawful visitor to the hazard***.

In the face of a defendant's summary judgment motion, the power of this doctrine in a negligence action, naturally when the facts provide the requisite circumstances, often becomes the *but for* factor to success. In essence, properly applied it supports a plaintiff's position that, one, a legal duty otherwise was imposed upon a respective defendant, and, two, that a ***jury*** should be permitted to decide whether the alleged obviousness, purported warning, or the ***injured party's actual knowledge*** of the hazardous

condition was enough to allow the defendant to refrain from engaging further care**.**

It should be noted, however, that the ***Southern Railway*** doctrine does **not** eradicate the affirmative defense of **contributory negligence,** which unfortunately remains alive and well in North Carolina and particularly with respect to the specific hazards within the construction industry. [vi] Nevertheless, the proper doctrine application to requisite facts almost invariably supports the corollary that evidence tending merely to show that a plaintiff ***may have been or should have been aware*** of the hazard is **insufficient** alone in most instances to find **contributory negligence** as a **matter of law.** This interesting proposition is best explained by a discussion of the equitable and legal principles underlying the ***Southern Railway*** doctrine.

As the Court in ***Southern Railway*** explained, citing the ***Restatement (Second) of Torts* § 343 A(1),** in certain situations where the premises controller is relying on the alleged ***obviousness*** of a hazard as a ***sufficient notice*** for protection of lawful visitors, that it otherwise should be imposed with an ***affirmative duty*** to take ***additional appropriate measures:***

> **...where the possessor has reason to expect that the invitee lawful visitor] will proceed to encounter the known or obvious danger because to a *reasonable man in the position the advantages of doing so would outweigh the apparent risk.*** *[Emphasis added.]*
>
> *Comment* f. to Subsection (1) of §345 (A) further clarifies:
>
> **There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause harm to the invitee [lawful visitor] notwithstanding its known or obvious danger. In such case the possessor is not relieved of the duty of reasonable care which he owes to the invitee [lawful visitor] for his protection. This duty may require him to warn the invitee, or take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee [lawful visitor] will nevertheless suffer physical harm [annotations added].**
>
> **Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted [vii], so that he will not discover what is obvious, or will forget what he has discovered[viii],**

> **or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.** [ix] **In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.**

In the Comment to Subsection (1) of §343 A, the editors have provided a factual illustration, *Illustration 5*., which is helpful in the construction project setting and any employment scenario:

> **A owns an office building, in which he rents and office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.**

As one would assume, the specific circumstances and manner by which the plaintiff responds to his or her actual notice of a hazard is normally dispositive of the contributory negligence issue. In fact, the *post-notice*, degree of care required appears to be heightened under a judge's scrutiny, at least based on my summary judgment experience, but such only seems fair if the *Southern Railway* doctrine is to be applied against a defendant.

Lastly, as for the doctrine of contributory negligence, which seems to hover over construction accident claims, one needs to seek factual evidence potentially supporting theories of a defendant's ***gross negligence***. Specifically, **N.C.P.I- Civil 102.86** ***Willful or Wanton Conduct Issue (Gross Negligence) – Used to Defeat Contributory Negligence*** states in material part:

> **An act is willful if the defendant intentionally fails to carry out some duty imposed by law or contract which is necessary to protect the safety of the person or property to which it is owed.**

Nevertheless, counsel must also be attuned to evidence supporting potential ***gross contributory***

negligence of the plaintiff which opposing counsel will argue negates any gross negligence.

(2) **Duty to Use *Ordinary Care* in the Performance of Contractual Obligations**

As initially discussed, North Carolina judicial decisions have established that a **legal duty** to protect others from harm may be created by, or otherwise arise from, ***contract***, as well as ***if one undertakes active or positive affirmative conduct***. This duty of ordinary care specifically has been imposed upon general contractors under proper circumstances. The duty may arise implicitly under attendant circumstances, but normally it is imposed directly when specific obligations for job site safety measures have been assumed and shifted by contract to the general contractor. [x]

Accordingly, plaintiff counsel should obtain through discovery or otherwise copies of any and all relevant contracts or other agreements **between the general contractor and the project owner**, as well as any of those between the **general contractor and relevant subcontractors**. In reality, many project owners, architects and general contractors rely upon **standard form contracts** for construction projects published by professional organizations which inherently delegate responsibility for numerous work safety measures to specified parties. Interestingly, many parties are not conversant with the specific safety measures respectively delegated and assumed by such contracts, because the relevant clauses simply are ***incorporated by reference*** into the primary contract but without copies of such documents being attached thereto. Bad habits are hard to break, and consequently some parties, especially general contractors, see the incorporated safety language imposing specific obligations upon them for the first time at their deposition. To preserve this ripe opportunity for effective (and sometimes enjoyable) cross-examination, I normally do not request such collateral contract documents with any specificity in discovery, but keep available copies of the documents on file for reference and use.

(3) **Affirmative Courses of Conduct**

As previously discussed, there is a legal duty of ***ordinary care*** imposed upon any person or entity engaged in any undertaking, either by an active course of conduct. Accordingly, notwithstanding any

duty arising from premises or contractual tort liability theories, it has been well-established by the North Carolina appellate courts that a **legal duty** to protect others from harm is created ***when one undertakes active or positive affirmative conduct.*** Naturally, because this is a broad principle, the courts tend to narrowly focus its application on the specific relevant and material facts. However, often a general contractor (or a subcontractor) will engage in a course of conduct that was not contractually required but otherwise voluntarily engaged. Consequently, if they fail to use ordinary care then they could be exposed to liability for any harmful results. For example, a project manager for a general contractor may instruct a subcontractor to install an alternative safety device pursuant to the subcontractor's specific work activities which proves to be inadequate and fails. But for such interference, the general contractor may not have had any liability exposure surrounding the subcontractor's initially intended safety measures, based on normal supervision requirements or job safety provisions.

C. EVIDENCE OF THE DEGREE OF CARE TO BE APPLIED: INDUSTRY CUSTOM, SAFETY CODES AND SELF-IMPOSED STANDARDS

To reiterate, industry custom and standards normally are admissible but only to establish the ***degree of care*** arguably required of a reasonably prudent person to exercise ordinary care. In this vein, relevant safety codes, standards, and regulations (OSHA standards) usually are admissible to show the ***degree of care*** a particular defendant as a reasonably prudent entity should have used under the circumstances.

In addition, the courts have held that evidence of a defendant's **voluntarily adopted safety practices or procedures** may be admissible ***as some evidence that a reasonably prudent person would adhere to their requirements...*** [xi] But, the courts also have clarified: A***s a general rule … an activity [that] is done without the customary precaution is evidence to be considered in determining negligence, although deviation from custom is not conclusive in itself.***[xii]

Specifically, as emphasized by the court in *Pike,* since OSHA regulations and published standards technically are considered only a form of ***industry custom,*** violations of such neither constitute

independent evidence of a legal duty nor evidence of negligence *per se.* However, there is one possible, murky exception.

Pursuant to **N.C.G.S. §95-139** ***Criminal penalties,*** if a relevant party ***willfully violates*** any standard, rule, regulation or order promulgated pursuant to N.C.G.S. §95-131(a) et seq. (*OSHA*), ***and*** said ***violation causes the death*** of any employee, then such violation subjects the employer to a criminal misdemeanor. Naturally, if the employee is employed by the alleged tortfeasor, then absent highly limited exceptions (i.e., proper *Woodson* claim elements), the employer would have immunity pursuant to the Workers' Compensation Act. However, for example, if the decedent was an employee of an independent subcontractor and the general contractor is the purported negligent party, then this statutory violation may apply. In essence, by strong implication pursuant to at least one North Carolina appellate decision, such a violation resulting in death may potentially constitute ***negligence per se*** in a tort action. However, the law on this point is far from clear and definitely not settled by decree of a North Carolina Supreme Court decision. [xiii]

VII Plaintiff Practice Pointers

The following practice pointers may act as a basic check-list to review when investigating and analyzing the potential liability of respective parties in the construction accident realm:

1. Identify the correct defendants and especially the proper premises owner(s)/controller(s) to avoid party misnomers, especially with prospective defendants having numerous *corporate relatives*;
2. When appropriate for actionable negligence, ensure that you plead sufficient facts supporting a clear allegation that a ***legal duty****, per se,* is imposed upon a respective party;
3. Plead sufficient facts to demonstrate prior ***actual or constructive notice*** of the respective hazardous condition/activity to the premises owner/controller, which is a prerequisite finding for a legal duty to be imposed. In this vein, party *creation of a condition* normally constitutes effective notice to it of the condition's hazardous nature, but not necessarily, so plead facts

accordingly to demonstrate the foreseeable, hazardous nature;

4. When applicable, plead proper facts supporting special liability theories such as ***res ipsa loquitor*** and ***non-delegable duties*** in the context of independent contractor relationships;

5. To establish a duty in the face of an alleged ***open and obvious hazard***, when appropriate plead sufficient facts supporting the applicability of the ***Southern Railway*** doctrine. Likewise, appropriately plead sufficient facts supporting ***counter-defenses*** (e.g., momentary diversion) to combat assertions of ***contributory negligence***, as well as to support valid allegations of gross negligence;

6. When present, sufficiently plead **material violations of relevant industry standards or customs, as well violations of any federal, state or local codes** which may be applicable to the locale or activities giving rise to the subject hazard;

7. Always seek to learn, via both pre-suit investigation and formal discovery, the existence of all relevant contracts which often identify parties responsible for implementing project site safety measures, and research any and all collateral documents incorporated by reference therein such contracts;

8. Retain a **qualified industry hazard expert** and review all applicable industry customs and standards upon which he or she intends to rely. Be proactive and independently research what you believe may be the relevant industry customs and standards, so you can discuss these with your expert to ensure that nothing critical is overlooked.

9. If an OSHA or other local, state, or federal agency investigated the construction accident, then interview the investigating officer and obtain any and all investigation file documentation.

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[i] *E.K. Cathey v. Southeastern Construction Co.*, 218 N.C. 525 , 11 S.E.2d 571 (1940).

[ii] *Pike v. D.A. Fiore Construction Services, Inc.*, 201 N.C. App. 406, 689 S.E2d 535, *disc. review denied by* 363 N.C. 855 (2010).

[iii] *Pike, supra*, citing *Bolick v. Bon Worth, Inc*., 150 N.C. App. 428, 430, 562 S.E. 2d 602, 603 *disc. review denied*, 356 N.C. 297, 570 S.E. 2d 498 (2002).

[iv] In 1998, the North Carolina Supreme Court abolished the distinction between licensees and invitees as determining the duty of care owed by a landowner/controller, replacing it with a standard of *reasonable care* toward all lawful visitors, via its decision in *Nelson v. Freeland,* 349 N.C. 615, 507 S.E.2d 882 (1998). Consequently, the resultant status dichotomy of *lawful visitor* and *trespasser* was established. With apparent limited practical exception, subsequent judicial decisions have engaged a nearly identical liability analysis with the lawful visitor status to that previously afforded the invitee status.

[v] See: *Maness v. Fowler-Jones Const. Co.*, 10 N.C. App. 592, 179 S.E.2d 816, *cert. denied,* 278 N.C. 522, 180 S.E. 2d 610 (1971).

[vi] For an enlightening, seminal case analysis of contributory negligence in the construction site realm, see: *Benton v. W.H. Weaver Construction Company*, 34 N.C. App. 421, 238 S.E.2d 655, *cert. denied,* 294 N.C. 182, 241 S.E.2d 517 (1978).

[vii]**.** This concept was encapsulated as the *momentary diversion* principle and applied by the North Carolina Supreme Court in the well-known case of *Walker v. Randolph*, 251 N.C. 805, 112 S.E.2d 551 (1960).

[viii]. This specific application of the *momentary diversion* principle has been applied in North Carolina in several dramatic cases. For an interesting example, see: *Dennis v. City of Albemarle*, 242 N.C. 263, 90 S.E.2d 532 (1955).

[ix]. §343 A (1) of the Restatement (Second) of Torts has been adopted with direct reference by the North Carolina courts in *Southern Railway Co. v. ADM Milling Co.,* 58 N.C. App. 667, *disc. rev. denied*, 307 N.C. 270, 299 S.E. 2d 215 (1982). Note: The court in *Southern Railway* stated, in addressing the general rule that an owner need not warn of or correct an open and obvious hazard, that *all of the circumstances must be taken into account* in determining whether the premises controller may rely on such *notice* to avoid such duty. This concept has been referred to as the *totality of circumstances* principle, and it most notably has been affirmed by the North Carolina Supreme Court in the case of *Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990).

[x] **See:** *Huyck Corp. v. C.C. Magnum, Inc.*, 309 N.C. 788, 309 S.E. 2d 183 (1987), clarifying that *negligence may arise from an act or omission when a duty to act falls upon a party …that party's obligation or duty to act may flow from explicit requirements*, i.e., *statutory or contractual, or may be implied from attendant circumstances*, citing *Wilson v. Lowe's of Asheboro Hardware, Inc.*, 259 N.C. 660, 131 S.E.2d 501 (1963); and *Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co.,* 47 N.C. App. 518, 268 S.E. 2d 12, *cert. denied*, 301 N.C. 527, 273 S.E. 2d 454 (1980) (duty of ordinary care for safety imposed on architect for structural design and construction supervision pursuant to specific contractual obligations). *See also*: *McCorkle v. North Point Chrysler Jeep, Inc*., 208 N.C. App.711, 703 S.E.2d 750 (2010), where project owner's duty of care to subcontractor's painter had been shifted to general contractor through contract.

xiv See: *Briggs v. Morgan*, 70 N.C. App. 57, 318 S.E.2d 878 (1984), citing *Slade v. Board of Education*, 10 N.C. App. 287, 178 S.E.2d 316, *cert. denied*, 278 N.C. 104, 179 S.E. 2d 453 (1971). See also: *Phelps v. Duke Power Company*, 76 N.C. App. 222, 332 S.E. 2d 715, *cert. denied*, 314 N.C. 668, 336 S.E.2d 401 (1985).

xv *Briggs, supra, id. at 59.*

[xiii] See: *Cowan v. Laughridge Const. Co.*, 57 N.C. App. 321, 324-325, 291 S.E. 2d 287, 289-290 (1982), *disc. rev. denied*, 324 N.C. 433, 379 S.E. 2d 241 (1989).