CONTRACTOR LIABILITY FOR INJURIES SUSTAINED BY WORKERS

Construction contractors risk tremendous potential exposure for liability for personal injuries sustained by workers. Project sites crowded with workers and heavy equipment are fertile grounds for producing personal injury lawsuits. To maintain a negligence action under Indiana law, a plaintiff must establish a duty on the part of defendants to conform their conduct to a standard of care arising from their relationship with the plaintiff. *Helton vs. Harbrecht*, 701 N.E.2d 1265, 1267 (Ind. Ct. App. 1998). The existence of a legal duty is a question of law to be resolved by the court. *Miller vs. Griesel*, 308 N.E.2d 701, 706 (Ind. 1974). Absent a duty, there can be no breach, and, therefore, no negligence. *Ebbinghouse vs. FirstFleet, Inc.*, 693 N.E.2d 644, 647 (Ind. Ct. App. 1998). A worker injured on a construction site may maintain a negligence action against contractors on the site under three separate theories of tort duty: (1) a general duty to ensure work-place safety; (2) a premises liability duty to maintain property in a reasonably safe condition; and, (3) a contractor's duty to exercise reasonable care in performing work to avoid foreseeable harm. Furthermore, contractors on a construction site may owe workers on the site multiple overlapping duties of care. *Hagerman Construction, Inc. vs. Copeland*, 697 N.E.2d 948 (Ind. Ct. App. 1998).

Duty for Work-Place Safety

As a general rule, a contractor is under no affirmative duty to provide employees of other contractors on the site with a safe place to work. *Daugherty vs. Fuller Engineering Service Corp.*, 615 N.E.2d 476 (Ind. Ct. App. 1993). Indiana case law formerly held that prime contractors had a statutory duty to provide work-place safety for all employees on the site based on administrative rules -- for example, 610 IAC 5-1-- enacted under Indiana's Labor and Industrial Safety Act, I.C. 22-1-1-1, *et seq.* *See Stevens vs. Thompson*, 525 N.E.2d 353 (Ind. Ct. App. 1988). However, changes in the administrative code and recent cases have eroded the prime contractor's statutory duty to provide general work-place safety.

However, a contractor, engineer or architect may contract to provide general work-place safety for all employees. Moreover, independent contractors may gratuitously assume a duty for general work-place safety through their conduct on the site. *Perry vs. NIPSCO*, 433 N.E.2d 44 (Ind. Ct. App. 1982); *Phillips vs. United Engineers and Constructors, Inc.*, 500 N.E.2d 1265 (Ind. Ct. App. 1986). In construction cases, the provisions of the project contracts are definitive as to the obligations assumed by contractors. *Walters*, 360 N.E.2d at 208. The general contractor's contract with the owner and all subcontractors must be carefully reviewed and harmonized to determine a particular contractor's duty for project safety. The standard AIA Owner/Contractor agreement often used by parties provides that general contractors are responsible for initiating, maintaining and supervising all safety precautions and programs for the project.

Moreover, project contracts often reference OSHA standards and a contractor may be deemed to have agreed to comply with safety regulations. Indiana case law holds that IOSHA regulations adopted pursuant to I.C. 22-8-1.1-13.1 apply only to the immediate employer of an injured employee. *Ramon vs. Glenroy Construction Co.*, 609 N.E.2d 1123, 1129 (Ind. Ct. App. 1993).

Furthermore, violation of IOSHA safety rules does not create a private cause of action. I.C. 22-8-1.1-48.1; *See id.*, 609 N.E.2d at 1129. Thus, generally, violation of a safety regulation does not go to the issue of whether a duty is owed to the employee in the first place but whether a duty was breached, with a violation raising a rebuttable presumption of negligence. *See Lewis vs. Lockard*, 498 N.E.2d 1024 (Ind. Ct. App. 1986). Generally, a tort duty sufficient to maintain a negligence action may arise from a contract. *See Plan-Tec*, 443 N.E.2d at 1218, *see also Williams vs. R.H. Marlin, Inc.*, 656 N.E.2d 1145, 1155. Indiana law specifically recognizes that a party can contractually agree to liability based on compliance with construction regulations. *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258 (Ind. Ct. App. 2002). Moreover, an injured worker might qualify as a third-party beneficiary of the contract. *St. Paul Fire & Marine Ins. Co., vs. Pearson Constr. Co*., 547 N.E.2d 853 (Ind. Ct. App. 1989).

Premises Liability Duty to Maintain Property

An independent contractor who occupies or exerts control over land assumes the landowner's common law duty to maintain the premises in a reasonably safe condition. *See, generally Helton vs. Harbrecht*, 701 N.E.2d 1265 (Ind. Ct. App. 1998). For the purpose of determining premises liability, a possessor/occupier of land is defined as a person or entity who is or has been in occupation of land with the intent to control it, or a person who is entitled to immediate occupation of the land, if no other person is or has been in occupation of the land with intent to control it. *Woods vs. Qual-Craft Industries, Inc.*, 648 N.E.2d 1198, 1201 (Ind. Ct. App. 1995). Consequently, only a party who exerts control over the premises owes a duty to persons coming on the premises. *Helton*, 701 N.E. 2d at 1267. Thus, workers injured from a defect in the project premises may sue contractors under a premises liability duty. Indiana case law recognizes that a contractor who temporarily leaves a project site is not responsible for maintaining property in a reasonably safe condition, if another contractor has assumed control of the premises. *See Helton*, 701 N.E. 2d 1265, *Risk vs. Schilling*, 569 N.E. 2d 646 (Ind. 1991). However, this does not absolve the contractor from liability based on other theories of tort duty. *Guy's Concrete, Inc. vs. Crawford*, 793 N.E.2d 288 (Ind. Ct. App. 2003).

Duty to Exercise Care in Performing Work.

Generally, an independent contractor owes a duty to all individuals, including workers, who are on the premises where the independent contractor is performing work under a contract. *Hartford Fire Ins. Co. vs. Pure Air on the Lake Ltd. Partnership*, 859 F.Supp. 1189, 1195 (N.D. Ind. 1994). Furthermore, contractors on a job site are subject to the general common law duty to exercise care to protect a reasonably foreseeable victim from a reasonably foreseeable harm. *Guy's Concrete*, 793 N.E.2d 288. In determining whether a duty exists, a court must consider three factors: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns. In *Woods vs. Qual-Craft Industries, Inc.*, 648 N.E.2d 1198, 1201 (Ind. Ct. App. 1995), the court expressly recognized that public policy and the relationship between a contractor and employees of other subcontractors on a project site can give rise to a duty to exercise care to prevent foreseeable harm to the employees. However, contractors have had success in obtaining summary judgment on the grounds that the injury was not, as a matter of law, foreseeable under the *Jarvis* test; *See Woods*, 648 N.E.2d 1198 (no duty because injury to worker falling on debris left on the project site by contractor not reasonably

foreseeable given intervening collapse of scaffolding); *Collins vs. J.A. House, Inc.*, 705 N.E.2d 568 (Ind. Ct. App. 1999) (no duty where risk of worker falling on concrete slab left by subcontractor not reasonably foreseeable).

The acceptance doctrine was abrogated by the Indiana Supreme Court in *Peters v. Forster*, 804 N.E.2d 736 (Ind. 2004); even before being abrogated the rule was severely diluted by the humanitarian exception for personal injuries. However, evolving case law dealing with situations where work is transferred between contractors prior to final acceptance provides contractors with a defense similar to the acceptance doctrine. In *Ramon vs. Glenroy Const. Co.*, 609 N.E.2d 1123 (Ind. Ct. App. 1993), a worker employed by a fire protection subcontractor fell through an unsecured manhole before final acceptance of a parking facility project. The injured worker filed an action against prime contractors Glenroy, H.H.N. and Grunau as well as Grunau's subcontractor, Ceco. Plaintiff's employer, Grunau Fire Protection, Inc., was also a subcontractor for Grunau. At the time of the accident, Ceco, Glenroy and H.H.N. had left the project site while Grunau and the injured worker's employer, Grunau Fire Protection, installed fire protection systems. The project had not yet been completed and accepted by the owner, and Ceco, Glenroy and H.H.N. each needed to return to the site to complete punch list items and remove materials.

The injured worker argued that Defendants owed him a duty because: (1) the project had not been accepted; (2) the defendants had not relinquished control over the area because each was required to return to the site to complete their contracts; and (3) regardless of whether they retained control over the area, the defendants left the project site in an unsafe condition. In rejecting Ramon's argument, the *Glenroy* court began by emphasizing that if multiple contractors retained continuous jurisdiction simply because the project had not been accepted, then each would be required to supervise safety precautions employed in a workplace no longer under their direct tutelage. *Id*. at 1131. The *Glenroy* court noted the irrationality of such a system:

> The cost of avoiding or insuring against potential liability would be entirely out of proportion to the anticipated profits from the job, particularly with respect to subcontractors. Chaos would reign supreme on any job on which several sub-contractors with divergent concepts of safety might take seriously their supposed duty to supervise the safety practices of the general contractor and of each other.

Id. Accordingly, the court held that in cases where a clear line of demarcation can be established, only contractors with jurisdiction over the work area are responsible for safety, regardless of whether other contractors have permanently left the site. *Id.* Thus, the court found for the defendants on the grounds that plaintiff's employer was in control of the area at the time of his fall. The court further rejected the plaintiff's argument that there existed an issue of fact as to whether defendants left the premises in an unsafe condition on the grounds that the evidence showed that his employer was the last to perform work in the area prior to the accident.