Issues in Construction Negligence Cases: Assumption of Duty; the Role of OSHA Regulations; and the Role of Expert Testimony

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I.

COMPARATIVE FAULT AND VICAROUS LIABILITY BY ASSUMPTION OF DUTY

Under Indiana law, all tort actions for personal injury, including construction actions, are subject to Indiana's Comparative Fault Act. I.C. § 34-20-8-1. Under Indiana's Comparative Fault Act "Comparative Fault Act", I.C. § 34-51-1, *et. seq.*, the jury apportions fault for Plaintiff's damages to Plaintiff, each defendant and each non-party identified in the pleadings. If Plaintiff's fault exceeds 50%, then a defense verdict is entered. Otherwise, each defendant is responsible for—and only for—that portion of the damages awarded in relation to its fault, and Plaintiff's award of damages is reduced by all fault assessed to Plaintiff as well as any identified non-parties.

An injured construction worker cannot bring an action directly against his employer to recover for personal injuries. *I.C. §22-3-2-6*. However, pursuant to Indiana's Comparative Fault Act, an employer can be named by the named defendants as a "non-party" whose fault caused or contributed to plaintiff's injuries. *I.C. §34-6-2-88*. The Comparative Fault Act does not restrict an injured employee from pursuing a claim against any "other person than the employer." *Ind.Code § 22–3–2–13 (2007). Hunt Const. Grp., Inc. v. Garrett,* 964 N.E.2d 222, 224 (Ind. 2012). As a general rule, "a general contractor [...] will ordinarily owe no outright duty of care to a subcontractor's employees, much less so to employees of a sub-subcontractor. This means that when a subcontractor fails to provide a reasonably safe workspace, the general contractor will not incur liability for employee injury, even when such injury is proximately caused by the subcontractor negligence." *Ryan v. TCI Architects/Engineers/Contractors, Inc.*, 72 N.E.3d 908, 913 (Ind. 2017).

Duty

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 v. 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 v. Griesel*, 308 N.E.2d 701, 706 (Ind. 1974). Absent a duty, there can be no breach, and therefore, no negligence. *Ebbinghouse v. First Fleet, Inc.*, 693 N.E.2d 644, 647 (Ind. Ct. App. 1998). A worker injured on a construction site may maintain a negligence action against a construction manager which does not physically occupy the Project premises on the site only by proving a general duty to ensure workplace safety.

"Under Indiana common law, it is well established that an employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace and consequently is not liable for the negligence of the independent contractor." *Stumpf v. Hagerman Const. Corp.*, 863 N.E.2d 871, 876 (Ind. Ct. App. 2007) *citing Armstrong v. Cerestar,* 775 N.E.2d 360, 369 (Ind. Ct. App. 2002); *Ramon v. Glenroy Constr. Co., Inc.*, 609 N.E.2d 1123, 1128 (Ind. Ct. App. 1993), *trans. denied.* "However, our court has recognized five exceptions to this general rule: (1) where the contract requires the performance of intrinsically dangerous work; (2) where one party is by law or contract charged with performing the specific duty; (3) where the performance of the contracted act will create a nuisance; (4) where the act to be performed will probably cause injury

to others unless due precaution is taken; and (5) where the act to be performed is illegal. *Id.*, (citing *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1267).

When a general contractor has assumed a duty to ensure the safety of a worksite, the general contractor becomes vicariously liable for breaches of that duty by its subcontractors. "In general, vicarious liability is 'indirect legal responsibility.' This doctrine applies where a party is legally responsible for the negligence of another, not because the party did anything wrong but rather because of the party's relationship to the wrongdoer. Courts employ various legal doctrines to hold people vicariously liable, including respondeat superior, apparent or ostensible agency, agency by estoppel, and the non delegable duty doctrine. Some doctrines are based in tort law, and some are based in agency law." *Hunt Const. Grp. v. Garrett*, 938 N.E.2d 798 (Ind. Ct. App. 2010), (citing *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142, 147 (Ind.1999)).

1. Duty Imposed by Law (Conduct) or Contract

There are numerous cases in which Indiana courts have found that the second exception, where a duty is imposed by law or contract, applies to the contractor- subcontractor relationship. A contractor may be charged with performing a duty to ensure workplace safety through contract or, in the absence of a contractual duty, through the contractor's conduct. *Hunt*, 964 N.E.2d at 224 (Ind. 2012) (citing *Plan–Tec, Inc. v. Wiggins*, 443 N.E.2d 1212 (Ind. Ct. App. 1983)).

Plan-Tec was a case of an employee of a subcontractor who was injured on the job. *Plan–Tec, Inc. v. Wiggins*, 443 N.E.2d 1216 (Ind. Ct. App. 1983). The plaintiff was employed as a carpenter by a subcontractor on a hospital work site. *Id.* Plan-Tec acted as a construction manager and negotiated contracts between the owners of the hospital and various subcontractors. *Id.* Plan-Tec needed the expansion joints on the exterior skin of the building to be changed in order to suit the architect's modifications. *Id.* Plan-Tec informed the Blakley Corporation of the need to change the expansion joints, who discussed it with two subcontractors including Wiggin's employer. *Id.* Both said this was not work within the contemplation of their contracts. *Id.* Plan-Tec then assumed the responsibility for the work order and had it performed by Wiggin's employer. *Id.* at 1217. Wiggins fell through the scaffolding while performing the work. *Id.*

Wiggins sued Plan-Tec, amongst others, for failing to ensure proper safety on the job and was awarded damages. *Id.* On appeal, the court of appeals upheld the trial court. The court found that a construction manager may owe a legal duty of care for jobsite employee safety in two circumstances: (1) when such a duty is imposed upon the construction manager by a contract to which it is a party; or (2) when the construction manager assumes such a duty through conduct. *Id.* at 1218-1219.

The standard set out in Plan-Tec remains the standard used by Indiana courts in determining whether a duty is owed to employees of contractors or subcontractors. In *Hunt*, the Supreme Court of Indiana noted that "The first reported case in Indiana of this nature was decided by the Court of Appeals almost three decades ago. *Plan–Tec* has proved to provide a durable template for resolving the issues in cases like this and we will use it for that purpose here." *Hunt*, 964 N.E.2d 225 (Ind. 2012). *Hunt* applied the same two-part test set out in *Plan-Tec* to the facts in that case. *Id.* In *Lee v. GDH, LLC*, the court of appeals declared that "[t]he key issue is whether GDH, as

the construction manager, owed a duty of care to Daniel, the employee of an independent contractor. *Hunt* is the leading case on this issue" 25 N.E.3d 761, 767 (Ind. Ct. App. 2015). As in *Hunt,* the court of appeals used the same two-prong test for whether a duty had been imposed by contract or conduct. *Id.* at 767-769.

(A) Assumption of Duties Through Contract

Whether a contractor assumed a duty to ensure worksite safety may be interpreted from the language of its contract with the project manager or property owner. *Stumpf*, 863 N.E.2d 876 (Ind. Ct. App. 2007). "If a contract affirmatively evinces intent to assume a duty of care, actionable negligence may be predicated upon the contractual duty. Furthermore, this duty is considered non-delegable, and a principal will be liable for the negligence of the contractor because the responsibilities are deemed 'so important to the community' that the principal should not be permitted to transfer these duties to another.'" *Id.,* (citing *Ryobi Die Casting v. Montgomery,* 705 N.E.2d 227, 229 (Ind.Ct.App.1999), *trans. denied*).

In *Stumpf*, the court found that the contractor had assumed a duty and thus become vicariously liable for the actions of its subcontractors to ensure the safety of the worksite based on the following contract language: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed.... Contractor shall designate a responsible member of its organization on the work, whose duty shall be the prevention of accidents." *Stumpf*, 863 N.E.2d at 877. The contract further required the contractor to "*administer* and comply with all the rules, standards, and regulations of the Construction Safety Act, and the Williams–Steigher Occupational Safety and Health Act of 1970." *Id.*

The court noted that the contract required the contractor to designate a responsible member of its organization whose duty would be the prevention of accidents, a fact which indicated a duty to ensure worksite safety. *Id.* at 878. The court also emphasized that the contractor had agreed to administer OSHA regulations, rather than oversee them, as a fact which indicated that there was a duty. *Id.*

Another such case is *Harris v. Kettelhut Construction, Inc.,* 468 N.E.2d 1069 (Ind.Ct.App.1984). In *Harris,* a steelworker sued his employer (subcontractor) and the contractor for damages relating to injuries he sustained when he fell through a roof. *Id.* at 1072. The steelworker argued that the following contract language gave the contractor a duty to ensure worksite safety: "The Contractor shall take all necessary precautions for the safety of all employees on the Project, and all other persons who may be affected thereby, and shall comply with all applicable provisions of the Contract Documents and Federal, state and municipal safety laws, building, mechanical and electrical codes and rules, regulations and restrictions to prevent accidents or injury to persons on, about or adjacent to the Project or elsewhere." *Id.* at 1072–73. Additionally, the "non-assignability clause" provided: "The Contractor shall neither delegate his duty of performance nor assign, in whole or part, his rights or obligations under the Contract without the prior written consent of the Owner, and any attempted delegation or assignment without such consent shall be of no force and effect. Subject to the restrictions contained in the preceding sentence, the Contract shall be binding

upon the Contractor and the Owner, their Successors, Executors, Administrators and Assigns." *Id.* at 1073.

The court concluded that the contract created a duty on the part of the contractor. *Id.* The contractual language "all employees on the Project" was so broad as to create a duty of care to all persons on the worksite, including employees of the subcontractor. *Id.* at 1074. Further, the contract made that duty a non-delegable duty, which necessarily meant that the contractor could not pass onto subcontractors the duty to ensure the safety of their employees. *Id.* at 1076.

Alternatively, in *Hunt,* the contract expressly stated that Hunt's construction-management services were to be "rendered solely for the benefit of the [Stadium Authority] and not for the benefit of the Contractors, the Architect, or other parties performing Work or services with respect to the Project." *Hunt*, 964 N.E.2d at 227 The Court found that, due to that provision, Hunt owed a duty only to the property owner, rather than to everyone on the worksite. *Id.* at 227-228.

In sum, contracts which impose upon a contractor, or construction manager, the responsibility to ensure safety throughout the worksite or to administer applicable safety regulations without reservation as to whom that duty is owed, will likely impose a duty upon the contractor to ensure safety of the worksite. The inclusion of provisions which specify that the contractor's safety-related duties are not rendered for the benefit of subcontractors and that the duty to ensure safety of subcontractor employees is the responsibility of the subcontractor will likely prevent the contractor from becoming liable.

(B) Gratuitous Assumption of Duties Through Conduct

As to whether a contractor or construction manager assumed a duty through their conduct, a contractor will generally not be found to have assumed a duty through conduct if that conduct does not exceed the duties imposed upon them by their contract, assuming that the contract does not impose a duty. *Plan-Tec* was one such case where "the general conditions of the contract unequivocally state that the contractors [rather than the construction manager] are to have the responsibility for project safety and the safety of their employees." *Plan-Tec,* 443 N.E.2d at 1218. However, the fact that the construction manager appointed a safety manager, held weekly safety meetings and directed that certain safety precautions be taken by contractors, none of which appeared to be required by the construction manager's contract, was a sufficient showing of conduct to submit the question of assumption of a duty to the jury. *Id.,* 1220.

In *Hunt*, the contract was also held not to impose a duty upon the construction manager because the contract explicitly stated that the construction manager was not "assuming safety responsibilities of individual contractors" nor taking "control over or charge of or be responsible for ... safety precautions and programs in connection with the Work of each of the Contractors, since these are the Contractor's responsibilities". *Hunt,* 964 N.E.2d at 227. The Court found that the contract did not create a duty of care because the contract specifically provided that it was the contractor's responsibility to provide for the safety of their employees, even if the construction manager had obligations related to safety. *Id.* at 228. "In short, Hunt did not undertake in its contracts a duty to act as the insurer of safety for everyone on the project. Rather, Hunt's responsibilities were owed only to Stadium Authority, not to workers like Garrett." *Id.*

The construction manager in *Hunt*, like in *Plan-Tec*, held weekly safety meetings and inspected the site daily for safety violations. *Id.* at 230. The Court acknowledged that the actions of the construction manager in *Hunt* were similar to those in *Plan-Tec*, but held that Hunt's actions were insufficient to create a duty of care through conduct because none of Hunt's actions went beyond that which was required by the contract. *Id.* Since the Court had already determined that the contract did not create a duty of care, Hunt's actions which adhered to the contract also could not create a duty of care. *Id.*

Although *Plan-Tec* and *Hunt* both deal with vicarious liability of construction managers, the Indiana Court of Appeals has applied the same legal principles in determining the vicarious liability of contractors over subcontractors. *See Dixon v. Shiel Sexton Co., Inc.,* 196 N.E.3d 717, 721 (Ind. Ct. App. 2022). In *Dixon*, the contractor required all subcontractor employees to watch a safety briefer before starting work; hired a safety manager to oversee the worksite; and held weekly meetings with subcontractors which discussed safety, in part. *Id.* at 722. The court in *Dixon* held that the contractor's actions regarding safety "fell within the scope of its contractual obligations to the Owner, and it did not assume a duty of care". *Id.* at 722–23.

Hunt illustrates a case in which a construction manager was able to avoid assuming a duty through contract or conduct, while still taking action to ensure safety on the worksite, by specifying in their contract that all duty to ensure safety for employees remained the duties of subcontractors and that any actions the construction manager undertook to ensure worksite safety were to be rendered solely for the benefit of the landowner. *Id.* at 227. Contractors who wish to avoid liability should take care to ensure that any planned safety measures are included as a duty of that contractor in their contract.

2. Duty Imposed by Peculiar Risk

Under the fourth exception, a contractee may be held liable for the negligence of an independent contractor where the work to be performed will probably cause injury to others unless due precaution is taken. *McDaniel v. Bus. Inv. Grp., Ltd.*, 709 N.E.2d 17, 22 (Ind. Ct. App. 1999). "The essence of this exception is the foreseeability of the peculiar risk involved in the work and of the need for special precautions." *Id.*, (quoting *Bagley v. Insight Communications Co.,* 658 N.E.2d 584, 586 (Ind.1995). To establish the "due precaution necessary to prevent injury" exception, a plaintiff must show that a particular risk exists, that that risk is foreseeable to the principal, and that the plaintiff's injury is consistent with that particular risk. *McDaniel*, 709 N.E.2d at 22. "Application of this fourth exception . . . requires an examination of whether, at the time [a party] was employed as an independent contractor, there existed a peculiar risk [that] was reasonably foreseeable and [that] recognizably called for precautionary measures." *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 856 (Ind. 1999) (quoting *Bagley*, 658 N.E.2d at 588). This exception also requires review of several elements, including a peculiar risk; the principal's foreseeability of that risk; and an injury consistent with the peculiar risk. *Myers v. Bremen Casting, Inc.*, 61 N.E.3d 1205, 1215 (Ind. Ct. App. 2016).

(A) Peculiar risk

A "peculiar risk" is "the risk of a particularized harm specific to the work being performed or the conditions under which it is performed," and only applies "when the risk involved is something more than the routine and predictable hazards generally associated with a given occupation: it must be a risk unique to the circumstances of a given job." *Myers*, 61 N.E.3d at 1215 (citing *McDaniel*, 709 N.E.2d at 22). This exception expects independent contractors to be "responsible for anticipating and guarding against routine or predictable dangers"; otherwise the exception would abrogate both the general rule of nonliability and the contractee/independent contractor relationship. *Id*.

In *McDaniel*, the Court found that a cave-in did not represent a peculiar risk. *McDaniel*, 709 N.E.2d at 22. The plaintiff argued in their brief that cave-ins were a peculiar risk of trenching, and pointed to statistics which show a "dismaying number of injuries and deaths connected with trenching and cave-ins" in support of that argument. *Id.* at 22. The Court, however, held that those statistics demonstrated exactly why cave-ins were not a peculiar risk: the risk must be peculiar to the particular job, not peculiar to the kind of work that is being performed. *Id.* "The relevant statistics demonstrate that cave-ins are a routine and predictable hazard of trenching, and even the construction industry has acknowledged that reality by devising and promoting safety measures to prevent such accidents." *Id*. Therefore, the risk of a cave-in was not a peculiar risk but rather a risk associated with trenching in general. *Id.*

(B) Foreseeability of that risk

The principal will only be liable under this exception if it should have foreseen at the time of contracting that injury to others was likely; the plaintiff must show the probability of the harm, not merely the possibility. *Walker v. Martin*, 887 N.E.2d 125, 136 (Ind. Ct. App. 2008); *McDaniel*, 709 N.E.2d at 23.

In *Red Roof Inns, Inc. v. Purvis*, the court found that the probability element was not met where the property owner could have foreseen the possibility of harm but not the probability 691 N.E.2d 1341, 1346 (Ind. Ct. App. 1998) *trans. denied*, 706 N.E.2d 166 (Ind.). The court determined that Red Roof did not owe the employee of a roofing contractor a non-delegable duty because the contractor had completed twenty-two roofing jobs for Red Roof during that year without injury. *Id.* at 1346-1347.[1]

McDaniel also addressed the probability prong, and noted that the plaintiff must show not just that injury was probable, but that the contractor or landowner knew of that probability. *McDaniel*, 709 N.E.2d at 23. "[N]othing in the designated evidence before us supports the conclusion that Acme should have foreseen the probability that Wilson's employees would not use recommended procedures and a cave-in and McDaniel's death would result." *Id.*

[1] In *Ryobi Die Casting v. Montgomery*, 705 N.E.2d 227, 229 (Ind.Ct.App.1999), *trans. denied*), the plaintiff attempted to distinguish their case from *Red Roof Inn* by pointing out that the contractor knew that the roofer in their case was inexperienced, which made injury more foreseeable. "[W]e do not consider the level of skill or experience of the independent contractor, only the risk involved in the performance of the work itself.") *Id.* at 230.

(C) Injury consistent with the peculiar risk

In order to fit within this exception, the danger that the principal must foresee "must be substantially similar to the accident that produced the complained-of injury." *Carie*, 715 N.E.2d at 857; *Walker*, 887 N.E.2d at 136.

In *Bagley*, the plaintiff suffered severe brain injuries when he was hammering a rod into the ground and another employee slipped off of a ladder and fell onto the plaintiff, driving his head into that rod. *Bagley*, 658 N.E.2d at 588. The Court did not discuss whether any risk of harm was peculiar and probable because the type of harm suffered was not consistent with the kind of risk that could have been foreseen. *Id.* "At the time the contracts were made, the delegated work did not present the peculiar probability that an injury such as Bagley's would result unless precautionary measures were taken, and the employers could not have been expected to foresee the sort of injury which actually occurred." *Id*.

In sum, contractors who wish to avoid becoming liable for injuries of subcontractor employees should ensure that their contract with the property owner specifies all of the safety provisions which the contractor may expect to undertake, and that those duties are undertaken for the benefit of the property owner. Contractors should avoid undertaking additional safety provisions as the job goes on. The foreseeable and peculiar risk provision is unlikely to apply unless a contractor is engaging in a particularly high-risk task and either the contractor or subcontractor fails to undertake reasonable precautionary measures. Where a contractor believes that they are engaging in job involving a peculiar risk, that contractor should ensure that their contract imposes upon them adequate safety measures so that they can ensure reasonable precautionary measures are taken.

II.

A. ROLE OF OSHA REGULATIONS

An OSHA violation does not in itself render a property owner or contractor liable in tort for the negligence of an independent contractor. *Vaughn v. Daniels Co. (West Virginia) Inc.*, 841 N.E.2d 1133 (Ind. 2006). However, a contractor who adopts a duty to ensure that applicable OSHA regulations are followed may be held liable for any failures to adhere to those regulations. *See Perryman v. Huber, Hunt & Nichols, Inc.*, 628 N.E.2d 1240, 1244-1245 (Ind. Ct. App. 1994) (finding that a contractor who agreed, by contract, to ensure that all subcontractors comply with federal safety regulations (including OSHA) assumed a duty to subcontractors' employees to do so, even if the subcontractors also owed the same duty to their employees).

1. Admissibility

In Indiana, a violation of Occupational Safety and Health Act regulations is not admissible as evidence of negligence per se in order to impose strict or absolute liability. *Hebel v. Conrail, Inc.*, 475 N.E.2d 652 (Ind. 1985); *Blocher v. DeBartolo Properties Mgmt., Inc.*, 760 N.E.2d 229, 239 (Ind. Ct. App. 2001). Nor can OSHA regulations be used to "expand or otherwise affect [a defendant's] common law duties or liabilities under a negligence per se theory, or as evidence of an expanded standard of care." *Jeffords v. BP Prod. N. Am. Inc.*, 963 F.3d 658, 664 (7th Cir. 2020)

(quoting *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603, 608 (7th Cir. 1989)). Without any power to create or expand duties in tort, the defendants' contractual duties to comply with OSHA regulations must remain just that: contractual promises that cannot be enforced by anyone not a party to them, in privity with a party to them, or an intended beneficiary of them. *Id.*

However, a contractor who agrees, via contract, to ensure that applicable OSHA or other safety regulations are followed on a worksite may adopt a duty to ensure OSHA compliance. In *Capitol Const. Servs., Inc. v. Gray*, the contract stated that the contractor would "comply with all laws, ordinances, rules and regulations bearing on the project" and "*maintain* physical conditions and employee performance on the jobsite during the course of construction to conform with all local and federal laws, rules and regulations including those covered by the Occupational Safety and Health Act of 1970" 959 N.E.2d 294, 304 (Ind. Ct. App. 2011). The court held that, although a contractor does not ordinarily owe a duty to employees of subcontractors to ensure OSHA compliance, that contract created such a duty. *Id.* at 305.

Although IOSHA regulations cannot be used to establish a duty, violations of those regulations can be introduced as evidence of a breach of a duty which has been established. "Violation of an administrative regulation can be considered evidence of negligence, though it is not evidence per se." *Beta Steel v. Rust*, 830 N.E.2d 62, 74 (Ind. Ct. App. 2005).[2]

In *Huffman v. Dexter Axle Co.,* the court considered the admissibility of evidence that the defendant had breached OSHA regulations where it had been established that the defendant owed a duty to the plaintiff as a matter of law, 990 N.E.2d 947 (Ind. Ct. App. 2013). Much of the discussion of admissibility pertains to whether the applicable OSHA regulations had been preempted by similar DOT regulations. *Id.* at 954-957. After establishing that "DOT regulations in this case do not preempt the regulatory authority of OSHA," the court found that "Linda has designated evidence that could establish Dexter violated OSHA regulations, and thus, breached its duty to Huffman." *Id*.at 957. This indicates that a plaintiff who has established that a duty was owed can prove a breach of that duty by showing that the defendant violated applicable OSHA regulations.

However, in every state except Alabama, evidence of OSHA citations themselves are inadmissible. *§ 21:13. Admissibility of OSHA violations and standards, Occ. Safety & Health L. § 21:13 (2024 ed.).* IOSHA worksheets which report on a specific jobsite or incident are also inadmissible. *Hagerman Const., Inc. v. Copeland,* 697 N.E.2d 948, 955 (Ind. Ct. App. 1998), *opinion amended on reh'g* (Oct. 6, 1998) ("The IOSHA worksheets and safety orders include detailed evaluations of project conditions relative to various safety regulations, and even attempt to reconstruct how the accident occurred. We conclude that the IOSHA worksheets and safety orders are not admissible pursuant to Evid.R. 803(8)(d), and that the trial court did not abuse its discretion in so deciding.")

[2] Note that *Beta Steel* was a case in which it was established that the defendant owed a duty to the plaintiff to maintain a reasonably safe worksite, not to ensure that the applicable safety code regulations were followed, yet evidence of a breach of safety code regulations was still admissible on the issue of whether the defendant had breached their duty to the plaintiff. *Beta Steel,* 930 N.E.2d 74 (Ind. Ct. App. 2005). "Evidence of violations of such rules, however, is relevant to the question of whether Beta breached any such duty and may be considered by a jury in that regard." *Id.*

Therefore, a plaintiff who seeks to introduce evidence that a defendant breached a duty to the plaintiff by violating OSHA regulations must do so through testimony.

2. Jury Instructions

Ordinarily, it is proper for a court to instruct a jury that OSHA or other safety regulations do not create a duty. In *England v. Fairfield Contracting, Inc.*, the court of appeals upheld the following jury instruction: "Where a general contractor requires a subcontractor, in writing and/or in any other form, to comply with safety requirements, IOSHA, or otherwise, by that act alone, does not assume safety obligations by the general contractor to the employees of the subcontractor. This is a question for the jury," 908 N.E.2d 238, 243 (Ind. Ct. App. 2008). "The instruction properly informed the jury that the mere fact that a contractor requires a subcontractor to comply with safety requirements does not, itself, mean that the contractor has assumed a duty of care to the subcontractor's employees. This is not an incorrect statement of the law, and to the extent that the instruction implies that a duty of care is delegable, we note that the jury was explicitly instructed that if Fairfield retained control over the safety practices of its subcontractor or evinced an affirmative intent in a contract to do so, then Fairfield may be solely liable for a failure to adequately perform that duty." *Id.*

However, if a contractor assumes a duty to ensure OSHA compliance on a worksite, the court may instruct the jury as such. In *Jones v. City of Logansport*, the applicable contract stated, in relevant part, "The Contractor shall comply in every respect with the Williams-Steiger Occupational Safety and Health Act of 1970 (OSHA) and all rules and regulations now or hereafter in effect under this Act. He shall also comply in every respect with all state and local laws and regulations pertaining to job safety and health," 436 N.E.2d 1138 (Ind. Ct. App. 1982). The defendant argued that the trial court erred in instructing the jury that the defendant was "responsible under the law for compliance with the regulations found in the Indiana Industry Safety Code, Burns Indiana Administrative Regulations (22-1-1-10) L 95", because OSHA regulations cannot create a private right of action. *Id*. at 1146. The court of appeals found that the contract in dispute incorporated those regulations by reference into the contract, thus making the regulations admissible in jury instructions. "These OSHA regulations are relevant not as federally promulgated safety regulations but rather, as contract terms setting forward an agreed upon standard of safety. The violation of these contract terms is therefore not negligence per se; rather, the violation of these terms may be considered by the trier of fact as evidence of negligence." *Id.* at 1148.

In short, OSHA or other safety regulations can never be used as evidence of a duty of care, but they can be used once a duty is established as evidence of a breach of the duty to take reasonable care. Evidence of OSHA citations or infractions by other regulatory safety departments cannot be introduced as evidence in a negligence action. In the rare instance that a contract is found to incorporate safety regulations by reference, those safety regulations will be entirely admissible as evidence of the applicable standard of care.

B. EXPERT TESTIMONY

"Indiana Evidence Rule 702 states that a witness may be qualified as an expert by virtue of 'knowledge, skill, experience, training, or education.' Only one of these characteristics is

necessary for an individual to qualify as an expert." *Troutwine Ests. Dev. Co., LLC v. Comsub Design & Eng'g, Inc.*, 854 N.E.2d 890, 901 (Ind. Ct. App. 2006). Evidence Rule 702 acknowledges that one may acquire the requisite knowledge through means other than formal education. *Messer v. Cerestar USA, Inc.*, 803 N.E.2d 1240, 1248 (Ind. Ct. App. 2004). In *Meeser*, the court concluded that an expert who spent fourteen years as a construction safety supervisor for the Illinois Toll Authority, worked four years as a consulting safety engineer, owned his own construction safety consulting business, and investigated jobsite accidents was qualified as an expert in worksite safety issues and accident investigation, despite his lack of formal education in construction safety. *Id.* at 1248.

In general, when OSHA experts or safety experts provide testimony, they cannot state whether a legal duty existed because it is a legal conclusion based upon contract law, not OSHA standards. Rule 704(b) prohibits witnesses from testifying to opinions concerning legal conclusions. Rule 704(a) allows opinions on an ultimate fact that are "otherwise admissible." *§ 704.206 Legal conclusions, 13 Ind. Prac., Indiana Evidence § 704.206 (4th ed.) See also Armstrong v. Cerestar USA, Inc.*, 775 N.E.2d 360, 368 (Ind. Ct. App. 2002) ("any determination made under OSHA regulations ... is irrelevant as to the issue of whether [the defendant] owed [the plaintiff] a duty because an OSHA standard cannot be used to expand an existing common law or statutory duty, or be used as evidence of an expanded duty of care.")

In *Stumpf*, the trial court struck the deposition of Frank Burg, "certified safety professional" who testified as to his expert knowledge of OSHA standards, on grounds that it was "irrelevant to the claims at issue, that it contained impermissible legal conclusions, and that his testimony was not based on any personal knowledge of the worksite at the time of Nathan's fall." *Stumpf,* 863 N.E.2d at 879. The court of appeals upheld the trial court's finding. *Id.* "[I]n the case at hand, Burg asserts that Hagerman and Dodd were the 'primary responsible party for the safety and health program, and implementation of policies and procedures' and were therefore required under OSHA to designate a competent person trained on ladder inspection." *Id.* at 880. "Such statements constitute legal conclusions of the duty Hagerman and Dodd owed to the Stumpfs. Therefore, as in *Merrill,* we conclude that 'Burg's determination regarding duty is a legal conclusion that invades the province of the court.'" *Id.* The court continued that "interpreting OSHA standards' is not relevant to the issue of whether Hagerman or Dodd used reasonable care or whether failure to use reasonable care proximately caused Nathan's injury. Rather, Burg's affidavit attempts to elucidate what *duty* is required under OSHA's provisions." *Id.*

In *Merrill v. Knauf Fiber Glass GmbH*, the court of appeals considered testimony of the same expert and again found portions of his testimony, submitted to the court in the form of an affidavit, to be inadmissible, 771 N.E.2d 1258 (Ind. Ct. App. 2002). "In his affidavit, Burg concludes that Knauf owed Merrill an affirmative duty to cover or guard the skylights. Burg's determination regarding duty is a legal conclusion that invades the province of the court. Given that Paragraph 5 relies upon inadmissible evidence, the trial court did not abuse its discretion when it struck that portion of Burg's affidavit." *Id.* at 1263-1264.

Safety experts can never testify to whether a duty was owed, or how a particular party should have acted on a worksite to ensure safety. Safety experts can testify to what the applicable safety regulations would have called for in a particular case or what industry standards are.