IT'S ALL ON YOU

A General Contractor's Nondelegable Duty in Florida and Its Impacts on Risk Transfer

By Kellie A. Caggiano

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In Florida, it is customary for a property owner to hire a general contractor to be the party responsible for daily project management of a construction job. Although the general contractor's role will vary depending on the contractual terms, for most projects—especially the larger ones—a general contractor would be responsible for overseeing the project, but may not actually self-perform any work.

The general contractor will usually hire subcontractors with different specialty licenses to perform different aspects of the work—concrete, roofing, HVAC, etc. If the owner later decides to sue the general contractor for defective work, the general contractor may argue that all damages should be apportioned to the subcontractors, as the subcontractors are the ones who performed all the actual work.

As a result, a growing body of law in Florida seems to imply that a general contractor may be precluded from apportioning fault due to its non-duty of supervision associated with its contract for work.

Courts have found that a nondelegable duty may exist for a general contractor who undertakes construction work. For example, the Second District Court of Appeal, in *Mills v. Krauss*, stated "[T]he duty of a general contractor to use due care in repairing the premises of another…is a nondelegable duty which many not be committed to an independent contractor; and the latter will be deemed to be the employee of the general contractor…. The general contractor, having undertaken to repair the premises of another…is under a duty to the owner of the premises by virtue of a relationship created by the general contract[.]"

The court's decision in *Mills* was later supplemented by other case law that found a nondelegable duty existed in relation to a general contractor's supervisory work. [See *Mastrandrea v. J Mann, Inc.*, 128 So. 2d 146, 148 (Fla. 3d DCA 1961); *Bialkowicz v. Pan Am. Condo. No. 3, Inc.*, 215 So. 2d 767, 771 (Fla. 3d DCA 1968); *ABD Constr. Co. v. Diaz*, 712 So. 2d 1146, 1147-48 (Fla. 3d DCA 1998); *CC-Aventura, Inc. v. Weitz Co., LLC*, No. 06-21598-CIV, 2009 WL 2136527 at *2 (S.D. Fla. July 13, 2009); and *People's Tr. Ins. Co. v. Lamolli*, 352 So. 3d 890 (Fla. 4th DCA 2022)].

A general contractor's duties are also set forth in various statutes that impose supervision, direction, management, and control requirements for a general contractor and/or its qualifiers, including §§ 553.79(5)(a), 553.79(10), 489.105(3), 489.105(4), and 489.113(2), Fla. Stat. (2024).

Notwithstanding these decisions related to the nondelegable duties, the question remained whether or not a general contractor could apportion fault to its subcontractors. General contractors regularly assert a "*Fabre*" defense in Florida, asking

the court to apportion fault to subcontractors under Florida Statutes § 768.81. While there is a body of law in non-construction cases in Florida that has held an assignment of liability is improper when a party has a nondelegable duty, the courts still have not ruled directly on the issue of whether apportionment is proper in the construction-defect context.

Recently, however, the newly formed Sixth District Court of Appeal issued a decision in *Pickell v. Lennar Homes, LLC* that contained a footnote where the court acknowledged that "any recovery from [the subcontractor] would be set off post-judgment from a potential future judgment against [the developer/general contractor]."

Therefore, based upon this footnote in the *Pickell* decision, some courts may prefer applying post-judgment setoffs rather than apportion fault in cases involving general contractors and their potential nondelegable duties.

Further, as a result of this nondelegable duty, courts may preclude general contractors from asserting common law indemnity claims against its subcontractors. Florida law governing common law indemnity requires that the party seeking indemnity (in this case, the general contractor) must be "wholly without fault." [See, e.g., *Florida Peninsula Ins. Co. v. Ken Mullen Plumbing, Inc.*, 171 So. 3d 194, 196 (Fla. 5th DCA 2015)].

For example, a Duval County trial court recently held that a general contractor was unable to bring common law indemnity claims, in part because of its nondelegable duty. The court, citing the statutes mentioned above as well as *Mills* and other cases, ruled that a general contractor could "never be wholly without fault" and could not bring a claim for common law indemnity. The court listed the nondelegable duty as an "independent" basis to defeat the indemnity claim, amongst other reasons.

Florida appellate courts have not directly addressed how potential nondelegable duties affect general contractors' ability to bring common law indemnity claims or apportion fault amongst their subcontractors. Recent decisions seem to trend toward placing the full scope of liability on the general contractor and potentially indicate a leaning towards limiting the general contractor's ability to pass off damages to others.

This obviously directly impacts general contractors' ability to transfer risk, and could benefit owners of the construction projects and subcontractors. Therefore, this is an important issue to be aware of when bringing and defending against claims. Further, to maximize risk transfer, general contractors may want to modify their contractual language or supervisory activities in order to account for this emerging trend. ■

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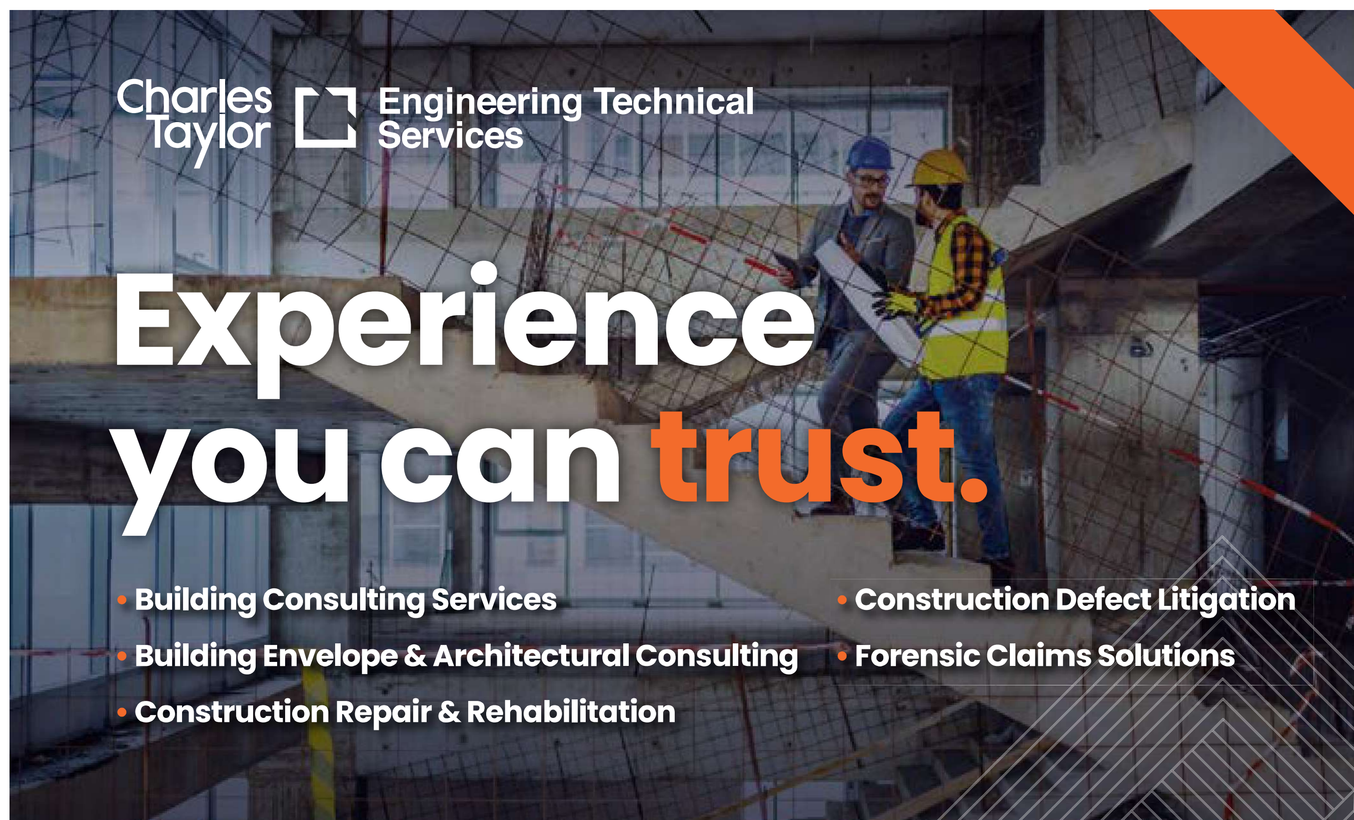

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