To: Senior Partner Bergman and Junior Partner Reller

From: First Year Associates Desai, Dosanjh, Karamyan, and Patel

Date: March 12, 2018

Re: Casey Nichols, Third Party Employment Liability

Bergman and Associates

Issues

(1) Was Renaissance Technologies negligent if Casey Nichols, employee of independent contractor Thornton Construction, sustained head and back injuries "in Alabama" when she fell from scaffolding, trying to step up from the lift to the scaffolding and whilst engaged in construction work on the border of Alabama and Florida?

(2) Was Renaissance Technologies negligent if Casey Nichols, employee of independent contractor Thornton Construction, sustained head and back injuries "in Florida" when she fell from scaffolding, trying to step up from the lift to the scaffolding and whilst engaged in construction work on the border of Alabama and Florida?

Short Answer

(1) No. In the state of Alabama, employer will not be negligent for the injuries sustained by the employee of an employer's independent contractor on the border of Alabama and Florida. Renaissance did not reserve control over the worksite, no specific act of negligence on part of Renaissance was present, and Renaissance did not have a duty to provide the employees of Thornton a safe workplace.

(2) Maybe. In the state of Florida, employer may be negligent for the injuries sustained by the employee of an employer's independent contractor on the border of Alabama and Florida. Nichols could potentially show a specific act of negligence on the part of Renaissance, given the dangerous instrumentalities they provided and inspected (the lift and scaffolding) and the fact that construction work is inherently dangerous work.

Facts

Our client, Renaissance Technologies, the Trump campaign's number one contributor of funds, was trying to win the government's contract to build the wall between Mexico and the US. In order to present the best possible proposal, Renaissance was determined to showcase a prototype of the wall to the Trump administration which they planned to build on land owned by Renaissance on the border of Alabama and Florida. Limited to their own internal resources,

Renaissance had to outsource the construction of the wall which resulted in Renaissance contracting Sempre Construction Co. to build the wall. Unfortunately for Renaissance, the first contracted company pulled out of the project, forcing Renaissance to look for another. Sempre had built a small portion of the wall which was about 7 feet tall and also left the scaffolding parallel to the wall. Thornton Construction Co. was the second construction company to be contracted by Renaissance Technologies to finish constructing the prototype. 36 year old Casey Nichols had been working for Thornton Construction Co. for about 7 years and brought onto this project in late August 2017. Renaissance, known for investing in large construction projects, already owned and provided a lift to Thornton Construction Co. for use in construction of the wall. Because the lift had been used in previous construction projects, Renaissance also voluntarily conducted an inspection of the lift.

On September 12, 2017, an inspector for Renaissance along with Nichols conducted an inspection of the lift and worksite. The inspector noticed that the lift did not fully reach the scaffolding parallel to the wall so employees of Thornton would have to take one step up onto the scaffolding from the lift. The inspector determined that the height at which the scaffolding and lift did not match was not a dangerous enough condition to stop work because it was a mismatch of only about one foot. The inspector did, however, recommend that employees of Thornton be provided with a safety harness to mitigate any danger of the one foot difference in height. Renaissance did not feel that the safety harness was necessary because it was a recommendation and not required. On September 18, 2017, during a morning meeting, Thornton employees were warned of the difference in height and were advised to be cautious.

The accident occured on December 5, 2017. While trying to take the step up from the lift to the scaffolding, Nichols lost her balance and fell off the lift to the ground. Nichols suffered from a concussion which resulted in brain trauma and back injuries and will no longer be able to work. Nichols' counsel provided Renaissance with a notice of intent to sue but did not specify which jurisdiction they would bring suit in.

Discussion

Was Renaissance Technologies negligent if Casey Nichols, employee of independent contractor Thornton Construction, sustained head and back injuries "in Alabama" when she fell from scaffolding, trying to step up from the lift to the scaffolding and whilst engaged in construction work on the border of Alabama and Florida; was Renaissance Technologies negligent if Casey Nichols, employee of independent contractor Thornton Construction, sustained head and back injuries "in Florida" when she fell from scaffolding, trying to step up from the lift to the scaffolding and whilst engaged in construction work on the border of Alabama and Florida. This memo examines the controlling law and precedent in the states of Alabama and Florida, considering the possible outcomes for our client in each jurisdiction, in

anticipation of the eventuality of the injured party filing suit in one of the two states. The topic has three main issues: 1) does the inspection conducted by Renaissance (the employer) equate to Renaissance's control over the worksite? 2) was there a specific act of negligence on the part of Renaissance? and 3) does Renaissance have an affirmative duty to provide employees of Thornton Construction with a safe workplace?

In our discussion of each pertinent issue, we will be examining the relevant common law governing the various theories under which claims of negligence may be brought against our client. Under the Alabama jurisdiction, the relationship between owner and independent contractor (prime contractor/subcontractor and owner/independent contractor), whether a danger is known or ought to be known to the owner and whether the owner had a responsibility to notify the independent employer and its employees of it, and whether an inspection is undertaken are key factors in the controlling cases. Under the jurisdiction of Florida, the employer's involvement in the work, the employer's duty to warn of dangerous condition, the classification of the work (inherently dangerous or otherwise), and the classification of the employer of the independent contractor's employee (invitee, third party) are key factors in the controlling precedent.

1. Does the inspection show that Renaissance reserves control over the worksite?

In Alabama, the rule is well settled that it is the "reserved right of control, rather than its actual exercise that furnishes the true test of whether the relations between the parties is that of an independent contractor or of employer and employee master and servant..." as upheld by Hughes v. Hughes *367 So.2d 1384 (Ala.1979).* An inspection was done on September 12, 2017 by an inspector for Renaissance accompanied by Nichols of the lift and worksite. The exercise of control, the inspection done by Renaissance Technologies, does not equate to reserve of control for the site. To claim, Renaissance Technologies had a duty to inspect the project, a relationship of prime contractor-subcontractor has to be established, therefore establishing the element of control.

In Pate v. U. S. Steel Corp., *393 So. 2d 992 (Ala. 1981)* the Court cited the rule established in *Hughes.* In the case of *Pate,* Pate and Carvey (other plaintiff) were employed by J.M. Foster, an independent contractor, who was employed by U.S. Steel Corporation for construction work. The plaintiffs were working to take down the form surrounding a concrete pedestal. The concrete was not mixed properly and so the form collapsed causing them both to fall to the ground. Pate first claims that U.S. Steel had a right to provide the employees of its subcontractors with a safe workplace under prime contractor-subcontractor relationship. However, the Court found that the relationship between the two parties was that of an owner-independent contractor; which the Court established by considering whether or not U.S. Steel Corp had the "right to direct the manner in which Foster performed its work" as part of the

contract. Pate also argued that, by employing a team of engineers to ensure monitor construction progress, U.S. Steel Corp. was exercising its reserved right of control. U.S. Steel Corp. claimed that its team of engineers were tasked to ensure the construction was going according to blueprints and was making progress. The Court did not agree with Pate because ensuring progress was a "legitimate concern of the owner". Unlike the court cases cited by Pate to support his theory, the Court argued that the engineers employed by U.S. Steel Corp. did not have direct control of the activity, the concrete formation, that lead to the injury. Thus, U.S. Steel Corp was not negligent. By this theory, Renaissance's inspection does not automatically correlate to it having control over the worksite or over the hazard that lead to Nichols' injury.

Renaissance Technologies had the right to perform an inspection on the worksite to reduce compensation claims. The inspection found that the lift did not fully reach the scaffolding forcing employee of Thornton Construction to take an extra step from the lift to the scaffolding. In *Hughes* the court stated "The law, simply stated, is that one who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care." Although it was not required to do so, Renaissance Technologies undertook the inspection of the worksite and to report any hazards found thereafter. There is no evidence that Renaissance Technologies ever had duty to or undertook a duty to correct the safety hazards it discovered. Renaissance Technologies discovered and reported to Thornton employees of the difference in height and advised employees to be cautious, the very hazard which result in Nicols' injury. Because Renaissance Technologies acted to notify employees of the hazard, a scintilla of evidence cannot be provided to prove the injury resulted because of Renaissance Technologies' negligence.

In order to present a case of negligence, the plaintiff, Casey Nichols would have to present evidence to verify that Renaissance Technologies, owner of the premise, reserved the right of control over the manner in which work was to be performed by Thornton Construction, the independent contractor, establishing a prime contractor-subcontractor relationship. There is no evidence to prove Renaissance Technologies reserved right of control or authority over the performance of the work performed by Thornton Construction.

While emphasized in Alabama, Florida case law does not consider whether or not employer had duty to inspect the project. Should the suit fall under Florida's jurisdiction, the initial question to address would be whether the employer's conduct of an inspection indicates an employer's control of the worksite. In Strickland v TIMCO Aviation Services Inc., TIMCO contracted Joye Painting Services to pressure wash the roof of an airplane hanger and to maintenance and repair a skylight on the roof *66 So.3d 1002 (2011)*. An employee of JPS, Travis Strickland, got mist from the pressure washing chlorine solution under his glasses while walking across the roof to attend to a spot that he had missed. He then stepped on a skylight and fell five floors down. Strickland sued TIMCO asserting that a "property owner who actively participates in or exercises direct control over the work" of an independent contractor can be held "liable for

the damages sustained by the employee of an independent contractor". In this case, TIMCO not only conducted an inspection of the work site but also provided JPS with a safety harness and man lift. Strickland argued that the inspection and provision of safety harness correlated to control over the worksite. The court in *Strickland* concluded that "inspection of work by TIMCO is not control of work of active participation [and] neither is provision of [a] safety harness." The inspection did not indicate that TIMCO exercised direct control over work performed by JPS. Court cited Cadillac Fairview of Florida, Inc. v. Cespedes *468 So.2d 417, 421, Fla. 3d DCA 1985* in which they determined that "'a staff of field supervisors who oversaw, directed and coordinated the construction project,' and a superintendent who made daily progress reports and 'sometimes became physically involved in the construction'" constituted active participation. Our client, Renaissance did conduct an inspection and provided a lift to Thornton Construction but in accordance with *Strickland*, this does not constitute control over the worksite or active participation.

2. Was there a specific act of negligence on the part of Renaissance Technologies?

In general, from the herein mentioned Alabama case law and specifically employer negligence cases involving the employee of an independent contractor, it is clear that the court does not consider a specific act of negligence on part of the employer as much as it does other factors. Case law in Alabama has focused instead on other elements such as if the work is inherently dangerous, if the dangerous condition is obvious, if the employee was extended the same duty as that of an invitee, and if the employer retained control over the worksite.

In the state of Alabama, in regards to the specific act of negligence, the court determined "the complainant must prove that the defendant had 1) undertaken to inspect the construction site, particularly the area in which the injury-causing hazard is located, 2) performed such inspection negligently, and 3) that such negligence was the proximate cause of his injuries. Injured employee must provide a scintilla of evidence that they were injured as a result of employer's negligent inspection," *Hughes v. Hughes, 367 So.2d 1384 (Ala.1979)*. An inspection was performed on September 12, 2017, by an inspector for Renaissance accompanies by Nichols of the lift and worksite. This satisfies the first requirement of negligence, to undertake to inspect the construction site, particularly the area in which the injury-causing hazard is located. The inspection found the lift to not fully reach the scaffolding parallel to the wall, making employees of Thornton Construction take an extra step up onto the scaffolding from the lift. The discrepancy was not determined to be a dangerous enough condition to stop work. The inspector recommended, not required, Renaissance to provide a safety harness to Thornton Construction employees to mitigate danger. Additionally, Thornton employees were warned of the difference in height and were advised to be cautious. Subsequent acts of negligence, performing the inspection negligently and that such negligence was the proximate cause of injuries, are not

present. The defendant must prove that all parts of negligence are present on the part of the defendant. By failing to do so, act of negligence does not exist.

It is clear from Nichols' attendance of the morning meeting between Thornton employees that she knew about the difference in height. *Hughes* affirmed that owner of premises owes no duty of care to the employees of an independent contractor in reference to conditions arising in the progress of work on the contract *United States Cast Iron Pipe and Foundry Co. v. Fuller, 212 Ala. 177, 102 So. 25 (1924)*.

Additionally, "the owner of [the] premise is not responsible to an independent contractor for injury from defects or dangers which the contractor knows of, or ought to know of. But if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he not do this he is liable for resultant injury," *Crawford Johnson & Co v. Duffner, 279 Ala. 678, 189 So.2d.474*. On September 18, 2017, during the morning meeting, Thornton employees were warned of the difference in height and were advised to be cautious, fulfilling the duty of the owner to warn the contractor of defects or dangers which the contractor knows of. The action of warning the contractor releases the owner from responsibility for resultant injury.

One especially pressing issue, in the event the case is brought under Florida's jurisdiction, is considering whether or not Renaissance was negligent for the head and back injuries sustained by Nichols while engaged in construction work on the border of Alabama and Florida, is whether or not there was a specific act of negligence on the part of Renaissance.

Under Florida Law, controlling precedent regarding employer liability to employees of independent contractors is Florida Power and Light Co. v. Price, *170 So.2d 293 (Fla.1964)*. In *Price,* George W. Price, an employee of Harlan Electric Co., who was contracted with Florida Power and Light Co. (FPL) to perform electrical work, sustained injuries while engaged in the electrical work when a fellow employee of Harlan Electric negligently allowed a jumper wire to energize a wire on which Price was working. Price brought suit against Florida Power and Light Co., alleging the company was liable for Harlan's negligence which led to his injuries. The Florida Supreme Court held employer FPL not liable for Price's injuries, holding that in the case of employer liability to employees of an independent contractor engaged in inherently dangerous work or injured by a dangerous instrumentality, the employer is not liable until and unless it is shown by positive act of negligence or negligent omission to cause injury to the independent contractor or its employees. The Court, in *Price*, specifically held the requirement that an injured employee of an independent contractor alleging negligence on the part of the contracting employer must make an "allegation or showing of an act of negligence or omission of duty or proper care" on the part of the employer of the independent contractor; a showing that the employer "in some way contributed or concurred in the act of negligence"; or a showing that the

contracting owner "by positive act of negligence or negligent omission" caused injury to the independent contractor or its employee. Thus, as per the law set forth in the controlling precedent of *Price*, Florida law sets forth an independent contractor exception to employer liability for employees of an independent contractor in the specified circumstances, whereby the injured party must show a specific act of negligence on the part of the employer for said employer to be potentially held liable.

Under the *Price* independent contractor exception to the doctrines of inherently dangerous work and dangerous instrumentalities, employers are liable for injuries incurred by employees of an independent contractor if that injured party is able to show a specific act of negligence on the part of the employer. In this case, our client, Renaissance contracted with Thornton to engage in construction work for the border wall prototype. As per the common law doctrine of inherently dangerous work, this type of construction work qualifies as "inherently dangerous work." Renaissance provided Thornton with the lift and the scaffolding, both of which Renaissance had ownership over. As per the common law doctrine of dangerous instrumentalities**,** both the lift and scaffolding qualify as dangerous instrumentalities. Nichols, employee of Thornton, sustained head and back injuries when she fell from the lift to the ground due to a misstep when trying to step up from the lift to the scaffolding. Therefore, the injuries she sustained potentially had something to do with defects with lift, the scaffolding, or a combination of the two. Thus, Renaissance is susceptible to claims by Nichols of negligence under the doctrines of inherently dangerous work and dangerous instrumentalities.

However, the holding in *Price* presents an exception to employer liability to employees of independent contractors under the doctrines of inherently dangerous work and dangerous instrumentalities, whereby the employer cannot be held liable and subsequently negligent unless the plaintiff-employee shows that by positive act of negligence or negligent omission, the employer caused injury to the independent contractor or its employees. Nichols sustained her injuries trying to step up from the lift to the scaffolding, with the required "one step up" being the product of the lift not fully reaching the scaffolding parallel to the wall. The initial report claims Nichols "lost her balance" and implies that to be the reason she fell to the ground. However, pending further investigation into the fall, we must consider, in light of the current facts, potential claims under the doctrines of dangerous instrumentalities and inherently dangerous work based on specific actions taken by Renaissance.

One such claim is that Nichols fell because the lift itself had some defect or due to the fact that the lift provided did not match up in height to the scaffolding provided. This theory presents the potential for a specific claim of negligence regarding the dangerous instrumentalities and inherently dangerous work. Renaissance voluntarily conducted an inspection of the lift and then gave it to Thornton to use, implicitly deeming it safe for use. Renaissance also was aware, through the inspection conducted on September 12, 2017, that the lift did not fully reach the

scaffolding parallel to the wall, and while they were informed that the mismatch was not a condition dangerous enough to stop work, they were recommended to provide a safety harness to mitigate any danger to the workers. Renaissance did not take the recommendation and instead warned Thornton employees in a morning meeting on September 18, 2017 to be cautious when stepping from the lift to the scaffolding. Both instrumentalities, the lift and the scaffolding, were potentially culpable for the injury, and Renaissance was made aware of specific dangers regarding the combination of the scaffolding and the lift and potentially made privy to dangers with the lift itself during the inspection of it.

This fact pattern creates the possibility of a specific claim of negligence on the part of Renaissance under various types of allegations laid out in *Price*, including an "allegation or showing of an act of negligence or omission of duty or proper care," and liability "by positive act of negligence or negligent omission causing injury to the independent contractor or its employee" *170 So.2d 293 (Fla.1964)*. It's plausible that Nichols could make a reasonable specific claim that Renaissance, by not providing the safety harness despite the recommendation, made a negligent omission causing the injury to Nichols. Another possibility is a reasonable claim by Nichols that Renaissance, by providing the lift and scaffolding instrumentalities, despite knowledge of the dangers they posed through inspection on top of the fact that construction is inherently dangerous work, breached a duty of care and were negligent.

Hence, as illustrated previously, under Florida law Renaissance may be found negligent in the event that Nichols, under the *Price* independent contractor exception, successfully argues for a specific claim of negligence against Renaissance as to violation of the doctrines of dangerous instrumentalities and inherently dangerous work. Consequently, Renaissance's liability and subsequent negligence hinges on the arguability of a specific claim of negligence under the standards set in *Price*.

3. Does Renaissance Technologies have an affirmative duty to provide employees of Thornton Construction with a safe workplace?

According to the law in Alabama, employers owe the same duty to employees of independent contractors as they owe to invitees. In Hill v. U.S. Steel Co., *640 F.2d 9 (1964)*, a case defining the duties owed by employer to the employee of an independent contractor, Jerry Hill, employee of independent contractor sustained injuries while working on the premises of employer U.S. Steel Corp. Hill fell from a "permanent walkway that was elevated more than four feet above the property's concrete flooring" (*Hill)*. Hill alleged that his injury was a direct result of U.S. Steel Co.'s failure to provide a safe workplace by way of installing a guardrail. However, the shared contract stated that, "safety of all persons employed by J.M Foster and his subcontractors on U.S. Steel Corp. property shall be the sole responsibility of J.M. Foster and that J.M. Foster shall take precautions to prevent injuries to his employees." The court in *Hill*

found U.S. Steel Corporation not held liable for negligence, stating that "(defendant), as owner of the premises, owed (plaintiff), as an employee of an independent contractor, the same duty a property owner owes an invitee. This duty, as declared by the Alabama Supreme Court in Claybrooke v. Bently, *1954, 260 Ala. 678, 72 So.2d 412,* is to maintain the premises in a reasonably safe condition and that an invitee assumes all normal or ordinary risks attendant upon the use of the premises; further, that the owner is under no duty to reconstruct or alter his premises to eliminate known or obvious dangers, and that he cannot be held liable for injuries resulting from a dangerous condition which was obvious, or should have been observed in the exercise of reasonable care."

The court added to the reasoning of *Hill* in the case of Green v. Reynolds Metal Co., *328 F.2d 372, 374 (5th Cir. 1964)*. In *Green,* Reynolds Metal Co. employed A. Nabakowski Company, an independent contractor to repair and replace the roof on one of Reynolds' aluminum reduction plant buildings. Green had been employed as a "helper" for more than three months and was performing his daily tasks when the incident occured. Green fell approximately 40 feet to the floor. No one saw Green fall and Green, who suffered retrograde amnesia as a consequence of the alleged fall, does not recall many details from the incident. According to the opinion, "the ledge had no side rails or safety rope, but had the usual amount of dust and was in the same condition that had existed previously (which condition had been observed by Green daily for thirteen weeks)" and was thus in its usual condition. The court in *Green* concluded that in Alabama, "(t)he owner of premises is not responsible to an independent contractor for injuries from defects or dangers which the contractor knows of, or ought to know of." Therefore, the court found Reynolds Metal Co. was not held liable for negligence.

Alabama law, as stated above, declares that the employee of an independent contractor is owed the same duty that a property owner owed to an invitee to maintain the premises in a "reasonably safe condition". Renaissance did not breach this duty because it conducted an inspection on the height difference between the scaffolding and lift. The results of the inspection concluded that the height difference was not "a dangerous enough condition" to stop work on the wall. Furthermore, by carrying the status of an invitee, Nichols also assumed any risks that could have resulted from use of the premises. The court in *Hill*, citing the opinion of *Claybrooke*, states that the owner of a property has no duty to "reconstruct or alter premises to eliminate known or obvious dangers". On September 18, 2017, Renaissance held a meeting with the employees of Thornton informing them of the height difference between the lift and the scaffolding and the potential risk arising from it. Therefore, the danger was known to all the workers and Renaissance had no duty to change the conditions of the worksite to mitigate the potential dangers. The court also reaffirmed this belief in the decision of *Green* where the court held that in Alabama, "(t)he owner of premises is not responsible to an independent contractor for injuries from defects or dangers which the contractor knows of, or ought to know of." Apart from the meeting explicitly informing workers of the risk, as construction workers who use the equipment

that caused the injury everyday, the contractor's employees were aware of the potential risk of injury when moving from the lift to the scaffolding.

The employee of an independent contractor is only owed the same duty as that of an invitee. Renaissance did not breach that duty because they did provide a reasonably safe workplace and informed employees of the dangers of working with the machinery. Moreover, since Nichols held the status of an invitee, she assumed the risk involved with working on the premise. Thus, if Nichols brought suit against our client in Alabama, our client would likely not be held liable.

A key consideration under Florida law in whether or not Renaissance was negligent in the head and back injuries sustained by Nichols, is whether or not Renaissance had an affirmative duty to provide employees of Thornton with a safe workplace.

The Restatement (Second) of Torts § 413 places an affirmative duty on employers that contract inherently dangerous work to independent contractors, to create a safe workplace, stating "one who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions…" Under Florida law, a key case holding precedent on this affirmative duty is Scofi v. McKeon Construction Co, *666 F.2d 170 (1982)*. Charles Scofi was an employee of Howdeshell Plumbing, which was contracted by McKeon Construction Co. to do the plumbing work for its condo development project. The estate of Charles Scofi brought suit against McKeon alleging its negligence resulted in the fatal injuries suffered by Scofi while laying pipe in a trench that caved in. In applying the relevant Florida law, the Florida Federal District Court jury trial found McKeon not negligent, which the US Fifth Circuit Court of Appeals Affirmed. The appellate court held, in applying *Price* to Restatement (Second) of Torts § 413, that there is not an affirmative duty on the employer to take proper precautions when the independent contractor is engaged in inherently dangerous work, specifically where the plaintiff is an employee of an independent contractor, rather than a third party member of the public. In Baxley v. Dixie Land and Timber Co., *521 So.2d 170 (1988),* the court held that the employer may be held liable for injuries sustained by employees of an independent contractor if at the time of injury, the injured subcontractor was not engaged in performing the work he/she was contracted to do and thus qualifies as a third party member of the public as defined in *Price*.

Under *Scofi*, an exception to Restatement (Second) of Torts § 413 is created, whereby the employer is absolved of its affirmative duty to take proper precautions when the independent contractor is engaged in inherently dangerous work where the third party injury claim is from an employee of an independent contractor rather than a third party member of the public. Under the common law doctrine of inherently dangerous work, the construction work Thornton is

contracted to do qualifies as being "inherently dangerous." Thus, there would be a potential claim under § 413 that Renaissance had an affirmative duty to take proper precautions regarding the work Thornton was engaged in, such as providing the recommended safety harness for the lift. However, a key fact is that the third party injury claim would come from Nichols, an employee of Thornton, the independent contractor. Therefore, Renaissance under the exception to § 413 established in *Scofi* would not have had an affirmative duty to provide the safety harness or take other proper precautions.

A potential argument that could find Renaissance not absolved of this affirmative duty is an argument that Nichols was a third party member of the public. In *Baxley*, the Florida First District Appeals Court held that Dixie could be found negligent in the death of Baxley, an employee of Dixie's independent contractor, since Baxley was injured while not engaged in work in the scope of employment, hence qualifying him as a third party member of the public under *Price*. Nichols sustained her injuries when she lost her balance and fell from the lift, while presumably working on building the wall, which is in the scope of employment. Thus, barring the surfacing of new facts where Nichols was up on the lift for a reason other than the work Thornton was contracted to do, she likely does not qualify as a third party member of the public.

Therefore, since under the current facts Nichols does not qualify as a third party member of the public, Renaissance maintains its absolvement from having an affirmative duty to provide employees of Thornton with a safe workplace, under Florida law.

In Holsworth v Florida Power and Light Company, the employer, Florida Power and Light (FPL) contracted Shaw Insulation Co. to remove asbestos from one of their buildings *700 So.2d 705 (1997)*. FPL voluntarily conducted an inspection in which the inspector considered the hatch leading to the roof a safety concern and "determined that it should be tied back". Shaw's employees took it upon themselves to attach a rope to the hatch. While climbing down a ladder through a hatch, one of Shaw's employees, Mack Holsworth, was hit with the hatch leading from the roof down to the building. While generally, the employer of an independent contractor is not liable for injuries to the independent contractor's employees, there are exceptions to this rule. In this case, the exception cited by FPL was "If the owner of the property is aware of a dangerous conditions that the employees could encounter, the owner has to give warning of, or use ordinary care to furnish protection against, such dangers to the employees of the contractor who lack actual or constructive knowledge of the hazards" *Florida Power & Light Co. v. Robinson, 68 So.2d at 410–11*. To deem the owner liable, you must also be able to prove that the dangerous condition is latent (meaning "not apparent by use of one's ordinary senses from a casual observation of the premises") because the owner is required to warn the independent contractor of latent defects *Kagan v. Eisenstadt, 98 So.2d 370, 371 (Fla. 3d DCA 1957)*. In the case of *Holsworth,* the hatch condition was obvious and apparent to Holsworth and therefore not latent. It was also determined that FPL was not aware that the hatch was a dangerous condition because

they had no prior complaints from other employees who had utilized the hatch nor did the FPL representative report any danger. In *Holsworth*, it was found that the contract between Shaw and FPL gave Shaw complete control of premises, including the ability to modify conditions it found unsafe as they did by attaching a rope to the hatch.

Unlike in the case of *Holsworth*, where the inspector deemed the hatch a safety hazard, the inspector in our client's case did not consider the step up from the lift to the scaffolding a safety hazard. Therefore, there was no dangerous condition for Renaissance to be made aware of.

The inspector also only "recommended" that a harness be provided to the employees which does not require Renaissance to provide the harness. In *Holsworth*, the independent contractor attached the rope to the hatch following the inspection and Thornton could have taken it upon itself to modify conditions it found unsafe as well. Finally, Nicols accompanied the Renaissance inspector throughout the inspection and was informed during a meeting of the step difference between the lift and scaffolding. Further, because the employees of Thornton would have to taken the step from the lift to the scaffolding routinely during the course of their work, the dangerous condition can not be considered latent.

If the employee of the independent contractor is classified as an invitee, the level of duty to provide a safe workplace changes. In Ahl v Stone Southwest, George Ahl, employee of Brown and Root (contracted by Stone Southwest to perform maintenance work), brought suit against Stone Southwest for personal injuries *666 So.2d 922 (1995)*. Before Brown and Root were to begin work, Stone Southwest took it upon themselves to hose down the machinery. When Ahl arrived to work, he noticed a solution of water, grease, and oil on the floor which he then reported to his supervisor. Ahl's supervisor told him that Stone Southwest was aware of the condition but was "unable to do anything". While carrying a 35 lb bearing down a ladder, Ahl slipped and fell on pipes, injuring his back. Cited by the court is the rule that a landowner must use "reasonable care in maintaining the premises in a reasonably safe condition" *Regency Lake Apartments Assocs. v. French, 590 So.2d 970, 973 (Fla. 1st DCA 1991); Emmons v. Baptist Hosp., 478 So.2d 440, 442 (Fla. 1st DCA 1985)*. In regards to maintaining the premises in a reasonably safe condition "the owner has no duty to warn where the danger is obvious and apparent, or the invitee otherwise has knowledge of the danger which is equal to or superior to the owner's knowledge" *Miller v. Wallace, 591 So.2d 971, 973 (Fla. 5th DCA 1991)*. It was determined, in this case, that the danger created by the water and oil on the floor is considered obvious danger because Ahl had seen it and was wearing soled shoes to prevent slipping in it. The court held, however, that Stone Southwest should have anticipated the injury despite Ahl knowing about the danger and reversed and remanded the case.

In our case, if Nichols was designated as an invitee in the eyes of the court, Renaissance would have to use reasonable care to maintain the work site in a reasonably safe condition. At

the same time, however, because Nichols had been working for Thornton for seven years and accompanied the FPL inspector, it can be inferred that the invitee "has knowledge of the danger which is equal to or superior to the owner's knowledge". Therefore, if Nichols were to bring suit in Florida and Nichols were deemed an invitee, Renaissance would likely not be liable for Nichols' injuries.

Closing

Under the laws in the state of Alabama, Renaissance will not be found negligent for the injuries sustained by Thornton's employee, Nichols, on the border of Alabama and Florida. Renaissance did not reserve control over the worksite, no specific act of negligence on the part of Renaissance was present, and Renaissance did not have a duty to provide the employees of Thornton a safe workplace. However, under Florida law, Renaissance may be found negligent for the injuries sustained by Nichols. Nichols could potentially show a specific act of negligence on the part of Renaissance, given the dangerous instrumentalities they provided and inspected (the lift and scaffolding) playing a role in the injuries sustained, and the fact that construction work is "inherently dangerous." Another potential avenue by which Renaissance could be found negligent is if, with new facts coming to light, Nichols is able to successfully argue she qualified as a third party member of the public when she sustained her injuries.

At this point, Nichols' attorney has provided us with a notice of intent to file suit but has not specified under which jurisdiction she plans to file. After careful consideration of Alabama and Florida law and, according to the current facts, it is clear that it would be most favorable to our client if Nichols files her negligence claim in Alabama. If Nichols should file suit in Alabama, we have an exceptionally strong case according to precedent in defense of our client not being negligent. In the event Nichols files in Florida, our case is less solid and our client is more susceptible to strong claims under specific claims of negligence negating the independent contractor exception.

Should Nichols file in Florida, it would be advisable to consider working out a settlement agreement, so as to avoid litigation and bad publicity for our client, especially given its hopes of landing the government contract. Another option would be to potentially file suit against Thornton, trying to build a case that Thornton had some duty as the independent contractor. Additionally, there is always the option of litigating Nichols' claim in court, seeking to provide a defense against whichever rationale her counsel chooses to justify the negligence claims. Regardless of which option we ultimately go with, it will be crucial to continue investigating the accident to clear up any ambiguities in the facts and to prepare in accordance with the various eventualities regarding Nichols' impending negligence claim.

Appendix

Alabama:

United States Cast Iron Pipe and Foundry Co. v. Fuller, 212 Ala. 177, 102 So. 25 (1924).

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