

BLURRED LINES: UNDERSTANDING THE APPLICATION OF FLORIDA'S WORKERS' COMPENSATION IMMUNITIES

By Reinaldo Alvarez and Shana P. Nogues

Florida's workers' compensation statute provides the exclusive remedy for job-related injuries. However, its application depends on finding an employment relationship. The following article discusses when "vertical" relationships between contractors and subcontractors, and "horizontal" relationships among subcontractors, will be deemed to create an employment relationship requiring an injured employee to use the workers' compensation system rather than suing in tort.

Florida's workers' compensation law provides an important, yet complicated, remedy for employees who are injured on the job. The purpose of the workers' compensation statutes is "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer."¹ Florida's workers' compensation scheme protects both employers and employees by keeping costs down for employers, while providing swift treatment to injured employees. While tricky, Florida's workers' compensation statutes are important to understand for workers' compensation and liability attorneys, alike.

Under the exclusivity provision of Florida's workers' compensation statutes, an employee's only remedy against her employer for a job-related injury is provided within the workers' compensation scheme. Workers' compensation is supposed to be self-executing — an employee gets hurt on the job, the employer provides the medical care and attention the employee needs, and the employee goes back to work. In the *quid pro quo* scheme, the employee gives up her right to sue her employer in exchange for medical care and wage loss benefits; however, employment structures have become so complicated that it is sometimes difficult to identify the employer.

An example of a complicated employment structure is a contractor-subcontractor situation. In these circumstances a person can be considered an employee of multiple entities. In certain scenarios, an injured person may even be able to bypass workers compensation and seek remedies in tort. This type of employment structure often leads to blurred lines between workers' compensation and traditional tort liability.

The situations in which an employee may escape workers' compensation and sue in tort are governed by the Florida workers' compensation statutes and a complicated body of case law. To further the legislative intent of keeping on-the-job injuries within the realm of workers' compensation, the Florida workers' compensation statute has been amended to include vertical and horizontal immunity. The focus of this article will be on explaining vertical immunity and horizontal immunity and how they affect the line between workers' compensation and tort liability.

Statutes Governing Florida Workers' Compensation Immunity

Florida workers' compensation immunity is governed by sections 440.10 and 440.11, Florida Statutes. Section 440.10 requires contractors and subcontractors to secure workers' compensation insurance for their employees:

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Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38.²

In 2003, the Florida legislature amended Section 440.10 to include immunity between employers, persons, or entities in vertical privity with the injured worker's employer, known as "Vertical Immunity," and to provide for immunity between subcontractors, known as "Horizontal Immunity." The pertinent provisions are:

(b) In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

(c) A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. A subcontractor who is a corporation and

has an officer who elects to be exempt as permitted under this chapter shall provide a copy of his or her certificate of exemption to the contractor.

(d)1. If a contractor becomes liable for the payment of compensation to the employees of a subcontractor who has failed to secure such payment in violation of s. 440.38, the contractor or other third-party payor shall be entitled to recover from the subcontractor all benefits paid or payable plus interest unless the contractor and subcontractor have agreed in writing that the contractor will provide coverage....

(e) *A subcontractor providing services in conjunction with a contractor on the same project or contract work is not liable for the payment of compensation to the employees of another subcontractor or the contractor on such contract work and is protected by the exclusiveness-of-liability provisions of s. 440.11 from any action at law or in admiralty on account of injury to an employee of another subcontractor, or of the contractor, provided that:*

1. *The subcontractor has secured workers' compensation insurance for its employees or the contractor has secured such insurance on behalf of the subcontractor and its employees in accordance with paragraph (b); and*
2. *The subcontractor's own gross negligence was not the major contributing cause of the injury....*³

(Emphasis added.)

Vertical and Horizontal Immunity

Vertical and horizontal immunity are of particular interest to liability attorneys defending cases where an injury has been sustained in the course of a plaintiff's employment. Even when the defendant was not the plaintiff's employer at the time of the alleged injury, vertical and horizontal immunity may be a viable defense for the defendant. The body of case law that has developed around vertical and horizontal immunity is finicky, but, given the right circumstances, can insulate a defendant from liability, even when it is not his direct employee who has been injured; As a starting point, it is important to note that the responsibility of an entity to secure compensation is what gives the entity immunity from suit as a third-party tortfeasor: "His immunity from suit is commensurate with his liability for securing compensation – no more and no less."⁴

Vertical Immunity

Vertical immunity exists where there is a contractual relationship for a subcontractor to perform some of a general contractor's obligations under a contract. An entity must meet the definition of "contractor" and be considered an injured employee's "statutory employer" to be entitled to vertical workers' compensation immunity. The Florida Supreme Court has defined "contractor" as one who has a primary obligation under a contract which it passes on to another to perform.⁵ A contractor who sublets all or any part of its contract work is not only the employer of its own employees, but is also considered the statutory employer of the employees of the subcontractor to whom any part of the principal contract has been sublet.⁶

When a subcontractor provides workers' compensation benefits to its injured employees, "workers' compensation immunity applies not only to the subcontractor, but to the general contractor as well."⁷ Florida case law has clearly established that, under section 440.10, once there is a situation where a contractor

delegates a portion of its obligation to a subcontractor, the contractor is afforded workers' compensation immunity when an employee of the subcontractor is injured on the job and receives workers' compensation benefits.⁸ Thus, if an employee of a subcontractor who is injured on the job receives workers' compensation benefits, the workers' compensation benefits become his exclusive remedy.

In this situation the general contractor becomes the "statutory employer" of the subcontractor's injured employee.⁹ For example, in *Lingold v. Transamerica Insurance Company*,¹⁰ a general contractor was hired to build a residence and the contract required the general contractor to supply and install floor covering. The general contractor subcontracted the floor covering obligation of the contract to a flooring company. While on the job, an employee of the floor covering company was injured and subsequently received workers' compensation benefits from his employer, the floor covering company. The employee then filed suit against the general contractor for failure to provide a safe work environment. The general contractor moved for summary judgment on the basis of workers' compensation immunity, which was granted and affirmed by the Fifth District Court of Appeal. In affirming the summary judgment below, the appellate court stated that because the flooring company was performing part of the general contractor's obligation, the flooring company was a subcontractor to the general contractor; therefore, the general contractor was the statutory employer of the plaintiff and workers' compensation immunity applied to make workers' compensation the plaintiff's exclusive remedy.

An owner of property does not become a "contractor" simply by entering into a contract with a general contractor or subcontractor to perform work for the owner. The owner must have a contractual obligation that is being passed on to another to perform. For example, in *Batmasian v. Ballachino*,¹¹ a roofer was injured while working

on a roof at a shopping center. The injured worker sought workers' compensation benefits from the owner of the shopping center, arguing that the shopping center owner qualified as a "statutory employer" because the shopping center owner had contracted with a roofing company to perform repairs.¹² The Fourth District Court of Appeal concluded that the shopping center owner's leases with the shopping center tenants did not render the shopping center owner a "contractor" within the meaning of the workers' compensation act because he had not personally agreed by contract to perform the repairs undertaken by the injured worker's employer.¹³ The court noted that the owner "would qualify as a statutory employer if — apart from his lease obligation to maintain the premises, he had agreed by contract to perform the actual repairs, and then, in turn, he had subcontracted the repair contract to another."¹⁴

Although an owner of property is not automatically considered a contractor for the purpose of applying workers' compensation immunity, Florida courts have recognized that, where an owner assumes the role of a general contractor, he is entitled to workers' compensation immunity.¹⁵

Other cases have held that where a subcontractor is not performing part of the contractor's contractual obligation, workers' compensation immunity does not apply to the contractor. For example, in *Smith v. Mariner's Bay Condominium Association*,¹⁶ Armor Security was hired by a condominium association to provide security guards to patrol the association's premises. The plaintiff, a security guard slipped and fell while patrolling the premises.¹⁷ Following his injury, he received workers' compensation benefits from his employer, and then filed the subject lawsuit against the association. The defendant association moved for summary judgment, citing sections 440.10(1)(b), 440.11(1).¹⁸ The trial court granted the motion, finding the association "had provided sufficient evidence to show an implied-in-fact contract for security services between itself and the unit owners,

and that it had sublet that obligation to Armor Security, [the plaintiff's] statutory employer, which rendered the association immune from civil liability."¹⁹ The Third District Court of Appeal reversed the trial court's decision, finding that "[f]or the association to be a contractor (and thus the plaintiff's statutory employer) under section 440.10, it must show that it has a contractual obligation to provide security guard services to the unit owners, a portion of which it sublet to Armor Security."²⁰ The Third District also found that the association's obligation to provide security arose out of a statutory duty to maintain the property, which cannot form the basis for a statutory employer relationship under the Florida Workers' Compensation Act.²¹ The court noted that a statutory duty does not preclude protection under the Workers' Compensation Act; however, there must be a contractual obligation that is sublet to another party for the Act to apply.²²

Horizontal Immunity

Horizontal immunity is "the statutory immunity for claims brought by an employee of one subcontractor against another subcontractor."²³

The seminal illustration of horizontal immunity is contained in *Amorin v. Gordon*.²⁴ There, Novelle Gordon was killed in a truck accident, and his estate brought an action for negligence against Alfredo Amorin and his employer.²⁵ The accident involved a collision between dump trucks driven by Alfredo Amorin and Novelle Gordon while they both were working on a road widening construction project.²⁶ In addition to working on the same construction project, Gordon and Amorin were employees of different subcontractors of the same general contractor: Amorin worked for Jose Amorin, a sub-subcontractor for C&A Trucking, while Gordon worked for Harrack Trucking & Land Clearing, a sub-subcontractor for East Coast Earth Movers. Both C&A Trucking and East Coast Earth Movers were subcontractors for Elmo Greer & Sons, the general contractor. Moreover, Gordon was a leased employee from Central Leasing,

a service personnel management company, which was obligated to provide workers' compensation insurance for him.²⁷

Elmo Greer & Sons, as part of its contract with the Florida Department of Transportation, maintained workers' compensation coverage for its own employees. Gordon argued that this coverage did not extend to C&A Trucking or Jose Amorin, pointing out that the policy contract listed only Elmo Greer as the named insured.²⁸ Although the subcontract with C&A Trucking, and the sub-subcontract with Jose Amorin, required those companies to have workers' compensation policies, neither company obtained the required coverage.

At the trial court level, both sides filed motions for summary judgment relating to workers' compensation immunity.²⁹ At the motion hearing, the Amorins asserted that they were entitled to horizontal workers' compensation immunity, arguing that as long as the general contractor had the statutory obligation to obtain workers' compensation coverage or ensure that its subcontractors did so, all of the subcontractors, sub-subcontractors, and employees of those companies would be immune from tort liability for injuries related to the project.³⁰ In opposition, Gordon's estate argued that the companies that had not provided the required coverage could not assert the immunity, and challenged the constitutionality of the workers' compensation statute.³¹

The trial court granted partial summary judgment for the Amorins and declined to consider the constitutional challenge. In addressing the applicable immunity provisions of Florida's workers' compensation statutes, sections 440.10(b) and (e), the Fourth District Court of Appeal held that Elmo Greer & Sons was the statutory employer of the Amorins; therefore, because C&A Trucking and Jose Amorin both failed to obtain workers' compensation coverage, Elmo Greer & Sons was responsible for providing it.³² The court also noted that Elmo Greer & Sons' policy contemplated such a scenario:

The policy that Elmo Greer maintained through New Hampshire Insurance allowed for just that. That policy, in pertinent part, state[d]: This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. All your officers and employees engaged in work covered by this policy; and
2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as a premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.³³

By construing the policy to refer to subcontractors who did not maintain their own workers' compensation policies, the Fourth District affirmed that the Amorins were entitled to horizontal immunity.³⁴ The court further found that the statutory immunities do not violate the Constitution.³⁵

Conclusion

This article has addressed vertical and horizontal immunities under Florida's workers' compensation statutes. These immunities apply only when the employers have fulfilled their duty to secure compensation coverage

and in certain scenarios where there is a contractor-subcontractor relationship. Only a small number of cases will involve an immunity concern and, normally, the employer/employee relationship is not difficult to determine. As employment structures become more complicated, however, it may become more difficult to decipher who may be responsible for an employee's injuries. Given the increasing convolvement of employment relationships, it will also become more difficult to determine how to address an injured person's rights to go outside of workers' compensation to seek remedies in tort. The contractor/subcontractor scenario will continue to cause blurred lines between workers' compensation and liability. To accurately advise clients, close attention needs to be paid to a contractor's contractual obligations and whether that contractual relationship or a portion of it was delegated to another to perform. The establishment of a statutory employer relationship will make all of the employees of the subcontractor employees of the general contractor, which will in turn initiate the detailed and subjective analysis to determine whether an immunity applies.

¹ § 440.015, Florida Statutes.

² § 440.10 (1)(a).

³ § 440.10 (1) (b)-(e) (emphasis added).

⁴ *Jones v. Florida Power Corp.*, 72 So. 2d 285, 287 (Fla. 1954).

⁵ *Id.*

⁶ *Woods v. Carpet Restoration, Inc.*, 611 So. 2d 1303 (Fla. 4th DCA 1992).

⁷ *Fred G. Wright, Inc. v. Dennis Edwards*, 642 So. 2d 808 (Fla. 2d DCA 1994).

⁸ *See Abernathy v. Employers Ins. of Wausau*, 442 So. 2d 953 (Fla. 1983); *Walker v. United Steel Works, Inc.*, 606 So. 2d 1243 (Fla. 2d DCA 1992); *Dempsey v. G & E Const. Co.*, 556 So. 2d 426 (Fla. 4th DCA 1989); *Lingold v. Transamerica Ins. Co.*, 416 So. 2d 1271 (Fla. 5th DCA 1982).

⁹ *Matchkavitz v. L. C. Boggs Indus., Inc.*, 407 So. 2d 910, 912 (Fla. 1981) ("Section 440.10 establishes the concept of "statutory employer" for contractors who sublet part of their work to others."); 416 So.2d 1271 (Fla. 5th DCA 1982).

¹⁰ 416 So.2d 1271 (Fla. 5th DCA 1982).

¹¹ 755 So.2d 157 (Fla 4th DCA 2000).

¹² *Id.*

¹³ *Id.* at 158 (citations omitted).

¹⁴ *Id.* (citations omitted).

¹⁵ *See, e.g., Sotomayor v. Huntington Broward Assocs.*, 697 So. 2d 1006, 1007 (Fla. 4th DCA 1997) (citing *Ramos v. Univision Holdings, Inc.*, 655 So. 2d

89 (Fla. 1995)); *Croon v. Quayside Associates, Ltd.*, 464 So. 2d 178 (Fla. 3d DCA 1985) (disapproved of on other grounds by *Ramos v. Univision Holdings, Inc.*, 655 So. 2d 89 (Fla. 1995)).

16 789 So. 2d 1228 (Fla. 3d DCA 2001).
17 *Id.* at 1229.

18 *Id.*

19 *Id.*

20 *Id.* (citing *Jones v. Florida Power Corp.*, 72 So. 2d 285, 289 (Fla. 1954); *Woods v. Carpet Restoration, Inc.*, 611 So. 2d 1303, 1304 (Fla. 4th DCA 1992); and *Roberts v. Gator Freightways, Inc.*, 538 So. 2d 55 (Fla. 1st DCA), approved by 550 So. 2d 1117 (Fla. 1989)).

21 *Id.* at 1230.

22 *Id.*

23 *Ramcharitar v. Derosins*, 35 So. 3d 94, 96 (Fla. 3d DCA 2010); *Amorin v. Gordon*, 996 So. 2d 913 (Fla. 4th DCA 2008).

24 996 So. 2d 913 (Fla. 4th DCA 2008).

25 *Id.*

26 *Id.* at 914.

27 *Id.* The decision notes that funeral expenses and workers' compensation death benefits were paid to Gordon's estate by Zurich American Insurance Company, the workers' compensation carrier for Central Leasing.

28 *Id.*

29 *Id.* at 915.

30 *Id.*

31 *Id.*

32 *Id.* at 916.

33 *Id.*

34 See *id.*

35 *Id.* (reversing the partial summary judgment and remanding to the trial court with instructions to enter summary judgment on behalf of the Amorins).

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