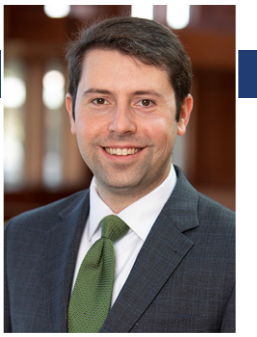
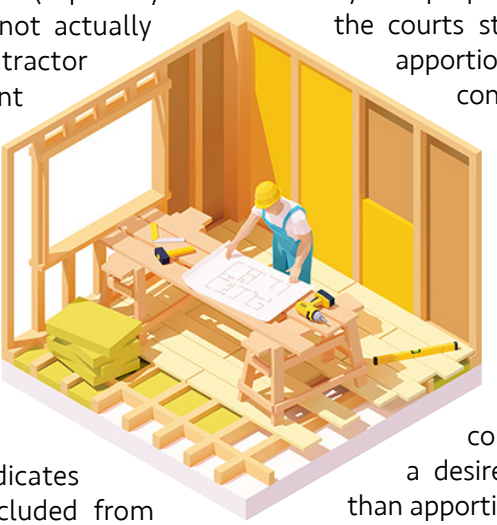


The Evolving Landscape of a General Contractor's Non-Delegable Duty

By (l to R) Randell H. Rowe, IV, and Matthew Greetham

For most construction projects in Florida, a property owner will hire a general contractor to handle the job. Although the contractor's role will vary depending on the contractual terms, for most projects (especially the larger ones) a general contractor may not actually self-perform any work. Instead, the contractor will hire subcontractors with different specialty licenses to perform different aspects of the work – concrete, roofing, HVAC, etc. If the owner later sues the contractor for defective work, the general contractor may argue that, because its subcontractors are the ones who performed all the actual work, all damages should be apportioned to those subcontractors.



However, an evolving body of law indicates that a general contractor may be precluded from apportioning fault due to its non-delegable duty of supervision associated with its contract for work. Early on, courts such as Second District Court of Appeal in *Mills v. Krauss* have found that a non-delegable duty may exist for a general contractor who undertakes construction work:

> [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[.][1]

The holding of *Mills* was later supplemented by other cases finding a non-delegable duty associated with the general contractor's supervisory work.[2] A general contractor's duties are also set forth in various statutes, which impose supervision, direction, management, and control requirements for a 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 non-delegable duties, the question remains whether or not a general contractor may apportion fault to its subcontractors to reduce damages assessed against it. General contractors often assert a *"Fabre"* defense[3] asking the Court to apportion fault to subcontractors under Florida Statutes § 768.81. Although certain non-construction cases have held that assignment of liability is improper when a party has a non-delegable duty,[4] the courts still have not directly addressed whether apportionment is proper in the construction defect context.

However, the newly formed Sixth District Court of Appeal recently issued a decision in *Pickell v. Lennar Homes, LLC*, where in a footnote 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]."[5] *The Pickell* decision may reflect a desire to apply post-judgment setoffs rather than apportion fault in cases involving contractor non-delegable duties.

A general contractor's non-delegable duty may also preclude the contractor from asserting common law indemnity claims against its subcontractors. The applicable law governing common law indemnity requires that the person seeking indemnity (in this case, the general contractor) must be "wholly without fault."[6] However, a Duval County trial court recently found that a general contractor was unable to bring common law indemnity claims in part because of its non-delegable duty.[7] Citing the statutes mentioned above, as well as *Mills v. Krauss* and other cases, the court held that a general contractor could "never be wholly without fault," and therefore, could not bring a claim for common law indemnity.[8] Although the trial court found the common law indemnity inappropriate for other reasons as well, the court listed the non-delegable duty as an "independent" basis to defeat the indemnity claim.[9]

The appellate courts still have not directly addressed a general contractor's ability to apportion fault or bring common law indemnity claims despite its non-delegable duties. However, recent decisions seem to place the full scope of liability on the general contractor and indicate a desire to limit the contractor's ability to pass off damages to others. Owners and subcontractors should be aware of this in bringing and defending against claims, and general contractors may want to modify their contractual language

or supervisory activities in order to account for this emerging trend.

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1. *Mills v. Krauss*, 114 So. 2d 817, 820 (Fla. 2d DCA 1959).
2. *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); *People's Tr. Ins. Co. v. Lamolli*, 352 So. 3d 890 (Fla. 4th DCA 2022).
3. *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).
4. *See, Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864 (Fla. 2d DCA 2010); *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 470 (Fla. 2005); *Walters v. Beach Club Villas Condo., Inc.*, 301 So. 3d 343, 348 (Fla. 3d DCA 2020).
5. *Pickell v. Lennar Homes, LLC*, 372 So. 3d 1279, 1280 n. 3 (Fla. 6th DCA 2023).
6. *E.g.*, *Florida Peninsula Ins. Co. v. Ken Mullen Plumbing, Inc.*, 171 So. 3d 194, 196 (Fla. 5th DCA 2015).
7. *Order Granting BH-FFS, LLC n/k/a Bradcorp Florida II, LLC d/b/a FFS-FKA Farris Floor Systems's Amended Renewed Motion for Summary Judgment as to Arlington's Common Law Indemnification Cause of Action*, Dk. # 2257, *22 Lantern, LLC, et al v. Arlington Construction Services, LLC*, No. 2016-CA-003849 (Fla. 4th Cir. Ct. Nov. 15, 2022).
8. *Id.*
9. *Id*.