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Negligence Is Not Enough: Litigating Third-Party Worker's Compensation Subrogation Claims Between Subcontractors

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What happens when one subcontractor (or its employee) causes an injury to an employee of another subcontractor? First, the injured employee is likely to go through the worker's compensation process provided in the Florida Statutes. The injured employee will receive a payout from the employer's workers' compensation insurance policy. Florida Statute § 440.11 dictates that the injured employee's employer is exclusively liable for his or her damages, and that third-parties—including injury-causing subcontractors—are immune from liability.

However, a claim may still be made against the injury-causing subcontractor, either directly by the injured employee or in a subrogation action by the insurance company. This narrow exception is carved out in Florida Statute § 440.10(1)(e), which provides that the injury-causing subcontractor may be responsible for the injured employee's damages if the "subcontractor's own gross negligence was . . . the major contributing cause of the injury." In other words, the fact that one subcontractor negligently caused an injury to another subcontractor's employee is not enough—a plaintiff must establish gross negligence.

To establish gross negligence, a claimant would need to establish three prongs to establish gross negligence: "(1) a composite of circumstances which, together, constitute a clear and present danger; (2) an awareness of such danger by the subcontractor; and (3) a conscious voluntary act or omission by the subcontractor that is likely to result in injury." *Pyjek v. Valleycrest Landscape Dev., Inc.*, 116 So. 3d 475, 477 (Fla. 2d DCA 2013). The mere knowledge of a possibility of injury is insufficient to establish gross negligence—there must be a likelihood of injury greater than "mere danger," amounting to a "clear and present danger." *Merryman v. Mattheus*, 529 So. 2d 727, 729 (Fla. 2d DCA 1988). Scenarios which create "a possibility of harm" establish ordinary negligence—but scenarios which create "a condition in which an accident would probably and most likely occur" establish gross negligence. *Moradiellos v. Gerelco Traffic Controls, Inc.*, 176 So. 3d 329, 336 (Fla. 3d DCA 2015).

Gross negligence often exists in cases where the subcontractor previously knew of a clear and present danger, and that danger caused an injury because the subcontractor consciously ignored it.

If handled by experienced attorneys, the facts of a case may lead to an early dismissal or a summary judgment at a lower cost than a typical personal injury claim—and unless a case's facts are particularly adverse, a favorable judgment may be obtainable at a lower cost than a nuisance-value settlement.

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