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### The Key to More Efficient Construction Projects is Collaborative Contracts

[Brian Perlberg](#), Executive Director, [ConsensusDocs](#)  
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According to the United States Bureau of Labor Statistics, the architecture, engineering and construction (AEC) industry is the only industry that has become less efficient and productive since 1964. Drones have become very popular among construction companies in the United States. Albert Einstein said that doing the same thing repeatedly and expecting different results is the very definition of insanity. The way we

traditionally contract, design and interact in the AEC industry fits this definition.

The AEC industry is one of the most important drivers of current and future success of the U.S. economy. It's a homegrown industry and probably still the best way for someone to start their own business. Construction jobs have a great home field advantage to create the infrastructure foundation we need for future success. But, if we don't get out of the old ways of doing things we will lose a golden opportunity.

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### Creating change

The AEC industry is fragmented and slow moving. The legal industry, which drives the structural relationships in construction contracts, is even slower to change. The combination has us stuck in the morass of contractual silos that create confrontation. Some wear this as a badge of honor. They follow a similar pathway that has been around for over a hundred years and have a mountain of case law dissecting the corpses of dead projects gone wrong interpreting this approach. A siloed approach is done in the name of protecting one party over another. But the studies demonstrate that this leads to busted schedules and costly overruns, followed by claims and litigation. Success in today's world requires communication and collaboration; fortunately, things are changing. However, they're changing too slowly.

Fueled by a combination of frustration with current results, a desire to improve and a technological revolution, the industry is trying new things. The most expensive and complicated construction per square foot, the hospital market, has been a market leader for change. The change comes from

searching for a better way of doing things. And that better way is through collaborating... really collaborating.

### **Improving the foundation**

A better foundation to build requires three things: trust, collaboration and innovation. If you don't have trust, you don't have anything. To build trust you need to be understood and act in accordance to what you've agreed to in letter and spirit. You can't say "general contractor" without saying "contract." The words that bind you matter, so use them wisely. Good legal writing is simply good writing. Don't try to address all contingencies up front, you are more likely to muddy the water. Vague and broad responsibilities that place all the risk on parties that are not able to control or mitigate the risk is the antithesis to trust. Ambiguities will naturally arise. Don't hide in your turtle shell when they do. Communicate constructively and avoid the blame game.

The common thread of failed projects is a lack of communication. Parties in a construction project often meet as strangers and leave as enemies. That's not a recipe for repeat business. Traditionally, contract structures funnel all information and most decisions to the architect. A better approach is to encourage parties to communicate directly and positively. Empowering people in-field who are most familiar with the information can be transformational. Creating a communication structure in which parties must talk to one another about timely issues before claims become intractable leads to less litigation. Early involvement by builders incorporates a practical constructability analysis that enhances overall project value. A race to the bottom to slash an impractical budget that becomes bloated with what might be labeling value-engineering (but is anything but) should be avoided.

### **The key is innovation**

Innovation is what is really driving a great opportunity to change. There has never been a time when there was a greater incentive to build more efficiently. Execution is so much better, safer and more valuable to the end-user when you maximize the impact of technology. To deploy these technology tools, it is necessary to build better teams early. Treat a project as an opportunity to learn and gain efficiency each step of the way, rather than to simply avoid the blame game. Then, and only then, can you yield the most out of the today's wave of incredibly powerful and time-saving construction technology devices. Today, the technology has arrived, is proven and is very powerful.

To build a better way, you must try something new. Structure your next project to truly collaborate by building trust, encourage the flow of timely information and embracing the maximum power of technology. Don't just pull out the same contract from the drawer and sign it without thought. Use the contract as opportunity to memorialize a business relationship that gets better results.

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**Construction  
Injuries/Fatalities: Best  
Practices in Handling  
OSHA Inspections**

[Charles E. Fombrun](#),  
Associate, and [Neal I. Sklar](#),  
Partner, [Peckar & Abramson,  
P.C.](#)



*According to the  
Occupational Safety and  
Health Administration  
(OSHA) in Washington,*

*almost 6.5 million people work at over 250,000 construction sites across the nation on any given day. In spite of increased safety measures, training and safety equipment on job sites, the number of construction worker fatalities has been on the rise in recent years, increasing 18 percent from 2011<sup>i</sup>. As a result, it is not surprising that the fatal injury rate for the construction industry has the highest national average across all industries. In light of this, OSHA conducted over Seventy-five thousand state and federal inspections in 2017 alone.<sup>ii</sup> With numbers like these, it wouldn't be considered unusual to receive a visit from an OSHA inspector on a jobsite especially since construction jobs have been historically documented as one of the country's most dangerous and accident-prone occupations.*

In fact, while the construction industry accounts for 4% of total employment in the United States, the industry alone accounted for 21.1% of private industry worker fatalities or one in five worker deaths in 2016.<sup>iii</sup> The top four causes of fatalities, referred to as "Construction's 'Fatal Four'", were (1) falls, (2) being stricken by an object, (3) electrocutions, and (4) getting caught in or compressed by equipment or structures.<sup>iv</sup> In 2017, the most frequently cited failures cited by OSHA as the primary cause of jobsite injuries in the construction industry were fall protection issues<sup>v</sup> and failing to meet scaffolding requirements.<sup>vi</sup> Contractors should keep these statistics in mind and maintain targeted safety procedures at their worksites in order to avoid potential injuries, fatalities, and corresponding violations through OSHA.

Due, at least in part, to the recent up-tick of accidents and fatalities in the construction industry, construction costs have been on the rise. The alarming rise in jobsite injuries and resulting adverse effect on Contractors' bottom line should serve as sufficient motivation for contractors to keep abreast of safety standards, best practices, OSHA guidelines and standard protocols to employ when OSHA comes knocking at your jobsite.

No one relishes the thought of OSHA combing through their jobsite in search of existing or potential violations. However, such inspections are routine especially once an injury or fatality is reported. For this reason, the steps taken prior to, during, and following an OSHA inspection will improve the chances of a successful outcome as well as improve safety on your jobsite. In general, an OSHA Compliance Safety and Health Officer may inspect your job site and/or the location of the incident once an injury or fatality occurs. If OSHA determines that its standards have been violated, it may issue a Citation and Notification of Penalty, which should detail the exact nature of the violation, the necessary corrective action and any associated penalties. Before any of these steps occur, it is important to mitigate any potential negative outcomes resulting from OSHA's inspection by establishing a safety checklist and abiding by some "dos and don'ts" when an OSHA officer arrives at your site. It is also important to keep in mind that an improperly conducted inspection could be detrimental to your case. As a result, your employees should be intimately familiar with your written safety and health program and disciplinary program for rule violations. Moreover, your employees

should also be trained on wearing proper protective equipment, safely operating their tools, and be able to recognize and report safety hazards.

An OSHA inspection can involve interviews with employees and an inspection of contractor logs, records and written safety programs. Allowing an OSHA officer unfettered access to your jobsite, to your records, and to your employees may be problematic. OSHA has two mechanisms for conducting a legal inspection – voluntary consent or a valid search warrant. Since the OSHA inspector will rarely show up with a search warrant, you will likely have to decide whether to allow the OSHA inspection to take place or request that OSHA secure a valid search warrant. It is important to note, however, that requesting a warrant may naturally raise an inspector's suspicions and prompt a very "thorough" inspection once OSHA secures a warrant. A contractor's decision on whether to request a warrant should be balanced with its need for additional time to prepare and secure the jobsite.

An OSHA inspection can be expected following a fatality or catastrophic event or can be unexpected such as when OSHA inspectors show up on a worksite unannounced. Regardless of the reason that causes OSHA to request an inspection, you should keep in mind the following when it comes time for an inspection:

### **Inspection Do's**

- Designate someone to represent the company in the inspection who is familiar with OSHA procedures and requirements. Designating your attorney or safety consultant as your representative would allow you to properly delay the inspection until your representative can arrive on site.
- Verify the inspector's credentials and legitimate OSHA identification. You may even want to contact the local OSHA office to verify that the inspector works there.
- Always ask the OSHA inspector to identify the reason and scope of the inspection.
- Accompany the OSHA inspector at all times during inspection and take detailed notes of where the inspector goes and what the inspector says and does.
- If the inspector takes photos or videos, do so as well. Essentially duplicate what OSHA does during its inspection insofar as photos, measurements, or videos. If, for example, a contractor's measurement differs from the one taken by the OSHA inspector, that issue should be raised during the inspection and any discrepancies should be resolved.
- A representative should always be present during OSHA interviews of management personnel.
- Always be courteous to inspectors and maintain a cooperative tone.
- OSHA has a right to interview employees privately outside the presence of a company representative. Once such interviews are completed, you should conduct an interview of those same employees soon thereafter to determine what was discussed with OSHA, whether the employee(s) have relevant information and so that an appropriate record is kept in the event a future discrepancy in each interview is encountered.
- Seek the advice of legal counsel to ensure compliance with all applicable regulations while protecting your legal rights.

### **Inspection Don'ts**

- Do not allow an OSHA inspector to walk through a jobsite alone.
- While you should answer the OSHA inspector's questions, you should avoid volunteering information.
- Do not admit or concede with an OSHA inspector that a condition the inspector observes is an OSHA violation or deficiency. Such issues should always be thoroughly vetted with legal counsel. Always be mindful that what the contractor representative says during the inspection can and likely will be used against the contractor by OSHA.

- Do not argue or be hostile with the inspector so as to not undermine any potential defenses you may wish to invoke as part of the investigation. Moreover, doing so will not earn the company any goodwill with the OSHA inspector.
- If the inspector does not have a search warrant, do not immediately agree to provide any documents, records, or information. If the inspector has a search warrant, be sure to examine the warrant for express limitations on the areas, locations, or documents to be searched or produced and consult with your legal counsel to confirm compliance with the warrant.

Once the inspection has been completed, the OSHA inspector will hold a closing conference wherein he/she will review the investigation and findings with the contractor including violations found during the inspection. This presents a good opportunity for the contractor to discuss the OSHA investigator's findings and conclusions with management and safety personnel. Corrective action should be taken for any deficiencies that require remedial measures to avoid future accidents and repeat violations.

In certain situations, OSHA may be unable to find that your company has violated a specific OSHA standard. In situations like these, Congress enacted a "General Duty Clause", which generally states that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. To establish a violation under the General Duty Clause, it must be shown that (1) that condition or activity in the workplace presented a hazard to employees; (2) the cited employer or the employer's industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard."<sup>vii</sup>

At the heart of the general duty clause is the existence of a recognized and preventable hazard. Hazards that are not *reasonably foreseeable* by the employer will generally not support a general duty charge. For example, a contractor had a ten-person crew performing site cleanup at a worksite, which required the removal of a large rock. A foreman picked up the rock in a front-end loader and prepared to load it into a dump truck. The rock was larger than the bucket. The crew determined that in order to load the rock into the truck, it was necessary to remove the tailgate. The foreman lowered the bucket with the rock still inside to the ground, left the loader in idle, and went to remove the tailgate from the truck. A few minutes later, the rock fell out of the bucket, rolled over toward the truck and struck the foreman and fatally injured the truck operator. The contractor was cited for the injuries and fatality under the general duty clause, but the charge against the contractor was later vacated. It was determined that a recognized hazard (i.e. the hydraulic lift) is not established where the evidence shows that an accident could occur only under freakish or utterly implausible circumstances<sup>viii</sup>. In other words, it was a totally unexpected event, which could not have been prevented through any action of the employer. While the general duty clause uses broad language, it does not allow OSHA to cite an employer for occurrences that do not involve recognized hazards or are reasonably unexpected to occur. This is useful to keep in mind in the event of a general duty charge by OSHA that may not be consistent with current law.

**\*\*Please note that the information contained herein is intended for informational purposes only and not to provide legal advice. You should consult with your legal counsel if you have further inquiries or concerns.**

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## **OSHA Fatality Investigation – You are at Risk for Criminal Prosecution – Not Just Fines!**

[Patrick J. Veters](#), Partner, [Jones Walker LLP](#)

Not long ago, industrial accidents which resulted in death were not typically considered for criminal prosecutions; however those days are now long gone. Now, the potential for criminal prosecution of the company as well as its officers and directors hangs above like the proverbial sword of Damocles. In one case involving a multiple fatality accident, that threat hung over a company and its officers and directors for five years until federal prosecutors agreed to drop the criminal investigation. This article highlights the source of the risk of criminal prosecution will and lays out some simple and practical, but incredibly essential steps to take in response to the unfortunate event of any fatality – steps that must be planned

ahead and must be implemented immediately upon a fatal accident.

The comments of Dr. David Michaels, a recent Assistant Secretary of Labor for Occupational Safety and Health, speak volumes:

“It’s an unfortunate fact that monetary penalties just aren’t enough. We believe that nothing focuses the mind like the threat of doing time in prison, which is why we need criminal penalties for employers who are determined to gamble with their workers’ lives and consider it merely a cost of doing business when a worker dies on the job.”

Section 17(e) of the Occupational Safety and Health Act provides for a misdemeanor criminal penalty if an employer’s willful violation of an OSHA standard causes the death of an employee. Section 17(e) states:

“Any employer who willfully violates any standard, rule or order promulgated pursuant to Section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000.00 or by imprisonment for not more than six months, or by both.”

Further, pursuant to the Sentencing Reform Act of 1984, the criminal penalty for willful violations of the OSH Act which causes the loss of human life was amended to be punishable by fines up to \$250,000.00 for individuals and \$500,000.00 for organizations.

Besides the willful violations that can result from an employee’s death, employers also face possible prosecution for falsifying OSHA documents, providing advance notice of an OSHA inspection, lying during an OSHA proceeding, as well as violating an environmental statute like the Clean Air Act. In addition, the OSH Act does *not* preempt prosecutions under state criminal laws, such as manslaughter or negligent homicide, for work-related deaths and injuries. For instance, in California, the Bureau of Investigation is a part of Cal OSHA and they will conduct a separate criminal inquiry into a serious accident or a fatality. In the event the BOI determines that a safety standard was willfully violated, they will refer the matter for prosecution to the local District Attorney.

### **LESSONS TO BE LEARNED**

#### **1. Yes, it can happen to you!**

No employer ever anticipates being the subject of a criminal investigation as the result of an industrial accident. The company that waited five years to have the threat of prosecution lifted never had as much as a trash can fire in its one-hundred-and-fifty-year history prior to its fatal accident. With the changed OSHA landscape, however, every employer should have a standing protocol in place to retain and have legal counsel's "boots on the ground" as soon as possible after an incident. In addition to securing critical evidence, the presence of counsel will ensure that all communications between the client and its management will be protected under the Attorney Client Privilege. OSHA will routinely request copies of all communications both prior to and even following a serious incident in the hope of finding a "smoking gun." Of course, these communications are protected discussions when outside counsel is part of the communication. In addition, protected communications will promote greater transparency in discussions with management as an effort is made to ascertain the cause of an incident.

**2. Begin immediate coordination of defenses to OSHA citations, the inevitable wrongful death case, and most importantly, possible criminal prosecution.**

There will be many moving parts following a fatality investigation. It is critical that company's management coordinate with counsel so that the company speaks with one consistent voice and that all relevant parties are on the same page with respect to its legal strategy going forward. Many a case has gone astray as the result of the left hand not knowing what the right hand was doing!

**3. Management should never consent to being interviewed by OSHA without counsel present.**

OSHA uses "management interviews" to obtain favorable admissions that can be used against the company to impute "employer knowledge". The presence of counsel at management interviews is imperative and will ensure that management is properly prepared and that no deficient statements will be used against management at a later date. It will also limit the scope of the inquiry from expanding to unrelated matters.

In conclusion, an aggressive proactive response immediately after the institution of an OSHA fatality investigation will ensure that you are in the best possible position to defend yourself in the event criminal prosecutors ever come knocking on your door.

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**Gain a Competitive Advantage by Promoting "Soft Skills"**  
[Donald A. Velez](#), Of Counsel, [Smith, Currie & Hancock LLP](#)

The construction industry is challenging in the best of times. In the current and foreseeable tight labor market companies need to gain every competitive advantage to attract and retain quality personnel. Personnel issues frequently take a back seat to bottom line concerns, but they can lead to reduced productivity and employee turnover that results in disruption and lower profits.

In a tough environment, firms must implement personnel strategies that incorporate "soft skills" to help teams focus,



increase productivity, and reduce turnover. Managers need to hire and identify employees with superior soft skills and encourage all employees to develop them. In the end, companies can leverage these tools to create a winning culture that benefits the business and its employees.

### **What are Soft Skills?**

Soft skills are about creating a functional company culture where good processes lead to excellent results.

- **Communication:** Superior communication increases productivity, avoids the need for expensive corrections, and improves employee satisfaction. Managers should provide overall goals and clear directives, be conscious of tone, and communicate frequently but concisely.
- **Conflict management:** Conflicts frequently arise within teams, and teaching employees how to handle disagreements in a professional manner allows them to focus on the company's goals. Employees who resolve conflicts save time and money.
- **Collaboration:** Employees who effectively collaborate with others understand their role and complement others. Collaborators help the team obtain quick and effective results.
- **Confidence:** Confident employees affirmatively promote the firm's best interests and believe their input has value. They can accept feedback and implement course corrections. Insecure employees look out for themselves first, which adversely affects results, morale, and effort.
- **Critical thinking:** Superior employees quickly identify issues and devise practical solutions that result in greater productivity and higher profits.

### **How to Develop and Encourage Soft Skills**

Leaders must receive training on communication, listening and offering effective feedback, and motivating others. When employees are effective, they must be recognized and promoted. When employees misstep, it should be addressed immediately, and they must be instructed on how to improve.

Communication training should address type, timing, and frequency of communication, as well as content and tone. Openly identify the preferred type of communication for different types of situations, e.g., group meetings, one on one discussions, voice calls, text, and email. Encourage teams to communicate frequently, but demand that they stay on task and avoid wordiness.

When a communication mode and/or tone works, recognize and encourage it. When a mode misfires or when directives were unclear, identify the issue and address it. For example, one might use more effective language, more appropriate timing, and/or a different mode of transmission. Communication is an ongoing process and requires constant small corrections. Non-verbal communication (body language) must also be addressed because it affects recipients in important, but less obvious ways. For instance, if a manager speaks with their arms crossed and uses a dictatorial tone, employees stop listening and ultimately shut down over time. Identify non-verbal cues and provide employees with guidance to create more effective and inviting discourse.

Conflicts frequently arise, and the construction industry has a "tough guy" reputation. Conflict can lead to improvements on a project, but management must encourage employees to raise issues and immediately address problems transparently. Thank employees for raising issues and let them know how the issues were resolved. Over time, employees will feel empowered to discuss potential problems, and managers will learn to relay solutions up and down the chain of command.

Collaboration really means that each employee's strengths and contributions are incorporated to maximize the team effort. If the firm's managers discuss the employees' contributions with them,



the employees will more readily accept their directives and work harder because they will feel appreciated.

Confidence is gained, and critical thinking is encouraged, through good results and specific feedback. When an employee achieves a good result or has a great idea, the firm's leaders should recognize their specific contribution. Overly general praise makes other employees jealous and feels less genuine. Specific recognition is more authentic and less susceptible to claims of favoritism.

Soft skills are increasingly important in these times, and with the upcoming generation of employees, firms must recognize and use soft skills to be competitive and to attract and retain the best employees.

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### **The Completed and Accepted Doctrine: When the Majority Rule Becomes the Minority**

[Raina L. Richter](#), Of Counsel, and [Michelle Beth Rosenberg](#), Associate, [Pepper Hamilton LLP](#)

The "Completed and Accepted Rule," or the "Completed and Accepted Doctrine," is a judicially created doctrine that is said to have originated in the United States with the 1919 Connecticut case *Howard v. Redden*, in which a

contractor was held to be not liable to a third-party passerby who was struck by a faulty cornice after completion and acceptance of the work by the owner.<sup>ix</sup> The stated reasoning for this rule is a lack of proximate cause due to "a break in the causal connection between the contractor's negligence and the injury."<sup>x</sup>

Although the Completed and Accepted Doctrine was adopted by the majority of jurisdictions as late as the 1950s, it is now the minority rule.<sup>xi</sup> Currently, 21 states still permit the application of some form of the doctrine, including Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Virginia and Wisconsin.

#### **A. The Doctrine**

The Completed and Accepted Doctrine provides that a building or construction contractor is not liable for injury to a third-party person as a result of the condition of the work after completion of the work and acceptance by the owner, even though the injury or damage was due to the contractor's negligence in performing the work or the contractor's failure to properly carry out the contract.<sup>xii</sup>

The doctrine relieves a contractor of liability to injured third parties caused by a patent defect after control of the completed premises has been turned over to the owner. Generally, the doctrine is limited to those situations where the defect is so obvious, open or “patent” that the owner could have discovered and remedied it.<sup>xiii</sup> The doctrine does not extend to latent or concealed defects.<sup>xiv</sup> Furthermore, under this doctrine, the work of the contractor must be fully completed and accepted before the owner becomes liable and the contractor is exonerated for injuries to third parties caused by the defective work.<sup>xv</sup> As a result, the doctrine does not apply when there is, in fact, no acceptance of the work.

## **B. Rationale for Completed and Accepted Doctrine**

The rationale for the Completed and Accepted Doctrine is that, by occupying and taking possession of the work, the owner deprives the contractor of the opportunity to rectify its wrong, and therefore there is a lack of causal connection between the contractor’s conduct and the third person’s injury.<sup>xvi</sup> Before accepting the work as being in full compliance with the terms of the contract, the project owner is presumed to have made a reasonably careful inspection thereof and to know of its defects.<sup>xvii</sup> Therefore, if the owner takes the project in a defective condition, he accepts the defects and the negligence that caused them as his own and, thereafter, “stands forth as their author.”<sup>xviii</sup> Not only does this doctrine provide an affirmative defense for contractors as to patent construction defects, but it has been applied to design professionals as well for patent defects in their designs.<sup>xix</sup>

Additionally, the doctrine is based on the concept that, although the contractor remains liable to the owner through privity of contract after completion and acceptance of the work, the contractor’s liability does not extend to third persons because there is no similar privity of contract between the contractor and third persons.<sup>xx</sup>

## **C. Exceptions to the Rule**

The Completed and Accepted Doctrine is conditioned upon a number of exceptions such that the exceptions nearly swallow up the rule.<sup>xxi</sup> One common exception is that the Completed and Accepted Doctrine does not apply when there is, in fact, no acceptance by the owner.<sup>xxii</sup> Lack of acceptance removes the presumption that the owner made a reasonably careful inspection of the property and therefore knows of its defects. However, acceptance need not be formal, and cases will look to various factors, such as whether (1) the owner or its agent reasserted physical control over the premises or instrumentality, (2) the work was actually completed, (3) the owner expressly communicated an acceptance or release of liability, or (4) the owner’s actions permit a reasonable inference that the work was accepted.<sup>xxiii</sup>

Another exception is known as the “imminently dangerous exception,” which imposes liability on the contractor after acceptance when (1) the defect is imminently dangerous to others, (2) the defect is so hidden that a reasonably careful inspection would not reveal it, and (3) the contractor knows of the defect, but the owner does not.<sup>xxiv</sup> Essentially, under this exception, a hidden (or “latent” defect) is not covered by the doctrine.<sup>xxv</sup>

Under another limitation, the doctrine applies only when the contractor has no discretion and merely follows the plans and specifications provided by its employer.<sup>xxvi</sup> The Arizona Court of Appeals noted that, “If the contractor is hired to exercise its discretion, special skills, and knowledge to prepare a design, and the owner does not control the design details, the contractor cannot invoke the rule.”<sup>xxvii</sup> This would appear to create an exception for design-build or EPC contractors that furnish their own designs and plans. However, to the extent that an owner provides even preliminary designs or specifications that a contractor must follow, the doctrine should still apply.

## **D. The Majority Rule (Foreseeability Doctrine)**

The “Foreseeability Doctrine,” or the “Modern Rule,” has replaced the Completed and Accepted Doctrine and become the majority.<sup>xxviii</sup> The Foreseeability Doctrine provides that a building or

construction contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion of the work and its acceptance by the owner, when it was reasonably foreseeable that a third person would be injured by the work due to the contractor's negligence or failure to disclose a dangerous condition known to the contractor.<sup>xxix</sup>

The Foreseeability Doctrine stems from products liability law, imposing liability for negligence on manufacturers of products based on the duty of care owed to the ultimate user of the product if “the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made.”<sup>xxx</sup>

In applying the Foreseeability Doctrine to hold contractors liable for injury to third parties, courts have cited to the *Restatement (Second) of Torts* section 385, which states “One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.”<sup>xxxi</sup>

For example, one Iowa court held that a contractor remains liable even after termination of the contractor's work and even if the possessor of land is under a duty toward the person injured to discover the condition created by the contractor, as expressed in *Restatement (Second) of Torts* section 384.<sup>xxxii</sup>

#### **E. Doctrine Abolished in Many States**

More than 30 states have abolished the Completed and Accepted Doctrine, including – ironically – Connecticut in 1977.<sup>xxxiii</sup> In *Coburn v. Lenox Homes, Inc.*, the state supreme court effectively reversed its landmark 1919 decision in *Howard v. Redden* and concluded that a contractor could be held liable to an injured third party, even though the contractor's negligent work had been completed and accepted by the owner.<sup>xxxiv</sup> *Coburn* instead adopted the reasoning of the Foreseeability Doctrine, which Connecticut now follows.<sup>xxxv</sup>

Texas abandoned the Completed and Accepted Doctrine in 1962, noting that the exceptions “have largely emasculated the rule.”<sup>xxxvi</sup> The Texas Supreme Court stated that the doctrine produces a harsh and unsound approach to the assessment of liability. It explained:

The rule eventually becomes enveloped by complex exceptions to cover such situations as nuisance, hidden danger, and inherently dangerous conditions. The result would be that in each case, after having first decided that there was an acceptance of the work, we would then have to decide issues involving all the various exceptions to the rule and in case any exception was found applicable, the basic issues of negligence and proximate cause would still remain for consideration. We believe that outright rejection of this oft-repudiated and emasculated doctrine would restore both logic and simplicity to the law.<sup>xxxvii</sup>

Arkansas adopted the Completed and Accepted Doctrine in 1910,<sup>xxxviii</sup> but abolished it in 1999, stating:

[T]he accepted-work rule has been thoroughly criticized as anachronistic and has provided unwarranted exceptions to general negligence principles. It has been said to have provided harsh results and many exceptions have been adopted to ameliorate such harshness . . . . From our review of the substantial legal authority on the subject, we believe the better-reasoned view is that the

accepted-work doctrine is both outmoded and often unnecessarily unfair in its application. We believe it would be a mistake to continue to apply a doctrine based upon privity of contract when the third party's injury is foreseeable.<sup>xxxix</sup>

Finally, the Montana Supreme Court criticized the doctrine's harsh results, stating that it

has the undesirable effect of shifting responsibility for negligent acts or omissions from the negligent party [the contractor] to an innocent person [the owner] who paid for the negligent party's services . . . based on the legal fiction that by accepting a contractor's work, the owner of property fully appreciates the nature of any defect or dangerous condition and assumes responsibility for it.<sup>xl</sup>

The court concluded that, in reality, the opposite is usually true, *i.e.*, that contractors, whether building contractors or architects, are hired for their expertise and knowledge.

Pepper Hamilton's Construction Practice Group has an unparalleled record of resolving complex construction disputes and winning complex construction trials. Our litigation experience – and success – informs everything we do, including translating into better results in our contract drafting and project management. Our lawyers counsel clients on some of the biggest, most sophisticated construction projects in the world. With more than 20 lawyers — including 13 partners who all have multiple first-chair trial experience — and a national network of 13 offices, we have the depth and breadth to try cases of any complexity, anywhere at any time. For more information about Pepper's Construction Practice, visit [www.constructlaw.com](http://www.constructlaw.com).

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<sup>i</sup> *The Surprises in AGC's New Study of Construction Fatalities*, Engineering News Records, July 26, 2017.

<sup>ii</sup> <https://www.osha.gov/oshstats/commonstats.html>.

<sup>iii</sup> Department of Labor, *Bureau of Labor Statistics*.

<sup>iv</sup> <https://www.osha.gov/oshstats/commonstats.html>.

<sup>v</sup> Fall protection is regulated by 29 CFR 1926.501.

<sup>vi</sup> Scaffolding requirements are regulated by 29 CFR 1926.451.

<sup>vii</sup> 29 U.S.C. § 654(a)(1).

<sup>viii</sup> *Kinsley Constr., Inc.*, 21 O.S.H. Cas. (BNA) ¶1372 (O.S.H.R.C.A.L.J. Oct. 12, 2005).

<sup>ix</sup> *Howard v. Redden*, 107 A. 509, 511 (Conn. 1919).

<sup>x</sup> *Id.* “Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof and to know of its defects; and if he takes it in the defective condition, he accepts the defects and the negligence that caused them as his own, and thereafter stands forth as their author. When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe; and

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if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury.”

<sup>xi</sup> See *Seitz v. Zac Smith & Co.*, 500 So. 2d 706 (Fla. Dist. Ct. App. 1987); see also W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 104A, 723 (5th ed. 1984).

<sup>xii</sup> *Slavin v. Kay*, 108 So.2d 462 (Fla. 1958); *Roskowske v. Iron Mountain Forge Corp.*, 897 S.W.2d 67, 71 (Mo. Ct. App. 1995); see also Annotation, *Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of work; "completed and accepted" rule*, 74 A.L.R.5th 523 § 1a (2017).

<sup>xiii</sup> *Sanchez v. Swinerton & Walberg Co.*, 47 Cal.App.4th 1461, 1470-1471 (Cal. Ct. App. 1996).

<sup>xiv</sup> *Id.*

<sup>xv</sup> *Gonsalves v. Sears, Roebuck & Co.*, 859 So.2d 1207, 1209 (Fla. Dist. Ct. App. 2003).

<sup>xvi</sup> 74 A.L.R.5th 523 § 2a.

<sup>xvii</sup> *Sanchez*, 47 Cal.App.4th at 1466-1467.

<sup>xviii</sup> *Slavin*, 108 So.2d at 466. See also Par. 12.3, AIA A201 General Conditions (2017 ed.) (under which the project owner has the right to accept the contractor's work with defects and to negotiate a reduction in the contract price for that defective condition. Presumably, such an owner would also assume the risk of those known defects).

<sup>xix</sup> See *Easterday v. Masiello*, 518 So.2d 260 (Fla.1988) (architects and engineers of jail containing patent defect, on which inmate committed suicide by hanging, were relieved of liability after control was turned over to jail owner).

But see *Pierce v. ALSC Architects, P.S.*, 890 P.2d 1254 (Mont. 1995) (rejecting accepted work doctrine as a defense for an architect).

<sup>xx</sup> This rationale can be traced to the English case *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), which states that a contractor for the supply of mail coaches was shielded from liability for a third party's injuries because the contractor and the third party were not in privity of contract. In the United States, *Howard v. Redden* adhered to a similar rationale in holding that a contractor was not liable to a third-party passerby when struck by a faulty cornice, even though the contractor remained liable to the owner after completion and acceptance of the work. *Howard*, 107 A. at 511.

<sup>xxi</sup> *Lynch v. Norton Constr. Inc.*, 861 P.2d 1095, 1099 (Wyo. 1993); see also Keeton, *supra* note 3, at 723 (noting that the exceptions tended to swallow the rule).

<sup>xxii</sup> *Seitz*, 500 So.2d at 710.

<sup>xxiii</sup> *Blake v. Calumet Const. Corp.*, 674 N.E.2d 167 (Ind. 1996).

<sup>xxiv</sup> *Roskowske*, 897 S.W.2d at 71-72.

<sup>xxv</sup> See, e.g., *Easterday*, 518 So.2d at 260 (contractors continue to be liable for latent defects); *Bob v. Scruggs Co.*, 419 S.E.2d 100, 102 (Ga. Ct. App. 1992) (contractor not liable unless work constituted nuisance per se, was inherently or intrinsically dangerous, or was so negligently defective as to be imminently dangerous to others).

<sup>xxvi</sup> *Menendez v. Paddock Pool Constr. Co.*, 836 P.2d 968 (Ariz. Ct. App. 1991).

<sup>xxvii</sup> *Id.* at 980.

<sup>xxviii</sup> *Id.*

<sup>xxix</sup> 74 A.L.R.5th 523§ 2a; see *Foreline Sec. Corp. v. Scott*, 871 So.2d 906, 909 (Fla. Dist. Ct. App. 2004).

<sup>xxx</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1919).

<sup>xxxi</sup> *Minton v. Krish*, 642 A.2d 18, 21 (Conn. App. Ct. 1994).

<sup>xxxii</sup> *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699 (Iowa 1995).

<sup>xxxiii</sup> See 75 A.L.R. 5th 413 § 3 (2017).

<sup>xxxiv</sup> *Coburn v. Lenox Homes, Inc.*, 378 A.2d 599 (Conn. 1977).

<sup>xxxv</sup> The test is “would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?” *Coburn*, 378 A.2d at 603.

<sup>xxxvi</sup> *N. M. Hubbard, Inc. v. Gehring*, 360 S.W.2d 787, 790 (Tex. 1962).

<sup>xxxvii</sup> *Id.* at 791.

<sup>xxxviii</sup> *Memphis Asphalt & Paving Co. v. Fleming*, 132 S.W. 222 (Ark. 1910).

<sup>xxxix</sup> *Suneson v. Holloway Const. Co.*, 992 S.W.2d 79, 85 (Ark. 1999).

<sup>xl</sup> *Pierce*, 890 P.2d at 1262.