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Torts—Statutory Duty of Subcontractor

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did not pass upon a brand-new point of law, but rather re-affirmed previous cases so holding.[8]

Statutory Duty of Subcontractor

In an action by an employee of a general contractor against an excavating subcontractor, the latter impleaded the general contractor. The Court of Appeals, affirming the Appellate Division's dismissal of the third party complaint, *held* that the violation of the excavating contractor of statutory duty to provide shoring and bracing[9] rendered him an active joint tort-feasor, and as such not entitled to indemnification.[10]

At common law, even in the absence of express agreement to indemnify, a party guilty of passive negligence could implead a party actively negligent and recover from him the full amount of the judgment paid to the injured plaintiff.[11] Since the excavating contractor was no longer on the premises and the general contractor was in exclusive possession and control, the subcontractor claimed that he was at best only passively negligent, and thus entitled to indemnification.

In the *Semanchuk* case [12], which re-affirmed the holding of the *Walters* case,[13] the Court abolished the distinction between active and passive negligence for purposes of indemnity in cases involving violation of section 241 of the Labor Law. The Court in both cases held that the section imposed a positive command upon owners and contractors, violation of which rendered *both* active joint tort-feasors not entitled to indemnity. In the *Schwartz* case[14] the Court refused to extend the rule enunciated in the above cases to fields not expressly covered by section 241 of the Labor Law.

Regardless of whether or not a case involved violation of section 241 of

8. See Note 7 *supra*; *Gorham v. Arons*, 282 App. Div. 147, 121 N. Y. S. 2d 669 (1st Dep't 1953), *aff'd mem.* 306 N. Y. 782, 118 N.E. 2d 600 (1954).

9. N. Y. LABOR LAW §241 (6) The board of standards and appeals may make rules to provide for the protection of workmen in connection with the excavation work for the construction of buildings. . . . . 3 N. Y. OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS DEPT. OF LABOR §23-4.4. The sides of every trench excavation five feet or more in depth where . . . there may be procured an unsafe condition, shall be securely held by timber bracing. . . .

10. *Rufo v. Orlando*, 309 N. Y. 345, 130 N.E. 2d 887 (1955).

11. *Phoenix Bridge Co. v. Creem*, 102 App. Div. 354, 92 N. Y. Supp. 855 (2d Dep't 1905), *aff'd without opinion* 185 N. Y. 580, 78 N.E. 1110 (1906).

12. *Semanchuk v. Fifth Ave. & 37th St. Corp.*, 290 N. Y. 412, 49 N.E. 2d 507 (1943).

13. *Walters v. Rao Elec. Equip. Co.*, 289 N. Y. 57, 43 N.E. 2d 810 (1943).

14. *Schwartz v. Merola Bros. Construction Corp.*, 290 N. Y. 145, 48 N.E. 2d 299 (1943). The situation here involved some terrazzo bags piled on the sidewalk, a situation not expressly covered by section 241 of the Labor Law.

Labor Law, where there is an agreement or covenant expressing an intention to indemnify a party for his own negligence, such intention being expressed in clear and unequivocal terms, such agreement controls.[15]

The dissent, based on the minority opinion in the Appellate Division[16] refused to recognize defendant as an independent contractor. Not being an independent contractor, he was not subject to statutory duty; further, it has been held that where an agent follows the instructions of his master, he may recover from the latter where he has to pay a judgment to the injured plaintiff.[17]

Thus it seems that the decision in the instant case does not rest so much on the violation of the statute, as on the Court's finding that Orlando was an independent contractor. Since Orlando was found to have been actively negligent, he would not have been entitled to indemnity in any event.

Defamation per se

A cause of action in defamation per se in New York will be given a plaintiff where the publication about him, either directly or through innuendo, describes his behaviour as a sort which might be thought immoral, seditious or dishonest by a reasonable man. This is so because of the unfavorable reputation the injured party will incur among the people who read or hear the publication.[18] Such a plaintiff may well get into court, however, if he is described inaccurately as being in impecunious financial straits. The reason for this allowance seems to be that the resultant pity for him may turn to contempt and aversion in those who know him or of him.[19] If, however, a plaintiff is unable to fit himself into such a category, he must allege special damages resulting from a publication to get to the jury.

Thus a plaintiff's case was given to a jury where he was reported as campaign

15. *Thompson-Starret Co. v. Otis Elevator Co.*, 271 N. Y. 36, 2 N. E. 2d 35 (1936).

16. *Rufo v. Orlando*, 286 App. Div. 88, 141 N. Y. S. 2d 24 (1st Dep't 1955).

17. *Howe v. Buffalo, N. Y. & Erie R. R. Co.*, 37 N. Y. 297, 4 Trans. App. 249 (1867). But if only an employee, defendant should have defended on grounds that plaintiff's action was limited to recovery under the Workmen's Compensation Law. *Kincer v. Kincer*, 280 App. Div. 850, 113 N. Y. S. 2d 325 (3d Dep't 1952).

18. "A writing is defamatory—that is, actionable without allegation or proof of special damage—if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him." *Mencher v. Chesley*, 297 N. Y. 94, 75 N.E. 2d 257 (1947). Also defamatory per se is any writing which tends to disparage a person in relation to his office, trade, or profession. *Kleeberg v. Sipser*, 265 N. Y. 87, 191 N.E. 845 (1934).

19. *Katapodis v. Brooklyn Spectator*, 287 N. Y. 17, 38 N.E. 2d 112 (1941).