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MEMORANDUM

TO: [redacted]

FROM: Theron E. Fry

RE: BUILDING OWNER'S POSSIBLE EXPOSURE TO LIABILITY FOR WINDOW CLEANING

DATE: December 7, 1994

Owners of high-rise buildings provide services to their tenants, including washing the exterior of the building's windows. Window washing can either be contracted out to a third-party window washing company or performed by the building owner's own employees. If service is performed by employees of the building owner, the state's workers' compensation laws would come into play and limit the amount of damage recovery from the building owner by the employee and his family. Workers' compensation would not limit the building owner's liability for damages to third-parties who were injured due to the negligence of the building owner's employees, and such potential damages are virtually unlimited.

By contracting with a third-party window cleaning company, the building owner attempts to insulate himself from liability under the general rule that he is not responsible for harm caused by the independent contractor-window washing company. However, as set forth below, this attempt to limit the building owner's liability is not effective under most circumstances.

The remainder of this memorandum is summarized in the following outline:

I. Building Owner's Negligence

A. Ordinary Negligence

1. Failure to Provide a Safe Place to Work
2. Negligence in Selection of an Independent Contractor-Window Washing Company

B. Negligence Per Se - Violation of Statutory or Regulatory Duties

II. Vicarious Liability - Liability For Another's Negligence

A. Nondelegable Duty

B. Statutorily Imposed Nondelegable Duties

I. Building Owner's Negligence

Even though a building owner has hired an independent contractor to wash the building's windows, liability is often imposed upon the building owner contrary to the general rule of non-liability. The general rule is as follows:

> "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants [employees]." The Restatement (Second) of Torts § 409 ("the Restatement")

The Restatement is a codification of the general rules of law applied in the jurisdictions of all 50 states. Although The Restatement is not statutory law in any state, its various sections have been adopted by the courts of numerous states as judicial law and it states the prevailing view in a majority of the jurisdictions. The Restatement is the most scholarly, widely consulted, and often adopted codification of the law of negligence in existence.

A. Ordinary Negligence

Despite the general rule stated above that the building owner is not liable for the negligent actions of the window washing company or the window washing company's employees, ordinary negligence can be alleged and proved against building owners under the following two theories:

1. Failure to Provide a Safe Place to Work

Even though an independent contractor is hired to wash the windows, the building owner is under a duty to provide the employees of that independent contractor a safe place to work, and his failure to do so may amount to negligence. Even those actions which do not amount to violations of statutory or regulatory duties can be negligence. Some examples, although not by any means exclusive, are buildings that have either permanent or temporarily restricted access to the roof, thus not allowing all of the window washing equipment to be transported to the roof and utilized. The following cases are a few cases that deal with the imposition of

liability for the negligence of the building owner failing to provide a safe place to work:

> In Bellefeuille v. City and County Sav. Bank, 40 N.Y.2d 879, 357 N.E.2d 1000, 389 N.Y.S.2d 345 (N.Y., 1976), plaintiff was a window washer employed by a third party to wash the windows on the building owned by defendant bank. Plaintiff was allowed to proceed to trial upon his theory that the bank was negligent in covering the radiators inside the windows, thus preventing the window washers from having any place to attach their safety belt.
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> In Wear v. Metropolitan Jockey Club, 13 N.Y.2d 980, 194 N.E.2d 689, 244 N.Y.S.2d 780 (N.Y., 1963), plaintiff was injured after failing off a canopy that was in a deteriorated condition. Plaintiff recovered a judgment against the building owner because of his failure to provide the window washing company and plaintiff a safe place to work.
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> In Derrico v. Clark Equipment Co., 91 Ill.App.3d 4, 413 N.E.2d 1345 (Ill.App. 1 Dist., 1980), plaintiff, an employee of a window washing company, was allowed to proceed to trial upon his theory that the defendant building owner was negligent in providing a safe place to work due to the fact that oil had been spilled on the floor, thus causing plaintiff's ladder to slip and plaintiff to fall.
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> In Searcy v. Paul, 20 Mass.App.Ct. 134, 478 N.E.2d 1275, 69 A.L.R.4th 187 (Mass.App.Ct., 1985), the court upheld a $112,500 verdict for the plaintiff, owner of a cleaning service. The verdict was against the owner of the property, whose agent provided a defective ladder for plaintiff's use.

2. Negligence in the Selection of an Independent Contractor - Window Washing Company

A building owner is also exposed to a claim that he was negligent by selecting an untrained or unskillful independent contractor to wash windows. This rule of law is set forth as follows:

> "Negligence In Selection Of Contractor. An employer is subject to liability for physical harm to third persons for his failure to exercise reasonable care to employ a competent and careful contractor

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons." Restatement § 411

Clearly, this rule of law imposes liability upon a building owner if they hire an incompetent or unskillful window washing company. Although, there are no cases involving window washers under this section of the Restatement, the case of Salinero v. Pon, 124 Cal.App.3d 120, 177 Cal.Rptr. 204 (Cal.App. 1 Dist., 1981), interpreting § 416 of the Restatement, quoted below in section (B)(1), acknowledges that window washing on tall buildings involves certain special and identifiable risks. Common sense plus the same analysis employed by the court in Salinero, supra, clearly shows that window washing involves the types of risks contemplated by § 411(a) of the Restatement and therefore an affirmative duty exists upon building owners to select and employ only "competent and careful" window washing companies.

Additionally, the Restatement provides that:

"One who employs an independent contractor to do work which the employer should recognize is likely to create, during his progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions." Restatement § 413

Under this section, a building owner is liable if it both fails to provide for the safety of those bystanders exposed to potential harm from the negligence of the window washers and it fails to contractually require the window washing company to take the steps necessary for protection of the members of the public at large.

In the event that a bystander is injured due to the negligence of a window washing company, the above section affords some protection to the building owner whose contract with the window washing company requires that the window washing company follow the statutes and regulations designed to protect the public. If this provision is not in the contract and the building owner fails to

provide for the public's safety in some other way, the building owner may be liable to members of the public that are physically injured.

B. Negligence Per Se - Violation of Statutory or Regulatory Duties

Building owners are subject to negligence for their failure to comply with statutes and regulations intended to protect both window washers and members of the public at large. This negligence is different from the ordinary negligence set forth above because violation of the statute of regulation is considered to automatically be negligent and the building owner is then liable for all damages proximately caused by the violation of the statute or regulation. With ordinary negligence the jury must weight the building owner's conduct to determine if it violates a duty owed to others and thus is negligent conduct. Per se negligence would include a violation of OSHA regulations including those requiring building owners to have moveable platform tracks and tie-downs on the exterior of their buildings. Additionally, some states have statutes included within their respective labor codes requiring the presence of safety equipment along similar guidelines as the OSHA regulations.

The following is a sampling of cases where a window washing company's employee was allowed to pursue a lawsuit against the building owner based upon the building owner's negligence in failing to comply with state or municipal statutory safety requirements:

> Fedt v. Oak Lawn Lodge, Inc., 132 Ill.App.3d 1061, 478 N.E.2d 469, 88 Ill.Dec. 154 (Ill. App. 1 Dist., 1985) (anchor devices lacking);
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> Constantine v. Scheidel, 249 Iowa 953, 90 N.W.2d 10 (Iowa, 1958) (defective screw eye);
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> Petruk v. South Ferry Realty Co., 2 A.D.2d 533, 157 N.Y.S.2d 249 (N.Y.A.D. 2 Dept., 1956) (defective safety anchor bolt);
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> Pollard v. Trivia Bldg. Corporation, 291 N.Y. 19, 50 N.E.2d 287 (N.Y., 1943) (absence of safety devises for window cleaning);
>
> Hartford Acc. & Indem. Co. v. Schutt Realty Co., 210 Minn. 235, 297 N.W. 718 (Minn., 1941) (safety bolt improperly secured).

Fedt v. Oak Lawn Lodge, Inc., supra, is one of the few reported cases that actually states the amount of damages recovered. This case involved scaffolding that collapsed due to the

absence of anchoring devices injuring two window washers and killing a third. One of the surviving window washers settled his claim prior to trial for $350,000. The jury returned verdicts in favor of the other surviving window washer in the amount of $1,032,000 and in favor of the deceased window washer in the amount of $1,000,000. The accident in this case occurred in 1977 and the appellate court upheld the amount of the damage awards in April of 1985.

In Kessler v. Swedish Hospital Medical Center, 58 Wash.App. 674, 794 P.2d 871 (Wash.App., 1990), an employee of a window washing company brought suit against the building owner hospital seeking recovery for personal injuries received when he fell from the ninth story onto an adjoining roof while cleaning the exterior windows from a ladder placed on the outside ledge. The plaintiff's claim was based on the hospital's alleged violation of a state regulation which requires that in every building "having windows so constructed that it is usual and/or practicable for a person to stand on the sill in order to clean said window, there shall be installed window cleaner's safety anchors approved by the American Standard Association." The court found that the regulation did not apply because the hospital intended for the windows to be cleaned from the inside. The evidence showed that the architect had designed the windows to pivot vertically and to be cleaned from the inside, and the plaintiff's employer had directed the plaintiff to clean the windows from the inside. The court found that plaintiff "recognized the risk of washing windows from the outside, yet deliberately did so by placing a ladder on the ledge below the windows from which they could be washed."

II. Vicarious Liability - Liability of Statutory or Regulatory Duties

A. Nondelegable Duty

Vicarious liability is a liability of an employer for the acts of his employee. The general rule quoted at the beginning of this memorandum that a building owner is not liable for the actions of the independent contractor-window washer (§ 409 of the Restatement) is not applicable if the work he contracted out, window washing, is a nondelegable duty. Nondelegable duties are generally those which include substantial risk of injury.

> "One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of harm to others unless special precautions are taken is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the

> employer has provided for such precautions in the contract or otherwise." Restatement § 416

Under this section, the building owner would be liable for physical harm to members of the public at large because window cleaning presents a "peculiar risk of physical harm to others unless special precautions are taken." In Salinero v. Pon, supra, the apartment building owners were sued by the window washer who was injured when his fellow window washer mistakenly removed the ballast securing his boatswain's chair. Although recover was denied on other grounds, the court applied § 416 of the Restatement and stated:

> "We acknowledge certain special and identifiable risks associated with washing windows on tall buildings. Among these are the danger that window washers not adequately protected by means of safety devices or adequate attaching mechanisms would fall while working." Salinero v. Pon, supra, at 137.

Because window cleaning presents more than just a "peculiar risk," it involves a "special danger" the following section of the Restatement is also applicable:

> "One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Restatement § 427

If window washing is found to be inherently dangerous, § 427 of the Restatement allows the building owner to be held directly liable for the negligence of the window washing company or the window washing company's employees. This in effect completely does away with the general rule of no liability for the negligence of the independent contractor.

The comments and the illustrations following the codification of § 427 of the Restatement recognize that it would cover situations involving window washers. Comment C states as follows:

> "Likewise, the use of a scaffold in painting the wall of a building above the sidewalk involves a recognizable risk that the scaffold, paint brush or brush, or the painter

himself, may fall and injure someone passing below."

The first two illustrations state as follows:

> "1. A employs B, an independent contractor, to paint the wall of his building above the public sidewalk. In the course of the work, the workman employed by B drops his paint bucket, which falls upon C, a pedestrian, and injures him. The danger is inherent in the work, and A is subject to liability to C.
>
> "2. A employs B, an independent contractor, to paint the wall of his building above the public sidewalk. B erects his scaffolding at a level so low that C, a pedestrian walking along the sidewalk in the dark, runs his head against the corner of the scaffolding and is injured. This is collateral negligence and A is not liable to C.

The difference between the two illustrations above is that the injury in "1" is from a recognizable special danger in working on a building above a public sidewalk. In illustration "2", C was not injured due to any recognizable special danger associated with working on the side of a building above a public sidewalk, but was injured solely due to negligence attributable to the erection of a scaffolding at too low of a level.

Despite the above cited illustrations from the Restatement, the Michigan Court of Appeals recently held that window washing while on a scaffold suspended approximately forty feet above the ground was not inherently dangerous. Szymanski v. K Mart Corp., 196 Mich.App. 427, 493 N.W.2d 460 (Mich.App., 1992), aff'd on remand, 202 Mich.App. 348, 509 N.W.2d 801 (Mich.App., 1993). The court stated:

> "The activity performed by plaintiff in this case, washing windows forty feet above the ground while on a scaffold suspended from the side of a building, is activity that presents a possibility of serious injury unless special precautions are taken. However, as noted by plaintiff's expert at trial, any danger of serious physical injury from this activity could have been prevented by the use of well-recognized safety measures, i.e. safety belts and safety lines. The risk of injury was not inherent to the work being done, but was created by the failure to use well-recognized safety measures."

Mentioning both § 416 and § 427 of the Restatement, the Supreme Court of Missouri recently held in Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.2d 384 (Mo. 1991) that the inherently dangerous exception does not apply to employees of independent contractors covered by workers' compensation, thereby overruling Mallory v. Louisiana Pure Ice & Supply Co., 320 Mo. 95, 6 S.W.2d 617 (Mo., 1928) and cases following Mallory.

B. Statutorily Imposed Nondelegable Duties

> "One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions." Restatement § 424

This section of the Restatement codifies the rule of law that a building owner may not, by contract with a window washing company, relieve itself of liability to the employees of the window washing company or members of the public at large for the failure of the window washing company to provide safe devices or other safeguards that are by statute of regulations required to be provided by the building owner. The building owner remains liable for the failure to comply with OSHA regulations and state statutes.

Conclusion

As set forth above, a building owner's exposure can be in one of two broad categories. First, a building owner is liable for his own negligence either in the form of ordinary negligence or negligence presumed by the violation of statutory duty. Second, a building owner may be liable for the negligence of his independent contractor because window washing is clearly a specialized and risky business, thus making the duty to provide safeguards a nondelegable duty.

Most of the reported decisions do not include the amounts of damages awarded to various plaintiffs. However, building owners are a sophisticated group that can surely recognize their potential liability is virtually unlimited due to the massive injuries that a window washer or a member of the public can suffer including injures resulting in death.