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MASTER AND SERVANT—LIABILITY FOR INJURIES TO THIRD PARTIES: EMPLOYERS' VICARIOUS LIABILITY TO EMPLOYEES OF AN INDEPENDENT CONTRACTOR

Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445 (N.D. 1994)

I. FACTS

In 1984, Defendant-Appellee, ANG Coal Gasification Co. [hereinafter ANG], hired Ceramic Cooling Tower Co. [hereinafter CCT][1] to replace plastic tiles with ceramic tiles in the water cooling towers of its coal gasification plant in Beulah, North Dakota.[2] CCT was hired as an independent contractor.[3] At that time, Plaintiff-Appellant, Melvin Fleck, was an employee of CCT.[4]

Fleck's job at CCT included cleaning the interior of the cooling tower and removing the plastic tiles on the inside of the tower.[5] The working conditions inside the towers were very dirty and wet, tiles were coated with a slimy, black residue, left from the water that flowed through the towers, and the air was extremely humid.[6] Through their own testing, ANG discovered potentially harmful bacteria in the water and slime inside the towers.[7] Consequently, ANG provided CCT employees with surgical masks, slickers, boots, and gloves, and issued an internal memorandum stating that this gear should be worn whenever anyone, including CCT employees, worked inside the towers.[8] In addition, ANG personnel tested air samples to ensure there was sufficient oxygen inside the towers.[9] An ANG plant supervisor also periodically walked through the towers to check on the progress of the work.[10] CCT's construction manager required all CCT employees to wear the

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1. Brief for Appellant at 5, Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445 (N.D. 1994) (No. 940062). CCT is based out of Fort Worth, Texas. *Id.*

2. Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 446-47 (N.D. 1994). In 1984, ANG, a Delaware corporation, was the "project administrator" of the Beulah plant, having complete control over all construction and operations. Brief for Appellant at 5 n.3, *Fleck* (No. 940062). The plant was owned by Great Plains Gasification Associates, a North Dakota partnership formed by several foreign corporations. *Id.* at 4 n.2.

3. *Fleck*, 522 N.W.2d at 447. This fact was not disputed by the parties. *Id.*

4. *Id.* At the time of the accident, Fleck had been employed by CCT for about one week. Brief for Appellant at 5, *Fleck* (No. 940062). Because this case was an appeal from a summary judgment in favor of ANG, the North Dakota Supreme Court drew all factual inferences in favor of Melvin Fleck, and thus assumed the truth of his assertions. *Fleck*, 522 N.W.2d at 448. Therefore, the facts in this Comment are also presented in the light most favorable to Fleck.

5. Appellant's Brief at 5, *Fleck* (No. 940062).

6. Brief for Appellant at 5, *Fleck* (No. 940062). Fleck's supervisor described the air inside the towers as "clouds of fog." *Id.*

7. *Id.* at 7-8. ANG had microbiologists and laboratory personnel on staff who tested the water and slime in the towers "at least once, sometimes twice, every day." *Id.*

8. *Id.* at 6-8.

9. *Id.*

10. *Id.*

protective gear.[11] However, despite having a history of asthma, Fleck did not wear the required face mask.[12]

On July 30, 1984, Fleck suddenly lost consciousness while working with a crew inside one of the cooling towers.[13] Fleck was immediately taken to the plant's first aid station, where the incident was recorded as occupationally related.[14] The following day, Fleck was examined by a pulmonary and critical care specialist, who diagnosed Fleck's respiratory problems as asthma, rhinitis, and acute bronchitis.[15] Fleck received medication for his illness and was told to return in two months for a follow-up exam.[16] Fleck did not return for the follow-up exam, but did apply for and received workers compensation benefits for his injuries.[17]

In July, 1990, Fleck brought a personal injury action against ANG in the South Central Judicial District Court, Burleigh County, claiming that exposure to hazardous chemicals while working in ANG's cooling towers had caused him to develop occupational asthma.[18] The District Court granted ANG's motion for summary judgment, and also awarded costs to ANG.[19] The District Court dismissed Fleck's claim on three grounds.[20] First, the District Court held that ANG had not retained sufficient control over CCT's work to make it liable under section 414 of the *Restatement (Second) of Torts* (1965).[21] Second, the court held that the work being performed by CCT was not "inherently dangerous" so as to impose liability on ANG under section 427 of the *Restatement*, and it also did not involve a "peculiar risk" so as to impose liability on ANG under section 416 of the *Restatement*.[22] Lastly, the court held that

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11. Brief for Appellee at 10, Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445 (N.D. 1994) (No. 940062).

12. *Fleck*, 522 N.W.2d at 447.

13. Brief for Appellant at 2, *Fleck* (No. 940062).

14. *Id.* at 2-3. Fleck was examined by an ANG physician, who advised him that he had bronchitis and sent him home. Appellee's Brief at 13, *Fleck* (No. 940062).

15. Brief for Appellee at 13, *Fleck* (No. 940062). Fleck was examined by Dr. Nicholas Neuman at the Heart and Lung Clinic of Bismarck. *Id.*

16. *Id.* Fleck was prescribed anti-inflammatory medications for his rhinitis and bronchitis and his existing prescription for his previously-diagnosed asthma was reviewed. *Id.*

17. Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 447 (N.D. 1994).

18. *Id.* Fleck alleged that he was exposed to "arsenic, ammonia, chlorides, among other toxic chemicals and biological substances." Brief for Appellant at 1, Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445 (N.D. 1994) (No. 940062).

19. *Fleck*, 522 N.W.2d at 447. In its summary judgment motion, ANG asserted "that it had no duty to provide for Fleck's safety on the job, that there were no hazardous substances present in the towers, and that Fleck's injuries were not caused by any exposure while working at the plant." *Id.*

20. Brief for Appellee at 1-2, Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445 (N.D. 1994) (No. 940062).

21. *Id.*

22. *Id.*

ANG had not assumed a duty for Fleck's safety under section 324A of the *Restatement*.[23]

The North Dakota Supreme Court affirmed the District Court's decision, *holding* first that ANG had not retained such control over the work to be performed by CCT so as to create a duty on ANG to provide for Fleck's safety under section 414 of the *Restatement*.[24] Furthermore, and most importantly, the Court held that an employer cannot be held vicariously liable to its independent contractor's employees under sections 416 and 427 of the *Restatement*.[25] The scope of this Comment will be limited to the issue of whether an employer may be held vicariously liable to its independent contractors' employees under sections 416 and 427.

II. LEGAL BACKGROUND

A. DEVELOPMENT OF EXCEPTIONS TO THE GENERAL RULE OF EMPLOYER NON-LIABILITY

It has long been established that an employer is not vicariously liable for the torts of an independent contractor.[26] The most commonly accepted rationale supporting the rule is that an employer usually does not have the right to control the manner in which the work is performed, since it is the independent contractor's enterprise.[27] Thus, the independent contractor, rather than the employer, is responsible for preventing and distributing the risk.[28]

However, equally as established as the general rule are the rule's many exceptions.[29] An often quoted passage states: "Indeed it would

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23. *Id.*

24. *Fleck*, 522 N.W.2d at 449.

25. *Id.* at 454. The North Dakota Supreme Court also held that a prevailing party is entitled to recover the costs of taking depositions intended for use at trial, even though the action does not actually go to trial. *Id.* at 455. *See* N.D. CENT. CODE § 28-26-06(2) (1991) (providing for recovery of deposition expenses).

26. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 509 (5th ed. 1984).

27. *Id.*

28. *Id.* One of the exceptions to the general rule is when the employer does retain control over the manner in which the work is to be performed. *Id.* In such a case, the employer has a duty to exercise that control with reasonable care and may be held directly liable for a failure to do so under § 414 of the RESTATEMENT (SECOND) OF TORTS (1965).

29. The following are the exceptions to the general rule of employer non-liability contained in RESTATEMENT (SECOND) OF TORTS (1965): § 410 ("Contractor's Conduct in Obedience to Employer's Directions"); § 411 ("Negligence in Selection of Contractor"); § 412 ("Failure to Inspect Work of Contractor After Completion"); § 413 ("Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor"); § 414 ("Negligence in Exercising Control Retained by Employer"); § 414A ("Duty of Possessor of Land to Prevent Activities and Conditions Dangerous to Those Outside of Land"); § 415 ("Duty to Supervise Equipment and Methods of Contractors or Concessionaires on Land Held Open for Public"); § 416 ("Work Dangerous in Absence of Special

be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions."[30] These exceptions have generally developed as specific rules to deal with specific situations.[31] However, the primary argument underlying the development of these exceptions is that since the employer receives the ultimate benefit of the work, it is the employer's enterprise.[32] Thus, the employer should be the party responsible for any risk the enterprise creates.[33] The modern version of this "enterprise theory" further states that because the employer is usually closer to the consumer than the contractor, the employer is in a better position to bear the cost of the risk of the enterprise.[34] This cost usually constitutes the insurance necessary to distribute the risk, which the employer can directly pass on to consumers as a cost of business.[35]

As stated above, the exceptions to the general rule tend to apply in particular situations.[36] They can, however, be grouped into three general categories:

1. Negligence of the employer in selecting, instructing, or supervising the contractor;
2. Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff; and
3. Work which is specially, peculiarly, or inherently dangerous.[37]

Precautions"); § 417 ("Work Done in Public Place"); § 418 ("Maintenance of Public Highways and Other Public Places"); § 419 ("Repairs Which Lessor is Under a Duty to His Lessee to Make"); § 420 ("Repairs Gratuitously Undertaken by Lessor"); § 421 ("Maintenance of Structures on Land Retained in Lessor's Possession Necessary to Tenant's Enjoyment of Leased Land"); § 422 ("Work on Buildings and Other Structures on Land"); § 422A ("Work Withdrawing Lateral Support"); § 423 ("Making or Repair of Instrumentalities Used in Highly Dangerous Activities"); § 424 ("Precautions Required by Statute or Regulation"); § 425 ("Repair of Chattel Supplied or Land Held Open to Public as Place of Business"); § 426 ("Negligence Collateral to Risk of Doing the Work"); § 427 ("Negligence as to Danger Inherent in the Work"); § 427A ("Work Involving Abnormally Dangerous Activity"); § 427B ("Work Likely to Involve Trespass or Nuisance"); § 428 ("Contractor's Negligence in Doing Work Which Cannot Lawfully be Done Except Under a Franchise Granted to His Employer"); §429 ("Negligence in Doing Work Which is Accepted in Reliance on the Employer's Doing the Work Himself"). The first exception was created as early as 1876 in Bower v. Peate, 1 Q.B.D. 321, which held an employer liable when his contractor's excavation work undermined the plaintiff's building's foundation. RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965).

30. Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937) (citing HARPER ON TORTS § 292; RESTATEMENT (SECOND) OF TORTS §§ 410-29 cmt. b. (1965)).

31. RESTATEMENT (SECOND) OF TORTS § 409 cmt. b. (1965).

32. KEETON ET AL., *supra* note 26, at 509.

33. Edward J. Henderson, *Liability to Employees of Independent Contractors Engaged in Inherently Dangerous Work: A Workable Workers' Compensation Proposal*, 48 FORDHAM L. REV. 1165, 1175 (1980).

34. *Id.* at 1176-77.

35. *Id.*

36. *See* Henderson, *supra* note 33 and accompanying text (discussing exceptions to the general rule of non-liability of an employer of an independent contractor).

37. RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965).

This Comment will focus on two of the exceptions to the general rule that fall into the third category.[38] These exceptions are created in sections 416 and 427 of the *Restatement (Second) of Torts*.

Generally, sections 416 and 427 of the *Restatement (Second) of Torts* create exceptions to the general rule by making employers vicariously liable for the physical harm caused by their independent contractors when the work the contractors perform creates a "peculiar risk" to others, or is "inherently dangerous."[39] Specifically, section 416 imposes vicarious liability on the employer of an independent contractor when the employer should recognize that the work will create a "peculiar risk of physical harm to others unless special precautions are taken."[40] Section 427 holds the employer vicariously liable for physical harm to others caused by a contractor's negligence when the employer knows or should know the work is inherently dangerous.[41] Sections 416 and 427 are closely related,[42] and are, in essence, merely different ways of stating the same exception to the general rule of employer non-liability; that the employer will remain liable for injuries caused by risks which the employer should foresee when it enters into the contract.[43] The employer cannot shift the responsibility for such risks to an independent contractor.[44] The difference, if any, usually focuses on the *type* of risk.[45] Section 416 applies to work which creates a specific, known risk that should be guarded against, such as excavation of a street.[46] Section 427 applies to work that creates several possible hazards, such as the use of explosives.[47]

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38. *See* RESTATEMENT (SECOND) OF TORTS §§ 416, 427 (1965).

39. *Id.*

40. *Id.* § 416. Section 416 of the Second Restatement provides:

> [O]ne who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical 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.

Id.

41. *Id.* § 427. Specifically, § 427 provides:

> [O]ne 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.

Id.

42. *Id.* § 416 cmt. a.

43. RESTATEMENT (SECOND) OF TORTS § 416 cmt. a.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

B. MAJORITY AND MINORITY VIEWS REGARDING SECTIONS 416 AND 427

In jurisdictions that have adopted both sections 416 and 427 of the *Restatement*, one question courts have had to determine is whether the word "others" used in those sections includes the employees of the independent contractor.[48] A clear majority position has emerged from the courts that have considered this issue.[49] Most courts hold that employees of independent contractors are not included under the exceptions to the general rule of employer non-liability created by sections 416 and 427 of the *Restatement*.[50] The most widely accepted reason for not allowing the employees of independent contractors a cause of action against the employer is the existence of workers compensation benefits.[51] Although the official Comments to the *Restatement* do not address the issue, many courts have used a Special Note in the 1962 Tentative Draft to the *Restatement* as persuasive authority to support the rationale that independent contractors' employees were not intended to be included under sections 416 and 427.[52]

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48. *See infra* notes 50 and 54 and accompanying text (citing the jurisdictions that have adopted the majority and minority views, respectively). This question of whether "others" includes employees of independent contractors applies to many exceptions to the general rule listed in §§ 410-29 of the RESTATEMENT (SECOND) OF TORTS, because they contain the same language. *See* Schlenk v. Northwestern Bell Tel. Co., 329 N.W.2d 605, 607 (N.D. 1983) (declining to decide whether "others" as used in §§ 411, 413, 414, 416, 424, and 427 included the employees of an independent contractor). *See also infra* note 122 and accompanying text (listing some of the sections that use the term "others" or similar terms).

49. *See infra* note 50 and accompanying text (citing the jurisdictions that have adopted the majority position).

50. The following courts have subscribed to the majority view that employees of independent contractors are not included under the exceptions to the general rule of employer non-liability: Morris v. City of Soldotna, 553 P.2d 474 (Alaska 1976); Jackson v. Petit Jean Elec. Coop., 606 S.W.2d 66 (Ark. 1980); Privette v. Superior Court, 854 P.2d 721 (Cal. 1993); Ray v. Schneider, 548 A.2d 461 (Conn. App. Ct. 1988), *cert. denied*, 551 A.2d 756 (Conn. 1988); Peone v. Regulus Stud Mills, Inc., 744 P.2d 102 (Idaho 1987); Johns v. New York Blower Co., 442 N.E.2d 382 (Ind. Ct. App. 1982); Dillard v. Strecker, 877 P.2d 371 (Kan. 1994); King v. Shelby Rural Elec. Coop. Corp., 502 S.W.2d 659 (Ky. 1973), *cert. denied*, 417 U.S. 932 (1974); Rowley v. City of Baltimore, 505 A.2d 494 (Md. 1986); Vertentes v. Barletta Co., 466 N.E.2d 500 (Mass. 1984); Conover v. Northern States Power Co., 313 N.W.2d 397 (Minn. 1981); Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.2d 384 (Mo. 1991); Anderson v. Nashua Corp., 519 N.W.2d 275 (Neb. 1994); Sierra Pac. Power Co. v. Rinehart, 665 P.2d 270 (Nev. 1983); Whitaker v. Norman, 551 N.E.2d 579 (N.Y. 1989); Curless v. Lathrop Co., 583 N.E.2d 1367 (Ohio Ct. App. 1989); Tauscher v. Puget Sound Power & Light Co., 635 P.2d 426 (Wash. 1981); Wagner v. Continental Casualty Co., 421 N.W.2d 835 (Wis. 1988); Jones v. Chevron U.S.A., Inc., 718 P.2d 890 (Wyo. 1986).

51. Henderson, *supra* note 33, at 1179-80. *See, e.g., Privette*, 854 P.2d at 727 (noting that workers compensation benefits are available, providing relief to injured employees).

52. *See* Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 449-50 n.2 (N.D. 1994) (citing RESTATEMENT (SECOND) OF TORTS, ch. 15, Special Note 17-18 (Tent. Draft No. 7, 1962)). This Special Note provides that §§ 416 and 427 are not applicable to the employees of independent contractors because of the availability of workers' compensation. *Id.* The reason, according to William Prosser,

The minority view holds, conversely, that independent contractors' employees are covered under sections 416 and 427 of the *Restatement*.[53] In the jurisdictions that have adopted this position,[54] courts have generally not taken into account the availability of workers' compensation benefits as a means of reparation.[55] These courts have determined that sections 416 and 427 impose a non-delegable duty on the employer to ensure that dangerous work is performed safely.[56] Because of the absolute nature of a non-delegable duty, these courts have held that the duty is owed to all third parties, including the independent contractors' employees.[57] In the two minority jurisdictions that have taken into account workers' compensation, Hawaii and New Hampshire, courts have adopted the minority position because their workers' compensation statutes only bar actions by employees against their direct employer, not against third parties.[58] These courts reasoned that since employers of independent contractors could not be considered "employers" under either jurisdictions' workers' compensation schemes under any circumstances, the employee of a contractor may bring an action against the contractor's employer, which corresponds with the minority view.[59]

C. SECTIONS 416 AND 427 IN NORTH DAKOTA LAW

The North Dakota Supreme Court recognized the "inherently dangerous work" exception to the general rule that employers cannot be held vicariously liable for the negligence of their independent

for not including the Special Note in the final version of the *Restatement* was lack of uniformity in the states' workers' compensation statutes, thus the *Restatement* took a neutral position. *Id.* (citing *Discussion of Restatement of Law Second, Torts*, 39 A.L.I. Proc. 244-49 (1962)). *See also Privette*, 854 P.2d at 728-29; *Peone*, 744 P.2d at 105; *Zueck*, 809 S.W.2d at 389-90; *Tauscher*, 635 P.2d at 430 n.7.

53. Henderson, *supra* note 33, at 1181. *See, e.g.*, Lindler v. District of Columbia, 502 F.2d 495, 499 (D.C. Cir. 1974) (determining that §§ 416 and 427 provide coverage for independent contractors' employees).

54. The following courts have adopted the minority view which includes employees of independent contractors under §§ 416 and 427: *Lindler*, 502 F.2d at 499; Makaneole v. Gampon, 777 P.2d 1183, 1185 (Haw. 1989); Giarratano v. Weitz Co., 147 N.W.2d 824, 834 (Iowa 1967); Vannoy v. City of Warren, 166 N.W.2d 486, 489 (Mich. App. 1968); Elliott v. Public Serv. Co., 517 A.2d 1185, 1187 (N.H. 1986); Hargrove v. Frommeyer & Co., 323 A.2d 300, 308 (Pa. 1974). California had held the minority position, but adopted the majority view in *Privette*, 854 P.2d at 729-30.

55. Henderson, *supra* note 33, at 1181. *See Lindler*, 502 F.2d at 499; *Giarratano*, 147 N.W.2d at 834; *Vannoy*, 166 N.W.2d at 489; *Hargrove*, 323 A.2d at 308.

56. *See, e.g.*, *Vannoy*, 166 N.W.2d at 489.

57. *Id.*

58. *See Makaneole*, 777 P.2d at 1187; *Elliott*, 517 A.2d at 1188-89.

59. *See Makaneole*, 777 P.2d at 1187; *Elliott*, 517 A.2d at 1188-89. New Hampshire's workers' compensation scheme does not consider an employer of an independent contractor a "statutory employer" even when the employer has directly paid the workers' compensation premiums, which it is required to do if the independent contractor fails to pay. *See Elliot*, 517 A.2d at 1188-89. North Dakota's workers' compensation statutes provide that a general contractor who employs an independent contractor is considered a "statutory employer," and is liable for premium payments if the independent contractor fails to pay. N.D. CENT. CODE § 65-01-02(15)(c) (1995).

contractors in 1912.[60] In *Ruehl v. Lidgerwood Rural Telephone Co.*,[61] the Lidgerwood Rural Telephone Co. hired Frank Zimmerman to dig the holes necessary for a new line of telephone poles.[62] The line of holes went near the plaintiff's farm.[63] Although the contractor had seen the plaintiff's children nearby while he was digging the holes, he did not take any precautions to ensure that none of the children would fall into the holes.[64] The plaintiff's young son fell into one of the holes, and either drowned or suffocated in the mud.[65] The child's father subsequently brought a negligence action against Lidgerwood Telephone for failing to take precautions.[66] The North Dakota Supreme Court held that if, in the performance of any kind of job, it is probable that persons will be injured unless proper precautions are taken, the person for whom the work is done has a duty to ensure that the work is done safely.[67] The court added that it was immaterial whether Zimmerman was an independent contractor or a servant, because Lidgerwood Rural Telephone Co. was vicariously liable in either case.[68] *Ruehl* is considered the first case in North Dakota recognizing the "inherent danger" exception to the general rule of employer non-liability.[69]

Following *Ruehl,* the North Dakota Supreme Court adopted the language of both sections 416 and 427 of the *Restatement* in 1979.[70] In *Fettig v. Whitman*,[71] an independent contractor's employee fell through an uncovered stairwell in the main floor of a house they were constructing.[72] The injured employee subsequently brought an action against Whitman, the employer of the independent contractor, relying on

60. Ruehl v. Lidgerwood Rural Tel. Co., 135 N.W. 793 (N.D. 1912).

61. 135 N.W. 793 (N.D. 1912).

62. Ruehl v. Lidgerwood Rural Tel. Co., 135 N.W. 793, 794 (N.D. 1912).

63. *Id.* at 794.

64. *Id.*

65. *Id.*

66. *Id.* at 793.

67. *Ruehl*, 135 N.W. at 795-96.

68. *Id.* at 796.

69. *See* Foremost Ins. Co. v. Rollohome Corp., 221 N.W.2d 722, 727 (N.D. 1974) (quoting Schultz & Lindsay Constr. Co. v. Erickson, 352 F.2d 425, 436 (8th Cir. 1965)). Although *Ruehl* is considered as recognizing the "inherent danger" exception, it may be more accurately seen as recognizing the "peculiar risk" exception, based on the examples given in comment a of the RESTATEMENT (SECOND) OF TORTS § 416 (1965). *See Ruehl*, 135 N.W. at 794; *supra* notes 46-47 and accompanying text (explaining the difference between the type of work covered by §§ 416 and 427).

70. Fettig v. Whitman, 285 N.W.2d 517, 521 (N.D. 1979). Although this was the first time the court used the language of §§ 416 and 427, the Eighth Circuit Court of Appeals, construing North Dakota law, cited to § 427 in Schultz & Lindsay Construction Co. v. Erickson, 352 F.2d 425, 435-36 (8th Cir. 1965). This citation was subsequently quoted by the Court in *Foremost Insurance Co.*, 221 N.W.2d at 727.

71. 285 N.W.2d 517 (N.D. 1979).

72. *Fettig*, 285 N.W.2d at 519. The stairway itself was not in place yet, so there was just a hole in the subfloor. *Id.*

the "inherent danger" exception recognized in *Ruehl*,[73] and section 416 of the *Restatement*.[74] In affirming the trial court's dismissal, the North Dakota Supreme Court quoted the "inherent danger" exception set forth in section 427 of the *Restatement*, and also quoted the "peculiar risk" exception set forth in section 416 of the *Restatement*.[75] In applying section 427, however, the court found that the construction of a house was not an "inherently dangerous" activity, thus section 427 did not apply.[76] Furthermore, the court found that the open stairwell was not a "peculiar risk" the employer should have had warning of, thus section 416 also did not apply.[77] The plaintiff, therefore, did not have a cause of action under either section.[78]

In *Fettig*, the court did not determine the issue of whether sections 416 and 427 applied to the independent contractor's employee.[79] The court may have allowed the employee of the independent contractor a cause of action if the work had been either "inherently dangerous" or involved a "peculiar risk" under sections 416 and 427 of the *Restatement*.

In two subsequent cases, the court again chose not to address the issue of section 416 or 427 applicability.[80] In both *Peterson v. City of Golden Valley*[81] and *Schlenk v. Northwestern Bell Telephone Co.*,[82] the court found that the type of work involved was not "inherently dangerous" nor created a "peculiar risk."[83] Thus, in each case, both sections 416 and 427 were inapplicable based on the type of risk involved, and again the court failed to resolve whether these sections apply to an independent contractor's employees.[84]

73. *Ruehl*, 135 N.W. at 795-96.
74. *Fettig*, 285 N.W.2d at 521.
75. *Id.* at 521-23.
76. *Id.* at 521.
77. *Id.* at 522-23.
78. *Id.* at 521-23.
79. *Fettig*, 285 N.W.2d 517.
80. *See* Peterson v. City of Golden Valley, 308 N.W.2d 550, 554 (N.D. 1981) (finding it unnecessary to determine whether §§ 416 and 427 apply to employees of independent contractors); Schlenk v. Northwestern Bell Tel. Co., 329 N.W.2d 605, 607 (N.D. 1983) (declining to determine whether §§ 416 and 427 apply to employees of independent contractors).
81. 308 N.W.2d 550 (N.D. 1981).
82. 329 N.W.2d 605 (N.D. 1983).
83. *See Peterson*, 308 N.W.2d at 554; *Schlenk*, 329 N.W.2d at 610. In *Peterson*, an employee of an independent contractor was killed when the trench he was working collapsed. *Peterson*, 308 N.W.2d at 551. A protective "cage" was available, but was not used at the time of the accident. *Id.* The court affirmed dismissal of the plaintiff's case, finding that the risk involved "was not inherent in or peculiar to" the type of trenching involved in the case. *Id.* at 554. In *Schlenk*, an employee of an independent contractor was injured when he became entangled in a "wire winder." 329 N.W.2d at 606. The court determined that the operation of the "wire winder" did not create any unusual risk of injury, thus the plaintiff did not have a cause of action. *Id.* at 610 (footnote omitted).
84. *See Peterson*, 308 N.W.2d at 554; *Schlenk*, 329 N.W.2d at 607.

Because the court had not determined whether sections 416 and 427 of the *Restatement* applied to independent contractors employees,[85] the implication created in *Fettig* remained a possibility.[86] Until recently, it may still have been thought that the North Dakota Supreme Court would apply sections 416 and 427 of the *Restatement* to employees of independent contractors, joining the minority of jurisdictions.[87] However, the court recently resolved the issue by adopting the majority position in *Fleck v. ANG Coal Gasification Co.*[88]

III. ANALYSIS

In *Fleck v. ANG Coal Gasification Co.*, the North Dakota Supreme Court addressed the issue of whether employers could be held vicariously liable to employees of independent contractors under sections 416 and 427 of the *Restatement (Second) of Torts*.[89] In affirming the trial court's grant of summary judgment for the Defendant-Appellee, ANG, Chief Justice Vande Walle, writing for a unanimous court, adopted the majority position.[90] The court held that sections 416 and 427 of the *Restatement* do not apply to employees of independent contractors.[91]

The court first discussed the purpose behind adopting sections 416 and 427 of the *Restatement*.[92] The court found that the rationale behind adopting these sections was to ensure innocent plaintiffs a remedy by not allowing employers to shift their liability for risk-creating work to an

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85. *Id.*

86. *See* Fettig v. Whitman, 285 N.W.2d 517, 521-23 (N.D. 1979) (implying that if the work involved in the case had been "inherently dangerous" or involved a "peculiar risk," the court would have allowed the employee of the independent contractor to maintain an action against the contractor's employer, thus adopting the minority view).

87. *See supra* note 54 and accompanying text (citing the jurisdictions that have adopted the minority view). Two federal cases construing North Dakota law did conclude that the North Dakota Supreme Court would adopt the majority view prior to *Fleck*. Olson v. Pennzoil Co., 943 F.2d 881 (8th Cir. 1991) (determining that employees of an independent contractor are not third parties within the meaning of §§ 416 and 427); Ackerman v. Gulf Oil Corp., 555 F. Supp. 93 (D.N.D. 1982) (determining that legislative intent indicated opposition to imposing liability on the employer of a contractor).

88. 522 N.W.2d 445 (N.D. 1994).

89. Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 449-54 (N.D. 1994).

90. *Id.* at 454. *See also supra* note 50 and accompanying text (listing jurisdictions that have adopted the majority position).

91. *Fleck*, 522 N.W.2d at 454.

92. *Id.* at 451. Before discussing their first argument, the court recognized that the *Restatement* does not provide any guidance regarding whether a contractors' employees are included under §§ 416 and 427. *Fleck*, 522 N.W.2d at 449-50 n.2. However, the court did note that in a Special Note to a tentative draft of the *Restatement*, it was stated that employees of independent contractors were not intended to be covered under sections 416 and 427. *Id. See supra* note 52 and accompanying text (discussing how this Special Note has been used as persuasive authority for many courts adopting the majority position). However, it appears that the Special Note did not weigh heavily in their decision because it was mentioned only in a footnote. *See Fleck*, 522 N.W.2d at 449-50 n.2.

independent contractor.[93] Following the California Supreme Court, the North Dakota Supreme Court reasoned that since workers' compensation guarantees injured employees a remedy, allowing independent contractors' employees a remedy under sections 416 and 427 serves no additional social interest.[94] Therefore, workers' compensation should provide the relief for injured independent contractors' employees, as it is the preferred remedy for job-related injuries.[95]

In addition, the court stated that since independent contractors necessarily include the cost of workers' compensation premiums in their contracts, employers have already indirectly paid for these benefits, as well as the exclusive remedy provisions they provide.[96] Therefore, allowing independent contractors' employees a cause of action under sections 416 and 427 would deny employers of independent contractors the exclusive remedy provisions included in the workers' compensation benefits for which they have already paid.[97]

The court further noted the "incongruous result" that would occur if employers could be held vicariously liable to employees of independent contractors.[98] The court determined that allowing independent contractors' employees a cause of action under sections 416 and 427 would subject employers to greater liability than if they used their own employees to perform dangerous work.[99] If a cause of action was allowed, employers who used their own employees would only have to pay workers' compensation premiums, while employers that hired contractors would be subject to tort liability for injuries to the contractors' employees.[100] For cost reasons, an employer would likely use his own, possibly inexperienced employees, rather than hire a skilled

93. *Fleck*, 522 N.W.2d at 451 (citing McLean v. Kirby Co., 490 N.W.2d 229, 235 (N.D. 1992)).

94. *Id.* (citing Privette v. Superior Court, 854 P.2d 721, 723 (Cal. 1993)).

95. *Id.* (citing Peone v. Regulus Stud Mills, Inc., 744 P.2d 102, 106 (Idaho 1987) (stating that it would be anomalous to allow an employee of an independent contractor to recover in tort when the accident is employment-related)).

96. *Id.* For the exclusive remedy provisions of North Dakota's workers' compensation system, see N.D. CENT. CODE § 65-01-08 (1995) (providing that workers' compensation benefits are the sole remedy for an injured employee against a complying employer); *Id.* § 65-04-28 (barring common law actions by injured employees against complying employers). Even if the independent contractor fails to pay the workers compensation premiums, the employer, if considered a general contractor, will still end up paying for them under § 65-01-02(15)(c), which imposes liability on the employer for the unpaid premiums. *Id.* § 65-01-01(15)(c).

97. *Fleck*, 522 N.W.2d at 451-52 (citing Tauscher v. Puget Sound Power & Light Co., 635 P.2d 426, 430 (Wash. 1981) (stating that the employee of an independent contractor "already has a remedy; one which the owner has paid for")).

98. *Id.* at 452.

99. *Id.*

100. *Id.* (citing Wagner v. Continental Casualty Co., 421 N.W.2d 835, 842 (Wisc. 1988)).

independent contractor.[101] Since independent contractors are usually hired for their particular expertise, "the minority view penalizes employers who hire experienced independent contractors with trained employees to perform dangerous work, instead encouraging the employer to use its own unskilled, untrained employees."[102] Thus, the court felt the minority view increases the risk of injury to the employer's own employees, and also to the public.[103] The court stated that by encouraging the hiring of trained professionals to perform dangerous work, the majority view better promotes the interests of safety for the general public and for employees.[104]

The court also recognized that there are valid reasons to distinguish between members of the public who are injured by the work and independent contractors' injured employees.[105] The distinction is made because members of the general public are usually unaware of any danger the work creates, and are therefore unable to protect themselves from possible injury.[106] Employees of independent contractors, on the other hand, are aware of the risk, and could therefore choose to take the necessary precautions to prevent injury.[107] Sections 416 and 427 are grounded in the rationale that dangerous work is tolerated as long as the public has recourse against a financially responsible party.[108] These sections were not intended to protect the employees of independent contractors, since they should be able to protect themselves from possible risks and are already insured against injury by worker's compensation.[109] Thus, the court found no justification for applying sections 416 and 427 to employees of independent contractors.[110]

The court also found that allowing employees of independent contractors a cause of action would create a "special" class of employees.[111] Employees of independent contractors may attempt to convince courts that their work was particularly dangerous, necessitating an exemption from the exclusive remedy provisions of workers' compensation.[112] This would create a remedy for a special class of

101. *Id.*

102. *Fleck*, 522 N.W.2d at 452; Privette v. Superior Court, 854 P.2d 721, 727-28 (Cal. 1993); Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.2d 384, 387-88 (Mo. 1991).

103. *Fleck*, 522 N.W.2d at 452. *See Zueck*, 809 S.W.2d at 387-88 (stating that the liability rules as established keep the risk of injury lowest).

104. *Fleck*, 522 N.W.2d at 452.

105. *Id.* at 453.

106. *Id.* (citing Morris v. City of Soldotna, 553 P.2d 476, 481-82 (Alaska 1976)).

107. *Id.*

108. *Id.* (citing Jackson v. Petit Jean Elec. Coop., 606 S.W.2d 66, 69 (Ark. 1980)).

109. *Fleck*, 522 N.W.2d at 453 (citing Jackson, 606 S.W.2d at 69).

110. *Id.* at 453-54.

111. *Id.* at 453 (citing Privette v. Superior Court, 854 P.2d 721, 729 (Cal. 1993)).

112. *Id.* (citing Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.2d 384, 390 (Mo.

employees which would not be available to regular employees.[113] Furthermore, the court found that since these special employees already received a higher wage due to their choice to undertake dangerous work, allowing them a cause of action would produce an inequitable result.[114]

Lastly, the court reasoned that since the Workers Compensation Act statutorily releases the independent contractor from liability, the employer is also released.[115] This precludes holding the employer vicariously liable under sections 416 and 427.[116] Allowing independent contractors' employees to recover workers' compensation benefits in addition to tort recovery, would violate the exclusive remedy provisions of North Dakota's Workers' Compensation Act.[117]

Based on the foregoing arguments, the North Dakota Supreme Court adopted the majority view.[118] The court held that employees of independent contractors are not included under the exceptions to the general rule of non-liability of employers for the negligence of their independent contractors, as stated in sections 416 and 427 of the *Restatement (Second) of Torts*.[119] The court thus limited the application of sections 416 and 427 of the *Restatement* to the general public.

IV. IMPACT

By holding that employees of independent contractors are not included in the term "others," as used in sections 416 and 427 of the *Restatement*, the North Dakota Supreme Court greatly limited the application of sections 416 and 427.[120] In so doing, the court has limited alternative ways in which employees of independent contractors may recover against the contractors' employers. Sections 416 through 429 of the *Restatement,* with the exception of section 426,[121] create

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113. *Id.*

114. *Fleck*, 522 N.W.2d at 453.

115. *Id.* at 453-54 (citing Horejsi v. Anderson, 353 N.W.2d 316, 318 (N.D. 1984) (holding that the release of a servant also releases the master from vicarious liability for the same conduct)).

116. *Id.*

117. *Id. See* N.D. CENT. CODE §§ 65-01-08, 65-04-28 (1995) (providing that workers' compensation benefits are an injured employee's sole remedy against a complying employer and that all common law actions by an injured employee against a complying employer are barred, respectively).

118. *Fleck*, 522 N.W.2d at 453.

119. *Id.*

120. *See id.* at 453-54 (adopting the majority view that an independent contractor's employer is not vicariously liable to the independent contractor's employees under §§ 416 and 427 of the RESTATEMENT (SECOND) OF TORTS).

121. Section 426 states that an employer of an independent contractor is not liable for injuries caused by the contractor's "collateral negligence." RESTATEMENT (SECOND) OF TORTS § 426 (1965). Collateral negligence is "negligence collateral to the contemplated risk." *Id.* § 426 cmt. a.

exceptions to the general rule of employer non-liability by holding the employers of independent contractors vicariously liable for the acts of their contractors in specific situations. Several sections use the term "others," or similar terms.[122] Based on the holding in *Fleck*,[123] it is likely that the North Dakota Supreme Court will similarly interpret the language of other exceptions in the *Restatement* not to include employees of independent contractors. Thus, it appears the impact of *Fleck* may be to further limit the avenues of recovery for independent contractors' employees by not allowing employers of independent contractors to be held vicariously liable to the contractors' employees under any of the *Restatement's* exceptions.[124] Therefore, in many situations, employees of independent contractors will be limited to receiving workers' compensation benefits.

However, the *Fleck* decision does not limit independent contractors' employees from holding the contractors' employers directly liable for negligence. In a final footnote, the court stated that its decision not to include independent contractors' employees under sections 416 and 427 did not conflict with previous decisions which allowed independent contractors' employees to hold employers liable under section 414 of the *Restatement*.[125] Because section 414 imposes direct liability on the employers of independent contractors, the court found that allowing contractors' employees a cause of action under that section does not conflict with the North Dakota Workers' Compensation Act, since the act does allow suits against third parties who are not the direct employer of the employee.[126] Generally, sections 410 through 415 of the *Restatement* create exceptions to the general rule by holding the

122. *See* RESTATEMENT (SECOND) OF TORTS § 417 ("members of the public"); *Id.* § 419 ("third persons"); *Id.* § 420 ("others"); *Id.* § 421 ("others"); *Id.* § 422 ("others"); *Id.* § 427A ("others"); *Id.* § 427B ("others"); *Id.* § 428 ("others"). *See also supra* note 29 and accompanying text (listing these exceptions with their titles).

123. Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 454 (N.D. 1994).

124. *See* RESTATEMENT (SECOND) OF TORTS §§ 416-29 (containing exceptions to the general rule of non-liability). *See also supra* note 29 and accompanying text (listing these exceptions with their titles).

125. *Fleck*, 522 N.W.2d at 454 n.3. RESTATEMENT (SECOND) OF TORTS § 414 (holding that employers of independent contractors are directly liable to "others" when they retain control of some operative detail of the work and fail to exercise that control with due care). *See* Madler v. McKenzie County, 467 N.W.2d 709, 711 (N.D. 1991) (finding an employer of an independent contractor owes a duty to the contractor's employees under § 414).

126. *Fleck*, 522 N.W.2d at 454 n.3. *See* N.D. CENT. CODE § 65-01-09 (1995) (allowing injured employees a right of action against third parties who cause the work-related injury). An independent contractor's employer may be held to be the contractor's employee's "statutory employer," but only if the employer is a general contractor and is liable for the payment of workers' compensation premiums due to the failure of the independent contractor. *Id.* § 65-01-02(15)(c). For the reasons why allowing independent contractors' employees a cause of action against contractors' employers under §§ 416 and 427 does conflict with North Dakota's workers' compensation act, see *supra* notes 115-117 and accompanying text.

employers of independent contractors directly liable for negligently selecting, instructing, or supervising their independent contractors.[127] Based on the court's final footnote in *Fleck*,[128] workers' compensation does not affect the applicability of these sections of the *Restatement* since they impose direct liability on the employer, not vicarious liability through the contractor.[129] Although *Fleck* will likely prevent employees of independent contractors from holding the contractors' employers vicariously liable, these employees can still hold the contractors' employers directly liable. Therefore, in certain situations, independent contractors' employees may still have a tort remedy in addition to their workers' compensation benefits.

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127. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 411 (imposing direct liability on an employer for negligently selecting an independent contractor).

128. *Fleck*, 522 N.W.2d at 454 n.3.

129. *See* RESTATEMENT (SECOND) OF TORTS §§ 410-15. *See also supra* note 29 and accompanying text (listing exceptions with their titles).