

**A General Contractor is Entitled to Indemnity by a Subcontractor when both the General and Subcontractor are liable, and when only the Subcontractor is at fault.**

The issue of partial indemnification- whether General Obligations Law § 5-322.1 allows a General Contractor who has been found to be partially at fault can enforce an indemnification provision against its Subcontractor for the portion of damages that are attributable to the Subcontractor's negligence- has remained unsettled after the Court of Appeals first broached it in *ITRI*. The Departments have split on this issue with the First, Third, and Fourth Departments in favor of partial indemnification and the recalcitrant Second Department against the concept. The Court of Appeals in *Brooks* has now established that a General Contractor is entitled to indemnity from a Subcontractor, even if the General Contractor is partially negligent.<sup>1</sup>

*In ITRI*, the General Contractor claimed it was entitled to full indemnity for a worker's injuries from its Subcontractor pursuant to an indemnification clause in the contract.' The agreement provided that the Subcontractor was to indemnify the General Contractor for any claims for personal injuries that occurred in connection with the project, regardless of whether or not the General Contractor was negligent.

The Court deemed the agreement void and unenforceable under the General Obligations Law § 5-322.1 because the agreement contemplated "full" indemnification for the General Contractor, that is, the clause provided for indemnification for the General Contractor's own negligence. General Obligations Law § 5-322.1 specifically prohibits this practice of being indemnified for one's own negligence in construction contracts.

While the Courts refused to honor the indemnity provision, the Court noted but declined to address if the agreement could survive if it excluded indemnification for the General Contractor's negligence. The Court noted that it could not salvage the contract and rewrite it to call for the General Contractor to be indemnified for the Subcontractor's Administration and the Federal Department of Labor requirements. One of these requirements mandated that trucks on a work site be equipped with a reverse signal alarm or that a worker on site designates that it is safe for the driver to back up.

The Court of Appeals dismissed the claim for vicarious liability against DOT, reasoning that the permit acted as a form of permission and not a contract that could impose a nondelegable duty. The Court also emphasized that even if the permit were a contract, the claim would still be dismissed. The Court reiterated the general rule that one who retains an independent contractor is not liable for that contractor's negligence. Stressing that the party retaining the contractor rarely controls how the work is done, the Court held that expanding vicarious liability to cover work permits would extend DOT's duties beyond its reasonable limits. Rather, *Brothers* noted the broad categories of exceptions to the general rule under the Second Restatement of Torts, namely where the activity is "inherently dangerous" and where the duty is nondelegable.

<sup>1</sup> *Itri Brick and Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y2d 786, 790 (N.Y. 1997)