How To Recover For A Subcontractor's Negligence

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Accidents occurring during construction projects often cause property damage for which the property owner's insurance carrier may seek to recover. Even if a subcontractor (or even a subcontractor's subcontractor) caused the accident, it may be wise to pursue recovery from the general contractor in case the subcontractor has no insurance or inadequate insurance coverage. (The general contractor is often referred to as a "principal" and the subcontractor as an "independent contractor.") A general contractor is not ordinarily liable for the negligence of an independent contractor such as a subcontractor. However, the second and third editions of the Restatement of Torts list several exceptions to this general rule.

This article discusses recent appellate court opinions[1] that address these exceptions in the hope that the reader may find helpful tools for pursuing recovery from general contractors.

While these exceptions are numerous, they are covered by three categories: (1) negligent selection, instruction, or supervision of the independent contractor, (2) hiring the independent contractor for work that is especially or inherently dangerous, and (3) work in which the general contractor's duty is non-delegable, that is, the general contractor cannot avoid the duty by delegating it to another party.[2]

Was the general contractor negligent in hiring the subcontractor?

The standard for this question is reasonable care.[3] If the general contractor knew or should have known of the subcontractor's ineptitude, this could prove negligence. Consider whether the general contractor made a reasonable inquiry into the subcontractor's qualifications or propensities for negligent conduct, especially for negligence similar to the conduct that caused the accident in question. The subcontractor's performance history may be the most important evidence on this issue.

Did the general contractor negligently give instructions to the subcontractor?

Such instructions would need to have caused the accident for the subcontractor's act to be considered the act of the general contractor.[4]

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[1] Each cited opinion is cited only once per paragraph. For sentences with no cite, please see the opinion cited elsewhere in the same paragraph (or section).

[2] Bethel v. Plaza, 943 N.Y.S.2d 790 (N.Y. City Civ. Ct. 2011).

[3] Id.

[4] See Azzam v. Rightway, 789 F.Supp.2d 110, 116 (D.D.C. 2011).

In the Azzam case, a demolition company razed plaintiff's house with no notice. The company that hired the demolition company moved unsuccessfully to dismiss. It had given the contractor arguably faulty instructions.

Did the general contractor retain control over the manner in which the negligent work was done?

The daily activities of oversight are not enough for the general contractor to be liable for the negligence of the subcontractor. The general contractor must direct how the subcontractor performs its duties or give specific performance instructions.[5]

The plaintiff in St. Croix alleged that a principal was liable for the negligence of a bulldozer driver who destroyed irrigation piping. The court was not persuaded by the plaintiff's evidence of control by the principal, analogizing the facts of this case to a homeowner directing a house painter to paint a living room a certain shade of yellow. Such color selection would not make the painter the agent of the homeowner/principal. The plaintiff lacked evidence that the contractor directed the method of performance by the bulldozer driver or gave him specific instructions about how to engage in his remediation work.

A contract may provide the best evidence of retained control. In the Joseph case, the contract between the principal and the independent contractor required the independent contractor to do the work in accordance with the principal's own regulations.[6] The contract also gave the principal input into the contractor's methods by requiring the contractor to work with the principal to resolve any disputes over how the contractor did its work. The principal provided all engineering drawings and specifications and all construction equipment, tools, and supplies as required in writing. The principal also had a construction manager available for consultation by the contractor during regular work hours. This control went beyond the usual general right to stop work, to inspect its progress, to receive reports, or to make recommendations which do not have to be followed. It presented a jury question as to whether the principal owed a legal duty to plaintiff to exercise its control with reasonable care.

A contract is not the only evidence of control; actual exercise of control may be sufficient to prove control.[7] The converse of this statement may also be true. At least one court has held that a contractual right to control is sufficient even if it is not exercised.[8]

One type of control is the right to coordinate the work done by various subcontractors.[9] In the Redinger case, the general contractor ordered one of its independent contractors to move a pile of dirt because the pile was blocking a truck's route to the work area. The dirt was close to employees of another contractor. The box blade of the tractor injured the finger of one of those workers. The court found that the general contractor had a duty to exercise its control with reasonable care because it

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5 St. Croix Renaissance Group v. St. Croix Alumina, 2011 WL 2160910, 2 (D. Virgin Islands 2011).
6 Joseph v. Hess Oil, 2011 WL 1304611 (V.I. 2011).
7 See Beil v. Telesis, 608 Pa. 273, 291, 11 A.3d 456, 467 (2011).
8 See Victoria v. Williams, 100 S.W.3d 323 (Tex. App. 2002).
9 Grand v. Haygood, 2013 WL 634872, 6 (Tex.App. Eastland 2013).

retained control by coordinating the work between two subcontractors and that it breached that duty by allowing the tractor near other workers and by failing to warn them.

Was the work inherently dangerous?

In the Gyongyosi case, owners of properties near a vacation home and their subrogated property insurers sued the owners of the vacation home for damages caused by a gas explosion due to a contractor's work removing and replacing floor tiles on the sun deck of the vacation home.[10]

Florida allowed for principals to be held vicariously liable for an independent contractor's negligence under the inherently dangerous activities doctrine. The doctrine may apply if (1) the work involves a special danger to others; (2) the employer knows that the danger is inherent in or normal to the work; and (3) injury is likely if proper precautions are not taken.

The court in Gyongyosi held that removal of floor tiles from a roof deck with a chipping hammer is not inherently dangerous. Even though such removal caused a liquid propane gas explosion in this case, such removal is generally not likely to result in serious bodily injury or death. A concealed gas line was located below the concrete roof sun deck. The court contrasted tile removal with dangerous activities such as blasting, pile driving, certain excavations, fumigation of buildings with dangerous gasses such as cyanide, emission of noxious gasses into densely populated areas, and the collection of explosives or inflammable liquids in a populous area.

Did the work involve a peculiar danger or special risk (aka "the peculiar risk doctrine")?

All construction work involves some risk.[11] For this exception to apply, the work must involve unusually dangerous circumstances. Routine construction work without proper safety precautions has been held not to satisfy this requirement. Violations of safety conditions are also not sufficient for this exception to apply. The increased risk must be inherent in the activity itself, not in how it is carried out.

The phrase "peculiar risk" means a risk that is particular to the situation, not one that is odd or weird.[12]

The court in the Smyth case evaluated the danger of a task by asking whether "in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken."[13] Such accidents are not inevitable or unavoidable. Instead, covered risks create a "much higher than usual likelihood of accidents in which there is a much higher than usual likelihood of major loss, injury or damage." Principals such as general contractors must assure that the work is done safely by trained employees with adequate financial resources (that is, adequate insurance) to assist accident victims. The court determined that summary judgment was not proper for either party because the record did not include information about the frequency of similar accidents or

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[10] Gyongyosi v. Miller, 80 So.3d 1070, 1076-1077 (Fla. App. 4 Dist. 2012).
[11] Fedor v. Van Note-Harvey, 2011 WL 1085993, 2-3 (E.D.Pa. 2011).
[12] SeaBright v. US Airways, 52 Cal.4th 590, 598, 258 P.3d 737, 741, 129 Cal.Rptr.3d 601, 606 (Cal. 2011).
[13] Smyth v. Infrastructure Corp. of America, 2013 WL 275573 (Fla. App. 2 Dist. 2013).

the training required for performing the task in question. Consider also, as this court did, whether the general contractor complied with contractual provisions requiring it to give notice about the subcontractor being on the project to the owner. If required notice was not given and if the principal would have ensured that the subcontractor had appropriate insurance coverage before allowing it to work on the project, then the general contractor might face additional exposure.

Consider whether the general contractor is in the best position to identify and minimize the risks involved in the subcontractor's activities.[14] If the general contractor knows that the independent contractor's work is likely to create a peculiar risk unless special precautions are taken and the general contractor does nothing to minimize that risk, whether by contract or otherwise, then the exception may apply. The Berrett court asked whether a reasonable person would recognize the need for special precautions.

There may even be strict liability for an activity considered "abnormally dangerous."[15] For this doctrine to apply, harm must be likely even if reasonable care is exercised. Consider also these factors from the Restatement when considering whether an activity is abnormally dangerous:

(a) existence of a high degree of risk of some harm to the person, land, or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Did a statute impose a non-delegable duty on the general contractor?

If a duty is imposed by law to protect public safety, the subject party may not be able to delegate that responsibility to an independent contractor.[16] In the cited 2011 case, the court noted that Texas applies this rule only where personal injuries are alleged, unless the action in question is inherently dangerous.

Did the subcontractor proceed in accordance with general practices?

If not, then the general contractor would have a stronger argument against liability because the subcontractor's negligence would be considered collateral, that is, unusual, abnormal, or foreign to the usual risks of such work.[17] For example, if a general contractor hired a subcontractor to excavate, expecting that the subcontractor would use a bulldozer as usual, but the subcontractor used blasting

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[14] See Berrett v. Albertsons, 293 P.3d 1108, 1115-1116 (Utah App. 2012).
[15] See Stout v. Warren, 290 P.3d 972, 976-977 (Wash. 2012).
[16] See In re Genetically Modified Rice Litigation, 2011 WL 339168, 5-6 (E.D.Mo.).
[17] See Park v. Puget, 2003 WL 21689977, 3 (Wash.App. Div. 1).

instead, then negligent blasting by the sub would be considered "collateral", and the general contractor probably would not be liable.

Was the general contractor previously aware of repeated safety violations by the subcontractor?

A Texas court held that an employer who is aware that its contractor routinely ignores safety may owe a duty to require corrective measures.[18] In the Victoria case, the plaintiff pursued this theory by proffering a general statement by a mechanic who had seen the contractor haul poles before daylight without the required attached lights and with the wrong size trailer. Because the claimant introduced no evidence that the violations were numerous, close in time to the accident, or known to the principal, the court held that the principal was not liable for the contractor's negligence.

Was the general contractor carrying on an activity that can be lawfully carried on only under a franchise granted by public authority?

If so, it may be liable to the claimant. The Victoria court also considered the claimant's argument that transportation of utility poles can only be carried out under a franchise. The court concluded that anyone, not just a common carrier, may obtain a special permit to transport utility poles. Therefore, the public franchise exception did not apply.

Did the general contractor have an implied and non-delegable duty to perform the services required by the contract in a careful, skillful, diligent, and workmanlike manner?

In the Winters case, a general contractor was hired to replace a roof.[19] The roof leaked. The general contractor hired a subcontractor to repair the roof. The subcontractor caused a fire, which resulted in a large insurance claim by the homeowners. Their insurance company sued the general contractor. Because the general contractor had an implied non-delegable duty to install the roof in a careful, skillful, diligent, and workmanlike manner, it could not escape liability by arguing that the subcontractor was an independent contractor.

Conclusion: Exploring these exceptions may lead to a recovery against a general contractor whose subcontractor caused an accident.

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[18] See Victoria v. Williams, 100 S.W.3d 323, 330-331 (Tex.App. San Antonio 2002).

[19] Federal Ins. Co. v. Winters, 354 S.W.3d 287, 289 (Tenn. 2011).