

Rights and Responsibilities

A property owner's liability to an injured construction worker

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When a construction worker is injured during a project, the property owner that contracted for that work may face a claim by the worker. The property owner is especially at risk for this type of claim when the construction worker's employer is insolvent, or where worker's compensation does not adequately compensate for the worker's injuries.

The laws that govern the degree of the owner's liability vary from state to state. But generally, under the law of premises liability, a property owner's duty to a construction worker is limited only to making the property reasonably safe for the performance of the worker's duties. *See, e.g.,* Restatement (Second) of Torts § 343 (1965). However, if an owner somehow controls the manner in which the contracted work is performed, the property owner then owes an independent duty to exercise that control in a way that prevents injury to a construction worker. *See, e.g.,* Kinsman v. Unocal Corp., 37 Cal. 4th 659, 670 (2005). This rule is often referred to as the "retained control" exception. *Id.*

In addition to premises liability, property owners have sometimes been held liable under a theory of vicarious liability. Essentially, vicarious liability allows a claimant to hold one person responsible for the negligent actions of another. In recent years, however, the rise of worker's

compensation has prompted courts to limit use of this theory of recovery against property owners. As a result, the trend in most states leans toward holding property owners liable only when their own negligence has contributed to the worker's injury in some affirmative way.

In accordance with this trend, a survey of significant recent legal developments from the past two years reveals that most cases have declined to expand the liability of property owners and that relatively few cases have increased owners' liability to injured workers.

Cases expanding potential owner liability

Two cases, both coming from California, have recognized expansions on existing theories of premises liability, but at the same time follow the legal trend of imposing liability only in scenarios where the owner's negligence has somehow contributed to the worker's injury. A third case, from New York, recognizes that federal immigration laws do not preclude illegal aliens from recovering lost wages from property owners in state courts.

a) Failure to warn of concealed condition

In the first case recognizing an extension of an owner's premises liability, Kinsman v. Unocal Corp., the California Supreme Court expanded an owner's general duty of care to make a property reasonably safe. 37 Cal. 4th at 664. This case recognizes that a property owner may be liable for injury to a construction worker where the injury was caused by a dangerous condition in the property that was known or knowable to the owner and unknown to the contractor and its employees, if the owner fails to warn the contractor about this dangerous condition. *Id.* In this case, a worker who was exposed to asbestos sued the property owner for his injuries. *Id.* Even though the responsibility to protect workers from obvious hazards can be legally delegated to a contractor, the court reasoned that a failure to disclose information about a latent danger is essentially an incomplete delegation of responsibility. *See id.* at 674. As a result, the court decided that a property owner should be responsible for a negligent failure to warn contractors of latent dangerous conditions. *See id.*

b) Owner's violation of safety regulation

In the second California case expanding an owner's potential liability, Barclay v. Jesse M. Lange Distributing, Inc., the California Court of Appeal recognized that an owner may be liable for injuries to a contractor's employee if the owner's violation of a safety regulation affirmatively contributed to the employee's injury, regardless of whether the owner had retained control of the project. 129 Cal. App. 4th 281, 301 (2005). In Barclay, a construction worker injured by exploding gas tanks was allowed to sue a property owner for failure to adhere to a Fire Code provision. Id. at 286. The worker had presented evidence that compliance with the Fire Code provision would probably have lessened the severity of his injuries. Id. at 299. For this reason, the court permitted the worker to seek damages from the owner regardless of "retained control" analysis. Id. at 301.

c) Recovery of lost wages by injured undocumented workers

Finally, in an additional case of significance, Balbuena v. IDR Realty LLC, The Court of Appeals of New York decided that federal immigration law does not prevent undocumented aliens, injured while working on a construction site, from recovering their lost wages in state court. 845 N.E.2d 1246, 1260 (N.Y. 2006). The court reasoned that this result was consistent with federal laws and that deciding otherwise would encourage dishonest employers to intentionally hire undocumented workers, knowing that they could violate safety laws without any potential liability. Id. at 1257-58.

Cases declining to expand a property owner's potential liability

Although the few cases described above have expanded an owner's liability

in the past few years, most cases have declined to make such an extension. Specifically, recent decisions have limited the scope of premises liability, duties of care, and the extent of damages that a worker can recover from a property owner.

a) Limitations on scope of premises liability

In a decision limiting the scope of premises liability, the Nebraska Supreme Court decided that damages for injuries resulting from defects in equipment provided to construction workers cannot be sought under a premises liability theory, since such defects are not defects in the land. Semler v. Sears, Roebuck & Co., 689 N.W.2d 327, 333-34 (Neb. 2004). The court stated that defects in equipment did not implicate an owner's duty of care to make a property reasonably safe, and that recovery from the property owner was not proper in this situation. Id. The scope of premises liability was also limited by the Indiana Supreme Court in PSI Energy, Inc. v. Roberts. In PSI, the court decided that where a worker's injury is caused by the dangerous condition that the contractor was hired to remedy, the worker cannot recover from the property owner. 829 N.E.2d 943, 948 (Ind. 2005). To come to this conclusion, the court reasoned that a property owner hires a contractor with an expectation that the contractor has the necessary level of expertise to perform a certain task. Id. at 961. As a result, the court concluded that an owner with no superior knowledge is reasonably entitled to rely upon the contractor's expertise to perform the work skillfully and safely. Id. With this decision, the court prevented the counterintuitive result of exposing a property owner to liability for making a responsible decision to fix a dangerous condition on its property.

b) Duty of care

Recently, courts have also made decisions concerning the respective duties

of care owed by both owners and construction workers. In Laico v. Chevron U.S.A., Inc., the California Court of Appeal declined to extend an owner's duty of care beyond a responsibility to keep a property reasonably safe, and concluded that an owner's duty of care does not include overseeing the safety practices of those working on a property. 123 Cal. App. 4th 649, 666 (2004). In addition, the Supreme Court of Wyoming decided that under the state's comparative fault scheme, which permits juries to divide blame for injuries by percentages, a worker also has a duty to exercise due care, and cannot recover from a property owner where the worker's fault exceeds fifty percent. See Parrish v. Groathouse Constr., Inc., 130 P.3d 502, 505-06 (Wyo. 2006).

c) Retained control exception

The most active area of development has been in the arena of the retained control exception, which requires claimants to prove that the property owner retained control of the manner in which the construction work was performed and exercised that control in a way that affirmatively contributed to the worker's injuries. Recently, courts have reaffirmed this rule, extended its scope, and further clarified the meanings of "retained control" and "affirmative contribution." In Pelak v. Indiana Industrial Services, Inc., the Court of Appeals of Indiana rejected an injured worker's argument that a property owner retains control over a property by virtue of ownership, and reaffirmed the retained control rule. 831 N.E.2d 765, 771 (Ind. Ct. App. 2005). The court stated that an owner has no duty to ensure worker safety beyond the general duty to maintain a property in a reasonably safe condition, particularly when there is no evidence that the owner had any control over the manner or means in which the contractor conducted its work. Id. The court emphasized that public policy did not

support holding a property owner responsible for protecting construction workers from risks that were solely within the control of the contractor. *Id.* at 770.

In addition, two cases decided by the California Court of Appeal have expanded the scope of the parties to which the "retained control" rule applies. The first case, *Michael v. Denbeste Transportation, Inc.*, decided that independent contractors, who are hired by subcontractors in place of traditional employees, must also meet the requirements of the retained control exception before they can recover from property owners. 137 Cal. App. 4th 1082, 1086 (2006). Further, in *Ruiz v. Herman Weissker,*

Inc., the court decided that an owner's agent was also protected under the retained control exception, meaning that a worker must prove that the owner's agent retained control of the manner or means by which the contractor performed its work before recovery from the owner is possible. 130 Cal. App. 4th 52, 61-62 (2005).

Recent developments in this area of the law have also provided a clearer picture of the meanings of key terms in the retained control exception. Generally, an owner has "retained control" where the owner controls the manner or means by which the construction work is performed. Following this rule, a Utah appellate court rejected the argument that an owner had "retained control" over the construction project where the owner merely controlled the desired result of the construction. *Smith v. Hales & Warner Constr., Inc.*, 107 P.3d 701, 705 (Utah Ct. App. 2005). The court explained that the retained control exception requires the owner's "active participation in the method or operative detail of the injury-causing activity in order to impose liability." *Id.* Another key term of the retained control exception, "affirmative contribution," was further limited in *Ruiz*. Generally, an affirmative contribution can arise from an omission or failure to act. *Ruiz*, 130 Cal. App. 4th at 65. For example, if a property owner promises to undertake a particular safety measure, the owner would be liable for an injury resulting from a failure to fulfill that promise. *Id.* However, the court in *Ruiz* decided that a failure to exercise a mere ability to correct an unsafe work practice did not constitute an "affirmative contribution" to a worker's injury. *Id.* As a result, an owner will probably only be liable for a failure to act when the owner has promised to act or has controlled some aspect of the safety procedures being observed during the project.

d) Damages

Finally, the Kentucky Supreme Court recently decided that, under the state's worker's compensation laws, the amount of damages recoverable from a property owner may be limited. In *Krahwinkel v. Commonwealth Aluminum Corp.*, the court decided that where a property owner is liable to a construction worker, the amount of recovery is not limited to worker's compensation benefits; however, the worker's judgment against the owner should be reduced by worker's compensation benefits actually paid to the employee, in order to prevent double recovery. 183 S.W.3d 154, 157-58 (Ky. 2005). So, depending on a state's worker's compensation laws, the amount of damages recoverable from a property owner may be limited.

Conclusion

In the past two years, courts have addressed a number of issues affecting liability of a property owner for construction worker injury. Although courts have made some decisions resulting in an expansion of an owner's duties and potential for liability, these cases are generally a reflection of the legal trend towards holding a property owner responsible only where the owner's conduct somehow contributed to the injury. Most of the recent developments in this area have declined to extend a property owner's responsibilities for the safety of construction workers. Overall, the rule generally remains that an owner is required only to make a property reasonably safe for visitors; however, if the owner controls the manner in which construction work is performed, then the owner has an additional duty to exercise that control in a way that prevents worker injury. ●

The author would like to thank Thy Bui for her insightful contribution of research and assistance in preparation for this article.

