LIABILITY FOR INJURIES TO SUBCONTRACTORS

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1. Introduction

A common issue faced by contractors is a claim for injury to an employee of a subcontractor. While the employee can turn to his or her employer for workers compensation benefits, additional redress is often sought from upstream contractors, up to and including the general contractor. Typically, the answer to this lies in the doctrine of vicarious liability – in other words, a party is generally not responsible for the tortious conduct of its independent contractors. Nevertheless, actions pursuing the general contractor are common, and it is important to understand the specific defenses available to a contractor in these situations. This paper will address the issues that arise in assessing these defenses using fact and law patterns from exemplar cases from North Carolina and Massachusetts.

2. North Carolina Exemplar Case

a. *Factual Background*

The Plaintiff, an employee of a mark-up crew, which was the subcontractor to a framing crew which was in turn the subcontractor of the main framing subcontractor. The general contractor retained the framing subcontractor, and this case involved the general contractor's motion for summary judgment, which was ultimately granted.

Plaintiff was injured when he moved a four foot by eight-foot (4' by 8') piece of plywood, which had been covering the opening of a mechanical shaft in part of a multi-family apartment building construction. According to the Plaintiff's Complaint, he was measuring and marking locations of walls on the existing wooden frame of the structure so that the rest of the framing crew could come behind him and construct the walls at the locations. He alleged that he bent over and lifted the plywood to knee level, and began to push it forward and out of the way without looking under it. The Plaintiff then fell through the mechanical shaft that was uncovered when he moved the plywood. The evidence presented was that an employee or representative the framing crew had covered the hole with the plywood, and that the plywood was not marked. It was not alleged, nor was there any evidence, that the general contractor cut the hole, covered the hole, or was aware of the condition in any respect.

b. Legal Standard

"The Courts of North Carolina have long recognized that a general contractor is not liable for injuries sustained by a subcontractor's employees." *Hooper v. Pizzagalli Constr. Co.,* 112 N.C.App. 400, 403, 436 S.E.2d 145, 148 (1993) (citing *Woodson v. Rowland,* 329 N.C. 330, 407 S.E.2d 222 (1991)), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994). Moreover, "North Carolina law provides that a general contractor does not have a duty to furnish a subcontractor or the subcontractor's employees with a safe place in which to work." *Id.* at 403–04, 436 S.E.2d at 148 (citing *Brown v. Texas Co.*, 237 N.C. 738, 76 S.E.2d 45 (1953)). "Instead, it is the duty of the subcontractor to provide himself and his employees with a safe place to work and, also, to provide proper safeguards against the dangers of the work." *Id.* at 404, 436 S.E.2d at 148. However, North Carolina does recognize a few exceptions to the general rule of no liability. These exceptions are: (1) situations where the contractor retains control over the manner and method of the subcontractor's substantive work, (2) situations where the work is deemed to be inherently

dangerous, and (3) situations involving negligent hiring and/or retention of the subcontractor by the general contractor. *Id.*

i. Control over the manner and method of the subcontractors' substantive work

The undisputed evidence was that the general contractor did not control or direct the framer's work. The general contractor's only direction to the framer was to provide framers and to "go and work." The North Carolina appellate courts have found that where an independent contractor is "free to perform its job according to its own independent skill, knowledge, training, and experience," liability under a retained control theory will not attach to the general contractor or landowner. *Hooper v. Pizzagalli Constr. Co.*, 112 N.C.App. 400, 436 S.E.2d 145, 149 (1993).

In *Hooper*, the plaintiffs' decedent, an employee of subcontractor Acme Plumbing and Heating, Inc., fell from an unsecured scaffold and died. *Hooper*, 112 N.C. App. at 403-04, 436 S.E.2d at 148. Plaintiffs asserted a claim against the general contractor, Pizzagalli Construction Company, for the wrongful death of the decedent, alleging that Pizzagalli was liable because it "retain[ed] control over the manner and method of Acme's work." *Id.* at 404, 436 S.E.2d at 148. Pizzagelli moved for summary judgment on the plaintiffs' claims, and the trial court granted its motion for summary judgment. *Id.* The Court of Appeals affirmed the trial court's ruling, explaining that "Pizzagalli did not retain the right to control the method and manner in which defendant Acme and its employees performed their job" because "[w]hile defendant Pizzagalli maintained a supervisory role and defendant Acme was expected to comply with the plans and specifications of the overall project, defendant Acme was free to perform its job according to its own independent skill, knowledge, training, and experience." *Id.* at 404-405, 436 S.E.2d at 148-49. The contract between Pizzagalli and Acme required Acme to "provide all labor, materials, tools, and equipment necessary to perform the work," and Pizzagalli "did not interfere with

Acme's work or any part of its work so as to retain control and thereby make itself liable." *Id.* at 405. 436 S.E.2d at 149. Based on this analysis, the Court held that Pizzagalli was not liable for the death of its subcontractor's employee as a matter of law and was therefore entitled to summary judgment in its favor. *Id.*

Likewise, in *O'Carroll v. Roberts Indus. Contr'rs, Inc.*, 119 N.C. App. 140, 457 S.E.2d 752, *disc. review denied*, 341 N.C. 420, 461, S.E.2d 760 (1995), the Court of Appeals held that the evidence before the trial court at the summary judgment hearing did not support the plaintiff's contention that Texasgulf, Inc., a company that employed an independent contractor to perform excavation and welding work, was liable for the death of that independent contractor's employee because, according to the plaintiff, it retained control over the independent contractor's work. Citing the testimony that Texasgulf "did not supervise, participate in, or 'police' the work done by [the independent contractor]" and its opinion in *Hooper* for the proposition that "merely taking steps to see that the contractor carries out his agreement does not make the employer liable," the Court rejected the plaintiff's theory that Texasgulf had retained control over the contractor's work and was therefore liable. *Id.* at 145, 457 S.E.2d at 756 (citation and quotation marks omitted).

As in *Hooper* and *O'Carroll*, the theory that the general contractor retained control of the subcontractor's work was not supported by evidence. The general contractor did not have any contractual relationship with the framing crew or the layout crew. In fact, the layout crew employer's testimony was that he did not have any discussions with anyone from the general contractor whatsoever regarding the scope of his crew's work. The Plaintiff's supervisor, and not the general contractor, controlled work of Plaintiff. Likewise, the general contractor did not control or direct the work of the framer or the framing crew. The general contractor's only direction to the framer Concrete related to the project was to provide framers and to "go and work."

Further, the general contractor's overseeing of safety on the Project does not equate with control over the method and manner of the subcontractors' work. "[I]n the specific context of retained control over safety measures, requiring that an independent contractor take its own safety precautions or even mandating compliance with the safety measures or requirements initiated by the owner or general contractor does not amount to control of the "method and manner" of performance. *Maraman v. Cooper Steel Fabricators*, 146 N.C.App. 613, 555 S.E.2d 309, 323-24 (2001), *aff'd in part, rev'd in part*, 355 N.C. 482, 562 S.E.2d 420 (2002) (per curiam); *Commee v. Nucor Corp*., 173 F. App'x 209, 212 (4th Cir. 2006).

As in *Hooper*, *O'Carroll* and *Commee*, the general contractor did not retain control over the method and manner of the subcontractors' work.

ii. Negligent Selection/Retention

In North Carolina, the plaintiff must prove four elements to prevail in a negligent hiring and retention case: "(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence." *Kinsey v. Spann*, 139 N.C.App. 370, 377, 533 S.E.2d 487, 493 (2000), citing *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990); *Little v. Othe framer Meats I, Inc*., 171 N.C. App. 583, 586-87, 615 S.E.2d 45, 48 aff'd, 360 N.C. 164, 622 S.E.2d 494 (2005). All four elements must be proven to prevail on a claim for negligent hiring and retention.

In this case, as to the first element, there was no evidence whatsoever that the framer was negligent. The framer's subcontractor, an independent contractor for whom the framer had no vicarious responsibility, apparently left the board in question. There were no allegations of direct negligence as to the framer than there are as to the general contractor.

As to the second element, there was no evidence that the framer was incompetent to perform the framing work on the Project. In *Kinsey*, the Plaintiff asserted a claim that the employee was incompetent to perform tree removal services. The Court found with regard to the employee's alleged incompetence, plaintiff's evidence, at best, only showed that he had no professional certification or license in tree surgery and had never owned or operated a tree removal service. The Court held that "[t]his, in and of itself, does not rise to the level of incompetence." 139 N.C. App. at 377. The evidence at trial reflected that the employee had been trained in tree felling and trimming, there is no requirement that tree surgeons be certified or licensed and that most of them in fact are not. Thus, the Court found this evidence as to element two to be insufficient to deem the employee incompetent. *Id*.

Likewise, in this case, there was no evidence that the framer was incompetent to perform the framing work it contracted to perform. The principal of the company had been doing framing work for a decade, and his current company had been in the framing business for five years at the time of the subject Project both for the general contractor and for other general contractors in apartment complex construction projects -- at least 7 other large apartment complex construction projects of 200-300 units.

The only purported "evidence" the Plaintiff presented that the framer was "incompetent" in this matter is that the name of the company did not have the word "framing" in it, that the word "framing" was not on their website, and that it was a home based company. The court agreed that none of these allegations were even arguably "evidence" to find a company incompetent. Thus, the Plaintiff's claim for negligent selection and retention fails for lack of an essential element.

Finally, there was no evidence that the general contractor had any actual or constructive knowledge of the framer's alleged incompetence. A presumption exists that an employer, or in this case a general contractor, has used due diligence in hiring its employees, or in this case an independent contractor. *Moricle v. Pilkington*, 120 N.C. App. 383 (1995). The burden is on the

Plaintiff to show that the employer did not use due care or that the employer had actual or constructive knowledge of the subcontractor's unfitness for the job. *Id.*

Despite this burden, the Plaintiff presented no evidence of such knowledge or of such alleged incompetence. To the contrary, there is no evidence that the general contractor had actual or constructive notice of the alleged incompetence of the framer. The evidence showed that the general contractor did exercise due care and diligence in retaining the framer as the framing contractor. If the general contractor has exercised due care to secure a competent contractor for the work, he may be relieved from liability for the alleged negligent acts of the subcontractor. *Page v. Sloan,* 12 N.C.App. 433, 439, 183 S.E.2d 813, 817 (citations omitted), *cert. allowed,* 279 N.C. 727, 184 S.E.2d 886 (1971), *aff'd,* 281 N.C. 697, 190 S.E.2d 189 (1972). *Jiggetts v. Lancaster*, 138 N.C. App. 546, 548, 531 S.E.2d 851, 852 (2000).

The Plaintiff further contended that the general contractor was negligent because it did not review the framer's OSHA record. This contention failed in light of evidence that the OSHA inspector, who researched the framer's OSHA history in connection with her inspection, discovered that OSHA had not cited the framer in the three years prior to working on the subject project. Thus, if the general contractor had researched the framer's safety history with OSHA, no violation would have been discovered, as none existed at the time of hiring.

Thus, all of the evidence showed that the general contractor was diligent in its selection of and exercised due care to secure a competent contractor for the work, thus relieving the general contractor from liability for the alleged negligent acts of the framer.

iii. The general contractor Construction is Not Liable for the Plaintiff's Injury Absent Knowledge of The Alleged Concealed Hazard

"It is also well-settled that the employee of a subcontractor working for a general contractor is an invitee [or lawful visitor] in relation to the general contractor." *Langley v. R.J. Reynolds Tobacco Co.*, 92 N.C.App. 327, 329, 374 S.E.2d 443, 445 (1988) (citing *Wellmon v. Hickory*

Constr. Co., 88 N.C.App. 76, 362 S.E.2d 591 (1987), *disc. review denied*, 322 N.C. 115, 367 S.E.2d 921 (1988); *Cowan v. Laughridge Constr. Co.*, 57 N.C.App. 321, 291 S.E.2d 287 (1982), *disc. review denied*, 324 N.C. 433, 379 S.E.2d 241 (1989). "Ordinarily, therefore, both the general contractor and the owner of the premises owe to the subcontractor and its employees the duty of ordinary care." *Id.* However, "[t]his rule extends only to defects which the subcontractor or his employees could not have reasonably discovered and of which the owner or general contractor knew or should have known." *Id.*

It is undisputed that the general contractor did not create the subject hole. The evidence showed that hole was created only a few days before the accident and covered by the framing crew. There was no evidence that anyone from the general contractor knew the hole had been cut out prior to the Plaintiff's fall; in fact, the Plaintiff himself testified that no one from the general contractor had knowledge that the hole had been cut prior to the date of his accident. Without such knowledge of the existence of the alleged concealed hazard, the general contractor had no duty to the Plaintiff to warn him about or protect him from the alleged hazard. *Cowan v. Laughridge Constr. Co.*, 57 N.C.App. 321, 291 S.E.2d 287 (1982).

On the other hand, there was evidence that the Plaintiff knew or should have known about the existence of the hole for the mechanical shaft prior to his accident. The Plaintiff was familiar with construction plans as part of his construction experience. In addition, the Plaintiff was familiar with mechanical shafts as part of his construction experience. The layout crew, including Plaintiff, marked, "popped out" the mechanical shaft prior to the Plaintiff's accident. The hole for the shaft existed and had already been cut when the layout crew, including the Plaintiff, popped the lines for the walls to go around the shaft. If the hole had not existed at the time Harper's crew, including the Plaintiff, popped the lines for the walls around the shaft, they would not have known how to snap the lines for the walls. Less than two to three inches from the mechanical shaft were doors that Plaintiff would have marked himself. The Plaintiff even acknowledged that plans call

for an opening to be cut in a floor to put in a mechanical shaft after it has been popped out. Thus, the Plaintiff had more knowledge of the existence of the hole for the mechanical shaft on the date of his accident than the general contractor did. Thus, there was no duty to warn the Plaintiff or to protect him from the alleged hazard.

3. Massachusetts Exemplar Case

a. Factual Background

The Plaintiff, an employee of a pile driver subcontractor, was working as an operator's apprentice for a pile driver subcontractor. The owner was a university in Boston that hired a GC, which then subcontracted with the Plaintiff's employer to perform pile driving services during the installation of an athletic complex at the university (the "Project").

The pile driver used a heavy wire cable to raise the hammer up and down the vertical boom; once the hammer was raised to the top of the boom, the operator released it to drive the pile into the ground. The heavy wire boom cable would regularly wear down from use, requiring the subcontractor to replace the worn wire cable with a spool of new cable.

To swap out the old worn out wire line with new wire line, the hammer would first be lowered to rest on the ground. The Plaintiff's co-worker would cut the old wire line free from the hammer then weld the cut end of the old wire line to the new wire resting on the ground. Once the old wire cable was temporarily "butt welded" to the new wire cable, the wire cable was pulled up and through the boom and reconnected to the hammer.

After the wires were welded together, the Plaintiff's co-worker instructed him to assist in the process of replacing the old wire with the new wire by climbing up to the top of the pile driver cabin. The Plaintiff's employer told him to help guide the old rope to the ground by standing atop the pile driver's cabin. The Plaintiff climbed to the top of the pile driver, approximately 8' – 10' off the ground, and was not using a safety harness.

As the Plaintiff was guiding the old wire line up and over the pile driver boom, he heard a loud “bang” that sounded like a gun being fired. He immediately felt the wire cable in his hand go limp and thought the line and/or boom was crashing down on him. He heard a co-worker call out that it was “coming down” and to get out of the way.

Plaintiff reacted and, believing the crane was collapsing, jumped off. He initially hit the pile driver’s treads then continued forward, falling to the ground. Upon impact, his knees buckled, and he suffered significant knee and ankle damage limiting his ability to safely operate equipment for the rest of his life. At the time, he was in his late 20’s and earning almost $100,000 a year.

It was undisputed that the weld was not inspected and neither the GC nor subcontractor had a specific requirement that such welds be inspected. Additionally, the Plaintiff was not wearing fall protection although the respective corporate and site-specific safety plans of the Owner, GC, and the Plaintiff’s employer required fall protection when working 6’ and above.

The evidence presented also showed that representatives of the Owner and GC were on site in a nearby jobsite trailer at the time of the accident. Both parties failed to conduct an inspection of the jobsite until the following day and failed to photograph or preserve the weld or take witness statements until the GC’s safety manger arrived to the site almost 24 hours later.

Although there was no evidence that the Owner or GC had explicit knowledge that the boom line was being replaced and/or welded, or that the Plaintiff was not wearing a safety harness, evidence was established that showed general awareness that the boom line would wear out and need to be replaced during the Project.

b. Legal Standard

In general, the primary question is whether a defendant owner or GC maintains sufficient control over the work by the plaintiff or his employer to impose a duty of care upon the defendant. Generally, “an employer of an independent contractor is not liable for harm caused to another by the independent contractor’s negligence, unless the employer retained some

control over the manner in which the work was done." *Lyon v. Morphew*, 424 Mass. 828, 834 (1997), citing *St. Germaine v. Prendergrast*, 411 Mass. 615, 623 (1992); *Corsetti v. Stone Co.*, 396 Mass. 1, 10 (1985); Restatement (Second) of Torts § 414 (1965) (property owner is not liable where independent contractor's negligence causes harm to others, including harm to employees of independent contractor, where owner has not retained control over any part of the work performed by independent contractor).

The Restatement (Second) of Torts, §414, and comments thereto, as adopted by the Supreme Judicial Court of Massachusetts, governs and states, in pertinent part, that:

> one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

For a plaintiff to defeat a motion for summary judgment, he must show that the Owner and/or GC retained not just *any* right to control the work at the Project: he must show that they retained control over the manner in which the work was to be performed. Retaining "a general right to order the work stopped . . . is not considered sufficient control to impose liability for a contractor's negligence." *Lyon*, 424 Mass. at 1310. Restatement (Second) of Torts § 414 comment c illustrates the control necessary to impose liability:

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress, or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such retention of a right of supervision that the contractor is not entirely free to do the work his own way.

Restatement (Second) of Torts § 414 comment c. See *DiLaveris v. W.T. Rich Co., Inc.*, 424 Mass. 9, 11 (1986) (the critical factor is whether the employer had any "meaningful control" over the independent contractor). "If the employer retains no control over the manner in which

the work is to be done, 'it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it.'" *Corsetti*, 396 Mass. at 10, quoting Restatement (Second) of Torts § 409 comment b (1965).

Usually, "[w]hether an employer has sufficient control over part of the work of an independent contractor to render him liable under § 414 is a question of fact for the jury." *Corsetti*, 396 Mass. at 11 (citations omitted). Although the question of control in cases involving § 414 is "ordinarily a factual issue to be resolved by the jury, summary judgment is proper when . . . the plaintiff fails to provide evidence creating a genuine issue for trial." *McNamara v. Massachusetts Port Authority*, 30 Mass. App. Ct. 716, 718 n. 3 (1991).

In *Lyon*, the plaintiff was an employee of an independent roofing contractor who sustained injuries when he fell from the roof of the defendant's hospital building on which he was working. *Lyon*, 424 Mass. 828. The trial judge allowed summary judgment for the defendants. On appeal to the SJC, the plaintiff argued that the defendants (the director and assistant director of the hospital), were liable for their failure to ensure that the plaintiff's employer complied with state and Federal safety regulations pertaining to roof safety. See *id.*

The SJC upheld the lower court's summary judgment decision, stating that "the hospital merely retained the authority to direct [the plaintiff's employer] to correct safety violations drawn to its attention. [The plaintiff's employer] provided the workers, materials, and technical experience to perform and provide necessary safety precautions. The defendants did not retain such a right of supervision such that [the plaintiff's employer] was not entirely free to do its work on its own." *Id.* at 1311. "The hospital's right to stop the project is precisely the type of general right that the Restatement says *should not trigger liability*." (emphasis added). *Id.*

c. Contractual Requirements Establishing Standard of Care

Courts routinely look to the Project contracts for evidence of whether the Owner and/or GC maintained control over the means and methods of a subcontractor's work or how it maintained its equipment. In this case, the contract between the Owner and GC was an AIA Document A201-1997. Article 3.3 "SUPERVISION AND CONSTRUCTION PROCEDURES" stated, in pertinent part:

> The contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.

Additionally, Article 3.3.2 stated that the Contractor "shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors." *Id*.

Article 10 of AIA Document A201-1997, "Protection of Persons and Property" stated that the Contractor:

> shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract . . . The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: (1) employees of the Work and other persons who may be affected thereby . . . .

Id.

Lastly, Article 10.2.3 of AIA Document A201-1997 stated that the Contractor "shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and precaution, including posting danger signs and other warnings against hazards, promulgating safety regulations . . . ." *Id*.

Thus, pursuant to the Agreement and the General Conditions of AIA Document A201-1997, Owner argued that the GC retained complete control over the work to be performed by its own employees and the employees of all subcontractors at the Premises, including the pile driving subcontractor and its employees.

d. Evidence of Foreseeability

A precondition to establishing a duty to a plaintiff is that the risk of harm to another be recognizable or foreseeable to the actor. See *Jupin v. Kask*, 447 Mass. 141, 147 (2006), citing *Foley v. Boston Hous. Auth.*, 407 Mass. 640 (1990) ("There is no duty owed when the risk which results in the plaintiff's injury is not one which could be reasonable anticipated by the defendant"). See Restatement (Second) Torts, § 284 (1965) ("Negligent conduct may be . . . an act which the actor as a reasonable man should *recognize* as involving an unreasonable risk of causing an invasion of an interest of another . . . ." [emphasis added]).

d. Massachusetts Summary

The Owner moved for summary judgment and argued that there was no evidence in the summary judgment record that it retained or exercised any control over, or supervision of, the construction means and methods, equipment repairs, or any other part of the Project that was performed on the Property pursuant to its prime contract, or that it either retained or exercised control over any of the independent contractors or over any employees of the independent contractors that the GC hired to assist it with the work.

The Owner also claimed that it was not aware that the weld was scheduled and that it retained the GC as an expert on such matters. Lastly, the Owner argued that the alleged accident was unforeseeable and that any safety violations were not causally connected to the accident.

The Plaintiff, however, opposed summary judgment and argued that the Owner and GC had respective corporate safety manuals that required job hazard analyses be conducted for "ultra-hazardous" activities, required fall protection be used when working at 6' or higher, and had

constructive, if not actual, notice that the pile driver was down for repairs and did nothing to investigate or ensure that work being done within 50' of the jobsite trailer was being performed safely and consistent with company policies. There was also evidence that the Owner and the GC had failed to implement their respective safety policies, including the fall protection requirements, and failed to conduct safety training on this Project.

4. Conclusion

The exemplar cases each seem to focus on the issue through a different lens but underlying both is the central premise of vicarious responsibility; a party is not directly responsible for the actions of another absent a principal/agent relationship. North Carolina cases have largely framed the issue of a variety of "exceptions" to this rule, but those purported exceptions are more along the lines of alternative ways to find direct liability, whether through the general contractor's own negligence in supervising and selecting the contractor or in failing to warn of dangerous conditions of which it has superior notice. The Massachusetts cases focus on the control and contractual analyses and whether the relationship was truly independent, as well as whether the control was properly exercised. Either way, for a general contractor to be held liable for the acts of a subcontractor, the vicarious liability hurdle must be leapt. The cases in both jurisdictions illustrate the variety of creative attacks that plaintiffs will pursue in making that leap.