# Full Disclosure

## California's newly expanded premises and independent contractor liability case law is now more aligned with those of several other Western states.

By WILLIAM SCOTT SHEPARD

The California Supreme Court has recently raised the risk of liability for developers and builders constructing projects on their own real property for injuries suffered by independent contractors based on a failure by the developer or builder to disclose hazardous conditions on the property to the independent contractor. Numerous potential nondisclosed hazardous conditions might create builder liability such as unstable soils/slide potential, presence of underground fuel tanks, presence of combustible underground natural gases, presence of lead or asbestos, unstable buildings in a remodel situation, or unstable trees near construction site. Prior to this recent decision, the independent contractor's sole remedy was worker's compensation insurance coverage.

**THE MAJORITY RULE IN THE WESTERN STATES IS THAT A DEVELOPER OR BUILDER WHO IS ALSO THE OWNER OF THE PROPERTY AT ISSUE MAY BE LIABLE FOR INJURIES SUFFERED BY AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR WORKING ON AN IMPROVEMENT ON THE PROPERTY.**

California raised this risk of liability for builders by answering the issue of the application of premises liability law to the general rule of nonliability of a landowner/hirer for injuries to independent contractors. In late 2005, the California court held that a landowner, which would include a developer that hires an independent contractor to do work on the property may be liable to the independent contractor's employees who are injured when: (1) the landowner/hirer knew, or should have known, of a hidden or concealed hazardous condition on its property; (2) the independent contractor did not and could not reasonably have discovered this hazardous condition; and (3) the landowner/hirer failed to warn the independent contractor about the hazardous condition. The holdings of recent California cases bring California premises liability and independent contractor law more in line with the holdings of courts in other Western states on these same issues.

Utah, Washington and Arizona are the Western states with rules closest to those now found in California.

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### UTAH AND WASHINGTON

In Utah and the state of Washington, the courts follow the language of the Restatement Second of Torts relating to the liability of possessors of land to invitees found at sections 343 and 343A which provide:

> A. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Section 343A provides:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

The Utah Supreme Court dealt with a recent case where a painter sued the homeowner acting as his own general contractor who hired him to paint his new home under construction for negligence and premises liability for injuries he suffered when he fell off of a balcony that had not yet had a railing or wall installed. The court made clear that the open and obvious danger rule as outlined in sections 343 and 343A was the rule of law in Utah and had replaced the old common law rule that protected the landowner from liability. If a landowner should expect that the independent contractor will be injured despite the obvious nature of the danger, the landowner must warn or take acts to protect the independent contractor from the injury.

The Supreme Court of Washington held in Kamla v. Space Needle Corp., 52 P. 3d 472 (2002), that the owner of the Space Needle Tower was not liable for the injuries suffered by an employee of an independent contractor they hired to install pyrotechnics on the tower when the employee's safety line was caught by a descending elevator. The court held that the independent contractor was an expert in the installation of fireworks, the contractor had worked two previous years on the Space Needle installing fireworks displays in and around the exposed elevator shafts, and the independent contractor was well aware of the danger posed by these conditions. In

addition, the contractor had devised a safety system on its own to avoid the elevator shafts.

Washington has also held that an entity that functions as the owner and general contractor for a residential condominium development was not liable for the injuries suffered by the operator of a scraper who worked for the independent contractor doing the initial grading for the project. The court noted that the plaintiff subcontractor was an expert in earthmoving, the project owner did not have any experience in that field, and the owner had no authority under the contract to control how the independent contractor performed its work. There was also no evidence that the project owner had any knowledge that the conditions at the jobsite created a dangerous condition or unreasonable risk of harm to the grader.

The Utah and Washington rule differs slightly from the California rule in that California does not place liability on the owner/hirer if the owner/hirer should expect that the independent contractor will fail to protect themselves against the danger as set forth in Restatement Second of Torts, section 343. California makes this exception to section 343, because California's public policy supports the ability of an owner or contractor to delegate to another contractor or subcontractor the responsibility for taking appropriate safety precautions at the jobsite.

## ARIZONA

In Arizona, the owner of real property who hires an independent contractor has a duty to disclose dangerous conditions on the property or premises known to the owner and not likely to be discovered by the independent contractor. This also includes a duty to make the property safe for the independent contractor or to ascertain dangerous conditions on the land and warn the independent contractor of the danger. The owner of property is generally not liable to the independent contractor or invitee for any danger that is open and obvious and known to the independent contractor or invitee. In some circumstances the owner must protect the invitee or independent contractor against known dangers where the owner should anticipate harm to the invitee despite the known danger. In Citizen's Utility, Inc. v. Livingston, 515 P. 2d 345 (1973), a public utility was found not liable for the electrocution of an independent contractor repairing the utility's downed power lines. The utility had met its duty of care to the independent contractor by warning the contractor's foreman that the power lines were hot/charged. In addition, the injury resulted from the very risk that an electrician is exposed to in the normal course of its work.

## IDAHO

Idaho follows a similar rule to the Western states discussed above, but it does not specifically follow the Restatement Second of Torts, sections 343 and 343A. In Idaho, if the hirer of the independent contractor is also the owner of the premises and remains in control of the premises during the work, the landowner owes the employees of an independent contractor a duty to manage and inspect the premises to keep it in a reasonably safe condition and to warn the independent contractor of concealed dangers which are known to or could be discovered by the landowner.

## NEVADA

The rule followed in Nevada is a little more favorable to a landowner or general contractor. A landowner owes the independent contractor working on the premises a duty to warn them of any hidden dangers. However, this duty to warn does not extend to open and obvious dangers or protecting the independent contractor against the defects or hazards that arise from the job the contractor has specifically undertaken to perform. The owner of a power plant is not responsible for the injuries suffered by an independent contractor who fell from a cooling tower under construction. The independent contractor was an expert in the construction of cooling towers, was more aware of the particular risk involved and better suited to protect against the risks of falling than the owner of the power plant, and the risk of falling from the cooling tower was a necessary consequence of building the tower.

## TEXAS

Lastly, Texas appears to be the state that is most different from California and the most favorable for limiting the liability of the landowner for injuries to independent contractors. The rule in Texas is set forth in Civil Practice & Remedies Code § 95.003 which provides:

A property owner is not liable for personal injury, death or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death or property damage arising from the failure to provide a safe work place, unless: (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death or property damage and failed to adequately warn.

**THE UTILITY HAD MET ITS DUTY OF CARE TO THE INDEPENDENT CONTRACTOR BY WARNING THE CONTRACTOR'S FOREMAN THAT THE POWER LINES WERE HOT/CHARGED. IN ADDITION, THE INJURY RESULTED FROM THE VERY RISK THAT AN ELECTRICIAN IS EXPOSED TO IN THE NORMAL COURSE OF ITS WORK.**

## SUMMARY

The majority rule in the Western states is that a developer or builder who is also the owner of the property at issue may be liable for injuries suffered by an employee of an independent contractor working on an improvement on the property, even if the independent contractor is covered by workers compensation insurance, if the developer or builder knows or should have known of a dangerous condition on the property, the independent contractor does not know of the dangerous condition, and the owner or builder fails to exercise reasonable care to protect the independent contractor from or warn them of the dangerous condition.