

Strategies and Defenses For Construction Personal Injury Claims

A carpenter falls 20 feet from scaffolding in an aging power plant undergoing major renovations. The carpenter, who is employed by a subcontractor, survives and is eligible for workers' compensation benefits from his immediate employer. But the carpenter believes the plant's condition, as well as the organization of the jobsite, was less than adequate and unnecessarily dangerous. He sues the power plant owner, the architect who designed the project and two general contractors and claims more than \$1 million for his injuries and loss of future work. Who is liable?

Multiparty personal injury claims can involve considerable time and paperwork to sort out who is responsible for the plaintiff's injuries.

Construction company owners and managers can anticipate and prepare for such legal quagmires if they understand some common construction law principles and the nuances of indemnification agreements.

COMMON INDEMNIFICATION SCENARIOS

After the carpenter files his lawsuit, the first issue to settle is who will be held harmless (indemnified) in the accident. Here are some considerations:

1 The owner of a construction site will most likely be indemnified. Construction site owners commonly include indemnifying language requiring one, or more, of the contractors to defend the property owner in the event of a third-party lawsuit. Typically, indemnity will be owed to the property owner by the general contractor that is responsible for the scope of work performed at the time of an accident.

2 General contractors and their subcontractors usually agree to



mutual general indemnification provisions for a project. Often, such contracts require each party to indemnify the other if either one was solely negligent for an accident. Many times, legal counsel for the contractor and subcontractor conduct their own informal investigation before legal discovery can determine who was negligent in order for the mutual indemnification provisions to apply.

In the carpenter's case, if the parties can agree on who was responsible for the scope of work at the time of the injury, one attorney may be able to represent both the general contractor and the property owner because of their indemnification agreements.

THE BEST DEFENSES

After settling the indemnification issues, the defendants will respond to the carpenter's

complaint with affirmative defenses (defenses that pose new allegations and/or disagree with the original complaint) and cross-claims and joinder complaints (additional claims including negligence against co-defendants and joinders of new parties such as the manufacturer of the scaffolding). Here are some common affirmative defenses:

For the Property Owner

- The property owner is under no obligation to maintain a safe building for the benefit of a contractor's employees working at the site.
- The property owner can assert that he did not have a sufficient degree of control over how the work was done and, therefore, cannot be liable for the injury.
- The property owner can say the work performed at the time of the accident was not inherently dangerous.

For the General Contractor

Provisions stemming from the workers' compensation law can provide protection from liability. The general contractor can plead the affirmative defense of being a statutory employer. This defense arises out of the obligation that a general contractor provides workers' compensation benefits in the event that a subcontractor fails to pay such benefits to its injured employee.

The general contractor is entitled to the protection of the statutory employer defense if the following five conditions are met:

- the employer is under contract with the owner or is in the position of an owner;
- the premise is occupied by or under control of the employer;
- the subcontract was made by the employer;
- part of the employer's regular business is entrusted to the subcontractor; and
- the injured worker is an employee of the subcontractor.

For the Architect/Engineer

Tort reform has led to a new defense for licensed design professionals, such as architects and engineers.

In Pennsylvania, and in some other states, a plaintiff must file a certificate of merit within 60 days of filing the complaint. The certificate of merit is a document certifying that another licensed professional believes a reasonable probability exists that the work in question, done by the design professional, fell outside the acceptable professional standards of conduct and caused the harm.

If such a certificate is not filed within 60 days, the design professional defendant can move to have a default judgment in his/her favor and, if granted, gain protection from liability.

This construction loss scenario involves some considerations and defenses that arise when a worker sustains an injury at a construction site.

These issues should be considered when drawing up contracts among property/business owners, contractors and subcontractors.

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