

The Contract Side of Safety

SENY Conference

New York

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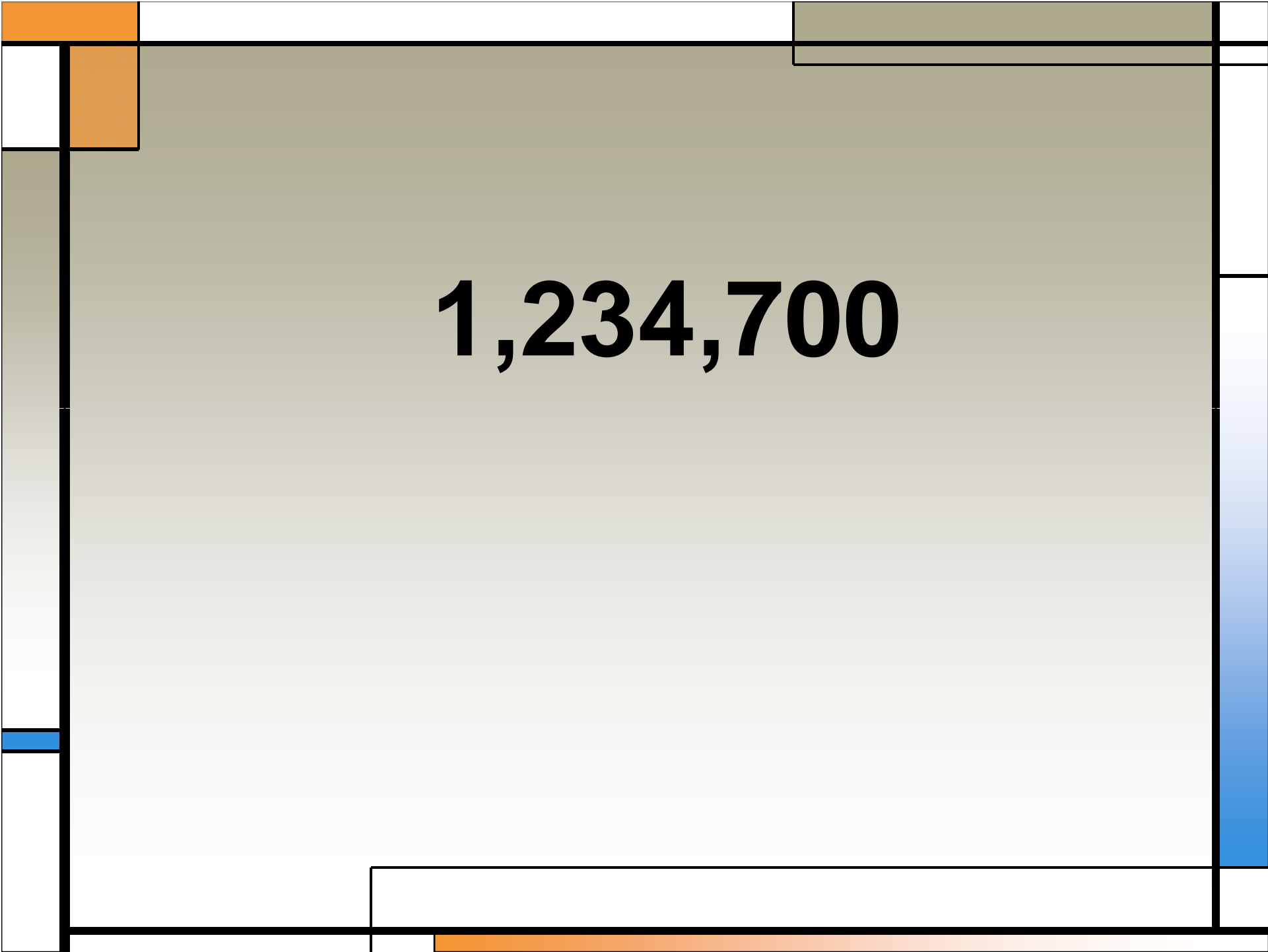
2005

**US Dept of Labor, Bureau of Labor
Statistics**

**Non-fatal injuries and illnesses, private
industry**

Cases involving days away from work

How many?



1,234,700

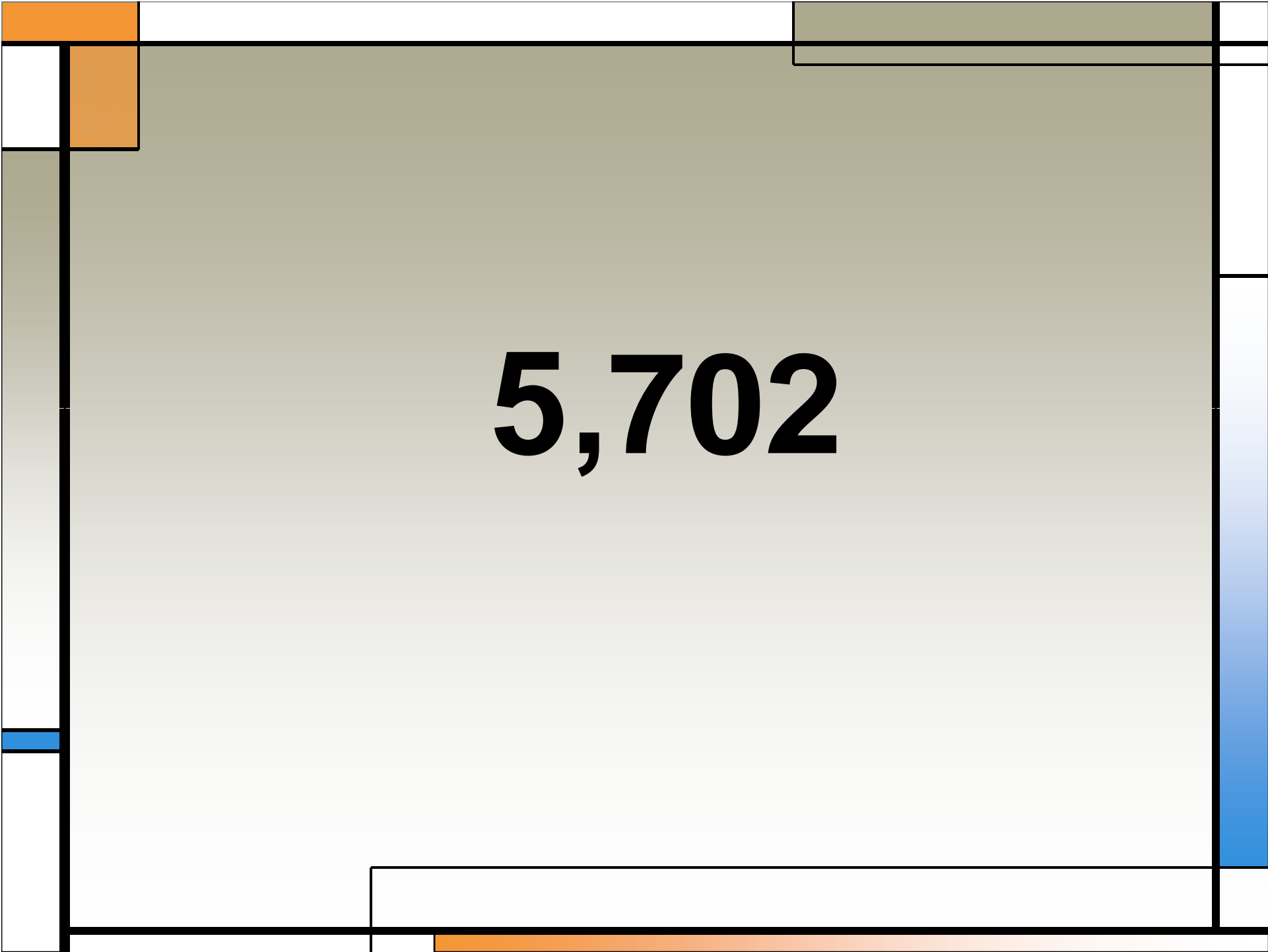


2005

Fatal work-related injuries

All sectors

How many?



5,702

Agenda

- **National Overview – Liability Theories and Trends**
- **Safety Plans and Programs**
- **Contract Documents – Understanding the Safety (and Financial) Impact**
- **Panel Discussion – Current New York Issues**

National Overview – Liability Theories and Trends

Safety Plans and Programs

Anthony G. Karamuzis
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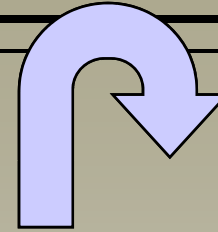


Liability Theories Against The Upper-Tier Contractors

- Initiating Safety Programs
- Ability To Stop Work
- Right To Inspect
- Presence On Site
- Supplying Equipment
- Observation Of Unsafe Work
- Key - Control Of Sub's Work



The Prevailing Trend:



From: A GC needed only to have retained the control of any part of the work in order to be subject to liability = A Non-Delegable Duty For Worker Safety.

To: A GC is not liable for merely retaining a general right to order work stopped, to inspect the work, to make recommendations, or to prescribe alterations. There must be retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Examples From Various States....

“CONTROL” of Site is key

- **...Fact specific!**

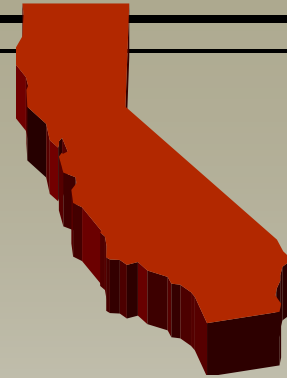


Illinois



- Martens v. MCL Construction Corporation, 347 Ill. App. 3d 303, 807 N.E.2d 480 (1st Dist. 2004); Cochran v. George Sollitt Construction Co., 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005)
- The general rule in Illinois is that there must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

California

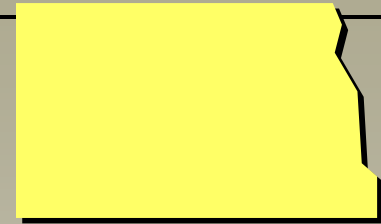


- Hooker v. Dept. of Transportation, 27 Cal. 4th 198; 38 P.3d 1081 (2002) – Supreme Court of California
- A hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries.

California Supreme Court

- "We hold that in light of recent California Supreme Court holdings limiting the liability of general contractors for injuries to employees of subcontractors, liability cannot be imposed on the general contractor based upon a mere failure to require the subcontractor to take safety precautions, where the general contractor's failure is not shown to have affirmatively contributed to the creation or persistence of the hazard causing the plaintiff's injuries. Accordingly, we affirm the judgment for defendant."

North Dakota

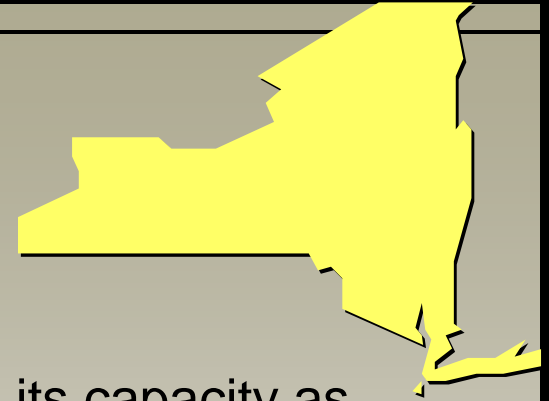


- The Supreme Court of North Dakota: "Employees of an independent contractor fall within the protection of Section 414, and an employer of an independent contractor owes a duty to the independent contractor's employees to exercise the retained control with reasonable care." - Fleck v. ANG Coal, 522 N.W.2d 445 (1994).
- The degree of control must be such a retention of the right of supervision of operative details that the independent contractor is not entirely free to do the work in his own way.

Utah

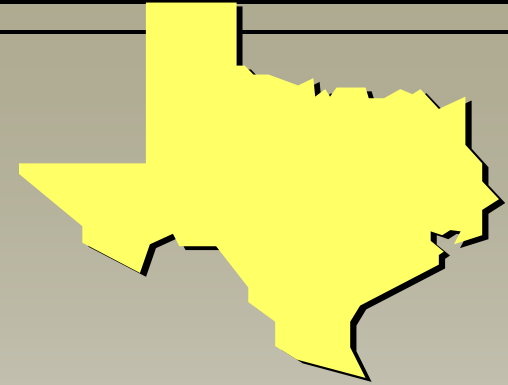
- One who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented.
- Thompson v. Jess, 1999 UT 22; 979 P.2d 322 (1999) – Supreme Court of Utah

New York



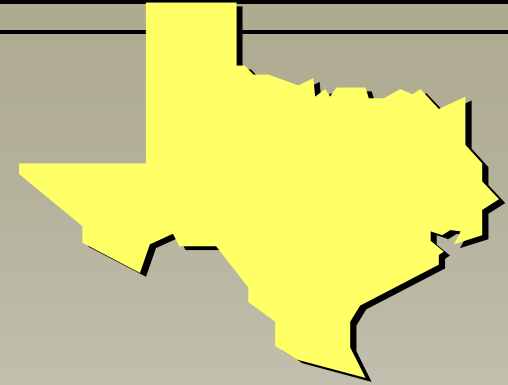
- “While there was proof that Structure Tone in its capacity as general contractor had general supervisory responsibility for the project, the showing essential to support a finding of liability pursuant to [Labor Law § 200](#), that the defendant oversaw or controlled the manner or method of the work in which plaintiff was engaged at the time of his injury was entirely absent.
- DeSimone v. Structure Tone, Inc, 306 A.D.2d 90; 762 N.Y.S.2d 39 (2003)

TEXAS



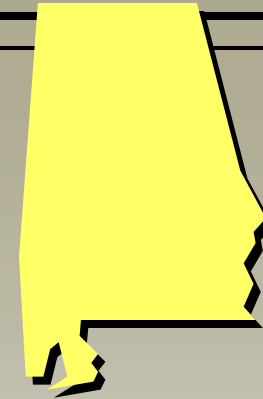
- Lee Lewis Construction, Inc. v. Harrison, 45 Tex. Sup. Ct. J. 232, 2000 WL 33666911 (Dec. 20, 2001).
- A recent Texas Supreme Court case held that a general contractor who retained the right to control its subcontractors' safety measures, and actually exercised a right of control over safety, was liable for the fatal fall of one of the subcontractors' employees because of the general contractor's implied approval of clearly dangerous work methods.

TEXAS



- The “form” AIA Contract required the subs to follow a voluminous, detailed safety manual.
- The right of control must be assumed either under the contract or by actual exercise of control. Here, court found “some” control.

ALABAMA

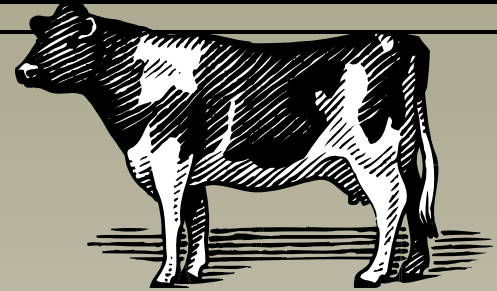


- Thomas v. Pepper Southern Constr., Inc.,
- 585 So.2d 882, 1991 Ala. LEXIS 803, (1991).
- The Alabama Supreme Court has held that where the general contractor monitored the work site and held safety meetings to remind employees to wear hard hats was not sufficient “control.” Thus, the general contractor had no duty to the employees of the subcontractor.

IOWA

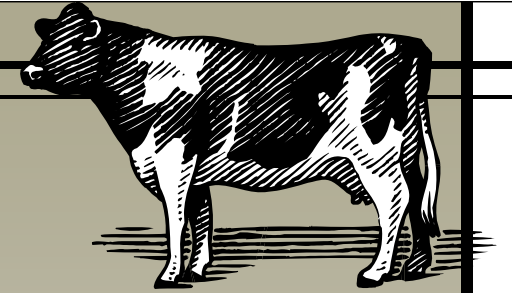
- Robinson v. Poured Walls of Iowa, Inc., 1996 Iowa Sup. LEXIS 392, 553 N.W. 2d 873.
- In Iowa, general contractors may be held liable for subcontractors' employees' injuries arising out of tasks involving a "Special Danger."

WISCONSIN



- Brooks v. Hayes, 133 Wis. 2d 228, 395 N.W. 2d 167 (1986) – Supreme Court of Wisconsin
- Ruling: The “independent contractor rule” is not a complete defense for general contractors.
- The general contractor still has a duty to perform with due care, even if performing the contract is delegated to others.

WISCONSIN



- “We hold that a general contractor who has a contractual duty of due care in performing the construction contract may be liable to the owner for damages when an independent contractor hired by the general contractor negligently performs under the construction contract and causes property damage to the owner.”
- Many years later, in Scott v. Savers Property & Casualty Ins. Co., 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715, the majority of the Wisconsin Supreme Court made it plain that it maintains that Brooks stands for the proposition that the failure to exercise common law duty to perform contracts with care and skill is a tort as well as a breach of contract.

- The Indemnity Agreement may be void in certain states (for example, Illinois) for seeking indemnification for the general contractor's own negligent or wrongful acts and...



- ...commingling the Indemnity and Insuring Provision may invalidate the Insuring Agreement (not good).
- Keep the Indemnity Agreements and Insuring Agreements separate at all times. They are different agreements addressing potentially different risks.



Safety Plans and Programs

The safety program “gone wild” vs. the simple but effective plan with a purpose, well coordinated, etc



The more dedicated to safety, the more complex your program becomes, the more necessary is time spent on training and educating your key personnel (and, frankly, all of your personnel) on your safety policy and program.

Recent Case Examples:

1st – Over “kill” them with Safety

- Corporate Safety Program
- District Safety Program
- Area Safety Program
- Jobsite Safety Program
- Job Hazard Analysis for Specific Task
- Daily Toolbox Meetings
- Weekly Safety Reviews
- Monthly Safety Conferences

2nd – Safety Made Simple

- 6,000 pound pre-cast panel
- Spring loaded straps
- C-Channels vibrated loose
- Amputated both legs and right thumb

Safety Program



- 1) Strap load before hooking up
- 2) Drop trailer before unstrapping
- 3) Block landing legs secure
- 4) When hooking trailer, hook air lines up so trailer does not roll back
- 5) Hard hats must be worn at all times – No Exceptions!!!
- 6) Work boots must be worn at all times – No Exceptions!!!
- 7) All loads must be strapped down (one strap every 10 feet)
- 8) Back up alarms on tractors
- 9) Make sure load is secure before unstrapping, and stay clear of load when unstrapping
- 10) After dark – No hooking or spotting without assistance
- 11) Before strapping load, secure load with one or two straps
- 12) All trucks must have flashlights

Contract Documents – Understanding the Safety (and Financial) Impact

Dennis J. Cotter
SmithAmundsen LLC



Parties to a Construction Contract

How many parties are there to a typical contract?

1. Owner
2. General Contractor
3. Subcontractor
4. Architect
5. Engineer
6. Construction Manager
7. Bank
8. Employees
9. Insurance Company
10. Legislature/ General Assembly
11. Courts
12. Arbitrator
13. Trade & Industry Associations (AGC, ASA)
14. Regulatory Agencies (OSHA, ANSI)

The Contract Documents – and the Importance of Each One

What risks and responsibilities are undertaken in common construction documents?

- Prime/Base Contract
- Bid documents
- Specifications
- Drawings and Plans
- General Conditions
- Supplementary Conditions
- Addenda
- Change Orders
- Insurance Rider
- RFI's
- Contract Modifications

Example - Specifications

1.1.6 Specifications

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

Insurance Requirements

GIBSON ELECTRIC CO., INC. INSURANCE REQUIREMENTS

All subcontractors shall procure and maintain insurance during the entire life of this project per the requirements below:

<u>FORM OF COVERAGE</u>	<u>MINIMUM LIABILITY</u>
WORKERS COMPENSATION	Statutory Limits \$ 500,000
<u>COMPREHENSIVE GENERAL LIABILITY</u>	
<u>OCCURRENCE FORM</u>	Per Occurrence \$1,000,000
Including Contractual Liability	Per Location \$1,000,000
Contractor's Protective Liability	Personal Injury \$1,000,000
And, where applicable, explosion, Collapse Completed Operations Coverage.	
<u>COMPREHENSIVE AUTO LIABILITY</u>	
Including Owned, Non-Owned and Hired Autos	\$ 1,000,000
<u>UMBRELLA LIABILITY</u>	\$ 3,000,000

Subcontractor shall be responsible to ascertain and warrant that all insurance coverages are complete in form and meet all minimum limit requirements as specified above. Subcontractor hereby agrees that if additional insurance is required by Gibson Electric Co., Inc.'s contract with the General Contractor or owner, this additional insurance will be supplied. In addition, Subcontractor shall file with Gibson Electric Co., Inc. a Certificate of Insurance in the appropriate form before beginning work. Such certificates must clearly show all coverage outlined above and shall indicate coverage provided by insurance carriers with an AM Best Rating of A1 VII or better and shall name Gibson Electric Co., Inc.; EMCOR Group, Inc.; the Owner, Architect and any others required for this project as additional insured. All insurance policies must be primary and non-contributory in favor of the additional insureds, as well as a waiver of subrogation in favor of the additional insureds. Any insurance held by any of the additional insured shall be excess and non-contributory insurance. Such certificates shall include a clause that at least (30) days advance written notice of cancellation shall be given Gibson Electric Co., Inc.

Additional Insured Endorsements

“B. COMMERCIAL GENERAL LIABILITY insurance on an occurrence basis providing limits for Bodily Injury and Personal Injury including its own employees of \$1,000,000 each occurrence and Property Damage of \$1,000,000 each occurrence. **The policy must include the parties listed in Article 43 as ADDITIONAL INSUREDS, on an ISO Additional Insured Endorsement ... covering ongoing and completed operations.**

AIA A201 General Conditions

“5.3 Subcontractual Relations

5.3.1 By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, **to be bound to the Contractor by terms of the Contract Documents, and to assume toward the contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor’s Work, which the Contractor, by these Documents, assumes toward the Owner and Architect...”**

Trench Collapse – Contract Documents Case Study





American Institute of Architects (AIA) Selected Sample Contractual Provisions

ARTICLE 3 CONTRACTOR

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.3.1 The Contractor shall supervise and direct the Work.... 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....

American Institute of Architects (AIA) Selected Sample Contractual Provisions

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

American Institute of Architects (AIA) Selected Sample Contractual Provisions

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury, and loss to:

.1 employees on the Work and other persons who may be affected thereby;

American Institute of Architects (AIA) Selected Sample Contractual Provisions

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection....

American Institute of Architects (AIA) Selected Sample Contractual Provisions

10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

What won the case?

5.3.1 – Subcontractual Relations

The “pass through” provision

Contractual Risk Shifting Scaffold Injury – Case Study

- Control over means, method and manner delegated to subcontractors by contract – wasted paper?
- Baker's scaffold case
- Clear absence of guardrails
- CM knew they were not being used
- Power of the contractual provisions at trial



**A few more important
considerations**

American Institute of Architects (AIA) Selected Sample Contractual Provisions

3.18 INDEMNIFICATION

3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify the Owner....

3.18.2 Indemnity obligation not limited by a limitation on the amount or type of damages payable.....

American Institute of Architects (AIA) Selected Sample Contractual Provisions

3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

6.2 MUTUAL RESPONSIBILITY

3.10.1 The contractor [after being awarded the Contract shall submit a construction schedule and that schedule] shall provide for expeditious and practicable execution of the Work.

6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of materials and performance of their activities....

Current New York Issues Panel Discussion

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Gary DiPaolo

Structure Tone, Inc

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