



## NEWSLETTER ARTICLE

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## Construction Law

### Liability Of A General Contractor For Injuries Caused By Negligent Subcontractor

*By Daniel G. Katzenbach*

Because a general contractor is generally in charge of the entirety of a construction project, it is often assumed, and alleged in lawsuits, that the general contractor is legally responsible for the safety of the job site. It is certainly true that general contractors are legally responsible for any affirmative actions they take that result in injuries on the job site — i.e. employees of the contractor fail to cover a hole they made, leave dangerous items unattended, operate a piece of equipment in a manner that injures someone, etc. But an area that often elicits much confusion is what happens when an employee of a subcontractor is injured on the job site because of the negligence of one of the subcontractors? Consider this scenario: General Contractor on a commercial construction project of a multistory building hires Subcontractor to paint the outside of a building. As part of its work, Subcontractor has to erect scaffolding on the building due to the height of the building. Subcontractor does so improperly, resulting in an unsafe condition on the scaffolding. Employee of Subcontractor is working on the scaffolding and falls off because of the unsafe condition, injuring himself. What is the legal responsibility of General Contractor? If Employee sues General Contractor, he will allege that General Contractor had a duty for the overall safety of the job site and to insure that all areas of the job site were safe for the subcontractors working there. But is that the case? Let's see how our scenario would be evaluated under current North Carolina law.

### Woodson v. Rowland

The case that brought the muddled law on this issue into focus was *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). *Woodson* held that a general contractor is not liable for the negligence of subcontractors, and therefore not liable for injuries sustained by a subcontractor's employees on the job site as a result of that negligence. *Woodson* clarified that generally speaking, 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.

However, *Woodson* established that North Carolina law recognizes two exceptions to the rule that a general contractor is not liable for injuries sustained by a subcontractor's employees: (1) situations where the contractor retains controls over the manner and method of the subcontractor's substantive work; and (2) situations where the work is deemed to be inherently dangerous. There is another possible exception that is, at this time, unclear under the case law: situations involving negligent hiring and/or retention of the subcontractor by the general contractor. The rationale behind these exceptions is that in those specific situations the court views the duty of safety as a non-delegable duty for the general contractor. So in our hypothetical scenario, General Contractor would not be liable for the injuries sustained by Employee unless General Contractor retained control over the manner and method of Subcontractor's work, or if Subcontractor's work was inherently dangerous; and possibly, if General Contractor negligently hired or retained Subcontractor.

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#### **Controlling Manner**

##### And Method Of Work

This exception holds that if an owner or contractor retains sufficient control of the independent contractor's substantive work, then it changes the independent contracting relationship into an employer-employee relationship, which would carry derivative liability. The issue here will be whether the subcontractor contractually obligated itself to, and did in fact, have sole responsibility and control over construction means, methods, techniques, sequences and procedures, and over coordinating all portions of its work consistent with the terms of the contract. The court is looking to see if there is any evidence that the general contractor had any right to control the method and manner of the substantive work being performed by the subcontractor. The court is looking at the evidence to see if the subcontractor was "free to perform its job according to its own independent skill, knowledge, training, and experience". *Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 404-405, 436 S.E.2d 145, 149 (1993). *Hooper* establishes that it is not enough for a general contractor to supervise the work of the subcontractor (since that is theoretically every general contractor's job) — the general contractor must specifically retain control of the work via the contract with the subcontractor, or specifically interfere with the work so as to establish retention and control of the work.

In our hypothetical scenario, the issue will be whether Subcontractor was free to perform its job of erecting the scaffold and painting the building according to its own independent skill, knowledge, training, and experience. Or, is there evidence that the contract between General Contractor and Subcontractor left General Contractor with the right to control the work, or that there is evidence that numerous times during the project General Contractor did in fact inject itself into the work of Subcontractor so as to be deemed to have controlled the means and methods of the work being performed by Subcontractor — i.e., did General Contractor change the way in which the scaffold was to be erected, direct or instruct the way in which the scaffold was to be erected, etc.? The answers to these questions will determine if General Contractor can be liable for Employee's injuries under this exception.

#### **Inherently Dangerous Activity**

This is probably the most often seen exception, since it is the most susceptible to argument from both sides in a lawsuit. The court in *Woodson* defined what constitutes inherently dangerous activities. They are activities involving a "recognizable and substantial danger inherent in the work..." *Woodson v. Rowland*, 329 N.C. 330, 351, 407 S.E.2d 222, 235 (1991). Further, inherently dangerous activities are those "from which mischievous consequences will arise unless preventive measures are adopted." *Woodson*, 329 N.C. at 352, 407 S.E.2d at 235. Additionally, in making this determination, the focus is not upon the work activity in a generalized sense, but rather on the specific work being done at the time under the particular attendant circumstances. The rationale by the courts is that all of a particular kind of work may not be inherently dangerous, or the work may not always be inherently dangerous.

The *Woodson* court recognized that, as a matter of law, some activities are inherently dangerous, and some are not. North Carolina courts have held as a matter of law that maintaining an open trench in a heavily populated area is inherently dangerous, *Evans v. Elliott*, 220 N.C. 253, 17 S.E.2d 125 (1941); blasting is an inherently dangerous activity, *Greer v. Callahan Construction Co.*, 190 N.C. 632, 130 S.E. 739 (1925); and installing electrical wires is an inherently dangerous activity, *Peters v. Carolina Cotton & Woolen Mills, Inc.*, 199 N.C. 753, 155 S.E. 867 (1930). Conversely, North Carolina courts have held that



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as a matter of law the activity of sign erection is not an inherently dangerous activity, *Brown v. Texas Co.*, 237 N.C. 738, 76 S.E.2d 45 (1953); plumbing is not an inherently dangerous activity, *Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 436 S.E.2d 145, 149 (1993); and roof construction is not an inherently dangerous activity. *Olympic Products, Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363, S.E.2d 367, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862 (1988); *Canady v. McLeod*, 116 N.C. App. 82, 446 S.E.2d 879, *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994).

Even if work is determined to be "inherently dangerous," that is not the end of the inquiry. A general contractor is liable for the injuries sustained by an independent contractor's employee only if the employee is engaged in an inherently dangerous activity and the general contractor knew or should have known of the circumstances creating the danger.

Finally, another consideration by the courts on this issue is whether injury was from "danger collaterally created by the independent negligence of the contractor." *Woodson*, 329 N.C. at 351, 407 S.E.2d at 235. No recovery may be allowed for an injury resulting from an act or fault purely collateral to the work and which arises from the wrongful act of the independent contractor or his employees. This means that if the employee is injured performing "inherently dangerous work," but that work is not a normal part of the subcontractor's job, then there is no liability for the general contractor. The example from *Hooper* is in that case the subcontractor was hired to perform plumbing work, but the employee was injured using a scaffold to reach a valve. The court reasoned that it was not a normal part of the subcontractor's work to use scaffolding during their plumbing work, and the contract did not call for it, so it was "collateral to the work" and the court did not need to address whether it was or was not "inherently dangerous."

So in our hypothetical scenario, the first question will be whether painting is an inherently dangerous activity. Employee's attorney will want to argue that the "activity" that should be evaluated is commercial painting involving the use of scaffolding, whereas General Contractor's attorney will argue that the "activity" is simply painting in general. Since there has never been a determination by the courts, as a matter of law, about whether painting in any form is inherently dangerous, the only way the court will be able to decide that issue is through expert testimony from both sides about the inherent dangerousness of painting, and of the particular painting job Employee was performing. Even if the court determines that painting is an inherently dangerous activity, the next inquiry will be whether General Contractor knew or had any reason to know of the dangerousness of painting as an activity. If the court determines that General Contractor did have reason to know of the dangerousness of painting, the final inquiry that will be made is whether the injury to Employee was the result of "danger collaterally created by the independent negligence of" Subcontractor. The question for the court here will be was Employee's injury caused by any work, activities or actions that were not part of the normal work or duties of Employee?

## **Negligent Hiring/Retention**

I have listed this as a possible exception to the general rule, because it is not clear whether this is actually an exception under North Carolina law. Most cases citing *Woodson* cite it for the proposition that negligent hiring/retention is an exception, but that is not exactly the holding of *Woodson*. The plaintiff's attorney argued to the court that the general contractor should be liable for negligent hiring of the subcontractor. The Court of Appeals recognized that case law establishes that an employee may sue his employer for negligent hiring/retention of a co-employee, and that a third-party may sue the person who negligently hired/retained an independent contractor, however the court stated that the issue of whether a subcontractor's employee could maintain an action for negligent hiring/retention against the general contractor had never been addressed by any courts in North Carolina. The court went on to hold that a general contractor may not be liable for negligent hiring/retention of a subcontractor. On appeal, the Supreme Court stated that they did not need to address the issue as to whether that cause of action was



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viable since there was insufficient evidence of negligent hiring/retention. Although most cases citing *Woodson* do so for the proposition that negligent hiring/retention, one subsequent case holds that because of the reasoning of the Court of Appeals in *Woodson*, which was appealed and not overturned by the Supreme Court, the law in North Carolina is that an employee of a subcontractor may not maintain an action against the general contractor for the negligent hiring/retention of that employee's employer. *Cook v. Morrison*, 105 N.C. App. 509, 413 S.E.2d 922 (1992). Although that seems like the correct interpretation, the answer to this issue is far from clear.

So in our hypothetical scenario, Employee's attorney will argue for the court to determine that North Carolina law allows for an employee of a subcontractor to maintain an action against the general contractor for the negligent hiring/retention of that employee's employer. General Contractor's attorney will argue that, as Cook states, the law in North Carolina is that no such action can be maintained.

## **Conclusion**

So while as a practical matter the general contractor is responsible for the project and job site, as a legal matter the general contractor is generally not held responsible for the safety of the job site. However there are limited situations where the court will find that job site safety is non-delegable, because either the general contractor has taken control of the particular situation, or the situation presents a particularly hazardous environment.

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