

A Challenge To Proposition 51: Court Rules That
Proposition 51 Will Not Apply In Favor Of A Property Owner
Where A Non Delegable Duty To Maintain Is Concerned, Even
Though The Maintenance, By Law, Must Be Conducted By A Contractor

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In 1986, the California electorate enacted Proposition 51, which modified the doctrine of joint and several liability in tort cases. See, Civil Code section 1431.2 and DaFonte v. Up-Right, Inc. (1992) 2 Cal.4th 593. Under Civil Code section 1431.2:

"[i]n any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount" [i.e. the judgment for noneconomic damages will be equal to the percentage of the defendant joint tortfeasors' fault]

An interesting exception, often argued by plaintiff personal injury attorneys in California deals with situations where the defendant property owner is considered to have a nondelegable duty. In general, a person who hires an independent contractor is not liable for the acts or omissions of the independent contractor. See, Srithing v. Total Investment Company (1994) 23 Cal.4 th 721, 725-726. However, an exception to this is what is called the "Doctrine of Nondelegable Duties" which was defined in Brown v. George Pepperdine Foundation (1943) 23 Cal.2d 256 (case involving child injured when falling down an elevator shaft in an apartment building). Quoting the California Supreme Court in Brown v. George Pepperdine Foundation (1943) 23 Cal.2d 256:

"[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is

nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay."

The question then becomes, however, in the context of Proposition 51, is a landowner severally liable for the acts of its independent contractors in maintaining the property. In Srithing v. Total Investment Company (1994) 23 Cal.4th 721, 725-726, a case involving a reroof of a mini-mall, the roof contractor, hired by the property owner, permitted hot asphalt to seep through the ceiling and injure the plaintiff's arm. In that case, the Court ruled that the liability of the property to maintain the roof was nondelegable and the landowner would be severally liable with its contractor for noneconomic damages.

Nevertheless, a theory developed by the defense bar argues that the nondelegable duty cannot apply where, by statute, the landowner is obligated to use third parties to conduct statutorily required maintenance. See, Restatement of Torts, section 422, comment d. Quoting that section:

"[a] possessor of land who employs an independent contractor to repair a structure thereon is not subject to liability for the contractor's failure to maintain the structure in safe condition unless similar conduct on the part of the employer, had he retained the making of the repairs in his own hands, would have subjected him to liability".

Using that argument, defense counsel in the matter of Koepnik v. Kashiwa Fudosan America, Inc. (2009) DJDAR 5504 argued that an owner of a high rise building in South San Francisco could not be jointly and severally liable with an elevator maintenance company for noneconomic damages under Proposition 51 for injuries which were suffered by an employee of an air conditioning company which had fallen in an elevator at the building. After the elevator maintenance company, Otis Elevator, settled with the plaintiff before trial for \$110,000, the building owner went to trial with the plaintiff who was awarded \$4,250,000 in noneconomic damages.

On appeal, the building owner's counsel argued (as it did at the trial court level) that because Labor Code sections 7300 to 7324.2, amended in 2002, bar a

landowner servicing the elevators unless the service person is certified as a qualified conveyance company, the building owner could not have been considered to be in control of the work of the elevator maintenance company.

The Court of Appeal, again, sided with the plaintiff's bar. The Court ruled that statutes requiring certified contractors do not bar landowners from performing work, but instead merely requires that the owner be certified if it wishes to perform the work. It also pointed out that the statute in question provided that the requirements for use of certified contractors did not lessen the responsibility of any owner of property.

The decision in Koepnick v. Kashiwa Fudosan America, Inc. will broaden the exposure of owners of property, particularly larger commercial structures. What the owner can do, to the extent practicable, is to obtain as much express indemnification rights as possible from the contractor. Also, in the event that an independent contractor (particularly ones without express indemnity obligations to the property owner) attempt to settle out, the nonsettling property owner should give serious consideration to opposing a good faith settlement motion as the property owner may be liable for all of the settling contractor's percentage of fault for noneconomic damages over and above the settlement amount.

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