

# Construction Law Practice Tip: Land Lessor Liable for Negligence

---

May 15, 2017

---

PRACTICES Construction Litigation

---

It is black-letter law that an employer is generally not responsible for the negligence of an independent contractor. But a litany of exceptions follows this otherwise simple rule. In particular, a lessor of land is liable for the negligence of a subcontractor hired to perform repairs that the lessor undertook voluntarily or under a duty. *Damron v. C. R. Anthony Co.*, 586 S.W.2d 907 (Tex. App.—Amarillo 1979, no writ) (citing RESTATEMENT (SECOND) OF TORTS §§ 419-420).

In *Damron*, the eponymous lessor agreed to replace the deteriorated roof of the building he leased to Anthony, per the lease's terms. The contractor improperly sealed the portion of the roof that he replaced on the first day and overnight rain damaged \$15,000 worth of store merchandise. Anthony eventually sued *Damron* for negligence. *Damron* responded that any negligence was that of the independent roofing contractor, which insulated her from responsibility. The jury found for Anthony and awarded all his damages.

*Damron* appealed arguing, *inter alia*, that she was not liable as a matter of law for the independent contractor's negligence. Citing Restatement (Second) of Torts §§ 419-420, the court of appeals disagreed. These two sections essentially state that the lessor's duty to repair, when it arises either by contract or by voluntary undertaking, is non-delegable:

## § 419. Repairs Which Lessor is Under a Duty to His Lessee to Make.

A lessor of land who employs an independent contractor to perform a duty which the lessor owes to his lessee to maintain the leased land in reasonably safe condition, is subject to liability to the lessee, and to third persons upon the land with the consent of the lessee, for physical harm caused by the contractor's failure to exercise reasonable care to make the land reasonably safe.

## § 420. Repairs Gratuitously Undertaken by Lessor.

A lessor of land who employs an independent contractor to make repairs which the lessor is under no duty to make, is subject to the same liability to the lessee, and to others upon the land with the consent of the lessee, for physical harm caused by the contractor's negligence in making or purporting to make the repairs as though the contractor's conduct were that of the lessor.

The court first held that even though these two sections spoke of "physical harm," it saw "no logical reason" to differentiate between "harm to the lessee's person and property," and that it would apply these sections to both. It also noted that "Texas has long followed" the principles enumerated in §§ 419-420. In *Dalkowitz*, a case with facts substantially identical to *Damron's*, the Texas Court of Civil Appeals held, in 1908, that the independent contractor is the landlord's [sic] representative from the tenant's perspective and cannot relieve the landlord of responsibility. The *Damron* court reasoned that

[t]he basis of liability in the foregoing cases is the assumption of a duty by the landlord to perform a particular act for the tenant. Whether the duty is assumed gratuitously or by contract, the landlord has primary liability for discharge of the duty and cannot insulate himself from the negligent discharge of the duty by his independent contractor.

Applying these principles to the facts of the case, the court overruled Damron's point of error and affirmed the judgment of the trial court in favor of Anthony, the lessee.

---

[1] Restatement (Second) of Torts § 409.

[2] Restatement (Second) of Torts §§ 410-429; see also *Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 277 N.W. 226, 229 (Minn. 1937) (the general "rule is now primarily important as a preamble to the catalog of its exceptions.").

[3] Damron also counterclaimed for breach of the lease and prevailed.

[4] *Damron*, 586 S.W.2d at 913 (citing *Dalkowitz Bros. v. Schreiner*, 110 S.W. 564, 565 (Tex. Civ. App.—San Antonio 1908, no writ) (landlord voluntarily undertook to replace the leasehold roof and resulting leaks damaged tenant's goods)).

[5] *Id.*