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LGC Prevails on Demurrer Regarding Vicarious Liability for Intentional Torts

Partner Jill Chilcoat and Associate Danica Brustkern recently prevailed on a demurrer to a complaint alleging that a client landlord was liable for the intentional torts of its contractor’s employee. The plaintiff, a tenant of the client, alleged she was inappropriately touched by an employee of a construction company hired by the landlord to perform water remediation-related repairs at the apartment complex. The plaintiff claimed the construction worker gained access to her apartment under the guise of needing to adjust the plumbing and allegedly touched her

leg while she helped him with the sink. The construction worker denied the allegations. In her lawsuit, the plaintiff asserted causes of action against the landlord for negligence, unfair business practices, and premises liability. Jill and Danica successfully argued those causes of action, as alleged by the plaintiff, failed due to well-established California precedent.

Generally in California, one cannot be vicariously liable for the alleged intentional tort of an employee of an independent contractor if the alleged

intentional conduct was not caused by, or related to the scope of, the work for which the contractor was hired. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 301). This is because such intentional torts are generally not foreseeable to the given employer or hirer, in light of the type of work involved. Exceptions to this general rule of nonliability are largely limited to the context of police officers and detainees.

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Nevada Supreme Court Clarifies Limitations on Pay-If-Paid Clauses in Construction Contracts

Following our July 2020 article regarding California’s Fourth District Court of Appeal decision that “pay-when-paid” clauses in construction subcontracts are unenforceable when they do not legitimately provide for payment to the subcontractor within a reasonable time, the Supreme Court of Nevada recently issued a ruling touching on a similar subject.

In *APCO Construction, Inc. v. Zitting Brothers Construction, Inc.*, a

developer hired a general contractor, who in turn hired a subcontractor to perform work on a project. Payment to the subcontractor was conditioned upon the general contractor receiving payment from the developer – which is known as a “pay-if-paid” provision. After the subcontractor performed a significant amount of work, the project shutdown, and the subcontractor did not receive payment from the general contractor.

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The Importance of Court Approval for Minors' Compromises

Litigating a case against a plaintiff under the age of eighteen requires particular care if the matter reaches settlement. Section 372 of the Code of Civil Procedure requires court approval for the compromise or settlement of any minor's claim. Any such settlement that has not received court approval can be repudiated and cannot be enforced under Code of Civil Procedure section 664.6. This rule is intended to protect the best interests of the minor.

The court-approval requirement creates potential pitfalls for defendants when dealing with claims by minor plaintiffs. Should a plaintiff develop or discover additional medical issues after a settlement agreement has been signed, she may attempt to void the settlement agreement and continue pursuing her

claim. Alternatively, she may subsequently discover facts that may convince her that she has a greater chance of succeeding at trial than she originally believed. For example, in *Scruton v. Korean Air Lines Co.* (1995) 39 Cal.App.4th 1596, minor plaintiffs brought a wrongful death claim against defendant Korean Air Lines for the death of their mother in a plane crash. The parties entered into a settlement agreement, but before it could be approved by the trial court, a jury in a separate case arising from the same crash found that Korean Air Lines engaged in willful misconduct because it knowingly ignored a programming error in the plane's navigation system. Based on this development, the plaintiffs in *Scruton* withdrew their consent to settle. Korean Air Lines therefore could not enforce the settlement agreement.

In order to avoid the resurgence of a minor's claims that are thought to be settled, and to truly buy the peace of mind a settlement agreement is intended to provide, defendants should consider including language in settlement agreements that requires minors to petition the trial court for approval of the agreement and conditions payment on such approval. Otherwise, a defendant may be left in a nebulous state of uncertainty as to a settlement reached with a minor plaintiff.

For more information regarding the issue addressed in this article, contact [Alex Getman](#) in LGC's San Diego office.

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The court in the case LGC defended noted the analysis hinges on whether the sexual assailant's personal motivations were an outgrowth of his responsibilities or the workplace conditions or events. The plaintiff attempted to circumvent the "no vicarious liability" rule by arguing the landlord knew or should have known the alleged sexual assault was likely to occur and should have acted in order to prevent it. To support her position, the plaintiff argued that a few unverified online reviews mentioning unrelated claims of non-violent crimes in the area, such as theft, should have put the landlord on notice that the premises were unsafe. The court concluded, however, that liability can only be imposed where

the employer knows or has reason to know that the employee, because of past behavior and other factors, is unfit for the specific tasks to be performed. Here, no facts were alleged that established the landlord had any information indicating the contractor's employee had any propensity to commit an assault or battery.

Ultimately, the court found that the plaintiff failed to allege facts sufficient to establish the contractor's employee's alleged acts were foreseeable or related to the work for which the contractor was hired. Similarly, the plaintiff's cause of action for unfair business practices also failed because plaintiff had not

shown that the landlord's representation that the apartment complex was "family-friendly" was a false or misleading statement about the premises. Such statements cannot be construed as a guarantee against untoward or illicit intentional conduct by others. Because the plaintiff had already attempted to amend her complaint once before and was unable to describe how she might be able to allege a viable cause of action against the landlord, the court sustained the demurrer with prejudice.

For more information regarding the issues addressed in this article, contact [Jill Chilcoat](#) or [Danica Brustkern](#) in LGC's San Diego office.

LGC Welcomes Its Newest California Associates

LGC is proud to welcome Melissa Mixer, Madeline Barrett, and Nicole Davidov as the newest associates in LGC's San Diego office.

Melissa Mixer earned her J.D. from the University of San Diego School of Law in 1993. She joined Lincoln, Gustafson & Cercos as an associate after having worked as an attorney at a boutique law firm since 1996. Melissa is married to Michael Mixer, who is also an attorney. Both are proud of the educational achievements of their daughters – Emily who graduated from U.C. Davis in 2019, and Katy who plans to transfer to a four-year university next September. Melissa's practice is focused primarily on insurance litigation and coverage as well as general civil litigation.

Madeline Barrett received her J.D., magna cum laude, from the University of San Diego School of Law in 2020. While in law school, she was a member of the San Diego Law Review and the Order of the Coif. She also completed an externship at the U.S. District Court for the Southern District of California. Madeline's practice areas include labor & employment, personal injury, and general civil litigation.

Nicole Davidov graduated cum laude from the University of San Diego School of Law in 2020. While in law school, Ms. Davidov gained valuable courtroom and legal advocacy experience as an extern for the Honorable Judge William V. Gallo at the United States District Court, Southern District of California. Ms. Davidov was also a

member of San Diego Law Review and earned CALI awards in Legal Research and Writing and Labor Law. Ms. Davidov participated in the Worker's Rights Clinic, where she provided legal services for low-income individuals with employment-related matters.



Madeline Barrett being sworn in as a member of the State Bar of California.

Nevada Supreme Court Clarifies Limitations on Pay-When-Paid Clauses in Construction Contracts (Continued from Page 1.)

The Supreme Court of Nevada held that pay-if-paid provisions, while not per se void in Nevada, are unenforceable if they require subcontractors to waive or limit certain rights (such as the right to prompt payment), relieve general contractors of certain obligations or liabilities, or require subcontractors to waive their rights to damages or time extensions. Because provisions in the APCO subcontract conditioned

payment on the general contractor receiving payment first and required the subcontractor to forgo its right to prompt payment under NRS 624.624 when payment would otherwise be due, the pay-if-paid provisions of the contract were deemed to be void under NRS 624.628(3). The general contractor therefore could not rely upon those provisions for nonpayment to the subcontractor for work performed.

The court unfortunately declined to provide an example of a pay-if-paid provision that might satisfy the enforceability test, but the restrictive test indicates that pay-if-paid provisions will very often be deemed unenforceable in Nevada.

For more information regarding the issue addressed in this article, contact [Jenna Lavigna](#) in LGC's Las Vegas office.