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Non Delegable Duties

Washington Civil Jury Instructions

WPI 12.09 Nondelegable Duties

Washington Pattern Jury Instructions--Civil

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 12.09 (7th ed.)

Washington Practice Series TM

Washington Pattern Jury Instructions--Civil

April 2022 Update

Washington State Supreme Court Committee on Jury Instructions

Part II. Negligence—Risk—Misconduct—Proximate Cause

**Chapter 12. Specific Factors Affecting Negligence and
Contributory Negligence**

WPI 12.09 Nondelegable Duties

Instruction No. _____

[name of person or entity] **is not relieved of its duty to**
[particular duty] **by delegating or seeking to delegate**
that duty to another person or entity.

NOTE ON USE

The WPI Committee recommends that this instruction be used only in cases involving subcontracted work or other circumstances that could mislead jurors into thinking that a nondelegable duty has been delegated. See the discussion in the Comment.

If a factual issue exists as to whether a duty is owed, the instruction should be revised to avoid an improper comment on the evidence.

COMMENT

Some duties may be delegated; others may not. *Afoa v. Port of Seattle*, 191 Wn.2d 110, 121, 421 P.3d 903 (2018) (a jobsite owner has a nondelegable duty to maintain a safe workplace only if it maintains a sufficient degree of control over the work). Duties may be made nondelegable by statute, regulation, common law, or contract. DeWolf & Allen, 16 Washington Practice, Tort Law and Practice § 4:14 (5th ed.); *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 282–87, 635 P.2d 426 (1981). Nondelegable duties often involve a form of vicarious liability. See DeWolf & Allen, 16 Washington Practice, Tort Law and Practice § 4:14 (5th ed.); *Jackson v. Standard Oil Co. of Cal.*, 8 Wn.App. 83, 95, 505 P.2d 139 (1972). However, a contractor's nondelegable duty can also be “primary” as opposed to vicarious when the contractor has delegated performance to an independent contractor. *Vargas v. Inland Wash., LLC*, 194 Wn.2d 720, 738, 452 P.3d 1205 (2019).

In some circumstances, primarily those involving subcontracted work, the jury must be instructed that a particular duty is nondelegable. See *Jones v. Robert E. Bayley Constr. Co., Inc.*, 36 Wn.App. 357, 362–63, 674 P.2d 679 (1984) (failing to instruct on nondelegability is prejudicial error when the proposed instruction is supported by evidence that work has been contracted out), overruled on other grounds, *Brown v. Prime Const. Co., Inc.*, 102 Wn.2d 235, 240 n.2, 684 P.2d 73 (1984); see also *Keegan v. Grant Cnty. Pub. Util. Dist. No. 2*, 34 Wn.App. 274, 284, 661 P.2d 146 (1983) (approving an instruction on nondelegability because work had been contracted out); *Vargas*, 194 Wn.2d at 735–36 (a contractor has both a statutory and common law duty to provide a safe place to work, regardless of whether the contractor retains control of the workplace).

The court in *Thoen* applied the rulings of *Vargas* and found that the trial court erred in its instructions. The trial court had instructed the jury that a general contractor met the standard of ordinary care if it took reasonable steps to provide a safe work environment “within common areas it controls.” *Thoen v. CDK Constr. Servs., Inc.*, 13 Wn.App.2d 174, 181, 466 P.3d 261 (2020). The Washington Supreme Court had “rejected this ‘common work area’ concept in *Vargas* and explained a general contractor’s common law duty actually extends to all portions of a job site ‘regardless of whether an expert other than the general contractor happens to be in charge of a specific job in the area.’” *Thoen*, 13 Wn.App.2d at 181. Under these circumstances, jurors could easily speculate that the legal duty was transferred along with the work being subcontracted, and they would need to be instructed that nondelegable duties are not transferred along with the subcontracted work.

For cases that do not similarly raise questions in jurors’ minds about potential delegability, the WPI Committee recommends that the instruction not be given. For several reasons, nondelegability instructions should be used with caution: “nondelegability” is a

“formidable” word to use with a jury, *Kelley v. Great N. Ry. Co.*, 59 Wn.2d 894, 904–05, 371 P.2d 528 (1962), it is often not necessary to the case. The word “nondelegable” can mislead jurors into thinking a nondelegable duty sets a higher standard of care than does a delegable duty. *Sage v. N. Pac. Ry. Co.*, 62 Wn.2d 6, 16, 380 P.2d 856 (1963); *Strandberg v. N. Pac. Ry. Co.*, 59 Wn.2d 259, 367 P.2d 137 (1961); *Kelley*, 59 Wn.2d 894 (all three cases holding that instructing on nondelegability is not reversible error).

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Another Valuable Recommendation from Seattle

Trial Lawyer Gary L. Wolfstone who believes this

Instruction is frequently overlooked!

