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LANDOWNER'S LIABILITY TO AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR

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For many years, lawyers and trial courts have misconstrued the duty of care owed by a landowner or occupier of land to an employee of an independent contractor who is injured on the landowner or occupier's premises. The basic source of error in construing this duty lies in attempts to impose greater liability on the landowner or occupier of land than actually exists by combining three independent propositions of law: the business invitee doctrine, the "safe place to work" doctrine, and the independent contractor liability doctrine. These propositions of law represent separate and distinct legal theories and cannot be combined under any given set of facts to impose greater liability on a landowner than would exist under the separate application of each doctrine. After exploring each of these doctrines, this article will suggest what an employee of an independent contractor needs to establish to hold the landowner or occupier liable for the employee's injuries.

BUSINESS INVITEE DOCTRINE

Under Indiana law, the business invitee doctrine places a duty of reasonable care on a landowner or occupier of land for the protection of business invitees on his property.[1] Judge Emmert, writing an opinion for the Supreme Court of Indiana in *Robertson Brothers Department Store, Incorporated v. Stanley*[2] set forth the principles underlying the business-landowner's duty of ordinary reasonable care to maintain business premises in a reasonably safe condition. The court explained that the proprietor of a store is not an insurer of the safety of his customers and thereby is not required to exert an unusual

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1. Hammond v. Allegretti, 262 Ind. 82, 87, 311 N.E.2d 821, 825 (1974).
2. 228 Ind. 372, 90 N.E.2d 809 (1950).

degree of care for their safety.[3] He must, however, maintain the premises so that customers who enter the store are not injured.[4] As the court further noted, it is the proprietor's invitation, whether express or implied, which imposes on him the duty to use ordinary care to keep the premises safe for the invitees.[5] This duty is not merely an initial one, but is active and continuous.[6] Finally, the duty of the proprietor to protect his customers encompasses not only the condition of the premises, but also the negligent acts of his employees.[7] Thus, the store owner is responsible for both the condition of the place of business and the actions of his employees.

The Indiana Supreme Court subsequently concluded in *Hammond v. Allegretti*[8] that a landowner or occupier must, as a matter of law, exercise reasonable care to protect invitees who enter the business premises.[9] Accordingly, if an employee of an individual contractor is a "business invitee," then the business invitee doctrine applies to him and the landowner or occupier then owes him a duty of reasonable care.

> . . . Business invitees are those who go: '. . . upon the land of another with the express or implied invitation of the owner or occupant, either to transact business with such owner, or occupant, or to do some act which is of advantage to him (the owner or occupant) or of mutual advantage to both licensee and the owner or occupant of the premises. An invitation is implied from such a mutual interest.' (Citation omitted).[10]

An employee of an independent contractor is a "business invitee" if he goes on another's land with express or implied invitation of the landowner or occupier to transact business with the owner or occupier or to perform an act which is of advantage to the owner or occupier.

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3. *Id.* at 378, 90 N.E.2d at 811. *See also* Great Atlantic & Pacific Tea Co. v. Custin, 214 Ind. 54, 59, 13 N.E.2d 538, 542 (1938).

4. 228 Ind. at 378, 90 N.E.2d at 811.

5. *Robertson Bros. Dept. Store, Inc.*, 228 Ind. at 378, 90 N.E.2d at 811; Silvestro v. Walz, 222 Ind. 163, 51 N.E.2d 629 (1943).

6. *Robertson Bros. Dept. Store, Inc.*, 228 Ind. at 378, 90 N.E.2d at 811. *See also* Sears, Roebuck and Co. v. Peterson, 76 F.2d 243 (8th Cir. 1935); F.W. Woolworth Co. v. Moore, 221 Ind. 490, 48 N.E.2d 644 (1943); J.C. Penney, Inc. v. Kellermeyer, 107 Ind. App. 253, 19 N.E.2d 882 (1939).

7. *See supra* note 6.

8. 262 Ind. 82, 311 N.E.2d 821 (1974).

9. *Id.* at 87, 311 N.E.2d at 825.

10. Standard Oil Co. of Ind., Inc. v. Scoville, 132 Ind. App. 521, 525, 175 N.E.2d 711, 713 (1961).

Since all employees of independent contractors are invited upon land to transact business or perform acts of advantage to the landowner or occupier, all employees of independent contractors are business invitees.

The business invitee doctrine is extremely broad. The duty to exercise reasonable care for the protection of the invitee on the business premises applies to all properties whether they be a candy factory, a restaurant, a grocery store, or even a steel mill where a person comes upon the property by invitation to transact business. However, the business landowner's duty of care to invitees is not without limitation. The business landowner does not have a duty with regard to conditions which the owner could not have anticipated would create a risk and conditions which the occupier did not know existed or could not have discovered with reasonable care.[11] There is also no duty on the owner to protect the invitee from dangers about which the invitee is aware.[12] Likewise, if the dangers are so obvious to the invitee that, under the circumstances, he should have discovered the defects, the landowner is not responsible;[13] the invitee must protect himself. Thus, the general rule is that the mere existence of a defect or danger does not establish liability except if the defect's character or duration is such that a jury may reasonably determine that the exercise of due care would have discovered the danger.[14] Because of these limitations and the corresponding relaxation of the occupier's duty, the courts frequently hold that reasonable care requires only that the owner warn the invitees about the danger.[15]

The landowner is liable to a business invitee (customer, patient, client, and salesmen, etc.) only if the business invitee is injured by a condition or defect which is not "obvious and apparent." Therefore, in order for the business invitee to recover, it must be shown that the condition or defect causing injury was "hidden and not normally observable"—a condition which would constitute a latent danger.[16] This exception to the broad general rule is based on the presumption that the invitee may reasonably be expected to discover an open and obvious condition and thereafter to protect himself from such condition.[17] In this regard, the invitee has a duty to exercise ordinary,

11. *See* Broadhurst v. Davis, 146 Ind. App. 329, 255 N.E.2d 544 (1970).
12. *Id.* at 331, 255 N.E.2d at 545.
13. *Id.*
14. *Id.*
15. *Id.*
16. Law v. Yukon Delta, Inc.,___ Ind. App. ___, 458 N.E.2d 677, 679 (1984).
17. *See* Law v. Yukon Delta, Inc., ___ Ind. App. ___, 458 N.E.2d 677, 679 (1984); Broadhurst v. Davis, 146 Ind. App. 329, 255 N.E.2d 544 (1970).

reasonable care to avoid injury to himself, including the duty to observe and appreciate danger or threatened danger.[18]

Construing the Indiana decisions together, the general rule is that a landowner is under a duty to exercise only reasonable care for the protection of invitees on the business premises. The owner is not an insurer of the safety of invitees.[19] His duty of care does have limitations. The owner of land must exercise due care to avoid injuring the invitee by an act of negligence and must warn the invitee of concealed latent dangers of which the occupier knows or should know. However, the landowner has no duty to protect invitees against dangers which are not known to him, either directly or constructively. In addition, the landowner's duty of care does not extend to dangers which are so obvious and apparent that the invitee may reasonably be expected to discover such dangers himself. If the dangerous condition is observed or should have been observed by the invitee, or if the invitee has been warned of such condition, the landowner's duty to exercise reasonable care for the protection of that invitee has been met; and the landowner cannot be held liable for injuries to the invitee resulting from that condition.

APPLICATION OF BUSINESS INVITEE DOCTRINE TO EMPLOYEE OF INDEPENDENT CONTRACTOR

Landowner liability under the business invitee doctrine arises with regard to an injured employee of an independent contractor under only three limited circumstances. The first occurs when the contractor's employee is injured by an active, direct tort from an agent, servant, or employee of the landowner, or when the landowner actively participates in the negligent act that causes injury. An example would be where the contractor's employee is run over by a truck driven by an employee of the landowner.

The second and third circumstances giving rise to landowner liability involve concealed and unobservable defects in the landowner's premises. When the defect in the premises is related to the task the employee was assigned to perform and is one which the independent contractor is not likely to discover, the landowner is liable to the employee for injuries sustained as a result of that defect only if the

18. *See* Hansberger v. Wyman, 247 Ind. 369, 216 N.E.2d 345 (1966). "A person is required to make reasonable use of his faculties and senses to discover dangers and conditions of danger to which he is or might become exposed." *Id.* at 348; 21 I.L.E. *Negligence*, Section 85 (1959). *See also* Day v. Cleveland C., C. & St. L. Ry. Co., 137 Ind. 206, 36 N.E. 854 (1894); Stewart v. Pennsylvania Co., 130 Ind. 242, 29 N.E. 916 (1892).

19. *Robertson Bros. Dept. Store, Inc.*, 228 Ind. at 378, 90 N.E.2d at 811.

landowner actually had knowledge of the defect. However, when the defect is unrelated to the task to which the employee is assigned, the landowner is held liable if he either knew or in the exercise of reasonable care should have known of the defect.

In *Nagler v. United States Steel Corporation*,[20] for example, an employee of the independent contractor was injured by bricks which fell on him from the top of a soaking pit while he was working in the area. The bricks constituted a dangerous condition unrelated to the employee's task. The court in *Nagler*, while recognizing the landowner's duty to inspect and discover defects and dangerous conditions and to warn the independent contractor of them refused to impose liability on the landowner.[21] The court maintained that only an owner's active participation in negligent acts or failure to warn of hidden defects about which he knew or should have known triggers his liability for injuries to an employee of an independent contractor.[22] It thus appears that the landowner is held to a higher duty of care in situations where the independent contractor and his employee are less likely to detect the danger themselves; that is, where the defect is unrelated to the task they were hired to perform.

NOTICE REQUIREMENT OF BUSINESS INVITEE DOCTRINE

It is clear that a landowner must warn of hidden or latent dangers on the business premises; however, it is unclear what type of warning is required and to whom the warning must be given. In 1983, the Indiana Court of Appeals answered this question when it rendered its decision in *Louisville Cement Company v. Mumaw*.[23] In that case, Mumaw was injured while doing demolition work as an employee of "Dismantling," an independent contractor. Mumaw brought action against Louisville Cement Company, the owner of the premises, to recover damages. The Court of Appeals held that the Louisville Cement Company, as owner of the premises, had discharged its duty to its invitee, Mumaw, by warning Mumaw's employer of the existence of the latent defects. The court said:

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20. 486 F.2d 794 (7th Cir. 1973).

21. *Id.* at 797.

22. An owner is not liable for negligent injuries to an employee of an independent contractor unless he actively participates in the negligent act causing injury or unless he fails to warn of hidden dangers on the premises of which he had, or ought to have had, knowledge, and of which the employee had not.

Id.

23. ___ Ind. App. ___, 448 N.E.2d 1219 (1983).

> The First District of this Court has succinctly enumerated the duties of a landowner to invitees upon its premises regarding latent or concealed defects in the following language:
>
> 'Little discussion or citation of authority is necessary to demonstrate that the owner or occupier of property owes an invitee a duty of keeping . . . the property in reasonably safe condition. That duty includes warning an invitee of latent or concealed perils such as are not known to the person injured. The status of the invitee is created by his entering the premises with the occupant's express or implied invitation to transact business or implied invitation to transact business or to perform some act which is of commercial advantage to the occupant.' (Citations omitted).
>
> Assuming without deciding a residue of fuel oil in a pipeline which has been drained and vented is a latent defect, we must next decide what the owner's duty was in this regard. The owner or occupant of premises who discovers the existence of a latent or concealed defect in the property which is not likely to be discovered by an invitee may at his option, either correct the condition, or warn the invitee of the latent defect's existence. The owner discharges his duty to the invitee if he follows either course. (Citations omitted). Louisville did warn Dismantling of the condition of the pipeline, its prior use as a diesel fuel conduit and of the corrective safety measures it had taken. Louisville discharged its duty to its invitee by the warning of the existence of the latent defect.[24]

The court in *Mumaw* also held that the evidence showed that the Louisville Cement Company had exercised reasonable care by giving notice of the pipeline condition to "Dismantling," the independent contractor, although not the injured plaintiff, before the plaintiff started to work on the project.[25] Courts in other jurisdictions have relied on the holding of this case: the warning to the employer of the injured invitee suffices as notice to the invitee. Accordingly, the landowner has a right to assume that the independent contractor will carry out his legal obligation to his employees.[26] Among these legal

24. *Louisville Cement Co.*, 448 N.E.2d at 1221.

25. *Id.* at 1224.

26. *See* Harris v. Atchison, Topeka & Santa Fe Ry. Co., 538 F.2d. 682 (5th Cir. 1976); Vest v. Nat'l Lead Co., 469 F.2d 256 (8th Cir. 1972); *See also* Cleveland C., C. & St. L. Ry. Co. v. Perkins, 171 Ind. 307, 86 N.E. 405 (1908); Wabash, Western R. Co. v. Morgan, 132 Ind. 403, 31 N.E. 661 (1892).

obligations is the independent contractor's duty as an employer to warn and instruct his employees concerning dangers inhering to the place of work or to the instrumentalities furnished.[27] This duty extends to dangers of which the employer has knowledge and, since it is the employer's duty to exercise ordinary care to know of the existence of such dangers, of which the employer should have had knowledge.[28] However, the employer is not charged with notice of transitory dangers arising merely from the manner in which the employees perform their duty. The employer is not bound to exercise care to ascertain such transitory perils, and therefore, he has no duty to warn against them, unless he has actual knowledge of the existence of danger at the time.[29]

In summary, when a landowner gives warning to an independent contractor concerning a dangerous condition, it becomes the independent contractor's duty under Indiana law to pass that warning on to his employees. The landowner need not directly warn the employees of the independent contractor. Under such circumstances, the knowledge of the independent contractor is imputed by law to his employees.

"SAFE PLACE TO WORK" DOCTRINE

Under Indiana law, a landowner or occupant who employs others in a master-servant relationship has a duty to maintain the work premises in a reasonably safe condition. This duty is embodied in Federal regulations (OSHA), state regulations (IOSHA), and various Indiana statutes[30] and administrative rules which are referred to collectively as the "safe place to work" laws.

Indiana courts have uniformly held that the "safe place to work" laws, statutes, and regulations apply only to the basic employee-employer relationship. The Indiana Supreme Court addressed this issue as early as 1918 in the case of *Bedford Stone and Construction Company v. Hennigar*.[31] In that case, an employee of an independent contractor was struck and killed by an elevator while he was work-

27. Southern Ry. Co. v. Howerton, 182 Ind. 208, 105 N.E. 1025 (1914); Chicago & E. R. Co. v. Dinius, 180 Ind. 596, 103 N.E. 652 (1913).

28. *See* Haskell & Barker Car Co. v. Trzop, 190 Ind. 35, 128 N.E. 401 (1920); Knickerbocker Ice Co. v. Gray, 171 Ind. 395, 84 N.E. 341 (1908); Salem Stone & Lime Co. v. Griffin, 139 Ind. 141, 38 N.E. 411 (1894).

29. Indianapolis Terre Cotta Co. v. Wachstetter, 44 Ind. App. 550, 88 N.E. 853 (1908). *See also* Lavene v. Friedrichs, 186 Ind. 333, 115 N.E. 324 (1917); W. B. Conkey Co. v. Larsen, 173 Ind. 585, 91 N.E. 163 (1910).

30. *Ind. Code* Section 22-1-1 *et seq.* (1981) (Indiana Construction Industry Safety Rules and Regulations).

31. 187 Ind. 716, 121 N.E. 277 (1918).

ing in the elevator shaft. The employee's estate sued the general contractor, who was also the landowner, alleging that he had failed to make the work place properly safe in compliance with the terms and conditions of Indiana statutes. In rejecting this theory of liability, the Indiana Supreme Court maintained that the case was tried upon a mistaken theory. The court explained that an owner who maintains control of a building and elevator by conferring with the architect to insure that the structures conformed to plans and specifications is not required to comply with provisions of the act relating to dangerous conditions.[32] The same is true of the independent contractor who maintains control of hardware only by seeing that the metal work around the elevator conforms to specifications.[33] A subsequent Indiana court reaffirmed the principle in *Jones v. Indianapolis Power & Light.*[34] The court stated:

> This statute, 40-2140, (Construction Safety Code) limits the application of the rules and regulations to 'employers' and 'employees.' Ipalco was not an employer of Decedent and the prime contractor definition section cannot magically transform Ipalco into an 'employer' by an interpretation that would ignore a contractee-owner's status as an awarding unit. Differently stated, a narrow interpretation of the prime contractor definition section of the regulations is consistent with the limits of the regulations issued under the enabling statute. . . .
>
> In reaching this conclusion, we have interpreted the words 'employer' and 'employee' in their ordinary and usual meaning.
>
> Furthermore, to reach a different conclusion would permit major departure from the common law rules insulating the contractee from liability to an employee of the independent contractor. . . . A statute must, if possible, be strictly construed to prevent such a derogation from that settled doctrine. (Citations omitted).[35]

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32. *Id.* at 719, 121 N.E. 278.

33. *Id.*

34. 158 Ind. App. 676, 304 N.E.2d 337 (1973).

35. *Id.* at 345-46. In a later case, Hale v. Peabody Coal Co., 168 Ind. App. 336, 343 N.E.2d 316 (1976), the court re-emphasized that these safety codes do not apply beyond the basic employee-employer relationship. In that case, an employee of an independent contractor argued that a specific duty was imposed on the general contractor by the Construction Industrial Safety Code. The court stated:

It has been previously held that these regulations do not apply beyond

The Indiana courts have continually confirmed that the landowner need not supply a "safe place to work" as the term is generally used in the the employer-employee relationship when an independent contractor's employees are involved. In *Hoosier Cardinal Corporation v. Brizius*,[36] the court stated quite clearly that because the owner of the premises was not the injured party's employer, the owner did not have a legal duty to provide the individual with a "safe place" to work.[37] In essence, the Indiana courts have held there is no "safe place to work" doctrine for employees of independent contractors and that such employees are limited to a course of action under the business-invitee doctrine.

INDEPENDENT CONTRACTOR LIABILITY DOCTRINE

Under Indiana law, a landowner is not liable to the employee of any independent contractor for the torts committed by the independent contractor.[38] Thus, the landowner is not liable to the employee for injuries sustained as a result of acts or omissions of the independent contractor, including the failure to properly supervise the employee's action.[39] In addition, Indiana law supports the general proposition that an employer of an independent contractor does not have a duty to protect the contractor or his employee against conditions which are obviously dangerous or which both parties know to be so; consequently, the employer of the independent contractor is not liable for injuries occasioned by such blatant conditions.[40] Additionally, the duty to provide a reasonably safe work place for

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> the basic employer-employee relationship, and do not affect the common law rules exempting the contractee from liability to the employees of an independent contractor.

Id. at 323.

36. 136 Ind. App. 363, 199 N.E.2d 481 (1964).

37. *Id.* at 374, 199 N.E.2d 486.

38. *See* Marion Shoe Co. v. Eppley, 181 Ind. 219, 104 N.E. 65 (1914); Texas Eascern Transmission Corp. v. Seymour Nat. Bank, ___ Ind. App. ___, 451 N.E.2d 698 (1983); Stewart v. Huff, 105 Ind. App. 447, 14 N.E.2d 322 (1938).

39. *See* Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N.E. 365 (1914); City of Anderson v. Fleming, 160 Ind. 597, 67 N.E. 443 (1903); City of Logansport v. Dick, 70 Ind. 65 (1880); Perry v. Northern Ind. Pub. Serv. Co., ___ Ind. App. ___, 433 N.E.2d 44 (1982); Allison v. Huber, Hunt and Nichols, Inc., 173 Ind. App. 41, 362 N.E.2d 193 (1977); Cummings v. Hoosier Marine Properties, Inc., 173 Ind. App. 372, 363 N.E.2d 1266 (1977); Hale v. Peabody Coal Co., 168 Ind. App. 336, 343 N.E.2d 316 (1976); Jones v. Ind. Power & Light, 158 Ind. App. 676, 304 N.E.2d 337 (1973); Hoosier Cardinal Corp. v. Brizius, 136 Ind. App. 363, 199 N.E.2d 481 (1964); Scott Constr. Co. v. Cobb, 86 Ind. App. 699, 159 N.E. 763 (1928); Falender v. Blackwell, 39 Ind. App. 121, 79 N.E. 393 (1906).

40. 41 Am. Jur. 2d *Independent Contractors*, Section 27 (1968).

employees of an independent contractor does not extend to known hazards which are incidental to the work which the contractor was hired to perform.[41]

Since employee injuries are generally attributable to factors for which the independent contractor rather than the landowner is responsible, such as lack of training, inadequate supervision, faulty equipment, insufficient safety procedures, or negligence on the part of the injured employee or a fellow worker, it becomes a matter of some importance to determine when one is considered to be an independent contractor.

The legal standard for designation as an independent contractor focuses around the degree of control exercised by the person hired for certain work. The general rule as set forth in *Prest-O-Lite Company v. Skeel*[42] is that an independent contractor is one who exercises an independent employment under a contract to do certain work by his own methods and without the employer objecting to the control the contractor exercises.[43] That the contractor must perform the work under the direction and to the satisfaction of the employer or his representatives does not affect the contractor's status as an independent contractor.[44] It is critical to the contracted person's status as independent contractor only that he determine the method and the means of the execution of the work to be done, not that he determine the product or result of the work.[45] The consequence of losing the status of independent contractor is that an injured employee may become the servant of the landowner. Hence, the landowner may then be liable for injuries sustained by that employee-servant or the landowner may escape liability altogether by virtue of the exclusive remedy provided by workmen's compensation.[46]

The Indiana courts have gradually recognized five exceptions to the general rule first enunciated in *Prest-O-Lite*. Thus, an individual may not acquire the status of an independent contractor (1) where the work contracted for is intrinsicly dangerous; (2) where the party is charged with a specific duty by law or contract; (3) where the act creates a nuisance; (4) where the act to be performed will likely cause injury to others unless due precaution is taken to avoid harm; and (5) where the act to be performed is illegal. According to the court

41. *Id.*
42. 182 Ind. 593, 106 N.E. 365 (1914).
43. *Id.* at 597, 106 N.E. at 367.
44. *Id.*
45. *Id.*
46. *Id.*

in *Denneau v. Indiana and Michigan Electric Company*,[47] these five exceptions are the only situations in which the landowner's duty of care cannot be delegated to an independent contractor to relieve the landowner of liability.[48] Thus, an employee of an independent contractor can bring a cause of action against the landowner for injuries sustained while performing the work for which the independent contractor was hired, only if one of the above enumerated exceptions can be shown to apply.

The first exception recognized following *Prest-O-Lite* was the intrinsicly dangerous work rule. However, an instrumentality or undertaking is not intrinsicly dangerous if the "risk of injury involved in the use can be eliminated or significantly reduced by taking proper precautions."[49] For example, in reviewing the intrinsicly dangerous work exception, the court in *Perry v. Northern Indiana Public Service Company*[50] held that the exception did not apply to the particular circumstances because the welding job which the employee was ordered to perform was not inherently dangerous.[51]

The standard for determining when work is intrinsicly dangerous is very strict. In *Cummings v. Hoosier Marine Products, Incorporated*,[52] the court noted that an activity is intrinsicly dangerous when the risk involved in doding the activity is inherent to the activity itself, such as in blasting.[53] In other words, the activity is inherently dangerous no matter what method is used to accomplish the activity.[54]

The second exception to the general rule of landowner nonliability involves a situation where the landowner has breached a specific duty imposed on him either by law or contract. This exception appears to be a rather narrow one. As previously noted, the OSHA and IOSHA regulations and the various safety statutes dealing with the employer-employee relationship do not apply to the landowner-independent contractor-employer relationship. In addition, the court in *Cummings*[55]

47. 150 Ind. App. 615, 277 N.E.2d 8 (1971).

48. *Id.* at 620, 227 N.E.2d 12. *See also* Cummings v. Hoosier Marine Properties, Inc., 173 Ind. App. 372, 363 N.E.2d 1266 (1977).

49. *Hale*, 168 Ind. App. at 343, 343 N.E.2d at 322. *See also Cummings*, 173 Ind. App. 372, 363 N.E.2d 1266; *Jones*, 158 Ind. App. at 686, 304 N.E.2d at 344.

50. ___ Ind. App. ___, 433 N.E.2d 44 (1982).

51. *Id.* at 47. The court further noted that use of proper scaffolding or other safety equipment would have sufficiently reduced or eliminated the employee's risk of injury.

52. 173 Ind. App. 372, 363 N.E.2d 1266 (1977).

53. *Id.* at 386, 363 N.E.2d at 1275.

54. *Id.*

55. *Id.* at 372, 363 N.E.2d at 1266.

made clear that not every contractual provision would support the implication of a duty on the part of the landowner. The court said:

> This Court in *Jones, Administratrix v. Ipalco, et al, supra* held that the owner's specifications requiring safety precautions do not give rise to a duty to exercise that right. The fact that the specifications require a contractor to take safety precautions does not impose a specific duty on the part of the owner to enforce the same. Moreover, an exception to the general rule of non-liability to employees of an independent contractor may not be read as involving a contractee in the manner and means of the independent contractor's performance by obligating the contractee to examine the contractor's work to make certain that all precautions have been taken to prevent probable harm to servants. *Hale v. Peabody Coal Company, supra.* Without a specific duty to inspect, contractor specifications requiring the observance of safety precautions imposes a duty only on the independent contractor and not the owner.[56]

Therefore, unless the injured employee can establish that the landowner breached a specific contractual duty or a duty imposed by a specific law, the general rule of landowner non-liability would apply.

The third exception to the independent contractor liability doctrine is where the act which the independent contractor was hired to perform will create a nuisance. Obviously, work done by an independent contractor will very seldom constitute a legal nuisance. Further, even were a nuisance to result, it is unlikely, applying the reasoning employed in the fourth exception below, that the employee creating that nuisance could recover from the landowner.

The fourth exception is where the act which the independent contractor is hired to perform is likely to cause harm to others. The fourth exception refers to a risk of harm to third persons who are not employees of the independent contractor and who are not likely to be aware of the danger involved because they are not associated with the work being performed.[57] This is obvious from the language of the exception which refers to "injury to others" indicating that the risk of harm must be to third persons and not to employees of the independent contractor.[58] The rationale behind this interpretation

56. *Id.* at 390-91, 363 N.E.2d at 1277.

57. *See* Louisville Cement Co. v. Mumaw, ___ Ind. App. ___, 448 N.E.2d 1219, 1222 (1983).

58. *Id.*

of the exception is to prevent the complete nullification of the general rule of non-liability on the part of the landowner for injuries to the employee of the independent contractor.[59] If the exception were applied so that the risk of harm involved the employees of the independent contractor, the landowner would be required to examine the independent contractor's work to ensure that proper precautions had been taken to prevent any probable harm to the independent contractor's employees.[60] This obligation on the landowner would destroy the basic relationship between the landowner and the independent contractor.[61] Thus, to interpret the fourth exception as measuring potential harm to employees of the independent contractor would nullify the general rule of non-liability between the landowner and the independent contractor.

Moreover, the fourth exception is strictly construed even where it is applied to the benefit of third parties.[62] If the exception were not strictly construed, the landowner would be given an absolute duty to guard against improbable as well as probable dangers to third persons while an independent contractor performed work on the landowner's premises.[63] If the landowner had an expanded duty to guard against both probable and improbable dangers to third persons, the fourth exception would give third persons greater right to recovery against the landowner employing an independent contractor than if the landowner had performed the work himself. This would abrogate the general doctrine that a landowner is not liable for the acts of an independent contractor or his employees.[64]

The fifth and final exception to the independent contractor's doctrine is where the independent contractor is hired to perform an illegal act. In order to avail himself of this exception, the injured employee of an independent contractor must establish that the contract between the landowner and the independent contractor was for an illegal purpose. Even then, it is not clear whether an employee who is injured when performing an illegal act has a cause of action against the party requesting the performance of the illegal act.

The general rule of landowner non-liability is based on the proposition that the independent contractor and his employees are possessed with sufficient skill to recognize the degree of danger in-

59. *Hale*, 168 Ind. App. at 336, 343 N.E.2d at 316.
60. *Id.*
61. *Prest-O-Lite Co.*, 182 Ind. at 593, 106 N.E.2d at 365.
62. *Hale*, 168 Ind. App. at 336, 343 N.E.2d at 316.
63. *Id.*
64. *Id.*

volved in their work and to adjust their methods of work accordingly.[65] To overcome this presumption and avoid application of the general rule, the employee must establish that he fits within one of the five above enumerated exceptions. If none of the exceptions is applicable, the general rule applies and the landowner is not liable for the employee's injuries.

FURTHER LIMITATION OF INDEPENDENT CONTRACTOR LIABILITY DOCTRINE

The landowner's already limited responsibility to an employee of an independent contractor under Indiana law may have been further circumscribed by the court in the case of *Johns v. New York Blower Company*.[66] In that case, the court held that there were two valid reasons for limiting the liability of landowners to employees of independent contractors not given under prior Indiana law:

> First, the principal reason for the development of the liability doctrine where independent contractors were involved was to prevent the employer-owner from escaping liability on inherently dangerous work or shifting their liability to their potentially less solvent contractors. Under modern law, the employees of the contractor in the vast majority of incidences are covered by workmen's compensation laws, and the owner does not escape liability since, in effect, he pays the premium for the workmen's compensation coverage as part of the contract price.
>
> Secondly, had the owner's own employees been injured performing the work, the owner's liability would be limited to the workmen's compensation laws. There does not appear to be any valid reason to subject the owner to greater liability for employing an independent contractor to perform the work than he would have had if he had employed his own servants.[67]

It remains to be seen whether this case presents a basis for advancing the theory that an injured employee who collects workmen's compensation as a result of an injury is barred from bringing a cause of action against the party paying the workmen's compensation coverage or in most cases the landowner.

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65. *See Broadhurst*, 146 Ind. App. 329, 255 N.E.2d 544; *Hansberger* 247 Ind. 367, 216 N.E.2d 345; *Hoosier Cardinal Corp*, 136 Ind. App. 363, 199 N.E.2d 481.

66. *See* Johns v. New York Blower Co., ___ Ind. App. ___, 442 N.E.2d 382 (1982).

67. *Id.* at 388.

APPLICATION OF INDIANA LAW TO THE TYPICAL EMPLOYEE INJURY CASE

The above analysis of Indiana law indicates that in order for an employee of an independent contractor to recover from the landowner, he must establish: (1) that he was on the premises in the capacity of a business invitee; (2) that he was injured by an instrumentality on the property which created a dangerous condition; (3) that this dangerous condition was not open and obvious to the employee, but was a hidden defect or condition; (4) that the dangerous condition was not a transitory peril associated with the manner in which the employee performed his duties; (5) that the landowner either knew of the dangerous condition and failed to give the independent contractor warning or notice of the condition, when the employee was injured by the condition relating to his work, or that the landowner should have known of the dangerous condition through the exercise of ordinary care and failed to warn the independent contractor of such dangerous defect when the employee was injured by a defect unrelated to his work; (6) that the landowner failed to give the independent contractor warning or notice of the dangerous condition. If an employee can establish these requirements, he may recover damages from the landowner suffered on the landowner's property while working for an independent contractor.