

A real estate developer purchased a large tract of land intending to construct residential housing on it. The developer hired a pool company to build a large in-ground swimming pool on the tract. The contract provided that the pool company would carry out blasting operations that were necessary to create an excavation large enough for the pool. The blasting caused cracks to form in the walls of a man's home in a nearby residential neighborhood.

Will the man prevail on an action for damages against the real estate developer?

- A. No, if the pool company used reasonable care in conducting the blasting operations.
- B. No, if the real estate developer used reasonable care to hire a competent contractor.
- C. Yes, because the blasting that the pool company was hired to perform damaged the man's home.
- D. Yes, but only if the real estate developer retained the right to direct and control the pool company's construction of the pool.

Explanation:

A principal is generally **not vicariously liable** for torts committed by its **independent contractor**. However, **vicarious liability will be imposed** when the independent contractor's work involves a **nondelegable duty**—ie, a duty retained by the defendant even when the performance of that duty is assigned to an independent contractor. That type of work includes **abnormally dangerous activities**—uncommon activities in the community that present a foreseeable and highly significant risk of harm that cannot be mitigated by reasonable care.

Here, the real estate developer hired the pool company (independent contractor) to build an in-ground swimming pool. Although the developer normally would not be vicariously liable for the pool company's torts, the pool company had to carry out blasting operations in a residential area (abnormally dangerous activity) to build the pool. And since that work involved a nondelegable duty, the developer is vicariously liable for damages caused by the blasting (cracks in the man's nearby home).

(Choice A) Strict liability (liability without proof of fault) is imposed for abnormally dangerous activities since the risk of harm cannot be mitigated by reasonable care. And since reasonable care could not have reduced the risk of harm from blasting (abnormally dangerous activity), the man can prevail against the real estate developer.

(Choice B) A principal can be *directly* liable for his/her own negligence in hiring an incompetent independent contractor or *vicariously* liable for the independent contractor's torts if they involved a nondelegable duty. Therefore, even if the real estate developer used reasonable care in hiring a competent contractor (no direct liability), the developer is still vicariously liable for the damage caused by the pool company's blasting.

(Choice D) A principal who retains the right to control any part of an independent contractor's work may be liable for failing to use reasonable care when exercising that control. But if the work involves an abnormally dangerous activity (as seen here), the principal will be vicariously liable for the plaintiff's harm (eg, damage to home)—regardless of whether the principal retained the right to control the work.

Educational objective:

A principal generally is not vicariously liable for its independent contractor's torts. However, vicarious liability will be imposed when the principal had a nondelegable duty of care—eg, when the contractor's work involved an abnormally dangerous activity.

References

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 57 (Am. Law Inst. 2012) (general rule – no vicarious liability for independent contractors).

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 58 (Am. Law Inst. 2012)
(exception – vicarious liability for independent contractor's abnormally dangerous activities).

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Vicarious liability for nondelegable duty

