

***Strouse v. Webcor Construction, L.P. (2019) 34 Cal.App.5th 703***

*The Court found that Webcor could not show there was a prejudicial error from the alleged jury instruction error.*

**FACTS/PROCEDURE**

Webcor Construction, L.P. was the general contractor hired by the University of California to perform seismic safety improvements. Webcor hired subcontractor ACCO – plaintiff James Strouse’s employer – to perform ventilation and plumbing services. Webcor was responsible for the safety and maintenance of the general hallways and access points of the project site used by all subcontractors and conducted daily site inspections. Webcor was solely responsible for covering the expansion joints – a gap of 12 inches wide and 12 inches deep, between concrete sections of a structure to allow the sections to move during an earthquake. Plaintiff walked in the general hallway across a covered expansion joint when the covering gave way. Plaintiff’s leg fell into the joint, causing bodily injuries. Plaintiff sued Webcor and Webcor filed a cross-complaint against ACCO, to enforce a contractual defense and indemnity provision against ACCO.

A jury found Webcor to be 100% at fault for the incident with no apportionment to Plaintiff or subcontractor ACCO. The jury found Webcor retained control over the expansion gap cover and safety conditions where Plaintiff fell, Webcor negligently exercised its retained control over safety conditions, and Webcor’s negligence was a substantial factor in causing harm to Plaintiff. Webcor moved for judgment notwithstanding the verdict and for a new trial. Both motions were denied; Webcor appealed the post-judgment orders.

**HOLDING/DISCUSSION**

**The First Appellate Court affirmed the jury verdict and the trial court’s post-judgment orders.** Webcor argued it was prejudicial error to have read CACI 1009B jury instruction to the jury without special instructions. CACI 1009B inquires in relevant part, whether Webcor’s negligent exercise of its retained control over safety conditions was a substantial factor in causing Plaintiff’s harm. Generally, when an employee of a subcontractor is injured at the workplace, they may not recover tort damages from the hirer of the subcontractor. An exception to that rule exists when the hirer has retained control over safety conditions at the workplace, and the hirer’s negligent exercise of retained control has “affirmatively contributed” to the employee’s injuries (*Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198, 222.)

Webcor argued that the instruction error in CACI 1009B is that it wrongly equates “substantial factor” causation with “affirmative contribution.” The Court acknowledge that there are differing viewpoints and decisions on this argument and declined to analyze the issue further. However, the Court stated that in the event Webcor’s argument prevails, that the jury instruction was incorrect, Webcor must still demonstrate prejudice from the error. In deciding whether a jury instruction was read in error, the Court must also evaluate “1) the state of the evidence; 2) the effect of other instructions; 3) the effect of counsel’s arguments; and 4) any indications by the jury itself that it was misled.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-81.) The Court found that the evidence strongly supports the conjecture that the jury found Webcor to have affirmatively contributed to Plaintiff’s injury. Webcor’s safety manager and safety expert provided the most persuasive testimony where they acknowledged that Webcor retained exclusive control

over the maintenance of the expansion joints and the general access areas. The Court found nothing in Plaintiff's counsel's closing arguments that appeared to have capitalized on the claimed instruction error. Finally, there was no evidence of jury confusion because the jury did not request a rereading of the instruction, submitted no questions concerning the jury instruction, and only took 90 minutes to unanimously find Webcor fully liable.

The Court held that Webcor could not demonstrate a reasonable probability that it would have obtained a more favorable result in the absence of the claimed instruction error, therefore the Court upheld the trial court's post-judgment orders.