

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Please note:

This sample document is redacted from an actual research and writing project we did for a customer some time ago. It reflects the law as of the date we completed it. Because the law may have changed since that time, please use it solely to evaluate the scope and quality of our work.

If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ARALIA

JOHN SMITH,  
Plaintiff,

vs.

TURNER INC.,  
Defendant.

Case No. 123456

PLAINTIFF JOHN SMITH'S  
OPPOSITION TO DEFENDANT  
TURNER INC.'S MOTION FOR  
SUMMARY JUDGMENT

Date:  
Time: 9:00 a.m.  
Dept. X  
Complaint filed:  
Trial date: none set

**INTRODUCTION**

Plaintiff John Smith, a truck driver for U.S. Trucks, Ltd. ("UST"), was injured when he fell off his truck while spreading a tarp over a load of titanium cladding he was picking up at defendant's facilities. He was spreading the tarp manually because Turner's loaders did not help him, as they had done in the past, by using their cranes to spread the tarp after Smith hooked it up. As he was backing up over the top of the A-frame and the titanium, he fell. Turner now seeks summary judgment, arguing that it had no duty to help spread the tarp. But because its management had instructed the loaders to help UST's drivers spread the tarp when they asked for assistance, Turner did have such a duty under California law. And because there is a triable issue of material fact whether Smith did ask for assistance that day, summary judgment should be denied.

1 **FACTS<sup>1</sup>**

2 Smith was injured on May 13, 20\_\_, at Turner’s Watertown facility while picking  
3 up a load of titanium cladding. At the time, he was employed by UST. The cab and  
4 trailer he drove were owned by UST, and he was dispatched to Turner by UST, as usual.

5 The titanium Smith was picking up was architectural facing material shipped in  
6 sheets weighing up to 9,000 pounds and measuring 10 feet 10 inches by up to 17 feet.

7 Turner loaders load the titanium onto a truck bed with an A-frame using a crane; up to six  
8 packages of titanium are loaded onto each truck, resting against the A-frame, with the  
9 long (17 foot) end on the bed. Thus, when loaded, the top of the titanium is about 10 feet  
10 10 inches from the truck bed. After the titanium is loaded, Smith secures the sheets to the  
11 truck bed by using straps and v-board. The final step in the process is to pull a large tarp  
12 over the entire load and secure it. Because of the way UST’s trucks are configured, to  
13 spread the tarp a driver must climb up to the top of the A-frame to the front of the bed,  
14 grasp the tarp, and manually spread it over the titanium by pulling it along the top of the  
15 load; to do so, he must walk backwards along the A-frame and titanium. Because this  
16 process is dangerous, Turner has instructed its crane operators to assist the UST drivers in  
17 pulling the tarp by using their cranes if the driver asks for assistance; while the driver  
18 must still hook the crane to the tarp, the crane will pull the tarp, sparing the driver the risk  
19 of walking along the top of the truck.

20 On the day in question, Turner’s operators did not assist Smith. Although he  
21 (understandably, given what happened) cannot specifically recall whether he asked for  
22 assistance that day, it was his usual custom and practice to do so. Smith slipped and fell  
23 as he was walking backwards on top of the A-frame, manually spreading the tarp.

24  
25  
26 \_\_\_\_\_  
27 <sup>1</sup>In the interests of brevity, all references to the parties’ separate statements of fact  
28 have been deleted from this sample document.

1 **ARGUMENT**

2 **1. Whether Turner violated its assumed duty to assist UST’s drivers to**  
3 **spread the tarp when asked is a triable issue of fact.**

4 Turner argues that it had no duty to help Smith spread the tarp over the load. It  
5 points to its contract with UST, and argues that there is no evidence of a custom and  
6 practice in the industry that loaders help drivers spread a tarp. While all of this is true,  
7 Turner ignores another source of duty long recognized by California courts.

8 Even if a duty does not otherwise exist, a defendant may create a duty of care by  
9 volunteering to act. *Williams v. State of California* (1983) 34 Cal.3d 18, 23; *Schwartz v.*  
10 *Helms Bakery Ltd.* (1967) 67 Cal.2d 232, 235. A volunteer is under a duty to exercise  
11 due care in the performance of that duty, and will be liable if either the failure to exercise  
12 due care increases the risk of harm to the other, or harm is suffered because of the other’s  
13 reliance on the undertaking. *Ibid.*; see also REST. 2D OF TORTS, § 323. In *Schwartz*, for  
14 example, a bakery-truck driver was held liable to a four-year-old child injured while  
15 running across a street to buy a donut. The child told the driver he wanted a donut, but  
16 had no money. The driver told the child to go back across the street, get money from  
17 home, and meet him farther up the street. After the boy got the money, he called to the  
18 driver and was hit by a car as he ran across the street. The supreme court held that, by  
19 undertaking to direct the child to an assigned rendezvous with the truck, the driver  
20 assumed a duty to exercise due care for the boy’s safety. *Schwartz, supra*, at 236-238.

21 In *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, county sheriffs arrested  
22 a man who had threatened the plaintiffs’ decedent. They promised to notify the decedent  
23 immediately if the criminal was released on bail. The criminal was released, the deputies  
24 failed to notify the decedent or his family, and the criminal killed the plaintiffs’ decedent.  
25 The court held that the plaintiffs could recover if they could show that, because of their  
26 reliance on the unfulfilled promise, they had failed to take other security measures that  
27 might have avoided the danger. *Id.* at 945.

1 In deciding whether there is a triable issue of fact, the court does not weigh the  
2 evidence, but rather must accept the opposing party's admissible evidence as true; it must  
3 also construe the moving party's papers narrowly and the opposing party's liberally.  
4 *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 843. There is a genuine issue of  
5 material fact if the evidence would allow a reasonable trier of fact to find the underlying  
6 fact in favor of the opposing party. *Thousand Trails, Inc. v. California Reclamation Dist.*  
7 *No. 17* (2004) 124 Cal.App.4th 450, 457.

8 Here, plaintiff has evidence that Turner voluntarily assumed a duty to assist UST  
9 drivers like Smith with spreading tarps over the titanium by using Turner cranes, if the  
10 drivers asked. Thus, Henry Jones testified that Turner drivers were told at safety  
11 meetings to so assist UST drivers who asked. And there is evidence that Smith did ask.  
12 Although Smith could not specifically recall whether he asked for Turner's assistance that  
13 day, he did state that it was his usual custom and practice to do so. Evidence of custom  
14 and practice is admissible "to prove conduct on a specified occasion in conformity with  
15 the habit and custom." Evid. Code § 1105. Certainly, had Turner's loaders assisted  
16 Smith by using the crane to spread the tarp, he would not have been forced to spread it by  
17 walking backwards along a narrow A-frame and titanium load.

18  
19 **CONCLUSION**

20 Defendant admits that its loaders did not assist Smith on the day of the accident.  
21 Whether their breach of their voluntarily assumed duty to assist increased the danger to  
22 Smith is a triable issue of fact. Turner's motion for summary judgment should be denied.

23  
24 Dated: \_\_\_\_\_, 20\_\_

Respectfully submitted,

25  
26 \_\_\_\_\_  
Attorneys for Plaintiff John Smith