

Warning: Hard Hat Area

By Gary A. Watt

Property owners and developers have many things to fear in getting a project from concept to completion. Among those concerns is being sued when a contractor's employee is injured on the jobsite. Fortunately, the California Supreme Court has erected some formidable barriers to such liability. Nevertheless, in order to avoid falling under an exception, property owners and their counsel must first know the rules. A recent appellate decision serves as a good primer and/or refresher course.

In *Padilla v. Pomona College*, 166 Cal.App.4th 661 (2nd Dist., 2008), the plaintiff, a subcontractor's employee, was injured while removing pipes in a basement. He fell when the pipe he was removing struck a remaining pipe that was still pressurized. The gush of water from the pressurized pipe knocked him off a ladder.

The defendants, Pomona College and its general contractor, moved for summary judgment under what is known as the *Privette* doctrine.

In *Privette v. Superior Court*, 5 Cal.4th 689 (1993), a contractor's employee was burned with hot tar while climbing a ladder to the homeowner-hirer's roof. He sued the homeowner under the "peculiar risk" theory — asserting that the owner could not delegate safety for inherently dangerous work. The Supreme Court concluded that extending liability to hirers is no longer justifiable given the state's workers' compensation system. Allowing an independent contractor's employees to recover under workers' compensation and also seek damages against the hirer gives those employees an unwarranted windfall. Additionally, it would be unfair to impose liability on the hirer when the liability of the injured employee's contractor is limited to providing workers' compensation coverage. See also *Toland v. Sunland Housing Group*, 18 Cal.4th 253 (1998); *Camargo v. Tjaarda Dairy*, 25 Cal.4th 1235 (2001).

The Affirmative Contribution Rule

As a result of *Privette*, *Toland* and *Camargo*, injured contractors' employees began asserting that the hirer retained control over the work, justifying liability

notwithstanding the workers' compensation scheme. But in *Hooker v. Department of Transportation*, 27 Cal.4th 198 (2002), the Supreme Court held that an employee may not sue the hirer of the contractor for the tort of negligent exercise of retained control unless the exercise of such control affirmatively contributes to the employee's injuries.

In *Hooker*, CalTrans permitted construction and other vehicles to use an overpass while plaintiff's crane was being operated. Because the overpass was narrow, the plaintiff crane operator was required to retract the crane's outriggers in order to let traffic pass. After retracting the outriggers to allow traffic to pass, the plaintiff swung the boom without first re-extending the outriggers. The weight of the boom caused the crane to tip over, throwing the plaintiff to the ground. He died from his injuries.

But *Hooker* held that mere failure to exercise general supervisory powers to prevent the creation or continuation of a hazardous practice on a project are insufficient to impose liability. In contrast, *Hooker* reasoned, imposing tort liability where the hirer's exercise of retained control "affirmatively contributes" to the injury is consistent with *Privette*'s rationale because the liability of the hirer in such a case is not vicarious or derivative, but is "direct in a much stronger sense of that term." See also *McKown v. Wal-Mart Stores Inc.*, 27 Cal.4th 219 (2002). Thus, *Hooker* ruled that "when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer."

Dangerous Condition of Property

After *Hooker*, some plaintiffs asserted that "unknown" or "hidden" conditions could give rise to liability despite the *Privette* doctrine. But in *Kinsman v. Unocal Corp.*, 37 Cal.4th 659 (2005), the Supreme Court limited such "premises liability" claims to the narrowest circumstances. In *Kinsman*, a carpenter, employed by an independent contractor installing scaffolding for asbestos workers in an oil refinery, alleged exposure to asbestos. He claimed that only the refinery owner knew

of the hazard.

The Supreme Court concluded that "a landowner that hires an independent contractor may be liable to the contractor's employee if: the landowner knew, or should have known, of a latent or concealed pre-existing hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition" (emphasis added). But, "when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, a corollary of *Privette* and its progeny ... is that the hirer is not liable to the contractor's employee if the contractor fails [to take the precautions]."

The Non-delegable Duty Wrinkle

In the wake of *Hooker* and *Kinsman*, the plaintiffs asserted alleged independent and non-delegable duties in an attempt to get around those two cases. The Supreme Court has yet to speak on this aspect of the *Privette* doctrine. But a 4th District Court of Appeal case, *Millard v. Biosources Inc.*, 156 Cal.App.4th 1338 (2007), is instructive. In *Millard*, a subcontractor's employee was injured while working in the attic of a building. The employee claimed that just prior to falling, the lights had gone out. Earlier that same day, the general contractor had been responsible for the lights going out in the attic while the employee had been working there.

Analyzing the case under the *Hooker* paradigm first, the 4th District assumed the general contractor retained control over safety at the project, so the question was whether there was a triable issue of fact that the general contractor affirmatively contributed to the employee's injuries. The court concluded that the answer was no. Even if it could be shown that the general contractor retained control over safety conditions at the project, there was no showing that the general contractor "affirmatively contributed" to the employee's injuries, i.e., that it caused the lights to go out the second time.

The 4th District then turned to the plaintiff's non-delegable duty argument. The plaintiff claimed that workplace safety statutes and regulations could be used in combination with negligence per se, to create a duty of care not insulated by the *Privette* doctrine's limita-



tions. But *Millard* rejected this attempt to evade *Privette*'s reach.

The appellate court concluded that "safety regulations may be admissible in actions by employees of subcontractors brought against general contractors [and property owners] that retain control of safety conditions, but only where the general contractor [or property owner] affirmatively contributed to the employee's injuries." *Millard* went further, concluding that nothing about Evidence Code Section 669 can transform the analysis absent the affirmative contribution. Rather, it is the act of retained control and affirmative contribution that creates the duty to a plaintiff that is not limited by *Privette* and its progeny. Describing a duty as non-delegable is insufficient unless there is evidence of an affirmative contribution to the injury. Safety statutes, standing alone, cannot circumvent the sweeping bar of the *Privette* doctrine. Absent affirmative contribution, negligence per se has no application.

The Common Denominator

The current trend then, is for plaintiffs to assert some statutory duty that the hirer allegedly cannot delegate and that violation of the statute affirmatively contributed to the injury. Returning to *Padilla*, the plaintiff alleged that the California Division of Occupational Safety and Health Administration regulations were violated by the general contractor for failing to depressurize the remaining pipe that ultimately

broke, resulting in his fall from the ladder. But the 2nd District rejected the broad assertion that all safety regulations are per se non-delegable. Rather, it is the language of the regulation itself that determines whether the duties it creates are non-delegable.

Turning to the regulation, the appellate court noted that nothing in the regulation "imposes safety precautions that cannot be delegated from the landowner to the general contractor to the subcontractors, as was done in this case." The court noted that the regulation "nowhere indicates who must perform these acts and does not expressly place the obligation on the landowner."

Having rejected the plaintiff's assertion that the OSHA regulation was non-delegable, *Padilla* nevertheless went on to agree with the 1st District in *Madden v. Summit View Inc.*, 165 Cal.App.4th 1267 (2008) and the 4th District in *Millard*, that even if a statute is found to be non-delegable, the plaintiff must still prove the breach resulted in an affirmative contribution to the injury.

The 2nd District concluded that there was no evidence that Pomona College or its general contractor made any affirmative contribution to the plaintiff's injuries. It then went one step further, noting that the only other avenue, *Kinsman*'s "hidden hazard" exception, was also foreclosed because the hazard in question — the remaining pressurized pipe — was open and obvious and fully disclosed to the plaintiff's employer.

Developers and owners of property are well protected from suits by injured employees of contractors. Retention of general control over safety on a project and/or the failure to discover and stop an unsafe practice will not, standing alone, result in liability. Nor will retention of control of the means and methods of the work. But such retention, coupled with an affirmative contribution to an employee's injury, can result in liability. So can provision of unsafe equipment.

Statutes may also create non-delegable duties, depending on the actual language. But even where the statute imposes such a duty, there will be no liability absent an affirmative contribution flowing from the breach of the regulatory duty.

Finally, characterizing a condition of the owner's property as dangerous will not result in liability where the condition was open and obvious and nothing prevented the injured employee's employer from addressing it. And characterizing such condition as hidden will not result in liability where the contractor could, in the ordinary course of performing the work, reasonably have discovered the condition.

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