



WEEKLY LAW RESUME™

Issue By: JOSEPH AGUILAR

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## The Trilogy of Tverberg: Non-Delegable Regulatory Duties and Negligent Exercise of Retained Control

*Jeffery Tverberg et al. v. Fillner Construction, Inc.*

Court of Appeal, First District (January 26, 2012)

This case involved injuries suffered by an independent contractor hired to construct a metal canopy over fuel-pumping units. The Court addressed whether the plaintiff can survive summary judgment on theories of breach of a non-delegable regulatory duty and negligent exercise of retained control.

In 2006, Fillner Construction, acting as general contractor, hired subcontractors to expand a commercial fueling station in Dixon, California. One of these subcontractors hired the plaintiff, Jeffrey Tverberg (“Tverberg”), as an independent contractor to act as the foreperson in constructing a metal canopy over some fuel-pumping units. Prior to Tverberg’s arrival on the jobsite, another subcontractor dug eight holes measuring four feet wide by four feet deep for “bollards,” which are concrete posts intended to keep vehicles from colliding with the pumps. When Tverberg started work in May, 2006, he initially asked a Fillner representative to cover the holes with metal plates; however, Tverberg was told that the necessary equipment was unavailable. Fillner did post warning stakes and safety ribbon around the holes. Just prior to starting work, Tverberg again asked to cover the holes, but Fillner did nothing. Soon thereafter, Tverberg fell into one of the holes, sustaining injuries.

The Appellate Court first confronted this case in 2008 when it overturned the trial court which granted summary judgment in favor of Fillner; however, the appellate decision was reversed in

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2010 by the California Supreme Court. In 2011 the Appellate Court released its second opinion on this case, holding that Tverberg could move to trial on the direct liability theories of a non-delegable regulatory duty and negligent exercise of retained control. But again, the Supreme Court granted review and reversed, now with direction to vacate in light of its recent decision in *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590.

Now, in this case's third trip before the Appellate Court, Tverberg argued that Fillner could not delegate away a regulatory duty, specifically compliance with Cal-OSHA's workplace regulations, by hiring Tverberg as an independent contractor. In this opinion, the Appellate Court held that the *SeaBright* decision clearly rejected Tverberg's theory and stated "when a hirer delegates contracted work to an independent contractor, it also impliedly delegates its duty to provide a safe workplace to that contractor." Therefore, the Appellate Court upheld the original trial court summary judgment decision on this issue.

Tverberg also claimed that Fillner retained control over the jobsite and acted negligently. The theory of retained control liability turns on whether "the hirer exercised that retained control in a manner that affirmatively contributed to the injury." This control can take many forms, including actively directing an independent contractor about the manner of the work performed; directing the means or mode by which the work is to be done; or not fully delegating the responsibility of providing a safe work environment. However, if an employer remains passive about the existence or occurrence of an unsafe condition, this does not constitute affirmative contribution.

In order to overcome a summary judgment motion a plaintiff must "show that a triable issue of material fact exists that warrants a trial." Here, the Court cited Fillner's direction of another subcontractor to dig the bollard holes as possible "active participation," and not merely letting an unsafe condition occur. Fillner's actions of putting safety ribbon and stakes around the holes provided a possible inference that Fillner "affirmatively assumed responsibility for the safety of workers" in that area. Lastly, the Court stated a reasonable jury could conclude that Fillner implicitly agreed to cover the bollard holes when acknowledging Tverberg's requests, but failed to take reasonable action. The Court held these as triable issues of material fact

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concerning the “affirmative contribution” necessary for retained control. Therefore, the Court reversed the trial court’s granting of summary judgment on negligent exercise of retained control.

## COMMENT

This decision makes clear that, as a matter of law, an employer does not retain regulatory duties to provide a safe work environment for its independent contractors. An employer may still face direct liability when the employer retains control over the work environment and implicitly or explicitly acts negligently. Retained control requires that the employer “affirmatively contribute” to the plaintiff’s injuries. The Court applied a liberal interpretation of this term, and this case will be relied upon to defeat motions for summary judgment. What constitutes “affirmative contribution” to a plaintiff’s injuries is a question of fact for the jury.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/A120050B.PDF](http://www.courtinfo.ca.gov/opinions/documents/A120050B.pdf)

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