



April 7, 2011

Hirer May Be Held Directly Liable For Independent Contractor's Injury Where Hirer Retained Control Over Safety Conditions At Jobsite

Jeffrey Tverberg v. Fillner Construction, Inc.

Court of Appeal, First Appellate District, Division Four (March 25, 2011)

In this case, the trial court granted summary judgment to Fillner Construction, Inc. ("Fillner") and dismissed the personal injury action of Jeffrey Tverberg ("Tverberg"). Tverberg appealed, contending that Fillner was liable for his injuries because of its (1) negligent exercise of retained control and (2) breach of non-delegable regulatory duty. The Court of Appeal reversed the judgment of the trial court.

In 2006, Fillner was the general contractor on a property to expand a gas station. Fillner hired subcontractor Lane Supply, which delegated work to Perry Construction, Inc. ("Perry") to install a canopy for the project. Perry hired Tverberg, an independent contractor, to construct the canopy. On May 1, 2006, Tverberg noticed that another subcontractor had dug holes for other work and asked that they be covered. The holes were not covered when Tverberg started work, and he was injured after falling into one.

Tverberg filed suit for negligence and premises liability. Fillner moved for summary judgment, contending it could not be held vicariously liable for Tverberg's injuries. The trial court granted Fillner's motion, finding an independent contractor hired by a subcontractor may not hold the general contractor vicariously liable for injuries arising from risks inherent in the nature of the



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location. After a series of appeals, the case was remanded to determine whether Fillner could be held *directly* liable.

The Court of Appeal concluded that if a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that *affirmatively contributes* to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control. Here, by ordering the holes to be created, and requiring Tverberg to conduct unrelated work near them, Fillner's conduct may have constituted negligent exercise of its retained control in a manner that could have made an affirmative contribution to Tverberg's injuries. Therefore, the Appellate Court found that a question of material fact existed regarding whether Fillner affirmatively assumed the responsibility for the safety of the workers near the holes, and discharged that responsibility in a negligent manner.

Tverberg also contended that Fillner was liable for his injuries because it breached a non-delegable regulatory duty. In some circumstances, a regulatory duty imposed on the hirer of an independent contractor is non-delegable, making the hirer liable for its breach of those regulations if the breach affirmatively contributed to the injuries sustained. Tverberg asserted that Fillner was responsible for ensuring compliance with applicable safety regulations, specifically, the Cal-OSHA requirement that all pits be barricaded or securely covered. While the regulation does not specify who is responsible for compliance, the underlying Labor Code provision provides that the employer who creates the hazard and the employer who is responsible for the safety of the construction worksite may be cited for safety violations. Here, Fillner created the bollard holes by directing another subcontractor to dig them. Fillner was also generally responsible for safety conditions on the jobsite. Under these circumstances, the Court concluded that the regulation created a non-delegable duty that may form the basis of direct liability.

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COMMENT

While an independent contractor hired by a subcontractor may not hold the general contractor vicariously liable for injuries arising from risks inherent in the nature of the location of the hired work over which the independent contractor has been granted control, a general contractor can be held *directly* liable on a theory that it retained control over safety conditions at the jobsite. The imposition of liability turns on whether the hirer exercised that retained control in a manner that *affirmatively contributed* to the injury. The mere failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a plaintiff to recover on a retained control theory, the hirer must engage in some active participation. While the passive permitting of an unsafe condition to occur is not an affirmative contribution, the act of directing that it occurs is active participation.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/A120050.PDF](http://www.courtinfo.ca.gov/opinions/documents/A120050.pdf)

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