California Court of Appeal Finds Possible Liability Under Privette Doctrine of Retained Control

Product Liability Advisory

February 2012 by Marc Brainich

In a recent opinion, the California Court of Appeal has added to the state's long line of "hirer liability" cases, which the Supreme Court has referred to as "*Privette* and its progeny." In *Tverberg v. Fillner Construction*, Inc., 202 Cal. App. 4th 1439 (2012), the Court held that a hirer may be found liable for injuries to an independent contractor who was hired by another subcontractor employed by the hirer, where the hirer's negligence in retaining control over the safety conditions of the worksite affirmatively contributed to the plaintiff's injuries.

In the *Tverberg* case, defendant general contractor Fillner Construction, Inc. (Fillner) was expanding a commercial fuel facility. Fillner (the hirer) delegated the construction of a metal canopy to one subcontractor, which delegated the work to a second subcontractor, which in turn hired plaintiff Tverberg, an independent contractor, to construct the canopy. Fillner also hired another subcontractor to dig a number of holes close to the work that Fillner was performing. Tverberg fell into one of these holes, injuring himself.

The trial court granted summary judgment in favor of Fillner. The Court of Appeal reversed, holding that Tverberg could go to trial on a theory of retained control, finding sufficient evidence to defeat summary judgment that "Fillner is directly liable for [Tverberg's] injuries because it retained control over the jobsite and itself negligently exercised that control in a manner that affirmatively contributed to Tverberg's injuries." First, Fillner directed another subcontractor to dig the holes and required Tverberg to perform unrelated work near them. Second, Fillner's employee in charge of the worksite determined that stakes and safety ribbons around the holes constituted sufficient worker protection. And finally, when Fillner told Tverberg in response to his complaints that the equipment needed to fill the holes was not available, this constituted an implied promise to cover the holes when the equipment became available.

The *Tverberg* opinion is based on the Supreme Court's opinion in *Privette*, which generally addressed the issue of when a hirer may be held liable for injuries to an employee of a subcontractor hired by the hirer. (*Privette v. Superior Court,* 5 Cal. 4th 689 (1993).) The Supreme Court reaffirmed the common law rule that the hirer has no liability to someone injured by the subcontractor, because it has no right to control the safety conditions of the workplace, whereas the independent contractor is better situated to do so. The Court noted that a number of exceptions to the common law rule of no liability had developed over the years. This included the doctrine of peculiar risk/inherently dangerous work, where the hirer could expect harm from the work it had retained the independent contractor to do, and thus could not delegate responsibility for a safe work place to the contractor when an innocent third party was injured. The Court then held that the doctrine of peculiar risk did not apply where the injured party was an employee of the contractor and had workers compensation benefits. The Court noted that California's workers compensation system protected the subcontractor's employee from the risk of the subcontractor's insolvency; any attempt by the employee to hold the hirer vicariously liable would in effect be an end run around the workers' compensation system.

One of *Privette's* progeny later set forth the theory of "retained control" as an exception to *Privette's* general rule of no liability of a hirer to the employee of a subcontractor. (*Hooker v. Department of Transportation* 27 Cal. 4th 198, 206 (2002).) Since the common law rule of no liability to the hirer was partly based on the grounds that the hirer had no control over, and thus no responsibility for, safety conditions of the workplace, *Hooker* held that the hirer could be held liable when it retained control over workplace safety conditions. *Hooker* emphasized the need for a plaintiff to prove that the hirer had affirmatively contributed to the hazardous condition, and held that there was no such contribution where the Department of Transportation simply allowed cars to use an overpass while a crane operator was working nearby, but did not direct the crane operator to retract the crane away from the car.

The unique facts of the *Tverberg* opinion suggest that the Court was stretching to apply the general legal principles concerning the imposition of the hirer's liability under *Hooker's* "retained control" theory. Following *Hooker's* emphasis that the hirer must have gone beyond merely passively retaining control and have "actively contributed" to the injury, the Court found such active

contribution where Fillner directed a subcontractor to dig the holes. The Court seemed less confident in finding that such active contribution occurred when Fillner "determined" that certain safety steps were sufficient, and virtually apologized when it adduced the implied promise of later action could be enough. *Tverberg's* holding illustrates the difficulty courts continue to have applying the principles of *Privette* and finding facts which may support liability under the theory of "retained control" or other "active contribution."

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