CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Tverberg v Fillner Construction (6/28/2010)

Peculiar Risk Doctrine; Privette Exception; Independent Contractor

This Solano County case stems from a work site injury in Dixon, California. Defendant Fillner was hired as the general contractor to construct a commercial fuel facility, which required a metal canopy over some fuel pumping units. Fillner delegated the work to Perry Construction which hired plaintiff as an independent contractor to act as foreman of Perry's two man canopy crew. It is undisputed that plaintiff Tverberg was an independent contractor.

As part of the project, Fillner hired Alexander Concrete to erect eight "bollards" designed to protect the fuel dispensers from moving vehicles. Alexander dug eight holes and marked them with stakes and safety ribbon. The bollards had no connection to the metal canopy. Plaintiff asked Fillner's "lead man" to have the holes covered while the canopy was erected. The next day, plaintiff commenced work, and when the holes were still not covered, he again requested that Fillner cover them with large metal plates. The holes were still not covered, when plaintiff fell into one, causing injury.

Plaintiff sued Fillner and Perry on theories of negligence and premises liability. Fillner, as general contractor, brought a motion for summary judgment which was granted by the trial court. The court found plaintiff could not hold the general contractor liable on a vicarious liability theory of peculiar risk. The court also rejected a claim of direct liability for failing to cover the holes. The ruling was appealed, and the Appellate Court found where an independent contractor, rather than his employee, has been hurt on a job, and the contractor is not covered by worker's compensation insurance, the rule of not imposing vicarious liability against a hiring party does not apply. The summary judgment was reversed, and this appeal to the California Supreme Court followed.

The High Court began its decision by noting that in *Privette v Superior Court* (1993) 5 Cal.4th 689, the owner of a duplex hired a roofer to install a tar and gravel

roof. One of the roofing contractor's employees was injured and he sued the duplex owner, Privette, under the peculiar risk doctrine, asserting the owner could be held vicariously liable for the roofing contractor's negligence. The **doctrine of peculiar risk** is a judicially created exception to the common law rule that a person hiring an independent contractor to perform inherently dangerous work is generally not liable to third parties for injuries resulting from the work. The doctrine provides that a landowner choosing to undertake inherently dangerous work on their premises should not escape liability simply by hiring an independent contractor to do the work. The rationale of the general rule is that "*innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work … would not have to depend on the contractor's solvency in order to receive compensation for the injuries*."

At first the peculiar risk exception subjected landowners to liability only to certain third parties such as bystanders and neighboring owners. In time, it was expanded to also cover employees of an independent contractor hired by the owner to perform work that is inherently dangerous, subjecting the owner to vicarious liability. In *Privette*, the Supreme Court rejected that expansion, by reasoning that workplace injuries to an independent contractor's employees are already compensable under the California Workers' Compensation Act. Since the employee is barred from suing the employer, so too, an independent contractor's employee should not be allowed to recover damages against the contractor's hirer who is indirectly paying for the cost of workers' comp coverage which presumably has been calculated into the contract price. (Privette, at p. 699) Later, in *Toland v Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, the *Privette* rule was expanded to protect not just the landowner, but the general contractor as well. The Supreme Court held that general contractors, like all others that hire independent contractors, have "the right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." Finally, in *Kinsman v Unocal Corp.* (2005) 37 Cal.4th 659, the Supreme Court explained that at common law, it was regarded as the norm that when a hirer delegated a task to an independent contractor, it in effect **delegated responsibility for performing that task safely**, and assignment of liability to the contractor followed that delegation. For various policy reasons discussed in *Privette*, courts have severely limited the hirer's ability to delegate responsibility and escape liability. Principally because of the availability of workers' compensation these policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an

independent contractor the duty to provide the contractor's employees with a safe working environment. (*Kinsman*, at p. 671)

Here the Appellate Court held the independent contractor could bring the lawsuit against the general contractor and that *Privette* did not control because unlike the independent contractor's employee injured at the jobsite, as occurred in *Privette*, the injured independent contractor here was not subject to mandatory coverage for workplace injuries under California's workers' compensation system. In doing so, the Appellate Justices disagreed with *Michael v Denbeste Transp., Inc.* (2006)137 Cal.App.4th 1082), which held the *Privette* holding also operates to bar peculiar risk liability for workplace injuries of an independent contractor.

The Supreme Court found that *Michael* did set forth the proper state of the law, that an independent contractor hired by a subcontractor cannot hold the general contractor vicariously liable for jobsite injuries on a theory of peculiar risk, but the Justices arrived via different reasoning than *Michael*, as follows. The doctrine of peculiar risk was developed as an exception to the common law rule of hirer non-liability to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous activities would not have to depend on the contractor's solvency in order to receive compensation for the injuries. In *Privette*, the availability of worker's compensation insurance to compensate for the injury was central to the holding that the hirer should not incur peculiar risk liability for the on the job injuries to an independent contractor's employee. **Here, the existence of workers' comp coverage is not relevant** to deciding whether a hirer should incur vicarious liability for workplace injury to an independent contractor who was hired by a subcontractor to do inherently dangerous work.

When an independent contractor is hired to perform inherently dangerous construction work, that contractor, unlike a mere employee, receives authority to determine how the work is to be performed and assumes a corresponding responsibility to see that the work is performed safely. The independent contractor receives this authority over the manner in which the work is to be performed from the hirer by **a process of delegation**. This delegation may be direct, when the hirer has contracted with the independent contractor, or indirect when the hirer contracts with another contractor who then subcontracts the work to the independent contractor.

Whether direct or indirect, this delegated control over the performance of the work removes the independent contractor from the category of "innocent third parties" deserving of financial protection under the doctrine of peculiar risk. When the hirer of an independent contractor delegates control over the work to the contractor, the hirer also delegates "…responsibility for performing the task safely." (Kinsman, p. 659) **An independent contractor who suffers injury resulting from risks inherent in the hired work, after having assumed responsibility for all safety precautions reasonably necessary to prevent precisely those sorts of injuries is not, in the words of *Privette*, a "hapless victim" of someone else's misconduct.** The purpose of the peculiar risk doctrine, compensating an innocent third person, is not present.

In hiring an independent contractor to perform work that presents some inherent risk of injury to others, the hirer delegates responsibility over the work to the contractor. It would be anomalous to allow the independent contractor to whom the responsibility has been delegated to recover against the hirer on a peculiar risk theory while denying such recovery to an independent contractor's employee.

For these reasons, the Supreme Court concludes that the doctrine of peculiar risk does not apply when, as here, an on the job injured independent contractor hired by a subcontractor seeks to hold the general contractor vicariously liable for injuries arising from risks inherent in the nature or the location of the hired work over which the independent contractor has, through the chain of delegation, been granted control. Because the bollard holes were located next to the area where Tverberg was to erect the metal canopy, the possibility of falling into one of those holes constituted an inherent risk of the canopy work.

Since the Court of Appeal did not address all of the issues on appeal from the summary judgment ruling, the case is remanded to the Appellate Court for consideration of those remaining issues consistent with this opinion. The Judgment of the Appellate Court is reversed.

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