

# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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## *Tverberg v Filner Construction* 1/26/12

### **Negligence; Retained control; Affirmative contribution**

This case has previously been the subject of an appeal to the California Supreme Court. Plaintiff, an independent contractor, was injured on May 26, 2006, when he fell into a hole near the area he was constructing a canopy for a commercial fuel facility in Dixon. Defendant Fillner was the general contractor, which contracted with Lane Supply, which in turn delegated the work to subcontractor Perry Construction Company. Perry hired plaintiff as foreperson of Perry's two person crew to build the canopy. Plaintiff held a state contractor's license and had more than 20 years experience in structural steel construction.

Meanwhile, Fillner hired subcontractor Alexander Concrete to erect eight "bollards" or concrete posts intended to protect the fuel dispensers from moving vehicles. Alexander had already dug eight holes, marked with stakes and safety ribbon in the area where plaintiff was to build the canopy. Tverberg had never seen bollard holes at a canopy installation site. Plaintiff asked Fillner's "lead man" to have the holes covered with metal plates, but the necessary equipment to do so was absent from the site. The next day, plaintiff again asked to have the holes covered, and again, it was not accomplished. Later in the day, while walking to his truck, Tverberg fell in one of the holes and was injured.

Plaintiff sued Fillner and Perry. Fillner moved for summary judgment, asserting it could not be *vicariously liable* based on *Privette v Superior Court* (1993) 5 Cal.4<sup>th</sup> 689. Fillner also argued it could not be *directly liable* for negligence in failing to provide a safe workplace. The trial court granted the motion. In 2008, the First District Court of Appeal reversed the trial court, but in 2010, the California Supreme Court reversed the appellate court decision,

holding that an independent contractor hired by a subcontractor may not hold the general contractor *vicariously* liable on a peculiar risk theory 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. The Supreme Court found that the possibility of falling into the holes constituted an inherent risk of the canopy work. The Court then remanded the matter for consideration of the *direct liability* theory.

On remand, in 2011, the First DCA issued its second decision, finding triable issues of fact on the negligent exercise of retained control and breach of nondelegable regulatory duty theories. The case was appealed to the California Supreme Court for a second time. The Supreme Court then issued its decision in *SeaBright Ins. Co. v US Airways, Inc.* (2011) 52 Cal.4<sup>th</sup> 590, another breach of regulatory duty case, and transferred this case back to the First DCA for reconsideration in light of its new decision. Accordingly, the First DCA **vacated** its earlier ruling and called for additional briefing.

Generally, when an independent contractor is injured in the workplace, the contractor cannot sue the party that hired the contractor to do the work. (*SeaBright*, at p. 594) Plaintiff concedes the Supreme Court has rejected this legal theory. **When a hirer delegates contracted work to an independent contractor, it also impliedly delegates its duty to provide a safe workplace to that contractor.** Here, Fillner delegated its obligation to comply with Cal-OSHA workplace regulations to Tverberg. Thus, the trial court properly granted Fillner's motion for summary judgment on the breach of regulatory duty theory of recovery.

On appeal, plaintiff also asserted that Fillner is *directly liable* for injuries because it retained control over the jobsite and itself negligently exercised that control in a manner that affirmatively contributed to plaintiff's injuries. The Justices explained that the *Privette* peculiar risk doctrine imposes vicarious liability on a hirer, based on the negligence of an independent contractor, not that of the hirer. (*Kinsman v Unocal Corp.* (2005) 37 Cal.4<sup>th</sup> 659; *Tverberg v Fillner Construction, Inc.* (2010) 49 Cal.4<sup>th</sup> 518) Generally, when an independent contractor is hired to perform dangerous work, the contractor receives authority to determine how the work is to be performed and assumes a corresponding responsibility to see that the work is performed in a safe manner. This authority

is delegated by the hirer, either directly or indirectly. If a hirer (such as Fillner) 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. (*Hooker v Department of Transportation* (2002) 27 Cal.4<sup>th</sup> 198) Because the hirer actively retains control, it cannot logically be said to have delegated that authority.

Even so, the Justices continued, a hirer is not liable to a contractor or a contractor's employee merely because it retains control over safety conditions. The imposition of tort liability **turns on whether the hirer exercised that retained control in a manner that affirmatively contributed to the injury**. An affirmative contribution may take the form of actively directing a contractor or an employee about the manner of performance of the contracted work. (*Kinsman*, at p. 670; *Hooker*, at p. 212) When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. (*Millard v Biosources, Inc.* (2007) 156 Cal.App.4<sup>th</sup> 1338) When the hirer does not fully delegate the task of providing a safe working environment but in some manner **actively participates in how the job is done**, the hirer may be held liable to the employee if its participation **affirmatively contributed** to the employee's injury. (*Kinsman*, at p. 671)

By contrast, **passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution**. (*Ruiz v Herman Weissker, Inc.* (2005) 130 Cal.App.4<sup>th</sup> 52) The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the 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 worker to recover on a retained control theory, the hirer must engage in some active participation**. (*Hooker*, at p. 215)

On appeal, plaintiff contends that a triable issue exists whether Fillner retained control over the jobsite in such a manner that it affirmatively

contributed to plaintiff's injuries. Plaintiff asserts that Fillner's affirmative contribution is shown by its direction of another subcontractor to dig the bollard holes in the first place. While the passive permitting of an unsafe condition to occur is not an affirmative contribution, the act of directing that it occur is active participation. (*Hooker*, at p. 214-215) The DCA agreed that in ordering the holes to be created and requiring plaintiff to conduct unrelated work near them, Fillner's conduct may have constituted a negligent exercise of its retained control in a manner that could have made an affirmative contribution to plaintiff's injury.

Plaintiff also contends that the affirmative contribution requirement is satisfied by Fillner's determination that there was no need to cover or barricade the bollard holes. Fillner's employee in charge of the jobsite testified that he concluded that the stakes and safety ribbon provided sufficient worker protection. Thus, the Justices decided that the evidence allows an inference that Fillner [affirmatively assumed the responsibility for the safety the workers near the holes and discharged that responsibility in a negligent manner](#), causing injury.

Further, plaintiff argues the evidence that Fillner's lead man said he did not have the necessary equipment to cover the holes raises the inference that Fillner intended to cover the holes when the needed equipment became available. Thus, plaintiff argues that Fillner agreed to undertake a safety measure and did not do so. The DCA felt this was a closer case on the issue of affirmative contribution, but the evidence could allow a reasonable jury to infer that Fillner agreed to cover the holes and then failed to meet this responsibility. (*Ruiz*, at p. 66)

The Appellate Court concluded that plaintiff offered sufficient evidence of a triable issue on affirmative contribution to overcome a motion for summary judgment on a retained control theory of direct liability. Since Fillner may be liable to Tverberg on a retained control theory, the trial court erred in granting its motion for summary judgment. The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with the decision.

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