

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG

Alternative Dispute Resolution

❖ Resolution Arts Building ❖

2630 J Street, Sacramento, CA 95816

ph: (916) 442-6739 • fx: (916) 442-4107

elong@ernestalongadr.com • www.ernestalongadr.com

Khosh v Staples Construction Company, Inc. 10/26/16

Privette Doctrine; Retained Control Affirmative Contribution Exception; Non-Delegable Duties Exception

The California State University Channel Islands (the University) hired Staples to install a backup electrical system at the university. Staples hired DK Electrical Systems, Inc. (DK) as the high-voltage subcontractor for the project. DK hired Myers Power Products, Inc. (Myers) to construct and install electrical switchgear for the system.

The contract between Staples and the University required Staples to “exercise precaution at all times for the protection of persons and their property,” and to “retain a competent, full-time, on-site superintendant to . . . direct the project at all times,” among other things. It made Staples “exclusively responsible” for the health and safety of its subcontractors, and required Staples to submit “comprehensive written work plans for all activities affecting University operations,” including utility shutdowns.

Myers informed Staples it needed three days to accomplish its last task on the project, including a shutdown of the electrical system. The University scheduled a campus-wide electrical shutdown. The shutdown was to be followed by final testing of the system’s operation.

Al Khosh arrived at the University two and a half hours before the scheduled shutdown time. The University's project manager let Khosh and a helper into a substation containing electrical switchgear. Khosh performed work in the substation, while the switchgear was still energized. An electrical arc flash occurred, severely injuring him. The flash occurred approximately half an hour before the shutdown was scheduled to begin. Staples did not have any personnel at the University at the time.

Khosh filed a complaint, asserting a cause of action for general negligence against Staples. Staples moved for summary judgment relying upon the *Privette* doctrine, which generally prohibits the employee of a contractor from suing the hirer of the contractor for work-related injuries. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 702)

Khosh argued *Privette* did not bar his claim because (1) Staples retained control over the work and affirmatively contributed to his injuries (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202); and (2) Staples violated nondelegable regulatory duties because it did not have a qualified electrical worker present to supervise Khosh and did not prepare a written procedure for the electrical shutdown. The trial court granted Staples's motion for summary judgment because Khosh failed to establish that Staples retained control over his work and affirmatively contributed to his injury. (Code Civ. Proc., § 437c; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202).

On Plaintiff/Respondent's appeal, the Second District Court of Appeal noted that an employee of an independent contractor generally may not sue the contractor's hirer for work-related injuries. (*Privette*, at p. 702.) Instead, the injured employee is **generally limited to worker's compensation remedies against his employer.**

There are **exceptions to the *Privette* doctrine**. One allows a contractor's employee to sue the hirer of the contractor when the hirer (1) retains control over any part of the work and (2) negligently exercises that control (3) in a manner that affirmatively contributes to the employee's injury. (*Hooker*, at p. 209.) Another exception permits recovery when the hirer (1) has a nondelegable legal duty (2) which it breaches (3) in a manner that affirmatively contributes to the injury. (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661); *Hooker*, at pp. 210, 215; *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146-147.) Khosh presented sufficient evidence that Staples retained control over the work, but there is no evidence that Staples affirmatively contributed to Khosh's injury.

Khosh presented competent evidence that Staples retained control over safety. In *Hooker*, a triable issue as to who retained control existed. The construction manual required Caltrans to comply with safety laws and regulations, know about highway construction procedures and equipment, and recognize and anticipate unsafe conditions. The manual required periodic visits by a construction safety coordinator, and authorized Caltrans to shut down work to correct dangerous conditions. Similarly, in *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, there was a triable issue as to who retained control because the general contractor employed a superintendant who was authorized to eliminate safety hazards, and who had the final say in any disagreements over safety.

Here too, the contract required Staples to "keep all phases of the work under its control," including compliance with safety laws and regulations. It also required Staples to take affirmative safety measures, such as implementing a safety program and installing safety devices on job equipment. It made Staples "exclusively responsible" for the health and safety of its subcontractors and required Staples to "exercise precaution at all times for the protection of persons and their property" and "comply with all applicable laws

relating to safety precautions.” This evidence **creates a triable issue of fact** as to retained control.

But, **“in order for a worker to recover on a retained control theory, the hirer must engage in some active participation.”** (*Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446) An affirmative contribution may take the form of directing the contractor about the manner or performance of the work, directing that the work be done by a particular mode, or actively participating in how the job is done.

A hirer’s failure to correct an unsafe condition, by itself, does not establish an affirmative contribution. (*Hooker*, at p. 215.) In *Hooker*, for example, there was no evidence of affirmative contribution where the contractor’s hirer, Caltrans, knew crane operators on the project were not extending the outriggers, but did not take any corrective action even though it had the right to do so. Caltrans’s **passive omission did not constitute an affirmative contribution.**

Khosh relies on similar omissions. He contends Staples promised to provide a written work plan for the shutdown, have a superintendant present to supervise Khosh’s work, and comply with applicable codes, statutes, and regulations. He contends Staples affirmatively contributed to his injury by breaching these promises. (*Hooker*, at p. 212, fn. 3.)

Hooker does not foreclose the potential for liability based on the hirer’s omission. (*Hooker*, at p. 212, fn. 3.) **When a hirer promises to undertake a particular safety measure, the negligent failure to fulfill that specific promise may constitute an affirmative contribution.** For example, the hirer in *Tverberg* could be liable when it did not cover holes at a construction site after it impliedly agreed to do so in response to the plaintiff’s employer’s request. But there was no specific promise here. This case is more like *Michael v. Denbeste*

Transportation, Inc. (2006) 137 Cal.App.4th 1082, in which a general promise to be “responsible for site safety” did not constitute a specific promise to undertake a particular safety measure. Likewise, in *Padilla*, there was no affirmative contribution when the hirer did not shut off utilities before work began although it promised to be generally “responsible for . . . all safety precautions,” and to “provide reasonable protection to prevent . . . injury . . . to . . . persons who may be affected” by the work. (*Padilla*, at pp. 666-667.) Because the hirer did not refuse a request to shut off service and did not prevent the independent contractor from installing protective devices there was no affirmative contribution.

This case is unlike *Regalado v. Callaghan* (2016) __ Cal.App.5th __ [2016 DJDAR 9788] (see Case Study of 9/28) in which evidence of an affirmative contribution supported a jury’s verdict against the hirer. There, the defendant hired a contractor to install a pool and spa at his home. The plaintiff, an employee of the pool contractor, was injured by an explosion in an underground vault which housed a propane heater for the pool. The defendant participated in the construction work, including installation of the underground vault. He worked with another contractor to modify the entry and exit points to the underground vault, and ran a propane line to the vault. He also obtained the permits for the plumbing to the vault, but did not obtain permits for the vault or the propane line, even though he represented to plaintiff’s employer that he did so. The plaintiff’s injury occurred when he ignited the propane heater in the inadequately ventilated vault, causing an explosion.

Unlike the facts in *Regalado*, Staples did not directly participate in construction activities. Staples did not assist in building the electrical substation or its component parts. Nor did Staples represent that all steps of the construction had passed inspection before Khosh began his work.

Like the contract in *Padilla*, **Staples's agreement with the University imposed only a general duty to prevent accidents.** It did not impose specific measures that Staples was required to undertake in response to an identified safety concern. There is no evidence that Staples refused a request to shut off electrical power or prevented Khosh from waiting until the scheduled shutdown before starting work. There is no evidence Myers or Khosh relied on a specific promise by Staples. There is no evidence of an act by Staples which affirmatively contributed to Khosh's injury.

Khosh contends two safety regulations imposed **nondelegable duties** on Staples. He contends Staples violated California Code of Regulations, title 8, section 2940, subdivision (c) (hereafter section 2940(c)), which states: "Only qualified electrical workers shall work on energized conductors or equipment connected to energized high-voltage systems. . . . Employees in training, who are qualified by experience and training, shall be permitted to work on energized conductors or equipment connected to high-voltage systems while under the supervision or instruction of a qualified electrical worker." He also contends that Staples violated National Fire Protection Association (NFPA) Standard 70E, section 120.2, subdivision (D)(2)(b), which provides that "all complex lockout/tagout procedures shall require a written plan of execution that identifies the person in charge."

The *Privette* rule applies "when the party that hired the contractor (the hirer) fails to comply with the workplace safety requirements concerning the precise subject matter of the contract." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594) **The hirer of an independent contractor presumptively delegates to that contractor the duty to provide a safe workplace for the contractor's employees. This includes any duty to comply with statutory or regulatory safety requirements.**

In *SeaBright*, an airline hired an independent contractor to service and maintain luggage conveyors. The plaintiff was injured when his arm was caught in its moving parts. An expert witness declared that Cal-OSHA regulations required safety guards which were not present but which would have prevented the injury. The delegation of tort law duty “is implied as an incident of an independent contractor’s hiring” and “the policy favoring ‘delegation of responsibility and assignment of liability’ is very ‘strong in this context’.” (*SeaBright*, at p. 602.) Because the alleged “duty” to an independent contractor’s employee “arose out of the contract” and “only existed because of the work . . . that the independent contractor was performing for the hirer,” it “did not fall within the nondelegable duties doctrine.”

Similarly, in *Padilla*, the duty to comply with a Cal-OSHA regulation requiring utilities to be shut off, capped, or otherwise controlled during demolition work was a delegable duty. The regulation only applied when specific work was being performed. (*Padilla*, at p. 671.)

The regulations at issue here are like those in *SeaBright* and *Padilla*. Section 2940(c) applies specifically to “work on energized conductors or equipment connected to high-voltage systems.” NFPA Standard 70E, section 120.2, applies specifically to lockout/tagout procedures. The regulations pertain to specific work, and apply only when that work is performed. (*Padilla*, at p. 673.)

This case is unlike *Evard*, in which a regulation that required the owner of a billboard to maintain horizontal safety lines on the billboard imposed an ongoing, nondelegable duty. (*Evard*, at p. 148.) “The regulation in *Evard* imposed a permanent obligation on the owner with respect to the condition of the property; no one but the owner was in a position to ensure that condition.” (*Padilla*, at p. 673.)

The safety regulations here do not impose nondelegable duties under the *Seabright* test. But even if they did, “the liability of a hirer for injury to employees of independent contractors caused by breach of a nondelegable duty imposed by statute or regulation remains subject to the *Hooker* test.” (*Padilla*, at p. 673.) Therefore, even where there is a breach of a nondelegable duty, **the plaintiff must show that the breach affirmatively contributed to his injury**. The absence of a work plan or a supervisor did not affirmatively contribute to Khosh’s injuries for the reasons set forth above.

In summary, there were no triable issues of material fact on the theory that either the retained control exception or the nondelegable duty exception applied. The judgment is affirmed. Respondent shall recover its costs on appeal.

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