**CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION**

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# *Alaniz v Sun Pacific Shippers, L.P.* 2/5/20

**Privette/Hooker Doctrine; Retained Control of Safety with Affirmative Contribution; Prior Knowledge of Concealed Condition**

Sun Pacific Shippers, L.P. (Sun Pacific) grows mandarins at its orchard outside Fillmore. It hires independent contractors to deliver empty bins to the orchard, pick the fruit, and deliver full bins to the packing house. Each contractor provides its own pickers, truck drivers, and forklift operators.

In February 2012, Alaniz, a truck driver employed by Navarro Trucking, delivered a truckload of empty bins to Sun Pacific's orchard. A forklift driven by Roberto Reynosa—who was employed by another independent contractor, J. Antonio Rosa Lule—unloaded bins from the north side of the trailer. Alaniz climbed onto the trailer and, as space became available on the north, pulled bins over so Reynosa could unload them. No one from Sun Pacific directed Alaniz to do this.

While pulling a stack of bins, Alaniz fell off the truck and onto the ground. Reynosa drove forward, crushing Alaniz's leg under the forklift. He offered to take Alaniz to the doctor. Alaniz declined Reynosa's offer and chose to finish working his shift instead. He went to a clinic four hours later, and subsequently underwent surgery on his leg and shoulder.

Alaniz and his wife sued Sun Pacific, Lule, and Reynosa for negligence, and Sun Pacific for premises liability. At trial, Alaniz testified that a Sun Pacific supervisor, Filipe Merino, told him to park at a specific location on the south side of the road; cars parked on the road made it too narrow for a forklift to access the trailer from the south. Alaniz also said that Reynosa told him to climb onto the trailer and pull the bins to its north side so Reynosa could unload them. Reynosa claimed that "everybody [did] this so it was okay to go up there and do it." Alaniz asked if they could instead move the cars parked on the north side of the road so he could park there, but Reynosa said that would take too long. Alaniz got onto the truck and pulled the bins to the north side of the trailer as directed by Reynosa.

Reynosa testified that Merino called him when Alaniz arrived at the orchard and told him to tell Alaniz where to park so he could unload the bins. Reynosa conveyed this instruction, and Alaniz complied by backing up a short distance. Reynosa said that cars did not block Alaniz from moving the truck so the forklift could reach the bins on the south. He denied telling Alaniz to get on the trailer to move the bins.

Merino denied telling Alaniz where to park, denied telling Reynosa to unload Alaniz's truck, and denied talking to either Alaniz or Reynosa before the accident. He testified that cars were not blocking Alaniz's truck.

Life-care planner Carol Hyland testified about future medical care costs, including an orthopedist, a physical therapist, gym membership, functional restoration program, and attendant care or chore services. She said that she included those services in her cost calculation on the recommendation of Dr.

Klapper. Dr. Klapper testified that he only had expertise in orthopedics, however, and was responsible for only certain aspects of Hyland's report.

The trial court instructed the jury on general principles of negligence, but refused Lule and Reynosa's request for a modified version of CACI No. 1009B, the instruction that explains negligent exercise of retained control pursuant to *Privette* and *Hooker* . *(Privette v. Superior Court* (1993) 5 Cal.4th 689; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198) Although Sun Pacific relied on the *Privette*/*Hooker* doctrine throughout trial, the record does not establish that it joined Lule and Reynosa's request.

The trial court also instructed the jury on general principles of premises liability. **It did not instruct on a landowner's limited responsibility to employees of an independent contractor pursuant to the *Privette*/*Hooker* doctrine.** Sun Pacific relied on the doctrine throughout trial, but did not request an instruction on it.

Lule and Reynosa requested a jury instruction on mitigation of damages based on Alaniz's delay in seeking medical treatment. The trial court refused the instruction, reasoning that it would be based on speculation because there was no evidence of how long an ambulance would have taken to reach the work site.

The jury awarded damages against Sun Pacific for injuries sustained by Jesus Alaniz, an employee of one of its independent contractors. The jury found for Alaniz and his wife, and assigned 40 percent responsibility to Sun Pacific, 35 percent to Lule and Reynosa, 15 percent to Navarro Trucking, and 10 percent to Alaniz. After reducing the award for workers' compensation benefits,

the trial court awarded Alaniz $2,563,190 for past and future economic and noneconomic losses. It awarded his wife $131,250 for loss of consortium.

Sun Pacific moved for a new trial and for JNOV on the basis that substantial evidence did not support either negligence or premises liability. The new trial motion also challenged the court's failure to give a mitigation of damages instruction and its admission of evidence regarding future medical expenses. The trial court denied both motions.

Defendant/Appellant Sun Pacific contends: (1) the trial court erred when it did not instruct the jury on the *Privette/Hooker* doctrine, (2) the court erred when it did not instruct on mitigation of damages, (3) the court improperly denied its motion for judgment notwithstanding the verdict (JNOV), and (4) substantial evidence does not support the award of future medical expenses. Sun Pacific contends the trial court prejudicially erred because it did not instruct the jury on the *Privette/Hooker* doctrine as it applies to either negligence or premises liability. The Alanizes assert Sun Pacific forfeited its contention because it did not request the instructions at trial. The Second District Court of Appeal disagrees with the Alanizes because without the instructions the court incorrectly explained the applicable law. (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9)

The *Privette/Hooker* doctrine limits the circumstances in which the hirer of an independent contractor can be liable for injuries to the contractor's employees. (*Privette v. Superior Court* (1993) 5 Cal.4th 689; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198) **In a negligence action, the hirer of an independent contractor may be liable to the contractor's employee only if "the hirer retained control over safety conditions at the worksite" and that "exercise of retained control *affirmatively contributed* to the employee's injuries."**

(*Hooker*, at p. 202) In a premises liability action, **the hirer may be liable for injuries to the employee only if: "(1) it knows or reasonably should know of a *concealed*, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the hirer fails to warn the contractor."** (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675)

The state Supreme Court's decision in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 is controlling. There, an employee of an independent contractor that built and dismantled scaffolding used by other trades was exposed to airborne asbestos produced by those trades. (*Kinsman*, at p. 665.) The trial court instructed the jury on the hirer's liability for failure to exercise ordinary care in the maintenance of the property to avoid exposing persons to an unreasonable risk of harm. But "**the usual rules about premises liability must be modified, after *Privette*, as they apply to a hirer's duty to the employees of independent contractors."** The trial court's instruction, "while an accurate statement of premises liability generally, was partly erroneous when applied" to the hirer's liability to Kinsman because it did "not make clear that **the hazard must have been unknown and not reasonably ascertainable to the independent contractor that employed Kinsman** and to other contractors working contemporaneously on the premises." Because a properly instructed jury could have concluded that the contractors knew about the hazard, the judgment was reversed.

Similarly here, the trial court instructed the jury that Sun Pacific was liable if its failure to use reasonable care was a substantial factor in harming Alaniz (see CACI Nos. 400, 401 & 4310), but **did not say that that principle only applied to the hirer of an independent contractor if its negligent exercise of retained control over safety conditions affirmatively contributed to the harm.** (*Hooker*, at p. 202.) The court also told the jury that Sun Pacific was liable if its

negligent use or maintenance of the property was a substantial factor in harming Alaniz (see CACI Nos. 1000, 1001, 1003 & 1011), but **did not say that these principles would only apply to Sun Pacific if the hazard were concealed.** (*Kinsman*, at p. 675.) Because each instruction was "an incorrect statement of law," Sun Pacific has not forfeited its contention. (*Suman*, at p. 9.)

And the trial court's error was prejudicial. Error in instructing a jury is reversible only if "there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 580) "Thus, when the jury receives an improper instruction in a civil case, prejudice will generally be found only '"where it seems probable that the jury's verdict may have been based on the erroneous instruction . . . ."' " (*Soule* at p. 574.) "'Reasonable probability'" means "merely a reasonable chance, more than an abstract possibility," a "'probability sufficient to undermine confidence in the outcome.'" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715)

To determine whether that probability exists here, the Justices evaluate the entire record, including (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. (*Soule*, at pp. 580-581.) The Court will assume the jury might have accepted Sun Pacific's evidence, and, if properly instructed, might have decided in its favor. (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1087.)

Here, a properly instructed jury might have decided in Sun Pacific's favor on the negligence cause of action based on the first three *Soule* factors. First, the jury could have found that Sun Pacific's general control over aspects of the harvesting operation, including designating the area to unload bins, did not

establish that it retained control over safety conditions for its contractors. (See, e.g., *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 788-790) It is also reasonably probable that the jury would have found that Sun Pacific merely permitted—rather than directed—the manner of unloading the bins. (*Hooker*, at pp. 214-215; see also *McDonald*, at p. 790)

Second, the jury instructions that were given support a finding of prejudice. CACI No. 1000 told jurors that "Sun Pacific owned or controlled the property," but **did not mention that it had to retain control over safety conditions for liability to attach.** (Cf. *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718) CACI No. 1001 told the jury that it could consider "the extent of Sun Pacific's control over the condition that created the risk of harm," but did not include the ***Privette/Hooker*** **requirement that Sun Pacific negligently exercise its retained control in a manner that *affirmatively contributed* to the harm.** (Cf. *Hooker*, at p. 202.) Moreover, these instructions were given as limitations on premises liability, not as limitations on negligence. They were thus an insufficient substitute for a *Privette/Hooker* instruction. (E.g., *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 594-595, 601)

Finally, counsel for Alaniz argued general principles of negligence, without mentioning the *Privette/Hooker* limitations. He also argued that Sun Pacific was negligent for failing to widen the area by removing trees. These arguments aggravated the prejudicial effect of the erroneous jury instructions. (*Vine*, at pp. 601-603; *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 660)

Because there is a reasonable probability the jury based its negligence verdict on the erroneous instructions, the case must be remanded for a new trial on negligence so that a jury may evaluate whether Sun Pacific is liable pursuant to the applicable legal standards.

Sun Pacific contends the trial court erred when it denied its motion for JNOV.

JNOV must be granted if the verdict is not supported by substantial evidence. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) Unlike an analysis of instructional error, when reviewing the grant or denial of a motion for JNOV the Justices view the evidence in the light most favorable to the party securing the verdict. (*Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1048.) Here, then, the Court will credit the testimony that Merino directed Alaniz to park at a location too narrow for the forklift to access the bins on the south side of the trailer.

As to the negligence cause of action, there was evidence that Sun Pacific exercised control over where vehicles parked to load and unload bins, and exercised that control in a way that affirmatively contributed to Alaniz's injuries. Based on this evidence, a properly instructed jury could have found Sun Pacific liable for negligence. (*Kinsman*, at p. 683.) Accordingly, the DCA must remand so a new jury may evaluate the evidence in light of proper jury instructions. (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1659-1661.)

As to the premises liability cause of action, there was evidence that the road where the bins were unloaded was too narrow and constituted an unsafe condition. But this condition was openly visible and known to Alaniz. As such, JNOV should have been granted on the premises liability cause of action. (*Kinsman*, at p. 675.) The Court will thus direct the trial court to enter judgment in favor of Sun Pacific on this cause of action. (Code Civ. Proc., § 629, subd. (c); *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 367.)

The judgment is reversed and the case is remanded for a new trial on the negligence cause of action. The trial court is directed to enter judgment in favor of Sun Pacific on the premises liability cause of action. Sun Pacific shall recover its costs on appeal.

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