

CAN AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR SUE THE HIRER OF THE CONTRACTOR?

The California Supreme Court has once again struggled with the question of whether an injured employee of an independent contractor can sue the hirer of the contractor. Usually, the hirer is the general contractor or landowner. Usually, a subcontractor hires an employee who gets hurt and then sues everyone up the chain except his immediate employer, who is immune under workers' compensation/exclusive remedy rules. Often, the "at fault" party is the immediate employer (immune under workers' compensation rules), and the hirers up the chain from there are, at most, passively negligent. Ever since the decisions of *Privette v. Superior Court* and *Toland v. Sunland Housing Group, Inc.*, the court has attempted to preserve an analysis which insulates the general contractor from vicarious or derivative liability in circumstances where the actively wrongdoing independent contractor is insulated by workers' compensation laws, unless the hirer is independently, actively negligent himself. The line between what constitutes "affirmative" negligence and "passive" action continues to blur in the recent decisions of *Camargo v. Tjaarda Dairy*; *Hooker v. Department of Transportation*; and *McKown v. Wal-Mart Stores, Inc.*

In *Privette* and *Toland* the court dealt with the doctrine of "peculiar risk" as described in sections 413 and 416 of the *Restatement*. Under section 413, a person who hires an independent contractor to do inherently dangerous work (i.e., who hires someone to deal with a "peculiar risk") but who fails to provide in the contract or in some other manner that special precautions be taken to protect against peculiar risks of that work, can be liable if the contractor's negligent performance of the work causes injury to others. Under section 416, even if the hirer has provided for special precautions in the contract or otherwise, the hirer can nevertheless be derivatively liable if the contractor fails to exercise

reasonable care to take such precautions and the contractor's performance of the work causes injury to others. In *Privette* and *Toland*, the court held that an employee of a contractor may not sue the hirer of the contractor under either of the alternative versions of the peculiar risk doctrine set forth above. The question left open was, what if the hirer of the independent contractor was personally negligent (in hiring or supervising, e.g.)?

In the *Camargo* case, the California Supreme Court held that an employee of a contractor may not sue the hirer of the contractor under the *negligent hiring theory* set forth in section 411. Under section 411, a hirer is liable for physical harm to third persons caused by the hirer's failure to exercise reasonable care to employ a competent contractor to perform work which will involve a risk of physical harm unless it is skillfully and carefully done, or to perform any duty which the hirer owes to third persons.

In the two most recent cases decided by the Supreme Court, *Hooker* and *McKown*, the court dealt with the question of whether an employee of a contractor may sue the hirer of the contractor for the tort of *negligent exercise*

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HOW DOES A CT (CAT) SCAN WORK?

A CT scan is a set of very thin planar x-ray images, taken through the body. Instead of just “shotgunning” a burst of radiation through the body as an x-ray does, CT machines aim a tightly focused beam which rotates around the patient, drawing a “slice” through the body and creating an image of a plane. The patient is then moved incrementally into the scanner and a series of slices are performed through the area of interest. If desired, images can be made in frontal or lateral views by a computer process called reformation. A CT examination can therefore include cross-sectional pictures, frontal, lateral, or any another desired image plane. Three-dimensional renderings of the CT data can also be created. This process is called Computer Aided Tomograph (or, sometimes, Computerized Axial Tomograph, which refers to the perpendicular, or axial, planes of the images), now just generally called Computer Tomography or CT.

The machine is generally calibrated so that bone will show up as white and will register as greater than 100 on the “Hounsefield Scale,” which indicates how much radiation is transmitted or absorbed at a particular location, i.e., how light or dark the picture will be at that spot. Classically, the machine is calculated so that water is the midpoint, called the “level,” set as 0 on the Hounsefield Scale, and air is set as -1000 and will show up as blank on a calibrated machine. The various shades of soft tissue relate to their particular propensity for absorbing x-radiation (“radiolucency”) or absorbing it (“radiopacity”). The machine can be set to emphasize different densities by setting the “window” and the “level.” The CT film will often note these settings under “w” and “l.”

Once you have chosen a midpoint, called the “level” (let’s say you choose the density of a spleen, about 58, as your level), you can tell the machine how far up (higher numbers = whiter areas, more dense) or down (lower numbers = darker areas, less dense) the window should be. So a level of 58 and window of 200 means the computer will now image things between densities of -42 and +158, the -42 objects coming out blank, the +158 objects coming out white, and gradations in between. Sometimes the report will mention that the machine was set for a “soft tissue window,” meaning that it has been calibrated to be most

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WESIERSKI & ZUREK LLP IN TRIAL

In *Belmudez v. Bustos*, Thomas G. Wianecki defended a woman who was sued by a neighbor who was shot trying to save her relatives from gang members who broke into her home.

Crying hysterically, a woman who lived down the street from Jesus Belmudez walked into his house one morning and pleaded for help to rescue her relatives from gang members forcing their way into her house. “I tried to calm her down but she was uncontrollable,” Belmudez said, according to his deposition transcript. He added, “She kept saying - like insisting like she wanted me to go and take a look.” Belmudez, 40-years-old at the time, went over to confront the intruders on his own. He brought along an unloaded shotgun. “I thought of doing that because I wanted to scare them or hold them until the police arrived,” he said.

His plan went horribly wrong when one of the criminals shot him in the upper right arm. No one else was hurt as the perpetrators escaped before law enforcement arrived at the scene.

Belmudez sued the lady who begged for assistance and her husband, who owned the house where the break-in took place.

Belmudez blamed both of the defendants for his injury because they allegedly knew that a relative staying with them would attract unsavory characters. The woman also stood accused of recognizing the home invaders from a prior incident and not properly warning Belmudez about their violent propensities. According to defense attorney Thomas G. Wianecki, if anyone was liable for what happened, it was the two hoodlums who fled the scene after shooting plaintiff Belmudez and were never brought to justice.

“Obviously, the perpetrators are overwhelmingly at fault,” Wianecki stated. And while the plaintiff’s counsel portrayed Belmudez as courageous, Wianecki considers him foolhardy. “He did not use common sense or good judgment,” emphasized Wianecki.

The jurors returned a defense verdict.

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of retained control set forth in section 414 of the Restatement. Section 414 provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

The *Hooker* case was a wrongful death action filed by the wife of Paul Hooker who was a crane operator. His employer was hired by CalTrans to construct an overpass. He was killed when his crane tipped over. Arguably, it tipped over in part due to some negligence of CalTrans.

Plaintiff, Hooker's widow, received workers' compensation benefits for his death from the contractor's insurer. Plaintiff also sued CalTrans on the theory CalTrans had negligently exercised control it had retained over safety conditions at the job site. CalTrans moved for summary judgment, which was granted on the ground, among others, that a suit against a hirer of an independent contractor by an employee of the contractor for negligent exercise of retained control was barred by the court's decisions in *Privette* and *Toland*.

The California Supreme Court held that summary judgment was appropriate in *Hooker*. The court held that plaintiff had raised triable issues of material fact as to whether defendant retained control over the safety conditions at the work site, but plaintiff failed to raise triable issues of material fact as to whether defendant actually actively exercised the retained control so as to affirmatively contribute to the death of her husband. While the evidence suggested that the crane tipped over because the crane operator swung the boom while the outriggers were retracted, and that the crane operator had a practice of retracting the outriggers to permit construction traffic to pass the crane on the overpass, there was no evidence that CalTrans' exercise of retained control over safety conditions at the work site affirmatively contributed to the adoption of that practice by the crane operator. There was, at most, evidence that CalTrans safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it. In essence, the court held that CalTrans could not be held liable for its *omission* or *passive* negligence, since there was no actual *active* act of wrongdoing.

In the *McKown* case, the court applied the same rule and in that case found that the hirer was actively negligent in exercising retained control. In *McKown*, the court held that a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury. McKown was the employee of an independent contractor hired by defendant Wal-Mart Stores, Inc. (Wal-Mart) to install sound systems in its stores, including its store in Chino where the accident occurred. Installation of the sound systems involved running wires and installing speakers in the store's ceilings. Wal-Mart requested that the contractor use Wal-Mart's forklifts wherever possible while performing the work. The request was understood not to be a directive. The forklift that Wal-Mart employees furnished McKown had equipment for overhead work, consisting of a work platform along with a 4-ft. extension to raise the platform. While his colleague was driving the forklift and McKown was working on the platform, the platform hit a ceiling pipe, disengaged from the extension, and fell about twelve feet to the floor with McKown on it. A jury found that Wal-Mart was negligent in providing unsafe equipment. The Court of Appeal affirmed the judgment, concluding that plaintiff's claim that Wal-Mart negligently supplied unsafe equipment was viable. The Supreme Court agreed, holding that Wal-Mart could be held liable for negligently furnishing unsafe equipment to the contractor, in that that action affirmatively contributed to the injury of an employee of the contractor. The court held that a hirer should be liable to the employee for the consequences of its own active negligence. In concluding, the court reasoned that an owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made.

- Jay T. Rubin

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sensitive to, and make the most shade-discriminations among, those densities that fall in the soft tissue range.

CT scan is the most important examination for the evaluation of bone detail and bony injury. It is also the primary procedure of choice for the evaluation of the lungs, the urinary tract, and most disorders within the abdomen.

- Paul J. Lipman and Stephen L.G. Rothman, M.D.PC

PRIMARY ASSUMPTION OF THE RISK APPLIES TO LITTLE LEAGUE BASEBALL: CAN'T SUE COACH FOR MAKING CHILD FIELD BALLS WITH SUN IN HIS EYES

Ten-year old Brandon West was playing Little League hardball for the first time. He previously had played T-ball and softball, but not organized hardball. Prior to the date of his injury, plaintiff had participated in numerous practices, two practice games and several official games. He normally played pitcher or first baseman.

On the day of his accident, Brandon and the rest of his team were warming up prior to an official game. His coach had Brandon and several other players stationed in the outfield, where the coach was giving the players fly ball practice. The coach threw a high ball simulating a pop fly. Brandon unfortunately lost sight of the ball in the sun, and was struck in the eye by the descending baseball. He sued his coaches, the local Little League team, and the international Little League Corporation. After initial discovery, all defendants moved for summary judgment on the basis of primary assumption of the risk. This motion was granted and plaintiff filed an appeal.

In *West v. Sundown Little League*, the Court of Appeals reiterated the now well known rule that participants in sporting activities are not owed a duty of care from the defendants unless the defendant increased the risks inherent to a particular sport. In this case, Brandon's attorneys argued that placing the players in an area of the field which faced the sun (as opposed to looking away from the sun) inherently increased the risk of being struck by a ball thrown to simulate a fly. In addition, Brandon's attorneys also argued that the league's proscription against the use of flip-up dark glasses also increased the risks that a player would lose a ball in the sun and become injured. The Court of Appeals rejected both arguments.

"Losing a fly ball in the sun and being hit by it is an inherent risk of baseball assumed by all players whether it happens during Little League warm ups or during game seven of the Major League World Series." The court noted that baseball is played under various lighting

conditions and changing lighting conditions are inherent in the sport. The declaration of the plaintiff's expert in support of the motion did not raise a triable issue of fact on the subject, since the motion of the sun and its effects on a baseball field and a baseball player are matters of common knowledge and thus not the proper subject of expert testimony. The court also rejected the expert's declaration to the effect that first-year Little League players should not be practicing catching pop flies in the sun by stating that such catches are routinely made in game situations, and thus are not inherently more dangerous when performed during practice sessions. The court also was not persuaded by any suggestion that if the coach had oriented the players differently, they may not have been facing the sun. Since baseball is not a static game, a coach is not increasing any risk by having his players play in all circumstances that might be encountered during an actual game.

"The simple fact remains, three inherent components of the sport of baseball are the ball, the player and the sun. These three components mix frequently." The court made it clear that in order for the duty to arise on the part of the defendants, the defendants must increase the inherent risks by creating an extraordinarily dangerous condition. The court found no such conditions under the circumstances and affirmed the judgment.

- Thomas E. Martin

Editor

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