

**A GENERAL CONTRACTOR WHO DOES NOT  
AFFIRMATIVELY CONTRIBUTE TO A WORKER'S INJURIES  
IS NOT LIABLE EVEN IF THE CONTRACTOR RETAINS  
CONTROL OVER SAFETY CONDITIONS AT A WORKSITE**

In *Richard Millard v. Biosources, Inc.*, plaintiff was injured while working in the attic of a commercial building that was being remodeled under the supervision of the general contractor, Biosources, Inc. Mr. Millard was a heating and air conditioning (HVAC) technician who was an employee of Apex Mechanical Systems, Inc. Apex was hired as a subcontractor to perform work on the HVAC system as part of a project on a property located in San Diego, California. Workers' compensation insurance covered all injuries that Mr. Millard sustained in this incident.

Around noon on the day of the incident, a Biosources employee inadvertently tripped on a circuit breaker which caused the lights to turn off in the attic where Millard and another Apex employee were working. On this occasion, Millard and the other employee used a flashlight to safely navigate their way out of the attic. At approximately 3:00 p.m. on that same day, Millard was working alone in the attic and alleged that the lights in the attic space turned off as he was crossing a 12-inch wide catwalk. Millard claims that when the lights went off, he lost his balance and stepped on a light fixture. The light fixture gave way, causing him to fall through the ceiling to the room below.

As general contractor and electrical contractor, Biosources exercised general supervisory control over the project, but did not direct the means or methods of Millard's work. There were no Biosources employees working or present at the time that Millard fell from the attic space. Nobody was found to have been working near the electrical panel or to have touched either of the switches that controlled the lights in the attic. Immediately after Mr. Millard fell, the lights

in the attic space were found to be on. There was also some disagreement as to whether Mr. Millard had told those first arriving on scene that the lights went out completely or that they had merely flickered.

At common law, a person who hired an independent contractor was not liable to third parties for injuries caused by the contractor's negligent performance of the work. One exception to this rule was known as the peculiar risk doctrine. Under the peculiar risk doctrine, the person who hired the independent contractor could be held liable if the agreement was to perform inherently dangerous work. The peculiar risk doctrine allowed the subcontractor to recover from a non-negligent hiror for injuries caused by the subcontractor's negligence.

In 1993, the California Supreme Court held in *Privette v. Superior Court* that a subcontractor could no longer sue a non-negligent hiror for injuries resulting from its own negligence. The rationale was that allowing

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injured employees to recover from a non-negligent hiror created a windfall in comparison to other injured employees who could only collect under workers' compensation law. The Court concluded that the workers' compensation system was adequate to protect the interests of injured employees and no societal interest was advanced by enforcing the peculiar risk doctrine.

In 2002, the California Supreme Court decided *Hooker v. Department of Transportation*. In *Hooker*, the Court held that the hiror of an independent contractor was not liable merely because the hiror retained control over safety conditions at a worksite. Rather, the hiror was only liable to such employee to the extent that its exercise of retained control affirmatively contributed to the employees' injuries. Affirmative contribution occurs where a general contractor "is actively involved in, or asserts control over, the manner of performance of the contracted work."

The trial court granted Biosources' motion for summary judgment and relied on the rule that general contractors are not liable for injuries to employees of subcontractors except when their actions affirmatively cause or contribute to the injury-causing event. The Court of Appeals affirmed the lower court's decision and held that Millard did not submit evidence sufficient to raise a triable issue of fact that Biosources affirmatively contributed to Millard's injuries.

*Millard* is a favorable decision for general contractors. The Court upheld *Privette* and *Hooker* and refused to impose liability on a general contractor who did not exercise retained control to affirmatively cause or contribute to the subcontractor's employees' injuries. The Court found that it would be unfair to impose greater liability on the general contractor than on the contractor whose negligence actually caused the injuries. Consequently, a general contractor is not necessarily liable for injuries sustained by employees of a subcontractor. Even if the general contractor acts as the safety supervisor for the project, it must have affirmatively contributed to the worker's injuries to be held liable.

- Carl Kremer

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## ENTERTAINMENT NEWS

### 30 Seconds to Mars Gets Sued by Record Label

Jared Leto's rock band, 30 Seconds to Mars, is being sued by their record label Virgin Records. In a suit filed August 15, 2008, Virgin alleges that the band has not performed under their record contract by failing to record the specified number of albums. According to the complaint, 30 Seconds to Mars repudiated the contract on July 4, 2008 citing *California Labor Code* 2855 which states that a contract to render personal service may not be enforced against an employee beyond 7 years from the commencement of service under it. The Complaint addresses this repudiation by citing another provision of the same labor code section which states that if a recording artist is contractually bound to produce a specified number of phonorecords (i.e. albums), and fails to do so prior to the repudiation date, the record company has the right to recover damages equivalent to the expected number of record sales.

Jared Leto is also an actor who has starred in "Panic Room," "Requiem for a Dream," and "Fight Club."

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## THIRD PARTY MAY RESPOND TO SUBPOENA BY PRODUCING RECORDS WITHOUT FEAR OF BEING SUED PERSONALLY FOR DIVULGING PRIVATE INFORMATION

Recently the California Court of Appeal, Second Appellate District, in *Foothill Federal Credit Union v. The Superior Court of Los Angeles County*, 2007 DJDAR 14901 held that a custodian of records could not be held liable for invasion of privacy and intentional infliction of emotional distress (“IIED”) when releasing records pursuant to a subpoena duces tecum.

A subpoena was served by Janet King, party in this probate action, on Foothill Federal Credit Union (“FFCU”) to produce copies of all account information for all accounts in the name of the individual whose estate was the subject of the action, Norman Kaplan or in the name of Janet King, including accounts held jointly by Kaplan & King. This subpoena was later narrowed by agreement between counsel to records “in the name of Kaplan or in the name of Kaplan jointly (and/or) with King, and no other documents.” FFCU responded to the subpoena. The Kings claimed personal financial records of all the parties in interest were produced, despite the narrowing language of the subpoena. The Kings filed a complaint for breach of contract, invasion of privacy and IIED. FFCU demurred to all three and the trial court sustained the demurrer to the breach of contract cause of action, but overruled the demurrers as to the privacy and IIED causes of action. FFCU filed a writ of petition to challenge the trial court’s denial of its demurrers.

The Court of Appeals, in reaching its decision, relied on a two-pronged analysis. The Court explored the legislative history of *Code of Civil Procedure* section 1985.3 and evaluated whether the elements of the Litigation Privilege – *Civil Code* section 47(b) were met.

*Code of Civil Procedure* section 1985.3 provides a mechanism for a custodian of records to respond to subpoenas requesting the release of documents by a particular party. It also provides for an individual whose records are sought a method by which to learn of this subpoena and have the appropriate time as well as opportunity to litigate the propriety of the subpoena prior to the release of the private records. The statute is a guarantor of consumers’ privacy rather than a statute that provides a method for a consumer to protect his or her own

privacy when a subpoena seeking private records is issued. Nowhere in the legislative history is there intent to create a private right of action in this section or to establish any remedy against a custodian of records for a violation of that section. Very little of the statute is actually directed toward the party receiving the subpoena.

In FFCU, Section 1985.3 served its purpose. The subpoena was issued, the parties learned of it, objected to it and caused it to be limited in scope. The ultimate delivery of the records may have exceeded this scope. This did not frustrate the purpose of the statute because Section 1985.3 neither contemplates nor provides recourse for a consumer against those custodians.

The litigation privilege, codified in *Civil Code* section 47, defines a privileged publication to be, among others, one made in any legislative or judicial proceeding. Four elements are required to apply this absolute privilege, of which all are met in this case. First, the disclosure of the records was made in the course of a judicial proceeding – pending litigation. Second, the FFCU was a participant authorized by law, as it was brought into the proceedings by the issuance of the subpoena ordering it to produce the specified documents. Next, the communication was made to achieve the objections of litigation – prove defendant’s case against plaintiffs. Last, the records bore some relation to the action, albeit a broad demand for documents. As counsel declared under penalty of perjury, the funds in question were held or transferred through the accounts at FFCU and that the records were sought in order to prove the allegation of “elder financial abuse.”

The Appellate Court found that while the parties were admittedly left without a remedy against FFCU in responding to the subpoena after the Section 1985.3 notice and modification process had taken place, they were not without the ability to seek the return of the erroneously produced records from the court or such other relief as would be appropriate. This case shows that the process delineated in Section 1985.3 may be insufficient to protect consumer rights in some circumstances, but Section 1985.3 is not stripped of its purpose, force or effect and courts are

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## UNINTENTIONAL MISREPRESENTATION IN INSURANCE APPLICATION CAN ALLOW INSURER TO VOID A MARINE INSURANCE CONTRACT

Recently a court ruled that even unintentional misrepresentation in an application for marine insurance could void an insurance contract. In *New Hampshire Insurance Co. v. C'est Moi, Inc.*, 2008 DJDAR 3825, Lawrence O'Rourke purchased C'Est Moi, Inc. along with a yacht. The yacht, insured through Washington International Insurance Co., was destroyed by fire in 1992 and O'Rourke received \$450,000 from Washington International. C'Est Moi, Inc. then required the yacht from Washington International at salvage value and began restoring it. In 2004, however, the yacht sank while docked at Newport Beach, California. C'Est Moi, Inc. filed another insurance claim, this time through New Hampshire Insurance Company ("NHIC"). NHIC sued O'Rourke to rescind the insurance policy, claiming uberrimae fidei applied and that C'Est Moi, Inc. misrepresented material facts on its insurance application.

Uberrimae fidei is a "longstanding federal maritime doctrine" that "applies to marine insurance contracts." It imposes a duty of utmost good faith, requiring the applicant for a marine insurance policy to "reveal every fact within his knowledge that is material to the risk." Applying that principle, the Court reviewed the information included in the application by C'Est Moi, Inc. When it applied for insurance with NHIC, C'Est Moi, Inc had identified the purchase price of the yacht as \$450,000 when in fact he only paid \$300,000. O'Rourke argued that he wrote \$450,000 as the purchase price because it included the value of the amount spent for restoration of the yacht. However, the Court determined that when a marine insurance application asks a specific question, such as the purchase price, the applicant was required to write in the actual purchase price and could not substitute that for the present value of the yacht. The Court explained that the purchase price was material to the risk since it provided "an objective measure of the vessel's worth and the corresponding risk of insuring the vessel." In contrast, the Court explained, the value of the vessel is subjective and debatable, requiring an evaluation of the value. The Court determined that C'Est Moi, Inc. made a material misrepresentation to NHIC in violation of its duty of uberrimae fidei.

C'Est Moi, Inc. also stated in the application that it was insured by "Wash Int" as the marine insurer but the yacht

had not been insured at the time C'Est Moi, Inc. filled out the application. C'Est Moi, Inc. argued that it made a mistake, claiming that it confused the section asking for present insurer with the section asking for former insurer. The Court acknowledged that C'Est Moi, Inc.'s explanation suggested that the misrepresentation was unintentional, but reasoned that under uberrimae fidei, the misrepresentation need only be material.

This means that, at least in the marine insurance context, material misrepresentations, even if they are not intentional, can be deemed sufficient to void an insurance contract.

- Mary H. Kim

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not willing to breathe rights into it which were not originally created. The courts uphold and protect custodians of records in order to continue eliciting their cooperation in the litigation process. Additionally, since FFCU met all elements of the litigation privilege, it barred the parties' causes of action for invasion of privacy and IIED. Applying these safeguards to custodians of record ensure they continue assisting litigants in preparing their cases without fear of becoming entangled in the litigation themselves.

- Arpineh Babakhanian

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### **Pastor's Wife Wins Lawsuit**

Super-pastor Joel Osteen's wife, Victoria Osteen, received a unanimous verdict on August 14, 2008 in connection with allegations that she roughed up a flight attendant in a 2005 flight from Houston to Vail, Colorado. According to the lawsuit, Sharon Brown, the attendant, was physically assaulted by Osteen after a spill on the armrest was not cleaned up quickly enough. The case went to trial and the jury did not believe the plaintiff's claim that she suffered physical and mental harm, including hemorrhoids. The jury awarded plaintiff nothing.

- Steven Ibarra

**Editor**

**Paul J. Lipman**