

Court of Appeal Holds That A General Contractor Can Be Held *Directly* Liable For An Independent Contractor's Injuries By Affirmatively Contributing To The Injury

Tverberg v. Fillner Construction, Inc.
2011 S.O.S. 1606 (Cal. App. 1 Dist. 2010)
March 25, 2011

HOLDING

In an action brought by an independent contractor against the general contractor for personal injuries sustained on a jobsite, the California Court of Appeal found a triable issue of fact as to whether the general contractor may be *directly* liable to the independent contractor on the theory that the general contractor retained control over safety conditions at the jobsite and that control affirmatively contributed to the independent contractor's injuries. Most importantly, the Court of Appeal also addressed whether a jury could conclude that the general contractor affirmatively contributed to the independent contractor's injuries by breaching a nondelegable duty, thus being directly liable for the independent contractor's injuries.

WHY THIS CASE IS IMPORTANT

This case is important for all general contractors who hire subcontractors who, in turn, hire independent contractors. The Appellate Court reaffirmed that general contractors can be directly liable for an independent contractor's injuries where the general contractor negligently exercises control of jobsite safety that affirmatively contributes to those injuries. While the California Supreme Court clarified 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 maintained control, the Court of Appeal held that a general contractor may be *directly* liable for an independent contractor's injuries on a theory that the general contractor retained control over safety conditions at the jobsite. However, the most important aspect of this ruling is that the appellate court also held that a general contractor may be directly liable to an independent contractor on a theory that violations of the California Labor Code and corresponding regulations may create a nondelegable regulatory duty to maintain a safe work area.

FACTS

Fillner Construction, Inc. ("Fillner"), the general contractor on a project to expand a fuel facility, hired subcontractors to construct a metal canopy. The subcontractor hired to construct the metal canopy, in turn, hired Tverberg as foreperson, an independent contractor with more than 20 years' experience in structural steel construction.

Fillner also hired a subcontractor to erect eight concrete "bollards" – concrete posts intended to prevent vehicles from colliding with the fuel dispensers. When Tverberg arrived on his first day of work, the bollard subcontractor had already dug eight holes measuring four feet wide and four feet deep. These bollard holes, marked with stakes and safety ribbon, were located in the area where Tverberg would be erecting the metal canopy. Upon discovering the holes, Tverberg requested Fillner cover the holes with large metal plates located at the site. Fillner declined, stating that they did not have the necessary equipment to do so. The Court of Appeal noted that Tverberg removed three or four stakes that marked the edges of some of the bollard holes.

The following day, with the bollard holes still uncovered, Tverberg commenced work on the canopy. Again, Tverberg requested Fillner cover the holes, only to be denied. A short while later, Tverberg fell into a bollard hole and was injured.

PROCEDURAL HISTORY

Tverberg filed a personal injury action against Fillner, alleging negligence and premises liability. Fillner moved for summary judgment, asserting that it could not be held vicariously liable for Tverberg's injuries based on *Privette v. Superior Court*, 5 Cal.4th 689 (1993). Fillner also argued that it could not be held *directly* liable for negligence in failing to provide a safe workplace. The Tverbergs argued that Fillner retained control over safety conditions at the jobsite and should be held *directly* liable for its failure to make safe the open bollard holes. The trial court granted Fillner's motion for summary judgment finding

that an independent contractor could not hold the general contractor *vicariously* liable on a peculiar risk theory. The trial court also found that Fillner could not be held *directly* liable for failing to cover the holes because Tverberg was aware of the danger and did not refuse to work. The Court of Appeal reversed the trial court's ruling. However, the California Supreme Court reversed the Court of Appeal holding that an independent contractor hired by a subcontractor may not hold the general contractor vicariously liable on a peculiar risk theory. The Supreme Court did remand the case to determine whether the general contractor could be held *directly* liable on a theory that it maintained control over safety conditions at the jobsite.

DISCUSSION

Faced with the California Supreme Court's ruling that Fillner could not be held vicariously liable for Tverberg's injuries, the California Court of Appeal was directed to determine whether Fillner, the general contractor, could be held directly liable on a theory that it maintained control over safety conditions at the jobsite.

On appeal, the Tverbergs claimed that Fillner was directly liable for their injuries for two reasons: 1) Fillner maintained control over jobsite safety in such a way that affirmatively contributed to Tverberg's injuries and 2) the California Labor Code and corresponding regulations created a nondelegable duty forming the basis of Fillner's direct liability.

To determine whether Fillner "affirmatively contributed" to Tverberg's injuries, the court restated the rule: if a hirer entrusts work to an independent contractor, but retains control over the safety conditions at the site 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. That being said, the court clarified that a hirer is not liable to a contractor's employee simply because it retains control over safety conditions; the hirer must also exercise that control in a manner that affirmatively contributed to the injury. Some examples include a general contractor directing a subcontractor or an employee about the manner of performance of the contract work, a general contractor directing the work to be accomplished by a particular mode or otherwise interfering with the means and methods of accomplishing the work, or where the general contractor does not fully delegate the task of providing a safe work environment but still actively participates in the job.

The Tverbergs argued that Fillner's negligence "affirmatively contributed" to the injuries in three ways. First, the Court of Appeal agreed that by ordering the bollard holes dug and requiring Tverberg to conduct unrelated work near the holes, Fillner could have made an affirmative contribution to Tverberg's injuries. Also,

the Court agreed that when Fillner placed stakes and safety ribbon around the bollard holes, thereby creating sufficient worker protection, Fillner affirmatively assumed responsibility for the safety of workers and discharged that responsibility in a negligent manner resulting in injury. Finally, the court found that because Fillner failed to cover the bollard holes after Tverberg asked twice, Fillner agreed to undertake a safety measure and did not (although the court did recognize that this was a closer case of affirmative contribution.) The foregoing reasons were sufficient to establish triable issues on affirmative contribution.

Finally, and most importantly, the Court of Appeal addressed Tverberg's argument that Fillner is also directly liable for the independent contractor's injuries because it breached a nondelegable regulatory duty. Tverberg claims that Fillner was responsible for ensuring compliance with the Cal-OSHA requirement that all pits be barricaded or securely covered. Although the Cal-OSHA requirement did not expressly state "who" is responsible for compliance, the court looked to the California Labor Code, which states that an employer who creates a hazard and an employer who is responsible for the safety of the construction site may be cited for workplace violations. Based on the fact that Fillner could be cited, the Court of Appeal concluded that a nondelegable duty may form the basis of direct liability. We expect that this holding will be appealed to the California Supreme Court. However, if it is not appealed or if the appeal is denied, this ruling will have far-reaching implications in construction injury cases in California. Based on the holding of the First District Court of Appeal, a general contractor who is responsible for CAL-OSHA regulations at a work site has a nondelegable duty to personnel on the worksite and therefore is directly liable for worksite injuries. This ruling expands the potential liability of general contractors for construction site injuries on construction work sites. Since most general contractors are responsible for CAL-OSHA compliance at construction sites, we can expect that plaintiffs injured at construction sites will use the holding of this case to find direct liability against general contractors. In addition, this case places a general contractor at greater risk of direct liability to independent contractors hired by subcontractors if the general contractor is involved with the independent contractor's work. After this case, a general contractor is potentially exposed to greater liability and, as such, should take greater care when dealing with subcontractors and independent contractors.