



New Case Update

Tverberg v. Fillner Construction, Inc. Supreme Court of California; June 28, 2010

HOLDING

Under the peculiar risk doctrine, a general contractor cannot be held vicariously liable for job site injuries suffered by an independent contractor, even if the independent contractor is not an employee and so is not entitled to receive workers compensation benefits for the injuries.

WHY THIS CASE IS IMPORTANT

This decision resolves a conflict among the courts of appeal in their interpretation of the California Supreme Court's decision in *Privette v. Superior Court* (1993) 5 Cal.4th 689. In *Privette*, the California Supreme Court held that one who hires an independent contractor is not vicariously liable to the independent contractor's employee who sustains jobsite injuries resulting from a special or peculiar risk inherent in the work. Rather, injuries to an independent contractor's employees are exclusively compensable under workers' compensation insurance coverage, the cost of which is presumably included in the contract price.

The decision in this case reaffirms the holding in *Privette* and clarifies that a general contractor is not vicariously liable for injuries sustained by an independent subcontractor that it hires because the general contractor delegates control over the performance of that work to the independent subcontractor and by that delegation, the independent subcontractor assumes the responsibility for safety precautions reasonably necessary to prevent construction site injuries. Most importantly, the court held that the general contractor's lack of workers' compensation coverage for the injuries suffered by an independent contractor is irrelevant to the determination of the general contractor's liability for such injuries.

FACTS

This case arose out of injuries suffered by Jeffrey Tverberg while he was working on a project at a commercial-fuel facility in Solano County. Fillner Construction, the general contractor, hired subcontractor Lane Supply to construct a metal canopy. In turn, Lane Supply subcontracted the canopy work to Perry Construction Company. Perry hired Tverberg as a foreman on the canopy-construction crew. Importantly, Tverberg was hired as an independent contractor and not an employee of Perry, Lane Supply or Fillner Construction. On the site near where Tverberg was to install the canopies were eight holes, each four feet wide and four feet deep and marked with stakes and safety ribbon. Tverberg asked the general contractor, Fillner Construction to cover the holes, but the necessary equipment was not available. The following day, Tverberg commenced work at the site, fell into one of the holes, and was injured.

Tverberg sued the general contractor, Fillner Construction, for negligence and premises liability and sought damages for physical and mental injuries and lost income. Fillner Construction moved for summary judgment, arguing that under *Privette*, it could not be held vicariously liable for the injuries of Tverberg who was an independent contractor on the construction site, and could not be held directly liable for negligence in failing to provide a safe workplace. In opposing the motion before the trial court, Tverberg argued that Fillner was directly liable for failing to eradicate a known danger because it had retained control over safety conditions. The trial court granted summary judgment to Fillner. In support of its ruling, the trial court relied on the holding in *Michael v.*

Denbeste Transp., Inc. (2006) 137 Cal.App.4th 1082, which held that Privette and its progeny applied to bar a hirer's liability for injuries to the plaintiff regardless of whether the injured plaintiff was the hirer's employee or independent contractor of.

On appeal, Tverberg argued for the first time that *Privette* did not bar the court from holding the general contractor vicariously liable on a theory of peculiar risk because Tverberg was not an employee and so workers compensation coverage was not available to him. The court of appeals agreed with Tverberg and reversed the trial court's granting of summary judgment. The appellate court expressly disagreed with the decision in *Michael v. Denbeste*, reasoning that Privette was not controlling when an independent contractor as opposed to an employee was the injured party because the general contractor is not subject to mandatory workers' compensation coverage for the independent contractor. The California Supreme Court granted Fillner's petition for review.

DISCUSSION

Under the common law, a person hiring an independent contractor to perform inherently dangerous work is generally not liable to third parties for injuries resulting from the work. The "peculiar risk doctrine" was developed by the courts as an exception to the general rule in order to prevent landowners from escaping liability for inherently dangerous activities on their land simply by hiring an independent contractor. It was initially designed to provide financial protection to innocent third parties injured by an independent contractor's negligence. However, courts have gradually expanded the doctrine to include employees of an independent contractor hired by a property owner to perform inherently dangerous work.

In *Privette*, the California Supreme Court rejected the application of the peculiar risk doctrine to employees of independent contractors. It reasoned that workers' compensation is the exclusive remedy for an employee's workplace injuries. Therefore, because the injured worker could not recover against the independent contractor, the employee should also be barred from recovering directly against the party who hired the contractor.

In this case, the Supreme Court agreed with the court of appeal's holding in *Michael v. Denbeste Transp., Inc.* that a general contractor could not

be held vicariously liable for injuries sustained by an injured independent contractor on a theory of peculiar risk. The Supreme Court reasoned that when a contractor or owner hires an independent contractor to perform work, the hiring owner or general contractor delegates control over the performance of that work to the independent contractor. Thus, the independent contractor is not an innocent third party deserving of the protection of vicarious liability for risks inherent in a project over which the independent contractor has been delegated control.

The importance of the holding in this case is that the California Supreme Court ruled that where a contractor hires an independent contractor, who is not an employee of the hiring contractor, to perform work at a job site and the hiring contractor delegates control over the performance of the independent contractor's work to the independent contractor, the hiring contractor will not be held vicariously liable for injuries sustained by the independent contractor even though the independent contractor is not an employee of any contractor on the job site and has no workers compensation coverage for the injuries. The court stated that the issue of workers compensation coverage raised by the appellate court was irrelevant to the analysis of vicarious liability when control of the performance of the work is delegated to the injured independent contractor. However, because the lower appellate court had found that the general contractor could be held vicariously liable, the lower court did not address other issues in its decision, including most importantly whether, by its actions, the general contractor could be held directly liable on the theory that the general contractor retained control over the safety conditions at the project. It therefore reversed and remanded the case to the court of appeal to consider those remaining issues.



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