

A Win For General Contractors: Court Of Appeal Holds That  
Alleged Violations Of Applicable California OSHA Regulations Are  
Not Pertinent To Construction Site Personal Injury Claims Where The General  
Contractor Did Not Affirmatively Contribute In Causing The Accident To Occur

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In a case which will sustain the importance of the so called "Privette Doctrine", the California Court of Appeal, 4th Appellate District, ruled that a general contractor defendant to a personal injury construction site accident case was entitled to summary judgment, irrespective of alleged violations of California OSHA regulations, where the general contractor did not affirmatively contribute to the work site accident in the first place.

In the case of Millard v. Biosources, Inc. (2007) DJDAR 17064 (herein, the "Millard" case), the Court of Appeal affirmed a trial court's grant of summary judgment in favor of a general contractor in a personal injury construction site accident case. The trial court determined that the general contractor had no liability to the injured employee of a subcontractor under either a "retained control theory" or under Labor Code section 6304.5 because the general contractor did not affirmatively contribute to the cause of the accident. The facts of the Millard case are familiar enough. In that case, Richard Millard, an employee of Apex Mechanical Systems, Inc. ("Apex"), was assisting in the installation of upgrades to the HVAC system for a tenant remodel of a commercial property in San Diego. Biosources, Inc. ("Biosources") was the general contractor. Apex directed Millard and other Apex employees as to the means and methods of the work assignments on the job site. Biosources exercised general supervisory control over the project, but did not direct the means or methods of Millard's work or other employees of Apex.

On the date of the accident, Millard was "trouble shooting" the HVAC system in an attic space. During the middle of the day, a Biosources employee inadvertently turned out the light which was being used in the attic space when he tripped an unmarked circuit breaker. Millard and another Apex employee exited the attic space using a flashlight and reported the problem to the Biosources employee that had inadvertently turned out the lights.

Later in the day, Millard was working alone in the attic space and claims that the lights in the attic went out while he was in the process of traversing a catwalk, causing him to lose his equilibrium. He allegedly then stepped onto a light fixture, which gave way, and fell through the ceiling to the room below. Workers compensation benefits were available to Millard.

At the time of the accident, Biosources did not have any employees on site. No one was working around the electrical panel which serviced the attic and no one was known to have touched either of the two switch plates which control the lights in the attic space. Also, at the time of the accident, the only other workers on site were employees of Apex.

Millard then brought suit for personal injuries against Biosources. Biosources then brought a motion for summary judgment arguing that Millard's action was barred by the "Privette Doctrine" and that the "retained control" exception to the Privette Doctrine did not apply because Biosources did not affirmatively contribute to Millard's injuries. Millard opposed the motion asserting that Biosources violated applicable OSHA regulations and the Privette Doctrine therefore did not apply because Biosources' duty was created by Labor Code section 6304.5 (as amended in 1999). Millard also argued that Biosources affirmatively contributed to the accident and was liable under the retained control exception to the Privette Doctrine

The trial court granted summary judgment. The Court of Appeal affirmed.

In its holding, the Court of Appeal first discussed the California Supreme Court decision in Privette v. Superior Court (1993) 5 Cal.4th 689 wherein the State Supreme Court concluded that an injured employee of a negligent subcontractor could not sue a non-negligent hirer under the peculiar risk doctrine (this is sometimes known as the "Privette Doctrine"). The Court of Appeal also noted the California Supreme Court's later decisions in Toland v. Sunland Housing Group, Inc. (1994) 18 Cal.4th 253 wherein it was held that a person who hires an independent contractor to do inherently dangerous work, but fails to contract or otherwise require the subcontractor take special precautions to avoid peculiar risks, cannot be held liable under the peculiar risk doctrine and in Hooker vs. Department of Transportation (2002) 27 Cal.4th 198 wherein it was held that the hirer of an independent contractor could be liable for injuries to the subcontractor's employee under the theory that the hirer retained control of the work but negligently exercised that control and that its exercise of retained control "affirmatively" contributed to the employee's injuries.

The Court of Appeal also acknowledged that California Labor Code section 6304.5 had been amended in 1999 to provide that occupational safety and health standards were subject to statutory judicial notice under Evidence Code Section 452 and claims of negligence per se under Evidence Code section 669. The Court of Appeal further noted that the California Supreme Court ruled in the case of Elsner v. Uveges (2004) 34 Cal.4th 915 that Cal OSHA regulations are to be treated like any other statute or regulation and may be admitted into evidence to establish a presumption of negligence for a breach of a standard of care in all negligence and wrongful death actions, including third party actions against general contractors by injured employees of a subcontractor. Importantly, the Court of Appeal concluded that the “presumption of negligence created by Evidence Code section 669 concerns the *standard of care*, rather than the *duty of care*.” As such, in order for the presumption to be available, “either the courts or the Legislature must have created a duty of care.” Thus, an “underlying claim of ordinary negligence must be viable before the presumption of negligence of Evidence Code section 669 can be employed.” The Court of Appeal reasoned that it “is the tort of negligence, and not the violation of the statute itself which entitles a plaintiff to recover civil damages.”

With this backdrop, the Court of Appeal first ruled that Millard did not submit evidence sufficient to raise a trial issue of fact that Biosources affirmatively contributed to Millard’s injuries and held that any claims against the general contractor would be barred under the Privette Doctrine. The Court of Appeal noted, in that regard, that Biosources did not control the means and methods of Millard’s work and no Biosources personnel were at the work site at the time Millard fell through the ceiling. Thus, Millard failed to submit evidence to establish that Biosources owed a duty to Millard at the time of the accident.

As for Millard’s claim that the Privette Doctrine did not apply given alleged violations of Cal OSHA regulations under Labor Code section 6304.5 (as revised in 1999), the Court of Appeal ruled that in order for the Cal OSHA regulations to be admissible to support a presumption of negligence under the doctrine of negligence per se, Biosources must have owed a duty of care to Millard. Based on the Court of Appeal’s ruling that under the Privette Doctrine, Biosources did not owe duty to Millard, the alleged violation of Cal OSHA regulations had no application because the general contractor did not control the manner and means of Millard’s work and did not affirmatively contribute to the cause of the accident in the first place. In its decision, the Court of Appeal reasoned that that the California Supreme Court’s holding in Elsner v. Uveges did not limit or impliedly overrule the Privette Doctrine. In that regard, the Court of Appeal noted that while the plaintiff in Elsner v. Uveges was entitled to admit evidence of Cal OSHA regulations into evidence, the plaintiff in Elsner v. Uveges had pursued a theory that the defendant general contractor/developer’s

direct negligence in providing non-compliant scaffolding upon which the plaintiff had injured himself had resulted in the accident. Based on that reasoning, the Court of Appeal concluded that the Privette Doctrine was not implicated by the Elsner v. Uveges decision. Thus, the Court of Appeal held that an injured worker could not use Labor Code Section 6304.5, as amended in 1999, to create a general contractor's duty of care to that injured employee of the subcontractor in cases where the general contractor has not retained control of the injured employee's work and did not affirmatively contribute to the accident in the first place.

The Millard case is an interesting and important decision. While Cal OSHA regulations may be admissible in actions by injured subcontractor employees against general contractors for work site accidents, the admission of Cal OSHA regulations will be limited to those cases where the general contractor affirmatively retained control of the construction site and its negligence affirmatively contributed to the employee's injuries.

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