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Morgan C. Smith

Since the last issue of the Forum dedicated to construction litigation, a number of cases have refined the area of construction injury law, but none have taken any great leaps in any direction. This article provides a current summary of the state of the law, and describes the recent cases that have touched upon the area.

A. Hooker v. Department of Transportation and McKown v. Wal-Mart

On January 31, 2002, the California Supreme Court decided McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal.4th 219 and Hooker v. Department of Transportation (2002) 27 Cal.4th 198. In short, these cases provide that if the general contractor's conduct was negligent and "affirmatively contributed to the injury of the contractor's employee," then a duty exists for that general contractor.

In Hooker, the plaintiff was a deceased crane operator killed during an incident at work. The evidence indicated the operator routinely retracted the crane's outriggers that provide stabilization to allow construction vehicles to pass along the overpass. While the outriggers were retracted, he moved the boom of the crane causing the crane to tip over. The plaintiff filed suit against the State of California, Department of Transportation, the entity that hired plaintiff's employer.

The Court found no evidence of any affirmative act on the part of the Defendant State of California. The only evidence presented was that the defendant retained general safety authority over the site, and may have been aware of the unsafe act. There was no evidence that the defendant had anything whatsoever to do with the creation or persistence of the hazardous practice.

The Court in Hooker found that when a general contractor affirmatively contributes to the employment of unsafe methods or procedures, liability may be imposed.

"Insofar as section 414 might permit the imposition of liability on a general contractor for mere failure to intervene in a subcontractor's working methods or procedures, without evidence that the general contractor affirmatively contributed to the employment of those methods or procedures, that section is inapplicable to claims by subcontractors' employees against the general contractor." (Hooker, 27 Cal.4th at 209, citing Kinney v. CSB Construction, Inc. (2001) 87 Cal.App.4th

28; emphasis added.)

In addressing the concept of "affirmative contribution," the Court further explained:

Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury. (Hooker, 27 Cal.4th at 212, fn 3; emphasis added.)

The McKown decision was issued on the same day as Hooker. McKown involved an injured worker who was told by defendant Wal-Mart to use equipment that lacked necessary safety features, and who was thereafter injured. The jury found Wal-Mart liable for it conduct and found it 23 percent responsible. The Supreme Court affirmed the ruling that such an act constituted affirmative conduct and that defendant's claim that immunity should be given since the employer was "primarily" responsible was soundly rejected. The Court stated:

In this case, we hold 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, 27 Cal.4th 221.)

Therefore, in a case against a general contractor or landowner the plaintiff must generally show "affirmative contribution to the risk of harm," as opposed to passive inaction. However, under footnote three of Hooker, the Supreme Court left open the situation where a duty may exist for failure to act if the general contractor was required by contract or otherwise to provide specific safety measures.

B. Ray v. Silverado

Following the Supreme Court's statement in Hooker, the Court of Appeal for the Fourth District decided in Ray v. Silverado Constructors (2002) 98 Cal.App.4th 1120, when a general contractor may be held liable for failure to act to prevent harm. The Court of Appeal was faced with the issue of how to interpret Hooker's footnote three in light of the Ray facts.

In Ray, the plaintiff was the wife of a deceased construction worker who was driving to work at the time of the incident. As he was driving to work, he noticed that large pieces of construction material from his employer's job site were being blown through the air by high winds, presenting a hazard to motorists. As he attempted to stop traffic to prevent harm to others, the flying construction materials struck and killed him. Plaintiff brought suit against TCA, the owner of

the construction project, as well as Silverado, the general contractor. Plaintiff claimed defendants had a contractual obligation to approve in advance any road closure and that had they done so, decedent would not have been killed trying to protect the public.

Defendants countered that they did not control the means, manner or methods of the work. Additionally, defendants claimed that while they did have to approve a road closure, that road closure was supposed to be done by plaintiff's employer, an independent contractor on the jobsite. Defendants in Ray sought to limit the application of Hooker to those situations where there was a showing of "affirmative conduct." Defendants further claimed that they did not perform any "affirmative act" which caused this injury.

In Ray, the Court of Appeal noted that under all the contracts on the project, Silverado, the general contractor, and TCA, the owner of the project, retained total control over the closing of roadways. The Ray court looked to the contracts between the parties to determine if a "promise" was made regarding any particular safety measure. The court stated as follows:

Hooker did not involve a situation where the independent contractor was barred from undertaking enumerated safety measures without the prior written consent of the general contractor, and, implicitly, the consent of the applicable public agencies with whom the general contractor communicated concerning the independent contractor's request. Here, [defendants] TCA and Silverado make no assertion that [decedent's employer] Rados had, fortuitously, obtained prior written permission to close Marine Way on the morning in question. Therefore, we assume Rados had not done so and was contractually restrained from barricading the roadway. If this is correct, it would appear Silverado was the party empowered by contract to close Marine Way at the critical time. This looks like retained control. (Id. at 1134.)

Having determined that the general contractor had the responsibility to determine when a road closure was to occur, the court in Ray held that a triable issue of material fact was created as to whether this constituted a failure to act when they had a duty to do so. Therefore, summary judgment was denied.

C. Application of Ray v. Silverado

What Ray establishes is really nothing more than common sense. If a defendant general contractor, or anyone else on a construction site, fails to do something that was their job to do, and it causes injury, a duty exists under those circumstances.

An example would be if a general contractor agrees by contract to undertake installation of all safety cable around the perimeter of the building for the benefit

of all workers thereon and then fails to do so. If a worker falls off the building due to lack of the promised and required safety rail, the failure of the defendant to carry out a promised safety performance constitutes a significant affirmative contribution to the occurrence of the incident. Clearly, the general contractor would owe a duty arising out of the contractual undertaking.

Similarly, if the contract called for the general contractor to install lateral supports for trenches to protect the workers and the contractor failed to fulfill its promised undertaking, resulting in injury, the contractor breached a duty to the injured workers. The Ray decision says nothing more than this. If a contractor agrees to be responsible for certain specific safety obligations, and fails to fulfill those obligations, it has breached a duty. If the breach affirmatively contributes to the incident, liability will lie.

D. Lopez v. C.G.M. Development, Inc.

In Lopez v. C.G.M. Development (2002) 101 Cal.App.4th 430, the plaintiff made two arguments as to why summary judgment should not be granted in favor of an owner who hired a general contractor, who in turn hired plaintiff's employer. The plaintiff asserted that because his direct employer did not have any workers' compensation coverage, the rulings of Privette v. Superior Court (1993) 5 Cal.4th 689 and Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253, should not apply. Accordingly, argued the plaintiff, he should be allowed to assert vicarious liability theories against the owner that were barred by Privette and Toland. The Court of Appeal rejected this argument stating that while the fact that the plaintiff's direct employer was uninsured for workers' compensation certainly gave the plaintiff the right to sue his own employer, it does not remove the prohibition against holding an owner vicariously liable for the torts of the employer. (Lopez, 101 Cal.App.4th at 445.) As to plaintiff's claims that the owner committed an affirmative act, the court stated as follows:

[Defendant] CGM's contract with the general contractor, Dekkon, provided that Dekkon would "be solely responsible for and have control over construction means, methods, ... and procedures." The contract also obligated Dekkon to provide "materials, equipment, tools, construction equipment and machinery ... for proper execution and completion of the Work." (Id. at 446.)

The court concluded that any supervision of the work was the obligation of the general contractor and not the owner on the project. Therefore, summary judgment was affirmed as to the owner of the project.

E. Kinsman v. Unocal Corp.

The First District Court of Appeal faced the issue of whether a refinery that hired contractors to perform work on a project was liable to an employee when another

contractor negligently removed asbestos from the facility causing injury to the plaintiff many years later.

In Kinsman v. Unocal, A093424 (Cal.App.4th 2003), plaintiff argued that the dictates of Hooker and McKown did not apply to owners because premises liability law dictates the duty of owners. As such, argued the plaintiff, the owner of a refinery should have a duty if it knew or reasonably should have known of the danger that caused injury to the plaintiffs.1

However, the court in Kinsman stated the following should be the rule in regards to such a defendant:

We announce a simpler rule that appears to be more in line with recent Supreme Court holdings, and the liability limitation expressed by Division Five of this court in Zamudio: A property owner cannot be liable to a contractor's employee for a dangerous condition a contractor has created on the land unless the owner exercised control over the condition and, in doing so, affirmatively contributed to the employee's injury. (Id.)

In effect, the court in Kinsman held that an owner is in no different position than a general contractor as to the rule announced in Hooker. However, the court unambiguously stated that such "affirmative conduct" requirement only exists so long as a contractor created the dangerous condition and the owner did not exercise control over the condition. While this may limit recovery for actions that arise out of a contractor's work, the decision leaves in place traditional concepts of duty for owners when the condition was not part of the work, or when the owner exercises control over the condition.2

F. Elsner v. Uveges

One of the most interesting cases currently before the Supreme Court is Elsner v. Uveges (2003) 106 Cal.App.4th 73, which will address the issue of the use of OSHA regulations in construction injury litigation, and any other types of cases, where applicable. This case is based on the amendments to Labor Code § 6304.5 passed in 2000, which changed the long-standing rule that OSHA regulations were not admissible in evidence in third party cases. The trial court let the OSHA regulations into trial as evidence relating to the standard of care. The jury found the defendant negligent per se for violation of these standards. Upon appeal, the Court of Appeal for the Fourth District found that the 2000 amendments were not intended to allow OSHA regulations into evidence. The Supreme Court accepted review of the Court of Appeal's decision with five of the seven justices requesting review. This decision will likely be issued by the middle of next year. Currently, however, there is no published opinion that deals with this issue.3

Conclusion

While construction injury law has undergone some refinements since the Hooker and McKown decisions, the basic concepts still remain: if a defendant does something they are not supposed to do, or fails to do something they have agreed to do, they have a duty and may be held liable. This is a simple rule that reduces the complex work of construction injury litigation down to the manageable.

1 See Restatement of Torts Second §343: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he [¶] (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and [¶] (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and [¶] (c) fails to exercise reasonable care to protect them against the danger."

2 Attorneys for plaintiff filed a request for rehearing, which was denied and a Petition for Review that is pending before the Supreme Court at the time this edition was published.

3 For information on the admissibility of OSHA into evidence, look at the following website address for PDF files on important documents establishing admissibility: http://www.arnslaw.com/AB%201127%20Page.html.

Morgan Smith is with The Arns Law Firm in San Francisco. He is a member of the Forum Editorial Board.