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Hooker and McKown: The Supreme Court Goes Back to Basics For Construction Litigation Cases

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Not since 19791 has the California Supreme Court reviewed a case involving an injured construction worker and actually found that the defendant was liable for those injuries. These were not great odds going into the wait for the recent decisions of McKown v. Wal-Mart (2002) 27 Cal.4th 198 [115 Cal.Rptr.2d 853] and Hooker v. State of California (2002) 27 Cal.4th 219 [115 Cal.Rptr.2d 868]. However, with both of the decisions taken together, the Supreme Court finally places to rest an area of law under attack since the decision in Privette v. Superior Court (1993) 5 Cal.4th 689. The Court affirms that people who hire independent contractors must exercise their control over the work in a safe and appropriate manner. If a hirer fails to do so, liability may be imposed. In McKown and Hooker, the Court expressed the unqualified opinion that if a hirer contributes to the happening of an injury in an "affirmative manner," the hirer has a duty and may be held liable no matter what percentage of fault the jury finds for that defendant. The Court also unmistakably holds that it is generally the role of the jury to determine whether sufficient evidence exists to impose a duty, not for the court as a matter of law.

However, these opinions cannot be understood in a vacuum. Without an understanding of the case law and the evolution of the law over the years, these decisions could easily be misinterpreted. In fact, these decisions only marginally change the retained control doctrine as described in prior precedent, yet provide clear guidance to plaintiffs in overcoming summary judgments brought by defendants.

This article will examine the prior Supreme Court decisions on the subject of construction injury litigation and conclude with an analysis of where the law stands, and likely will stand for years, in the wake of the Hooker and McKown decisions.

I. Prior History of Construction Injury Litigation Law

The California Supreme Court first addressed the respective duties of a hirer and an independent contractor in Austin v. Riverside Portland Cement Co. (1955) 44 Cal.2d 225. This decision expressly cited the language of Restatement of Torts section 414, which came to be known as the control doctrine:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The Supreme Court found a duty under these circumstances, and started the reliance on section 414 as a basis for a duty in California. However, in the same year the Court issued the opinion of McDonald v. Shell Oil Co. (1955) 44 Cal.2d 785, which substantially limited the scope of section 414 in construction litigation cases, and arguably changed the application of the doctrine as it applied to construction workers, as opposed to bystanders. The Court stated as follows:

An owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made [citation] or unless he exercises active control over the men employed or the operations of the equipment used by the independent contractor. (Id., at 788-89, emphasis added.)

This case appeared to add in the requirement that not only must the defendant "retain" control over the work for a duty to exist, but that there must be an "exercise of active control" over the work for the doctrine to apply.

In 1962, the Supreme Court decided Woolen v. Aerojet General Corp. (162) 57 Cal.2d 407, and extended liability of hirers to include a duty under the peculiar risk doctrine found in Restatement of Torts section 413, which is entirely distinct from the control doctrine. The court stated it already found a duty under section 414 and "there is no reason to hold otherwise with respect to section 413." (Id., at 411.) Peculiar risk is based on the following law:

One who employs an independent contractor to do work which the employer should recognize as necessarily creating, during its progress, conditions containing an unreasonable risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the absence of such precautions, if the employer (a) fails to provide in the contract that the contractor shall take such precautions (as to which see section 416), or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

This doctrine arguably applied to create a duty, even in the absence of control over the work. This doctrine requires the hirer to assure the independent contractor will take proper safety precautions for the work under the independent contractor’s control. This doctrine is best suited to avoid the hazards of the low bid process. In other words, it protects workers from hirers simply hiring the cheapest contractor, which normally has the least provision for safety.

In 1968, the California Supreme Court decided Van Arsdale v. Hollinger (1968) 68 Cal.2d 245, which added section 416 of the Restatement to the list of protections. Restatement 416 is a vicarious version of peculiar risk as described in section 413. Under this vicarious liability/peculiar risk doctrine, even if the hirer does take adequate precautions to assure the independent contractor follows proper safety precautions, but the independent contractor does not and an employee is injured, the hirer is liable. In many ways, the decision of Van Arsdale that created vicarious liability without control over the work is what started the chain of roll-back decisions in 1993.

II. Privette v. Superior Court

In Privette v. Superior Court (1993) 5 Cal.4th 689, the undisputed facts are as follows:

Privette, a school teacher, owned some rental properties, including the duplex where roofing employee Contreras was injured. Privette had hired the Krause roofing firm to reroof his duplex only after checking references and determining that Krause was licensed and carried workers' compensation insurance for its employees. Privette was not present when Contreras was injured during the roofing process, nor did he participate in the foreman's decision to have Contreras carry buckets of hot tar up a ladder to the roof. (Id., at 692-93.)

How, the Supreme Court asked itself, could this school teacher be held liable for negligent acts that were entirely the fault of the plaintiff's employer? Yet, pursuant to Restatement Torts section 416, there was vicarious liability for those very acts. Additionally, the Court noted the employee was already covered by workers' compensation for these very injuries that were caused entirely by the fault of his employer. The Court concluded that when the fault for an injury lies entirely with the employer who maintains workers' compensation, "additional recovery from the person who hired the contractor – a nonnegligent party – advances no societal interest that is not already served by the workers' compensation system." (Privette, supra, at 692.)

However, the problem with the Privette decision is that it left many more questions unanswered than it answered. While it was hard to disagree that Mr. Privette should not be liable, the opinion left open some major questions: (1) If workers' compensation is sufficient for an injury on the job, does that include all injuries on the job, even those caused by the fault of another? (2) While the Court denied liability under the vicarious liability aspect of peculiar risk found in section 416, did Privette prohibit liability under the non-vicarious aspect of section 413 as well?2 (3) How did the rationale of Privette apply to the doctrines of control over the work as applied in section 414? None of these questions were answered – creating something of a free-for-all in the appellate courts interpreting

these sections.

III. Toland v. Sunland Housing

The Supreme Court again revisited the issue of peculiar risk of liability pursuant to Rest. Torts section 413. The Court accepted review of Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253, on the single issue of peculiar risk and declined to review the portion of the Court of Appeal opinion that dealt with the control doctrine. (See fn. 2 to Toland opinion.)

In Toland, the Court unmistakably came down on the side of finding that liability under peculiar risk section 413, just like section 416, are forms of vicarious liability, even where "the person hiring an independent contractor ‘fails to provide in the contract that the contractor shall take [special] precautions.’ " (Id. at 265.) The reasoning was that it was still placing a duty on a defendant to control the actions of a third party independent contractor.

The court had three basic rationales for its decision: (1) Peculiar risk is essentially vicarious in nature as agreed to by the majority of jurisdictions in the United States (Id., at 267); (2) It is "illogical and unfair" to place greater liability upon the hirer of an independent contractor than that placed on the direct employer (Id., at 270); (3) The cost of workers’ compensation coverage is " ‘included by the contractor in his contract price’ and ‘ultimately ... borne by the defendant who hires him.’ " (Id. at 266, citing Privette.)

While the Privette decision could well be based on the first rationale alone, the inclusion of the last two rationales created a new problem. Both these rationales also argue for the wholesale repeal of the right for any injured worker to sue someone that hires them for any reason. After all, the liability in a third-party lawsuit will most always be greater than the limited recovery obtainable through the employer’s workers’ compensation coverage. Secondly, the cost of the coverage will always be included in the contract price. Therefore, asked the prospective defendants, should we not be protected from any lawsuits so long as the person is covered by workers’ compensation?

IV. Courts of Appeal Weigh In

The first interpretation of Toland was not very helpful to any side. In Zamudio v. City and County of San Francisco (1999) 70 Cal.App.4th 445, which was originally intended to be an unpublished opinion, the court tried to reconcile the peculiar risk doctrine of Toland with the control doctrine that was specifically not addressed in the decision. Without guidance from the Supreme Court as to how far the second and third rationales listed above should be taken, the court did not know whether any liability should exist or to what extent it did still exist. Zamudio basically combined the theories of Toland and found that the facts of the

case did not get past a claim of vicarious liability no matter what it is called. However, Zamudio did not provide any real test for determining when liability exists.

The next case to take the plunge on the issue was Kinney v. CSB Construction, Inc. (2001) 87 Cal.App.4th 28,3 which proposed a new test to determine when a duty was present. Kinney took the overall rationale of Toland to mean that the control doctrine contained in section 414 cannot be vicarious in nature: simply failing to stop another from doing an unsafe act cannot be the basis of liability under Toland.

Therefore, the court concluded that a hirer may be liable if it affirmatively contributes to the happening of the incident; it is not liable for mere failure to stop another from doing an unsafe act. In other words, there must be some causal connection between the happening of the event and the defendant, other than they could have stopped the event it they wanted.4 However, the court was not specific on whether this evidence should be determined by the court as a matter of law upon summary judgment, or whether a jury should determine it.

V. Hooker v. State

1. Case as presented to the Court

Not satisfied with abrogation of vicarious forms of liability from the work place, the defendant in Hooker v. State of California, supra, 27 Cal.4th 219 [115 Cal.Rptr.2d 868], took the second and third rationales of the Toland decision and sought to persuade the Court that all forms of liability should be precluded with respect to a person who hires an independent contractor. Rather, workers' compensation should be the exclusive remedy against the world.

Hooker involved a crane operator who was killed when his crane rolled over. The roll-over occurred because the operator had retracted his stabilizing outriggers on the crane to allow vehicles to pass by on a Cal Trans project. The suit was brought against Cal Trans on the theory that Cal Trans knew the outriggers had to be retracted to allow construction traffic by, should have known that was dangerous and, therefore, had a duty to prevent this incident. The defendants in this case also argued in the strongest of terms that a plaintiff who receives workers' compensation should be limited to that recovery, unless there was evidence of an intentional tort on the part of a hirer. (See Def. Cal Trans Opening Brief, p. 35-36.) Defendant Cal Trans also took issue with the holding in Kinney concerning "affirmative conduct" stating that it was unworkable, and should be limited to intentional acts. (Ibid.)

As discussed in a prior Forum article concerning these cases (see Smith, M., Minority Rules: The Consensus on the Retained Control Doctrine, CAOC Forum,

Vol. 31, No. 5, June 2001), defendant was asking for relief that did not exist in any other state in the country. Ten states have statutory workers' compensation systems to hold a hirer liable for workers' compensation, and give them corresponding immunity. Of all the other states, not a single state holds that receipt of workers' compensation benefits prevents recovery from any third party that contributes to the happening of an injury. (Ibid.)

2. Decision of the Court in Hooker v. State of California

This decision is a classic case of a defendant wining the battle, but losing the war. Defendant Cal Trans wanted an elimination of any negligence liability in California and only succeeded in persuading the Court of no liability under the facts of the case before it.5 The Court in Hooker had three realistic options in reaching its decision: (1) it could have followed the defendant's request and abrogated all third party liability in the construction context; (2) it could have abrogated only the control doctrine and left in place simple negligence; or (3) it could have accepted the control doctrine and defined its scope.

The first option, as argued for by the defendant, was soundly rejected by the Court. Not a single justice agreed with this interpretation of the law, the only dissent being for a slightly more lenient standard than offered by the majority. (See Werdegar, J. dissent.)

Interestingly, however, the Court also did not Cal Trans' second argument that the control doctrine should not apply to employees of subcontractors. The Court examined a number of out-of-state jurisdictions, and cites three cases for the proposition that "others" does not include employees of subcontractors under section 414.6 The Court also cited numerous cases where section 414 is accepted, but did not mention that it is actually accepted in all other jurisdictions that do not legislatively hold a hirer liable for workers' compensation liability. (See Smith, M., Minority Rules: The Consensus on the Retained Control Doctrine, CAOC Forum, Vol. 31, No. 5, June 2001.)

In Privette and Toland the court cited the tentative draft of the Restatement for the proposition that section 413 and section 416 should not apply to employees of subcontractors.7 This draft was a strong backing for the holding of both decisions. Defendant requested this holding be extended to the section 414 liability. However, in Hooker the Court rejected this request and concluded:

if a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer. (Hooker, 27 Cal.4th 213.)

The Hooker Court took pains to reject Cal Trans' argument that a duty under the control doctrine should be abrogated. Clearly, this was done for a reason and

there must be an intellectual distinction between simple negligence and the rule as announced by the Supreme Court.

The distinction comes from the Court's understanding that it was creating a heightened duty in the context of a construction injury case for the hirer of subcontractors. While the Court is clear that simply failing to stop a contractor from working in an unsafe manner is insufficient as a matter of law under the control doctrine, the Court provides a broad standard of when the evidence is sufficient to meet this imposed duty upon the hirers of contractors. The Court cites directly the language of Kinney, which imposes a duty when there is:

evidence that the hirer's conduct contributed in any way to the contractor's negligent performance by, e.g., inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise. (Hooker, supra, 27 Cal.4th 210-211.)

As further indication of the level of contribution necessary, the Court relied heavily on the Utah Supreme Court case of Thompson v. Jess (Utah 1999) 979 P.2d 322, which provided the following standard:

Under the "active participation" standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. (Id. at 327, emphasis added.)

As a final note, the Court resolved an issue left open in Kinney, i.e., whether failing to do something can lead to liability under certain circumstances. The Court answered in the affirmative and stated:

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's injury. (Hooker, supra, 27 Cal.4th 212, n.3.)

This footnote further defines the heightened duty existing under the control doctrine as defined by Hooker. It recognizes that construction sites are complicated work sites where many different responsibilities are placed on each participant. If a party fails to do an act that they are obligated to do under contract, or by custom and practice, that also may be a basis for liability. Footnote 3, and the other definitions, really makes "affirmative conduct" a term of art. While it has a common understanding, it can only be legally understood in conjunction with the above definitions and examples.

Footnote 3 also seems to make a distinction between a "general" promise of keeping a job site safe in a contract, and a "specific" promise to be responsible for specific items of safety. For a general contractor this certainly could include the responsibility for providing safe access to the work site for all trades in common areas, responsibility to coordinate the work to avoid trades interfering with one another, responsibility to place guardrails around openings or other specific responsibilities. Therefore, while no duty may exist under a general clause in a contract to keep the job safe, the Court directly acknowledged liability under a contract for "specific" responsibilities retained by the hirer.

Finally, the Court also resolved another outstanding issue that was never previously addressed by this Court: who must decide whether a defendant "affirmatively contributed" to the happening of the incident? The Court came down unmistakably on the side of the jury. The Court, in ruling against the plaintiff in the case, found that plaintiff had not raised "triable issues of material fact as to whether defendant actually exercised the retained control so as to affirmatively contribute to the death of plaintiff's husband." (Hooker, supra, 27 Cal.4th 215.)

This is an extremely important issue. It is not up to the court to weigh the evidence of affirmative conduct and determine whether it exists or not. If a plaintiff presents any reasonable evidence of affirmative conduct, a court must deny a summary judgment because it is up to the jury to weigh the evidence.

Taken altogether, the duty created under the control doctrine as defined by the Court is clear: If a hirer is "involved with" (Thompson) or "contributed in any way" (Kinney) to the happening of an incident, they have a duty. Moreover, if the plaintiff presents any reasonable evidence or inference from which a jury could find the above, then summary judgment must be denied. "[S]ummary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (Code Civ. Proc. § 437c, subd. (c).) The court must strictly construe the moving party's evidence, and liberally construe the opposing party's evidence, with any doubt as to the granting of the motion being resolved in favor of the opposing party. (Zavala v. Arce (1997) 58 Cal.App.4th 915, 926; Neverkovec v. Fredericks (1999) 74 Cal.App.4th 337, 344.)

In Alcaraz v. Vece (1997) 14 Cal.4th 1149, 1171, the Supreme Court laid out the precise burden that must be met by plaintiffs to avoid summary judgment in a similar case where duty is created by specific factual evidence. The issue in Alcaraz was whether a rental house owner exercised control over a city-owned water meter box to such an extent he had a duty to maintain the water meter box. This is substantially similar to the required proof of control in Hooker. In reversing summary judgment, the Alcaraz Court commented upon the respective

roles of the trial courts and the jury:

... plaintiff has raised a triable issue of fact whether defendants exercised control over the strip of land owned by the city so as to give rise to a duty to protect or warn persons entering the land. It will be for the trier of fact to decide, based upon the evidence received at trial, whether defendants actually exercised such control. We express no opinion as to other issues that will arise, in the event the trier of fact finds that such control was exercised by defendants – including whether defendants breached that duty of care and to what extent, if any, plaintiff's injuries were caused by his sole or comparative negligence. (Alcaraz, supra, at 1171.)

This case clearly limits the role of the trial court to determining whether any reasonable evidence exists from which a jury could find exercise of control. Upon such a finding, all other issues are reserved for the jury's determination. It is also important to note from this statement of law that there is no requirement that the evidence or inference of an affirmative act, or exercise of control, be negligent in and of itself. Negligence is a separate element from duty. In order to meet the standard of proving a duty under these decisions, plaintiff need only show an inference that the defendant affirmatively contributed, or exercised control over the happening of the incident. The following examples explain how this may work:

1. A general contractor provides access to a closed area with unsecured glass that falls out of place injuring a subcontractor's worker. A third company installed the glass. (See accompanying article by Patricia Law.)

2. A general contractor provides a ladder to a job site. At the time of the incident, the ladder was not properly secured and injury results to a subcontractor's employee. Defendant claims they did not realize the ladder was set up or being used at the time.8

Under both of these scenarios there is evidence from which a jury could conclude an affirmative act was committed. In example one, defendant provided access and in example two, defendant provided a ladder. Under Hooker the evidence is sufficient for a jury to determine that the defendant committed an "affirmative act" such that summary judgment must be denied. It is then up to the jury to determine if, under the circumstances, the hirer was negligent.

Unfortunately for the plaintiff in Hooker, the Court found that the evidence was insufficient and remanded the case to the Court of Appeal for additional determination consistent with its opinion. The Court noted there was no evidence which moved beyond the right of the party to stop the dangerous act, and arguable awareness of the dangerous act. This was the same evidence found

insufficient under Kinney.

VI. McKown v. Wal-Mart

1. Case as presented

As in Hooker, the defendant in this case sought to eliminate all liability against hirers of contractors when the contractor’s employees received workers’ compensation.

McKown involved defendant Wal-Mart, who hired an independent contractor to perform work and "requested" that they use the Wal-Mart forklift which lacked a necessary safety device. The employees of the contractor did as requested, noting that the forklift lacked the safety equipment. The subject injury was caused by the lack of the safety equipment. The jury found Wal-Mart 23% responsible and the employer 55% responsible for the incident. Wal-Mart appealed and sought to immunize itself from liability claiming that since the worker received workers’ compensation, that should be his exclusive remedy, even if Wal-Mart was negligent.

Defendant argued the type of conduct that should give rise to liability on the part of the hiring party should be limited to "the types of conduct that also allow an injured worker to sue his or her employer in tort, outside the workers’ compensation system, under Labor Code section 3602(b)." (See Def. Wal-Mart’s Opening Brief p.10.) Under this section, recovery is limited to "willful physical assault" and "fraudulent concealment of the existence of the injury" (e.g., intentionally not telling employees they are being exposed to injury-causing chemicals). In support of this extreme position, defendant followed the course of the Hooker defendant and raised the following arguments: (1) it would be illogical and unfair to hold Wal-Mart liable when the employer was "primarily responsible" for the incident; and (2) receiving workers’ compensation and allowing a third party lawsuit is an "unwarranted windfall" to the injured worker.

2. Decision of the Court in McKown v. Wal-Mart

The Court rejected these contentions and concluded in a clear and simple manner:

in this case, as well as in Hooker, the hirer’s affirmative contribution to the employee’s injuries eliminates the unfairness in imposing liability where the contractor is primarily at fault. (McKown, supra, 27 Cal.4th 226.)

In so holding, the Court reaffirms the comparative fault nature of our state. If a hirer is liable for any percentage of an incident, they have a legal liability according to the law. In short, when it comes to "affirmative" conduct as the term of art is used, the Court retracted all the policy rationales that it applied to

peculiar risk.

VII. Conclusion

The twin decisions of Hooker and McKown remove a great deal of uncertainty in the area of construction injury litigation. The Court squarely rejected defendants' attempts at precluding all third party negligence liability of a hirer of subcontractors. The Court firmly rejected the abrogation of the control doctrine that is accepted in most every state in this country, and provided a workable standard for determining duty. Under this standard a plaintiff is required to present some evidence from which a jury could reasonably conclude that the defendant "affirmatively contributed" to the happening of the incident, whether by act or omission. While a decision will rarely give either side everything they wanted out of the decision, these decisions together provide a strong and workable standard that will likely be in place for many years to come.

1 See Aceves v. Regal Pale Brewing Co. (1979) 24 Cal.3d 502

2 The Supreme Court addressed this issue in footnote 2, but wrote the distinction in such an unclear manner that either side could claim the footnote supported their version. [See Owens v. Giannetta-Heinrich Construction Co. (1994) 23 Cal.App.4th 1662 citing footnote 2 of Privette for support of position that section 413 survives Privette.]

3 This was case handled by my office, and our office did not seek Supreme Court review of this decision because it frankly was better than Zamudio in giving a workable standard.

4 In the original portion of this decision it also addressed the OSHA in evidence portion of Labor Code § 6304.5 and § 6400. This portion of the decision was subsequently depublished by the court.

5 Even this result is unclear since the case was remanded back to the Court of Appeal for further determination consistent with the Court's opinion.

6 However, two of those cases are not nearly as clear as identified by the Supreme Court. In Sutherland v. Barton (Minn. 1997) 570 N.W.2d 1 and Parker v. Neighborhood Theatres (1988) 76 Md.App. 590, 601 [547 A.2d 1080], the court questioned whether section 414 applied in such situations, but then applied the section anyway, but finding the facts did not support application of the doctrine.

7 See Toland v. Sunland Housing Group, Inc., supra, 18 Cal.4th 253, 266-67.

8 The facts of this hypothetical were the same as those involved with a recent motion for summary judgment before the Stanislaus County Superior Court Judge

Hurl Johnson. The motion was filed before Hooker and McKown, but these decisions came down before the opposition was due. In denying the Summary Judgment, Judge Johnson specifically stated that had this summary judgment been brought before the Hooker and McKown decisions, he would have granted the motion. However, because of these decisions, he denied the motion since there were factual issues of affirmative conduct for the jury to determine.