Title: Majority Rules: The Consensus on the Retained Control Doctrine
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Majority Rules: The Consensus on the Retained Control Doctrine

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Premises liability law regarding workers on construction sites developed its own path over the last fifty years. This subset of cases involves injuries occurring on property within the possession or control of a general contractor during construction. Starting in the early 50's California courts found that the duty of the general contractor, who has control over the premises, is essentially the duty to "keep the premises in a reasonably safe condition" for the employees of the independent contractors. (See Revels v. Southern Cal. Edison Co. (1952) 113 Cal.App.2d 673, 677; Gonzales v. Robert Hiller Construction (1960) 179 Cal.App.2d 522; Gettemy v. Star House Movers (1964) 225 Cal.App.2d 636, 645.) Under basic premises liability, the right to control land brings with it the attendant duty to assure such land is reasonably maintained and free of defects. (See Alcaraz v. Vece (1997) 14 Cal.4th 1149.) This duty exists in the premises setting and in the work setting when the key element of retained control is established.

The Supreme Court recently granted review of two cases that will address the issue of liability regarding control of work at multi-employer worksites. These cases will allow the Supreme Court to address the retained control doctrine found in Restatement of Torts 2nd § 414 and concepts of basic negligence. These cases follow the Supreme Court's rulings concerning the peculiar risk doctrine, based on Restatement of Torts 2nd § 4131 and § 416 found in Privette v. Superior Court (1993) 5 Cal.4th 689 and Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253. While the peculiar risk doctrine is accepted in only a few jurisdictions as it applies to employees of subcontractors, liability under the retained control doctrine of § 414 is accepted in all forty states where is has been addressed by case law. In fact, the only exception exists in states that have passed legislation making a general contractor liable for workers' compensation payment for all subcontractor's employees, and correspondingly granted the general contractor immunity from suit.2 In light of this unanimity of belief, the Supreme Court should be compelled to follow the rationale as described by the vast majority of other courts that have addressed this issue.

The cases of Hooker v. State of California and McKown v. Wal-Mart Stores, Inc. (2000) 82 Cal.App.4th 562, will set the boundaries of this litigation for the foreseeable future. Hooker arises out of an unpublished opinion where the 2nd Distrct Court of Appeal overturned a trial court's grant of summary judgment. In

Hooker the plaintiff's wife sued the state for the death of her husband, occurring when his crane fell over on top of him. The grant of review for Hooker specifically asks the parties to brief the issue of the nature and extent of the retained control doctrine pursuant to Restatement of Torts 2nd 414 following the decisions of Privette v. Superior Court (1993) 5 Cal.4th 689 and Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253.

McKown involves a slightly different issue. It reviews the published decision from the 4th District Court of Appeal that involves a hirer of an independent contractor providing defective equipment to a subcontractor's employees. The equipment lacked a specific piece of safety equipment required to make it safe.

Hooker and McKown are interrelated beyond the fact both were granted review late last year without any briefing, and the Court asked for new briefing on both of these cases within days of each other early this year. Taken together, they provide the Court a full range for determination of potential duty questions in the construction injury setting.

A. Common Law Forms of Duty

Under common law negligence, there are various levels of duty that exist in regard to different persons and situations. The duty that exists for all persons is the duty to avoid causing foreseeable harm through their actions. (See Civ. Code § 1714.3) People must not act or fail to act in any manner that will cause foreseeable harm to others.

Secondly, there is the duty under vicarious liability, which holds a person liable regardless of whether they could have acted or prevented the harm. The basic form of peculiar risk found in § 416 fell within this category. Under peculiar risk the hirer of the independent contractor was liable for the failure of the independent contractor to take proper precautions based solely on proof that a "peculiar risk" existed. In other words, only one step is required for liability: proof of a peculiar risk inherent in the work.

B. Duty in the Construction Injury Context

The Privette case was extremely clear that vicarious liability based on Restatement of Torts 2nd § 416 had no purpose or place in the work setting when an employee is covered by workers' compensation. If all that is required for liability is proof that a peculiar risk exists, it creates a co-extensive duty with the employer. Since the standard for determining whether a peculiar risk exists is based on an objective standard, a hirer could be held liable for risks that they were not even aware of, and even risks they could not have been aware of in light of their limited construction knowledge. This is the basis of vicarious liability that was rejected by the Court.

In Toland, the Supreme Court held that although Restatement of Torts 2nd § 413 sounded similar to the primary duty to do no wrong, it was really a form of vicarious liability. The Court stated in Toland "[w]e also observed in Privette that although the doctrine of peculiar risk is sometimes described as 'a nondelegable duty' rule, it is in effect a form of vicarious liability." (Toland at 261-62).4

C. Issues Presented in Hooker and McKown

McKown involves a specific negligent act on the part of the hirer in providing defective equipment to an employee of a subcontract, resulting in injury. Thus, McKown is squarely on point addressing the primary duty under Civil Code § 1714 prohibiting a person from engaging in an act that causes foreseeable injury. The underlying case went to trial with a finding that the defendant, Wal-Mart, was negligent for providing defective equipment to the employees of the subcontractor. Therefore, in order to prevail the defendant must persuade the Supreme Court that no case of negligence should be allowed against any person if the injured worker receives workers' compensation benefits. In other words, workers' compensation is the exclusive remedy against the world.5

On the other hand, Hooker presents a slightly different duty issue. In Hooker the defendant State of California retained the right and power to implement any safety measure on the project. However, the State was arguably not involved in the decision-making process that led to the death of the decedent, but could have required different and safer means to perform the work, and according to plaintiff unreasonably failed to do so.6

In order for the heirs to prevail in the Hooker case, the Court must confirm that a defendant has a duty to assure safe practices are followed on the job. This duty is based on the long-accepted retained control doctrine of Restatement of Torts 2nd § 414, which requires those who retain control over the work to exercise that control in a safe manner.

Thus, the Court now has the two poles from which to finalize the nature and extent of the duty owed to employees of subcontractors on multi-employer work sites. In order for the Court to reach a conclusion on these issues, it must consider three primary sources: past precedent of the Court; the decisions from the 49 other jurisdictions in the United States; and California legislative activity, if any.

The analysis of these three sources is unanimous: All past precedent of the Court and all other states in the United States that have not legislatively held a hirer liable for workers' compensation payments of all employees on a multi-employer work site, rely upon the retained control doctrine in § 414 to protect work sites from hazards. Since all such states impose the higher secondary duty that requires a hirer to prevent harm under work within their control, these states necessarily

encompass the primary duty issue in McKown. The following is a description of these persuasive authorities.

D. Analysis of Past Supreme Court Cases

The retained control doctrine is founded on the principal of premises liability. In Snyder v. Southern Cal. Edison Co. (1955) 44 Cal.2d 793, 799 the Supreme Court held that control over the work is the foundation of liability. The first California case to apply the retained control doctrine found in Restatement of Torts 2nd § 414 to employees of a subcontractor was La Malfa v. Piombo Bros. (1945) 70 Cal.App.2d 840. The court fully adopted the language of Restatement of Torts 2nd § 414 as follows:

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. (La Malfa, supra, 70 Cal.App.2d at 848-49. See also Holman v. State of California (1975) 53 Cal.App.3d 317, 332; Castro v. State of California (1981) 114 Cal.App.3d 502, 518; and Morehouse v. Taubman Company (1970) 5 Cal.App.3d 548, 557, which all adopt the language of Rest.2d Torts § 414 and comments (a) and (b) in total.)

The Supreme Court adopted the holding of La Malfa in Austin v. Riverside Portland Cement Co. (1955) 44 Cal.2d 225 in which the court applied § 414 liability to an employee of a subcontractor. "[A defendant] may be liable under the rule stated in [§ 414] unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others." (Id., at 232-33, emphasis added.)

The Court further explained the control doctrine in McDonald v. Shell Oil Co. (1955) 44 Cal.2d 785, 789. The Court stated that the owner may retain broad general powers of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract without creating a duty under this doctrine. (Id., at 790).7

These cases are the only precedent regarding the retained control doctrine decided by the California Supreme Court. Privette did not mention the retained control doctrine, and Toland specifically stated that it was not deciding anything in regard to the retained control doctrine. (See Toland at fn. 2.) Therefore, all prior decisions of the Court firmly establish liability under the retained control doctrine. Under this doctrine, a hirer of a independent contract owes a basic duty of care to assure that work under his direction or control is done in a safe manner: nothing more, nothing less. The retained control doctrine is best described in the post Privette, pre-Toland case of Grahn v. Tosco (1997) 58 Cal.App.4th 1373,

which stated:

Having retained control of the independent contractor's work, the hirer has a direct and nonimputed obligation to see that reasonable precautions are taken to eliminate or reduce the risk of harm to the employees of its independent contractors. (Id., at 1394, emphasis added.)

As will be seen below, this statement of law as described in Grahn is accepted in every other jurisdiction in the United States with little variation.

E. The Law in 49 Other States Regarding the Retained Control Doctrine

Ten states in the country have adopted a workers' compensation system that requires a hirer to be liable for workers' compensation for all employees, regardless of whether they are employees of a subcontractor.8 This places the burden of a safe work site on the general contractor, as an unsafe work site under their control will increase their personal workers' compensation rates.

As the California Legislature has not placed this liability upon the hirer of independent contractors, hirers are not shielded from third party lawsuits under the exclusive remedy provision of workers' compensation. California law allows an injured employee to sue any person other than the employer for causing or contributing to his injuries. (See Lab. Code § 3852; see also Summers v. Newman (1999) 20 Cal.4th 1021.) In the 40 states that have similar provisions allowing third party lawsuits, every single state imposes a duty upon a hirer of a subcontractor who retains control over the work. Each of these states are slightly different in their interpretations of the doctrine, but all adopt the doctrine in essentially the same, or even less restrictive, form as expressed in Grahn v. Tosco.9

Many of these states' Supreme Court decisions hold that the language of the contract alone is sufficient to impose a duty of reasonable care.10 In other words, if a hirer agrees by contract to have safety responsibility on the job, they cannot avoid that responsibility to injured employees.

The majority of these remaining decisions adopt the language directly from the Restatement § 414 and hold a hirer has a legal duty of reasonable care if they retain control over the work such that the subcontractor is not entirely free to work in its own manner.11

F. Does the Rationale in Privette and Toland Dictate a Different Result in California?

Both Privette and Toland are strong in their language concerning the unfairness of holding a hirer liable under a duty pursuant to the peculiar risk doctrine found in Restatement of Torts 2nd §§ 413 and 416. The question arises, does this holding

apply with equal force to the control doctrine found in Restatement of Torts § 414? Again, this issue has been addressed by virtually every other state in the union that allows third party suits under legislative enactment, such as California. Every Supreme Court that has examined both the retained control doctrine and the peculiar risk doctrine has either accepted both doctrines or abrogated only the peculiar risk doctrine. Many of these states reached this conclusion in the same opinion. (See Tauscher v. Puget Sound Power & Light Co. (1981) 96 Wn.2d 274, 282; Parker v. Neighborhood Theaters (1988) 76 Md.App. 590; Whitaker v. Norman (1989) 75 N.Y.2d 779, 780; Thompson v. Jess (1999 UT) 979 P.2d 322, 327; Matteuzzi v. Columbus Partnership, L.P., (1993) 866 S.W.2d 128, 131-2; Anderson v. Nashua Corporation (1994) 246 Neb. 420.) Many of these decisions rely on the same rationales listed in Privette for their reasoning in rejecting peculiar risk, yet each affirms a duty under § 414 in the same decision.

This reasoning is best summarized in Fleck v. ANG Coal Gasification Co. (N.D. 1994) 522 N.W.2d 445, 451, where the court stated that:

There is no inconsistency between our conclusion that an independent contractor's employees are not protected by [peculiar risk], yet are protected under Section 414. [Peculiar risk] create vicarious liability for the independent contractor's acts and omissions, and therefore conflict with the exclusive remedy provisions of the workers compensation act. Section 414, however, creates an independent duty, not vicarious liability, on the party who hires the independent contractor. (Id., at fn. 3.)

Therefore, while many states agree with the analysis in Privette and Toland in regard to peculiar risk, not a single state has applied that analysis to the retained control doctrine. The defendants in the McKown and Hooker cases have argued strenuously that Privette and Toland dictate a ruling in their favor. However, the California Supreme Court will realize that no other state in the union that has addressed this issue agrees with their argument.

G. Legislative Activity

California legislation expressly allows suits against anyone other than the employer for injuries caused by their negligence. (See Lab. Code § 3852.12) The California Legislature has not adopted a system of workers' compensation that places workers' compensation liability upon any hirer of subcontractors. Therefore, California is within the statutory scheme of the 40 other states allowing third party law suits. California has recently passed AB 1127 that increases the responsibility for safety of hirers on multi-employer work sites. (See Lab. Code § 6400.) This does not indicate any legislative desire to restrict the retained control doctrine.

H. Conclusion

Based on 50 years of prior precedent in this state, the analysis of every other Supreme Court that has addressed the relevant issues, and the lack of legislative desire to abrogate or restrain the control doctrine, the result is clear: unless this California Supreme Court wants to be a minority of one in contradiction to every other state that has addressed these same issues, it will affirm the retained control doctrine. Privette or Toland were intended to prevent a hirer from being liable for failing to instruct his contractors how to do their jobs absent any control or right to control the work.

However, there is no logical reason to extend this rationale to prevent a hirer from being liable for his or her own negligence that causes injury, such as providing defective equipment to a subcontractor that causes injury. Affirming the retained doctrine in the Hooker case, will make the case of McKown necessarily fall into line since the defendant actively caused the injury by providing the defective equipment. Therefore, while no hirer will be vicariously liable for not requiring a third party to use safety precautions, all hirers will have to use reasonable care over the work that they control or participate in. No other result is warranted.

1 Under section 413, a person who hires an independent contractor to do inherently dangerous work, but who fails to provide in the contract or in some other manner that special precautions be taken to avert the peculiar risks of that work, can be liable if the contractor’s negligent performance of the work causes injury to others. Under section 416, even if the hiring person has provided for special precautions "in the contract or otherwise," the hiring person can nevertheless be liable if the contractor fails "to exercise reasonable care to take such precautions" and the contractor’s performance of the work causes injury to others.

2 As described, infra, ten states require by legislative enactment that any hirer of an independent contractor be liable for all workers’ compensation payments for any employee on a job, even employees of subcontractors.

3 Civil Code § 1714: "(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

4 The majority in Toland also rejected a modification of the peculiar risk doctrine that would hold a hirer liable under peculiar risk if they had "superior knowledge" of a peculiar risk. This would have applied a subjective standard to the determination of liability. The majority disliked this suggestion because it would provide a standard that prevented summary judgment in any case because,

"superior knowledge" is a question for the jury. Therefore, it would have the same effect as creating a duty in all situations for purposes of summary judgment.

5 This position is in conflict with Labor Code § 3852, which allows such third party suits for negligence.

6 The death of Mr. Hooker occurred when he was crushed under his crane when it rolled on top of him. The reason it rolled was due to the retraction of the outriggers that provided support for the crane. The outriggers had to be constantly retracted because of construction traffic passing through a narrow area, including trucks from Cal Trans. Decedent's heirs argued that had other traffic flow patterns been required by Cal Trans, the outriggers would not have to be removed and the incident would not have occurred.

7 It is of special note in regards to the McKown case that McDonald specifically states that a duty exists in the cases of a hirer who "provides defective equipment" to employees of subcontractors. The Court stated liability would exist if "... this [were] a case where the owner furnished the equipment or was obligated by contract to do so, and the equipment proved to be defective, causing injury to the employee of the independent contractor." (McDonald v. Shell Oil Co. (1955) 44 Cal.2d 785, 791)

8 The states with such workers' compensation rules are as follows: Colorado CRS 8-41-40; Georgia Code Ann. § 34-9-8; Kansas K.S.A. 44-503; Kentucky Code 342.700; Nevada NRS 616A.210; Oklahoma Code § 85-11; Pennsylvania WCA § 52; South Carolina Code § 42-1-40; Tennessee Code 50-6-113; Virginia Code 65.2-302.

9 The only exceptions to this rule are Florida, Ohio and Utah, which apply slightly different retained control analysis. These states require "active participation" in the work, which is less restrictive than the standards as dictated in Kinney v. CSB Construction (2001) 87 Cal.App.4th 28, which holds that evidence of an "affirmative act" placed duty upon hirer. (See Conklin v. Cohen (Fla. 1973) 287 So.2d 56, 60; Cafferkey v. Turner Constr. Co. (1986) 21 Ohio St.3d 110, 113; and Thompson v. Jess (1999 UT 22).) However, they all still impose a duty if the higher proof of control is established. Kentucky is the only state in the union that held § 414 does not apply to employees of subcontractors in the decision of King v. Shelby Rural Electric Cooperative Corp. (1974) 502 S.W.2d 659, 662. However, this decision was issued one year after the state Legislature had already held a hirer liable under workers' compensation and immune to third party liability.

10 See Lewis v. N.J. Riebe Enter. (1992) 170 Ariz. 384; Elkins v. Arkla, Inc. (1993) 312 Ark. 280, 281; Makaneole v. Gampon (1989) 7 Haw.App. 448, 454; Corsetti v. Stone Co. (1985) 396 Mass. 1, 10; Jones. v. James Reeves

Contractors, Inc. (Miss. 1997) 701 So.2d 774; Parrish v. Omaha Pub. Power Dist. (1993) 242 Neb. 783, 796-7; Elliot v. Public Service Co. of N. H. (1986) 128 N.H. 676, 680; Coastal Marine Service of Texas v. Lawrence (Tex. 1999) 988 S.W.2d 223, 226; Tauscher v. Puget Sound Power & Light Co. (1981) 96 Wn.2d 274, 287; Dykstra v. McKee & Co. (1981) 100 Wis.2d 120.

11 See Alabama Power Co. v. Beam (Ala. 1985) 472 So.2d 619; In McGlothlin v. Municipality of Anchorage (Alaska 1999) 991 P.2d 1273, fn 20, the Alaska Supreme Court unequivocally wrote, "[w]e expressly adopted the Restatement (Second) of Torts § 414 (1965) when we approved of the retained control theory of negligence"; Raboin v. North American Industries, Inc. (2000) 57 Conn.App. 535, 539 rev. denied September 14, 2000; of Jin v. Doubles Developers, Inc. (Del.Supr. 11-8-2000) ___ A.2d ___; Vickers v. Hanover Construction. Co., Inc. (1994) 125 Idaho 832; Gneiting v. Idaho Asphalt Supply, Inc. (1997) 130 Idaho 393; Bokodi v. Foster Wheeler Robbins (2000) 312 Ill.App.3d 1051, 1059; Carie v. PSI Energy, Inc., (Ind. App. 1999) 715 N.E.2d 853; Robinson v. Poured Walls of Iowa, Inc. (Iowa 1996) 553 N.W.2d 873, 876; Crane v. Exxon Corp., U.S.A. (La.App. 1 Cir. 1992) 613 So.2d 214, ¶17, (rev. granted 620 So.2d 858 (1993) on unrelated issue); Mudgett v. Marshall (1990 ME) 574 A.2d 867; Parker v. Neighborhood Theatres (1988) 76 Md.App. 590, 601; also Plummer v. Bechtel Construction (1992) 440 Mich. 646; Sutherland v. Barton (Minn. 1997) 570 N.W.2d 1, 5-6; Matteuzzi v. Columbus Partnership, L.P. (Mo.banc 1993) 866 S.W.2d 128, 131; Beckman v. Butte-Silver Bow County (MT 2000) 112, ___ Mont. ___; Elliot v. Public Service Co., of N. H. (1986) 128 N.H. 676, 680; Carvalho v. Toll Bros. and Developers (1996)143 N.J. 565, 579; Valdez v. Cillessen & Sons, Inc. (1987) 105 N.M. 575, 579; Whitaker v. Norman (1989) 75 N.Y.2d 779, 780; O'Carroll v. Roberts Industrial Contractors (1995) 119 N.C.App. 140, 144; Oregon Code 654.305; Madler v. McKenzie County (N.D. 1991) 467 N.W.2d 709; Blumhardt v. Hartung (1979) 283 N.W.2d 229, 234; Gero v. J.W.J. Realty (June 16, 2000) ___ Vt. ___; Kerns v. Slider Augering & Welding, Inc. (1997) 202 W. Va. 548, 555; Hittel v. Wotco, Inc. (Wyo. 2000) 996 P.2d 673, 676.

12 Labor Code § 3852: "The claim of an employee, including, but not limited to, any peace officer or firefighter, for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer."