



Update on California Premises Liability



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In the September 2001 issue of *Columns: Asbestos*, we looked at the impact of *Camargo v. Tjaarda Dairy, Inc.*, 25 Cal. 4th 1235 (2001), on asbestos-related premises liability claims in California. Since then, the California Supreme Court has completed a premises liability trilogy of decisions with *Hooker v. Department of Transportation*, 27 Cal. 4th 198 (2002), and *McKown v. Wal-Mart Stores, Inc.*, 27 Cal. 4th 219, 226 (2002), and several Courts of Appeal also have contributed published opinions. This article summarizes the developments in California premises liability law pertinent to asbestos litigation.

I. The Analytical Framework for Actions Against Premises Owners

Premises liability issues arise in California asbestos litigation primarily where the injured plaintiff was an employee of an independent contractor hired by a premises owner to perform work on the premises. In this situation, the plaintiff is barred from maintaining a claim against the premises owner based solely upon the latter's status without regard to fault. *Toland v. Sunland Housing, Inc.*, 18 Cal. 4th 253, 267 (1998). The *Privette-Toland* doctrine bars the assertion of vicarious liability in tort against the hirer of a contractor for injuries to the contractor's own employees. *Zamudio v. City & County of S.F.*, 70 Cal. App. 4th 445, 451 (1999); see *Privette v. Superior Court*, 5 Cal. 4th 689 (1993).

Therefore, the premises owner will not be held liable unless it committed some independent act of negligence which affirmatively contributed to the plaintiff's injury. *Hooker*, 27 Cal. 4th at 198. *Grahm v. Superior Court*, 58 Cal. App. 4th 1373 (1997), disapproved on other grounds by *Camargo*, 25 Cal. 4th at 1245, was the first asbestos case to set forth examples of independent negligence by premises owners. *Grahm* presented three examples of such independent acts of negligence: negligent exercise of retained control, negligent hiring of

the plaintiff's contractor employer, and negligent maintenance of a dangerous condition on the premises. *Id.* *Camargo* eliminated the negligent hiring theory as an avenue of recovery. 25 Cal. 4th at 1244. Subsequently, the possible theories for a contractor's employee to maintain a negligence action against the premises owner who hired his contractor employer have been further clarified and supplemented, as discussed in further detail below.

II. *Hooker v. Department of Transportation*

In *Hooker*, the California Department of Transportation ("Caltrans") hired a general contractor to construct an overpass. 27 Cal. 4th at 202. The decedent, a crane operator employed by the general contractor, was killed when the crane tipped over because he had retracted the outriggers to allow other vehicles to pass. *Id.* The safety chapter of the Caltrans construction manual stated that Caltrans was responsible for compliance with all safety laws and regulations and that the construction safety coordinator must be familiar with traffic management and be able to recognize and anticipate unsafe conditions. *Id.* The decedent's widow sued Caltrans under the theory that Caltrans' negligent exercise of retained control over safety conditions at the jobsite caused her husband's death.

The *Hooker* court held that "a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as the hirer's exercise of retained control affirmatively contributed to the employee's injuries." *Id.* at 202 [emphasis original]. In doing so, the court rejected the "retained control" standard articulated in *Grahm* — that to be liable the hirer needed only to retain sufficient control over the contractor's work to be able to prevent or eliminate through the exercise of reasonable care the cause of the injury. *Id.* at 209. Under the *Hooker* standard, such mere retention of the ability to control

safety conditions is not enough. *Id.* Rather, the hirer must engage in conduct that affirmatively contributes to the employee's injury. *Id.* at 211-12. *Grahn* was disapproved insofar as it was inconsistent with *Hooker*. *Id.* at 214. Caltrans permitted construction vehicles to use the narrow overpass as a shortcut. *Id.* at 214.

Decedent retracted the crane's outriggers so that the vehicles could pass by. *Id.* The court found that Caltrans, by permitting traffic to use the overpass while the crane was being operated, did not affirmatively contribute to decedent's death. *Id.* at 215. Caltrans did not direct the crane operator to retract his outriggers to permit traffic to pass. *Id.* Thus, while Caltrans may have retained control over the safety conditions, it did not actually exercise that retained control so as to affirmatively contribute to the accident. *Id.* Consequently, Caltrans was not liable. *Id.*

III. *McKown v. Wal-Mart Stores, Inc.*

McKown introduced a theory of independent negligence not discussed in *Grahn*: negligent furnishing of unsafe equipment to the contractor. 27 Cal. 4th at 225. In *McKown*, Wal-Mart hired an independent contractor to install overhead sound systems in its retail stores. *Id.* at 223. "Wal-Mart requested that the contractor use Wal-Mart's forklifts whenever possible in performing the work. The request was understood not to be a directive." *Id.* Plaintiff, a contractor's employee, used a Wal-Mart forklift to perform the work. *Id.* He used the forklift to elevate a work platform on which he stood to access the ceiling. *Id.* Although the forklift was supposed to have two safety chains securing the platform to the lift, it had only one. *Id.* When the platform accidentally hit a ceiling pipe, the platform disengaged and plaintiff fell to his injury. *Id.* Plaintiff sued Wal-Mart on the ground that it negligently furnished him an unsafe forklift. *Id.*

The court held that a premises owner is not liable for injuries resulting from defective equipment unless the owner supplied them or had the privilege of selecting them or the materials out of which they were made. *Id.* at 225, quoting *McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 788-89 (1955). "[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the

"Though the theories of liability may appear under different names, the fundamental question is whether the premises owner/hirer took affirmative steps which contributed to the injury."

contractor." *Id.* Therefore, plaintiff was allowed to recover against Wal-Mart because Wal-Mart requested that plaintiff use, and supplied, a forklift that was unsafe due to the missing chain. *Id.*

IV. *Ray v. Silverado Constructors*

In *Ray v. Silverado Constructors*, 98 Cal. App. 4th 1120, 1123 (2002), general contractor Silverado hired subcontractor Rados on a bridge construction project. Decedent, a Rados employee, was struck and killed by construction materials which below off the bridge overhead on a windy day. *Id.* at 1124. Decedent's widow sued Silverado, alleging active negligence in failing to exercise due care for the work site. *Id.* Appeal was taken from a summary judgment in favor of Silverado. *Id.*

The court emphasized that the *Hooker* standard requires "affirmative contribution," not "affirmative conduct." *Id.* at 1128-29.

[A]ffirmative 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.

Id. at 1129, quoting *Hooker*, 27 Cal. 4th at 212 n.3. Thus, while *Hooker* stated that the mere ability to control safety conditions does not give rise to liability, a premises owner or hirer who affirmatively takes on the responsibility to control them may be found to have "affirmatively contributed" to the injury. *Id.* at 1129.

In the *Ray* fact pattern, Rados was barred from undertaking enumerated safety measures without prior written consent of Silverado. *Id.* at 1134. Thus, Silverado was the party empowered to close off the road underneath the bridge at the critical time. *Id.* The court concluded that "this looks like retained control," and ruled that there were triable issues of material fact as to retained control sufficient to defeat summary judgment. *Id.*

V. *Lopez v. C.G.M. Development, Inc.*

In *Lopez v. C.G.M. Development, Inc.*, 101 Cal. App. 4th 430, 434 (2002), premises owner CGM hired general contractor Dekkon to develop commercial property. Dekkon in turn hired a subcontractor to frame the roof according to plans prepared by an architect. *Id.* Plaintiff, an employee of the subcontractor, fell from a wooden platform when a metal hanger attaching the platform to the roof failed to provide adequate support. *Id.* at 229. He sued CGM, alleging that it exercise of retained control affirmatively contributed to the employee's injuries. *Id.* at 237.

Following *Hooker*, the court found that CGM did not retain control over work conditions at the jobsite, and it did not affirmatively contribute – by act or omission – to plaintiff's injuries. *Id.* at 446. CGM's contract with Dekkon provided that Dekkon was solely responsible for and had control over construction means, methods, and procedures. *Id.* Furthermore, Dekkon provided all of the materials, tools, and equipment for the construction. *Id.* A Dekkon employee supervised the work of the subcontractors and held weekly safety meetings. *Id.* Although a CGM vice-president occasionally appeared at the jobsite to express her opinion that the construction was behind schedule, she did not supervise any of the work or tell any of the workers how to do their job. *Id.*

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Even if the architectural plans were defective, the evidence did not show that CGM knew or should have known about the defect or that CGM prepared the plans with respect to the framing of the roof. *Id.* Therefore, the evidence did not suggest that CGM affirmatively contributed to plaintiff's injury. Accordingly, plaintiff could not recover against CGM. *Id.*

The *Lopez* court also held that the *Privette-Toland* rule bars recovery against the hirer even if the plaintiff's contractor employer does not actually have workers' compensation coverage. *Id.* at 445. Moreover, the hirer has no duty to ascertain whether the contractor was properly insured. *Id.*

VI. *Park v. Burlington Northern Santa Fe Railway Company*

In *Park v. Burlington Northern Santa Fe Railway Company*, 108 Cal. App. 4th 595, 597 (2003), Burlington employed Consolidated, a hazardous waste disposal contractor, to dispose of used batteries. Plaintiff, a Consolidated employee, was injured in an explosion while repackaging the batteries from Burlington's containers into Consolidated's drums. *Id.* Plaintiff sued Burlington on a retained control theory. *Id.* at 605.

The court found that Burlington did not retain sufficient control over the disposal work so as to affirmatively contribute to plaintiff's injuries. *Id.* at 611. The cause of the accident was Consolidated's repackaging of the batteries into drums it selected which lacked adequate ventilation. *Id.* Although Burlington was informed of Consolidated's packing methods and knew through manifests that Consolidated was certifying batteries for transport that were not safely packaged, that did not amount to affirmative exercise of retained control. *Id.* at 614. Therefore, Burlington was not liable for plaintiff's injuries. *Id.*

VII. *Sheeler v. Greystone Homes, Inc.*

In *Sheeler v. Greystone Homes, Inc.*, 113 Cal. App. 4th 908, 910 (2003), an injured employee

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of a masonry and tile subcontractor sued Greystone, the general contractor who hired the subcontractor. Although the defendant was not a premises owner, the *Sheeler* analysis and holding applies equally to a premises owner who hires a general contractor.

Plaintiff tripped on debris while climbing a staircase at a construction site. *Id.* He contended “that Greystone negligently retained control over a facet of safety operations, namely, the scheduling of cleanups; that Greystone negligently scheduled a cleanup at the same time that [plaintiff] was to work in the unit, rather than before he commenced his work; and that Greystone’s cleanup contractor negligently swept debris onto the stairs, causing [plaintiff’s] injuries.” *Id.* at 920.

The court disagreed, finding no evidence that Greystone exercised retained control in a manner that affirmatively contributed to plaintiff's injuries. *Id.* at 920, 922. There was no evidence that Greystone scheduled cleanups solely to ensure safety, as opposed to for other reasons such as to facilitate painting. *Id.* at 920. There was no evidence that Greystone scheduled a sweep to occur while plaintiff was working. *Id.* Lastly, there was no evidence that the debris was swept by Greystone's cleanup subcontractor. *Id.* Plaintiff did not know the identity of the sweeper, and in any event, nothing indicated that Greystone exercised any control over the manner in which the man swept the unit. *Id.* Therefore, plaintiff could not recover against Greystone. *Id.* at 922.

The court distinguished the case at bar from *Ray* because nothing obligated Greystone to schedule cleanups to ensure safety, and Greystone was unaware of the debris on the

stairs. *Id.* at 921. Thus, Greystone did not affirmatively contribute to the injury through an omission. *Id.*

Sheeler also squarely rejected plaintiff's argument that Greystone was liable due to a nondelegable duty to ensure the safety of the premises upon which plaintiff worked. *Id.* at 921-22. The court noted that the nondelegable duty rule is a form of vicarious liability because it is not based on the personal fault of the landowner who hired the independent contractor. *Id.* at 922. Thus, application of the nondelegable duty rule cannot be reconciled with the *Privette-Toland* limitations on suits against hirers based on vicarious liability. *Id.* In so concluding, *Sheeler* — the first California published decision to address the issue — adopted the position which the authors of this article advocated in their 2001 article on premises liability.

VIII. Conclusion

The foregoing cases show a trend in California law to focus upon retained control as the determinative issue in hirer liability for injuries to a contractor's employee. Though the theories of liability may appear under different names (*e.g.* negligent exercise of retained control or negligent provision of defective equipment), the fundamental question is whether the premises owner/hirer took affirmative steps which contributed to the injury. A general supervisory right or a passive ability to control safety conditions is not sufficient to create liability. The hirer will be liable only where its affirmative conduct — either directing the contractor how to do the work, or assuming responsibility for a relevant safety aspect then omitting to exercise due care — contributed to the employee's injury.

