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Construction-site injury cases – knowing what you need to prove

THE KEY TO THESE CASES IS UNDERSTANDING THE LAW AND HOW TO OBTAIN THE EVIDENCE TO PROVE YOUR CASE

As a general rule, most workers injured while working at a construction site will receive workers' compensation benefits, which is the exclusive remedy the injured worker has against their employer, with some exceptions under Labor Code section 3600, et seq.

The injured worker can also pursue third parties for compensation who bear responsibility for their injuries. The potential defendants may include the following:

- project owner
- general contractor (assuming the injured worker was not an employee)
- other subcontractor(s)
- materials/equipment suppliers

Understanding the peculiar risk doctrine and the case law

In analyzing which if any of these entities may bear responsibility, you need to be familiar with the current state of the law in California as it relates to the liability of these potential third-party defendants.

Under the common-law doctrine of "peculiar risk," the project owner could be held vicariously liable when hiring an independent contractor to do inherently dangerous work if the contractor causes injury to others by negligently performing the work.

However, beginning with the landmark case of *Privette v. Superior Court* (1993) 5 Cal.4th 689, and the cases that followed (see, e.g., *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 523; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198; and *Seabright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590), the California Supreme Court under the "*Privette* doctrine" has continually been limiting the liability of the owner (and general contractor acting as the hirer of the independent contractor) to situations where the owner or general contractor *both* 1) retained a right of control over the work being performed which caused injury to the worker and 2) negligently exercised such control over the work in a manner that affirmatively contributed to the worker's injuries. In the absence of such evidence, the owner/general contractor will not be held liable for the negligence of the independent contractor it hired in causing injury to its employee.

Regarding the potential liability of a landowner/occupier for a dangerous condition on the property, the Supreme Court in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 held that a landowner/occupier who hires an independent contractor may be liable for injuries to the independent contractor or its workers if the landowner knew, or should have known, of a concealed hazard on the property that the contractor did not know of and could not have reasonably discovered, and the landowner failed to warn the contractor of the hazard.

However, most recently, a 2021 Supreme Court decision held that, when an owner hires an independent contractor to perform a task on the owner's property, unless the owner retains control over any part of the contractor's work and negligently exercises that retained control in a manner that affirmatively contributes to the injury, it will not be liable to an independent contractor or its workers for an injury resulting from a known hazard on the premises. (*Gonzales v. Mathis* (2021) 12 Cal.5th 29).

Further, the Court in *Gonzales* specifically held that a landowner/occupier is *not* liable for injuries to an independent contractor or its workers that result from a known hazard on the premises where there were no reasonable safety precautions they could have adopted to avoid or minimize the hazard, even in the situation where the independent contractor is unable to minimize or avoid the danger through the adoption of reasonable safety precautions.

Another 2021 Supreme Court decision, *Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256, provides further clarification on the three key concepts outlined in *Hooker* (retained control, actual exercise, and affirmative contribution), and whether the corresponding CACI jury instruction on Liability to Employees of Independent Contractors for Unsafe Conditions – Retained Control (CACI No. 1009B), adequately captures the elements of a claim under *Hooker*.

The Court in *Sandoval* emphasized that "retained control" means more than general control; rather, the control must be exercised over the methods and manner of the work being performed at the time of the injury-producing event. Further,

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that the hirer of the independent contractor "actually exercised" such control by exerting some influence over the manner in which the work is performed through direction, participation or induced reliance. Finally, that "affirmative contribution" meant that the hirer's exercise of retained control in some respects induced – not just failed to prevent – the independent contractor's injury-causing conduct.

The Court in *Sandoval* then addressed the issue of whether CACI 1009B adequately instructed juries on the necessary elements of a *Hooker* claim and concluded it did *not*. The Court reasoned that the instruction improperly conflated the liability of a landowner for a dangerous condition on the property under *Kinsman* with the liability of the hirer of an independent contractor under *Hooker* by including as an element of the *Hooker* theory that the defendant owned or controlled the property on which the incident occurred, when in fact no such limit governs the retained control exception recognized in *Hooker*.

Further, the Court in *Sandoval* determined that CACI 1009B's requirement that, "retained control over safety conditions at the worksite" does not properly capture whether the hirer retained control over the manner of performance of some part of the work entrusted to the contractor. And that whether the hirer's "negligent exercise of its retained control over safety conditions was a substantial factor in causing plaintiff's harm" does not properly capture whether the hirer's exercise of retained control affirmatively contributed to the plaintiff's injury. As a result, the Court concluded that the "Judicial Council and its Advisory Committee on Civil Jury Instructions should update this instruction with suitable language consistent with this opinion." (*Id.* at 283.)

The new CACI instruction published in response to the *Sandoval* case

The updated CACI 1009B instruction published in June of 2022 in response to the *Sandoval* opinion eliminates the first requirement that the defendant owned/leased/occupied/controlled the property entirely. It changes the requirement that the defendant retained control over safety conditions at the worksite to a requirement that the defendant retained some control over the contractor's manner of performance of the work at issue.

The new version also changes the requirement that the defendant negligently exercised retained control over safety conditions to a requirement that the defendant actually exercised its retained control over the work at issue. Finally, the new version changes the final requirement that the defendant's negligent exercise of retained control over safety conditions being a substantial factor in causing the plaintiff's harm to a requirement that the defendant's negligent exercise of retained control affirmatively contributed to plaintiff's harm, eliminating the link to "safety conditions" and the "substantial factor."

Practically speaking, to establish the liability of the owner and general contractor as hirers of the independent contractor whose employee is injured, you must develop the evidence to show that these potential defendants retained and exercised control over the work being performed by the independent contractor and its employees at the time the injury occurred and their negligence in the exercise of this control *affirmatively* contributed to the employee's injuries (as opposed to the mere failure to act).

Developing your evidence to meet the burden

So, how do you obtain this evidence? It starts with conducting as much investigation as you are able to once you are retained by your client, prior to bringing your third-party case. The questions to ask: Who was directing the work being performed? Who supplied the equipment/tools/materials being used by the injured worker? What other trades/subcontractors were working in proximity to where the injury occurred? Was your client or any of their co-workers able to get photos or videos showing the location/conditions where the injury occurred? Was there a Cal/OSHA investigation? Did your client's employer conduct an investigation as part of their reporting the injury to their workers' compensation insurer? The more information you can develop before filing your third-party case, the more prepared you will be in identifying potential third-party defendants and being ready to respond to their discovery once your case is filed.

Once you have filed your case, your discovery will be critical to obtaining both documentary and testimonial evidence to establish the defendants' liability. Serving document demands for all project contracts, Illness and Injury Prevention Programs (or "IIPP"s, required for all contractors by Cal-OSHA), job progress and safety meeting minutes, and tailgate meeting logs and sign-in sheets will all provide critical information on who was directing/controlling the work, what specific jobsite hazards were identified and what safety precautions were being taken (or were supposed to have been taken) to mitigate the hazards. To assist in the identification of witnesses, demand payroll records showing who was working on the site and consider issuing subpoenas for workers' compensation insurance records to show who was working on site (premiums charged for these policies are based on the payroll records provided by the contractor to its workers' compensation insurer).

To the extent there was an investigation conducted by Cal/OSHA, issue a subpoena for all photos, witness statements and reports generated from the investigation. Do the same with the employer. Consider other third parties to issue subpoenas to, who may have been involved with safety at the site.

I recently had a case where the general contractor had hired a safety contractor to help with developing the written safety programs (the IIPPs) and conducting periodic safety inspections at the site, a large apartment/retail building

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under construction. The case involved a fall from shoring scaffolding because of my client not being supplied with a proper safety harness with double hooks to climb up the scaffolding. When the documents were produced, I discovered that on two occasions prior to the fall the safety inspector reported to the general contractor that he had observed workers working without safety harnesses. Despite this, the general contractor took no action in response before the fall occurred.

You should also be looking at the safety program documents, in particular the IIPPs and safety meeting minutes, for a "job hazard analysis." (Cal/OSHA requires employers to conduct a hazard assessment of the worksite and to document these hazard evaluations as well as the corrective actions taken to reduce or control known or suspected hazards.) I recently had a case where my client was operating an excavator, digging trenches, when he struck temporary underground power lines, which were unmarked and not covered by concrete, as was required, sustaining severe shock injuries as a result. I also learned later the lines were not placed in the location shown on the plans for placement of the lines. The job hazard analysis I obtained through discovery specifically identified the power lines as a safety hazard, and the failure of the contractor to ensure that the lines were properly located and protected (in violation of the National Electrical Code) helped to definitively establish the liability of the contractor for my client's injuries.

Get your experts on board early!

To assist you with identifying such standards and code requirements, I strongly recommend retaining a qualified construction safety expert early on to assist you with drafting your discovery to make sure you are asking for the right things in your written discovery and asking the right questions in deposition. Such an expert will also be able to assist you in identifying whether the Defendant committed any Cal/OSHA or other uniform code violations which create duties and standards, the violations of which can help establish the Defendants' negligence by showing that applicable standards of care were not followed by the contractor. (While Cal/OSHA citations and fines, or lack thereof, and the findings of the Cal/OHSA investigator are not admissible in a personal injury action against a contractor under California Labor Code section 6304.5, the failure of the contractor to follow standards of care created by such regulation and codes can be used to establish the contractor's negligence.)

Finally, you should consider whether there is a potential products-liability case against an equipment or material supplier. Did a piece of equipment or tool contribute to the injury as a result of the equipment or tool being defectively designed, manufactured or misused in a manner that was reasonably foreseeable? Inadequate warnings or instructions on proper use of the equipment or tool? Again, involving an expert early on is key in determining whether there may be such a case.

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