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The construction-site case from complaint through discovery

A LOOK AT WHAT IT TAKES TO GET YOUR CONSTRUCTION-SITE PREMISES-LIABILITY CASE TO TRIAL

Injuries on a construction site are, unfortunately, very common occurrences. Hazards exist everywhere, and workers are often at risk of serious injuries. Common examples of injuries include if a worker is injured by the negligence of a general contractor (e.g., the general contractor provides a broken forklift that malfunctions while being used, injuring the subcontractor); the negligence of the property owner (e.g., the owner fails to warn about a concealed hazardous electrical issue and the worker gets electrocuted); or the negligence of another subcontractor (e.g., one subcontractor digs a trench and a worker for another subcontractor falls in).

Typically, recovery for injuries sustained at a construction site would be limited to workers' compensation. However, there are avenues towards setting up a successful civil case against the general contractor and other subcontractors, under the theories of negligence and premises liability. This article will walk you through the steps of setting up a successful construction premises-liability case, from the legal hurdles, discovery and experts.

Establishing liability of the general contractor -- *Privette*

Unlike the liability of a separate subcontractor who creates a dangerous condition, the liability of a general

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contractor is not so straightforward. The *Privette* Doctrine arises from the California Supreme Court case *Privette v. Superior Court* (1993) 5 Cal.4th 689, which contemplated whether an injured worker could hold the hirer or landowner liable for injuries sustained while working on the premises. The Supreme Court ultimately held that the plaintiff could not sue the hirer of an independent contractor who had no fault in the injury, when the plaintiff's employer, an independent contractor, carried proper workers' compensation. (*Id.* at 692.) In general, the rule is meant to prevent injured workers from seeking recovery outside of workers' compensation, under the rationale that the hirer of the injured party had no control over the work done and therefore should not be held "vicariously" liable. As such, it is often used by general contractors or landowners to avoid liability on a third-party claim.

Over the years since *Privette* was decided, courts have re-examined the limits and carved out certain exceptions, including when the injury results from (1) the general contractor affirmatively contributing to the incident by retaining control over conditions that lead to the incident; (2) the failure of the general contractor to warn about a hidden, dangerous condition; or (3) defective equipment supplied by the general contractor. Each of the above exceptions is noteworthy, as they can provide the basis for maintaining a civil lawsuit against the otherwise-protected general contractor.

The common theme that runs through each court-held exception is that a general contractor who somehow affirmatively contributes to the incident that causes injuries should be held liable for these actions. Conversely, courts have found that a general contractor whose only job was to hire the subcontractor to perform work on the construction site should not necessarily be held liable, as their role is only as a hirer, and workers' compensation coverage is already available. Below we will discuss the specific cases that have presented exceptions to the *Privette* Doctrine.

Hooker and retained control

Nearly ten years after *Privette* was decided, the California Supreme Court ruled on *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, which asked the Court to decide whether retained control could form the basis of a claim against the hirer of an independent contractor. The key, the Court contemplated, was whether the hirer had affirmatively contributed to the injuries in retaining control. This scenario stands in contrast to times when the hirer has retained the ability to exercise control over the worksite, but does not actually do so: "The fairness rationale at the core of *Privette* and *Toland* applies equally to preclude imposition of liability on a hirer for mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice, where such liability would exceed that imposed on the injured plaintiff's immediate employer, who created the hazard." (*Hooker, supra*, at p. 211 (citing *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 36).)

In *Hooker*, the Court found that there was insufficient evidence of triable issues of fact to withstand summary judgment. In that case, the plaintiff's husband died when a crane he was operating tipped over. Although there was evidence that the defendant knew that operating the crane in the manner the plaintiff's husband had done was potentially dangerous and could lead to the crane tipping over, there was no evidence that the defendant had affirmatively contributed to the decedent's actions in operating the crane. Importantly, the *Hooker* Court found that merely having the ability to correct conditions, or enact safety precautions, is insufficient to find the general contractor is liable under a retained control theory. (*Hooker, supra*, at p. 215.)

In practice, this requires looking at the facts of the case, and considering what actions the defendant has taken that affirmatively contributed to the plaintiff's injuries. Finding liability on the theory of retained control requires a careful examination of the available evidence in your case, and numerous depositions of persons at the job site in order to establish who really was in control of the situation.

Failure to warn of dangerous condition – *Kinsman*

A general contractor can also be held liable for failing to warn a subcontractor of a concealed dangerous condition on the property. In *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, the California Supreme Court created another exception to *Privette* where (1) the hirer either knows or should have reasonably known about a concealed dangerous condition, (2) the subcontractor does not know and reasonably could not have known about it, and (3) the hirer fails to warn the subcontractor about the hazard. (*Kinsman, supra*, at p. 675.) Under this reasoning, a hirer cannot escape liability where it knows of a certain dangerous condition that is not readily apparent or known to the subcontractor, even if the hirer does not retain control over the work done.

Establishing a case under the *Kinsman* exception to *Privette* may seem straightforward, however rarely will a defendant simply admit that the dangerous condition was hidden, that the defendant knew of its existence, or even that the condition was dangerous in the first place. Through careful discovery, you will build the foundation to this claim. Obtaining all communications, including meeting notes, reports, witness statements, along with photographs, building plans, site maps, and deposition testimony will be crucial to establish what the defendant knew, and what the plaintiff and his company reasonably could have known about.

Defective equipment – *McKown*

Providing defective equipment has been found to essentially be a subset of

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"retained control." In *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, the California Supreme Court was presented with the question of whether the hirer of an independent contractor can be held liable for providing defective equipment to the worker. In holding that the hirer could be held liable, the Court considered that liability was proper given that in this scenario, the hirer was affirmatively contributing to the worker's injuries by providing him with the defective equipment. As Wal-Mart had requested that the workers use Wal-Mart's own forklifts, there were no reasonable alternative forklifts to use, and the worker was injured when the Wal-Mart forklift malfunctioned and the worker fell off of it, the jury's verdict against Wal-Mart could stand.

Independent contractors without workers' compensation coverage

The above sections discussed scenarios where the employee of a subcontractor is injured on the job. But what happens when the injured party is an independent contractor working for the general contractor, or is an employee of a general contractor that has no workers' compensation coverage?

Separate and apart from the *Privette* Doctrine and exceptions thereto, the California Labor Code allows for a lawsuit to proceed directly against an employer under very specific circumstances. This can affect lawsuits brought by independent contractors working for a subcontractor at a construction site, or the employees of the general contractor. In both scenarios, it might be possible to hold the general contractor civilly liable for the injured worker.

California Labor Code section 2750.5 has created a rebuttal presumption that a worker performing work that requires a license is an employee rather than an independent contractor. (Lab. Code, § 2750.5.) In other words, even if the worker would otherwise be classified as an independent contractor as opposed to an employee, the worker can still benefit from classification as an employee unless it can be established that (a) the individual has the right to control and discretion as to the manner of performance of the contract for services; (b) the individual is customarily engaged in an independently established business; and (c) the independent contractor status is "bona fide and not a subterfuge to avoid employee status." (Lab. Code, § 2750.5, subds. (a)-(c).)

Labor Code section 3706 provides that "if any employer fails to secure the payment of compensation, any injured employee . . .may bring an action at law against such employer for damages, as if this division did not apply." A lawsuit brought under section 3706 is extremely beneficial to the plaintiff, as a presumption of negligence attaches, and the defendant employer cannot assert contributory negligence, assumption of the risk, or the negligence of another party as a defense. (Lab. Code, § 3708.)

Putting these Code sections together, an injured independent contractor may still have standing to bring a civil claim, as may an injured employee of a general contractor. The injured independent contractor, if performing work that requires a license, may be conferred the status of an employee. If the employer has no workers' compensation coverage, then a civil lawsuit may be maintained against them. Similarly, if a general contractor is operating without workers' compensation coverage for its employees, an injured employee may be able to maintain the civil case with the presumption of negligence afforded under Labor Code section 3708.

When these situations arise in the case, it is important to work closely with the workers' compensation attorney on the matter. If the case goes to trial at the workers' compensation level, and there is a finding that the general contractor failed to check for licenses, or that the general contractor failed to secure workers' compensation coverage for the injured party, then these issues should be conclusively established for purposes of the civil case. In other words, the workers' compensation findings can be used to your advantage in the civil action as res judicata, potentially setting you up for a motion for summary adjudication on the issue.

The takeaway from this section is that even when it seems like there is no way to hold a possible defendant liable for the incident, the Code and case law can allow you to be creative and find loopholes around no liability.

Discovery, experts and pre-trial considerations

Once the theories of liability are in place, it is time to turn to discovery, and how you will prove your theory. In a construction case, as with any other case, both written discovery and depositions are crucial for establishing how the incident occurred.

Every construction site case is going to come with many different rules and regulations that you can use to pinpoint violations that ultimately caused your client's injuries. This is why it is crucial you hire a safety expert early in the case. But be careful on the type of expert you hire. There are dozens of construction experts in Southern California, but the vast majority of these men and women have only testified in construction defect cases. They rarely, if ever, have actual experience analyzing jobsite safety and injury prevention, which are extremely important topics in premises construction cases.

This means you are going to want to deeply vet any expert you intend to retain by confirming he or she has actual construction experience, and that he or is she is an expert in safety and injury prevention on jobsites. Make sure he or she has an in-depth understanding of OSHA and CAL-OSHA regulations, Injury and Illness Prevention Programs (IIPPs) that all contractors must have, as well as safety meeting customs and practices. This will give you a leg up every time in the battle of the experts. Almost every defense expert we have deposed only has experience in construction defect cases, with little to no knowledge of the

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safety rules and regulations. At trial, we then are able to dismantle the expert in no time at all, by showing they are not actually the right expert for this case.

Once you have retained your expert, you will want to work with this individual to determine the safety rule violations. The first place to look is the defendant's IIPP. This is the rule book all contractors are required to give their workers that lays out how to keep themselves, co-workers, other subcontractors, and the public safe while working on a jobsite. You will find solid gold if you comb through these documents. For example, on a trench case we had that went to trial in 2018, one of the defendants had a detailed section in its IIPP that laid out twenty different rules in regards to how its employees are required to ensure no one is injured in and around trenches. Nearly every single one of these rules was violated by the defendant's own employees. Juries don't like it when defendants deny liability, but all of their own employees violate these safety rules.

Attacking with OSHA violations

Attacking the defendant with its own rule violations will score the most points with the juries. Secondarily, you will want to attack them on OSHA violations. Your expert should be able to provide you with a list of all OSHA regulations that apply to your facts, but you will want to do your own research by not only reviewing the specific regulations, but also the "Interpretation Letters" OSHA publishes as official guidance on how to interpret OSHA requirements.

Again, going back to our trench case example, the trench at issue was three feet deep and two feet wide. The defense wanted to argue that under OSHA 1926.501(b)(4)(i) "Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) *more than 6 feet (1.8 m) above lower levels,* by personal fall arrest systems, covers, or guardrail systems erected around such holes." Therefore, since the trench was only three feet deep there was no duty on the general or subcontractor to cover or barricade the trench at issue.

However, when we dug deep (no pun intended) into the OSHA Interpretation Letters, we found two different opinions stating any "hole," as defined under OSHA 1926.500(b) as a "gap or void two inches or more in its least dimension, in a floor, roof, or other walking surface," must be covered or guarded under OSHA 1926.501(b)(4)(ii) stating "each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers." With these letters, we were easily able to easily rebut the defense experts' contentions that the trench did not need to be covered.

All of the above needs to be done very early in the case, preferably before you file, to enable you to dictate how discovery should be conducted so you can prove your case.

Depositions from subcontractors

On a construction site, there are often several subcontractors working under the general contractor at any given time, with each business employing multiple persons in various roles, including business owners, project managers, superintendents, forepersons, and workers. Based on safety meeting notes, reports, written witness statements in any OSHA report, and other materials, you will be able to determine which of these persons you need to depose, and often, there are multiple depositions that must occur, including the depositions of each company's person most knowledgeable (PMK).

For example, on our 2018 trench trial, we took the depositions of each company's PMK, in addition to the foreperson for each company and the general contractor's superintendent for the jobsite. During depositions, it became apparent that each company was pointing the finger at the other, and that the employees had no idea what was going on. These depositions became crucial at trial to establish the complete breakdown in the general contractor and subcontractor's systems, which led to our client falling into an unmarked and unbarricaded trench and suffering four broken ribs with a lacerated spleen.

In creating your PMK Deposition Notice, it is important to be as specific as possible with respect to each category of information you wish to have this person testify on. Some sample categories appear below:

1. Defendant's policies and procedures RELATING TO construction at the SUBJECT PREMISE;
2. Defendant's CONSTRUCTION PLANS for the SUBJECT PREMISE;
3. Defendant's policies, guidelines, procedures, forms, methods, and rules regarding warnings, caution, and notification of ongoing construction at the SUBJECT PREMISE at the time of the SUBJECT INCIDENT.
4. Defendant's policies, guidelines, procedures, and rules related to employee injury prevention at the SUBJECT PREMISE at the time of the SUBJECT INCIDENT.
5. Defendant's contracts and agreements with subcontractors RELATING TO the SUBJECT PREMISE;
6. Defendant's distribution of jobsite duties at the SUBJECT PREMISE;
7. The SUBJECT TRENCH at the SUBJECT PREMISE;
8. Covering the SUBJECT TRENCH at the SUBJECT PREMISE;
9. COMMUNICATIONS with any and all subcontractors RELATING TO the SUBJECT PREMISE.

Written discovery

Written discovery provides a great opportunity not only to gather all documents related to the construction site and the incident, but also a chance to establish the positions of the parties. In our construction cases, we propound written discovery early on in the case, using pre-existing templates specific to construction cases that we then tweak for the facts of each individual case.

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With each construction case, however, there are several base line items that we always request. This includes OSHA reports, meeting notes and handouts from safety meetings, tailgate meetings, and internal meetings, construction plans, photographs, surveillance footage, agreements and communications between the general contractor and subcontractors, and any IIPP manuals, policy and procedures on safety and other topics specific to the incident.

It should also be noted that while effective in determining who witnessed the incident and the positions of the parties, the OSHA Report is often not favorable to the plaintiff and is not something you may want to introduce at trial. Luckily, the law is on your side. California Labor Code section 6304.5 specifically states that the findings contained within an OSHA Report are not admissible at any personal injury trial.

Requests for admissions and special interrogatories can be used to establish what the defendants believe happened, and what measures they had in place to prevent these types of incidents in the first place. In addition, interrogatories and requests for admissions can help establish what may seem like basic facts, such as the depth of a trench, or the height of a platform, that can then be used to establish violations of the contractor's own policies and procedures. For example, in the same trench case mentioned above, we were able to use admissions as to the depth of the trench at the time of the plaintiff's fall against the defendants at trial, by showing that the general rules require trenches of a certain depth be covered at all times.

In addition, during our last construction trial, written discovery was also extremely useful to provide the jury with statements showing that the defendants were pointing the finger at each other. Oftentimes, their responses mirrored each other with the exception of the name of the at-fault party. For example, one would say "the trench was in the control of the general contractor" while the other would say "the trench was in the control of the subcontractor." These near-identical statements were impactful to the jury, who could see that neither party wanted to accept responsibility for creating the dangerous condition.

Conclusion

Construction cases may seem like a whole separate world from your typical slip- or trip-and-fall case. However, with the proper preparation and understanding of the specific terms and rules applicable to construction cases, you can set yourself up for success in a case against the general contractor and any subcontractors.

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