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July 2010

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CONSTRUCTION DEFECT/PROVETTE

• Tverberg v. Fillner Construction, Inc.

A general contractor is not vicariously liable for an independent contractor's on-the-job injuries arising from risks inherent in the nature or the location of the work that the independent contractor was hired to do and over which he has assumed control.

FACTS: Fillner Construction was the general contractor for the expansion of a commercial fuel facility. The project required a metal canopy to be built over fuel pumps. Fillner hired subcontractor Lane Supply to build the canopy. Lane Supply delegated the work to sub-subcontractor Perry Construction. Perry Construction hired independent contractor Jeffrey Tverberg as foreman of Perry's two man canopy construction crew. It is undisputed that plaintiff Tverberg was an independent contractor and not an employee. As part of the construction project, concrete posts intended to prevent vehicles from colliding with the gas pumps also were required. Eight holes, measuring four feet wide and four feet deep had been dug for this purpose by the time canopy construction was to start. The holes were located in the same area where the metal canopy was to be constructed. On his second day on the job, Tverberg fell into a hole and was injured.

The trial court granted defendant Fillner's motion for summary judgment on the ground that the general contractor could not be vicariously liable under the peculiar risk doctrine for an injured independent contractor's injuries. Privette v. Superior Court was a seminal California Supreme Court case that held that the hirer of an independent contractor is not vicariously liable to the contractor’s employee who sustains on-the-job injuries resulting from a special or peculiar risk inherent in the work. Those injuries, Privette explained, are covered by workers compensation insurance, the cost of which is generally included in the contract price for the project.

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In this case, the trial court followed the Second Appellate District's decision in Michael v. Denbeste Transportation, Inc. (2006) 117 Cal.App.4th 1082, which applied the holding of Privette to preclude vicarious liability on the part of a general contractor for injuries sustained by an independent contractor arising from work the independent contractor was hired to undertake. In Tverberg, the court of appeal for the First Appellate District expressly disagreed with the holding of Michael and reversed the grant of summary of judgment. The appellate court reasoned that the lack of workers' compensation insurance coverage for the individual independent contractor was controlling. The contract, Fillner, appealed to the California Supreme Court. The California Supreme Court granted Fillner's petition for review.

HOLDING: Reversed. This California Supreme Court decision resolves a conflict among the courts of appeal stemming from application of the holding of Privette v. Superior Court (1993) 5 Cal.4th 689 to independent contractors. Privette held that employees of independent contractors could not impose vicariously liability on general contractors who contracted with the independent contractor for workplace injuries arising out of a peculiar risk.

Privette is an exception to the peculiar risk doctrine (which itself is an exception to the general rule of nonliabiltiy to independent contractors). A "peculiar risk" is neither abnormal to the work done, nor abnormally great; it is a special or recognizable danger inherent to the work itself. Under the peculiar risk doctrine, the hirer who elects to undertake inherently dangerous activities on his land cannot escape liability for injuries to others by hiring an independent contractor.

The California Supreme Court agreed with Michael that a general contractor cannot be vicariously liable to an injured independent contractor, but for reasons different than those advanced by the Michael court. Unlike in Privette, the California Supreme Court did not consider the non-existence of workers' compensation relevant to the inquiry. The Supreme Court found that Privette was not directly on point because, in this case, the injured independent contractor was not an innocent third party—he had assumed control over the work and assumed responsibility for completing the work safely. The Supreme Court remanded the case to the lower court to determine whether summary judgment was properly granted on plaintiff's claim for direct negligence liability against the general contractor.

TORTS/PERSONAL INJURY

• Chude v. Jack in the Box

FACTS: Uninsured driver Teckla Chude received second degree burns when she spilled coffee on her lap that she had just purchased at the drive through window at Jack in the Box. The trial court granted summary adjudication of her general damages claim under Proposition 213 (codified as Civil Code section 3333.4). Plaintiff appealed, arguing that sitting in her car at the drive through window with the engine running, the car in drive, and her foot on the brake did not constitute operation or use of a motor vehicle within the meaning of the statute.

HOLDING: Affirmed. Proposition 213 bars an uninsured motorist from recovering general damages for injuries caused by coffee while sitting inside her car in a fast food drive through because such damages arose from the operation or use of a motor vehicle.

UNINSURED MOTORIST/INSURANCE

• Hervey v. Mercury Casualty Co.

FACTS: Plaintiff Hervey was injured in a collision with an uninsured motorist. She received med pay under the uninsured motorist provision of her policy of insurance with Mercury Casualty Co. The uninsured motorist provisions contained in Part IV of the insurance policy expressly provided that med pay to which an insured was entitled would be subtracted from any amount paid by Mercury pursuant to uninsured or underinsured motorist coverage. Mercury agreed to pay plaintiff's uninsured motorist claim but took the position that it was entitled to an offset for earlier payments to plaintiff made under her med pay coverage. Plaintiff Hervey brought a class action suit against Mercury for breach of contract, violation of the Unfair Competition Law, and declaratory relief. Mercury demurred. The trial court sustained the demurrer without leave to amend.

HOLDING: Affirmed. An insurer does not breach an insurance policy by deducting the amount paid under medical pay coverage from amount paid to its insured under uninsured motorist provision. Plaintiff's argument that a policy endorsement titled, "Medical Expense-No Excess, No Reimbursement" that operated to delete medical expense payment offsets or reimbursement provisions from liability recoveries form third party tortfeasors (contained in Part II of the Policy) failed. The endorsement did not refer to Part IV, the section dealing with uninsured and underinsured motorist coverage. The policy was not ambiguous and plaintiff's construction, which would require the insurer to pay twice for the same injury, was not a reasonable construction.

UNINSURED MOTORIST/INSURANCE

• Blankenship v. Allstate Insurance Co.

FACTS: On September 10, 2004, 13 year old Dakota Blankenship was riding his bike on the wrong side of the road when he suddenly turned into traffic. He collided with a car driven by Jennifer Outcalt and owned by Edward McEnespy. Ms. Outcalt was not insured; Mr. McEnespy's insurer denied coverage. The minor's stepfather made a claim on his behalf with his auto insurer, Allstate. Allstate offered $10,000 to settle the claim, which was not accepted. Allstate heard nothing on the claim until August of 2007, when it was contacted by the minor's attorney. Plaintiff's counsel advised that a complaint was filed on February 26, 2007, and eventually demanded arbitration more than three years after the collision. Allstate denied the demand. Plaintiff filed a petition to compel arbitration, which was denied for failure to comply with the time limitations set forth in Insurance Code section 11580.2(i). Plaintiff appealed and alleged that his minority excused non-compliance with section 11580.2(i).

HOLDING: Affirmed. Under Insurance Code section 11580.2, subdivision (i), a person injured by an uninsured motorist cannot file a lawsuit against his UM insurer unless, within two years of the accident, he filed a lawsuit against the uninsured motorist, demanded arbitration with his UM insurer, or reached an agreement with his UM carrier. The statute specifically enumerates estoppel, waiver, impossibility, impracticality, and futility as excuses for non-compliance with the limitations period. Minority is not a recognized excuse for failure to comply with the statute. Accordingly, plaintiff's appeal fails. This case reaffirmed the holding of Allstate Insurance Co. v. Orlando (1968) 262 Cal.App.2d 858 in light of later amendments to the statute.

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