

Filed 6/25/25 Kelly v. Westfield Topanga Owner, LLC CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BRUCE KELLY,

Plaintiff and Appellant,

v.

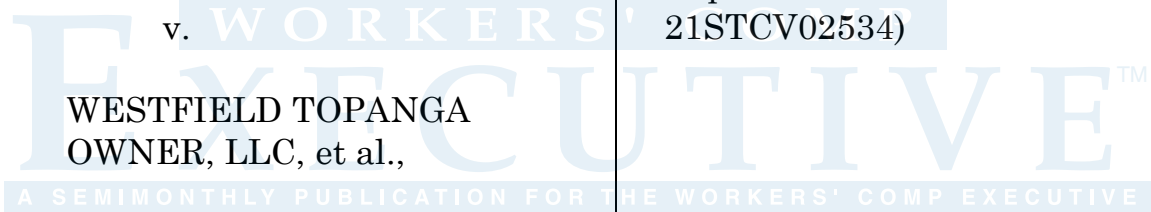
WESTFIELD TOPANGA
OWNER, LLC, et al.,

Defendants and Respondents.

B329795

(Los Angeles County
Super. Ct. No.

21STCV02534)



APPEAL from judgments of the Superior Court,
Los Angeles County, Virginia Keeny, Judge. Reversed.

McMurray Henriks and Yana Henriks for Plaintiff
and Appellant.

Stone | Dean, Kristi W. Dean and Leslie A. Blozan for
Defendants and Respondents Westfield Topanga Owner, LLC
and Westfield DDC, Inc.

Bradley Gmelich & Wellerstein, Jonathan A. Ross, Darren
P. Salute and Mark I. Melo, for Defendant and Respondent
CSI Electrical Contractors, Inc.

Plaintiff Bruce Kelly sued defendants Westfield DDC, Inc. (WDDC), Westfield Topanga Owner, LLC (WTO, collectively with WDDC, Westfield), and CSI Electrical Contractors, Inc. (CSI) to recover damages for personal injuries suffered when he fell from a 12-foot ladder while installing cable in the ceiling of the Westfield Topanga shopping mall. At the time, plaintiff was employed by Communication Technology Services LLC (CTS), which had subcontracted with CSI, under CSI's contract with Westfield, to perform the cable installation.

The trial court granted motions for summary judgment in favor of Westfield and CSI based on the *Privette* doctrine, which generally shields a hirer from suits for injury by an independent contractor's employees. (See generally *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*); *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 37–38 (*Gonzalez*)). Plaintiff argues the evidence raises triable issues of fact as to whether defendants' exercise of retained control over CTS's work negligently contributed to his injury so as to overcome the *Privette* doctrine's presumption that a hirer has delegated to the independent contractor all responsibility for workplace safety. We agree and reverse.

BACKGROUND

Consistent with our standard of review, we state the facts in the light most favorable to plaintiff as the party opposing the summary judgment motions, resolving all doubts concerning the evidence in his favor. (*Gonzalez, supra*, 12 Cal.5th at p. 39.)

In 2018, Westfield entered into a design/build agreement with CSI to upgrade electrical systems at the Westfield Topanga shopping mall. The agreement provides that “time is of the essence” and specifies that the mall “is a fully operating facility” such that “only night work is permitted for this job.”

Consistent with the terms of the design/build agreement, CSI entered into a subcontract with CTS to perform some of the cable installation work for the project. Like the design/build agreement, the subcontract between CSI and CTS states “[t]ime is of the essence” and imposes financial penalties in the event CTS fails to complete the work in a timely manner.

Plaintiff worked nights as an installation technician on a three-man crew that CTS had deployed to install cable in the mall’s ceiling. CTS supplied the tools for the crew’s work, including a set of hydraulic scissor lifts and ladders. According to CTS’s senior construction manager, ladders were not the crew’s “first go to” for working in the ceiling, and the lifts had been used the “majority of the time to do the install.” Nevertheless, the crew had used ladders on the project, but generally only in areas of the mall where they were unable to fit a lift.

Westfield—either directly or through its contractor CSI—had directed the CTS crew to take specific measures to protect the mall’s tile floor when using the hydraulic lift. These measures required the crew to place a layer of Masonite (compressed cardboard) directly on the floor, then a layer of three-quarter-inch plywood over the Masonite, and then a layer of carpet over the plywood ahead of the hydraulic lift’s path whenever moving the lift around the mall. This was a time-consuming process that could add several hours to the time it would otherwise take to move the lift from the “lay down area” (where CTS stored its equipment for the project) to the work location and then back to the lay down area before the mall opened each morning.

On the night of plaintiff’s injury, the crew’s work took it to an area of the mall with new tile floors that had to be protected

according to defendants' directives for using the hydraulic lift. The area was also in the north corner of the mall—far from CTS's lay down area on the mall's south side. Due to the time it would take to cover the floors along the lift's path, the crew foreman made the decision to use ladders—instead of the safer hydraulic lift—to ensure the work could be finished before the mall opened the next morning.¹

Plaintiff used one of the CTS-supplied 12-foot ladders from the crew's lay down area that night. He had used the ladder before and had noticed it “wasn't as good as the other ladders,” as it was “older” and “wasn't as tight.” He had reported these problems to the CTS crew foreman at least three times earlier. Despite these reports and the foreman's duty to inspect the crew's equipment as part of his daily job safety assessment, the ladder remained in service on the project.

While trying to feed cable through an area of dense insulation in the ceiling, plaintiff fell from the top of the 12-foot ladder and struck his head on the mall floor. Although it was CTS's standard safety practice to have a “spotter” hold the ladder while another crew member was on it, plaintiff did not have a spotter at the time of his accident. Unfortunately, his co-crew member—who normally acted as plaintiff's spotter—had been looking at blueprints on his phone when he heard the ladder begin “rocking back and forth” just before plaintiff fell from it.

¹ Plaintiff's co-installer testified it took the crew 10 to 15 minutes to walk from the lay down area to the work location that night, whereas it would have taken the crew a “few hours” each way to move the hydraulic lift to and from the work location while following defendants' directives for protecting the mall's floors.

Plaintiff sued Westfield and CSI, asserting causes of action for negligence, premises liability, and negligent exercise of retained control.² In general, he alleged defendants retained and exercised control over the worksite in a “dangerous and hazardous manner” that subjected plaintiff to the foreseeable risk of harm he experienced that night.

Westfield and CSI filed separate motions for summary judgment. Both motions argued plaintiff’s claims were barred under the *Privette* doctrine because defendants had delegated to CTS all duty for ensuring its workers’ safety and neither defendant had exercised control over CTS’s work on the project.

Plaintiff opposed the motions, relying principally on his co-crew members’ accounts regarding defendants’ directives for protecting the mall’s floors and how the time-consuming nature of those directives had impacted the foreman’s decision to use ladders—instead of the preferred and safer hydraulic lift—to perform the work that night. He argued the directives amounted to an exercise of retained control under the *Privette* doctrine, and he maintained triable issues of fact existed as to whether defendants had unreasonably exercised this control in a manner that contributed to his injuries.

The trial court granted both motions, concluding the *Privette* doctrine barred plaintiff’s negligence claims against defendants. Although the court acknowledged plaintiff’s evidence showed “that CSI required CTS (at the instruction of the

² Plaintiff also asserted claims for product liability and strict liability against entities involved in manufacturing and distributing the ladder from which he fell. Those causes of action, and the defendants against whom they were asserted, are not part of this appeal.

Westfield Defendants) to place plywood (or other similar material) on the floor if moving the lift,” the court reasoned this evidence failed to establish “a triable issue of fact that CSI [or Westfield] maintained control and that such control affirmatively contributed to the plaintiff’s injury.” The court explained: “[T]he fact that Plaintiff and his crew may not have had enough time to lay down the Masonite as required by [defendants], complete their work, and move the lift back before the mall opened is not indicative of affirmative contribution by [defendants]. . . . The evidence of control amounts to little more than that [defendants] required work during a night time shift and that precautions be taken to protect the client’s property. It was CTS’s decision when to start the work, how to stage it, how big a crew to deploy, and whether certain measures could be taken to reposition the lift in advance. There is no evidence [defendants were] involved in these decisions or interfered with them in any[]way.”

The court entered judgments in favor of Westfield and CSI. Plaintiff filed timely notices of appeal.

DISCUSSION

Plaintiff argues the summary judgment evidence, when viewed most favorably to him as the non-moving party, raises triable issues of fact as to whether defendants unreasonably exercised control over CTS’s work in a manner that contributed to his injury. We agree and conclude the trial court erred in granting summary judgment.

The *Privette* doctrine is premised on the presumption “that a hirer generally delegates to an independent contractor all responsibility for workplace safety and is [therefore] not liable for injuries sustained by the contractor or its workers while on the

job.”³ (*Gonzalez, supra*, 12 Cal.5th at p. 40.) This presumption “is grounded in two major principles: first, that independent contractors by definition ordinarily control the manner of their own work; and second, that hirers typically hire independent contractors precisely for their greater ability to perform the contracted work safely and successfully.” (*Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256, 269 (*Sandoval*).

Notwithstanding the “strong presumption” of delegation, our Supreme Court has identified exceptions to the *Privette* doctrine where “a hirer has failed to effectively delegate all responsibility for workplace safety to the independent contractor.” (*Gonzalez, supra*, 12 Cal.5th at pp. 37, 42.) One of these exceptions—commonly referred to as the *Hooker* or retained-control exception—applies when the hirer “exercises retained control over any part of the contractor’s work in a manner that affirmatively contributes to the worker’s injuries.” (*Id.* at p. 42, citing *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 (*Hooker*); see also *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225–226 (*McKown*)). Under this exception, “[t]he imposition of tort liability turns on whether the hirer exercised that retained control in a manner that *affirmatively contributed* to the injury.” (*Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446 (*Tverberg*)).

³ “The delegation of control over safety ‘may be direct, when the hirer has contracted with the independent contractor, or indirect, when the hirer contracts with another contractor who then subcontracts the work to the independent contractor.’ [Citation.] The *Privette* doctrine therefore bars liability against not only the hirer, but also any other entities in that ‘chain of delegation.’” (*Collins v. Diamond Generating Corp.* (2024) 107 Cal.App.5th 1162, 1175.)

This affirmative contribution element “is not met solely because a hirer is aware that there is an unsafe condition on the worksite or knows that the contractor is engaging in an unsafe work practice. [Citation.] Something more is required, such as ‘“inducing injurious action or inaction through actual direction” ’ [citation]; directing ‘“the contracted work be done by use of a certain mode” ’ [citation]; or interfering with ‘“the means and methods by which the work is to be accomplished.” ’ ” (Gonzalez, at p. 42; Tverberg, at p. 1446.)⁴

In *McKown*, our Supreme Court applied the retained-control exception to affirm a judgment holding a hirer liable for

⁴ While we conclude plaintiff has raised triable issues of fact with respect to the retained-control exception, there should be no doubt that the trial court correctly rejected plaintiff’s contention that defendants’ mere retention of control under the design/build agreement or subcontract, standing alone, was sufficient to overcome the *Privette* doctrine’s presumption of delegation. (See *Sandoval, supra*, 12 Cal.5th at p. 276 [to establish retained-control exception, “[c]ontract workers must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury”]; *Hooker, supra*, 27 Cal.4th at p. 210 [*Privette* doctrine applies where “‘the *sole* factual basis for [worker’s] claim is that the hirer failed to exercise a general supervisory power to require the contractor to correct an unsafe procedure or condition of the contractor’s own making’ ” (italics added)].) The trial court also correctly rejected plaintiff’s argument that statutory duties under OSHA constitute non-delegable duties beyond the *Privette* doctrine’s purview. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 597 [non-delegable duty doctrine is “inapplicable” to claim that hirer owed duty to contractor’s employees “to comply with the safety requirements of Cal-OSHA”].)

injuries an independent contractor's worker suffered while using defective equipment. (*McKown, supra*, 27 Cal.4th at pp. 225–226.) Wal-Mart had hired the plaintiff's employer to install sound systems in its stores and had “requested that the contractor use Wal-Mart's forklifts whenever possible in performing the work.” (*Id.* at p. 223.) The forklift that Wal-Mart furnished was missing one of two chains that secured an overhead work platform to the forklift. (*Ibid.*) “After discussing the advisability of using the forklift without a chain securing the platform,” the plaintiff and his co-worker decided to use the equipment as Wal-Mart had requested. (*Ibid.*) While his co-worker was driving the forklift and the plaintiff was working on the platform, the platform hit a ceiling pipe, disengaged from the forklift, and fell about 12 to 15 feet to the floor with the plaintiff on it. (*Ibid.*) A jury found Wal-Mart was negligent in providing unsafe equipment and allocated 55 percent of the responsibility for the accident to the plaintiff's employer, 23 percent to Wal-Mart, 15 percent to the manufacturer of the equipment, and 7 percent to the plaintiff himself. (*Ibid.*)

Wal-Mart challenged the judgment, arguing there was insufficient evidence to establish the affirmative contribution element of the retained-control exception because Wal-Mart had “merely requested, and did not insist, the contractor use its forklift.” (*McKown, supra*, 27 Cal.4th at p. 225.) Our Supreme Court rejected the argument. Although the plaintiff admitted that Wal-Mart's “request was understood not to be a directive” (*id.* at p. 223), the *McKown* court concluded the request was nonetheless sufficient to constitute an inducement that interfered with the contractor's choice of the means and methods by which

the work was to be accomplished. (*Id.* at pp. 225–226.) Our high court explained:

“The contractor had several contracts with Wal-Mart for the installation of sound systems in Wal-Mart stores, and Wal-Mart, the world’s largest retailer, was a customer the contractor was presumably loath to displease. . . . Wal-Mart presumably believed the forklift it provided was safe, and plaintiff may well have believed that refusal to use it would have generated ill will. The extra expense of renting a forklift would have been chargeable to Wal-Mart. Moreover, renting a forklift would have entailed delaying the installation project for at least 24 hours . . .

Admittedly, Wal-Mart was not the only one at fault, but then the jury’s verdict reflected that.”

(*Ibid.*; cf. *Hooker, supra*, 27 Cal.4th at pp. 210–211 [under *Privette* doctrine, a hirer cannot be held liable for *failing to exercise retained control* over workplace safety rules where there is “no evidence that the hirer’s conduct contributed in any way to the contractor’s negligent performance by, e.g., inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise”].)

The *McKown* court also rejected Wal-Mart’s contention that the hirer should be free from liability “because the jury found the contractor was *primarily* (55 percent) at fault.” (*McKown, supra*, 27 Cal.4th at p. 226.) Although an original rationale for the *Privette* doctrine had been that “ “it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker’s on-the-job injuries,

is limited to providing workers' compensation coverage," "our high court explained, "in this case, . . . the hirer's affirmative contribution to the employee's injuries eliminates the unfairness in imposing liability where the contractor is primarily at fault." (*Ibid.*; see also *Gonzalez, supra*, 12 Cal.5th at p. 37 [listing "rationales" from which the *Privette* doctrine "originally stemmed"].)

McKown is controlling. Much as Wal-Mart argued in *McKown*, the trial court here reasoned defendants' conduct had not "affirmatively contributed" to plaintiff's injury because "[i]t was *CTS's decision* when to start the work, how to stage it, how big a crew to deploy, and whether certain measures could be taken to reposition the lift in advance." (Italics added.) The circumstances were substantially similar in *McKown*. The evidence showed Wal-Mart's "request was understood not to be a directive"; the plaintiff and his co-worker "discuss[ed] the advisability of using the forklift without a chain securing the platform"; and, despite having discretion to rent a forklift with a complete set of safety chains, the workers "decided" to use the forklift that Wal-Mart provided. (*McKown, supra*, 27 Cal.4th at p. 223.) Notwithstanding these facts, the *McKown* court held Wal-Mart's "mere[] request[]" to use its forklift was sufficient to establish liability under the retained-control exception to the *Privette* doctrine, because the evidence supported the jury's implicit finding that Wal-Mart's request had induced the workers to use the unsafe equipment. (*Id.* at pp. 225–226.) Here, viewing the evidence most favorably to plaintiff as the party opposing summary judgment, we are compelled to find his evidence raised triable issues of fact as to whether defendants' conduct likewise

induced plaintiff to use a ladder instead of the safer hydraulic lift that the CTS crew had used for most of its work on the project.

The evidence showed that, due to defendants' decision to keep the mall in full operation during the day, work on the project could be performed only at night, and CTS was required to return its equipment to the lay down area each morning. While CTS ostensibly could decide what equipment to use to do its work, the evidence showed its discretion was not entirely free from defendants' control. On the contrary, if CTS wanted to use the hydraulic lift to perform overhead work in the ceiling, the evidence showed defendants required CTS's workers to construct a path of Masonite, three-quarter-inch plywood, and carpet to move the lift between the lay down area and the work site, and then, after performing the work, CTS's workers had to break down the path and store these materials before the mall opened each morning. The evidence showed this was time-consuming work that, on the night of plaintiff's injury, would have required CTS's workers to spend most of their time laying down, then removing and storing, the floor protection materials in order to use the lift. Indeed, the evidence showed the CTS foreman's decision to use ladders that night was principally (if not entirely) driven by the requirements defendants imposed for moving the hydraulic lift, as the crew had to work in the north corner of the mall, far from CTS's lay down area on the mall's south side. This, in the foreman's experience, made it practically impossible to create a path for the lift, perform the necessary work, then remove the path and store all the materials and equipment before the mall opened.

The trial court reasoned the foregoing evidence was insufficient to establish defendants' affirmative contribution

because CTS remained free to take other actions that, “with proper planning,” might have allowed the workers to move the lift into position during the night shift while still complying with defendants’ directives for protecting the floors. This reasoning is inconsistent with *McKown* and other precedents governing the retained-control exception. As our Supreme Court explained in *Hooker*, a plaintiff overcomes the presumption of delegation at the core of the *Privette* doctrine by showing “the hirer’s conduct contributed in *any way* to the contractor’s negligent performance by, e.g., *inducing* injurious action or inaction through *actual direction*, reliance on the hirer, or *otherwise*.” (*Hooker, supra, 27 Cal.4th at p. 211, italics added.*) Here, as in *McKown*, although defendants did not direct CTS to use ladders that night, a jury could reasonably find defendants should bear at least some responsibility for *inducing* this decision because they imposed requirements—i.e., exercised control—that made it practically impossible to use a hydraulic lift in areas of the mall where CTS would be required to work. Thus, notwithstanding any potential contributory fault on plaintiff’s or CTS’s part, triable issues of fact remain as to whether defendants’ conduct also affirmatively contributed to plaintiff’s injury. (See *McKown, supra, 27 Cal.4th at p. 225* [hirer is liable under retained-control exception, notwithstanding contractor’s contributory fault, because hirer’s negligent conduct “is *not* in essence *vicarious* or *derivative* in the sense that it derives from the act or omission of the hired contractor”]; *Sandoval, supra, 12 Cal.5th at p. 276* [“A hirer ‘actually exercise[s]’ its retained control over the contracted work when it involves itself in the contracted work ‘such that the contractor is not entirely free to do the work in the contractor’s own manner’ ”]; *Tverberg, supra, 202 Cal.App.4th at p. 1446*

[same]; cf. *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1276–1277 [presumption of delegation not overcome where there was no evidence that hirer “*directed* that no guardrailing or other protection against falls be placed along the raised patio, or that it acted in any way to *prevent* such a railing from being installed”].)

For their part, defendants argue the summary judgments should be affirmed because there is “no evidence” they “took any affirmative steps” to decide “which scissor lift would be used”; “whether a ladder would be used instead of a scissor lift”; “how to use the ladder”; or “what safety precautions to take when using a ladder.” Defendants insist plaintiff’s “accident was a ‘one-time occurrence’ resulting from the convergence of *his negligence* in not using safe ladder practices; *the failure of CTS* to make certain [plaintiff] had a spotter while he was on the ladder; and the *condition of the ladder* itself.” (Italics added.) We are not persuaded. By focusing on the contractor’s conduct or on the ladder’s condition, defendants make essentially the same error as did the trial court—they raise factual issues relevant to contributory fault and causation, while disregarding evidence of their own conduct that is directly relevant to the duty and delegation issues at the heart of the *Privette* doctrine. “The *Privette* doctrine is concerned with *who owes a duty of care* to ensure workplace safety—the hirer or the independent contractor—under *principles of delegation*.” (*Gonzalez, supra*, 12 Cal.5th at p. 53, italics added.) Contributory fault and causation are part of the negligence inquiry, but they are distinct from the duty element that defendants challenged in their summary judgment motions. (See *McKown, supra*, 27 Cal.4th at p. 226 [“the hirer’s affirmative contribution to the employee’s

injuries eliminates the unfairness in imposing liability where the contractor is primarily at fault”]; *Sandoval, supra*, 12 Cal.5th at p. 278 [“affirmative contribution is a different sort of inquiry than substantial factor causation”; “affirmative contribution does not itself require that the hirer’s contribution to the injury be substantial”].)

While evidence of a contractor’s conduct is likely to impact the ultimate liability determination, this evidence does not negate the duty a hirer owes to a contractor’s workers when the hirer exercises affirmative control over an aspect of the contractor’s work that may contribute to a worker’s injury. (See *McKown, supra*, 27 Cal.4th at pp. 225–226.) Regardless of whether another actor’s conduct proves to be a substantial causal factor, “[i]f a plaintiff proves that the hirer actually exercised retained control in a way that affirmatively contributed to the contract worker’s injury, the plaintiff establishes that the hirer owed the contract worker a duty of reasonable care as to that exercise of control.” (*Sandoval, supra*, 12 Cal.5th at p. 278; *McKown*, at p. 226.) Plaintiff’s evidence raises triable issues of fact as to whether defendants negligently exercised the requisite control under this exception to the *Privette* doctrine. The trial court erred in granting summary judgment.⁵

⁵ Because we conclude the court erred on the merits of the summary judgment motions, we need not address plaintiff’s contention that the court abused its discretion by denying his request for a continuance.

DISPOSITION

The summary judgments are reversed. Plaintiff Bruce Kelly is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:



KLATCHKO, J.*

* Judge of the Riverside County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.