SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/29/12			DEPT. NWQ
HONORABLE RUSSELL STEVEN KUSSMAN	JUDGE	W. DELGADO	DEPUTY CLERK
HONORABLE non-calendar	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
R. VILLAGONZALO,C.A.	Deputy Sheriff	NONE	Reporter

2:00 pm	LC093213	Plaintiff Counsel	
	MAJOR PAUL STOVALL, ARLENE STOV VS S.C. ANDERSON INC ETAL	Defendant Counsel	NO APPEARANCES
	170.6 JAMES KADDO		

NATURE OF PROCEEDINGS:

COURT'S RULING ON THE MOTION FOR SUMMARY JUDGMENT SUBMITTED ON JUNE 22, 2012;

Attached please find a copy of the court's ruling on the motions for summary judgment heard on June 20, 2012 and submitted to the court on June 22, 2012.

Counsel for plaintiff is directed to give notice of this ruling to all interested parties.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the
MINUTE ORDER DATED 6/29/12 AND RULING ON MSJ
upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Van Nuys, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid,

MINUTES ENTERED
06/29/12
COUNTY CLERK

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NATURE OF PROCEEDINGS:

in accordance with standard court practices.

Dated: 6/29/12

John A. Clarke, Executive Officer/Clerk

By: (S)
W. Delgado

ARASH HOMAMPOUR, ESQ.
15303 VENTURA BLVD., STE. 1000
SHERMAN OAKS, CA 91403

MINUTES ENTERED
06/29/12
COUNTY CLERK

Stovall v. S.C. Anderson

Motions for Summary Judgment by defendants Anderson, Inc. and Rika Corporation

A. On the objections to evidence by defendant Rika Corporation, the court rules as follows:

Objection #1: (Exh. "M"): Sustained
Objection #2: (Exh. "O"): Overruled
Objection #3: (Exh. "T"): Sustained
Objections #4-8 (Wexler Declaration): Overruled

On the objection to evidence by defendant S.C. Anderson, the court rules as follows:

Benson deposition testimony: Overruled

B. On the merits of the Motions for Summary Judgment, the court rules as follows:

1. Did defendants Anderson and Rika have a duty of due care to plaintiff?

Plaintiff Stovall was employed by Twining Laboratories, which contracted with the Las Virgenes Unified School District to provide laboratory sampling, testing, and inspection services relating to a construction project. The school district separately contracted with defendant S.C. Anderson ("Anderson") as the general contractor. Anderson was obligated to provide safe and proper facilities for the project, and also agreed to require any subcontractors to take all necessary precautions for the safety of workers on the project. One of the subcontractors was Columbia Steel, which in turn subcontracted with Rika Corporation ("Rika") for the installation of components fabricated by Columbia. Together, Anderson and Rika had a joint responsibility to provide safe access on the job site to workers. However, plaintiff was not an employee of Anderson, Columbia, or Rika. Instead, plaintiff was a welding inspector hired by Twining, working under its separate contract directly with the school district.

Under common law, a person hiring an independent contractor is generally not liable to third parties for injuries resulting from the work. But where inherently dangerous activity is involved, the "peculiar risk" theory of liability holds that a landowner who chooses to undertake inherently dangerous activity should not escape liability for injuries to others simply because he hired an independent contractor to do the work. *Tverberg v. Filner* (2010) 49 Cal.4th 518, 524-525. However, the vicarious liability of landowners hiring contractors to perform inherently dangerous work which results in their employees' on-the-job injuries is limited by the *Privette* doctrine. Two of the key underpinnings of *Privette* are (1) the presence of worker's compensation insurance; and, (2) the concept of delegation.

In *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, our Supreme Court explained how the concept of delegation helps understand *Privette*'s rule that the hirer of an independent contractor is not vicariously liable for workplace injuries suffered by an employee of a negligent independent contractor. In the words of *Kinsman*, "[a]t common law it was regarded as the norm that when a hirer delegated a task to an independent contractor, it in effect delegated responsibility for performing that task safely, and assignment of liability to the contractor followed that delegation." *Kinsman, supra.* at 671. For various reasons, courts severely limited a hirer's ability to delegate responsibility and escape liability. *Id.* But "...principally because of the availability of worker's compensation ... [the] policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment." *Kinsman, supra.* at 671. Otherwise, there could be the anomalous result that an innocent hirer who did nothing to create the risk that caused the injury would be "illogically and unfairly [subjected] ... to greater liability than that faced by the ... contractor whose negligence caused the employee's injury." *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 256. General contractors, like all others who hire independent contractors, have the right to delegate to independent contractors the responsibility of ensuring the safety of their workers. *Toland, supra.* at 269. Therefore, the *Privette* doctrine limits the liability of the landowner or contractor where he delegates responsibility for the work to a subcontractor, and the on-the-job-injured worker is in the "chain of delegation." *Tverberg, supra.* at 528-529.

Here, plaintiff was hired by Twining Laboratories, which was hired by the school district. Separately, the school district hired Anderson, which hired Columbia, which hired Rika. But Twining (and plaintiff) were not in the School District-Anderson-Columbia-Rika "chain of delegation." Defendants did not delegate to Twining (or to plaintiff) their entire obligation to provide a safe workplace. It follows that the *Privette* doctrine limiting defendants' vicarious liability would not apply here.

Defendants claim that the doctrine applies because of the case of *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082. In *Michael*, the landowner Filtrol hired contractors Aman, CWM and Denbeste to provide "...decontamination, demolition and remediation services" for the Filtrol facility. In addition, Filtrol hired Secor to oversee "decontamination, demolition and remediation of the Friltrol facility." *Michael, supra.* at 1087. That is, Secor was hired to address the very same issues that the other contractors were hired to address. Even though Secor did not directly hire the other contractors, the court held that it was an agent of the Filtrol, and there was no legal distinction between it and the landowner in terms of its relationship with the plaintiff. Therefore, plaintiff's hirer was in the chain of delegation, and the *Privette* doctrine applied. But in the instant case, unlike in *Michael*, plaintiff is NOT in the chain of delegation between the school district, Anderson, Columbia and Rika.

In its opposition papers, Defendant Rika draws a helpful chart which graphically shows the distinction. See, Rika Corp. Motion for Summary Judgment, p. 7, l. 18-28. With this chart, one readily sees that plaintiff Michael is directly in the chain of

delegation from the landowner, through Aman, CWM, and Denbeste. Aman delegated the responsibility for workplace safety to CWM, which delegated it to Denbeste, which hired the plaintiff. *Privette*, therefore, applied. The court held that Secor was also a hirer, because there was no legal distinction between it and the landowner. *Michael, supra.* at 1097. But Rika's own chart shows clearly that here, unlike in *Michael*, the plaintiff here is not in the chain of delegation. He is off to the side, on different branch. Anderson delegated responsibility to Columbia, which delegated responsibility to Rika (a.k.a. DMW). But plaintiff was not hired by Rika. He was hired by Twining (not shown on the graph). And Twining was not hired by the defendants; nor was it in the chain of delegation with them. Harking back to the underlying rationale for *Privette*, there is no risk of an anomalous result that an innocent hirer would "illogically and unfairly be subjected to greater liability than that faced by the contractor whose negligence caused the injury," because (1) defendants did not hire Twining; and, (2) Twining was not a contractor whose negligence caused the injury.

While it may be true that Twining shared in responsibility for workplace safety and had its own requirements, and it may even be that plaintiff himself breached his duty to act safely and prudently in the workplace, those issues go to whether there was comparative fault by others. If so, it may affect the extent of defendants' liability, but it would have no bearing on whether they had a duty to plaintiff in the first instance. Thus, it would not bear upon their vicarious liability under the *Privette* doctrine. Simply put, where plaintiff is an employee of a contractor that is not in the chain of delegation, the rationale for the *Privette* doctrine disappears. Therefore, it should not apply in this case.

2. Even if the *Privette* doctrine did apply, are defendants Anderson and Rika shielded from liability as a matter of law?

Under *Privette*, there are exceptions to the liability limits afforded to contractors who hire subcontractors. Where the contractor retains control of the workplace and in the negligent exercise of that retained control affirmatively contributes to the employee's injuries, he still may be vicariously liable. *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198. However, the mere failure to exercise a power to compel a subcontractor to adopt safer procedures does not, without more, violate a duty owed to the plaintiff. *Hooker, supra.* at 209. But where a contractor contributes to an unsafe procedure or practice by its affirmative conduct; is actively involved in, or asserts control over the manner of performance of the contracted work; directs that the work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to accomplished, then he may be liable despite the *Privette* doctrine. *Id.* at 215. Affirmative contribution need not always be in the form of active conduct. A hirer may be liable for omissions as well, where he promises to undertake a safety measure, then negligently fails to do so, resulting in employee injury. *Hooker, supra.* at 212, fn. 3. A recent case held that a contractor's negligence in scheduling the work, which may lead to difficulty and overlap in planning and timing, by itself, is insufficient to obviate the *Privette* doctrine. See, *Brannan v. Lathrop Construction Associates, Inc.* (2008 WL 8833510 (Cal.App. 1 Dist. May 21, 2012)). Nevertheless, *Brannan* followed the basic

rule that where a contractor retains control of the workplace and exercises that control in a manner that affirmatively contributes to plaintiff's injuries, it is liable despite *Privette*.

Here, plaintiff presented evidence that both Anderson and Rika retained control of the workplace and were responsible for its safety. As to Anderson, evidence supporting this conclusion is reflected in plaintiff's separate statement of material facts numbers 15-22, 24, 25, 27-29, and 38-43. As to Rika, such evidence is reflected in plaintiff's separate statement of material facts numbers 22-29, 31, 32, 34-36, and 45-50. A key pillar of the *Privette* doctrine is that the employee of a contractor cannot sue the party that hired the contractor [because] the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the workplace. *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594. But in this case, as noted above, defendants did not delegate full responsibility for workplace safety to plaintiff's employer Twining. The evidence indicates that defendants were both actively involved in the safety of the project on a regular basis. (As noted above, if Twining or the plaintiff himself were negligent, issues of comparative fault may arise. But this does not eliminate any duty of the defendants).

However, retained control of the workplace is not enough. As the case law points out, defendant's conduct must also have affirmatively contributed to the employee's injuries. *Hooker, supra.* at 215. Plaintiff did present evidence that the failure by both defendants to meet their obligations affirmatively contributed to plaintiff's injury. As to Anderson, some of the evidence is contained in plaintiff's separate statement numbers 44-48 and 51-54. As to Rika, evidence in reflected in the separate statement numbers 51-55 and 58-61. For example, there was a change in the work order relating to welding requirements that in turn led to a more difficult and dangerous inspection of the welds by plaintiff. The workplace was allegedly wet and plaintiff needed to be elevated to observe continuous welds, yet no tie off anchor points were present on which he could secure himself. In short, inspecting the welds suddenly became riskier in a setting where defendants were responsible for safety. Then, plaintiff fell as a result of the very risks that had been created. This seems to be a different situation than the one in *Hooker*, where the defendant, at most, was aware of an unsafe practice by plaintiff and failed to exercise their retained authority to correct it. Here, it appears from the evidence that defendants were much more actively involved in the changed and unusual (according to plaintiff's expert -- see, below) circumstances that increased the risk. They were not passive observers.

Of course, this court professes no expertise in construction projects. But to the extent that expert opinion helps one understand this situation, plaintiff provides that as well. The declaration of Dr. Wexler includes opinions about the unusual construction methods, the change in the welding requirements which led to the need for continuous/constant inspection of the weld, resulting in the need for different equipment, including tie off anchor points, rolling scaffolds, scissor lifts, etc., which were apparently not provided to plaintiff. He ultimately opines that plaintiff would not have fallen if defendants had done their job, and that by failing to do so, they affirmatively contributed to plaintiff's incident and injuries. See, e.g., plaintiff's separate statement as to Anderson, numbers 73-82 and as to Rika, numbers 80-87.

Defendants claim that they did nothing affirmatively to contribute to the injury, but the law is clear that an omission to act may constitute an affirmative contribution in some circumstances: "[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." *Hooker, supra.* at 212, fn. 3. Of course, as noted above in paragraph B.1 above, neither Anderson nor Rika were hirer's of Twining or plaintiff in any event. But regardless, a jury could reasonably infer in this setting that defendants' conduct -- whether by acts or omissions -- affirmatively contributed to this outcome. Certainly, on summary judgment where the court must "...liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party," (see, *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206) one cannot say as a matter of law that retention of control by defendants did not affirmatively contribute to the plaintiff's injuries.

Therefore, even if the *Privette* doctrine did apply, its application does not preclude liability under these circumstances.

3. Regardless of Privette or peculiar risk, are there grounds for the court to find that defendants had no duty to plaintiff?

Anderson contends that, peculiar risk and *Privette* aside, it owed no duty to plaintiff in any event because they had no contractual relationship, and because work safety and related statutes do not provide for it. Rika, for its part, claims it owed no duty to plaintiff under general tort principles, as delineated by *Rowland v. Christian* (1968) 69 Cal.2d 108 and its progeny. Both positions are without merit.

Anderson's claims that there was no contract between the parties, and that various code sections do not create a duty, is beside the point. The plaintiff's theory of liability falls within general tort principals established under *Civil Code* §1714, which states that "...[e]veryone is responsible ... for an injury occasioned to another by his or her want of ordinary care." Although contracts may often reflect the relationship between parties, no contractual relationship, and no separate statutory duty, is necessary to recover for injuries due to tortious conduct.

The weakness of Anderson's theory is revealed by this internally inconsistent argument: "Even if a duty somehow existed, SCA presumptively delegated its duties to Twining Laboratories, plaintiff's employer. The *Seabright* ruling makes clear a general contractor presumptively delegates to the independent contractor its duty to provide a safe workplace to the independent contractor's employees. Here, Twining Laboratories is not SCA's subcontractor. Still, if a general contractor presumptively delegates its duties to the hired independent contractor, the same could be said of SCA who had no privity or control over the plaintiff at all." That sentence is either nonsense, a *non sequitur,* or both. But it certainly does not support the conclusion that defendants should not be liable if their negligence caused plaintiff's injury.

Rika, on the other hand, contends that it had no duty under general tort principles, citing *Biakanja v. Irving* (1958) 49 Cal.2d 647; *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799; *Rowland v. Christian* (1968) 69 Cal.2d 108; and *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764. Those cases discuss various factors a court should look to when deciding whether there is an exception to the general rule that everyone has a duty not to negligently injury other people. *J'Aire Corp.* and *Biankanja* involved damage to plaintiff's finances; they were not personal injury cases. Therefore, the factor relating to "the extent to which the transaction intended to benefit plaintiff" is not helpful here. Rika goes on to state that the second factor -- foreseeability -- has historically been "given little weight and for good reason." This is a bit astounding, since foreseeability is the first major factor listed by the *Rowland* court and has traditionally been the bulwark of tort liability since the time of *Palsgraf v. Long Island Railroad Co.* (1928) 248 N.Y. 339. ("The risk reasonably to be perceived defines the duty to be obeyed..."). California courts have long held this view as well: "The most important of [the] considerations in establishing duty is *foreseeability*. As a general principle, a defendant owes a duty of care to all persons who are *foreseeably* endangered by his conduct..." *Giraldo v. Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231 [emphasis added].

Nothing in the recent unanimous Supreme Court decision *Cabral v. Ralphs Grocery, supra.* implies otherwise. Indeed, the *Cabral* court explained in detail the general rule that one is liable when his or her want of ordinary care causes injury, and that departures from this rule must be clearly justified -- which only then triggers an inquiry into the *Rowland* factors. Courts will only find "no duty" when it can "...promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases." *Cabral, supra.* at 773, fn. 3. For example, the *Privette* doctrine carves out such an exception. But absent the *Privette* exception, in this setting the general rule applies.

Defendants Anderson and Rika turn the general rule of tort liability on its head. Their apparent position is that there is no tort duty, *unless* the court can find one -- e.g., under statute, contract, or public policy as reflected by *Rowland* and its progeny. The opposite is the case. *Everyone is responsible...for an injury occasioned by his or her want of ordinary care* is the "default position." C.C. §1714. If defendants did not use ordinary care in their efforts here, and this lack of ordinary care was a substantial factor in causing plaintiff's injury, they are liable, unless there is an exception to the general rule. Defendants attempted to show there was an exception with the *Privette* doctrine. For the reasons stated above, this court is not persuaded. Absent an exception, defendants' Motions for Summary Judgment must be denied. First, they have failed to show that they owed no duty of care to plaintiff; and they have not shifted the burden to plaintiff to demonstrate that there are triable issues of material fact. And second, from the evidence presented relating to defendants' retained control of the workplace and their negligent exercise of that retained control affirmatively contributing to plaintiff's injuries (see, paragraph B.2, above), plaintiff has presented triable issues of material fact as to both negligence and causation in any event.

4. Conclusion:

For the reasons stated herein, the court:

a. Finds that the *Privette* Doctrine does not apply in this case, and therefore defendants had a duty of care to plaintiff;

b. Finds that, even if the *Privette* Doctrine did apply, there are triable issues of material fact as to whether defendants retained control of the workplace, and as to whether in the negligent exercise of that retained control they affirmatively contributed to plaintiff's injury; and,

c. Concludes that under general rules of tort liability, defendants have failed to shift the burden to plaintiff to demonstrate that there are triable issues of material fact as to negligence and causation; and, moreover, that plaintiff has presented evidence of such triable issues of material fact in any event.

Therefore, the Motions for Summary Judgment by both Anderson and Rika are DENIED. This ruling will serve as the ORDER denying the motions, pursuant to *C.C.P.* §437c.

Plaintiff to give notice.