Adding Uncertainty to Injury

By Michele M. Goldsmith

It is not uncommon for Courts of Appeal to disagree. By virtue of the recent decision in *Tverberg v. Fillner Construction, Inc.*, 2008 DJDAR 17828, it appears that it will soon fall to the California Supreme Court to rule on whether an injured independent contractor who lacks access to workers' compensation is owed a duty of care. Previously, there had been much discussion about whether a truly non-"independent" contractor's employees should be considered employees of the hiring entity for the purposes of compensation and benefits. See, e.g., *Cargill v. MWD* (the Supreme Court's statutory interpretation of CalPERS and its application to common law employees). In *Tverberg* the issue, more particularly, concerned the ability of an independent contractor to recover for injuries sustained on the job, not wages. The plaintiffs' obstacle to recovery was the longstanding *Privette* doctrine, originating from *Privette v. Superior Court*, 5 Cal.4th 689 (1993), which stands for the proposition that the party that hires an independent contractor owes no duty of care to the contractor's injured employees because the injured employees have an alternative remedy through the workers' compensation system. In California, workers' compensation insurance is designed to cover the insured employer's liability under the California Worker's Compensation Act. The act provides a comprehensive system of remedies administered by the Worker's Compensation Appeals Board, but both the employer and the employee must be subject to the provisions of the act to take advantage of its benefits. Workers' compensation coverage generally does *not* extend to an independent contractor. See California Constitution Article XIV Section 4; Labor Code Sections 3351, 3357, 3600(a), 3700. The Tverbergs argued that as an independent contractor, and not an employee, the *Privette* doctrine should therefore not apply to them. The appellate court agreed — overturning the summary judgment granted on the basis of the employer's lack of duty to the independent contractor.

As a result, the *Tverberg* appellate decision strikes a blow to the longstanding California rule that has effectively shielded employers from damage claims brought by their contractors' injured workers.

Tverberg v. Fillner Construction

In 2006, the respondent, Fillner Construction, was the general contractor on a gas station project in Dixon, Calif. Fillner contracted with Lane Supply, which in turn hired Perry Construction, Inc., to install a canopy at the project site. Perry hired the appellant, Jeffrey Tverberg, to erect the canopy. Uncovered holes had been dug near where the canopy was to be installed. In May 2006, Tverberg fell into one such hole, and as a result he suffered both physical and emotional injuries. His injuries also allegedly affected his relationship with his wife, Catherine. In July 2006, the Tverbergs filed a personal injury action against Fillner and Perry.

In July 2007, Fillner moved for summary judgment, primarily under the *Privette* doctrine, arguing that it owed no duty of care to the Tverbergs. The Tverbergs, in opposing the motion, contended that the *Privette* doctrine did not apply to their case because Tverberg was injured while working as an independent contractor, not as an employee of Perry. They reasoned that only a contractor's employee who is entitled to apply for workers' compensation benefits is barred from bringing a successful action for damages against the party that hires the contractor. In their respective statements of undisputed facts, both sides agreed that Tverberg had been hired by Perry as an independent contractor. After a hearing on the motion, the trial court granted the motion for summary judgment, finding that Fillner owed Tverberg no duty of care because it did not affirmatively contribute to his injuries. The trial court cited *Michael v. Denbeste Transportation, Inc.*, 137 Cal.App.4th 1082 (2006), in support of its ruling that Fillner had established a complete defense to the Tverbergs' action.

The 'Tverberg' court weighed the public policy reasons cited in 'Privette' and its progeny, and found that those policies were inextricably connected to the interplay of the peculiar risk doctrine and the workers' compensation system.

The Court of Appeal reversed, finding "the Tverbergs' reasoning compelling" and concluding that the trial court erred in granting summary judgment. The Court of Appeal observed that the case posed an issue of important public policy.

The 'Privette' Doctrine

In considering Tverberg's appeal, the court first addressed the *Privette* doctrine. It explained that at common law, with some exceptions, a person who hires an independent contractor is not liable to third parties for injuries caused by the contractor's negligence in performing the work. One such exception — commonly referred to as the doctrine of peculiar risk — pertains to contracted work posing an inherent risk of injury to others. See Rest.2d Torts, Section 416. Courts have adopted the peculiar risk exception to the general rule of nonliability to ensure that innocent third parties, injured because of the negligence of an independent contractor hired to do inherently dangerous work, do not have to depend on that contractor's solvency in order to be compensated for those injuries, but can also look to the party that hired the contractor for compensation. If held liable under the doctrine of peculiar risk, the hiring party is entitled to equitable indemnity from the contractor at fault for the injury.

The general rule of nonliability, however, is premised on the hiring party's lack of control over the work that is the subject of the contract. The work performed is the enterprise of the contractor, who is thought to be better able than the hiring party to absorb the risk of accident losses incurred in the course of the contracted work. Furthermore, in *Privette*, the California Supreme Court held that if the injured person is an employee of a negligent contractor, the employee is barred from obtaining recovery from the party that hired the contractor because the employee's injury is already compensable under the state's workers' compensation scheme.

In 2006, the *Michael* court extended the *Privette* doctrine to apply to independent contractors.

Disagreement with the 'Michael' Decision

In disagreeing with precedent, the Court of Appeal in *Tverberg* reasoned that all of the *Privette* cases decided by the California Supreme Court involved plaintiffs who were identified as "employees" of the contractor or who were covered by workers' compensation. None of the plaintiffs in those cases were independent contractors. The *Michael* decision, as the Court of Appeal observed, "stands alone in its application of *Privette* and its progeny to an independent contractor."

The *Tverberg* court further noted that the California Supreme Court *Privette* decisions all acknowledged that the *Privette* doctrine is grounded in the interplay of the workers' compensation system and the peculiar risk doctrine. A plaintiff entitled to workers' compensation benefits is limited to that remedy alone, for reasons of public policy. The Court of Appeal was critical of the *Michael* decision to the extent it extended the *Privette* line of cases to independent contractors — *not* eligible for workers' compensation benefits — without considering the underlying workers' compensation public policy reasons at issue in those cases. The *Tverberg* court concluded that "the *Michael* decision rings hollow, as it fails to explain how the public policies furthered by the *Privette* cases — all of which are interwoven with the fact of workers' compensation coverage — apply in the context of a case in which there is no such coverage. In our view, *Michael* fails to make any reasoned analysis of the public policy reasons set out in *Privette* at all." The Court of Appeal continued that as *Privette* represents a public policy exception to the peculiar risk doctrine, "it is particularly troubling that *Michael* does not distinguish the policy reasoning underlying the *Privette* line of cases."

Importantly, the *Tverberg* court weighed the public policy reasons cited in *Privette* and its progeny, and found that those policies were inextricably connected to the interplay of the peculiar risk doctrine and the workers' compensation system. These policy considerations include the fact that workers' compensation alleviates the concern that an injured employee may go uncompensated; when an employee is covered by workers' compensation, an innocent hiring party cannot obtain equitable indemnity from the injured employee's negligent employer; a hiring party pays for workers' compensation for the contractor's employee as part of the subcontract price and is entitled to receive the benefit of that coverage; and an employee would receive a windfall if he or she was able to obtain both workers' compensation benefits from the employer and tort damages from the hiring party. "These public policy reasons — applicable when the plaintiff is an injured employee — have no force when the injuries are suffered by an independent contractor."

Finally, the Court of Appeal reasoned that the *Michael* decision misconstrued the only case it cited in support of its conclusion that a lack of workers' compensation insurance coverage is not dispositive in determining whether *Privette* applies. The court in *Lopez v. C.G.M. Development, Inc.*, 101 Cal.App.4th 430 (2002), found that the hirer of a contractor should not be held liable to the contractor's injured employee despite the contractor's failure to obtain workers' compensation insurance for its employees. *Tverberg* found *Lopez* distinguishable because the plaintiff *was* covered by workers' compensation (and it was the employer who illegally failed to obtain workers' compensation insurance), and because Lopez was eligible to recover comparable benefits through the state's uninsured employers fund. Curiously, the *Tverberg* decision does not specify whether Tverberg carried his own workers' compensation coverage or not. Presumably, if he had such coverage, this would have been addressed and reasoned into the opinion.

Unknown Effects

It would appear the conflicting decisions of the 1st and 3rd Districts will end up before the California Supreme Court for clarification. But until this split of authority is resolved, a case will probably be able to proceed against a party that hires an independent contractor, if the contractor or its employees are injured on the job. An employer, therefore, should evaluate its available options when hiring an independent contractor.

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