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Injured Independent Contractor Can't Sue Hirer Either

Nearly 20 years ago, the California Supreme Court ruled that an employee of an independent contractor injured on the job cannot sue the company or property owner that had hired his independent-contractor employer. Now, the Supreme Court has ruled that, if it's the independent contractor himself who is injured, he can't sue the owner either.

In 1993 in a decision known as *Privette*, the Supreme Court observed that a contractor's injured employee always would have the right to workers' compensation benefits. Because a business or property owner that hires the independent contractor company contributes toward workers' compensation benefits through its contract price, the court reasoned, it shouldn't be held separately, vicariously liable to the injured worker. For instance, in *Privette*, a roofer burned by hot tar while working on a duplex could not sue the duplex's owner since he had the right to collect from the roofing company's workers' compensation coverage.

The court's new decision, *Tverberg v. Fillner Construction Inc.*, looked at what happens when workers' compensation isn't part of the equation. The plaintiff, Jeffery Tverberg, was a free-lance construction supervisor hired to oversee a two-man crew brought in by a subcontractor to do a small part of a large construction job. When Tverberg fell into a hole on the jobsite, he sued the general contractor, among others.

The trial judge threw the lawsuit out, based on precedent saying that the "policies and rationale" of *Privette* applied to injured contractors directly. But an appellate court reversed the judge, holding that the *Privette* rule only fit cases with workers' compensation.

The Supreme Court reversed again. It did rule that the general contractor couldn't be held vicariously liable. But it said all the lower courts had gotten the reasons wrong.

The correct reason flows from the independent contractor's responsibilities as an independent contractor. The "contractor, unlike a mere employee, receives authority to determine how the work is to be performed and assumes a corresponding responsibility to see that the work is performed safely," the court explained. Unlike the mere employee, he is not a "hapless victim;" he is in charge of his own safety.

Moreover, the contractor gains this authority and responsibility because the property owner or general contractor has delegated control over the work to him. "Having assumed responsibility for workplace safety, an independent contractor may not hold a hiring party vicariously liable for injuries resulting from

the contractor's own failure to effectively guard against risks inherent in the contracted work," the unanimous court held.

Of course, the court noted, the injured independent contractor still might be able to sue the hirer for direct liability if it had somehow retained control over jobsite safety.

Panel Critiques Collateral Source Rule for Medical Costs

The complexities of the modern U.S. healthcare system are running roughshod over the simple logic of the U.S. legal system's view of how injured tort plaintiffs should be compensated for the medical expenses.

But at least the California Supreme Court is gearing up to make sense of it all.

The legal system assumes that someone injured in, say, an auto accident will seek medical treatment, pay for it, sue whomever's at fault for the accident and win damages equal to what he or she paid — or, more accurately, equal to the "reasonable value" of the treatment. Further, under the "collateral source" rule of evidence, if an insurance company or kindly benefactor actually paid the doctors and hospitals, jurors don't need to be confused by that fact because the insurers or benefactors can sort out their repayment needs with the injured person later.

That approach worked reasonably well for a century. But these days, figuring out the "reasonable value" of medical services is far from simple.

A recent opinion from a California appellate court shows why. A woman was injured in an auto accident, and she needed surgery. Her hospitals and doctors issued bills for treating her that totaled about $44,500. However, they happily accepted payments from her health insurer totaling a mere $18,400 — a discount of more than 58 percent.

A jury awarded her the billed amount, but the judge cut the award to the paid amount. The appellate court reversed in *Yanez v. SOMA Environmental Engineering Inc.*

For one reason, under "the health care financing model that has evolved in this country," the amount that providers accept as payment from insurers "is often *not* the entire consideration the providers receive in exchange for their services," the court said. Specifically, in exchange for agreeing to lowered payments, the providers receive "noncash, pecuniary consideration" from the insurers, such as a guaranteed supply of policyholders as patients. "Making the amount paid or incurred for medical care an absolute ceiling on a plaintiff's recovery for past medical care ignores this reality."

And those bill write-offs are part of the consideration policyholders like Yanez receive in exchange for paying medical insurance premiums, the court added.

Late last year, a different appellate court reached a similar decision in a similar case, as described in a Rodolff Law Firm newsletter. In March, the Supreme Court agreed to decide that case itself, *Howell v. Hamilton Meats and Provisions, Inc.*

One justice deciding the new case may have had the Supreme Court in mind when she wrote a lengthy concurring opinion argue for an end to the collateral source rule.

The real issue in these cases, Justice Kathleen M. Banke wrote, is the correct measure of the plaintiff's special damages. Should the goal be "reimbursing the plaintiff for actual economic loss, or … placing on the defendant the full economic consequence of his or her tortious conduct."

Most courts around the country have favored focusing on the "full economic consequence" of the defendant's conduct. Under that approach, Banke wrote, juries generally would tend to find that the "reasonable value" of services matched the amount of the doctor and hospital bills — even though those amounts are almost certainly far too high.

The problem, Banke declared, is the collateral source rule, which prevents juries from finding out just how little providers actually are willing to accept. "The ensuing decades have … brought us the medical billing and payment practices that now make evidence of what providers are paid highly relevant on the issue of the 'reasonable value' of medical services," she wrote.

The majority opinion suggested it might be time to re-examine the collateral source rule. "I agree and submit it is time to let properly instructed juries make damages awards for past medical expenses based on all the relevant evidence."

At the end of July, SOMA asked the Supreme Court to review the *Yanez* case. Because the Supreme Court has accepted the *Howell* case for review, it probably will accept *Yanez* as well.

Termite Inspector Won't Take the Fall for Balcony Collapse

How is a termite inspector like an auditor or a real estate broker? Under California law, it seems, they have much in common.

They each prepare and submit reports on their professional findings to those who hire them. And none of them is liable to a stranger injured in some way because of gaps in those reports.

A California Court of Appeal drew the parallel in a case brought by a man who fell through a rotten railing at an old house. The injured plaintiff claimed a termite service that worked on the house months before should have reported the rot.

But in a June decision, *Format v. The Lloyd Termite Control Co.*, the appellate court held the company had no duty to the guest of a homeowner. The only duty arising from the termite inspection "should be limited to the intended beneficiary — the property owner," the court declared.

The facts in the case are fairly simple. A woman inherited a home from her mother, who had lived there 40 years. After an inspection spotted some termite damage, the woman brought in Lloyd Termite, who fumigated.

Next, the homeowner sold half the house — including an attached apartment with balcony — to her son and his wife. It was their guest, Kelly Format, who crashed through the 10-foot-high balcony railing.

In a lawsuit against the termite company, the injured guest said the company should have spotted and reported on the dry rot in the railing. The company countered that the homeowner should have take its advice to bring in a contractor to examine and repair possible damage to the patio and balcony.

The issue of pest-control inspectors' liability turned out to be "uncharted territory" in California law, the appellate court noted. So it looked to a decision about an auditor who missed problems in a company's books before an investor bought in and to decisions about real estate brokers who hadn't warned buyers about mold or a faulty balcony before the buyers' guests were injured.

Those cases held that in such commercial transactions, the duties of the auditor and brokers only reached as far as their contracts — to the audit client or homebuyers — and not out to third parties.

A termite inspection is the same, the court held, because the goal — facilitating a decision about fumigation or repairs — primarily is commercial, the court said. "[T]he duty owed from disclosures made to help decide whether to purchase fumigation should be limited to the intended beneficiary — the property owner."

A traditional tort analysis ends up in the same result, the court added. Generally under California law, whether someone has a duty to protect another turns on factors such as foreseeability and moral blame.

But in this case, those factors don't help the plaintiff. The homeowner bears most of the moral blame for failing to bring in the recommended building contractor to repair the balcony, the court said. The termite company's "allegedly negligent inspection is not directly connected to the injury suffered," and even if the company "conducted a flawless report, the outcome probably would not have been affected."

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