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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LATESHA WILLIAMS-FOREMAN, as Successor, etc., Plaintiff and Appellant, v. CONOCOPHILLIPS COMPANY, Defendant and Respondent.	A142968 (Contra Costa County Super. Ct. No. MSC-13-00173)

Janice Williams-Sample broke her ankle when she slipped and fell at an oil refinery owned by ConocoPhillips Company (ConocoPhillips). She was an employee of TIMEC Company, Inc. (TIMEC), which was hired by ConocoPhillips as an independent contractor, and was injured in the course and scope of her employment with TIMEC. Williams-Sample recovered workers' compensation for her injury from TIMEC and sued ConocoPhillips on claims of negligence and premises liability. The trial court granted summary judgment to ConocoPhillips.[1]

Employees of independent contractors injured in the workplace cannot sue the party that hired the contractor to do the work absent exceptional circumstances. (*Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*).) The trial court found no exceptions to the *Privette* rule applicable on the evidence presented. We shall affirm the judgment.

[1] Williams-Sample died from respiratory failure after judgment was entered, while the case was on appeal. Her daughter, Latesha Williams-Foreman, is her successor in interest and was substituted as plaintiff and appellant. We refer to decedent by her surname and to her successor in interest as appellant.

Statement of Facts[2]

ConocoPhillips owns and operates an oil refinery in Rodeo, California. In May 2012, one of the refinery's sulfur plants was undergoing a planned, periodic shutdown known as a "turnaround." A turnaround is conducted every two years, during which time equipment is tested and maintenance performed.

ConocoPhillips hired TIMEC as an independent contractor to perform maintenance during the turnaround. The written contract between ConocoPhillips and TIMEC provides: TIMEC "shall be fully responsible for and shall have exclusive direction and control of its agents, employees and subcontractors and shall control the manner and method of carrying out operations." TIMEC agreed to be "solely responsible for the work safety . . . of itself and its agents, employees, and subcontractors."

Williams-Sample was employed by TIMEC as a general helper and safety attendant. Her duties included watching for fire. She never dealt directly with ConocoPhillips personnel, receiving all job assignments, instructions and tools from TIMEC. On May 13, 2012, Williams-Sample was walking from a ConocoPhillips administrative office trailer to a nearby permit shack to drop off paperwork when she slipped and fell near the trailer, breaking her ankle.

Photographs of the trailer show its foundation to be gravel that extends several feet around its perimeter. The door at the front of the trailer opens onto a level area. The ground at the sides and rear of the trailer slope downward. One exiting the trailer may

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[2] The statement of facts is based on the parties' pleadings, separate statements of undisputed facts and supporting evidence submitted on the motion for summary judgment. Appellant contends that much of the evidence submitted in opposition to the motion was improperly excluded by the court. We need not address the many evidentiary objections that were made and sustained. For purposes of this appeal, we have considered all the evidence with one exception—we have disregarded portions of the declaration of appellant's expert witness, Gerald Fulghum, that are inadmissible legal conclusions. (Evid. Code, § 310, subd. (a); *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529-532; *Towns v. Davidson* (2007) 147 Cal.App.4th 461, 472-473.) " 'The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion.' " (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179.)

walk straight out the front door across a flat gravel area to a paved road. When Williams-Sample exited she walked around the corner of the trailer along the side and rear to reach the same paved road at a point nearer the permit shack, which is located down the road from the trailer at its rear. She was three to five feet from the corner of the trailer when she felt her foot slipping on the gravel and fell. Williams-Sample testified at her deposition that workers for both ConocoPhillips and its contractors commonly turned the corner of the trailer and walked down the gravel slope rather than keep to the paved road. Nobody from ConocoPhillips or TIMEC, however, told her to use the route she took to the permit shack. It is also undisputed that Williams-Sample had walked down the gravel slope previously without incident and neither she nor any other TIMEC employee reported the gravel incline surrounding the trailer as a safety hazard.

Williams-Sample collected workers' compensation for her injury, which was her exclusive remedy against her employer TIMEC. (Labor Code, § 3200 et seq.) In January 2013, she sued ConocoPhillips on causes of action for negligence and premises liability. ConocoPhillips denied liability and, in December 2013, moved for summary judgment. The trial court granted the motion. The court ruled, pursuant to *Privette, supra,* 5 Cal.4th 689, that employees of a hired contractor are barred from seeking recovery against the hirer absent exceptional circumstances, none of which applied. Williams-Sample timely filed a notice of appeal.

Discussion

1. *Summary judgment standard.*

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and [properly] sustained. [Citation.] Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is

entitled to judgment as a matter of law." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

2. *Liability of the hirer of an independent contractor.*

"At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work." (*Privette, supra,* 5 Cal.4th at p. 693.) Numerous exceptions developed over time, including an exception pertaining to "contracted work that poses some inherent risk of injury to others" known as the doctrine of peculiar risk. (*Ibid.*) "The courts adopted the peculiar risk exception to the general rule of nonliability to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries." (*Id.* at p. 694.) "[I]n its original form the doctrine of peculiar risk made a landowner liable to innocent bystanders or neighboring property owners who were injured by the negligent acts of an independent contractor hired by the landowner to perform dangerous work on his or her land. . . . [¶] Gradually, the peculiar risk doctrine was expanded to allow the hired contractor's employees to seek recovery from the nonnegligent property owner for injuries caused by the negligent contractor." (*Id.* at p. 696.) California was among the minority of jurisdictions to adopt that view. (*Ibid.*) Our Supreme Court has since repudiated it. (*Ibid.*) In *Privette*, the court held that when "injuries resulting from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis for the employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries." (*Id.* at p. 702.)

There remains a limited basis for a contractor's employee to seek recovery of tort damages from the contractor's hirer. An employee of a contractor may recover from the hirer of the contractor where the hirer retains control over the work performed by the contractor and "exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee." (*Hooker v. Department of*

Transportation (2002) 27 Cal.4th 198, 208-210, italics omitted.) "[M]ere retention of the ability to control safety conditions is not enough. '[A] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct.' " (*Id.* at p. 209.)

Another basis for a contractor's employee to seek tort damages from the contractor's hirer is a limited form of premises liability. "[W]hen there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 673-674.) "However, if the hazard is concealed from the contractor, but known to the landowner, the rule must be different. A landowner cannot effectively delegate to the contractor responsibility for the safety of its employees if it fails to disclose critical information needed to fulfill that responsibility, and therefore the landowner would be liable to the contractor's employee if the employee's injury is attributable to an undisclosed hazard." (*Id.* at p. 674.)

3. *ConocoPhillips did not exercise retained control over TIMEC and its employees that affirmatively contributed to the employee's injury.*

ConocoPhillips hired TIMEC as an independent contractor and TIMEC's employee Williams-Sample was injured in the course and scope of her employment when she fell walking from an office trailer to the permit shack. As the employee of an independent contractor, Williams-Sample (or her successor) cannot recover against the hirer, ConocoPhillips, on a negligence cause of action without showing that ConocoPhillips retained control over safety at the worksite and "*exercised* the control that was retained in a manner that *affirmatively* contributed" to the employee's injury. (*Hooker v. Department of Transportation*, *supra*, 27 Cal.4th at p. 210.)

The safety of TIMEC's workers rested largely with TIMEC itself. TIMEC had "exclusive direction and control" of its employees and "the manner and method of

carrying out operations." The contractor agreed to be "solely responsible for the work safety" of its employees. It was also TIMEC's responsibility to inspect "local conditions existing at the work site including, but not limited to, such things as location, accessibility, general character of the site, surface conditions, obstacles of every nature or type," roads and "all other physical and topographical conditions either known or readily ascertainable."

ConocoPhillips owns the refinery, controls access to it, and maintains its roads and walkways. The company admitted, in discovery responses, that it was responsible for ensuring that work areas intended for access and designated access ways were "free of slipping hazards." Appellant contends that work safety regulations required ConocoPhillips to maintain safe walkways at the refinery, citing regulations directing that "walkways shall be kept reasonably clear and in good repair" (8 Cal. Code of Regs., § 3272, subd. (c)) and "debris shall be kept reasonably cleared from work areas, passageways, and stairs in and around buildings or other structures" (*id.*, § 1513, subd. (a)).

But Williams-Sample was not injured on a road or walkway. She chose not to walk on the paved road between the trailer and permit shack in favor of a shorter route down a gravel slope bordering the trailer, where she fell. Appellant argues that gravel spilled from the slope onto the road and that ConocoPhillips' failure to sweep gravel off the road caused the injury. In Williams-Sample's declaration opposing summary judgment, she said she began slipping on the gravel slope but "continued to slip into the paved roadway where [she] ultimately fell and landed." The declaration does not show she would have escaped injury had ConocoPhillips swept gravel from the road, as her fall was admittedly caused by slipping on the gravel slope. Moreover, "in opposing a summary judgment motion, a plaintiff may not create a disputed issue of fact by contradicting his or her deposition testimony with an affidavit or declaration." (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 177, citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20-22.) In her deposition, Williams-Sample testified that she slipped and fell on the gravel slope, a few feet from the corner of the trailer, and marked a

photograph showing that she slipped and fell on the slope. In describing her fall, she testified: "I left [the] trailer, and I proceeded to walk down the hill. And that's when I began to slip on the gravel. [¶] Q. . . . [¶] A. I began to slip on the gravel, and that's when my ankle was twisting. I felt pain. And it happened so quick, before I know it I was down on the ground. I fell." Nothing in this testimony suggests that any failure of ConocoPhillips to sweep its roads caused the injury.

Appellant argues that ConocoPhillips, knowing that workers commonly walked down the gravel slope, should have made the route safe or barred access to the route. She notes that ConocoPhillips erected a scaffold around the trailer after the accident to prevent additional injuries and thus had the authority and means to do so before the accident. But "it would be unfair to impose tort liability on the hirer of the contractor merely because the hirer retained the ability to exercise control over safety at the worksite" and did not use that power to undertake safety measures. (*Hooker v. Department of Transportation, supra,* 27 Cal.4th at p. 210.) "[P]assively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution." (*Tverberg v. Fillner Construction Inc.* (2012) 202 Cal.App.4th 1439, 1446.) Liability may be imposed only if the hirer "*exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee" by, for example, "inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise." (*Hooker, supra*, at pp. 210-211.)

There is no evidence here that ConocoPhillips induced Williams-Sample to take the route she did, induced TIMEC or its employees to rely upon it to detect and correct unsafe walking routes, or prevented TIMEC from undertaking safety measures it deemed appropriate. ConocoPhillips cannot be held liable for simply permitting workers to walk off the paved road and around the trailer. A hirer or " 'principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. [Citation.] Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise

interferes with the means and methods by which the work is to be accomplished.' " (*Hooker v. Department of Transportation, supra*, 27 Cal.4th at p. 207.) ConocoPhillips did nothing to direct Williams-Sample's work or the work of other TIMEC employees. TIMEC was free to assess site safety and take measures to address hazards posed by the route Williams-Sample and other workers took around the trailer. TIMEC had site safety monitors and ground personnel at the refinery who were authorized to clean the grounds, sweep gravel and erect barricades around safety hazards. ConocoPhillips did not control the manner in which Williams-Sample travelled from the trailer to the permit shack and was not required to assert control over it.

4. *The slipping hazard posed by the gravel slope was open and obvious.*

As noted above, a limited form of premises liability survives *Privette, supra*, 5 Cal.4th 689 and its progeny. "[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman v. Unocal Corp., supra*, 37 Cal.4th at p. 675.) Appellant contends the trial court addressed only the negligence cause of action and failed to rule on the premises liability cause of action. While the court's summary judgment order does not discuss the premises liability cause of action in detail, the court clearly ruled on the matter when it found that "the gravel incline was open and obvious to all contractors who worked at the site" and, thus, was not a concealed hazard. The record fully supports that finding.

The area around the trailer was plainly a gravel slope and, as the trial court observed, Williams-Sample "and her employer, TIMEC, were in as good a position as ConocoPhillips to perceive that loose gravel on an incline might cause someone to slip and fall." Appellant disputes this point. She asserts: "While the gravel incline itself may have been open and obvious, the fact that the gravel proved to be a hazard was unknown to [Williams-Sample] and she had no reason to suspect its hazardous character since her path of travel was so commonly used by Refinery workers." But a hazard is open and

obvious if the hazardous condition is "reasonably apparent," regardless of whether the injured worker was subjectively aware of the danger. (*Kinsman v. Unocal Corp., supra*, 37 Cal.4th at p. 678.) The slipping hazard posed by a gravel slope is reasonably apparent.

Appellant argues that "obviousness of danger may negate any duty to warn [but] it does not necessarily negate the duty to remedy." (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 119.) This may be true under certain circumstances where, for example, "necessity requires persons to encounter" the hazard. (*Id.* at p. 122.) In *Osborn*¸ a trucker was injured when he fell walking over a demolished concrete ramp that had been reduced to a wide field of rubble and was the only way to reach a silo for delivery of materials. (*Id.* at pp. 109-110.) In finding a disputed factual issue as to premises liability, the court noted that the worker's "employment required him to pass across this area in order to complete his work." (*Id.* at p. 123.) Williams-Sample's employment did not require her to walk down a gravel slope. A paved road provided ready access between the trailer and permit shack. The hazard presented by a gravel slope was reasonably apparent and readily avoidable.

Disposition

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Jenkins, J.