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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

TERESA CAPPS et al.,	C084639
Plaintiffs and Appellants,	(Super. Ct. No. 159882)
v.	
DEPARTMENT OF TRANSPORTATION,	
Defendant and Respondent.	

Bradley Capps, an employee of Viking Construction Company, fell to his death from a bridge while working on a construction project for defendant State of California Department of Transportation (CalTrans). Plaintiffs, Capps's surviving wife and children, brought suit against CalTrans, alleging the accident occurred while Capps was performing work at the specific direction of CalTrans. CalTrans successfully moved for summary judgment on the basis that it was not liable per *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*), which generally prohibits an independent contractor or

his employees from suing the hirer of the contractor for workplace injuries, and the exception for negligent exercise of retained control did not apply.

On appeal, plaintiffs contend it was error to grant summary judgment because triable issues of fact remain as to whether CalTrans (the hirer) affirmatively contributed to Capps's death by interfering with Viking's (the contractor's) work. Specifically, they contend CalTrans interfered with Viking's work by going outside the established chain of command to order unscheduled work. They further contend the trial court erred in requiring them to prove that CalTrans retained control while the law requires only that they raise a triable issue as to that fact. Finally, they contend all of their evidentiary objections are preserved for appeal because the trial court did not rule on them.

We find no triable issue as to whether CalTrans retained and negligently exercised control over Capps's work at the time of his fall. The manner in which CalTrans *directed* work to be done did not cause it to retain control over the manner in which Viking *performed* the work. Accordingly, we shall affirm the judgment.

BACKGROUND

The Accident

CalTrans contracted with Viking for a construction project, known as the Chico 99 Project, to widen roadways and bridges on a state highway in Butte County. The Chico 99 Project included work on a bridge 21 feet above the ground in the Bidwell Park area. On either side of the driving surface of the bridge was a 33-inch high K-rail; the K-rail was 22 inches from the edge of the bridge.[1]

During this construction, a temporary traffic screen, known as a gawk screen or a glare screen (screen), had been installed on top of the K-rail. The screen is composed of 10-foot long sections of plywood or particle board about two feet high. Pipes at the end

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[1] A K-rail is a concrete barrier. (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1552

of the board are inserted into holes in the K-rail. The purpose of the screen is to prevent motorists from being distracted by the construction work and to protect workers from the glare of headlights. CalTrans's standard plans call for an opening in the screen every 60 meters. The purpose of the opening is to permit motorists to leave the construction area in case of an emergency. The screen had been installed in accordance with the standard plans.

Ed Yarbrough, the CalTrans construction safety engineer on the Chico 99 Project, determined it would be unsafe for a motorist to pass through the opening of the screen and thereby end up only 22 inches from the edge of the bridge. He directed Viking to fill the gaps in the screen.[2]

Early in the morning on May 15, 2012, Deborah Davis, the CalTrans assistant resident engineer, told Viking's foreman, Robert Burns, that the openings in the screen were to be filled in by the end of the shift, 5:00 a.m. Burns and Capps finished their scheduled work and began to install additional screens where necessary. On the final installation, while it was still dark, as Burns was adjusting the light and Capps unstrapped the screen from the truck, Burns heard a sound like a boot scuffing on concrete. When he turned, Capps had fallen from the bridge. Burns had fall protection for both men in the truck with him, but had not used it.

The Motion for Summary Judgment

CalTrans moved for summary judgment, arguing that as the employer of an independent contractor, it could be liable for Capps's injuries only if it retained control over the work site and negligently exercised that control so as to affirmatively contribute

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[2] There was evidence that Yarbrough gave this direction a few days before the accident. In his deposition, Yarbrough said he only suggested filling in the gaps in the screen and Viking's project manager, John Quiggle, said he would address it. Quiggle did not remember any such discussion. For purposes of the summary judgment motion, CalTrans assumed the first request to fill in gaps in the screen occurred May 15, 2012.

to Capps's injuries. CalTrans asserted the undisputed facts showed it did nothing to affirmatively contribute to Capps's injuries.

CalTrans provided evidence that under the contract, responsibility for worker safety was delegated to Viking. CalTrans did not give Viking any instructions as to how to fill the gaps in the screen, did not provide any equipment, and did not give any advice as to safety measures. Plaintiffs had received workers' compensation benefits for the accident. CalTrans provided excerpts of the deposition of Burns in which he testified he had fall protection with him but did not use it; he had removed or installed these screens at night "many, many times" and knew how to do it safely. Viking's project manager Quiggle drove by and saw Burns and Capps doing the work and did not give them any safety instructions.

In opposition, plaintiffs agreed that most of the facts set forth in CalTrans's separate statement were undisputed, but claimed many of these facts were "supported by evidence subject to objections." They filed objections to this evidence. Plaintiffs disputed that CalTrans did not exercise any control over the work. They argued CalTrans retained control by ordering unplanned, unscheduled work and by going outside the chain of command in issuing the order.

Plaintiffs provided the declaration of Mark Rieser, a civil engineer with 30 years of experience. Rieser declared that CalTrans policies prohibit a CalTrans employee from directly instructing the contractor's employees about their work. In his opinion, Yarbrough had no authority to order filling the gaps in the screen and Davis had no authority to issue the order to Burns. These improper orders deprived Viking of the opportunity to hold a planning meeting. The clear violation of the chain of command led to Capps's death; without the unauthorized orders, he would not have been on the bridge (as he had been working elsewhere before participating in installing the additional screens).

Plaintiffs also provided excerpts from the deposition of Ben Hargrove, the CalTrans resident engineer on the Chico 99 Project. Hargrove testified about his safety concerns with Viking, particularly the failure to use fall protection. After the accident, he walked away from the job as he was very frustrated. He had identified the need for overtime and other resources but CalTrans refused them due to budgetary constraints.

CalTrans objected to much of this evidence as irrelevant.

The trial court found no evidence that CalTrans took affirmative control of the work. The court found that ordering the work to be done and its deadline did not rise to the level of affirmative conduct that interfered with the method and mode of work. The court granted the motion and entered judgment for CalTrans.

DISCUSSION

I

Summary Judgment

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence." (Code Civ. Proc., § 437c, subd. (c).)

"A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court's grant of summary judgment de novo. (*State of California v. Allstate Ins. Co*. (2009) 45 Cal.4th 1008, 1017-1018.) We employ the same three-step analysis as the trial court. " 'First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' [Citations.]" (*Waschek v. Dept. of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

II

Failure to Rule on Evidentiary Objections

Both CalTrans and plaintiffs objected to evidence the other party offered in support of and in opposition to the motion for summary judgment. The trial court did not rule on any of these objections. No party pressed for a ruling.

"In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c, subd. (q).)

Plaintiffs contend all the evidentiary objections are preserved on appeal. Although they do not explain the import of preserving the objections, we construe their argument to mean that CalTrans failed to carry its burden in the motion for summary judgment because it relied on inadmissible evidence.

Plaintiffs admitted that most of the facts upon which CalTrans relied in its motion were undisputed. By admitting these facts within CalTrans's statement of undisputed facts, plaintiffs waived any objection to the evidence on which these admitted facts are based. (*Hurley Construction Co. v. State Farm Fire & Casualty Co*. (1992) 10 Cal.App.4th 533, 541.) As this court has explained: "The *express* admission that a

fact is true necessarily includes the admission the evidence on which it is based is admissible; presumably, an opponent would not admit to that which cannot be proven by the moving party." (*Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 741.) Thus, we will consider all the evidence supporting admittedly undisputed facts.

III

The Applicable Law

"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.) Over time, exceptions arose to this common law rule, one of which was contracted work that posed an inherent risk of injury, known as the peculiar risk doctrine. (*Ibid*.) In *Privette,* our Supreme Court considered the potential conflict between the peculiar risk doctrine and the system of workers' compensation. (*Id*. at p. 691.)

The *Privette* court concluded "in the case of on-the-job injury to an employee of an independent contractor, the workers' compensation system of recovery regardless of fault achieves the identical purposes that underlie recovery under the doctrine of peculiar risk. It ensures compensation for injury by providing swift and sure compensation to employees for any workplace injury; it spreads the risk created by the performance of dangerous work to those who contract for and thus benefit from such work, by including the cost of workers' compensation insurance in the price for the contracted work; and it encourages industrial safety." (*Privette, supra*, 5 Cal.4th at p. 701.)

Privette held peculiar risk liability did not extend to employees of an independent contractor. When "the 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." (*Privette, supra*, 5 Cal.4th at p. 702.)

In *Toland v. Sunland Housing Group, Inc*. (1998) 18 Cal.4th 253, our high court held that *Privette* applies not only when, as in *Privette*, recovery is sought under the theory the hirer is liable for the contractor's negligence *despite* providing in the contract that the contractor take special precautions (Rest.2d Torts, § 416), but also when recovery is sought under the theory that that the hirer *failed* to provide for special precautions in the contract (Rest.2d Torts, § 413). "In either situation, 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." (*Toland*, at p. 267.)

In *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), the Supreme Court considered whether an employee of a contractor may sue the hirer of a contractor for the tort of negligent exercise of retained control. The court held "a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Id.* at p. 202.) The court explained, "if an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an *unwarranted windfall*. The tort liability of the hirer is warranted by the hirer's own affirmative conduct. The rule of workers' compensation exclusivity 'does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury' [citation], and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer." (*Id.* at p. 214.)

The *Hooker* court explained that an affirmative contribution need not always be affirmative conduct. "Such affirmative 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,* 27 Cal.4th at p. 212, fn. 3.)

In *Hooker,* plaintiff's decedent was a crane operator employed by an independent contractor hired by CalTrans to construct an overpass. The overpass was 25 feet wide and the crane, with its outriggers extended, was 18 feet wide. The crane operator would retract the outriggers to permit construction vehicles and CalTrans vehicles to pass. While the outriggers were retracted, the operator attempted to swing the boom. The weight of the boom caused the crane to tip over, throwing the operator to the pavement, killing him. (*Hooker, supra,* 27 Cal.4th at p. 202.) Our Supreme Court held summary judgment for CalTrans was appropriate. CalTrans did not affirmatively contribute to the operator's death because it only *permitted* traffic to use the overpass while the crane was in operation; it did not *require* it. (*Id.* at p. 215.) CalTrans did not direct the operator to retract the outriggers to allow traffic to pass. (*Ibid.)* "There was, at most, evidence that CalTrans's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it." (*Ibid*.)

"The imposition of tort liability turns on whether the hirer exercised that retained control in a manner that *affirmatively contributed* to the injury. [Citations.] An affirmative contribution may take the form of actively directing a contractor or an employee about the manner of performance of the contracted work. [Citations.] When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative

contribution occurs. [Citations.]" (*Tverberg v. Fillner Construction, Inc*. (2012) 202 Cal.App.4th 1439, 1446.)

IV

Negligent Exercise of Retained Control

CalTrans presented undisputed evidence that Viking was responsible for its employees' safety under the contract.[3] It also presented undisputed evidence that it did not direct the mode, means, or method of the work. Burns testified Davis did not tell them how to fill in the gaps in the screen. "No, she wouldn't be telling us how to do it."

Plaintiffs contend that CalTrans retained control by interfering with Viking's work the night of the accident. Yarbrough and Davis went outside the chain of command and directly ordered Viking employees to complete the unscheduled work of filling in gaps in the screen. Plaintiffs contend CalTrans staff negligently exercised this control by issuing the order mid-shift which deprived Viking of the opportunity to plan how to perform the work safely. Further, CalTrans insisted the work be performed at night even though Burns told Davis he wanted to wait until there was more light.

Plaintiffs, however, presented no evidence that safely performing this type of work required planning or a safety meeting or that the work could be safely performed only during the day. Burns was the foreman and testified he knew how to do the job correctly and had done such work at night "many, many times." Quiggle, Viking's project manager, saw Burns and Capps installing the screen but did not mention fall protection or other safety measures or otherwise stop the work. Quiggle felt Burns had sufficient training and experience to install the screen safely.

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[3] While plaintiffs claimed to dispute this evidence, their objection was that the law provides for exceptions to a contractor's responsibility for the safety of its employees. Plaintiffs did not dispute the contract provision was in place.

An accidental fall caused Capps's death and it was undisputed that Burns had fall protection with him. He made the decision not to use it for himself and Capps because he did not think it necessary. CalTrans's failure to exercise control over Viking's ultimately unsafe work practices is not actionable. (*Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 66.)

In *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, an employee of a bridge subcontractor on a highway construction project was struck and killed by construction materials blown off a bridge by high winds while he was attempting to clear debris from the roadway below the bridge. The appellate court reversed summary judgment for the owner and general contractor in large part because the general contractor had retained the right to control traffic safety and had contractually precluded the subcontractor from implementing certain safety measures, such as closing the lower roadway. (*Id.* at p. 1134.) "This looks like retained control." (*Ibid*.) Here there is no evidence CalTrans retained the right to control safety measures.

In *Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257, review granted May 16, 2018, S247677, a window washer hired to clean a skylight fell off a roof and was injured. He sued the homeowner, alleging that loose rocks, pebbles, and sand on the roof constituted a dangerous condition that caused his fall. In opposition to the homeowner's motion for summary judgment, the window washer argued there were triable issues of fact as to retained control. He cited evidence that the homeowner's agent had directed him to perform tasks in a particular order and had ordered him to get on the roof and tell his employees to use less water. (*Id*. at p. 264.) The appellate court found the homeowner's directing the order in which the work should be performed did not demonstrate retained control. (*Id*. at p. 270.) The direction to use less water did suggest some level of control but plaintiff failed to explain how the instruction "affirmatively contributed" to the accident. (*Ibid*.) Although *Gonzalez* has no precedential value because it is under review, we find persuasive its analysis that the direction to perform work in a particular

order, similar to the direction here to perform the work before the end of the shift, does not demonstrate retained control. (Cal. Rules of Court, rule 8.1115(e)(1).)

Plaintiffs make much of the fact that filling in the gaps in the screen was unscheduled work and not part of the contractual work. The screen had previously been installed in accordance with CalTrans standards. The manner of *giving directions*, however, did not interfere with the manner of *performing work* or worker safety. In their opening brief, plaintiffs contend the unplanned nature of the work prevented safety planning. As discussed, they presented no evidence that safety planning was necessary or would have been undertaken if advance notice had been provided.

In their reply brief, plaintiffs argue the rule of *Privette* should not apply to extra-contractual work because there has been no contractual delegation of safety responsibility for such work.[4] We ordinarily will not consider issues raised for the first time in a reply brief because such consideration deprives the respondent of the opportunity to counter the appellant by raising opposing arguments about the new issue. (*American Indian Model Schools v. Oakland Unified School District* (2014) 227 Cal.App.4th 258, 276.) Plaintiffs offer no reason why we should depart from this general rule in this case.

Also in their reply brief, plaintiffs argue that by selecting Burns and Capps to do this extra work, CalTrans was controlling the means, manner, and mode of the work. They argue selecting the workers was analogous to selecting the proper equipment. They rely on *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, which our Supreme Court held a hirer of an independent contractor who affirmatively contributes to the injury of the contractor's employee by negligently furnishing unsafe equipment is liable to the employee. Not only is this an untimely new argument, but plaintiffs fail to show

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[4] Plaintiffs do not argue such extra-contractual work is not subject to workers' compensation benefits, a primary basis of the *Privette* decision. (*Privette, supra,* 5 Cal.4th at p. 701.) It is undisputed that plaintiffs received such benefits.

how CalTrans was negligent in the selection of Burns and Capps. As discussed *ante*, the evidence was that Burns was trained and skilled in the work and there was *no* evidence as to Capps's skill or experience. Further, although plaintiffs state multiple times in their briefing (without citation to the record) that CalTrans employees ordered Capps to work on the screens, the record is not clear at all as to how Capps was chosen to accompany his foreman to the bridge.

At the hearing on the summary judgment motion, the trial court asked plaintiff's counsel to list the alleged acts of affirmative control. Plaintiffs cite to this portion of the record and argue the court was improperly requiring them to prove that CalTrans retained control instead of merely raising a triable issue of fact. We read the court's comments as merely an attempt to flesh out plaintiffs' argument. This was a laudable goal and was not error.

Plaintiffs failed to raise a triable issue of fact under the retained control theory of liability. The trial court did not err in granting CalTrans summary judgment.

DISPOSITION

The judgment is affirmed. CalTrans shall recover costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(1), (2).)

/s/
Duarte, J.

We concur:

/s/
Mauro, Acting P. J.

/s/
Hoch, J.