By Aaron L. Osten

The legal doctrine barring recovery in tort for employees of independent contractors is well known under *Privette v. Superior Court*, 5 Cal. 4th 689 (1995) — which makes the 2nd District Court of Appeal's decision to publish its recent opinion in *Al Khosh v. Staples Construction Company, Inc*., 4 Cal. App. 5th 712 (2016), all the more interesting. Cases are meant to be published when they add a meaningful expansion to existing law or provide clarity to contested issues. *Khosh* does nothing of the sort. The decision is not only wrong on the merits but it is so strikingly devoid of any substantive analysis and legal authority that one wonders what value it had in being turned into a published decision. It is little wonder that efforts are currently underway to appeal and to de-publish this odd opinion.

In *Khosh,* a subcontractor was injured while installing switchgear for a backup electrical system at California State University, Channel Islands. Staples Construction Company, the general contractor, was contractually required to "exercise precaution at all times for the protection of persons on their property … to retain a competent, full-time, on-site superintendent to … direct the project at all times" and was "exclusively responsible" for safety of subcontractors and required to submit "comprehensive written work plans for all activities affecting University Operations, including utility shutdowns."

Prior to commencing its work, the subcontractor told Staples it would need a shutdown of the electrical system in order to perform its work. Yet, on the day of the incident, Staples failed to have an on-site superintendent present to direct the project, and failed to prepare any written work plans for the work; two specific promises made by Staples. The subcontractor arrived at the work site two hours prior to the scheduled shutdown, gained access to the site from university personnel, began working on the energized switchboard, and sustained severe injuries when an electrical arc flash occurred.

One exception to *Privette* is to show the contractor: (1) retained control over the work, and (2) affirmatively contributed to the worker's injuries. *Tverberg v. Fillner Const., Inc*., 202 Cal. App. 4th 1439, 1448 (2012); *Kinsman v. Unocal Corp*., 37 Cal. 4th 659, 671 (2005); *SeaBright Ins. Co. v. US Airways, Inc*., 52 Cal. 4th 590, 601 (2011).

The trial court entered summary judgment for Staples, and the appellate court confirmed, finding that "Khosh presented competent evidence that Staples retained control over safety" but that "there is no evidence Staples affirmatively contributed to Khosh's injury." The court wrote, "an affirmative contribution may take the form of directing the contractor about the manner or performance of the work, directing that the work be done by a particular mode, or actively participating in how the job is done. Evidence of Staples' omissions does not create a triable issue of fact regarding affirmative contribution." (Citation omitted.) From this point, the opinion enters a tailspin.

The court's analysis on affirmative contribution is scant and troubling: "When a hirer promises to undertake a particular safety measure, the negligent failure to fulfill that specific promise may constitute an affirmative contribution … but there was no specific promise here." *Khosh* incredibly relies on *Michael v. Denbeste Transportation, Inc*., 137 Cal. App. 4th 1082 (2006). In that case, only a general promise to be "responsible for safety" existed, which the court ruled did not qualify as a "promise to undertake a particular safety measure." Staples' failure to fulfill two specific promises is simply

disregarded, despite being the critical and pivotal question of whether there was an affirmative contribution by Staples.

A critical exception to *Privette* is the liability of a general contractor based upon actionable omissions. A host of cases supports this exception: *Ray v. Silverado Constructors*, 98 Cal. App. 4th 1120 (2002), *McKown v. Wal-Mart Stores, Inc*., 27 Cal. 4th 219 (2002), and *Hooker v. Department of Transportation*, 27 Cal. 4th 198, 212 n.3 (2002). As *Hooker* states: "[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*." (Emphasis added.)

Khosh contains no meaningful discussion of this authority.

In *Ray,* the employee of a subcontractor was killed when debris from a bridge was blown off during a windstorm and struck the employee. The general contractor argued it was entitled to summary judgment because the subcontractor assumed responsibility over safety of its employees and failed to secure the very piece of debris which killed their worker. The court acknowledged the same, but held the general contractor improperly failed to exercise its independent retained duty to shut down roads during a windstorm. The court found that because general contractor had the duty to close the road and failed to exercise that duty it could not invoke *Privette*. The court also noted it improper to fixate on the words "affirmative conduct" and discount the words "affirmatively contributed." *Hooker* made clear that an affirmative *contribution* is what is key."

In *Khosh*, the plaintiff also argued that Staples breached a non-delegable duty arising under statute. The court rejected this argument on the premise that the hirer of an independent contractor presumptively delegates to that contractor the duty to provide a safe work environment for the contractor's employees, including the duty to comply with statutory requirements. *SeaBright Ins. Co. v. US Airways, Inc*., 52 Cal. 4th 590, 600 (2011).

Yet *Khosh* reasoned that even if the statutes had imposed non-delegable duties, breach of such duties were subject to the "affirmative contribution" test, which the plaintiff failed to satisfy because of "*the reasons set forth above*." But "*the reasons set forth above*" are bare conclusions devoid of any basis. The several obvious reasons why Staples' omissions could have affirmatively contributed to the incident (a job superintendent and/or written work plans would have *at least* ensured the equipment was de-energized prior to work commencing) are simply never discussed in *Khosh*.

Despite its recent publication, *Khosh* should not be read as breaking new ground. The absence of any meaningful legal or factual analysis dooms its viability as a legitimate source of authority. Further, the verdict is still out as to whether this case will remain good law or a published decision. Any party relying on *Khosh* does so at its own peril.

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