

AGCC/LAC NEW CASES OF INTEREST

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Prepared by Aaron P. Silberman
Rogers Joseph O'Donnell & Phillips
311 California Street
San Francisco, California 941041

Tel. (415) 956-2828
Fax (415) 956-6457

email: asilberman@rjop.com

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CALIFORNIA

***Privette* and Its Progeny Apply Regardless of Whether the Subcontractor's Employee's Injuries Were Caused by the Subcontractor or Whether the Elements of Premises Liability Are Met**

Sheeler v. Greystone Homes, Inc., 03 C.D.O.S. 10220 (11/26/03)

The Court of Appeal affirmed the trial court's grant of summary judgment in favor of the defendant general contractor against an employee of its tiling subcontractor.

Jimmy Sheeler was a tile and masonry worker for Roy Gerbitz Tile, a subcontractor for Greystone Industries, Inc. Greystone was the prime contractor at a home construction site in Stephenson Ranch. Sheeler was injured at the site when he tripped over debris left on the stairs in one of the homes under construction. He received worker's compensation benefits from his employer's carrier.

Sheeler sued Greystone for negligence. Greystone successfully moved for summary judgment on the ground that it was not liable under any theory permitted under *Privette* and its progeny. Sheeler appealed, and the Court of Appeal for the Second Appellate District affirmed.

Sheeler first contended that *Privette* did not apply because Sheeler's injuries were not traceable to any negligence of his employer. The court rejected this

contention both factually – the evidence showed that Sheeler’s supervisor acted negligently – and legally – relying on *Smith v. ACandS, Inc.*, 31 Cal. App. 4th 77, 82-5 (1994), and holding that *Privette* still governs regardless of whether the injured worker’s employer was negligent.

Sheeler also contended that there was a disputed material issue as to whether Greystone exercised retained control, precluding summary judgment. The court rejected this contention as well, distinguishing the case at hand, in which there was no evidence that Greystone affirmatively contributed to Sheeler’s injuries and cases like *Ray v. Silverado Constructors*, 98 Cal. App. 4th 1120 (2002), in which the owner affirmatively and contractually undertook responsibility for traffic control and its failure to meet this responsibility caused the plaintiff’s injuries.

Finally, Sheeler argued that Greystone was liable under a premises liability theory. Under this theory, a contractor generally has a nondelegable duty to prevent injuries from pre-existing conditions that are either non-obvious or are obvious but could foreseeably cause injury. The court found that this theory “is incompatible with the limitations on hirer liability established in *Privette* and subsequent cases” and held that “an employee cannot recover under the theory of premises liability unless the hirer had control of the dangerous condition and affirmatively contributed to the employee’s injury.”

A Contractual Arbitration Provision May Be Unconscionable Even if the Contract Is Not an Adhesion Contract

Harper v. Ultimo, 03 C.D.O.S. 10501 (12/5/03)

The Court of Appeal affirmed the trial court’s denial of contractor’s motion to compel arbitration.

Two homeowners, the Harpers, entered into two contracts with a contractor, Ultimo, to stabilize the soil and re-level a pool on their property. The pre-printed contracts provided by Ultimo contained provisions requiring that all disputes be settled in accordance with the Uniform Rules for Better Business Bureau (“BBB”) Arbitration, but those rules were not attached.

Ultimo allegedly broke a sewer pipe causing considerable damage to the Harper house’s plumbing and backyard drainage systems. At that point, the Harpers learned that the BBB rules precluded their recovery of tort, punitive or any other damages. After they sued Ultimo in superior court, Ultimo moved to compel arbitration. The court denied Ultimo’s motion, and Ultimo appealed.

The Court of Appeal easily found the arbitration provisions both procedurally and substantively unconscionable and, therefore, unenforceable. The court held that the appeal was not frivolous, however, due to two issues that it

considered somewhat unclear under California law: (1) whether a finding of adhesion is a prerequisite for a finding of unconscionability and (2) whether the trial court should have severed the unconscionable provisions and compelled arbitration on the rest of the Harpers' claims.

On the first issue, the court held that an arbitration provision may be unconscionable even if the contract was not one of adhesion. While a party can show procedural unconscionability by showing adhesion, that is not the only way to do so. In the case before it, the court found the clauses definitely involved procedural unconscionability (because the BBB rules were not attached and, to the Harpers' surprise, provided that no relief would be available for property damage, even if Ultimo committed fraud), regardless of whether the contract was adhesive.

On the second issue, the court held that the trial court's decision not to sever the Harpers' damages claims for jury trial and order the remaining claims to arbitration was not an abuse of discretion, even under the heightened standard of review called for by *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000). The fact that the Harpers' claims were "all bound up with one another," such that separate adjudications presented a risk of inconsistent rulings, was sufficient to support the trial court's decision.

Other California Decisions Relevant to Contractors

Insurance

Garamendi v. Golden Eagle Ins. Co., 03 C.D.O.S. 10199 (11/25/03)

Rampart General, Inc. was the fireplace subcontractor for William Lyon Company on a home development project in Orange County. Rampart was a defendant in a construction defects lawsuit brought by a number of homeowners. Shortly before trial, Rampart's CGL insurer, Golden Eagle, discovered that Rampart's corporate status had been suspended for failure to pay franchise taxes. As a result of the suspension, Rampart could no longer appear in the lawsuit. Golden Eagle was given an opportunity to intervene to protect its interests but chose not to do so. After a trial on the merits, judgment was entered against Rampart. Golden Eagle became insolvent shortly after the trial.

The homeowners sought to enforce their judgment against Golden Eagle. The administrator in charge of the conservatorship of Golden Eagle denied their claim based in part on his finding that the underlying judgment was a default judgment inadmissible as evidence of Golden Eagle's liability. The homeowners challenged that decision in the superior court. The court agreed with them, holding that the judgment against Rampart was not a default judgment and, as such, could be used as evidence of Golden Eagle's liability. The First District Court of Appeal agreed and affirmed the judgment for the homeowners.

Punitive Damages

Romo v. Ford Motor Co., 03 C.D.O.S. 10150 (11/25/03) and *Simon v. San Paolo U.S. Holding Co. Inc.*, 03 C.D.O.S. 10376 (12/2/03)

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), the United States Supreme Court held that punitive damages must bear a reasonable relationship to the individual injury at issue and the compensatory damages awarded. Based on that decision, the Fifth District Court of Appeal in *Romo* reduced a \$290 million punitive damages award to \$23.7 million because it found the original award was disproportionate to the \$6.2 million awarded in compensatory damages. The Second District, on the other hand, held in *Simon* that *State Farm* did not deprive California courts of their discretion over the imposition of punitive damages, and the Court of Appeal upheld an award of \$1.7 million in punitive damages, even though the jury awarded only \$5,000 in compensatory damages.

Sexual Harassment

State Dept. of Health Services v. Superior Court (McGinnis), 03 C.D.O.S. 10088 (11/24/03)

Employers are strictly liable for sexual harassment by supervisors under the California Fair Employment and Housing Act (FEHA), Gov. Code § 12900. *et seq.* A harassed employee may only recover damages, however, to the extent those damages could not have been avoided with a reasonable effort.

FEDERAL

Total Cost

Propellex Corp. v. Brownlee, 342 F.3d 1335 (Fed. Cir. 2003)

The Court of Appeals for the Federal Circuit affirmed the Armed Services Board of Contract Appeals decision affirming the Army's denial of the contractor's modified total cost claim.

Propellex was the prime contractor under two contracts with the United States relating to the production and delivery of gun primers for the Army. Propellex submitted a claim for additional costs incurred under both contracts. After the Contracting Officer issued a final decision denying the bulk of the claim, Propellex appealed to the Board of Contract Appeals. The Board affirmed the Army's denial of the claim, and Propellex appealed to the Federal Circuit.

Although the Federal Circuit agreed with Propellex and the Board of Contract Appeals that Propellex was entitled to some recovery, it rejected the contractor's attempt to calculate damages using a modified total cost method. In particular, the court concluded that Propellex had failed to prove the first prong of the four-part test stated in *Servidone Const. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). Specifically, Propellex failed to prove that it was impracticable to prove its actual losses directly. The court noted that Propellex could easily have set up an accounting system to keep track of all of the costs that were necessitated by the flawed test procedures but chose not to do so. Thus, the court held that the total cost method is not available when a party could have kept accurate records, did not do so, and has offered no legitimate reason for its failure to do so. *Id.*

Comment: *Propellex* is the most recent reported Federal decision applying the *Servidone* test adopted by the California Supreme Court in *Amelco Electric v. City of Thousand Oaks*, 27 Cal. 4th 228, 242-3 (2002). Under that test, before a contractor may recover under the total cost method, it must prove: (1) it is impracticable to prove actual losses directly; (2) its bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs of the project. *Amelco*, 27 Cal. 4th at 242-3 (citing *Servidone*, 931 F.2d at 861).