Horne v. Ahern Rentals Inc. (2020) 2020 DJDAR 5624

Hirer is only liable for injury to employee of contractor if hirer exercised control over safety conditions at worksite in way that "affirmatively" contributed to employee's injuries.

FACTS: Ruben Dickerson was crushed underneath a forklift owned by Defendant Ahern Rentals when the forklift slipped off a jack while Dickerson was performing a tire change. Dickerson was employed by 24-Hour Tire Service, which Defendant had hired as an independent contractor. Dickerson was on Defendant's premises when he was killed. 24-Hour Tire's insurer paid workers' compensation benefits to Plaintiffs, Dickerson's surviving heirs. Plaintiffs sued Defendant, alleging a single cause of action for wrongful death. Plaintiffs claimed Defendant negligently failed to provide a safe and level work surface, allowed the tire change to proceed with the forklift's boom raised, and failed to properly train its employees and independent contractors how to safely repair the forklift.

PROCEDURAL POSTURE: Defendant denied liability and was granted summary judgement.

- Defendant's summary judgement motion argued Plaintiffs' complaint was barred by the *Privette* rule.
- On appeal, Plaintiffs maintained that their wrongful death action against Defendant should be allowed to proceed notwithstanding the *Privette* rule because the *Hooker* retained-control exception applied.

HOLDING: <u>The Second District Appellate Court affirmed summary judgement in favor of Defendant.</u>

DISCUSSION: The court rejected Plaintiffs' contention that the *Hooker* exception was applicable and held that the trial court properly applied the *Privette* rule in this case. The *Horne* court relied primarily upon *Privette v. Superior Court* (1993), which held that an independent contractor's employee, injured while performing inherently dangerous work, cannot sue the contractor's hirer to recover damages for the same injuries compensable under workers' compensation.

The court also discussed the case invoked by Plaintiffs, *Hooker v. Department of Transportation* (2002), which established one of several exceptions to the *Privette* no-liability rule. The *Hooker* exception applies where a hirer "exercises retained control" over a worksite and thereby *affirmatively contributes* to the employee's injuries. Under *Hooker,* "affirmative contribution" means actively directing, participating in or interfering with the way the independent contractor's work was done, or failing to implement a specifically promised safety measure.

I. <u>*Hooker* Inapplicable Because Defendant Neither Directed the Contractor to Perform Work in Particular Manner, nor Failed to Undertake a Promised Safety Measure.</u>

Plaintiffs argued that triable issues of fact remained as to whether Defendant affirmatively contributed to the forklift collapse that caused Dickerson's death. The court disagreed. It stated that *Privette* and its progeny establish that the hirer of an independent contractor "presumptively delegates to that contractor its [] duty to provide a safe workplace for the contractor's employees." The "*Privette* presumption" also affects the parties' evidentiary burden. If a defendant produces evidence that it hired the independent contractor's employee to perform work at the defendant's premises and the employee was injured while working at the site, the burden shifts to the plaintiff to raise a triable issue of fact.

Here, Plaintiffs' evidence showed that Defendant "retained control" over the forklift by performing the initial set-up for 24-Hour's tire change. But according to the *Horne* court, this evidence was not sufficient to create a material factual dispute as to whether Defendant's retained control "affirmatively contributed" to Dickerson's death. In support of its finding, the court also pointed to the testimony of a 24-Hour Tire employee, who said that Defendant "did not assist in performing any of the work" and that 24-Hour was "100 percent" responsible for the tire change which resulted in Dickerson's death.

Citing *Tverberg v. Fillner Construction (2012)*, the court explained that "Passively permitting an unsafe condition does not amount to actively contributing to how it is done." The Second District Appellate Court therefore affirmed the trial court's finding that the undisputed facts "[a]t most. . . show[ed] Defendant passively permitted an unsafe condition." The *Horne* court noted, however, that the outcome would likely be different if Defendant had promised 24-Hour Tire or its employees that it would take steps to properly stabilize the forklift and never followed through.