

***Atlas Construction Supply, Inc. v. Swinerton Builders*, 2021 Cal. App. LEXIS 64**

Cross-complainant not barred from appealing good faith determination for failure to file a petition for writ of mandate. Exoneration of a joint tortfeasor from liability does not “aggrieve” other individually liable tortfeasors so as to confer standing to appeal.

FACTS AND PROCEDURAL POSTURE

Swinerton was the general contractor for a residential development in San Diego. Swinerton hired JR Construction to perform concrete work and subcontractor Brewer Crane and Rigging to perform crane work for the project. JR Construction rented a concrete column formwork—a vertical structure that wraps around metal rebar and holds liquid concrete in place—from Atlas for use during the project. The formwork was approximately 10 feet tall and weighed 300 to 400 pounds. Brewer placed the formwork at the worksite, positioned upright, but unsupported by braces. While climbing on the formwork to modify its size, Marcelo Develasco was killed when another crewmember stepped off the formwork and caused it to fall over. A wrongful death lawsuit was filed against Swinerton, Atlas, and Brewer. Atlas cross-complained for equitable indemnity, contribution, and declaratory relief.

Swinerton moved for summary judgment pursuant to *Privette v. Superior Court* (1993) 5 Cal.4th 689, which holds that the hirer of a contractor generally may not be held liable in tort when the contractor is hired to do inherently dangerous work and an employee of the contractor suffers work-related injuries due to the contractor’s negligence. Plaintiffs opposed the motion on the grounds that the negligence of Brewer harmed and employee of a *different* contractor, and thus *Privette* did not apply. Atlas also opposed the motion, arguing that Swinerton could be held liable pursuant to *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, which held a hirer may be held liable for injuries suffered by a contractor’s employee when the hirer retains control over safety conditions at a worksite and the hirer’s retained control affirmatively contributes to the employee’s injuries. The trial court granted the motion for summary judgment.

However, Swinerton did not seek entry of judgment on the order granting summary judgment, but negotiated a settlement with plaintiffs, in exchange for a waiver of costs (totaling \$5,349.63) subject to a good faith determination. In its motion for good faith determination, Swinerton argued it had no proportionate liability to plaintiffs based on the *Privette* doctrine, and did not affirmatively contribute to the incident, thus a waiver of costs in comparison to its minimal potential liability constituted a good faith settlement. Atlas opposed Swinerton’s motion for good faith determination, arguing plaintiff’s likely recovery at trial would be \$2.7 million, and that Swinerton could be held liable under the *Hooker* exception to *Privette*, and would likely be found 75%-85% liable. Thus there was a vast disparity between the settlement value and the potential liability. The court granted Swinerton’s motion, but declined to dismiss Atlas’s cross-complaint finding that Swinerton did not meet it’s burden of establishing Atlas’s claims in the cross-complaint were barred by the good faith determination. Swinerton and Atlas executed a stipulated request for dismissal of Atlas’s cross-complaint – the Court dismissed the cross-complaint per the stipulation.

DISCUSSION

Atlas appealed three issues: (1) the order granting Swinerton’s motion for summary judgment; (2) the good faith settlement determination; and (3) the stipulated order dismissing Atlas’s cross-complaint.

The Court first analyzed whether it had jurisdiction to address the issues raised in Atlas's appeal. It held the dismissal of Atlas's cross-complaint was an appealable judgment because it disposed of all causes of action between the parties to the cross-complaint. As to the good faith determination, the Court held Atlas was not barred from appealing the good faith determination for failure to file a petition for writ of mandate under Code of Civil Procedure section 877.6(e), which permits a party to seek immediate appellate review by petition for writ of mandate. The Court held the filing of a writ of mandate is not a prerequisite to an appeal.

As to the summary judgment order, the Court held Atlas could not appeal because Atlas was not aggrieved by the ruling. The Court noted it is well settled in California that the exoneration of a joint tortfeasor from liability does not "aggrieve" the other individually liable tortfeasor insofar as that word is understood to apply to a party's standing to appeal. The Court also pointed out that the dismissal of Atlas's cross-complaint was not the result of the order granting summary judgment, but the stipulated order following the good faith determination.

Finally, the court dismissed the appeal on the merits because Atlas failed to substantively address the factors considered in making a good faith determination, instead focusing on the summary judgment decision and making the bare assertion that the good faith ruling "flowed directly from the erroneous summary judgment."