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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

EUGENE MATHIES,

Plaintiff and Appellant,

v.

ROBERT BUHRER,

Defendant and Respondent.

A133832

(Sonoma County  
Super. Ct. No. SCV246608)

Defendant Robert Buhner, a homeowner, hired Jerry Caldwell, to do the framing work for an addition to a detached garage. At the time Buhner hired Caldwell, Caldwell was a validly licensed contractor who had filed a no-employee certification exempting him for carrying workers' compensation insurance. Several weeks after commencing work, Caldwell hired three workers, including plaintiff Eugene Mathies. At that point, Caldwell was required to have workers' compensation insurance; because he did not, his license was immediately and automatically suspended. (Bus. & Prof. Code, § 7125.2.) Mathies was subsequently injured, and later filed this statutory tort action (Lab. Code, §§ 3706, 3708)<sup>1</sup> against Caldwell. Mathies then filed an amended complaint, adding Buhner as a defendant.

Buhner moved for summary judgment on the ground Mathies' tort action, as against him, was barred by *Privette v. Superior Court* (1993) 5 Cal.4th 689, and its progeny. *Privette* precludes an employee of an independent contractor from

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise indicated.

bringing a tort action against the person or entity that hired the contractor. There are, however, several recognized exceptions to the *Privette* doctrine, and in opposing Buhner's motion, Mathies did not dispute that he was the employee of an independent contractor, but argued there were triable issues of fact as to these exceptions. The trial court concluded there were no triable issues of material fact that any of the exceptions to the *Privette* doctrine applied, and granted Buhner's motion. On appeal, Mathies makes a new argument—that the moment Caldwell's license was suspended he (Mathies) no longer was the employee of an independent contractor, but rather under section 2750.5, was a “statutory” employee of Buhner and therefore *Privette* does not apply.

We first conclude the trial court correctly determined there are no material issues of fact that any of the recognized exceptions to the *Privette* doctrine apply. We further conclude, however, that given the state of the record and the fact Caldwell was not validly licensed at the time Mathies was injured, the judgment must be reversed.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Buhner decided to add a second story to a detached garage at his residence. He retained an architect to prepare the plans, and several trade contractors to do the work, including a framing contractor, a roofing contractor, and an electrician.<sup>2</sup>

Buhner hired Caldwell, doing business as Caldwell Builders, to do the framing work. Buhner was familiar with Caldwell's work, Caldwell having worked as a sub-contractor for the general contractor that built Buhner's residence several years earlier, and having helped build the detached garage to which the upper room was being added. Caldwell gave Buhner a written proposal for the framing work on Caldwell Builders stationery, which bore contractor's license No. 589684. The estimated price

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<sup>2</sup> Buhner knew the improvement project required a building permit, but did not obtain one. A standard building permit application contains numerous advisements to property owners concerning the use of licensed and insured contractors. (Health & Saf. Code, § 19825.) After Buhner was reported by an anonymous caller, he paid all penalties, brought the work into compliance with code and passed inspections.

was \$25,000, with a notation there would be a discount of “3k for cash.” Buhner paid in cash. At the time Buhner hired Caldwell, Caldwell was a validly licensed contractor. Caldwell did not carry workers’ compensation insurance, having filed, as allowed by the workers’ compensation law (Bus. & Prof. Code, § 7125, subd. (b)(1)), a no-employees certificate.

Caldwell’s arrangement with Buhner was that Buhner would pay suppliers for the materials. Caldwell arranged for Buhner to get contractor pricing in some instances.

Caldwell began work, ordered at least some materials delivered to the site and also either supplied or arranged for the delivery of equipment required for the framing work. Caldwell could not do the specified framing work by himself, and hired three individuals, including Mathies, to assist him. Apparently, Caldwell paid Mathies and at least one of his other two employees in cash.

According to Caldwell, Buhner’s role in supervising the framing work was “minimal.” Several times when Caldwell was not on site, Mathies spoke directly with Buhner, who often worked at home and was frequently around the premises. On one occasion, Mathies told Buhner there were some electrical wires in the way and the framing work could not continue until they were moved. Buhner called an electrician, and the lines were moved. Another time, Mathies told Buhner the gutter contractor needed to get the gutters up for the work to proceed. The gutter contractor was there the next day. When an issue about head clearance in the stairwell occurred, Buhner had the architect out to talk with Caldwell about an adjustment. According to Mathies, Buhner said the workers could use any of his tools, although Mathies specifically recalled use of only several ladders and perhaps a vise.<sup>3</sup>

About three and a half weeks after he began working for Caldwell, Mathies fell 10 to 12 feet from an A-frame scaffolding and seriously injured his ankle. Caldwell owned and provided the scaffolding.

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<sup>3</sup> Buhner disputed that he gave permission to his own hand tools and testified they were locked in another garage.

Buhrer had never asked Caldwell whether he had workers' compensation insurance and denied knowing Caldwell lacked insurance until sometime after Mathies's injury.

Mathies subsequently filed this action against Caldwell and Caldwell Builders, seeking tort damages for negligent failure to provide safe working conditions (first cause of action), and for negligence per se for violation of Cal-OSHA standards (second cause of action). He subsequently filed a first amended complaint adding as defendants Robert Buhrer and his wife Alexandra. He maintained the first cause of action against Caldwell; alleged two new causes of action against the Buhrers, for negligence based on a nondelegable duty to provide a safe workplace (second cause of action) and negligence based on retained control (third cause of action); and added the Buhrers to the claim of Cal-OSHA violations (now the fourth cause of action). In his general allegations, incorporated into all the causes of action, Mathies alleged that when he was injured he was working "as an employee of defendants Mr. Caldwell, Caldwell Builders and/or defendants Buher [*sic*] and/or Does 1-9."

The Buhrers filed an answer to the first amended complaint, in which they alleged workers' compensation as an affirmative defense: "[I]t is hereby alleged upon information and belief that at the time of the accident described in the [first amended] Complaint, [Mathies] was in the course and scope of his[] employment with these answering defendants. Therefore, the Worker's [*sic*] Compensation statutes and/or laws and the Worker's [*sic*] Compensation Appeals Board have exclusive jurisdiction over and concerning [Mathies's] claims and as a result the [first amended] Complaint is barred with this Court having no jurisdiction."<sup>4</sup>

By stipulation of the parties, Mathies filed a second amended complaint. This pleading added two new causes of action against Caldwell and Buhrer, for negligently providing unsafe equipment (fifth cause of action) and—in what appears to be a duplication of the second cause of action—for breach of a nondelegable duty to provide

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<sup>4</sup> Alexandra Buhrer was later dismissed from the lawsuit.

a safe workplace (sixth cause of action). The pleading repeated the general allegation of Buhrer's status as employer quoted above. Buhrer filed an answer, again alleging workers' compensation as an affirmative defense: "the [second amended] complaint is barred by the provisions of Labor Code [section] 3601 and/or [section] 3602."

Buhrer subsequently moved for summary judgment or summary adjudication of issues. As we have recited, Buhrer grounded his motion on *Privette, supra*, 5 Cal.4th 689. He argued he was not liable in tort to Mathies, whose remedy, as the employee of an independent contractor is as provided by the workers' compensation law and it makes no difference in this regard that Caldwell was uninsured, citing *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, 442-445 (*Lopez*). He further argued none of the recognized exceptions to the *Privette* doctrine Mathies alleged in his amended complaint—that Buhrer had (a) retained control of the worksite or job safety, (b) furnished unsafe equipment that contributed to Mathies's injury and (c) violated a nondelegable duty required by statute or regulation that is designed for the safety of the worker—applied. Mathies filed opposition, arguing there were triable issues as to the *Privette* exceptions.

The trial court granted Buhrer's motion. It concluded there were no triable issues that any of the *Privette* exceptions applied. Following *Lopez*, the court further concluded Caldwell's failure to have workers' compensation insurance did not foreclose the application of *Privette*. The trial court accordingly entered judgment for Buhrer.

## II. DISCUSSION

We review the grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) A defendant moving for summary judgment bears the initial burden of showing that one or more elements of a cause of action cannot be established, or that there is a complete defense to the cause of action. Once this burden is met, the burden shifts to the plaintiff to show there is a triable issue of material fact as to the cause of action, supported by reference to specific facts and not mere allegations of the pleadings. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849; *Brizuela v. CalFarm Ins. Co.* (2004) 116 Cal.App.4th

578, 586.) Summary judgment is a “drastic measure that deprives the losing party of a trial on the merits.” (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 (*Molko*), superseded by statute on another ground as stated in *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 853, fn. 19.) It should therefore “be used with caution.” (*Ibid.*) On review of a grant of defense summary judgment, we view the evidence in the light most favorable to the plaintiff. (*Ibid.*; *Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 142.) “Any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion.” (*Molko, supra*, at p. 1107.)

We first address the trial court’s ruling under *Privette*. In *Privette*, a homeowner hired a licensed contractor, who carried workers’ compensation insurance, to install a new roof on his duplex. An employee of the roofing contractor was injured and subsequently sued the homeowner in tort. (*Privette, supra*, 5 Cal.4th at pp. 692-693.) *Privette* observed that “the rule of workers’ compensation exclusivity, which shields an independent contractor who pays workers’ compensation insurance premiums from further liability to its employees for on-the-job injuries, should equally protect the property owner who, in hiring the contractor, is indirectly paying for the cost of such coverage, which the contractor presumably has calculated into the contract price. Therefore, . . . the property owner should not have to pay for injuries caused by the contractor’s negligent performance of the work when workers’ compensation statutes already cover those injuries.” (*Id.* at p. 699; see also *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 267 [“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”].)

There are several recognized exceptions to the *Privette* doctrine, which Mathies alleged in his amended complaint. On reviewing the evidence, however, the trial court determined there were no material issues of fact as to the applicability of any of them: First, “[a]lthough . . . Buhner maintained control of many aspects of the

project, . . . Buhrer did not maintain control over the manner in which the framing was accomplished and did not provide the equipment from which . . . Mathies fell.” Second, rejecting the contentions based on nondelegable duty, the court ruled “[t]he independent contractor and not the owner or the general contractor is responsible for the safety of the independent contractor’s employees.” Third, Mathies “has not shown a concealed dangerous condition of the property, and has not shown that . . . Buhrer provided unsafe equipment contributing to [Mathies’s] injuries.”

The trial court further concluded Caldwell’s lack of workers’ compensation insurance did not foreclose the application of *Privette*, relying on *Lopez*. In *Lopez*, a property owner hired a general contractor to develop its property. The general contractor, in turn, hired a sub-contractor to frame the roof. (*Lopez, supra*, 101 Cal.App.4th at p. 434.) Although licensed, the sub-contractor did not have workers’ compensation insurance. (*Id.* at p. 435.) Lopez, employed by the sub-contractor, was injured on the job. (*Ibid.*) Lopez sued the property owner, who moved for and was granted summary judgment. (*Ibid.*) The Court of Appeal affirmed. Acknowledging the uninsured sub-contractor could be sued in tort under the provisions of the workers’ compensation law, the court rejected Lopez’s argument that he should also be able to sue the property owner. “Equity and public policy would not be served by penalizing” the property owner for the sub-contractor’s wrongdoing and failure to obtain workers’ compensation coverage—which not only triggered the civil penalty provisions of the workers’ compensation law, but was also a misdemeanor (§§ 3700, 3700.5).

Having reviewed the record, we agree the trial court correctly concluded there is no triable issue of material fact as to any of the *Privette* exceptions Mathies alleged. Nevertheless, given the state of the record, we cannot affirm the summary judgment.

As we have recited, Mathies alleged generally that when he was injured he was working “as an employee of defendants Mr. Caldwell, Caldwell Builders and/or defendants Buher [*sic*] and/or Does 1-9.” It is also undisputed that at the time Mathies was injured, Caldwell was required to have, but did not have, workers’ compensation

insurance. Caldwell was therefore not validly licensed at the time Mathies was injured. (Bus. & Prof. Code, § 7125.2.) Accordingly, under *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, and section 2750.5, issues remain as to whether Mathies was a “statutory” employee of Buhner.

We do not agree with Buhner that the 2002 amendments to Business and Professions Code section 7125.2 effectively abrogated the Supreme Court’s decision in *State Compensation Ins. Fund*, which is binding on us. Rather, given the timing and import of the amendments, we conclude they were intended to insure a result different than that reached in *Smith v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 117. In *Smith*, the Court of Appeal, construing the prior statutory language, held a contractor, who had claimed no-employee exemption from workers’ compensation insurance requirements but had hired employees, did not immediately lose his licensing status and remained validly licensed until notified by the Board. As amended, Business and Professions Code section 7125.2 makes explicit that failure to have required workers’ compensation insurance results in an immediate and automatic license suspension.<sup>5</sup> (Bus. & Prof. Code, § 7125.2.)

The issues raised by *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.*, *supra*, 40 Cal.3d 5, and section 2750.5, are numerous and include whether Buhner has workers’ compensation liability (as distinguished from tort liability) under the governing statutes and cases (see, e.g., §§ 3351, subd. (d), 3352, subd. (h); *Zaragoza v. Ibarra* (2009) 174 Cal.App.4th 1012, 1016; *Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227, 232-235), and if so, whether Buhner has homeowner’s insurance, which by law must include workers’ compensation coverage (Ins. Code, §§ 11590,

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<sup>5</sup> The Court of Appeal in *Lopez* did not address the applicability of section 2750.5, but rather, assumed the contractor retained independent contractor status despite not having workers’ compensation insurance. This is understandable given the court’s holding that under the then-existing provisions of Business and Professions Code section 7125.2, the contractor remained validly licensed at the time of the employee’s injury.

11591).<sup>6</sup> We express no opinion as to these issues, or as to whether Buhrer would be subject to tort liability in the absence of such insurance.<sup>7</sup> (See *Cortez v. Abich* (2011) 51 Cal.4th 285, 291, 298; *Ramirez v. Nelson* (2008) 44 Cal.4th 908, 913.)

### III. DISPOSITION

The summary judgment is reversed and the case remanded for further proceedings consistent with this opinion.<sup>8</sup> Respondents to recover costs on appeal.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.

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<sup>6</sup> At oral argument, counsel for Buhrer advised these issues are pending in a related workers' compensation case.

<sup>7</sup> Further dispositive motions may be appropriate upon a more developed record, including with respect to the workers' compensation claim Mathies has filed against Buhrer.

<sup>8</sup> The request for judicial notice filed May 16, 2012, is denied as to Exhibit Nos. 1 and 2 and granted as to Exhibit No. 3.