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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

LANIER LEWIS et al., Plaintiffs and Appellants, v. PEPPER CONSTRUCTION COMPANY PACIFIC, Defendant and Respondent.	C060212 (Super. Ct. No. 05AS04118)

When the employee of a subcontractor is injured, the general contractor may owe a duty of care to the employee of the subcontractor if the general contractor retained control over the details of the work *and* affirmatively contributed to the employee's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210 (*Hooker*), discussing *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and its progeny.)

In this case, plaintiff Lanier Lewis, an employee of a subcontractor, was injured when he fell more than 15 feet off an elevated beam while working at the IKEA construction site in West Sacramento. He and his wife seek to recover in tort from

Pepper Construction Company Pacific (Pepper), the general contractor, alleging that Pepper owed Lewis a duty of care. The trial court entered summary judgment in favor of Pepper, finding that Pepper did not owe Lewis a duty of care.

On appeal, Lewis contends that (1) Pepper owed him a duty of care pursuant to statute and Pepper's status as a "controlling employer" under the Labor Code, regardless of whether Pepper retained control over the details of the work and affirmatively contributed to Lewis's injuries, because Labor Code section 6304.5 allows reliance on the Labor Code and related regulations to establish a duty of care and (2) the facts establish that Pepper committed an "affirmative act" that contributed to Lewis's injuries.

In part I of the discussion, we conclude, following a recent case of another district (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1349-1352 (*Millard*)), that Labor Code section 6304.5 was not intended to expand the duty of care owed by a general contractor to a subcontractor's employees beyond the limitations of *Privette* and its progeny.

We conclude in part II of the discussion that the facts do not establish that Pepper affirmatively contributed to Lewis's injuries and, therefore, Pepper did not owe Lewis a duty of care under the common law.

Lewis additionally asserts that the trial court's reasoning in granting summary judgment was erroneous. In part III of the discussion, we conclude that the trial court's judgment was correct regardless of the reasoning.

In part IV of the discussion, we conclude that we need not consider separately the claim of Lewis's wife for loss of consortium.

We therefore affirm.[1]

STANDARD OF REVIEW

Summary judgment is required when a defendant shows the "action has no merit." (Code Civ. Proc., § 437c, subd. (a).) To make this showing, the defendant must set forth admissible evidence establishing "that there is no triable issue as to any material fact and that the [defendant] is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

Because summary judgment involves purely matters of law, we review a summary judgment ruling de novo. (*Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1116.) Any doubts as to the propriety of granting the motion are resolved in favor of the party opposing the motion. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

FACTS

Pepper entered into a contract with IKEA to act as the construction manager for the construction of IKEA's West Sacramento facility. Under its authority as the general contractor, Pepper subcontracted with JD2, Inc. (JD2) for the

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[1] In a request for judicial notice filed June 30, 2009, Pepper requested that we take judicial notice of two decisions of the state Occupational and Health Appeals Board and a mandamus proceeding regarding one of those decisions. The request is granted. (Evid. Code, §§ 452, 453, 459.)

structural steel work at the IKEA site. JD2 subcontracted with Innovative Steel Erectors (ISE) for the steel erection work. Lewis was working as an employee of ISE when he was injured.

The Contracts

Pepper's contract with IKEA (the general contract) stated that Pepper would be solely responsible for and have control over the construction methods and safety "unless the Contract Documents give other specific instruction concerning these matters." The general contract assigned to Gary Opp, a Pepper employee, the duty to supervise on-site activities, including responsibility to "ensure all safety regulations are followed." Concerning those safety regulations, the general contract stated: "The safety regulations shall be developed by [Pepper]. [Pepper] shall require all Subcontractors to provide [Pepper] with a safety plan prior to the commencement of work."

The subcontract between Pepper and JD2 required JD2 to conform to all of Pepper's safety policies as well as any government regulations. It provided that JD2 would review its safety plan with Pepper personnel. And it required JD2 employees and its subcontractors' employees to abide by the regulations of the Occupational Safety and Health Acts (OSHA). With respect to fall protection, the subcontract included Pepper's fall protection guidelines and required JD2 to abide by the guidelines, including fall protection for workers at 15 feet and higher.

The subcontract between JD2 and ISE similarly required full compliance with OSHA regulations.

Both subcontracts required the subcontractors (JD2 and ISE) to obtain worker's compensation and general liability insurance with Pepper and IKEA named as insureds.

Events Leading Up to the Fall

Lewis, a union ironworker, was hired by ISE to work on the IKEA project. He received direction for his work and safety from the ISE foremen only and did not meet with or receive instruction from any Pepper employee.

Before starting its work on the site, ISE submitted a safety plan to Pepper. Although the contracts required compliance with Pepper's safety guidelines and OSHA regulations, which include 15-foot fall protection, Lewis asserts that the plan submitted by ISE did not explicitly include 15-foot fall protection for all workers, under all circumstances.

The day before the accident, Patrick Rioux, a Pepper employee, made a notation in a daily report that he had told "J.R." that "his men needed to be tied off while they were shaking out the decking." In his opening brief, Lewis claims that "J.R." was "the JD2 Inc./ISE foreman," but he does not provide a citation to the record for this claim. Lewis then asserts: "Pepper thus knew the work being performed by ISE was being done without 100% fall protection but failed to correct the violation of Cal-OSHA, the contracts and the fall protection program." Again, Lewis does not provide a citation to the record supporting his assertion that Pepper knew that ISE was not providing fall protection. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [requiring citations to record].) "The claimed

existence of facts that are not supported by citations to pages in the appellate record, or not appropriately supported by citations, cannot be considered by this court." (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 816, fn. 5.)

Casanova Claybrook, a fellow ISE employee who was working with Lewis when Lewis was injured, expressed his opinion that, if a general contractor required that subcontractors' employees be able to anchor ("tie-off") as protection from falling, then it was the general contractor's responsibility to make sure it was possible to tie off. Claybrook testified, in deposition, that he was working at the same level as Lewis and was tied off by wrapping a lanyard that he was wearing around some of the steel work. It was Claybrook's understanding that Lewis should also have been tied off, but he was not. According to Lewis, there was no place for him to tie off. There was also no perimeter safety cable at that location.

There is a dispute between the parties concerning how to classify the task in which Lewis was engaged when he was injured, whether it was "connecting," which may not require fall protection because the ironworker must be more mobile, or some other ironwork that requires fall protection. For the purpose of summary judgment review, we need not resolve this dispute but instead accept Lewis's characterization of the work as not being "connecting" work. Lewis asserts the work required "affirmative anchorage points for fall protection" under federal and state

regulations and Pepper's safety plan. (See Cal. Code Regs., tit. 8, § 1710(m).)[2]

Lewis's Fall

On the day of the accident, Lewis was working on a welding project when an ISE foreman asked him to help move decking from the ground level to the second floor. Claybrook and Lewis were up on the second floor of the structure. Lewis was sitting sidesaddle on a beam. The ISE foreman hoisted a bundle of decking up to the second floor level using a forklift. As Lewis and Claybrook were working with the foreman to position the bundle of decking, Lewis fell more than 15 feet from his position on the beam to the ground below.

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[2] California Code of Regulations, title 8, section 1710(m) states:

"(A) When connecting beams or other structural members at the periphery or interior of a building or structure where the fall distance is greater than two stories or 30 feet, whichever is less, ironworkers shall be provided with and use a personal fall protection system as described in Article 24 tied-off to either columns, pendant lines secured at the tops of columns, catenary lines, or other secure anchorage points.

"(B) At heights over 15 and up to 30 feet above a lower level, connectors shall be provided with a personal fall arrest system, positioning device system or fall restraint system and wear the equipment necessary to be able to be tied off; or be provided with other means of protection from fall hazards in accordance with subsection (m)."

DISCUSSION

I

Controlling Employer

Lewis contends that Pepper owed him a duty of care, without regard to the common law requirement that the general contractor retain control over the details of the work and affirmatively contribute to the injuries, because the duty of care is established by statute and regulations. Specifically, Lewis contends that Pepper was the "controlling employer" at the worksite pursuant to Labor Code section 6400 and OSHA regulations, which make Pepper responsible for ensuring that hazardous conditions are corrected.[3] Based on this duty of a "controlling employer," Lewis contends that Pepper owed Lewis a duty of care because Labor Code section 6304.5 allows reliance on Labor Code provisions and related regulations to establish a duty of care.

Before discussing Lewis's contentions, we review (A) the state of the law concerning suits against general contractors by injured employees of subcontractors in the common law context of *Privette, supra,* 5 Cal.4th 689 and its progeny. We also review

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[3] Labor Code section 6400, subdivision (b)(3) states that, if an employee is exposed to a hazard, a citation may be issued to "[t]he employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)."

(B) the changes in the Labor Code that prompt Lewis's argument that Pepper owed Lewis a duty of care. And finally, we conclude that (C) Lewis's argument that Pepper owed Lewis a duty of care because Pepper was the "controlling employer" at the worksite is without merit because Labor Code section 6304.5 did not supplant the *Privette* doctrine.

A. *The* Privette *Doctrine*

A recent opinion of the First Appellate District provides a useful overview of the *Privette* doctrine:

"*Privette* and its progeny . . . have defined and limited the circumstances in which an independent contractor's employee may recover in tort from the party hiring the contractor. In *Privette*, the Supreme Court examined whether a hired contractor's employees may seek recovery based on the theory of 'peculiar risk' from a nonnegligent hiring party for injuries caused by the negligent contractor. (*Privette, supra*, 5 Cal.4th at p. 696.) The peculiar risk doctrine had developed as an exception to the general rule that a person who hired an independent contractor was not liable to third parties for injuries caused by the contractor's negligence in performing the work. (*Id.* at p. 693.) It had been applied by the courts when the contracted work was deemed to pose some inherent risk of injury to others. (*Id.* at pp. 693–694.) The theory underlying the exception was that a private landowner who engages in inherently dangerous activity on his land should not be able to insulate himself from liability for injuries to others simply by hiring an independent contractor to do the work. (*Ibid.*) In

the event of the contractor's insolvency, the peculiar risk exception would allocate the loss to the person for whose benefit the job was undertaken. (*Id.* at p. 694.) By spreading the risk of loss to the person who primarily benefited from the hired work, the courts also sought to promote greater workplace safety. (*Ibid.*) The peculiar risk doctrine was gradually expanded to allow the hired contractor's *employees* to seek recovery from the nonnegligent property owner for injuries caused by the negligent contractor. (*Id.* at p. 696.)

"The *Privette* court rejected the extension of the peculiar risk doctrine to the contractor's employees. The court reasoned that 'when the person injured by negligently performed contracted work is one of the contractor's own employees, the injury is already compensable under the workers' compensation scheme and therefore the doctrine of peculiar risk should provide no tort remedy, for those same injuries, against the person who hired the independent contractor.' (*Privette, supra*, 5 Cal.4th at p. 696.) Because the workers' compensation scheme shields an independent contractor from tort liability to its employees, 'applying the peculiar risk doctrine to the independent contractor's employees would illogically and unfairly subject the hiring person, who did nothing to create the risk that caused the injury, to greater liability than that faced by the independent contractor whose negligence caused the employee's injury.' (*Toland* [*v. Sunland Housing Group, Inc.* (1998)] 18 Cal.4th [253,] 256 [(*Toland*)] [summarizing the holding of *Privette*].) The scope of the *Privette* doctrine has

been held to include claims that the hirer failed to take special precautions (*Toland*, at p. 267) and that the hirer was negligent in hiring the contractor whose negligence caused the injury (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244–1245 []).

"In *Hooker*[, *supra*,] 27 Cal.4th 198, 200–202 [], the court considered whether the hirer of an independent contractor could be held liable for injuries to the contractor's employee resulting from the contractor's negligence under the theory that the hirer retained control of the work but negligently exercised that control. The high court held in *Hooker* that 'a hirer of an independent contractor was not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but was liable to such an employee insofar as its exercise of retained control *affirmatively contributed to the employee's injuries*." (*Millard*[, *supra*,] 156 Cal.App.4th 1338, 1348 [] [summarizing *Hooker*].) In such cases, the liability of the hirer is not 'vicarious' or 'derivative' in the sense that it derives from the act or omission of the hired contractor, but is direct. (*Hooker*, at p. 212; see also *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222, 225 [hirer is directly liable to an employee of an independent contractor when hirer's provision of unsafe equipment affirmatively contributes to the employee's injury].)

"In *Hooker*, the widow of a deceased crane operator who had been employed by a general contractor hired by the California Department of Transportation (Caltrans) to construct an

overpass, sued Caltrans for negligently exercising its retained control over jobsite safety. (*Hooker, supra*, 27 Cal.4th at p. 202.) The Caltrans construction manual provided that Caltrans was responsible for obtaining the contractor's compliance with all safety laws and regulations, and Caltrans's onsite engineer had the power to shut the project down because of safety conditions and to remove employees of the contractor for failing to comply with safety regulations. (*Id.* at pp. 202–203.) The plaintiff's husband died after the crane tipped over when he attempted to operate it without reextending the crane's outriggers. (*Id.* at p. 202.) He had retracted the outriggers in order to allow Caltrans and other vehicles to use the narrow overpass. (*Id.* at p. 214.) The plaintiff alleged that Caltrans was negligent in permitting traffic to use the overpass while the crane was being operated. (*Id.* at pp. 202, 214–215.)

"Although the court found that the plaintiff in *Hooker* had raised triable issues of material fact as to whether Caltrans retained control over safety conditions at the worksite, she failed to raise triable issues of material fact as to whether Caltrans actually exercised the retained control so as to affirmatively contribute to the death of her husband. (*Hooker, supra*, 27 Cal.4th at p. 202.) The court stated: '"[A] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to

adopt safer procedures does not, without more, violate any duty owed to the plaintiff."' (*Id.* at p. 209.) Under the standard approved in *Hooker*, a general contractor contributes to an unsafe procedure or practice by its affirmative conduct where the general contractor '"is actively involved in, or asserts control over, the manner of performance of the contracted work. [Citation.] Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. [Citations.]" [Citation.]' (*Id.* at p. 215, italics omitted.)

"*Hooker* also states that an omission may constitute an affirmative contribution in some circumstances: '[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.' (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.)

"Applying these standards to the facts before it, the *Hooker* court held: 'While the evidence suggests that the crane tipped over because the crane operator swung the boom while the outriggers were retracted, and that the crane operator had a practice of retracting the outriggers to permit construction traffic to pass the crane on the overpass, *there was no evidence Caltrans's exercise of retained control over safety conditions*

at the worksite affirmatively contributed to the adoption of that practice by the crane operator. There was, at most, evidence that Caltrans's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it.' (*Hooker, supra*, 27 Cal.4th at p. 215, italics added.)" (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272-1275, fn. omitted, original emphasis.)

B. *Labor Code section 6304.5*

This case involves the intersection of the *Privette* doctrine with Labor Code section 6304.5. This intersection was discussed in *Millard, supra,* 156 Cal.App.4th 1338, a case which Lewis asserts was wrongly decided. We first quote the holding and reasoning of *Millard*, then address Lewis's assertions with respect to that case.

The *Millard* court stated:

"[A]s amended in 1999, [Labor Code] section 6304.5 now provides: 'It is the intent of the Legislature that the provisions of this division, and the occupational safety and health standards and orders promulgated under this code, *are applicable* to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety. [¶] Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer. *Sections 452* [*permissive judicial notice*] *and 669* [*negligence per se*] *of the Evidence Code shall apply to this*

division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation. The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards. It is the intent of the Legislature that the amendments to this section enacted in the 1999–2000 Regular Session shall not abrogate the holding in *Brock v. State of California* (1978) 81 Cal.App.3d 752.' (Italics added.)

"Evidence Code section 452 permits judicial notice of state statutes and regulations. (Evid. Code, § 452, subd. (a).) Evidence Code section 669, subdivision (a) codifies the common law doctrine of negligence per se, under which statutes and regulations may be used to establish duties and standards of care in negligence actions: 'The failure of a person to exercise due care is presumed if: [¶] (1) He violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; [¶] (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.'

"In *Elsner* [*v. Uveges* (2004)] 34 Cal.4th 915 [(*Elsner*)], the California Supreme Court held that under amended [Labor Code] section 6304.5, 'Cal-OSHA provisions are to be treated

like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, *including third party actions*.' (*Elsner, supra*, 34 Cal.4th at p. 928, italics added.) Based upon this language, Millard [as does Lewis here] asserts that, despite *Privette*, [Labor Code] section 6304.5 allows admission of statutes and regulations to create a duty of care, even where the nonemployer contractor did not affirmatively contribute to the injured subcontractor's injuries.

"However, an analysis of *Elsner* demonstrates that it was not intended to limit or impliedly overrule *Privette* and its progeny, and is inapplicable to the facts of this case. First, in *Elsner*, the roofing subcontractor's employee was injured at a construction project when scaffolding constructed by the defendant general contractor collapsed. (*Elsner, supra*, 34 Cal.4th at p. 924.) As the court in *Elsner* noted: 'At trial, this case proceeded on a single theory: Uveges negligently furnished unsafe scaffolding *that contributed to Elsner's injury*.' (*Id.* at p. 937, italics added.) Thus, in *Elsner*, *Privette* was not at issue because the plaintiff was not attempting to impose liability on the general contractor for the negligence of others, but for the general contractor's affirmative contribution to his injuries. The court was not asked to and did not decide [Labor Code] section 6304.5's impact, if any, on *Privette.*

"Furthermore, the Supreme Court's discussion of the retroactivity of the amended version of [Labor Code] section

6304.5 compels the conclusion that the 1999 amendments did not abrogate or limit *Privette* or its progeny. In assessing whether the amendments to [Labor Code] section 6304.5 were retroactive, the high court in *Elsner* noted that the critical question is, 'Does the law "change[] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct[?]" [Citation.] Does it "substantially affect[] existing rights and obligations[?]" [Citation.] If so, then application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application.' (*Elsner, supra*, 34 Cal.4th at p. 937.) The high court noted that '[t]he admission of provisions imposing broader duties on a defendant than existed under the common law expands the defendant's liability.' (*Ibid.*)

"The high court in *Elsner* then noted that the plaintiff's expert 'testified to the content of various Cal-OSHA provisions for purposes of establishing the relevant standard of care. ([Lab. Code, §§ 6400, 6401, 6403, 7151]; Cal. Code Regs., tit. 8, §§ 1513, 1637, 1640.) The jury was instructed on the requirements of these Cal-OSHA provisions, instructed on the duties imposed by [Labor Code] sections 6400, 6401 and 6403, and instructed on *negligence per se*.' (*Elsner, supra*, 34 Cal.4th at p. 936, italics added.) The court then concluded that amended [Labor Code] section 6304.5 could be applied retroactively because it did *not* expand the defendant general contractor's duty of care: '[T]he admission of [Labor Code] sections 6400, 6401 and 6403 did not expand Uveges's common law duty of care.

These provisions imposed on Uveges the duty to furnish a safe place of employment, to use safe practices and procedures, and to provide and use appropriate safety devices and safeguards. (§§ 6400, 6401, 6403.) But Uveges already owed Elsner a common law duty to provide safe equipment: "[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, *affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence*." [Citation.] At trial, this case proceeded on a single theory: *Uveges negligently furnished unsafe scaffolding that contributed to Elsner's injury*. That Frey, Uveges's agent, constructed the scaffolding from which Elsner fell was undisputed. Also undisputed was that when Uveges furnished scaffolding for the construction project, he had a common law duty to furnish safe scaffolding. The principal issues were breach, causation, and comparative negligence: whether the scaffolding met the standard of care, whether any defects contributed to Elsner's injuries, and whether Elsner's own conduct contributed to his injuries. Thus, Uveges cannot complain that the jury verdict in this case arose from a retroactive expansion of his duty of care.' (*Elsner, supra*, 34 Cal.4th at p. 937, italics added.)

"Thus, as the court in *Elsner* emphasized, amended [Labor Code] section 6304.5 was not intended to expand a general contractor's duty of care to an injured employee of a subcontractor. This includes the limitations on such a duty

imposed by *Privette* and its progeny. Under amended [Labor Code] section 6304.5, safety regulations may be admissible in actions by employees of subcontractors brought against general contractors that retain control of safety conditions, but only where the general contractor affirmatively contributed to the employee's injuries. As we have explained, *ante*, in this case there is no triable issue of fact that Biosources affirmatively contributed to Millard's injuries.

"This result is further confirmed when it is recognized that the pertinent amendment to [Labor Code] section 6304.5 only concerned causes of action for negligence per se." (*Millard, supra,* 156 Cal.App.4th at pp. 1349-1352, original emphasis.)

C. *Lewis's Objections to the Holding in* Millard

Lewis contends that Pepper was the controlling employer at the IKEA worksite for the purpose of applying Labor Code section 6400, which provides that a controlling employer may be cited for failing to ensure that a hazardous condition has been corrected. For the purpose of discussion, we will assume that is true.

Lewis also contends that the conditions at the IKEA worksite were in violation of various OSHA regulations concerning fall protection. We will also assume that is true, for the purpose of discussion.

Lewis does not attempt to distinguish *Millard* on its facts. Therefore, we will consider only whether Lewis is correct in contending that *Millard* and another case that followed *Millard* (*Madden, supra,* 165 Cal.App.4th 1267) were wrongly decided.

Lewis finds three purported problems with *Millard* and *Madden*: (1) they failed to consider the legislative history of Labor Code section 6304.5; (2) they are inconsistent with the Supreme Court's decision in *Elsner*; and (3) their holdings with respect to Labor Code section 6304.5 are dicta. None of these contentions has merit.

1. Legislative History

Lewis's opening brief contains a lengthy discussion of the legislative history of Labor Code section 6304.5. In his argument concerning *Millard*, however, Lewis states only that *Millard's* analysis of Labor Code section 6304.5 "was apparently made without any provision of the legislative history as provided [in the opening brief]." Beyond this conclusion, Lewis gives no reason for us to reject *Millard* based on a deficiency in the analysis of the legislative history. Therefore, Lewis fails to establish that *Millard's* failure to more fully analyze the legislative history of Labor Code section 6304.5 renders the holding incorrect.

2. Consistency with *Elsner*

Lewis's main criticism of *Millard* is that it is inconsistent with the Supreme Court's decision in *Elsner*, *supra*, 34 Cal.4th 915, upon which the *Millard* court relied. We disagree.

According to the *Millard* court, *Elsner* held that "amended [Labor Code] section 6304.5 was not intended to expand a general contractor's duty of care to an injured employee of a subcontractor." (*Millard, supra,* 156 Cal.App.4th at p. 1352;

see also Madden, supra, 165 Cal.App.4th at p. 1279.) Lewis claims that this statement is incorrect because it assumes that the statutory duty of care owed by the general contractor is no greater than the common law duty of care.

To the contrary, that is precisely what *Elsner* held. The *Elsner* court stated: "[T]he admission of [Labor Code] sections 6400, 6401 and 6403 did not expand [the defendant's] common law duty of care. These provisions imposed on [the defendant] the duty to furnish a safe place of employment, to use safe practices and procedures, and to provide and use appropriate safety devices and safeguards. ([Lab. Code,] §§ 6400, 6401, 6403.) But [the defendant] already owed Elsner a common law duty to provide safe equipment: '[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence.' [Citation.]" (*Elsner, supra,* 34 Cal.4th at p. 937.)

Therefore, as explained in *Millard*, the *Privette* doctrine still applies: the general contractor owes a duty of care to the injured employee of a subcontractor only if the general contractor retained control over the details of the work *and* affirmatively contributed to the employee's injury.

Lewis cites two other cases of the Court of Appeal (*Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137 (*Evard*) and *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129

Cal.App.4th 281 (*Barclay*)) in his attempt to discredit *Millard*. Neither case, however, is inconsistent with *Millard* because they both involve a duty owed directly from the general contractor or owner to the employee of the subcontractor. Here, instead, Pepper's duty was delegated to the subcontractors -- the usual *Privette* doctrine scenario.

In *Evard*, a summary judgment case, the owner of a billboard had a nondelegable duty to maintain the billboard in a safe condition. (153 Cal.App.4th at p. 147.) The employee of a contractor hired to work on the billboard was injured when the aluminum pole he was using came into contact with a power line. The employee received a shock and fell from the billboard. (*Id.* at pp. 142-143.) The court held that the owner owed a nondelegable duty to provide guardrails to prevent falls. Therefore, the owner owed a duty of care to the employee. (Id. at pp. 146-147.)

In *Barclay*, another summary judgment case, this court similarly found that a property owner may have owed a duty of care to an employee of a contractor hired to work near fuel tanks because regulations required the owner to provide fire extinguishers. (129 Cal.App.4th at p. 301.) The employee was injured when one of the tanks exploded, and there was no fire extinguisher available. (*Id.* at p. 286.) Although we based our decision on the owner's duty to provide fire extinguishers, we also noted that the employee must establish that the owner's conduct affirmatively contributed to the employee's injuries: "[The owner] may be liable if its breach of regulatory duties,

owed to plaintiff, affirmatively contributed to plaintiff's injuries." (*Id.* at p. 298.)

Therefore, Lewis fails in his attempt to establish that *Millard*, as well as the trial court's judgment in this case, is inconsistent with *Elsner* and Court of Appeal precedents.

3. Dicta

Lewis's complaint that the relevant holdings in *Millard* and *Madden* should be disregarded as dicta fares no better.

Lewis states that "the *Millard* discussion of duty is *dicta*, as the court found that the statutory duty was not pled in the complaint, and therefore, not properly before the court." (Original emphasis.) It is true that the *Millard* court, in the last paragraph, finds, as an alternative to its holding concerning the duty of care, that the doctrine of negligence per se (based on the regulatory duty) was not properly pled. (*Millard, supra,* 156 Cal.App.4th at p. 1353.) This one-paragraph, alternative basis for affirming, however, does not render invalid or unpersuasive the remainder of the opinion.

Similarly, the *Madden* opinion, which we need not discuss in detail because it essentially relied on *Millard*, stated alternative grounds for affirming the judgment entered in favor of the general contractor. (*Madden, supra,* 165 Cal.App.4th at pp. 1276-1281 [no retained control, no affirmative contribution to injuries, and no duty resulting from regulatory violation].) "When an appellate court bases its decision on alternative grounds, none is dictum. [Citation.]" (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485.)

II

Affirmative Act

Lewis contends that Pepper owed him a duty of care under the common law because Pepper committed affirmative acts that contributed to Lewis's injuries. He bases this assertion, primarily, on footnote three in *Hooker*, *supra,* which states that affirmative contribution may be in the form of a failure to act. We conclude that, although the facts relied on by Lewis arguably show that Pepper retained some control over the safety precautions at the worksite, Pepper's conduct or failure to act did not constitute affirmative contribution to Lewis's injuries.

In *Hooker*, the Supreme Court included a footnote concerning the common law principle that a general contractor does not owe a duty of care to a subcontractor's employee unless the general contractor retained control over the details of the work and affirmatively contributed to the employee's injury. As noted above, that footnote states: "Such affirmative 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." (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3.)

Lewis cites several facts which he claims support his assertion that we should find that Pepper owed him a duty of care. These include: Pepper created a 15-foot tie-off policy

and was responsible for enforcing safety provisions and informing ISE of the safety provisions. Pepper approved a plan by ISE that did not conform to Pepper's safety plan. Carl Beltz, a JD2 employee, believed that Pepper was responsible for enforcing contractual safety provisions and correcting any problems with fall protection. And Casanova Claybrook, who was Lewis's coworker at ISE, believed that, if Pepper required ironworkers to tie-off at 15 feet and above, it was Pepper's responsibility to ensure that it was possible to tie-off, including engineering of the worksite to make it possible.

These facts do not support Lewis's contention that Pepper affirmatively contributed to his injuries. Instead, they are similar to the facts in *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28 (*Kinney*), a case in which the court found that the general contractor did not owe the subcontractor's employee a duty of care. In *Kinney*, a subcontractor's employee fell from a scaffold. The employee argued that the general contractor retained the power to control safety procedures at the worksite but failed to do so. The general contractor's site superintendent stated the general contractor retained the right to order any safety measures it felt appropriate at the site. In addition, if the superintendent observed an unsafe condition, he had the authority to do whatever he believed appropriate. The general contractor had the final authority on safety procedures. (*Id.* at p. 31.) The *Kinney* court affirmed summary judgment in favor of the general contractor. The court reasoned: "The mere failure to exercise a power to compel the

subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff." (*Id.* at p. 39.)

The Supreme Court, in *Hooker*, cited and quoted *Kinney* approvingly: "[M]ere retention of the ability to control safety conditions is not enough. '[A] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff. Insofar as section 414 [of the Restatement Second of Torts] might permit the imposition of liability on a general contractor for mere failure to intervene in a subcontractor's working methods or procedures, without evidence that the general contractor affirmatively contributed to the employment of those methods or procedures, that section is inapplicable to claims by subcontractors' employees against the general contractor.' (*Kinney*, at p. 39.)" (*Hooker, supra,* 27 Cal.4th at p. 209.)

Here, as in *Kinney*, Pepper had the power to compel ISE, Lewis's employer, to adopt safety precautions and retained the authority to correct safety violations. These facts, however, do not amount to affirmative contribution to Lewis's injuries. Accordingly, the trial court was correct in granting summary judgment with respect to the common law duty of care.

Notwithstanding this precedent, Lewis asserts that two cases support his assertion of a common law duty of care.

(*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (*Kinsman*); *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120 (*Ray*).) Neither case is on point.

In *Kinsman*, an employee of a contractor hired by an oil company was injured by asbestos used to insulate the pipes. The employee claimed that the oil company negligently failed to warn the contractor of the presence of asbestos or to provide safety equipment. Finding a potential duty of care on the part of the oil company because the contractor was not aware of the asbestos danger, the Supreme Court commented that "when the hirer does not fully delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort to the employee." (37 Cal.4th at p. 671.) Here, there was no hidden danger concerning which ISE was unaware.

In *Ray*, an employee of a subcontractor was killed when construction materials that had blown off a bridge struck the employee in the head. The Court of Appeal found that the general contractor owed a potential duty of care to the employee of the subcontractor because there was a triable issue of fact concerning whether the general contractor retained authority, to the exclusion of the subcontractor, to close the road (the construction site) if conditions became too windy and dangerous. (98 Cal.App.4th at pp. 1134-1136.) Here, there was nothing in Pepper's retained control of the worksite that prevented ISE from fully implementing safety precautions.

Lewis failed to establish a common law duty of care.

III

Asserted Errors in the Trial Court's Reasoning

Lewis asserts that several aspects of the trial court's reasoning in granting summary judgment were erroneous. For example, he states that the tentative decision improperly limited the reach of a controlling employer's duty. Having concluded that summary judgment was proper, we need not review asserted errors in the court's reasoning because we affirm a summary judgment that was properly granted even if the trial court's reasons for granting it were wrong. (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 575.)

IV

Loss of Consortium Claim

Lewis's wife also sued Pepper, basing her derivative claim on loss of consortium. On appeal, she makes no separate assertions of error. Therefore, we need not discuss her loss of consortium claim separately.

DISPOSITION

The judgment is affirmed. Pepper is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

NICHOLSON, J.

We concur:

SCOTLAND, P. J.

RAYE, J.