



LEWIS BRISBOIS BISGAARD & SMITH LLP

Construction Update

Moving Toward a "Class-less Society"

Construction Contacts:

Inland Empire

John Lowenthal | 909.381.7168

Las Vegas

Jeff Ballin | 702.693.4327

Los Angeles

Karl Loureiro | 213.680.5031

Orange County

Charlie Harris | 714.668.5501

Phoenix

Jim Kloss | 602.385.7850

Sacramento

Brigitte Mayo | 916.646.8206

San Diego

Jacqueline Vinaccia | 619.699.4927

San Francisco

J. Erick Dimalanta | 415.438.6654



Karl Loureiro

In this issue of the Lewis Brisbois Bisgaard & Smith Construction Law Newsletter, we discuss the impact of the Nevada Supreme Court case of *Schuette v. Beazer Homes Holding Corporation* in both the Nevada and Arizona forums. Jeffrey Ballin, a partner in our Las Vegas office, discusses how the *Schuette* case has had a significant impact in the way plaintiffs file construction defect cases. There has already been a marked reduction of residential construction class action suits filed in Southern Nevada. James Kloss, a partner in our Phoenix office, discusses the impact of *Schuette* on the Arizona judiciary and its immediate effect on class action certification in construction defect litigation. Arizona construction defect class actions are now being met with similar disfavor, with *Schuette* accelerating the trend toward denial of class action certifications.

Our Inland Empire partner, John Lowenthal, provides us with a brief history of the *Privette* Doctrine and walks us through some case highlights of the last 18 months. These cases reaffirm some basic principles prevalent in construction site accident litigation with John's analysis offering helpful insight as to the applicability of these cases and the common sense maxims they offer. These lessons are worth reviewing by both claims professionals as well as construction industry personnel and will assist our readers in taking an offensive approach in navigating the sometimes perilous construction industry waters.

As always, Lewis Brisbois Bisgaard & Smith strives to keep its clients current on the most recent developments and changes in relevant areas of construction law. We actively solicit your input on any topic you would like to see addressed in this newsletter.

Karl R. Loureiro

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SCHUETTE AND CLASS ACTIONS IN NEVADA

By Jeffrey H. Ballin

Prior to December 2005, certifying a single family home class action in Nevada involved little more than procuring a few class representations, producing a few *pro forma* expert reports, and propounding a few paragraphs in a perfunctory motion. The rubber stamp was, though, relegated to the scrap heap in December 2005 with the Nevada Supreme Court's decision in *Schuette v. Beazer Homes Holdings Corporation*, 124 P.3d 530, 537 (2005), in which the Court disseminated its thoughts on (1) the components of NRCP 23, (2) the propriety of class actions in the real property setting, and (3) the circumstances when class action certification is warranted for single family homes.

NRCP 23(a) and (b)

NRCP 23 is the statute that governs class actions in Nevada.

Under NRCP 23(a), plaintiffs seeking to certify a case as a class action must establish four prerequisites. First, "numerosity" [NRCP 23(a)(1)] requires that the members of the proposed class be so numerous that separate joinder of each member is impracticable. Second, "commonality" [NRCP 23(a)(2)] requires the existence of questions of law or fact common to each member of the class. Third, "typicality" [NRCP 23(a)(3)] requires a showing that the representative parties' claims or defenses are typical of the class' claims or defenses. And, fourth, "adequacy" [NRCP 23(a)(4)] mandates that the representative parties be able to fairly and adequately protect and represent each class member's interests.

And, under NRCP 23(b), plaintiffs seeking to certify a case as a class action must meet one of three conditions. First, that separate litigation by individuals in the class would create a risk that the opposing party would be held to inconsistent standards of conduct or that non-party members' interests might be unfairly impacted by the other members' individual litigation. Second, that the party opposing the class has acted or refused to act against the class in a manner making appropriate classwide injunctive or declaratory relief. Or, third, that common questions of law or fact predominate over individual questions, and a class action is superior to other methods of adjudication.

In commenting on the components of NRCP 23, the *Schuette* Court held that:

Class action suits are designed to allow representatives of a numerous class of similarly situated people to sue on behalf of the class in order to obtain a judgment that will bind all. Thereby, class actions promote efficiency and justice in the legal system by reducing the possibilities that courts will be asked to adjudicate many separate suits arising from a single wrong and that individuals will be unable to obtain redress for wrongs otherwise irremediable because the individual claims are too small or the claimants too widely dispersed.

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So that these goals are not thwarted, NRCP 23(a) and (b) specify the circumstances under which a case is appropriately designated and maintained as a class action. Under those subsections, it is the plaintiffs' burden to prove that the case is appropriate for resolution as a class action. Therefore, when deciding to certify a case to proceed as a class action, the district court must look at NRCP 23(a) and (b) in pragmatically determining whether the plaintiffs have shown that it is better to proceed as a single action, than as many individual actions, in order to redress a single fundamental wrong.

NRCP 23(b)(3) was the gravamen of Plaintiffs' quest for certification in *Schuette*.

CLASS ACTION TREATMENT

In commenting on the propriety of class actions in the real property setting, the *Schuette* Court held that:

As pointed out by the California Supreme Court, class actions involving real property are often incompatible with the fundamental maxim that each parcel of land is unique. Although, as that court recognized, the uniqueness of land principle was developed at common law in response to concerns that did not involve class actions, the rule takes on added significance in this modern area of development. Simply stated, there are now more characteristics and criteria by which each piece of land differs from every other. Allowing class actions to proceed on issues, especially those of liability, that involve variables particular to unique parcels of land would require either an alteration of this principle or an extensive subclassification system that would effectively defeat the purpose of the class action altogether. Like the California court, we recognize that, where specific characteristics of different land parcels are concerned, these unique factors weigh heavily in favor of requiring independent litigation of the liability to each parcel and its owner.

Class action treatment may be proper under NRCP 23, for instance, if the constructional defect case or issue involves a singular defect that predominates over any other problems, which remain minimal. In a California case, the claimants were allowed to proceed with a class action on issues regarding breach of warranty, since the alleged defect consisted of the improper use of a certain material in each house's concrete slab. With regard to their breach of warranty claims, the parties merely requested economic damages for the defective items' repair or replacement; thus, the claims could be resolved with generalized proof and simple damages formulas.

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On the other hand, the plaintiffs in that case were not permitted to proceed with their negligence claims arising from the same defect because, for those claims, each class member would be required to specifically prove damages, and thus the individual factual questions as to causation and damages would make a class action unmanageable.

PREDOMINANCE & SUPERIORITY

In commenting on the circumstances that warrant class action certification for single family homes, the *Schuette* Court held that:

The predominance prong of NRCP 23(b)(3) tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. The questions of law or fact at issue in this analysis are those that qualify each class member's case as a genuine controversy; therefore, the questions that class members have in common must be significant to the substantive legal analysis of the members' claims.

While the NRCP 23(b)(3) predominance inquiry is related to the NRCP 23(a) commonality and typicality requirements, it is more demanding. The importance of common questions must predominate over the importance of questions peculiar to individual class members. For example, common questions predominate over individual questions if they significantly and directly impact each class member's effort to establish liability and entitlement to relief, and their resolution cannot be achieved through generalized proof. On the other hand, when the facts and law necessary to resolve the claims vary from person to person, taking into account the nature of the defenses presented, or when the resolution of common questions would result in superficial adjudications which deprive either [party] of a fair trial, individual questions predominate so that class action is an inappropriate method of adjudication. Ultimately, as the United States Supreme Court has pointed out, courts should exercise caution in allowing a class action to proceed when the individual stakes are high and disparities among class members great.

The second prong questions whether class action is the superior method for adjudicating the claims, thereby promoting the interests of efficiency, consistency, and ensuring that class members actually obtain relief. A proper class action prevents identical issues from being litigated over and over, thus avoiding duplicative proceedings and inconsistent results. It also helps class members obtain relief when they might be unable or unwilling to individually litigate an action for financial reasons or for fear of repercussion.

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Other factors worth considering, however, including the members' interests in individually controlling the litigation, whether and the extent to which other litigation of the matter by class members has already commenced, the desirability of litigating the class action in the particular forum, whether the class action will be manageable, and the time and effort a district court must expend in becoming familiar with the case.

DISCUSSION

With the advent of *Schuette*, plaintiffs seeking to certify a class of single family homes in Nevada must carefully consider whether

- (1) Their case involves a single fundamental wrong,
- (2) Their damages can be proved through generalized proof, and
- (3) There are no disparities among the class participants.

If not, plaintiffs must abandon visions of class action and opt for joinder. The impact of the *Schuette* decision is already being felt in southern Nevada as a number of class action suits have been decertified and the number of class action suits being filed has been markedly reduced.



Jeff Ballin


CONSTRUCTION DEFECT CLASS ACTIONS MEET WITH DISFAVOR IN ARIZONA

By James Kloss

Widespread residential construction defect litigation surfaced in Arizona toward the end of the 1990's. Over the course of the last eight years, Arizona courts have struggled with the issue of whether class certification is appropriate for residential construction defect cases. To date, none of the Arizona Appellate Courts have yet rendered a decision on the propriety or impropriety of certifying class action in a construction defect case. Accordingly, until recently, Arizona trial court judges have rendered individualistic decisions, reflecting the temperament of the particular judge and/or the particular facts at issue. However, recent developments in the adjoining State of Nevada indicate the trend is changing.

In the influential decision of *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. Adv. Op. No. 82 (Dec. 15, 2005), the Nevada Supreme Court rendered an influential opinion. In *Shuette*, the trial court certified a broad-based class action involving 206 single-family residences. It was a broad-based case, with claims involving soils, framing, drywalling, and windows. The trial court decided that class certification was appropriate on all defects. With the victory on class action issues in hand, plaintiffs went on to a trial victory and an ultimate award of well in excess of \$7 million. The builder appealed to the Nevada Supreme Court.

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On appeal, the Nevada Supreme Court reversed on the preliminary issue of whether the case had been appropriate to certify for class action status. After a very thorough and well-reasoned opinion, Justice Hardesty reviewed the considerations appropriate to determine whether any case should be certified for class action status. Factors considered by the Nevada Supreme Court, such as numerosity, typicality of defects, superiority of class action forum, and commonality, are the same factors generally utilized by most courts across the country. Justice Hardesty indicated that class certification in a construction defect action tends to be inappropriate because of the difficulty in demonstrating that the same defect and the same resulting damages are present in each of the many homes at issue. *Shuette* concluded by stating that because single-family residents construction defect cases present significant issues requiring individualized determination, they are not appropriate for class certification.

Shuette has already had a broader impact, extending beyond the borders of Nevada. In Arizona, trial court judges up to now have had no appellate guidance. While there is still no appellate guidance from an Arizona court, Arizona judges are influenced by well-reasoned decisions of appellate courts from nearby states. *Shuette* has already been cited in Arizona construction defect litigation, with trial court judges conceding that they believe it is a well-reasoned decision.

Up until now, Arizona trial court judges have been far from uniform in their conclusions as to whether construction defect cases are appropriate for class certification. The first Arizona case to go to trial in a broad-based construction defect case, *Popevis v. Beazer Homes Sales of Arizona, Inc.* (which went to trial in February, 2004), involved certification on a wide variety of defects in an entire subdivision of single-family homes. While class certification has been granted in other Arizona construction defect cases since that time, the trend has now begun to clearly swing back toward denial of class certification. *Shuette* has accelerated that process, with the likelihood being that, absent an Arizona appellate decision going the other way, Arizona will follow Nevada in denying class certification in the vast majority of construction defect cases.

Plaintiffs' construction defect counsel are, if nothing else, flexible in their approach in these cases. Accordingly, we can expect to see a response from plaintiffs' counsel. The response is expected to be that certification will only be sought on narrow issues. For example, instead of attempting to obtain class certification on a shotgun list of every possible defect, it is expected that plaintiffs' counsel will focus on seeking class certification on limited issues. Further, it is expected that class certification will not be sought on broad-based claims of defective workmanship, but will instead focus on narrow design issues. For example, we expect that plaintiffs' counsel will look to certify issues like a failure to use post-tension slabs leading to soils claims, or a claim that the window systems are defective because they all lack flashing. These types of design claims, which are based on decisions made by the builder/general contractor, are arguably more appropriate for class certification because the same "defect" will, by design, exist in every single home in the subdivision. Therefore, the claimed defect will be typical and common, in addition to being numerous.

Defense counsel will have to be prepared to continue to point out the individualized nature of the defect claims, even on design-related issues. For example, defense counsel could look at the individualized damages. Even if every slab is defectively designed, not every slab will encounter the same soil factors, and, therefore, each slab will react differently. Some homes may end up with extensive damage.

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Other homes with moderate damage, and some homes with no damage. Further, defense counsel can emphasize that class certification is not the best way to handle construction defect litigation. Class actions are appropriate where the plaintiff has no realistic option to sue on their own. For example, claims relating to a milk carton or a compact disc can only be reasonably handled by way of class certification, because no individual user of the product would ever seek monetary recovery in the court system for such a modest sum. However, because a home purchase typically represents the largest investment to be made by the homeowner, if the homeowner is truly aggrieved by the construction status of the home, there is no reason that the homeowner would not or could not seek assistance for the claim through the court system. Considering the trend in home prices in Arizona, the damages claimed for any particular home in a construction defect lawsuit will only increase, likely averaging figures that will begin to approach \$100,000. While an aggrieved consumer may not pursue a claim over a defective \$15 compact disc, the same situation is not faced when the claim involves defects in a \$400,000 home.

The trend in Arizona cases toward denial of class certification in residential construction defect cases does not, by any means, end this type of litigation. Plaintiffs' counsel will continue to file mass actions of individually-named homeowners, and will continue to seek class certification on limited issues, mainly relating to design allegations. However, the days of a 200-home single-family subdivision going to trial over a shotgun list of 50 different defects are likely over. The effect is to significantly decrease the value and exposure in many cases, a trend that is certainly welcome news for the defense.

CONSTRUCTION SITE ACCIDENTS, THE YEAR (OR SO) IN REVIEW

By John Lowenthal

No discussion of construction site accident litigation would be complete without a primer on *Privette*.

A (brief) History of the *Privette* Doctrine:

Privette v. Superior Court (1993) 5 Cal.4th 689 is the first in a series of California cases limiting the liability of a party who hires an independent contractor for injuries to the contractor's employees. *Privette* stands for the proposition neither a property owner nor a general contractor are vicariously or derivatively liable to employees of an independently-hired sub-contractor who sustained injury as a result of the sub-contractor's negligence. The rationale of *Privette* is a recognition it is simply unfair for a landowner or other person who hires an independent contractor to shoulder greater liability for the independent contractor's negligence toward the contractor's employees than the independent contractor whose liability is limited to providing workers' compensation coverage.

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Privette has been extended to bar claims brought under a theory defendant negligently hired the independent contractor, who in turn employed the injured plaintiff (*Camargo v. Tjaarda Dairy* (2001) 21 Cal.4th 1235). More recently in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, the question was whether the party hiring the independent contractor could be liable for negligent exercise of a retained power to control performance of the work. The Court held mere failure to exercise a retained power of control cannot, by itself, make the party hiring an independent contractor liable because the hiring party owes no duty of care to an employee of a sub-contractor to prevent or correct unsafe procedures or practices to which the hiring party did not contribute by direction, induced reliance or other affirmative conduct. For example, mere failure to exercise a power to compel a sub-contractor to adopt safer procedures does not, without more, violate any duty owed to the sub-contractor's employees.

An example of "affirmative contribution" to injury was discussed in *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219. In that case, defendant required the independent contractor to use defendant's forklift which turned out to be unsafe and caused plaintiff's injury. The *McKown* court recognized that where the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the sub-contractor.

A landowner or other hiring party may be liable to an independent contractor's employees even if it does not retain control over the work, if it knew or reasonably should have known of a concealed, pre-existing hazardous condition of the premises; the independent contractor does not know and could not reasonably ascertain the condition; and the landowner or other hiring party failed to warn the independent contractor (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659).

If the principle of these cases can be stated in a sentence, it appears to be that the liability of a hirer of an independent contractor for injuries to an employee of the [independent] contractor cannot be predicated on the [independent] contractor's negligence; rather the [hiring party] can only be liable where it injures a worker through its own negligence. . . . However, these cases may be understood, and are perhaps understood, as resting on the principle that the hirer of an independent contractor has no duty to protect an employee of the [independent] contractor from the consequences of the [independent] contractor's negligence.

RECENT CASES

For those of us who handle and litigate construction site accident claims, the lessons from the last eighteen months include:

- (1) It is rarely a good idea to remove safety equipment in order to get the job done faster;
- (2) Failure to have fire extinguishers handy at a gasoline storage facility yields predictable results;

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- (3) A sub-contractor's sub-contractor is still a sub-contractor; and
- (4) A construction site is a dangerous place and a person can get hurt if he/she is not careful.

Now you know the gist of the recent cases and while I appreciate the natural urge to stop right here, let's read on.

1. *Browne v. Turner Construction Company* (2005) 127 Cal.App.4th 1334 – **It is Rarely a Good Idea to Remove Safety Equipment in Order to Get the Job Done Faster**

Plaintiff in this case sustained serious injuries when he fell about nine feet from a ladder on which he was standing in an attempt to install some overhead sprinkler pipes. The evidence suggested that the general contractor (Turner Construction) removed safety equipment from the work area, including hydraulic lifts which plaintiff could have used other than a ladder. It also removed the fall protection system consisting of catenary (suspended) anchoring cables to which workers secure or "tie off" their safety lanyards. The evidence also suggested Turner Construction removed the safety equipment as part of an effort to complete the work more quickly.

The Court of Appeal reversed summary judgment in favor of the general contractor noting plaintiff asserted, without dispute, that defendants provided two safety systems, at least one of which was intended for, and both of which had, the effect of protecting plaintiff and other workers from fall-related injuries. The Court noted "[w]hether defendants furnished the systems gratuitously or out of obligation, once they did so they assumed the duty not to increase the risk of harm to plaintiff either by acting negligently or by inducing reliance which increases the harm." In essence, plaintiff was forced to work without fall protection which the hiring party elected to remove.

2. *Barclay v. Jesse M. Lang Distributors, Inc.* (2005) 129 Cal.App.4th 281 – **Failure to Have Fire Extinguishers Handy at a Gasoline Storage Facility Yields Predictable Results**

Plaintiff in this case was employed by an independent contractor hired to clean gasoline storage tanks located on defendant's property. During the cleaning operation there was an explosion and plaintiff was severely burned. The California Fire Code requires fire extinguishers shall be located "within 75 feet of those portions of a petroleum storage facility where fires are likely to occur." Once again, a summary judgment was reversed. The Court concluded liability may be predicated upon the owner's breach of its own regulatory duties, regardless of whether or not it voluntarily retained control or actively participated in the project.

For purposes of imposing liability for affirmatively contributing to a plaintiff's injuries, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation omitted] (*Barclay*, *supra* at 256).

While the presence of fire extinguishers as required by code would not have prevented the explosion, there was evidence plaintiff's injuries would likely have been much less severe had a fire extinguisher been close by.

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3. *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082 – A Sub-Contractor of a Sub-Contractor is Still a Sub-Contractor

The injury in this case occurred during disposal and transportation of hazardous waste. The property owner hired defendant, Aman Environmental Construction, Inc., a general contractor for demolition work on the site. Aman prepared a Site Specific Health & Safety Plan (SSP) which detailed fall protection procedures, including the requirement that one or more of the fall protection/prevention systems outlined in it shall be provided at all locations where fall hazards of six feet or greater exist.

Aman hired Chemical Waste Management, Inc., a hazardous waste handler, to provide transportation and disposal of waste materials from the site. Chemical Waste Management, Inc., in turn, hired Denbeste Transportation. Denbeste and plaintiff entered into a sub-haul agreement under which plaintiff provided his own tractor to pull a Denbeste trailer. While preparing to leave the site with a load of hazardous debris, plaintiff fell from the trailer sustaining a spinal cord injury which resulted in paraplegia. Plaintiff contended he was an independent contractor, not Denbeste's employee, and, therefore, the *Privette* doctrine does not apply. Essentially, plaintiff proposed a rule which would preclude Aman and Chemical Waste Management from delegating to Denbeste the duty to ensure the safety of the work site for independent contractors hired by Denbeste.

Aman and Chemical Waste Management successfully moved for summary judgment, which was upheld on appeal.

Assuming for purposes of analyzing the liability of Aman and CWM that Michael is an independent contractor rather than an employee with respect to Denbeste, we conclude the *Privette* doctrine governs nonetheless. (*Denbeste*, *id* at 1093)

The Court drew no meaningful distinction between whether plaintiff was an employee of the sub-contractor or was, himself, independently contracted to Denbeste which was in turn independently contracted to Chemical Waste Management, sub-contractor to Aman Environmental Construction, Inc.

4. *Jonkey v. Carignan Construction Company* (2006) 139 Cal.App.4th 20 – A Construction Site is a Dangerous Place

Jonkey is not a *Privette* doctrine case. Plaintiff, the owner and supervisor of a steel fabrication sub-contractor, was injured when struck by a falling plank from a scaffold being disassembled by defendant, Cruz Masonry. It was obvious to even a casual observer that the scaffold was being disassembled and planks dropped to the ground. One of defendant's employees tried to warn plaintiff as he approached, however, plaintiff was absorbed in a cell phone conversation and looking at the ground at the time of injury. I include this case, not only because my partners Keith Taylor and Mike Connally tried the case to a defense verdict and prevailed on appeal, but for the beautiful common sense of the Appellate Court's comments:

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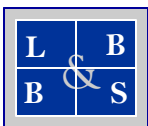
A construction site can be a dangerous place. There are some people who are keenly aware of this danger – construction workers. . . . Here, it is ironic that Eric Jonkey (appellant), a seasoned and mature construction worker who had risen in the industry to a position of management and ownership, could be injured in the way we shall describe. Of all people at a construction site, appellant was and is chargeable with caring for his own safety. That he was walking near scaffolding which was being disassembled at a construction site looking down absorbed in a cell-phone conversation is tantamount to strolling on a battlefield wearing ‘horse blinders’ and ear-plugs. While we regret that he was injured, he should be grateful that he wasn’t killed. (*Jonkey*, *id* at 22.)

While the jury found Cruz Masonry negligent, it also determined defendant’s negligence was not a substantial factor and, therefore, not the legal cause of plaintiff’s injuries.

COMMENT

Most of the construction site accident cases decided in the last few years involve the *Privette* doctrine and, specifically, what does or does not constitute “affirmative contribution” to plaintiff’s injuries. In 2004 the California Supreme Court handed down its decision in *Elsner v. Uveges* 34 Cal.4th 915, holding violation of OSHA regulations is admissible to prove negligence in a construction site accident case. So far, I have not seen this decision have significant impact on *Privette* doctrine cases. While *Elsner* makes it easier to establish negligence on the part of an owner or general contractor, plaintiff must still establish the negligence affirmatively contributed to his or her injuries in order to prevail.

One issue yet to be addressed is whether or not the *Privette* doctrine will protect an owner or contractor where sub-contractor “A”’s failure to comply with its safety responsibilities results in injury to an employee of sub-contractor “B” who, unlike in *Michael v. Denbeste Transportation*, was not hired by sub-contractor “A”. As an example: Construction Company contracts with Framer to install safety railings on the second story of homes under construction. Construction Company contracts separately with Drywall Company for installation of wallboard. Drywall Company’s employee falls and sustains injury because Framer neglected to install the safety railings. The injured employee sues Construction Company and contends *Privette* does not apply as Drywall Company was not hired by Framer. As the same policy and other reasons for extending the *Privette* doctrine appear to apply, I believe a strong case can be made for the proposition that such a distinction (as compared to *Michael v. Denbeste*) is insignificant. Perhaps the courts will tell us during the next year (or so).





Chicago
312.345.1718

Phoenix
602.385.1040

Costa Mesa
714.545.9200

Sacramento
916.564.5400

Lafayette
337.3265777

San Bernardino
909.387.1130

Las Vegas
702.893.3383

San Diego
619.233.1006

Los Angeles
213.250.1800

San Francisco
415.362.2580

New York
212.232.1300

Tucson
520.202.2565

EDITOR IN CHIEF

Karl Loureiro
Partner & Vice Chair of the Construction Group in Los Angeles
He can be reached at loureiro@lbbslaw.com or 213.680.5031

CONTRIBUTING EDITORS

Jeffrey Ballin
Partner in the Construction Group in Las Vegas.
He can be reached at ballin@lbbslaw.com or 702.693.4327

James Kloss
Partner in the Construction Group in Phoenix.
He can be reached at jkloss@lbbslaw.com or 602.385.7850

John Lowenthal
Partner in the Construction Group in the Inland Empire Office.
He can be reached at lowenthal@lbbslaw.com or 909.381.7168

Resumes are available at www.lbbslaw.com.
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