

CALIFORNIA FARM OWNER LIABILITY FOR HEAT-RELATED INJURIES TO THEIR INDEPENDENT FARM LABOR CONTRACTOR'S FARM WORKER EMPLOYEES

I. INTRODUCTION

On May 16, 2008, 17-year-old Maria Isabel Vasquez Jimenez, two months pregnant, died of heat stroke two days after collapsing in a Farmington vineyard while under the supervision of Maria De Los Angeles Colunga, a farm labor contractor.¹ California “has since revoked De Los Angeles Colunga’s contractor’s license and fined her \$262,700.00, the largest fine ever assessed to a labor contractor for labor violations.”² The San Joaquin County District Attorney’s office filed involuntary manslaughter charges against her, the former safety director, and the former supervisor.³ In addition, two civil actions have been filed against her, Merced Farm Labor, and West Coast Grape Farming (the operator of the vineyard).⁴ This is not the first time she has seriously violated safety regulations.⁵ In 2006, she was fined \$2,250 and had her license revoked;⁶ yet, she never paid any fines nor appealed, and her contractor’s license

¹ Jennie Rodriguez, *Suspect in heat death skips court*, STOCKTON (CALIFORNIA) RECORD, May 6, 2009, available at http://www.smfws.com/articles2009/may_2009/art05062009.htm.

² *Id.*

³ *Id.*

⁴ The San Joaquin District Attorney’s office filed involuntary manslaughter charges against Maria De Los Angeles Colunga (owner of the labor company), Elias Armenta (former safety director), and Raul Martínez (former supervisor). They each face one felony and five misdemeanor charges (which if convicted will give them a minimum prison sentence of two years and a maximum prison sentence of six years), for failing to provide Jimenez with reasonable access to potable water, shade, heat illness training and prompt medical attention. *Id.*

⁵ See Susan Ferriss, *Cal-OSHA to review handling of heat cases*, SACRAMENTO BEE, Dec. 31, 2008, available at <http://www.sacbee.com/capitolandcalifornia/story/1507906.html>.

⁶ *Id.*

was later renewed.⁷ Although both incidents came after Title 8 of the California Code of Regulations Section 3395 Heat Illness Prevention (hereinafter “Heat Illness Prevention Regulation”) went into effect, those tragically, preventive regulations were not followed.⁸

This Comment will focus solely on what, if any, remedies are available to a California farm worker employee (hereinafter “farm worker”), in light of the special circumstances of his or her employment, against the farm owner/hirer of the independent contractor (hereinafter “farm owner”), who did not hire the farm worker, but did hire the farm labor contractor/employer (hereinafter “farm labor contractor”).⁹ This Comment will first address the background of the problem, followed by potential legal avenues for recovery, in light of the limitations that California case law has put on those potential legal avenues. This Comment will conclude with a proposed amendment to the Heat Illness Prevention Regulation that addresses this problem.

II. CALIFORNIA CENTRAL VALLEY AGRICULTURE

“California is home to the most productive agricultural counties in the nation,” containing nine of the top ten producing counties in the nation.¹⁰ In 2007, California’s agricultural crops gross cash receipt was \$36.6 billion, with the state producing “half of all United States-grown fruits, nuts, and vegetables.”¹¹ California has over 75,000 farms and ranches totaling less than four percent of the nation’s total number of farms; yet, its agricultural production represents more than 12.8 percent of the United States’ total value of agricultural crops gross cash receipt.¹² In 2007, California exported twenty-eight percent of its agricultural products to more than 156 countries.¹³

The San Joaquin Valley leads this agricultural production, with Fresno County topping the list with an agriculture value of \$5.35 billion.¹⁴ Tulare County ranks second with \$4.87 billion, followed by Kern County

⁷ *Id.*

⁸ See CAL. CODE REGS. tit. 8, § 3395 (2005).

⁹ If the hirer of the independent contractor is a landowner, the landowner has a separate duty to employees. In California, a duty will be owed to all occupants on the land regardless of status. *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968).

¹⁰ CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2008-2009: AGRICULTURAL STATISTICAL REVIEW 19 (2009), available at http://www.cdffa.ca.gov/statistics/files/CDFA_Sec2.pdf.

¹¹ *Id.* at 17.

¹² *Id.* at 17 and 19.

¹³ *Id.* at 22.

¹⁴ *Id.* at 19-20.

with \$4.09 billion.¹⁵ To reach these production numbers, California is “heavily dependent upon a large seasonal workforce.”¹⁶ This includes 732,000 farm laborers, totaling 1.3 million people when their families are included.¹⁷

Most farm owners in California hire farm labor contractors who then “provide the labor for planting, pruning, and picking.”¹⁸ In California, an independent contractor is defined as “any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.”¹⁹ Further, a farm labor contractor is defined as:

... [A]ny person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to these persons.²⁰

In 1997, farm labor contractors and the farm workers they employed harvested ninety percent of California’s fruit and sixty-seven percent of vegetable and melon farm crops.²¹ In 2002, there were 1,200 California licensed farm labor contractors and an unknown number of unlicensed contractors who bid for jobs.²² Farm owners hire farm labor contractors instead of employees to harvest their crops because it is the most beneficial labor arrangement.²³ Farm labor contractors have access to plenty of inexpensive labor and they put the primary responsibility of withholding taxes, some liability for injuries, paying minimum wages, providing housing, and complying with immigration regulations and safety laws on the farm labor contractors themselves.²⁴

¹⁵ *Id.* at 20.

¹⁶ MICHAEL RODRIGUEZ ET AL., CALIFORNIA RESEARCH BUREAU 2002 EDUCATIONAL TOUR SERIES, POLICY BRIEF NUMBER 4, HEALTH OF MIGRANT FARM WORKERS ON CALIFORNIA I (2002), available at <http://www.library.ca.gov/crb/03/05/03-005.pdf>.

¹⁷ *Id.*

¹⁸ *Id.* at 13.

¹⁹ CAL. LAB. CODE § 3353 (1937).

²⁰ CAL. LAB. CODE § 1682 (1951).

²¹ RODRIGUEZ ET AL., *supra* note 16, at 13-14.

²² *Id.* at 14.

²³ *See id.*

²⁴ *Id.*

Minimalizing potential liability is advantageous for the farm owners because “agriculture is one of the most hazardous occupations in the United States.”²⁵ In 2000, the United States documented 780 deaths and 130,000 disabling injuries in agriculture employment.²⁶ In California, over 20,000 disabling injuries among farm workers are reported annually.²⁷ The number reported is probably substantially lower than the actual number, as many injuries are not reported due to farm workers’ fears of job loss or deportation.²⁸

California’s Central Valley has extremely hot weather, with temperatures exceeding 100 degrees during harvest times.²⁹ In Fresno County, the average high for harvest months ranges from ninety to ninety-eight degrees Fahrenheit.³⁰ Weather conditions like these make farm workers “four times more likely than non-agricultural workers to suffer from heat-related illnesses,” including heat stroke, heat exhaustion, and heat cramps.³¹ In 2006, California coroners reported a total of 147 deaths from heat-related illness,³² although there was no indication of how many of these victims were farm workers. One study estimates that the actual heat-related mortality was really two to three times greater than the coroner’s reports indicate.³³ Therefore, it is possible many more farm workers died due to heat-related illness than were actually reported.³⁴

²⁵ Eric Hansen & Martin Donohoe, *Health issues of Migrant and Seasonal Farmworkers*, 14 J. HEALTH CARE FOR POOR & UNDERSERVED 155 (2003) (discussing the benefits of hiring an independent contractor), available at <http://pshj.org/files/Migrant%20and%20Seasonal%20Farm%20Worker%20Health/Migrant%20and%20Seasonal%20Farm%20Workers%20-%20JHCPU.pdf>.

²⁶ *Id.*

²⁷ RODRIGUEZ ET AL., *supra* note 16, at 14.

²⁸ Hansen & Donohoe, *supra* note 25, at 155-156.

²⁹ See MSN Weather Averages, Fresno, California, http://weather.msn.com/monthly_averages.aspx?wealocations=wc:USCA0406 (last visited Aug. 25, 2009).

³⁰ The average temperature for the following months is as follows: June ninety-two degrees; July ninety-eight degrees; August ninety-seven degrees and September ninety degrees. MSN Weather Averages, Fresno, California, http://weather.msn.com/monthly_averages.aspx?wealocations=wc:USCA0406 (last visited Aug. 25, 2009).

³¹ Hansen & Donohoe, *supra* note 25, at 158.

³² CALIFORNIA CLIMATE CHANGE CENTER, ESTIMATING THE MORTALITY EFFECT OF THE JULY 2006 CALIFORNIA HEAT WAVE I (2009), available at <http://www.energy.ca.gov/2009publications/CEC-500-2009-036/CEC-500-2009-036-D.PDF>.

³³ *Id.* at 11.

³⁴ See *id.*

III. REGULATIONS TO PROTECT FARM WORKERS

“California became the first state in the nation to develop a safety and health regulation addressing heat illnesses in 2005.”³⁵ Subsequently, in 2006, the Division of Health and Safety (hereinafter “Cal/OSHA”) issued permanent heat illness prevention regulations to protect outdoor workers.³⁶ Under Heat Illness Prevention Regulation, employers must

³⁵ Press Release, California Department of Industrial Relations, *Cal/OSHA Moves to Strengthen Heat Illness Prevention Regulations* (July 31, 2009)(on file with author), available at <http://www.dir.ca.gov/DIRNews/2009/IR2009-26.html>.

³⁶ CAL. CODE REGS. tit. 8, § 3395 (2005).

(a) Scope and Application. This section applies to the control of risk of occurrence of heat illness. . . This section applies to all outdoor places of employment. . . This standard is enforceable by the Division of Occupational Safety and Health. . . It is a violation of Labor Code Sections 6310, 6311, and 6312 to discharge or discriminate in any other manner against employees for exercising their rights under this or any other provision offering occupational safety and health protection to employees . . .

(b) Definitions. “Acclimatization” means temporary adaptation of the body to work in the heat that occurs gradually when a person is exposed to it. Acclimatization peaks in most people within four to fourteen days of regular work for at least two hours per day in the heat. “Heat Illness” means a serious medical condition resulting from the body’s inability to cope with a particular heat load, and includes heat cramps, heat exhaustion, heat syncope and heat stroke. “Environmental risk factors for heat illness” means working conditions that create the possibility that heat illness could occur, including air temperature, relative humidity, radiant heat from the sun and other sources, conductive heat sources such as the ground, air movement, workload severity and duration, protective clothing and personal protective equipment worn by employees. “Personal risk factors for heat illness” means factors such as an individual’s age, degree of acclimatization, health, water consumption, alcohol consumption, caffeine consumption, and use of prescription medications that affect the body’s water retention or other physiological responses to heat. “Preventative recovery period” means a period of time to recover from the heat in order to prevent heat illness. “Shade” means blockage of direct sunlight. Canopies, umbrellas and other temporary structures or devices may be used to provide shade. One indicator that blockage is sufficient is when objects do not cast a shadow in the area of blocked sunlight. Shade is not adequate when heat in the area of shade defeats the purpose of shade, which is to allow the body to cool. For example, a car sitting in the sun does not provide acceptable shade to a person inside it, unless the car is running with air conditioning.

(c) Provision of water. Employees shall have access to potable drinking water meeting the requirements of Sections 1524, 3363, and 3457, as applicable. Where it is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective procedures for replenish-

provide: water, and encourage workers to drink it; access to shade; training on how to recognize heat illnesses; and written reports showing compliance efforts.³⁷ California courts and Cal/OSHA enforcement officials take these regulations seriously, as evidenced by the cases filed in the Jimenez matter, discussed in the introduction of this Comment.³⁸

The shade, water, and training requirements imposed by Heat Illness Prevention Regulation are not unduly burdensome or costly as shade and water are of nominal cost and free training is provided by the government.³⁹ The substantial fines and potential civil liability are “supposed to” greatly increase pressure on farm labor contractors to protect their farm workers.⁴⁰ In 2008, inspectors from Cal/OSHA “issued more than \$3.9 million dollars in heat-safety” violation fines.⁴¹ However, of the \$1 million dollars of heat-safety violation fines assessed in 2007, only \$593,000 was actually paid.⁴²

Currently, the Heat Illness Prevention Regulation only requires the direct employers to take preventive measures for their employees.⁴³ Therefore, only the farm labor contractors are responsible, not the farm owners themselves.⁴⁴ This statute leaves the farm owners, who may violate or may allow the safety regulations to be violated, free from liability.⁴⁵ The same pressure the statute imposes on the farm labor contractors should be placed on the farm owners to ensure compliance with this vital regulation and to ensure adequate compensation for any violation.

ment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in (e), shall be encouraged. (d) Access to shade. Employees suffering from heat illness or believing a preventative recovery period is needed, shall be provided access to an area with shade that is either open to the air or provided with ventilation or cooling for a period of no less than five minutes. Such access to shade shall be permitted at all times. Except for employers in the agricultural industry, cooling measures other than shade (e.g., use of misting machines) may be provided in lieu of shade if the employer can demonstrate that these measures are at least as effective as shade in allowing employees to cool.

(e) Training. (1) Employee training. . . (2) Supervisor training. . . .

³⁷ § 3395.

³⁸ See Rodriguez, *supra* note 1.

³⁹ See CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF CALIFORNIA OCCUPATION SAFETY AND HEALTH, HEAT ILLNESS PREVENTION, WHAT YOU NEED TO KNOW (2008), available at <http://www.dir.ca.gov/dosh/HIPnews6-11-08.pdf>.

⁴⁰ See Ferriss, *supra* note 5.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See CAL. CODE REGS. tit. 8, § 3395 (2005).

⁴⁴ See § 3395.

⁴⁵ See § 3395.

IV. HOW FARM WORKERS MAY RECOVER

A. *Distinction between Employer and Independent Contractor*

“[A]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.”⁴⁶ Courts apply the “control-of-work” test to determine the person’s status, gauging who actually has control of the given project.⁴⁷ Any party having operative control over details of the project will be treated as an employer and their subordinates will be treated as employees.⁴⁸

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399, 407 (Cal. 1989), the California Supreme Court determined that, despite having an agreement to the contrary, farm workers harvesting cucumbers were not independent contractors exempt from Workers’ Compensation coverage because the farm owner retained absolute overall control of the production and sale of the crop.⁴⁹ Specifically, the court noted that the farm workers made no capital investment beyond simple hand tools; they performed manual labor requiring no skill; the remuneration did not depend on their initiative, judgment, or managerial abilities; their seasonal service was rendered annually; and the farm workers were dependent for subsistence on whatever farm work they could obtain.⁵⁰

There are situations in which the farm owner can become so involved that the farm worker becomes the employee of a joint venture, becoming an employee of both the farm owner and the farm labor contractor.⁵¹ In this scenario, the farm worker is entitled to the protection of the exclusive remedy provisions of the Labor Code whether from the farm owner or the farm labor contractor.⁵² However, because the farm owners want to escape liability, it is highly unlikely that a farm owner would permit the intertwining of the relationship between the farm labor contractors and himself in a manner that would reach the level of entanglement seen

⁴⁶ CAL. LAB. CODE § 3357 (1937).

⁴⁷ *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399, 403 (Cal. 1989).

⁴⁸ *See id.*

⁴⁹ *Id.* at 407.

⁵⁰ *Id.*

⁵¹ *Reed v. Industrial Acc. Com.*, 73 P.2d 1212, 1213 (Cal. 1937); *Horney v. Guy F. Atkinson Co.*, 190 Cal.Rptr. 18, 20 (Cal. App. Dep’t Super. Ct. 1983); *Sonberg v. Bergere*, 34 Cal.Rptr. 59, 60 (Cal. Dist. Ct. App. 1963).

⁵² *See Reed*, 73 P.2d at 1213; *Horney*, 190 Cal.Rptr. at 20. *See Sonberg*, 34 Cal.Rptr. at 60.

in *S.G. Borello & Sons, Inc.*⁵³ Therefore, despite *S.G. Borello & Sons, Inc.*, farm labor contractors hired by the farm owners will most likely be deemed independent contractors and the farm workers will most likely be considered employees of only the farm labor contractor.⁵⁴

B. Farm Workers Seeking Damages From an Employer/Independent Farm Contractor

California adopted Workers' Compensation insurance under a no fault system, where employees injured in the course of employment get automatic compensation for medical care in exchange for mandatory relinquishment of the employee's right to sue his or her employer for negligence.⁵⁵ The California Department of Industrial Relations and the Employment Development Department estimated that nineteen percent of California employers either do not carry Workers' Compensation insurance or underestimate their payroll to avoid paying Workers' Compensation premiums.⁵⁶ If an employer does not carry Workers' Compensation insurance then employees may bring a civil action against the employer to recover damages.⁵⁷

Although the farm worker does not have to prove that his employer was negligent, the potential liability is drastically restricted by the limits under Workers' Compensation, leaving some farm worker employees inadequately compensated, and therefore seeking alternative or additional means of compensation.⁵⁸ Workers' Compensation limits recovery as follows: twenty-four chiropractic and twenty-four physical therapy visits per year; temporary disability of \$728 per week; permanent disability of \$728 per week; burial expenses of \$5,000, and death benefits of \$160,000.⁵⁹ It is important to note that this is the maximum amount one

⁵³ See *S.G. Borello*, 769 P.2d at 407.

⁵⁴ See *id.*

⁵⁵ Division of Workers' Compensation- The California Workers' Compensation System, <http://www.dir.ca.gov/dwc/basics.htm#structure> (last visited Nov. 25, 2009).

⁵⁶ LABOR RESEARCH ASSOCIATION (LRA), WORKERS' COMPENSATION FRAUD: THE REAL STORY (1998), available at http://www.laborresearch.org/ind_temps/work_comp_fraud_rpt.html.

⁵⁷ CAL. LAB. CODE § 3706 (1937).

⁵⁸ See COMMISSION ON HEALTH AND SAFETY AND WORKERS' COMPENSATION, WORKERS COMPENSATION MEDICAL CARE IN CALIFORNIA: ACCESS TO CARE. COMMISSION ON HEALTH AND SAFETY AND WORKERS COMPENSATION (2003), available at http://www.dir.ca.gov/chswc/WC_factSheets/WorkersCompFSAccess.pdf. See L. Rudolph, et al., *What do injured workers think about their medical care and outcomes after work injury?*, 44 J. JOURNAL OCCUPATIONAL & ENVTL. MED. 2002 at 428.

⁵⁹ Division of Workers' Compensation- The California Workers' Compensation System, <http://www.dir.ca.gov/dwc/basics.htm#structure> (last visited Nov. 25, 2009).

can receive and the actual amount one receives is set to a base of two-thirds of his or her lost earnings.⁶⁰ A study suggested that 23.1 percent of Californians being treated for occupational injuries under Workers' Compensation incurred unreimbursed medical expenses.⁶¹ A typical farm worker earns less than \$10,000 per year and any recovery will be based on that expected income.⁶²

C. Farm Workers Seeking Damages From the Hirer of the Independent Contractor

In *Coleman v. Silverberg Plumbing*, 69 Cal.Rptr. 158, 162 (Cal. Ct. App. 1968), a California court held that an owner or general contractor is not liable under the Workers' Compensation Act for the injuries of his uninsured independent contractor's employees.⁶³ The court held that the decision as to whether a hirer should be held liable for the failure of his or her independent contractor to obtain Workers' Compensation should come from the legislature, and not the judiciary.⁶⁴

California does allow employees, including farm worker employees, to recover damages from multiple parties:

The claim of an employee. . .for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer. Any employer who pays. . .may likewise make a claim or bring an action against the third person.⁶⁵

A farm worker may only recover damages once per injury, but he can sue both the farm labor contractor and the farm owner to assure that he is fully compensated for that injury while avoiding the issue of double recovery.⁶⁶

In *S.G. Borello and Sons, Inc.*, the California Supreme Court articulated four distinct objectives of the Workers' Compensation Act:

(1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society; (2) to guarantee prompt, limited compensation for employees' work injuries, regardless of fault, as an inevitable

⁶⁰ *Id.*
⁶¹ COMMISSION ON HEALTH AND SAFETY AND WORKERS' COMPENSATION, *supra* note 58; Rudolph, *supra* note 58, at 428.
⁶² ALICIA BUGARIN & ELIAS LOPEZ, FARMWORKERS IN CALIFORNIA, CALIFORNIA RESEARCH BUREAU 3 (1998), available at <http://www.library.ca.gov/crb/98/07/98007a.pdf>.
⁶³ *Coleman v. Silverberg Plumbing*, 69 Cal.Rptr. 158, 162 (Cal. Ct. App. 1968).
⁶⁴ *Id.*
⁶⁵ CAL. LAB. CODE § 3852 (1937).
⁶⁶ *See Dodds v. Bucknum*, 29 Cal.Rptr. 393, 397 (Cal. Dist. Ct. App. 1963).

cost of production; (3) to spur increased industrial safety; and (4) in return, to insulate the employer from tort liability for his employees' injuries.⁶⁷

Workers' Compensation pays for injuries incurred under independent contractors, but it does not greatly affect the pocketbook of either the farm owner or the farm labor contractor;⁶⁸ therefore, both lack a direct or immediate incentive to provide safer working conditions.⁶⁹ Since the Heat Illness Prevention Regulation was passed in 2005, eleven farm workers have died in California due to heat illness-related injuries.⁷⁰ Therefore, the Heat Illness Prevention Regulation is not effectively protecting all farm workers.

Allowing a farm worker to recover against the farm owner continues to insulate the farm labor contractor from tort liability while appropriately compensating the farm worker. Attorney Bradley Phillips of Munger, Tolles & Olson recognizes that the farm owners profit the most from the farm workers' labors and have little incentive to ensure adequate water and shade because farm labor contractors employ the farm workers.⁷¹ In a pending lawsuit, he states that farm labor contractors see little reason to comply with the regulation because "those few violators who are occasionally identified generally escape with little or no punishment" and that even if they are held liable, they are "not well capitalized and often have no fixed assets."⁷² The way to improve worker safety is to "create the maximum economic incentive" for farm owners by imposing some sort of fine or penalty on them for violations.⁷³ Therefore, allowing a farm worker to recover Workers' Compensation benefits against the farm labor contractor and recover in a separate civil lawsuit against the farm owner does not contradict the Workers' Compensation policy and, in fact, helps to further the important public policy concern of worker safety by providing a financial incentive for farm owners to comply.

⁶⁷ S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 769 P.2d 399, 406 (Cal. 1989).

⁶⁸ See Kevin O'Leary, *Fatal Sunshine: The Plight of California's Farm Workers*, TIME, Aug. 10, 2009, available at http://news.yahoo.com/s/time/20090810/us_time/08599191496100/print.

⁶⁹ See *id.*

⁷⁰ Steven Greenhouse, *Farm Workers' Union Sues California Agency Over Rules on Heat Safety*, N.Y. TIMES, July 30, 2009, available at <http://www.nytimes.com/2009/07/31/us/31farm.html>.

⁷¹ Complaint at 4, *Bautista, et al. v. State of California*, No. BC418871 (Superior Court of Los Angeles July 30, 2009); O'Leary, *supra* note 68.

⁷² Complaint at 3, *supra* note 71; O'Leary, *supra* note 68.

⁷³ O'Leary, *supra* note 68.

(1) CALIFORNIA CASE LAW

D. Indirect Liability/Vicarious Liability

Indirect or vicarious liability would impose liability on the hirer of the independent contractor for the negligence of that independent contractor without direct fault.⁷⁴ Generally, however, the hirer of an independent contractor is not liable for the negligence of its independent contractor based on the theory that the hirer has no control over the manner in which the work is done.⁷⁵ There are some exceptions to this, which include non-delegable duties such as: negligent orders or directions from the hirer; negligent hiring of an independent contractor; peculiar risk; negligently retaining control of part of the premises/work; exceptions provided by statute, or if the hirer himself is negligent.⁷⁶ Unless the relationship between the farm owner and the farm worker falls into one of these listed exceptions, the farm owner will not be vicariously liable for injuries to the farm worker.⁷⁷

1. Peculiar Risk

The California Supreme Court recognized the Second Restatement of Torts, sections 413 and 416, as non-delegable duties, to place additional liability on the hirer of an independent contractor for the negligence of that independent contractor under the non-delegable duty of peculiar risk.⁷⁸

The Second Restatement of Torts Section 413 states:

One who employs an independent contractor to do work which the employer should recognize as necessarily creating, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence

⁷⁴ See *Hooker v. Department of Transportation*, 38 P.3d 1081, 1085 (Cal. 2002). See BLACK'S LAW DICTIONARY 998 (7th ed. 2009). See MARC SCHNEIER, CONSTRUCTION ACCIDENT LAW: A COMPREHENSIVE GUIDE TO LEGAL LIABILITY AND INSURANCE CLAIMS 125 (American Bar Association 1955) (1999).

⁷⁵ See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399, 403 (Cal. 1989).

⁷⁶ *Hooker*, 38 P.3d at 1083 (affirmative contribution to the injury); *McKown v. Wal-Mart Stores, Inc.*, 38 P.3d 1094, 1097 (Cal. 2002)(affirmative contribution to the injury); *Camargo v. Tjaarda Dairy*, 25 P.3d 1096, 1097 (Cal. 2001)(negligent hiring of an independent contractor/peculiar risk); *Toland v. Sunland Housing Group, Inc.*, 955 P.2d 504, 506 (Cal. 1998)(peculiar risk); *Privette v. Superior Court*, 854 P.2d 721, 727 (Cal. 1993)(peculiar risk).

⁷⁷ See *Toland*, 955 P.2d at 506. See *Privette*, 854 P.2d at 727.

⁷⁸ See *Toland*, 955 P.2d at 508-509. See *Privette*, 854 P.2d at 725-726 n.2.

of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.⁷⁹

The Second Restatement of Torts section 416 further expands on Restatement of Torts section 413, stating:

One who employs an independent contractor to do work which the employer should recognize as necessarily requiring the creation during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.⁸⁰

A “peculiar risk” is a danger that is specific or somewhat unique to the work being done which arises out of the character of the work or the place where the work is to be done, and against which a reasonable person would recognize the necessity of taking special precautions.⁸¹ For farm workers in the Central Valley, triple digit heat requires the type of special precautions that should qualify as a peculiar risk.⁸² The Valley’s heat severity was recognized and codified in Heat Illness Prevention Regulation and should, therefore, satisfy the peculiar risk requirements.⁸³ If this assertion was accepted, it would make the provision of shade, water and heat illness training a non-delegable duty which the farm owner could not side-step by passing the responsibility on to the farm labor contractor. Thus, both the farm owner and the farm labor contractor would be responsible for providing shade, water, and heat illness training. The failure of either party to provide these necessities would then make them jointly liable for heat-related injuries to the farm worker.

i. Prior to 1993

Although the Restatement of Torts provided the peculiar risk exception imposing liability on hirers of independent contractors, courts across the nation were split on whether to apply this to the relationship between

⁷⁹ RESTATEMENT (FIRST) OF TORTS § 413 (1934).

⁸⁰ RESTATEMENT (FIRST) OF TORTS § 416 (1934).

⁸¹ *Aceves v. Regal Pale Brewing Co.*, 595 P.2d 619, 622 (Cal. 1979), *overruled by* *Privette v. Superior Court*, 854 P.2d 721 (Cal. 1993); *Griesel v. Dart Industries, Inc.*, 591 P.2d 503, 507 (Cal. 1979), *overruled by* *Privette v. Superior Court*, 854 P.2d 721 (Cal. 1993).

⁸² See CAL. CODE REGS. tit. 8, § 3395 (2005).

⁸³ See § 3395.

the hirer of an independent contractor and the employee of that independent contractor.⁸⁴ There was a question as to whether Workers' Compensation already addressed the problem that the peculiar risk non-delegable duty was drafted to resolve.⁸⁵

The California Supreme Court addressed the peculiar risk exception in *Aceves v. Regal Pale Brewing Co*, 24 Cal.3d 502, 508 (Cal. 1979).⁸⁶ In this case, an employee of an independent contractor sued for damages for injuries sustained while working on the demolition of a building owned by the defendants.⁸⁷ The court held that the defendant owner of the building was liable under the peculiar risk doctrine because, in the absence of special precautions, the demolition work and associated falling structures involved a recognizable risk of harm to the workers.⁸⁸ The court listed numerous reasons as to why it was fair to hold the hirer of the independent contractor liable, including: "the employer is the one who primarily benefits from the contractor's work; the employer selects the contractor and is free to insist on a competent and financially responsible one; the employer is in a position to demand indemnity from the contractor; the insurance necessary to distribute the risk is properly a cost of the employer's business; and the performance of the duty of care is one of great public importance."⁸⁹

Farm owners greatly benefit from the farm workers because of their cost-effectiveness.⁹⁰ The farm owners solicit bids from farm labor contractors and then hire the party of their choice.⁹¹ The safety of California employees is a matter of great public importance and farm owners can more freely absorb these costs because they have the superior bargaining power and the best resources to counteract these heat dangers.⁹² Therefore, *Aceves* should permit farm workers recover against farm owners.⁹³

ii. Post 1993- Current Case Law Interpretation

In *Privette v. Superior Court*, 854 P.2d 721, 723 (Cal. 1993), for the first time, the California Supreme Court directly addressed the conflict between the peculiar risk doctrine as applied in favor of the contractor's

⁸⁴ SCHNEIER, *supra* note 74, at 140-141.

⁸⁵ See *Aceves*, 595 P.2d at 622.

⁸⁶ See *id.*

⁸⁷ *Id.* at 620-621.

⁸⁸ *Id.* at 623.

⁸⁹ *Id.* at 622.

⁹⁰ RODRIGUEZ ET AL., *supra* note 16, at 14.

⁹¹ *Id.*

⁹² See *id.*

⁹³ *Aceves*, 595 P.2d at 623.

employees and the Workers' Compensation system.⁹⁴ There, a duplex owner hired an independent contractor to install a new roof on the duplex.⁹⁵ One of the employees of that independent contractor brought a personal injury action against the owner and hirer after he was burned while carrying a bucket of hot tar up a ladder to the roof.⁹⁶ The trial court denied the duplex owner's Motion for Summary Judgment, which claimed that Workers' Compensation was the exclusive remedy because the peculiar risk exception did not apply to employees of hirers of independent contractors.⁹⁷ The California Supreme Court reversed, explaining that under the peculiar risk doctrine, the liability of a person hiring an independent contractor does not extend to the contractor's employees.⁹⁸

This effectively overturned *Aceves*.⁹⁹ It also led California to join the majority of states in precluding an independent contractor's employee from recovering against the hirer of the independent contractor under the peculiar risk doctrine.¹⁰⁰ The rationale was that the Workers' Compensation system affords compensation regardless of fault, which advances the same policies underlying the doctrine of peculiar risk.¹⁰¹ The California Supreme Court acknowledged that similar reasoning appeared in a tentative draft of the Second Restatement of Torts, which recognized that workplace injuries incurred by an independent contractor's employees are covered by Workers' Compensation, the cost of which is "included by the contractor in his contract price" and is therefore "ultimately ... borne by the defendant who hires him."¹⁰² However, the proposed limitation on liability was not included in the Restatement itself due to the variation among the Workers' Compensation statutes that have been adopted

⁹⁴ See *Privette v. Superior Court*, 854 P.2d 721, 723 (Cal. 1993).

⁹⁵ *Id.* at 723.

⁹⁶ *Id.*

⁹⁷ *Id.* at 724.

⁹⁸ *Id.* at 731.

⁹⁹ *Aceves v. Regal Pale Brewing Co.*, 595 P.2d 619, 623 (Cal. 1979), *overruled by Privette v. Superior Court*, 854 P.2d 721 (Cal. 1993).

¹⁰⁰ Schneier discusses how after the Second Restatement of Torts was adopted courts were split in determining whether or not to apply the peculiar risk doctrine to employees in independent contractors against the hirer. He then discusses today that an overwhelming majority of states do not allowed the hirer to be vicariously liable for the injuries of its hired independent contractors' employees and federal law is in accord. He also states there are most notably at least six jurisdictions that allow an employee of an independent contractor to recover against the owner under peculiar risk doctrine. States that impose this requirement via case law are: Iowa, Michigan, North Dakota, Pennsylvania, Tennessee and South Dakota, while Georgia imposes this liability through statute Georgia Code Annotated Section 51-2-5 (1982). SCHNEIER, *supra* note 74, at 141-144.

¹⁰¹ *Privette*, 854 P.2d 726-727.

¹⁰² *Privette*, 854 P.2d 726-727; SCHNEIER, *supra* note 74, at 133-134.

throughout the United States.¹⁰³ This ruling effectively barred employees of independent contractors from recovering from the hirers on the peculiar risk basis.

2. Retained Control in regards to Peculiar Risk

In *Toland v. Sunland Housing Group, Inc.*, 955 P.2d 504, 510 (Cal. 1998), the California Supreme Court reaffirmed *Privette*, and held that under peculiar risk, a party could only recover for direct liability, not vicarious liability, if:

A person hired an independent contractor and (a) failed to provide in the contract that the contractor shall take such precautions, or (b) failed to exercise reasonable care to provide in some other manner for the taking of such precautions.¹⁰⁴

A farm owner retaining any control could not be held *indirectly* liable--but could rather be held *directly* liable.¹⁰⁵ In her concurrence of the result and dissent of the rationale in *Toland*, California Supreme Court Justice Werdegar stated her support of *Nelson v. United States*, 639 F.2d 469, 478 (9th Cir.1980), which proposed that liability existed only when the hirer "was in a better position than the contractor either to anticipate dangers to workmen; to foresee and evaluate the best methods of protection; or to implement and enforce compliance with appropriate on-site safety precautions."¹⁰⁶ The majority in *Toland* rejected this argument, claiming that it would be too difficult to determine and would always become a triable issue of material fact for the jury to decide, precluding summary judgments.¹⁰⁷

In California, farm labor contractors have connections within farm worker communities, allowing them to act as liaisons.¹⁰⁸ Though farm labor contractors are not always very knowledgeable regarding the California Labor Code, farm owners tend to be well-educated¹⁰⁹ and are more likely to be knowledgeable about Cal/OSHA and other labor require-

¹⁰³ SCHNEIER, *supra* note 74, at 133-134.

¹⁰⁴ *Toland v. Sunland Housing Group, Inc.*, 955 P.2d 504, 510 (Cal. 1998).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 275 (Werdegar, J., concurring in part and dissenting in part); see *Nelson v. United States*, 639 F.2d 469, 478 (9th Cir.1980).

¹⁰⁷ There were five justices in the majority and two justices concurring in the result but dissenting in the rationale. *Toland*, 955 P.2d at 514.

¹⁰⁸ See SABRINA ISE ET AL., DIRECTLY HIRING WORKERS VERSUS USING FARM LABOR CONTRACTORS iv (1994), available at <http://are.berkeley.edu/APMP/pubs/flc/direct-flc.pdf>.

¹⁰⁹ Well-educated is defined as the grower has at least some college training. *Id.* at 2.

ments.¹¹⁰ Under the logic of Justice Werdegar's dissent regarding the rationale, these farm owners, whose knowledge regarding Cal/OSHA requirements was superior to that of their farm labor contractors, would be held liable for the farm labor contractors' failure to implement these requirements for their farm workers.¹¹¹ If Justice Werdegar's reasoning in her dissent of the rationale were adopted, liability would be more fairly shared by both farm labor contractors and the farm owners.¹¹²

3. Negligent Hiring

Building off of *Privette*, in *Camargo v. Tjaarda Dairy*, 25 P.3d 1096, 1097 (Cal. 2001), the California Supreme Court refused to allow recovery under negligent hiring because it viewed this as another form of vicarious liability.¹¹³ This holding prohibited farm workers from suing a farm owner for negligently hiring a farm labor contractor with little or no knowledge of California Heat Illness Prevention Regulation.¹¹⁴

E. Direct Liability

Direct liability is based on some fault of the hirer and is more difficult to prove than indirect liability or vicarious liability because the farm worker must prove a cause of action of negligence against the hirers of these independent contractors.¹¹⁵ With indirect or vicarious liability, the farm worker only has to prove a duty based on the hirer-independent contractor relationship, which is only the first element of a negligence cause of action.¹¹⁶ However, *Privette* has made it very difficult to impose no-fault liability, leaving direct liability as the most viable cause of action for farm workers.¹¹⁷

¹¹⁰ *Id.* at 4.

¹¹¹ *See Toland*, 955 P.2d at 519 (Werdegar, J., concurring in part and dissenting in part).

¹¹² *See id.*

¹¹³ *Camargo v. Tjaarda Dairy*, 25 P.3d 1096, 1097 (Cal. 2001).

¹¹⁴ *See id.*

¹¹⁵ *See Hooker v. Department of Transportation*, 38 P.3d 1081, 1085 (Cal. 2002). *See* BLACK'S LAW DICTIONARY 998 (7th ed. 2009). *See* SCHNEIER, *supra* note 74, at 125.

¹¹⁶ *See Hooker*, 38 P.3d at 1085. *See* SCHNEIER, *supra* note 74, at 125. *See* BLACK'S LAW DICTIONARY 998 (7th ed. 2009).

¹¹⁷ *See Privette v. Superior Court*, 854 P.2d 721, 726-727 (Cal. 1993).

1. Retained Control/Negligence on Behalf of Hirer

California case law recognizes the retained control/negligence on behalf of the hirer as set forth in Restatement of Torts Section 414 under some circumstances.¹¹⁸ Restatement of Torts Section 414 states:

One who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.¹¹⁹

In *Hooker v. Department of Transportation*, 38 P.3d 1081, 1083 (Cal. 2002), an employee of an independent contractor, who was hired to build an overpass, was killed on the job.¹²⁰ His widow sued the hirer, the California Department of Transportation, under the theory that it negligently retained and exercised control over safety conditions at the job site by allowing vehicles to use the overpass.¹²¹ The court held that the hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at the worksite, but that the hirer “is liable to an employee of a contractor insofar as a hirer’s exercise of retained control affirmatively contributed to the employee’s injuries.”¹²² Under *Hooker*, the farm owner will only be liable if they affirmatively injured the farm worker by providing insufficient shade or water, as opposed to the failure to provide shade, water, or training.¹²³

In *McKown v. Wal-Mart Stores, Inc.*, 38 P.3d 1094, 1095 (Cal. 2002), an employee of an independent contractor sued the hirer when he was injured after using, upon the hirer’s request, the hirer’s forklift.¹²⁴ The court upheld a jury verdict for plaintiff, holding that a hirer is liable to an employee of an independent contractor insofar as the hirer’s provision of

¹¹⁸ See *Hooker*, 38 P.3d at 1083.

¹¹⁹ RESTATEMENT (FIRST) OF TORTS § 414 (1934).

¹²⁰ *Hooker*, 38 P.3d at 1083.

¹²¹ *Id.* at 1084.

¹²² *Id.* at 1083. Justice Werdegard dissented, stating that this ruling usurps the fact finding and fault allocation functions assigned to the jury under the California comparative fault system by not allowing the jury to determine who was negligent and to what degree. This could be particularly applicable to migrant farm worker employee cases if the farm owner/hirer was the only one who could put up shade or provide water. The dissenting opinion suggests this issue should go to a California jury to determine what the fault allocation of each is. *Id.* at 1092 (Werdegard, J., dissenting).

¹²³ See *id.* at 1083.

¹²⁴ *McKown v. Wal-Mart Stores, Inc.*, 38 P.3d 1094, 1095 (Cal. 2002).

unsafe equipment affirmatively contributes to the employee's injury.¹²⁵ Further, despite the fact that the jury's verdict showed the plaintiff's employer to be primarily at fault, the hirer's affirmative contribution to the employee's injuries eliminated any unfairness.¹²⁶ This opens the door for a farm worker to sue the farm owner who provided inadequate shade, water or training.

If farm owners go through the trouble of severing any potential indirect liability by hiring farm labor contractors, they probably severed any direct contractual liability by absolving themselves of any responsibility. Direct liability would be difficult to prove because farm owners will not maintain sufficient contact with farm workers via providing tools or safety equipment to assure that they do not assume a duty of complying with safety regulations as well as to avoid subjecting themselves to civil or criminal liability. This lessens protection for farm workers and limits their chances to adequately recover.

(2) CREATING A SOLUTION VIA THE LEGISLATURE

California case law recognizes the Restatement of Torts Section 424, which states:

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.¹²⁷

In *State Commissioners Ins. Fund v. Industrial Acc. Commission*, 116 P.2d 173, 175-176 (Cal. Dist. Ct. App. 1941), the court acknowledged that a failure to impose liability on the hirer would, in many instances, nullify the purpose of the Workers' Compensation law by placing liability for industrial injuries upon the industry, rather than on the worker, since it often happens that an independent contractor is either insolvent

¹²⁵ *Id.* at 1097.

¹²⁶ *Id.*

¹²⁷ *State Commissioners Ins. Fund v. Industrial Acc. Commission*, 116 P.2d 173, 175-176 (Cal. Dist. Ct. App. 1941); RESTATEMENT (FIRST) OF TORTS § 424 (1934).

or uninsured.¹²⁸ This ruling reiterates the concerns of inadequate compensation.¹²⁹ The court did acknowledge that the ability of the legislature to impose liability on the hirer of an independent contractor for the independent contractor's employee has been questioned in *Carstens v. Pillsbury*, 158 P. 218, 221 (Cal. 1916).¹³⁰ The court ultimately ruled that such a complete change in the scope of the law should come from some law-making source, rather than from the courts.¹³¹ As a change does not appear imminent from the judicial branch, it will be up to the legislative branch to decide whether to step in and impose liability on farm owners.¹³²

¹²⁸ *State Commissioners Ins. Fund*, 116 P.2d at 175-176.

¹²⁹ *Id.*

¹³⁰ *Id.*; *Carstens v. Pillsbury*, 158 P. 218, 221 (Cal. 1916). In *Carstens*, the court did question whether a statute imposing liability would be Constitutional stating:

“Clearly, this does not include the power to create and enforce a liability on the part of any person not an employer, to compensate persons employed by others and who do not sustain to him the relation of employee. Without regard to the question whether the legislature may create such a liability against persons not employers, it does not have the power under that Section to create courts, or commissions having judicial power, for the settlement of disputes concerning such liability, and to enforce the same.” *Carstens*, 158 P. at 221.

¹³¹ *Id.*

¹³² See *State Commissioners Ins. Fund*, 116 P.2d at 175-176. Georgia appears to have the only statute in the United States imposing liability on the hirer of an independent contractor. GA. CODE ANN. § 51-2-5 (1982). Georgia Code states:

“An employer is liable for the negligence of a contractor: (1) When the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance; (2) If, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed; (3) If the wrongful act is the violation of a duty imposed by express contract upon the employer; (4) If the wrongful act is the violation of a duty imposed by statute; (5) If the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference; or (6) If the employer ratifies the unauthorized wrong of the independent contractor.” This basically codifies the Restatement of Torts in an attempt to limit liability. As California's courts have narrowed down potential liability so much, a similar statute would actually impose greater liability on hirers of independent contractors than already exists. GA. CODE ANN. § 51-2-5 (1982).

F. California Legislative Solutions

California case law has eliminated many potential recovery routes.¹³³ As discussed above, California Labor Code Section 3852 allows a party to recover Workers' Compensation and then to commence a separate civil lawsuit, provided that there is no double recovery.¹³⁴ In the event of legislative action, a statute could impose automatic liability on hirers of independent contractors for the independent contractor's employees, but such a law could be overbroad.

California's heat-related farm worker injury problems could be resolved if the farm owners would comply with Cal/OSHA Heat Illness Prevention Regulation.¹³⁵ Therefore, a statute would only have to require farm owners and their farm labor contractors adhere to the law.¹³⁶ The legislature enacted this law to further the public policy of protecting farm workers.¹³⁷ This public policy concern should not be vitiated through case law. If the legislature truly wants to protect farm workers, then it must impose that responsibility on the farm owner, as well as the farm labor contractor, to ensure that safety precautions are implemented.

California's Department of Industrial Relations, in conjunction with Cal/OSHA, requested that the Occupational Safety and Health Standards Board adopt emergency amendments to the current Heat Illness Prevention Regulation.¹³⁸ These emergency amendments include the requirement of a written Injury and Illness Program and more specific requirements for shade when temperatures exceed eighty-five degrees Fahrenheit; fresh, pure, suitably cool, potable drinking water; heat illness training for employers and employees; minimum five minute cool off periods when employees feel like they are overheating; and exceptions when warranted.¹³⁹ A 120-day standard rulemaking process will follow

¹³³ See *Hooker v. Department of Transportation*, 38 P.3d 1081, 1083 (Cal. 2002)(affirmative contribution to the injury). See *McKown v. Wal-Mart Stores, Inc.*, 38 P.3d 1094, 1097 (Cal. 2002)(affirmative contribution to the injury). See *Camargo v. Tjaarda Dairy*, 25 P.3d 1096, 1097 (Cal. 2001)(negligent hiring of an independent contractor/peculiar risk). See *Toland v. Sunland Housing Group, Inc.*, 955 P.2d 504, 506 (Cal. 1998)(peculiar risk). See *Privette v. Superior Court*, 854 P.2d 721, 727 (Cal. 1993)(peculiar risk).

¹³⁴ CAL. LAB. CODE § 3852 (1937).

¹³⁵ See CAL. CODE REGS. tit. 8, § 3395 (2005).

¹³⁶ See § 3395.

¹³⁷ See § 3395.

¹³⁸ West News, *California Seeks to Amend Heat Illness Prevention Standard*, INS. J., June 11, 2009, available at <http://www.insurancejournal.com/news/west/2009/06/11/101300.htm>.

¹³⁹ *Id.*

to develop permanent amendments to the Heat Illness Prevention Regulation regulations.¹⁴⁰

Cal/OSHA Heat Illness Prevention Regulation should be amended to impose liability on farm owners and farm labor contractors.¹⁴¹ Under the Scope and Application section, this would read: “[+]This section applies to all outdoor places of employment and employers, independent contractors and their hirers must comply with the provisions set forth.” Thus, farm owners could then be cited or sued civilly if they did not make sure their farm contractors were following these regulations. By imposing this liability, these farm owners would take out insurance which would increase production costs, but it would also protect the farm owners. This imposed liability would put the control back in the hands of the injured farm worker, who could then decide what avenue of redress would best meet his or her needs.

V. CONCLUSION

In order to satisfy the public policy concerns of providing adequate compensation and to ensure the safety of farm workers, California courts should revert back to *Aceves v. Regal Pale Brewing Co*, 595 P.2d 619, 623 (Cal. 1979), and impose liability under the non-delegable duty of peculiar risk.¹⁴² This would allow farm workers such as Maria Isabel Vasquez Jimenez to recover against the farm owner and farm labor contractor to ensure adequate recovery.

The second best option would be, per the court’s request in *State Commissioners Ins. Fund v. Industrial Acc. Commission*, 116 P.2d 173, 175-176 (Cal. Dist. Ct. App. 1941), for the legislature to address this issue to ensure that its policy to protect outdoor workers, including farm workers, is not impeded.¹⁴³ A statute imposing liability on farm owners would force them to take responsibility for farm workers instead of just reaping the benefits of their labor while imposing the financial burdens of workers’ injuries on the general public. Therefore, the legislature should amend Heat Illness Prevention Regulation to impose the responsibility of enforcing regulations on both farm owners and farm labor contractors.¹⁴⁴ This would give Cal/OSHA the authority to cite

¹⁴⁰ *Id.*

¹⁴¹ *See* § 3395.

¹⁴² *Aceves v. Regal Pale Brewing Co*, 595 P.2d 619, 623 (Cal. 1979), *overruled by* *Privette v. Superior Court*, 854 P.2d 721 (Cal. 1993).

¹⁴³ *State Commissioners Ins. Fund v. Industrial Acc. Commission*, 116 P.2d 173, 175-176 (Cal. Dist. Ct. App. 1941).

¹⁴⁴ *See* § 3395.

these farm owners and provide farm workers with a valid cause of action for injuries sustained in the course of their employment. This direct effect on farm owners' and farm labor contractors' pocketbooks will result in diligent implementation of these safety regulations and possibly fewer farm worker injuries, thereby satisfying the true public policy concern and preventing another tragedy like what happened to Maria Isabel Vasquez Jimenez.

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