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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TIMOTHY GLENN et al., Plaintiffs and Appellants, v. RADIANT SERVICES CORPORATION et al., Defendants and Respondents.	B235741 (Los Angeles County Super. Ct. No. TC021564)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan S. Rosenfield, Judge. Affirmed.

Casey, Gerry, Schenk, Francavilla, Blatt & Penfield and Jeremy Robinson for Plaintiffs and Appellants.

Horvitz & Levy, H. Thomas Watson, Stephen E. Norris; Yoka & Smith, Christopher E. Faenza and Christopher P. Leyel for Defendants and Respondents.

INTRODUCTION

Plaintiffs Timothy Glenn (Glenn) and his wife, Dana Glenn,[1] appeal from a judgment entered after the trial court granted a motion for summary judgment in favor of defendants Radiant Services Corporation (Radiant) and BK Real Estate Associates (BK). The case arose out of injuries Glenn sustained while working in a facility operated by Radiant in a building owned by BK. Glenn contends the trial court erred in ruling that Radiant and BK were not liable for his injuries as a matter of law. We agree with the trial court's determination that under *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (*Kinsman*) Radiant and BK are not liable for Glenn's injuries, and therefore we affirm.

FACTUAL BACKGROUND

A. *Radiant's Commercial Laundry Plant and the Electrical Utility Room*

In 1997 Radiant moved its commercial laundry business to a building owned by BK at 651 West Knox Street in Gardena. The building had been previously occupied by Teledyne, which did not operate a laundry facility there, and had been vacant for six years.

Electricity came into and was distributed throughout the building from an electrical utility room, which a previous owner of the building had built. A sign on the door of the electrical utility room read, "DANGER HIGH VOLTAGE." There were three panels inside the electrical utility room. The electricity came into the main panel, which sent the electricity to two distribution panels.

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[1] Dana Glenn's only cause of action was for loss of consortium. We refer to Glenn in the singular whether referring only to Timothy Glenn or to both Timothy and Dana Glenn for ease of reference.

The distribution panels contained various brands and styles of circuit breakers and disconnects. The distribution panel on the left, Panel 1, contained two large units with handles on them, called fused disconnects. They had labels on them, left over from the time Teledyne occupied the building, that read "WELD ROOM" and "BRAZE ROOM." The fused disconnect with the label "WELD ROOM" was not connected to any of Radiant's equipment. The handles on the fused disconnects were designed to allow safe access to the inside of the disconnect without shutting off power to the entire distribution panel. Turning the handle down into the off position de-energized the circuit and released the latch on the door to the disconnect. When the circuit was energized, the door to the disconnect could not be opened.

Panel 1 also contained smaller circuit breakers, some of which were connected and some of which were not. Panel 2, the panel on the right, had a similar configuration. There was an empty space at the top, then two large circuit breakers, and smaller circuit breakers underneath them.

B. *Radiant Decides To Install New Laundry Equipment*

In 2005 Radiant solicited bids for the installation of new commercial laundry equipment in its facility. It sought a "turn-key" job, meaning the company or person hired to do the work would take care of the installation of the new equipment including connecting it to the utilities. The job would include installing a new 600 amp subfeed electrical panel to distribute electricity to the new equipment.

John Laszlo of Laszlo Electric visited Radiant's facility in preparation for submitting a bid. Reliant's maintenance engineer removed a face plate on one of the distribution panels so Laszlo could look inside in order to determine where he could install a new circuit breaker required for the job. Radiant employees also opened a spare fused disconnect so Laszlo could look inside. The electrical power to the distribution panel was not turned off when Laszlo looked inside, but the handle to the fused disconnect was in the off position.

C. *Glenn's Company Wins the Radiant Contract and Begins Work*

East Coast Services (ECS), a company owned and operated by Glenn, submitted a bid for the contract. ECS is based in North Carolina and specializes in "turn-key" industrial laundries. Glenn has many years of experience in setting up and installing laundry equipment. Although ECS was a licensed electrical contractor, Glenn did not have an electrical contractor's license. Glenn, however, did have experience working with electricity and understood the hazards of such work.

Radiant awarded the contract to ECS. The contract required ECS to prepare the facility for the new laundry equipment, including setting up the necessary electrical connections. The contract also required ECS to install the 600 amp subfeed panel and breakers, run conduit from the panel to the equipment, and pull wire through the conduit.[2] ECS subcontracted the electrical work to Loftis Electric. Loftis provided two electricians, Mauricio Linares and Francisco, to do the electrical work. Linares had safety concerns about the job because the main breaker had not been inspected in about 20 years, and Linares shared his concerns with Glenn.

A week or two after beginning the work, Glenn had to return to North Carolina, but he arranged for work on the Radiant project to continue in his absence. Linares and Francisco were going to install the required breaker in Panel 1. Linares discovered, however, that the type of breaker sent by the electrical supplier was incompatible with the panel. Linares took a photograph of Panel 2 to show the supplier. Because Panel 2 was missing a breaker, the photograph showed the electrical connections between the panel and the breakers, known as Z bars, in the back, which would enable the supplier to determine the right type of hardware to supply.

When Glenn returned to California, he spoke to Cyrus Shahbaz, Radiant's plant manager, and explained that the breakers supplied to ECS did not fit. Shahbaz suggested fabricating brackets for the breakers, but Glenn said he was not willing to do that. Glenn

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[2] Radiant later requested an 800 amp subfeed panel or two 400 amp subfeed panels.

went to a company in San Diego County called California Breaker and learned that the type of breaker he needed was no longer manufactured and was very difficult to find. California Breaker did have some reconditioned fused disconnects, however, that appeared similar to those in Panel 1. The California Breaker employees stated that the reconditioned fused disconnects would have to be certified and prepared for use, and suggested that Glenn make sure they would fit in the distribution panel. Glenn took the measurements of the reconditioned fused disconnects to compare with those of the fused disconnects in the distribution panels at the Radiant facility.

D. *The Accident*

When Glenn returned to the Radiant facility the following day, he saw a fused disconnect at the bottom of Panel 2 that was in the off position. He decided to use that fused disconnect to take measurements to see if the fused disconnects from California Breaker would fit in the distribution panels. He explained that he went into the electrical utility room by himself: "I was not going into the electrical room to do any work. I wasn't going to remove anything. Basically I was going in to make a visual inspection of the panel again to try to obtain as many surface measurements as I could. Basically I [had] seen the disconnect in Panel Number 2 was in the off position, was not servicing, which indicated to me that it was a disconnect that was unusable, that was off, in the off position. So I decided to make an internal visual inspection of that panel to see how it related to the disconnects that I looked at at California Breaker."

Glenn took measurements around the outside of the fused disconnect. He then pushed the switch to open the fused disconnect to take inside measurements, but he felt some resistance. He saw rust along the edges of the fused disconnect and used a screwdriver to scrape away some of the rust. He put the screwdriver down, pushed the switch and pulled the door of the fused disconnect open. He "immediately [saw] a piece of metal fall from right to left and then at that time there was an explosion, a flash, [a] loud boom. The force of it rolled [Glenn] backwards [on] the floor."

ECS employee Robert Lawhon, Jr., went into the electrical utility room and found Glenn injured and in shock. Paramedics arrived and took Glenn to the hospital. The room, and especially the area around Panel 2, was a "black, sooty" mess. The force of the explosion left a silhouette of Glenn on the wall behind Panel 2 and knocked out power to the entire building.

E. *Radiant's Motion for Summary Judgment*

Radiant[3] filed a motion for summary judgment, arguing that under *Privette* and *Kinsman* it was not liable for Glenn's injuries because he was the employee of an independent contractor. Glenn opposed the motion on the ground Radiant could be liable for having a concealed dangerous condition and failing to warn him of that condition.

Both parties submitted expert declarations in support of their positions. According to Glenn's expert, Robert W. Armstrong, a forensic electrical engineer, "No personal safety equipment is needed to open a fused disconnect that has been turned to the off position because the power for that circuit is turned off as well. No one opening a fused disconnect under such circumstances would expect the disconnect to remain energized or pose any risk of electrical injury. The whole point of the exterior handle design is to allow access to the inside of the disconnect without having to turn off the power to the entire electrical system."

Based on his review of the materials in the case and the Radiant facility, Armstrong formed the opinion that "when Mr. Glenn opened the door to the fused disconnect in panel number two, the fuse assembly was gone but unattached and energized Z bars remained. The middle Z bar (called the 'B phase') rotated downward and came into contact with the lower Z bar (called the 'C phase'). This caused a powerful arc flash." Armstrong opined that the Z bars "were not properly removed, secured, or insulated."

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[3] Because Glenn's contentions on appeal focus only on Radiant, we refer to "Radiant" rather than "defendants."

Armstrong explained that when a fused disconnect is abandoned, the Z bars should be removed or, at the very least, insulated and attached to the frame of the distribution panel. "Regardless of which of the above methods is used, an abandoned circuit breaker or fused disconnect should be properly locked out and tagged out, preventing access to the abandoned breaker or disconnect and warning other people not to use it." Because that was not done here, "[n]either Mr. Glenn nor anyone else would have any way to know such a dangerous condition existed, however, and would have no reason to suspect opening the disconnect panel could be hazardous." Laszlo, who submitted a declaration as Radiant's expert, agreed that, based on the construction of the distribution panels, he would have removed the Z bars. He stated: "In my opinion, I would remove them because of not only them being attached with one single bolt . . . but they are so close in proximity to each other that without anything being permanently fixed to them, I would be in fear that over time, one of these would swing down and hit another. So I would remove them completely if I were the one doing it."

F. *The Trial Court's Ruling*

The trial court granted Radiant's motion for summary judgment. The court stated that "[p]ursuant to a long line of California case authority, starting with *Privette* . . . and most recently stated in *Kinsman* . . . , the hirer of a contractor has no duty to act to protect the contractor or its employees from hazards which are known to the contractor and which can be addressed through reasonable safety precautions on the part of the independent contractor. At the time of the incident, [Glenn] was working as a contractor installing industrial laundry equipment on the premises owned and operated by defendants. While working on the job, [Glenn] accessed an electrical service panel in the main electrical room while the panel was energized with 480 volts of electricity. There is no dispute that energized electrical panels are extremely dangerous and there can be no dispute that [Glenn] was working on the panel without using any safety precautions. Thus, because the hazards of the electrical panel were open and obvious, defendants did not have a duty to protect [Glenn] from those hazards."

The trial court further explained that the scope of the work contracted to ECS included taking appropriate safety precautions. Glenn "was working within the scope of the contracted job duties, even though not himself an electrician. Defendants had unquestionably delegated to ECS the inspection responsibilities associated with ascertaining the electrical needs of the project. In fact, in the days preceding the accident ECS had taken pictures and was attempting to measure an area within an electrical panel when the accident occurred." Under *Kinsman*, "[t]he key to the analysis seems to lie in the scope of work that is embedded in the delegation doctrine, combined with a notion of a landowner/hirer's duty to inspect *generally* the premises and to disclose known dangers to the delegee [*sic*]. In the instant case, the injury to [Glenn] occurred directly within the scope of work that had been delegated. The job included electrical work in a high voltage environment that was placarded with a suitable warning ('DANGER HIGH VOLTAGE') on the door of the room containing the electrical panels. The work area was known at the time of the accident by both the hirer and the contractor (and [Glenn] personally) to be comprised of antiquated electrical equipment. Protections against adverse electrical events were part of the duty of the contractor in this case."

The trial court added: "Finally, the death knell for [Glenn's] position on a concealed defect or failure of the landowner to generally inspect lies in the evidence submitted by [Glenn's] expert witness when he states that neither [Glenn] *nor anyone else* could have known of the dangerous condition. Under that opinion, 'anyone' would include the landlord/hirer. [¶] Thus, no triable issue of material fact as to defendants' liability is in existence from which a trial may sprout." The court concluded that "[d]efendants are protected by the *Privette* doctrine under these facts and have no liability."

DISCUSSION

A. *Standard of Review*

Summary judgment is proper if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) To obtain summary judgment, the moving defendant may show that the plaintiff cannot establish one or more elements of each cause of action or that there is a complete defense to the causes of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) The defendant must "'show that under no hypothesis is there a material issue of fact requiring the process of a trial, thus defendant is entitled to judgment as a matter of law. [Citation.]' [Citation.]" (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 420; see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to a cause of action or a defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849.) "There is a triable issue of fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, at p. 850; see *Travelers Property Casualty Co. of America v. Superior Court* (2013) 215 Cal.App.4th 561, 574.)

On appeal, we exercise our independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Travelers Property Casualty Co. of America v. Superior Court*, *supra*, 215 Cal.App.4th at p. 574.) Because the grant or denial of a motion for summary judgment strictly involves questions of law, we must reevaluate the legal significance and effect of the parties' moving and opposing papers. (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 192.)

B. The *Privette Doctrine*

Under the *Privette* doctrine, "when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594.) The Supreme Court formulated the *Privette* doctrine as an exception to the peculiar risk doctrine. The peculiar risk doctrine is an "exception to the general rule of nonliability to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries." (*Privette, supra,* 5 Cal.4th at p. 694.) Under *Privette*, "[w]hen . . . the injuries resulting from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis for the employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries." (*Id.* at p. 702.)

"A useful way" of understanding *Privette* and its progeny is to "view the . . . cases . . . in terms of delegation." (*Kinsman, supra,* 37 Cal.4th at p. 671.) These cases "establish[] that an independent contractor's hirer presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees." (*SeaBright Ins. Co. v. US Airways, Inc., supra*, 52 Cal.4th at p. 600.) "The policy favoring 'delegation of responsibility and assignment of liability'" is a "very 'strong'" one, "and a hirer generally 'has no duty to act to protect the [contractor's] employee when the contractor fails in that task . . .' [citation]." (*Id.* at p. 602.) Nevertheless, the courts have carved out exceptions to the rule of a hirer's nonliability for injuries to an independent contractor's employees. Glenn relies on two of these exceptions: Failure by the hirer to warn of a known hazard (*Kinsman, supra,* at p. 664) and retention by the hirer of control over safety (*id.* at p. 671; *Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446).

C. *The Exceptions to the Privette Doctrine Do Not Apply*

1. Failure To Warn of Known Hazard

In *Kinsman*, on which the trial court relied, the Supreme Court addressed the question of "when, if ever, is a landowner that hires an independent contractor liable to an employee of that contractor who is injured as the result of hazardous conditions on the landowner's premises?" (*Kinsman, supra,* 37 Cal.4th at p. 664.) The court concluded the landowner or possessor "may be liable to the contractor's employee if the following conditions are present: the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition." (*Ibid*., fn. omitted.)

Glenn argues that the trial court disregarded all of his evidence in concluding that the failure to warn exception did not apply. He claims that he "demonstrated that Radiant must have created the hazard that injured Mr. Glenn, that Mr. Glenn had no way to know the hazard existed, and that Radiant failed to warn Mr. Glenn or his employees about the danger." Specifically, Glenn claims that his "injuries were caused by a concealed dangerous condition—a 'live' fused disconnect box where the components had been removed, but the powered Z bars had been left in. This configuration was either created by, or known to, Radiant, but it was unknowable to Mr. Glenn since he could not see it and had no reason to expect it. Radiant failed to fix the condition or provide proper warnings and safeguards, i.e., 'locking out' and 'tagging out' the disconnect, and thus Mr. Glenn experienced an extremely unpleasant surprise when he opened the disconnect."

As the trial court found, the key issue is whether Radiant knew or should have known of the dangerous condition. It was undisputed that Glenn did not know of the condition, and the trial court agreed with Glenn that the evidence showed he could not reasonably have discovered the dangerous condition. The court pointed out: "In discussing the risks posed by the Z-bars, [Glenn's] expert opines that, 'neither [Glenn] *nor anyone else* would have any way to know such a dangerous condition existed,

however, and would have no reason to suspect opening the disconnect panel could be hazardous.'"

In *Kinsman* the court explained that a "landowner's duty generally includes a duty to inspect for concealed hazards. [Citation.] But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, the principles enunciated in *Privette* suggest that the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability." (*Kinsman*, *supra*, 37 Cal.4th at pp. 677-678.)

Here, the trial court found "[t]he scope of the work of the independent contractor, ECS, was to install laundry equipment and to provide appropriate electrical service for that purpose. . . . [Radiant] had unquestionably delegated to ECS the inspection responsibilities associated with ascertaining the electrical needs of the project." The evidence showed this was a "turn-key" job, meaning ECS as the contractor was responsible for providing all materials and services necessary to setting up a functional commercial laundry facility (see *Thomas v. Buttress & McClellan, Inc.* (1956) 141 Cal.App.2d 812, 815), and to turn the facility over to Radiant "ready to 'turn the key' and start" doing laundry (*White v. Cascade Oil Co.* (1936) 14 Cal.App.2d 695, 702). Having

delegated to ECS the duty to do all electrical work necessary for the project, Radiant had no duty to inspect the electrical utility room for any concealed hazards of which it may have been unaware; that duty of inspection belonged to ECS, to whom Radiant had delegated the duty of job safety. (See *Kinsman*, *supra*, 37 Cal.4th at p. 677.) As the trial court found, "[p]rotections against adverse electrical events were part of the duty of the contractor in this case."

Moreover, the evidence showed that Linares, the electrician, observed that the main breaker had not been inspected in approximately 20 years, was concerned about safety, and told Glenn of his concerns. Glenn observed that the fused disconnect that he was trying to open was not in use and there was enough rust on it that he had to scrape some of it away with a screwdriver in order to open the door. If anyone had constructive notice of the hazardous condition and was in a position to take appropriate safety precautions, it was Glenn, not Radiant. (See *Gravelin v. Satterfield* (2011) 200 Cal.App.4th 1209, 1216 [hirer is not liable "if the hazard is apparent, or becomes apparent, and 'the contractor nonetheless failed to take appropriate safety precautions'"], quoting *Kinsman*, *supra*, 37 Cal.4th at p. 676.) Despite these verbal warnings and observational yellow flags, Glenn proceeded to access the fused disconnect without asking Radiant to shut off the power. Glenn, not Radiant, "assumed responsibility for determining a safe approach to" the inside of the fused disconnect, and it was Glenn's "unfortunate miscalculation of an appropriate access route, not any negligence by [Radiant], that led to his injury." (*Gravelin*, *supra*, at p. 1218.) Under *Kinsman*, a "hirer is . . . not liable where a worker is injured because the contractor 'has failed to engage in inspections of the premises implicitly or explicitly delegated to it,'" as Radiant delegated to ECS here. (*Id*. at p. 1216, quoting *Kinsman*, *supra*, at p. 677.)

Glenn argues that the evidence shows "Radiant most likely created" the hazardous condition and that "[i]f Radiant created the condition, it had actual or constructive notice of it." Specifically, Glenn cites to evidence that (1) "before Radiant took over the plant, it hired Daniel Martinez, (dba Western State Design), an electrical contractor, to come in and do a complete overhaul of the electrical equipment for Radiant's business"; (2) "[i]n

approximately 1998 or 1999, Radiant employees removed and replaced one of the circuit breakers in the electrical room"; (3) "Radiant personnel occasionally would remove the large covers around the panels to see if the inside needed cleaning"; and (4) "Linares testified that while ECS was performing its work, he saw Radiant maintenance people in the electrical room using the breakers." Glenn argues that this evidence created a triable issue of fact on whether Radiant created, and therefore knew or should have known about, the hazardous condition on its property.

We conclude that the evidence in the record cited by Glenn, and reasonable inferences from that evidence, do not create a triable issue of fact on Radiant's knowledge of the condition, in part because some of the evidence cited by Glenn does not say what Glenn contends it says. For example, there is no evidence in the record that when it took over the property in 1997, Radiant did a "complete overhaul of the electrical equipment." The record includes statements by Shahbaz in his deposition that he took a photograph of the electrical equipment because Radiant's "electric contractor was working on the panel," and that Martinez was an electrician from San Diego who did some "work on the electrical room" in late 1997 and early 1998. Glenn does not cite to any evidence in the record, however, showing what electrical work Martinez did, whether he did any work involving or even near the fused disconnects, or that he did anything close to a "complete overhaul" of the electrical equipment in Radiant's utility room. When asked by counsel for Glenn whether Radiant changed the electrical panel when Radiant "took over" the premises, Shahbaz stated, "Not—not really. Might change something. I don't recall from now to 14 years ago." Although counsel for Glenn suggested in his questioning of Shahbaz that Martinez "came in and did the work to prepare [the] Knox Street [property] to run the Radiant Services business," Shahbaz did not confirm this, and testified that he did not deal with Martinez or his company and did not know who from Radiant did.

Similarly, although Shahbaz did testify that in 1999 Radiant removed and replaced one circuit breaker, he said that it was the "one and only time" Radiant did so. Shahbaz stated: "That's the only time we moved or replaced one circuit breaker. That's it."

Shahbaz testified that Radiant changed the circuit breaker at the top of the right panel, but there is no evidence that Radiant employees worked anywhere near the fused disconnects, or that they were in a position to create or discover anything about the condition of the fused disconnects when they changed the circuit breaker. Shahbaz testified that no one from Radiant ever did any work on the fused disconnects:

"Q . . . Did you or anyone working for you ever remove the fuse[d] disconnects from 1997 to the time Mr. Glenn was injured in 2006?

"A No.

"Q Did you have any contractors move or work on any of the fuse[d] disconnects between 1998 when Martinez completed his work to the day of the incident?

"A No."

Had Glenn submitted more evidence about what Radiant did to change the single circuit breaker at the top of the electrical panel in 1999, what kind of work it involved, and whether it could have had any effect on or causal connection to the creation of the hazardous condition in the fused disconnect at the bottom of the panel, such evidence, with the assistance of "'all' of the 'inferences' reasonably drawn therefrom" (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843), might have created a triable issue of fact. It is not a reasonable inference from the evidence Glenn submitted, however, that Radiant's circuit breaker change in 1999 created the dangerous condition in the fused disconnect. (See *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 181 ["[i]nferences based on guesswork or speculation are not sufficient to demonstrate the existence of a material fact issue"]; *Isner v. Falkenberg/Gilliam & Associates, Inc.* (2008) 160 Cal.App.4th 1393, 1398 ["inference is reasonable if, and only if, it implies the existence of an element more likely than the nonexistence of that element"]; *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 ["responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact"].) Glenn's musing that by removing one circuit breaker Radiant "could very well have rendered other fused disconnect boxes in the panel obsolete and unnecessary," which "could explain the presence of a fused disconnect with

no fuses," is speculation about what the evidence might suggest, not a reasonable inference from what the evidence actually was.

Again citing Shahbaz's testimony, Glenn asserts that Radiant employees occasionally removed the large side panels to determine if the interior required cleaning. Shahbaz testified Radiant personnel did this kind of maintenance every three or four years. Shahbaz stated that when they did this, they could see the fused disconnect and the circuit breakers, but that "we don't mess with these things. We don't touch those." Again, absent evidence that by performing this type of maintenance Radiant could have affected the condition of the fused disconnects, or that such conduct could have increased the risk of damaging the fused disconnects or the "unattached and energized Z bars" within, there is not enough evidence from which a reasonable inference can be made to create a triable issue of fact. Glenn cites to no evidence in the record, such as testimony by his expert witness, that connects Radiant's triennial or quadrennial maintenance check of the electrical equipment with creation of the electrical hazard in the fused disconnect. Armstrong's declaration in opposition to Radiant's motion for summary judgment is silent on any relationship between the creation of the hazardous condition and the removal of a panel or the changing of a circuit breaker by Radiant employees.[4]

As for Linares' testimony, he stated that while he was working at Radiant he saw "[m]aintenance people of the company" "[m]oving the breakers for their own equipment or machinery." Linares stated, however, that although he saw Radiant employees working in the electrical room "[o]n some occasions," he had "no idea" what they were doing, except that he never saw anyone install or remove a breaker. Again, this vague

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[4] In his supplemental declaration in support of Glenn's motion for a new trial Armstrong stated his opinion that Radiant "created the dangerous condition by removing the components of the empty fused disconnect without properly removing, securing, or insulating the Z-Bars or locking out/tagging out the unused fused disconnect," and that his opinion was "corroborated by the testimony of" Shahbaz, Glenn, Linares, and Lawhon "that Radiant personnel had removed and replaced breakers on at least one occasion and ECS workers had not." Armstrong did not give this opinion or explanation, however, in his declaration submitted in opposition to the motion for summary judgment.

reference to "moving the breakers" is not sufficient evidence from which to draw a reasonable inference that Radiant's "maintenance people" somehow created the hazardous condition that injured Glenn.[5]

Finally, citing slip and fall cases like *Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, *Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381, and *Oldham v. Atchison, T. & S. F. Ry. Co.* (1948) 85 Cal.App.2d 214, Glenn argues that because "Radiant exercised exclusive dominion over the electrical room until Mr. Glenn's company arrived," Radiant "is presumed to have" created the hazard. For example, in *Getchell*, where the plaintiff slipped on jewelry cleaning solution on the floor of an employee break room to which only the defendant's employees had access, the court held that because "the break room where the accident occurred and the cleaning solution which caused the accident were under the exclusive control of defendant and its employees," it "reasonably could be inferred that defendant's employees caused the dangerous condition," and "knowledge of the condition is imputed to defendant." (*Getchell v. Rogers Jewelry*, *supra*, 203 Cal.App.4th at p. 386.)

Getchell (and *Hatfield* and *Oldham*), however, were not *Privette*/*Kinsman* cases, and they did not involve a concealed hazardous condition. Nothing in *Kinsman* suggests that a plaintiff can satisfy the first element of the *Kinsman* landowner failure-to-warn exception to *Privette* (namely, that the landowner knew or should have known of the hazardous condition) by showing that the landlord exercised exclusive control of the property. Indeed, no case involving the *Privette* doctrine or the *Kinsman* exception has ever cited *Getchell*, *Hatfield*, or *Oldham*. Moreover, unlike *Getchell*, *Hatfield*, and *Oldham*, the landowner in this case did not have exclusive control of the property during the entire time period in which the hazard could have been created. For example, the

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5 Glenn also cites to Linares' testimony that he saw "maintenance people" come in and "turn back on the breakers of the other machines that were in the plant," and that these individuals worked on installing generators, but this activity occurred after Glenn's accident.

evidence showed that the electrical utility room was set up before Radiant moved into the facility, that the fused disconnects in Panel 1 were labeled "WELD ROOM" and "BRAZE ROOM" before Radiant moved into the facility, and that the "WELD ROOM" fused disconnect was not connected to any of Radiant's equipment. The dangerous condition in this case, a fused disconnect with loose Z bars, arose over a potentially much longer time period than the hazards in *Getchell* (fluid on the break room floor), *Hatfield* (wax on the floor of a department store), or *Oldham* (plaster board and debris on a pathway), and could have been created while one of Radiant's predecessors was in possession of the property.

2. Retained Control

Under the retained control exception to *Privette*, where the "hirer entrusts work to an independent contractor, but *retains* control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Construction, Inc., supra,* 202 Cal.App.4th at p. 1446; see *Kinsman, supra*, 37 Cal.4th at p. 670.) "Even so, a hirer is not liable to a contractor or a contractor's employee merely because it retains control over safety conditions. [Citations.] The imposition of tort liability turns on whether the hirer exercised that retained control in a manner that *affirmatively contributed* to the injury. [Citations.] An affirmative contribution may take the form of actively directing a contractor or an employee about the manner of performance of the contracted work. [Citations.] When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. [Citations.] 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, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [Citation.]" (*Tverberg v. Fillner*

Construction, Inc., supra, 202 Cal.App.4th at p. 1446; see *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202, 210-212.)

Glenn relies on *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225 and *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120 for the proposition that Radiant retained control over the electrical power to the facility and so may be held liable for his injuries. *Austin,* which predated *Privette,* involved the employee of an independent contractor who was injured when equipment he was working on came in contact with an energized power line. (*Austin, supra,* at p. 231.) The court held that because the defendant controlled the power line and should have anticipated the danger to the independent contractor's employees, it could be held liable for the plaintiff's injuries. (*Id*. at pp. 232-233.) Because *Austin* predated *Privette,* however, the court in *Austin* did not address the issue of delegation of the duty to take safety precautions or affirmative contribution to the employee's injuries. After *Privette,* liability cannot be imposed "'merely because [the hirer] retained the ability to exercise control over safety at the worksite . . . .'" (*SeaBright Ins. Co. v. US Airways, Inc., supra,* 52 Cal.4th at p. 600.)

Ray v. Silverado Constructors, supra, 98 Cal.App.4th 1120 addressed the exception to *Privette* based on the hirer's direct liability for its affirmative conduct. (*Id.* at pp. 1128-1129.) The court noted that where the hirer retains exclusive control over the power to take safety measures, the hirer may be held liable for the failure to take such measures. (See *id*. at p. 1134.) Glenn argues that "[i]t is clear that Radiant did not delegate all authority to conduct electrical work to ECS since ECS had no ability to shut off the power."

Glenn, however, does not cite to any evidence in the record to support this argument. As Radiant points out, Glenn acknowledged in his deposition that he arranged with Shahbaz a time at which the power could be shut off so that Linares and Francisco could install the new circuit breakers. Linares and Francisco told Glenn that the electrical power was shut off on Sunday, January 16 before they opened up the distribution panel to do the installation. Glenn failed to present any evidence that he asked Radiant to turn off the power before he attempted to open the fused disconnect to take measurements and

that Radiant refused his request. (See *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 671 [retained control exception did not apply where there was no evidence that the independent contractor asked the hirer to turn off the water supply to the pipe where the employee was working when he was injured].) In *Ray*, there was evidence of communications between the hirer and the independent contractor regarding safety considerations prior to the accident. (*Ray v. Silverado Constructors*, *supra*, 98 Cal.App.4th at p. 1137.) That evidence was sufficient to establish a triable issue of fact regarding the application of the retained control exception to *Privette*. (*Ibid*.) Glenn presented no such evidence.

3. Summary Judgment Was Proper

Glenn presented no evidence that Radiant "knew, or should have known, of a latent or concealed preexisting hazardous condition on [the] property" (*Kinsman, supra,* 37 Cal.4th at p. 664) or that Radiant "exercised that retained control in a manner that affirmatively contributed to [Glenn's] injury" (*Tverberg v. Fillner Construction, Inc.*, *supra,* 202 Cal.App.4th at p. 1446, italics omitted). Defendants were entitled to judgment under *Privette* and *Kinsman*.

DISPOSITION

The judgment is affirmed. Defendants are to recover costs on appeal.

SEGAL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.