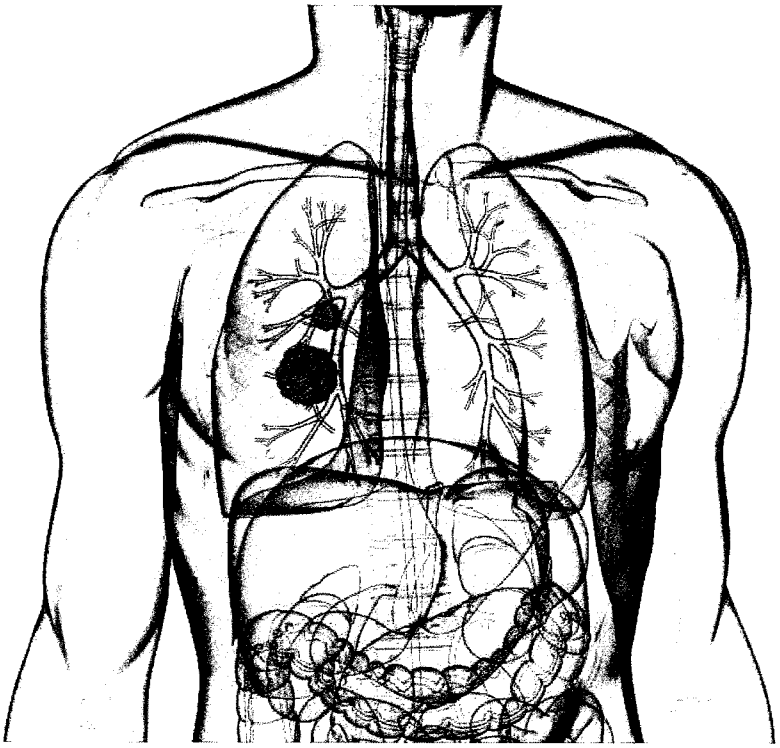

Is *Hernandezcueva* a Dog with a Bark Bigger Than Its Bite?

By Erin S. McGahey
Sinunu Bruni LLP

In *Hernandezcueva v. E.F. Brady Company, Inc.*, the Court of Appeal, Second Appellate District, held that a subcontractor could be held strictly liable for the products used in the trade if the entity was sufficiently involved in setting the defective product into the stream of commerce.[1] To the consternation of many, the decision seemed completely at odds with the decision rendered by the Court of Appeal, Fifth Appellate District, in *Monte Vista Development Corp. v. Superior Court* (1991) 226 Cal.App.3d 1681. Monte Vista held that a subcontractor was not subject to the principles of strict liability for defective products used incidentally in their role primarily as a service provider, or installer of products. Despite pleas to review and to address the split of authority, the petition to review (as well as a request for depublication) was denied by the California Supreme Court this past March.

E.F. Brady was a drywall and fireproofing subcontractor during the original construction of the Fluor complex building in 1974. Plaintiff Joel Hernandezcueva worked at the building as a janitor between 1992 and 1995, performing clean-up of debris while remodel and repair were being conducted in the building, including the removal of walls alleged to have been originally installed by E.F. Brady. E.F. Brady was not involved in the remodel that took place during Plaintiff's employment. In 2011, Plaintiff was diagnosed with mesothelioma at the age of 43. Plaintiffs[2] filed a lawsuit for personal injury against various manufacturers, suppliers, and distributors of asbestos-containing products, as well as contractors alleged to have previously installed asbestos products at the worksite. Plaintiffs asserted claims against E.F. Brady for negligence, strict liability, misrepresentation, intentional failure to warn, contractor liability and loss of consortium.

At trial, the evidence showed that E.F. Brady worked on high-rise office buildings and large construction projects since the late 1960s. The contract for the Fluor project was for the installation of fireproofing and drywall valued at more than $2 million. The bid was typical of nearly all construction contracts and included costs for labor and materials. E.F. Brady's corporate witness testified that 75% of the bid was generally allocated towards labor and the remaining 25% allocated towards materials, but that the profits arose from the provision of labor. The materials used on the project were detailed by the architectural design and/or the general contractor's specifications, which normally called for a specific brand "or equal." E.F. Brady used Kaiser Gypsum drywall and joint compound supplied by a local supply house. During the construction, it was found that the Kaiser Gypsum joint compound was not performing effectively and, after a meeting was held between representatives of E.F. Brady, Kaiser Gypsum and Hamilton, a change was made to use Hamilton brand joint compound, with the approval of the general contractor and architect. Relying on *Monte Vista*, the trial court granted E.F. Brady's motion for non-suit on Plaintiff's claims for strict liability, leaving the claim for negligence to be determined by the jury. The jury returned a defense verdict in favor of E.F. Brady and Plaintiffs appealed following their denial of the motion for a new trial.

The appellate court considered at least four factors in evaluating the application of strict liability to a subcontractor defendant. The analysis begins, of course, with the seminal Supreme Court case regarding the application to manufacturers, *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57. It is the quotable phrase familiar to all practitioners in products liability: "the purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market [,] rather than by the injured persons who are powerless to protect themselves."[3]

Strict liability has been extended to entities involved in the distribution of products, including retailers, wholesalers and developers of mass-produced homes.[4] *Bay Summit* adopted the further concept that strict liability may be properly imposed if the party "played a substantial part in insuring that the product [was] safe or ...

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[was] in a position to exert pressure on the manufacturer to that end."[5] Hence, a second factor is whether the defendant has any influence over ensuring the product safety or selection.

A third factor addressed by the court in considering the application of strict liability is whether the defendants derived benefit or profit from their participation in the venture. Quoting *Kasel v. Remington Arms Co.,* the Court noted that "there is no precise legal relationship to the member of the enterprise causing the defect to be manufactured.... It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product ... which calls for imposition of strict liability."[6]

The *Hernandezcuueva* court recognized that simply being a link in the chain of commerce is not sufficient in and of itself to justify imposition of strict liability.[7] The question is the role of defendant and whether the essence of the transaction was one of obtaining a service, whether the sale of any product was simply incidental, or whether the transaction was both the sale of products and services.[8] Thus, a fourth factor turns to the inquiry of what constitutes a "seller" under the Restatement of Torts.

MONTE VISTA – COMPARED AND CONTRASTED

Prior to *Monte Vista,* the application of strict liability to contractors had generally arisen in cases involving construction defect. The theory was not based on defective products supplied by a contractor but rather, based on a faulty method of construction for which plaintiff asserted strict liability.[9] The question of strict liability had not been examined with respect to alleged defects in products supplied by a contractor.[10] In *Monte Vista,* the Fifth District held that a contractor was not subject to strict liability for an alleged defective product that caused injury to Plaintiff. Defendant Willey Tile had installed tile in the unit of a residential building, including installation of a soap dish that later gave way when plaintiff leaned on it, causing plaintiff to fall and sustain injury. The court focused the analysis "not on whether Willey Tile was a subcontractor but whether the tile company came within the chain of commerce as a supplier of the soap dish to the extent that it became strictly liable if the item was defective."[11] Noting that Willey was not in the business of selling soap dishes, that it made no difference to Willey who supplied the soap dish, and that Willey furnished primarily services, the court found Willey was not a "seller" as defined by the Restatement of Torts.[12] *Monte Vista* concluded that defendant was a service provider rather than a seller and that strict liability was not warranted.

So why did the *Hernandezcueva* court reach a different conclusion? The Court was influenced by E.F. Brady's "substantial purchases of the defective products, coupled with its ongoing relationships with their manufacturers [to] support the imposition of strict liability."[13] This offers little guidance in describing the circumstances where liability may be found. Contractors often foster relationships with their suppliers, whether it be a middleman supplier or directly with the manufacturer. Contractors buying in bulk typically receive a contractor's discount when purchasing from wholesalers. There is the establishment of customer loyalty and good will, resulting in economic benefit to minimize costs and maximize profits for all parties including the project developer or premise owner. This is inherent in the construction industry between contractors and suppliers and is necessary for contractors to develop a competitive edge. What constitutes a "substantial purchase" is also vague, but likely to be determined on a case by case basis. In *Monte Vista,* the defective product purchased and installed by Willey was a soap dish installed incidentally pursuant to the installation of tile, the primary product for which they were hired. Had Willey had a substantial purchase of soap dishes or had the tile been the defective product, *Monte Vista* may have undergone a different analysis and had a different outcome.

The appellate court also examined the evidence that E.F. Brady was a large contractor with a sizeable project valued at more than $2 million. The bid submitted by E.F. Brady allocated 75% of the amount to labor with 25% to materials that included the sales tax plus a one or two percent markup to account for escalating costs of materials. No profit was derived from the provision of the materials. Nonetheless, the Court emphasized that E.F. Brady was "always" involved in the provision of drywall and the finishing joint compound and that this was material to its business.[14] The Court also found the time and materials bid relevant in evaluating E.F. Brady's role as a provider of products. This supported the Court's finding that their participatory connection to the stream of commerce was significant and that a jury could reasonably find that E.F. Brady was more than an occasional seller of drywall products.

The analysis of the "time and material" bid is concerning when evaluating whether it is appropriate to impose strict liability. It is not unusual for contractors to submit bids on a "time and material" basis, itemizing the labor and materials and providing a mark-up for materials. It also was not unusual for contractors to have a resale license, which permits the contractor to include the sale tax in the final bid to collect and then remit to the state. These costs, like any other additional expenses including freight costs, FICA or SDI contributions, or other extraneous costs are passed on to the contracting party, usually the general contractor or premise owner. Unfortunately, it appears that a customary practice of incorporating costs for materials as essential to the transaction could tip the scale in favor making the installer a seller and give rise to strict liability.

The scale was tipped further in the direction of seller versus service provider by the "ongoing relationship" between E.F. Brady and the joint compound manufacturers.[15] The court concluded that simply because E.F. Brady orchestrated a meeting amongst the representatives of Kaiser Gypsum and Hamilton, Brady "'was in a position to exert pressure on the manufacturer' to improve product safety."[16] The court is arguably overreaching here. Other than having some influence on selecting a product that performed pursuant to the specifications and requirements dictated

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by the architect, general contractor, and/or premise owner, there is no evidence that E.F. Brady was or could have had any influence over the product formula or design of the joint compound.[17] Although the court's suggestion that a subcontractor had some influence with the product manufacturer is dictum, defense counsel should prepare to challenge any notion that subcontractor had any kind of "dealership" contract with the manufacturer.

The defense should find some comfort in the fact that the decision of *Hernandezcueva* was largely influenced by the specific facts of the case: "The key question before us concerns the application of the doctrine of strict products liability *under the circumstance* established by the Herndandezcueva's evidence."[18] Several times the Court acknowledged that the inquiry regarding the imposition of strict liability is fact-specific and hinges on the party's role in placing the product in to the stream of commerce.[19]

By declining to review *Hernandezcueva,* the Supreme Court either felt that there was no conflict between the appellate courts on the issue of whether strict liability can be applicable to subcontractors, or declined to resolve the issue for some other reason. *Monte Vista* still stands as persuasive precedent (or binding precedent for the Fifth Division) for the principle that subcontractors are outside the stream of commerce and not subject to strict liability for products incidentally supplied pursuant to the service. *Hernandezcueva* only assigns liability under the specific facts presented, but the role of the defendant must be examined on a case by case basis. Only time will tell whether the factors addressed in *Hernandezcueva* result in a nasty bite for subcontractors in the future.

ENDNOTES

1 *Hernandezcueva v. E.F. Brady Co.,* Inc. (2016), 243 Cal.App.4th 249, at 263.

2 Plaintiffs were Joel Hernandezcueva and his wife, Jovana, who also brought a claim for loss of consortium. During the pendency of the appeal, Joel died and his wife was appointed as successor-in-interest. For clarity, "Plaintiff" refers to Joel only.

3 *Hernandezcueva,* 243 Cal.App.4th at 257 (citing *Greenman,* 59 Cal.2d at 63).

4 *Id.* (citing *Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 772-773).

5 *Id.*

6 *Hernandezcueva,* 243 Cal.App. 4th at 257-258 (citing *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, 725).

7 *Hernandezcueva,* 243 Cal.App.4th at 258.

8 *Id.*

9 *Monte Vista,* 226 Cal.App. 3d at 1686.

10 *Id.* at 1687.

11 *Id.*

12 *Id.*

13 *Hernandezcueva,* 243 Cal.App.4th at 264.

14 *Id.* at 263-264.

15 *Id.* at 263.

16 *Id.* (citing *Bay Summit,* 51 Cal.App.4th at 773).

17 See Petition for Review by Petitioner E.F. Brady, p. 20.

18 *Hernandezcueva,* 243 Cal.App. 4th at 257 (emphasis added).

19 *Id.* at 258 (citing *Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.Ap.3d 340, 344), See also *Hernandezcueva,* Id. at 259 ("[T]he imposition of strict liability on a party hinges on its role in the relevant transaction.") (emphasis added); Id. at 260 ("The propriety of imposing strict liability on a party that both supplies and installs a defective component hinges on the circumstances of the transaction.) (emphasis added); Id. at 266, ("That principle ... dictates *a fact-sensitive inquiry* into the party's activities relating to the defective product....").

Erin S. McGahey

Erin S. McGahey is a member of the ADCNCN Board of Directors, and is co-chair of the Toxic Torts Substantive Law Section. A graduate of U.C. Santa Barbara and Benjamin Cardozo School of Law, Ms. McGahey is a partner at San Francisco's Sinunu Bruni, where she concentrates on the defense of toxic tort litigation, especially involving asbestos.