Construction site injuries: Strategies for defeating the *Privette* defense

Defense counsel will present Privette *as a complete defense against civil liability. It is not.*

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When your client is injured while employed by a subcontractor on a construction site, succeeding in a personal injury lawsuit against the property owner or general contractor who hired your client's employer can be challenging. Resolving such cases have become significantly more difficult for plaintiffs due to a body of law commonly referred to as the *Privette* doctrine, which defendants typically tout as their key defense to liability. (See *Privette v. Superior Court* (1993) 5 Cal.4th 689.) Defendants often incorrectly argue that this doctrine provides that an employee of an independent contractor injured on the job is precluded from recovering damages from the hirer of the independent contractor under negligence and premises liability theories.

The *Privette* doctrine does not remove an employee's right under Labor Code section 3852 to maintain suit against a third party who proximately causes the employee's injury. Rather, these cases merely preclude theories of negligent hiring and vicarious liability against a hirer. *Privette* addressed what was then a potential conflict in California law between the peculiar risk doctrine and the workers' compensation system. (*Id.* at 691.) The Court held that a *non-negligent* hirer of a contractor is not liable for injuries suffered by the contractor's employee while performing inherently dangerous work. (*Id.* at 702.)

This decision expressed a policy interest that when the hirer is not negligent, the hirer should not be vicariously liable for the contractor's negligence that caused the injury. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674.)

Further, a hirer cannot be liable for negligently hiring the contractor that employed the injured plaintiff. (See *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244.) However, the hirer can still be responsible under general tort principles based on the hirer's own negligence. (*Browne v. Turner Constr. Co.* (2005) 127 Cal.App.4th 1334, 1345.) "Nothing in these cases suggests that with respect to its own actual (as distinct from imputed or constructive) negligence, the hirer should enjoy any more freedom from liability to workers on its site than would an invitee or passerby." (*Ibid.*)

Because defendants are often confident when relying on a *Privette* defense, plaintiffs will almost inevitably face a motion for summary judgment and need to defeat it before discussing settlement or going to trial. When handling a *Privette*-primed case, it is advisable to start early in preparing to oppose defendant's MSJ by developing a theory of liability and a discovery plan.

The scope of potential liability of property owners and general contractors who hire contractors is much narrower than it was before *Privette*. However, there are three recognized negligence theories under California law which injured employees of independent contractors can rely on to defeat the defense and establish liability against the hirer of the contractor. A defendant is liable to employees of independent contractors for injuries caused by: (1) unsafe concealed conditions on the defendant's property; (2) the defendant's negligent provision of unsafe or defective equipment; or (3) the defendant's negligent exercise of retained control over safety conditions.

Theory 1: Unsafe concealed conditions on the property

Privette and its progeny do not relieve the liability of property owners who hire independent contractors to perform work on their property for hazardous conditions on their property when an employee of an independent contractor is injured. Rather, the cases expressly limit the delegation of responsibility to the independent contractor for its own employees' safety to the *specified work which is the subject of the contract*. All other areas are subject to traditional premises liability principles. Thus, the property owner retains its duty to inspect, maintain, repair, and warn regarding areas of its premises that are outside the scope of the contract and the work that the contractor was hired to perform.

In *Kinsman*, *supra*, 37 Cal.4th 659, the California Supreme Court considered the issue of when a landowner who hires an independent contractor is liable to the contractor's employee who is injured as the result of hazardous conditions on the landowner's premises. (*Id.* at 664.) The Court held that a "hirer as landowner may be independently liable to [a] contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Id.* at 675; see also CACI 1009A.) "An unsafe condition is concealed if either it is not visible or its dangerous nature is not apparent to a reasonable person." (CACI 1009A.)

Kinsman also provided that the independent contractor's responsibility for job safety generally includes a limited duty to inspect the premises, not in a general sense, but rather is limited to the area falling within the scope of the contractor's employment. (*Kinsman*, *supra,* 37 Cal.4th at 678.) The Court gave the following examples to illustrate: An employee of a roofing contractor sent to repair a defective roof would generally not be able to hold the hirer liable if the employee were injured by falling through that roof due to a structural defect. This is because an inspection for a structural roof defect could reasonably be implied to be within the scope of the roofing contractor's employment. By contrast, if the same roofing contractor's employee fell from a ladder propped up against the wall due to the collapse of the wall, which was not due to a defect related to the roof under repair, the employee may maintain a claim against the hirer. (*Id.* at 677-678.) The rationale is that 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. (*Id.* at 678.)

These examples highlight the significance of the nature and the location of the hazard that causes the independent contractor's injuries. It is thus important to determine the scope of work and request in discovery all related documents, including bid proposals and the contract. You will then need to distinguish the particular hazard and its location as much as possible from the instrumentality, scope, and location of work that the defendant hired the contractor to perform. The closer the contractor's injury is related to the work area or the contractor's work, the more challenging it will be to succeed on this claim.

Theory 2: Unsafe or defective equipment provided by the hirer

A hirer has liability for negligently providing a contractor with unsafe or defective equipment that contributed to the plaintiff's injuries. (See CACI 1009D.) *Privette* is not a valid defense to this claim. In *McKown v. Wal-Mart Stores, Inc*. (2002) 27 Cal.4th 219, 222, the California Supreme Court held that "a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury." The rationale is that where the hiring party actively contributes to the injury by supplying unsafe or defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor. (*Id*. at 225.)

In *McKown*, Wal-Mart had hired a contractor to install speakers in the store ceilings and had made available to the contractor's employees the use of Wal-Mart's forklifts to perform the work. McKown, an employee of the contractor,

was injured while using one of Wal-Mart's forklifts, which was missing a chain to support the extended work platform attached to the forklift. The Court affirmed a judgment against Wal-Mart for providing the unsafe forklift to the contractor's employee. In so holding, the Court rejected Wal-Mart's argument that it should not be held liable because it did not insist that the contractor use its forklift. In 2004, the California Supreme Court reinforced the holding in *McKown* and the common law duty to provide safe equipment. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 937.)

Theory 3: Negligent exercise of retained control

In *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 203, the California Supreme Court held that a hirer is liable to an employee of a contractor when a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries. (See also CACI 1009B.) "[I]f a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, *it is only fair to impose liability on the hirer*." (*Hooker*, 27 Cal.4th at 213 (emphasis added).)

The rationale for this exception to *Privette* was stated as follows:

> [I]f an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an *unwarranted windfall*. The tort liability of the hirer is warranted by the hirer's own affirmative conduct. The rule of workers' compensation exclusivity "does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury" (citations omitted) and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer.

(*Id.* at 214 (original italics).)

The Court found that its holding was consistent with its decisions in the preceding *Privette* line of cases because the liability of a hirer is not vicarious or derivative from an act or omission of the hired contractor. "To the contrary, the liability of the hirer in such case is *direct* and in a much stronger sense of that term." (*Ibid.* (original italics).)

Retained control

In *Hooker*, the decedent was operating a large crane on a highway overpass project and attempted to swing the boom when the stabilizing outriggers were retracted, which caused the crane to tip over and throw him to the pavement. Just prior to the incident, the decedent was required to retract the outriggers to allow vehicles to use the overpass, but he had failed to re-extend the outriggers when resuming work. The decedent's widow sued Caltrans, the hirer of the decedent's employer, based on the theory that Caltrans had negligently exercised its retained control over jobsite safety.

On appeal following the granting of Caltrans's motion for summary judgment, the Court found that the plaintiff had raised triable issues of material fact as to whether the defendant had retained control over safety conditions at the worksite. (*Hooker*, *supra*, 27 Cal.4th at 215.) Evidence that supported this finding included: (1) Caltrans's manual which required its construction safety coordinator to periodically visit projects; (2) Caltrans's authority to shut down the project because of safety conditions; and (3) Caltrans's authority to remove a contractor's employee for failing to comply with safety regulations. However, the Court did not find triable issues as to any Caltrans conduct that affirmatively contributed to the decedent's death. Evidence that Caltrans permitted the unsafe practice of allowing traffic to use the overpass during construction and its failure to exercise the authority it retained to correct the practice was insufficient to defeat the motion for summary judgment. (*Ibid.*)

Affirmative contribution

"When the employer directs that the 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." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446.) "While the passive permitting of an unsafe condition to occur is not an affirmative contribution, the act of directing that to occur is active participation." (*Id.* at 1448.)

Affirmative contribution to the injuries of the contractor's employees need not always be in the form of actively directing the contractor or employee. Rather, "there will be times when a hirer will be liable for its omissions." (*Hooker*, *supra*, 27 Cal.4th at 212, fn. 3.) For example, a hirer should be liable for causing an injury as a result of its negligence in its failure to follow through on its promise to undertake a particular safety measure. (*Ibid.*)

In *Tverberg*, the subcontractor plaintiff sued the general contractor for his injuries resulting from falling into an uncovered bollard hole which was near his area of work but unrelated to his work. The Court concluded that there was sufficient evidence of a triable issue regarding affirmative contribution and thus summary judgment for the defendant was in error. The Court found that the plaintiff had presented evidence of three separate acts from which a jury could find the defendant's affirmative contribution to the plaintiff's injury. These included: (1) the defendant's order that the holes be created and the requirement that the plaintiff perform unrelated work near them; (2) the defendant's determination that stakes and a safety ribbon were sufficient to protect against the holes instead of covering or barricading the holes with bollards; and (3) the defendant's failure to cover the holes after the plaintiff had requested that the defendant do so. (*Tverberg*, *supra*, 202 Cal.App.4th at 1448.)

Since the framework for the retained control theory has been established, there has been very little case law on the subject and few decisions from appellate courts which have found triable issues on retained control and affirmative contribution. This does not mean that these claims are rarely successful or not worth pursuing. However, when handling these claims, it is essential to develop evidence and arguments to distinguish the facts of the cases which found no defendant liability and to analogize the facts of the cases that supported a finding of defendant's retained control and affirmative contribution to the plaintiff's injuries. This means analogizing your case facts to the *Tverberg* case as much as possible. While the outcome of *Hooker* was not favorable to the plaintiff, you must address *Hooker* in opposing a motion for summary judgment. *Hooker* can be used in your favor to create parallels between your facts and Caltrans's conduct to show retained control over safety and to distinguish your facts related to the affirmative contribution element. *Hooker* also contains the "must quote" citations set forth above regarding an omission qualifying as an affirmative contribution and liability based on the retained control theory not being an "unwarranted windfall" to the injured worker.

Conclusion

The *Privette* doctrine is not an automatic death knell to a negligence claim against a hirer for an independent contractor's injuries, though defendants probably wish it were. Early planning and development of theories and evidence of the hirer's direct negligence are key to putting yourself in the best position to defeat the almost certain motion for summary judgment and resolve the case.

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