



Appellate Reports

Privette and its applicability to indirect owner of hirer. Also, sports and assumption of the risk; dangers alongside high-speed roadways

By JEFFREY I. EHRLICH

Privette doctrine; applicability to indirect owner of hirer

Collins v. Diamond Generating Corp. (2024) __ Cal.App.5th __ (Fourth Dist., Div. 3.)
Sentinel Energy Center, LLC (Sentinel) owns a high-pressure natural-gas electrical-generating facility near Palm Springs, called the Sentinel Plant. Defendant Diamond Generating Corporation (DGC) owns an indirect 50% interest in Sentinel. After the plant was built, Sentinel hired DGC Operations (OPS), a wholly owned subsidiary of DGC to run the plant. The decedent, Daniel Collins, was an OPS employee. Collins was killed while performing maintenance on the plant when he unbolted the lid of a high-pressure gas tank, which he mistakenly thought was depressurized.

At trial of their wrongful-death claim, Collins's wife and son asserted a negligent-undertaking claim against DGC. Their theory was that DGC had voluntarily assumed a duty with respect to plant safety, and in particular the safe performance of the "lock-out/tag-out" (LOTO) procedure that was used during maintenance of pressurized components of the gas system. They showed that DGC had hired the plant manager, who was an OPS employee, and had assumed responsibility for managing his job performance, including his performance of his duties concerning LOTO training and procedures. The plant manager was supposed to personally audit LOTO procedures after maintenance was performed to assure that employees performed it in accordance with established procedures, but the plant manager never did this. Had DGC exercised any diligence in its review of the plant manager's performance, it would have easily seen that he was not doing his job. But it consistently gave him high marks for his safety-related

responsibilities and paid him annual bonuses.

At trial, DGC argued that plaintiff's claim was barred by the *Privette* doctrine, but the trial court rejected this argument because DGC had not hired OPS; Sentinel had. The jury ruled in favor of plaintiffs, awarding non-economic damages of \$150 million. The trial court remitted this figure to \$100 million. The Court of Appeal reversed.

It held that, because DGC owned an indirect interest in Sentinel, it was entitled to assert the *Privette* doctrine, even though it was not a "hirer." Had the trial court instructed on *Privette*, then the jury would have had to decide whether the "retained control" exception to *Privette* would have applied. Because the jury was not instructed on *Privette* or the defenses to its application, the judgment for the plaintiff was reversed and the case was remanded for a new trial.

Contact sports; primary assumption of risk; instructor liability; jury instructions

Greener v. M. Phelps, Inc. (2024) __ Cal.App.5th __ (Fourth Dist., Div. 1.)

Jack Greener, a Brazilian jiu jitsu (BJJ) student, suffered a fractured neck and a spinal-cord injury due to a series of moves his instructor, Francisco Iturralde, performed on him while sparring at Del Mar Jiu Jitsu Club (the Club), a BJJ dojo owned and operated by M. Phelps, Inc. Greener sued, alleging Iturralde was negligent and M. Phelps, Inc. (collectively, Appellants) was vicariously liable. Appellants invoked the primary assumption of risk doctrine, contending they had no duty to protect Greener from incurring these injuries in the inherently risky sport of BJJ.

The relevant jury instruction on primary assumption of risk, CACI No. 471, provides two alternative standards under which a sports instructor may be

liable to an injured student. The applicable standard depends on the particular facts of each case. Option 1 – the primary assumption of risk doctrine – holds an instructor liable only if the instructor intentionally injured the student or acted so recklessly that the conduct was "entirely outside the range of ordinary activity involved in teaching" the sport. Option 2 – a sports-specific negligence standard – imposes liability if the instructor "unreasonably increased the risks to" the student "over and above those inherent in" the sport. (CACI No. 471.)

The court instructed the jury on option 2, finding it "most applicable for these facts." The special verdict form mirrored this instruction. Following the Directions for Use for CACI No. 471, the court also gave CACI No. 400, which states the elements of negligence. In addition, the court gave CACI No. 401, which defines the basic standard of care in ordinary negligence actions. The jury, by a vote of 9 to 3, found in favor of Greener and awarded him \$46 million in damages.

Appellants argue the judgment must be vacated because the trial court, inter alia, prejudicially erred by (a) instructing the jury on CACI No. 471, option 2, and CACI Nos. 400 and 401. In a 2-1 decision, the panel affirmed the judgment.

Although the California Supreme Court has limited liability to option 1 when "it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction" (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 103, (*Kahn*)), Courts of Appeal have applied option 2 in cases where the instructor, for example, (1) "encourag[ed] or allow[ed] the student to participate in the sport when he or she [wa]s physically unfit to participate or" (2) permitted the student "to use unsafe equipment or instruments."



As the majority saw it, while sparring with Greener during a BJJ class, Iturralde gave no demonstration or active instruction. Instead, he acted more like a student coparticipant than an instructor when he immobilized and executed a series of maneuvers on Greener. But as an instructor with superior knowledge and skill of BJJ, Iturralde was differently situated from other students, and thus he can – and the court concluded that he should – be held to a different standard. There was evidence Iturralde knew he had created a situation posing heightened risk to Greener’s safety beyond that inherent in BJJ and had the time and skill to avoid that risk, yet he consciously chose to proceed. The risk an instructor will perform a maneuver on a student after immobilizing the student and knowing it will injure the student is not an inherent risk of BJJ sparring. On these facts, the majority concluded that the trial court had elected the proper standard – option 2 of CACI No. 471 – under which Iturralde could be held liable under a negligence standard.

The dissent explained that, in *Kahn*, the Supreme Court held that “[i]n order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student’s capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student’s injury or that the instructor acted recklessly in the sense that the instructor’s conduct was ‘totally outside the range of the ordinary activity’ ... involved in teaching or coaching the sport.” (*Id.* at p. 1011.)

However, because the issue was not presented, *Kahn* did not directly address whether the primary assumption of the risk doctrine *also* applies when a coach in an inherently dangerous sport is the direct physical cause of a student’s injury

due to the coach’s hands-on instruction through co-participation. That is the situation presented by this case. Iturralde caused Greener’s injury through his own direct physical action during sparring, which is a core activity of Brazilian Jiu Jitsu, an inherently dangerous sport.

The majority concludes that *Knight’s* intentional/reckless standard is not applicable when an instructor causes an injury during hands-on instruction through co-participation. They explain, “Here, Greener was not injured due to a move *he* was challenged or directed to perform; instead, he was injured by his *instructor’s* unilateral choices to immobilize him and apply moves which now unacceptably increased the risk of injury to him. These facts distinguish this case from *Kahn*, where the instructor forced the *student* to perform a skill without training.”

The dissent noted that, under *Knight v. Jewett*, a co-participant in a sport is only liable for a resulting injury if that co-participant “intentionally injure[d]” the other person or “engage[d] in conduct that [was] so reckless as to be totally outside the range of the ordinary activity involved in the sport.” But under the majority’s approach, in any of those instances, if an injury occurs while an *instructor* is involved as a co-participant in the same sport, the primary assumption of the risk doctrine does *not* apply, and the instructor will be liable for an injury resulting from a negligently performed move. In the dissent’s view, this approach will chill participation in an instruction in inherently dangerous sports.

Negligence; duty; duties of property owners whose property abuts high-speed roadways

Union Pacific Railroad Co. v. Superior Court (2024) 105 Cal.App.5th 828 (Fifth District).

Union Pacific owned property abutting State Route 99 in Madera County. A eucalyptus tree with an eight-foot diameter grew on its property about 21 feet from the right traffic lane. The decedents were both traveling northbound on Route 99 when their vehicles came into contact, then left the roadway and struck the tree, bursting into flame. Their heirs filed a wrongful-death claim against Union Pacific and CalTrans. Union Pacific moved for summary judgment, arguing that it owed no duty of care. The trial court denied the motion. Union Pacific sought and obtained a writ of mandate reversing the order denying summary judgment and directing the trial court to grant the motion.

The Court of Appeal held that imposing a duty of care on property owners to avoid having obstacles or obstructions on their property that could pose a danger to motorists who left the roadway would effectively operate as a taking of a portion of the property without just compensation. Accordingly, the court held that landowners were categorically exempt from a duty of reasonable care to passing motorists.

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