



CALIFORNIA SUPREME COURT EXPANDS PRIVETTE DOCTRINE

By Sara B. Allman * ©2011

Introduction

Under *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*), the hirer of an independent contractor implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the workplace that is the subject of the contract.

In its recent August 22, 2011 decision in *Seabright Insurance Co. v. U.S. Airways, Inc. (Seabright)*, authored by Associate Justice Joyce L. Kennard, the California Supreme Court effectively extended the *Privette* doctrine to protect the hirer of an independent contractor from liability to the contractor's employee, even though the hirer had violated Cal-OSHA regulations which contributed to the employee's injury.

Background

US Airways used a conveyor to move luggage at San Francisco International Airport. US Airways hired independent contractor Lloyd W. Aubry Co. to maintain and repair the conveyor; US Airways neither directed nor had its employees participate in Aubry's work.

The conveyor lacked certain safety guards required by applicable Cal-OSHA regulations. Verdon was inspecting the conveyor as an employee of Aubry, and his arm got caught in its moving parts. Plaintiff Seabright Insurance Company, Aubry's workers' compensation insurer, paid Verdon benefits based on the injury and then sued defendant US Airways, claiming the airline caused Verdon's injury and seeking to recover what it paid in benefits. Verdon intervened as a plaintiff in the action, alleging causes of action for negligence and premises liability.

The trial court granted summary judgment for US Airways. The Court of Appeal reversed and held that, under Cal-OSHA, the hirer has a non-delegable duty to comply with its safety regulations and, thus, whether US Airways' failure to perform its duty affirmatively contributed to plaintiff's injury was a triable issue of material fact precluding summary judgment. The California Supreme Court concluded that the Court of Appeal had erred in reversing the trial court.

The Holding

The California Supreme Court held in *Seabright* that "[*Privette*'s] implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with

applicable statutory or regulatory safety requirements." The court rejected the premise that the tort law duty, if any, that a hirer owes under Cal-OSHA and its regulations to the employees of an independent contractor is non-delegable and observed that "an incident of an independent contractor's hiring — included a duty to identify the absence of the safety guards required by Cal-OSHA regulations and to take reasonable steps to address that hazard."

The court noted that it did not intend to suggest that the hirer can delegate the pre-existing duty it owes to its own employees to the independent contractor. "But under the definition of "employer" that applies to California's workplace safety laws (see § 6304), the employees of an independent contractor like Aubry are not considered to be the hirer's own employees, and the issue here is whether defendant US Airways implicitly delegated to contractor Aubry the tort law duty, if any, that it had to ensure workplace safety for Aubry's employees."

The court also observed that the policy reasons behind *Privette*, including the availability of workers compensation benefits to the injured employee of the independent contractor, support its decision. The court concluded: "In sum, we see no reason to limit our holding in *Privette* simply because the tort law duty, if any, that the hirer owes happens to be one based on a statute or regulation."

The Concurring Opinion

In a concurring opinion, Associate Justice Kathryn M. Werdegar disagreed with the majority's analysis and observed that the case could have been disposed of on an independent ground, because the trial court had excluded for lack of foundation an accident reconstruction expert's opinion that safety guards would have prevented the accident. Since no evidence raised a triable issue of fact as to causation, summary judgment was properly granted on this basis alone.

The concurring opinion also pointed out that the majority's holding that an employer's statutory and regulatory duties are presumptively delegated to independent contractors cannot be reconciled with the plain language

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* *Scott Rogers is a partner with Holme Roberts & Owen LLP in San Francisco, CA where he specializes in real estate finance, equity and lease transactions and real estate litigation for private and institutional investors and governmental agencies. He is a director of the Marin County Bar Association and the former Chair of the Real Property Section of the State Bar of California. He can be reached at 415.268.1990 or at scott.rogers@hro.com.*

* *Ted Klaassen is senior counsel in the San Francisco office of Holme, Roberts & Owens. As a member of the firm's real estate group, Ted represents developer, investor, corporate, and institutional clients in a broad spectrum of real estate transactional and litigation matters. Ted earned his journalism degree from the University of Missouri and his law degree from the University of Southern California. He can be reached at 415.268.1969 or at ted.klaassen@hro.com.*

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of Evidence Code section 669 under which Cal-OSHA statutes and regulations are admissible to show negligence per se in tort actions.

The concurring opinion finally noted that, given that the Legislature has already determined that the Cal-OSHA duties of employers at multi-employer worksites extend not just to the employer's own employees but to the employees of other employers (Labor Code § 6400, subd. (b)), "to apply a common law doctrine like *Privette* in tort actions to selectively negate one aspect of an employer's Cal-OSHA duty (i.e., the employer's duty to other employers' employees), while enforcing other aspects of that duty (i.e., the employer's duty to its own employees; see maj. opn., ante, at p. 14), is plainly inconsistent with legislative intent."

The Impact

Seabright leaves the door open for the Legislature to specifically address the interplay between Cal-OSHA, the Labor Code, and *Privette*. Until that time, *Seabright* extends the *Privette* doctrine to allow implicit delegation of the hirer's duty to comply with Cal-OSHA regulations to the independent contractor, thereby protecting the hirer from tort liability to the contractor's injured employee for any violation.

* *Sara B. Allman is president of Allman & Nielsen, P.C. She practices civil litigation and is an appellate law specialist, certified by the Board of Legal Specialization of the State Bar of California. She can be reached at Allman & Nielsen, P.C., 100 Larkspur Landing Circle, suite 212, Larkspur, CA 94939; phone: (415) 461-2700, e-mail: allniel@comcast.net.*

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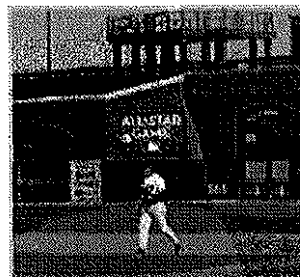
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