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Not my Means & Methods: The History and Future of the Privette Doctrine

I. Life Before Privette (pre-1993)

A. General Rule of Non-Liability

Generally, 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.)

B. Exception: Peculiar Risk Doctrine (Born of Public Policy)

Under the peculiar risk doctrine, a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others. **This allowed the Plaintiff's Bar to Double-Dip.**

II. Privatte Doctrine (Post 1993)

The "Privette Doctrine" has governed the extent of liability that general contractors and property owners have for worksite injuries suffered by a subcontractor's employees.

In Privette v. Superior Court (1993) 5 Cal.4th 689, the California Supreme Court held that "Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work."

When the person injured by negligently performed contracted work is one of the contractor's own employees, the injury is already compensable under the workers' compensation scheme and therefore the doctrine of peculiar risk should provide no tort remedy, for those same injuries, against the person who hired the independent contractor.

The Court reasoned when an independent contractor causes injury to the contractor's own employee, the Act's "exclusive remedy" provision shields the contractor from further liability for the injury. Yet, under the expansive view of the peculiar risk doctrine that has been adopted in California and a minority of other jurisdictions, the person who hired the independent contractor can, for the same injury-causing conduct of the contractor, be held liable in a tort

action for the injuries to the contractor's employee. Because this expansive view produces the anomalous result that a nonnegligent person's liability for an injury is greater than that of the person whose negligence caused the injury, it has been widely criticized.

III. Exceptions to the Privette Doctrine

Following the Privette Doctrine coming into play, the Plaintiff's bar began its process of carving out exceptions to the Privette Doctrine. These exceptions include the following:

a. Claims involving a breach of a non-delegable duty imposed by statute.

b. Claims arising out of injuries caused by defective equipment supplied by the general contractor. McKown case - use of owner's defective forklift.

c. Claims based on a failure to warn of a hidden dangerous condition. Kinsman case – where workman could not detect structural deficiency on reasonable assessment; and

d. Where a general hirer retains control over a jobsite in such a manner that it affirmatively contributed to the employee's injuries.

IV. Retained Control Exception

The Plaintiff's bar favorite and most common exception they try to use regarding the Privette Doctrine is the Retained Control Exception. 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.

The Court has dealt with several different issues when it comes to the term "Retained Control." Typically Retained Control is set forth as follows:

a. General contractor generally is 'in charge" of the worksite.

b. General contractor promises the owner to provide safe working conditions.

c. Typically, the GC's has a safety coordinator and even a safety company to comment on safety periodically.

d. The GC has the authority to shut down the project because of safety conditions or to remove a contractor's employee for failing to comply with safety regulations; and

e. The subcontract typically requires the trades to comply with the GC's safety rules.

Another aspect that is imperative when dealing with the Privette Doctrine is what is an 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.) This means we need to look at the Subcontractor's scope of work, the means, and methods by which it completes its scope of work, and potentially "Negligence by Omission", i.e., the failure to through on a promise to undertake a safety measure.

Typically, a subcontract will delegate safety within the trade's means and methods to the trade. An example would be as follows:

> "Subcontractor shall conduct inspections to determine that safe working conditions and equipment exist in compliance with Contractor's Safety Program, and accepts sole responsibility for providing a safe place to work for its employees and for employees of its subcontractors and suppliers of material and equipment, for adequacy of and required use of all safety equipment and for full compliance with the aforesaid laws, orders, citations, rules, regulations, standards and statutes."

In *Sandoval v. Qualcomm* in an opinion dated September 9, 2021, the Court affirmed "Delegation". The is a presumption of delegation even if not in the contract. It also clarifies the original Privette Public policy of unfairness to spread great risk to the higher is changed to the "strong policy" of delegation.

The Court continued reasoned delegation is fair because the Subcontractor is "best situated to prevent contract worker injury given its relative proximity to the work, superior expertise and resources, ability to internalize costs, and relationship with the workers."

"The hirer's right to delegate responsibility for performing dangerous work in a safe manner is founded on the premise that contractors are typically in the best position to know what safety precautions should be taken to ensure their work is performed in a safe manner." [Seabright]

Sandoval also overturned a state sanctioned, standard jury instruction. This has an important practical effect when it comes to taking a Privette case to trial.

CACI No. 1009B. Liability to Employees of Independent Contractors for Unsafe Conditions - Retained Control
Judicial Council of California Civil Jury Instructions
(2020 edition)

Plaintiff claims that he/she was harmed by an unsafe condition while employed by Defendant's subcontractor and working on Owner's property. To establish this claim, Plaintiff must prove all the following:

1. That Defendant owned, occupied, or controlled the property
2. That Defendant retained control over safety conditions at the worksite
3. That Defendant negligently exercised its retained control over safety conditions through negligent acts or omissions
4. That Plaintiff was harmed

5. That Defendant negligent exercise of its retained control over safety conditions was a substantial factor in causing Plaintiff's harm.

Previously, underlying court held the instruction acceptable because the contribution of the hirer's negligence can be decided as to whether it was a substantial factor. However, there is no reference to the "affirmative contribution" and does not define it to the jury.

We need to remember the difference between Duty and Causation as Tort elements. Additionally, there needs to be a determination of "whether the hirer's exercise of retained control affirmatively contributed to the Plaintiff's injury." This affects whether there is a duty. Substantial factor determines if there is causation.

Lower courts often missed an "elemental" distinction in whether a tort has been committed, while reluctant to modify a "standard" instruction.

V. The Practical Effect of Privette on the Claims Decisions

The Privette Doctrine has a ripple affect in all aspects of the claim handling process. As we know, there are several injuries that occur on a job site. This means these types of "construction accident" litigations can involve multiple parties, multiple policies, and multiple…attorneys.

As with any construction case there are coverage issues that need to be taken care of. Often there are Additional Insured issues that are paramount to resolving the claim. Typically, an employee of a subcontractor who is injured will sue the General Contractor because he is barred from suing his employer because Worker's Compensation is the only remedy. The General Contractor will often then cross-complaint against the Subcontractor for indemnity.

While the insurance issues are being hashed out between the General Contractor and the Subcontractor and money is being spent by all involved, a collaborative defense is likely the best way to quickly resolve these matters. Reservations of Rights often prevent a single law firm from handling the defense because of conflicts, however, if there was a single strong defense, the attorneys could prepare a Privette motion and resolve the case in an expedited fashion via a motion for summary judgment.

WRAP Policies also can provide different coverage opinions as to who exactly is responsible and how the defenses can be handled. The benefit of the Privette Doctrine is the ability to get out of a case on a Motion for Summary Judgement. This can influence a faster settlement at a much lower number than the injury the plaintiff suffered typically would garner.