

PERSPECTIVE

The *Privette* Doctrine: What's Next in Store?

By Gary A. Watt

The exclusive remedy of workers' compensation protects employers from suit by their injured employees. (Labor Code Section 3601.) And those employees face difficulty suing other parties such as owners, developers and contractors. Standing between plaintiffs and a jury trial is summary judgment under a formidable body of law called the *Privette* doctrine. (*Privette v. Superior Court*, (1993) 5 Cal.4th 689, 691.) To avoid

The *Privette* doctrine rests primarily upon the premise that holding the hirer liable is not justified given the common practice of delegating safety and the existence of workers' compensation.

summary judgment, plaintiffs increasingly turn to an exception known as the "non-delegable duty" rule. With the state Supreme Court reviewing the rule in *Seabright Insurance Co. v. U. S. Airways Inc.* (1st Dist. 2010) 183 Cal.App.4th 219, look for the high court to reverse *Seabright* and further narrow the exception.

Under *Privette* and its progeny, suit is barred unless the hirer retains control of the details of the work and affirmatively contributes to the accident (*Hooker v. Department of Transportation*, (2002) 27 Cal.4th 198, 202); the hirer furnishes equipment that is defective and the defect affirmatively contributes to the accident (*McKown v. Wal-Mart Stores Inc.* (2002)



27 Cal.4th 219, 222); or a landowner-hirer knows or reasonably should know of a concealed, preexisting hazardous condition, the contractor employing the injured worker does not know and cannot ascertain the condition by reasonable inspection, and the landowner fails to warn the contractor (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664). The common denominator is affirmative contribution.

The world just prior to *Privette* consisted of a common law, hirer no-duty rule, eviscerated by exceptions. Even nonnegligent hirers were held liable under the Restatement of Torts and judicial doctrines such as peculiar risk. The *Privette* doctrine rests primarily upon the premise that holding the hirer liable is not justified given the common practice of delegating safety and the existence of workers' compensation. One rationale is preventing a double recovery in the form of damages against the hirer and workers' compensation benefits from the employer. The doctrine also

assumes that if anyone is culpable, it is usually the immediate employer, not the hirer. Yet under the workers' compensation statutes, the hirer cannot file a cross-complaint against the more culpable employer for equitable indemnity.

In light of *Privette's* grounding in a hirer's delegation of safety and the means and methods of performing the work, plaintiffs increasingly turned to safety regulations and statutes to allege a nondelegable duty. "[A] nondelegable duty assure[s] that when a negligently-caused harm occurs, the injured party will be compensated by the person whose activity caused the harm..." (*Maloney v. Rath* (1968) 69 Cal.2d 442, 446 (no defense that motorist's mechanic was negligent, motorist had nondelegable duty to ensure brakes operated properly).) The nondelegable duty doctrine predates *Privette* and does not consider workers' compensation.

The appellate courts, attempting to harmonize the two doctrines, have unani-



Gary A. Watt, partner with Archer Norris in Walnut Creek and member of the firm's appellate practice team, teaches appellate advocacy at UC Hastings, is director of the Hastings Appellate Project's 9th Circuit clinical program and chair of the Contra Costa County Bar Association's appellate practice section. He can be reached at g watt@archernorris.com.

mously held that even under the nondel-egable duty rule, affirmative contribution to the injury must be demonstrated. (See, e.g., *Madden v. Summit View* (1st Dist. 2008) 165 Cal.App.4th 1267, 1279-1280 (subcontractor's employee falling from patio failed to link evidence of affirmative conduct by general contractor to alleged Cal-OSHA violation relating to handrails); *Padilla v. Pomona College* (2d Dist. 2008) 166 Cal.App.4th 661, 673-74 (OSHA regulations alone insufficient absent affirmative contribution by college and general contractor to injury resulting when pressurized pipe burst).) But the appellate courts do not agree on whether omissions such as failing to follow safety statutes or regulations constitute the affirmative contribution *Privette* requires. (*Evard v. Southern California Edison* (2d Dist. 2007) 153 Cal.App.4th 137, 147-148 (triable issue of fact whether billboard owner's failure to provide guardrail or horizontal safety line required by general industry safety order affirmatively contributed to contractor's employee's fall); *Barclay v. Jesse M. Lange Distributor Inc.* (3d Dist. 2005) 129 Cal.App.4th 281, 298-299 (triable issue of fact whether property owner's failure to provide fire extinguisher required by fire code affirmatively contributed to injuries sustained by contractor's employee when fuel tank exploded).)

Seabright joins *Evard* and *Barclay* in holding that failure to follow regulations alone can be the affirmative contribution *Privette* requires. In *Seabright*, U.S. Airways contracted with the plaintiff's employer to maintain and repair conveyor belts used to move luggage on and off airplanes. The plaintiff was injured when his arm got caught in the rotating pulleys that turn the conveyor belt. Contrary to Cal-OSHA regulations, the conveyor belt's pulleys lacked a protective shield. *Seabright*, analogizing to *Evard* and *Barclay*, distinguished regulations that apply to property owners in general from those

applying because construction work is being performed. It concludes that U. S. Airways' omission in providing a guard over the conveyor belt's pulleys created a triable issue of fact as to whether such failure is itself an affirmative contribution.

Seabright, *Evard* and *Barclay* rest their holdings on a footnote in *Hooker*. There, the high court stated that "such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury."

But *Hooker's* discussion of omissions speaks to induced reliance. (*Cf.*, *Ruiz v. Herman Weissker Inc.* (4th Dist. 2005) 130 Cal.App.4th 52, 66 (owner's agent's failure to implement regulatory safety measures not actionable under *Hooker* absent promise to plaintiff's employer to undertake such measures); but see, *Browne v. Turner Construction Co.* (6th Dist. 2005) 127 Cal.App.4th 1334, 1347-1348 (general contractor's provision of safety lines used by subcontractor's employees coupled with sudden removal of same before subcontractor's work complete sufficient to create triable issues under *Hooker*).) Yet in *Seabright*, it is undisputed that U. S. Airways did not own the conveyor belts; its employees did not instruct or direct plaintiff in how to perform his work; and it relied entirely on plaintiff's employer for upkeep of the conveyor belts. *Seabright* does not involve induced reliance.

S *seabright's* distinction between regulations focused on property ownership rather than construction work is also tenuous. It overlooks the implications of the Supreme Court's decision in *Kinsman*. There, addressing the argument that dangerous conditions of property can give

rise to liability despite *Privette*, the Court required a concealed defect unknown to plaintiff that could not be ascertained by a reasonable inspection by the plaintiff's employer. *Seabright* involves an open and obvious condition that the most superficial inspection would reveal — the absence of a cover over the pulleys. If the Court was unwilling to allow liability to property owners for hidden defects that could be ascertained by reasonable inspection, will it allow liability for open and obvious conditions on a machine?

Seabright also asserts that holding U. S. Airways liable fits within the contours of *Privette* because it is being held liable for its own negligence. But that assertion arises from language in *Hooker* stating that when there is affirmative contribution, hirer liability is direct as opposed to vicarious or derivative. And two years after *Hooker*, when construing the legislative amendments repealing the ban on admission of Cal-OSHA violations in third party negligence actions, the high court did not even mention, much less abandon, its insistence on affirmative contribution. (*Elsner v. Uveges*, (2004) 34 Cal.4th 915, 937 ("the admission of *Cal-OSHA regulations* by legislative repeal did not expand defendant's duty of care").)

And so we have traveled full circle. After all, *Privette* mostly restored a common law no-duty rule that had become riddled with exceptions. But *Seabright*, *Evard* and *Barclay* effectively erase *Privette*. In *Seabright*, the 1st District observes that "there appear now to be two strands of judicial thought on the interpretation of footnote 3 of *Hooker*. *Barclay* and *Evard* take the view that the breach of a nondel-egable statutory or regulatory safety obligation, without more, can create a triable issue as to whether the hirer affirmatively contributed to the employee's injury, while *Millard* and *Madden* take the view that it cannot." It is time for the authors of footnote 3 to tie the two strands back together.