B.J. Abron
ABRON LAW P.C.

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Premises-liability cases at construction sites hinge on *Privette*

CONSTRUCTION SITES ARE DANGEROUS FOR WORKERS AND *PRIVETTE* DEFENSES MAKE THE LAW DANGEROUS FOR INJURED PLAINTIFFS

Premises-liability cases are among cases most likely to receive a motion for summary judgement ("MSJ") from defendants. When it comes to construction cases it becomes even more likely that you will see the defense file an MSJ. The *Privette* doctrine acts as an affirmative defense from liability for injuries sustained by employees of subcontractors. Since 1993, when the *Privette* doctrine was established, it has been the primary weapon for defense counsel and general contractors seeking to escape liability. As a result, it is imperative that you know about the doctrine before filing a case where it is likely to apply.

A brief look into the history of *Privette*

The *Privette* doctrine holds that owners and general contractors are not liable for injuries to the employees of subcontractors unless there is affirmative negligence by the owner/general contractor. This is based on the rationale that the hirer indirectly paid into workers' compensation (that should be furnished by the independent contractor for its employee) as part of the contract price. (*Privette v. Superior Court* (1993) 5 Cal.4th 689.)

In *Privette*, the owner of an apartment complex hired a roofing subcontractor to reroof some rental properties. An employee of the roofing subcontractor fell off a ladder and was injured while trying to follow the order of the roofing company foreman to carry buckets of hot tar up the ladder. The injured employee could not sue his employer in light of the workers' compensation exclusivity rule. But he sued the owner of the apartment complex, invoking the "peculiar risk doctrine." As the *Privette* court explained, "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 injury to others." (*Id.* at 691.)

The issue in *Privette* was how the peculiar-risk doctrine should apply when a subcontractor's employee is injured – should the hirer be vicariously responsible for the injuries of the employee of the subcontractor? The Court concluded that the hirer could not be held *vicariously liable* for the injuries to the subcontractor's employee and that the peculiar-risk doctrine did not apply. Over the years, the doctrine has been extended to general contractors.

Defense tactics and plaintiff exceptions

Defense counsel in many cases will attempt to argue that a general contractor's duty of care for its own direct negligent acts that contribute to a subcontractor's injuries vanishes upon the mere hiring of a subcontractor. By no means is this true. In fact, caselaw since *Privette* has made it clear that hirers, such as general contractors, are not relieved of their ordinary duty of care for their own direct negligence and affirmative negligent acts when they cause harm to a plaintiff. Perhaps most demonstrative is *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198. In *Hooker*, the plaintiff claimed that the general contractor negligently controlled a construction site that resulted in the death of a subcontractor's employee. The Court held that when a general contractor affirmatively contributes to the subcontractor employee's injuries, the general contractor may be held directly liable.

In *Tverberg Filner Construction, Inc.* (2012) 202 Cal.App.4th 1439, the court explained this principle in detail:

> The imposition of tort liability turns on whether the hirer exercised that retained control in a manner that affirmatively contributed to the injury. An affirmative contribution may take the form of actively directing a contractor or an employee about the manner of performance of the contracted work. When the employer directs that 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. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury.

(*Id.*, 202 Cal.App.4th at p. 1447, internal citations removed.)

Furthermore, in *McKown v. Wal-Mart* (2002) 27 Cal.4th 219, 225, the court states that a hirer's own negligence can be a basis for holding the hirer/general contractor negligent when the negligence affirmatively contributes to a plaintiff's injuries. In *McKown*, a hirer was found to be negligent for the act of furnishing unsafe equipment to the hired contractor. The court explained that "the hirer should be liable to the employee for consequences of the hirer's *own negligence*." (*Id.*, emphasis added.)

Along with the affirmative-contribution exception articulated by the Supreme Court in *Hooker*, another exception to be aware of is drawn from *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659. In *Kinsman*, the Court addressed the question of liability where a landowner knew about a latent dangerous condition (asbestos contamination) that its contractor was not aware of. The Court created a narrow exception to the *Privette* doctrine that relates to preexisting and latent hazardous conditions on the premises, holding, "A landowner may be independently liable to the contractor's employee even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed,

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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.)

Where *Privette* issues are usually asserted in the litigation

While *Privette* issues can arise during any stage of litigation, it is more commonly seen at the demurrer and MSJ stages. Although some defense counsel will try to demur based on *Privette*, in most cases you can have the demurrer easily overruled by asserting properly pleaded allegations. The court must even assume as true those facts *which may be inferred* from those expressly alleged. (*Harvey v. Holtville*, (1969) 271 Cal.App.2d 816, 819 (internal citations omitted).) As long as the complaint is properly pled with facts alleging that the general contractor retained control and its actions were directly negligent in causing injury to the plaintiff, the court will likely overrule the demurrer because whether the general contractor is negligent will hinge on a factual determination that should not be ruled on at the demurrer stage.

Tools to navigate *Privette*

There are many tools that can be instrumental to navigating the *Privette* defense. The first key is understanding *Privette* and its progeny, as well as the applicable exceptions as discussed above. As with all cases you should first look to the jury instructions for guidance on what you will need to meet your burden of proof at trial. In doing so you will also find CACI 1009A which follows the case law in *Kinsman*, and CACI 1009B which follows the case law in *Hooker*. Understanding the caselaw and jury instructions is the foundation in development of your approach to a successful outcome in your case.

The second key is conducting proper fact-finding prior to filing a lawsuit and during the discovery phase after you are in active litigation. When learning of the specific facts surrounding how the injury occurred, the layout of the construction site, and how the construction site is operated, it is important to become familiar with the OSHA guidelines and reports that can be retrieved. Cal-OSHA safety regulations apply to defendant and create negligence per se liability. (*Elsner v. Uveges* (2004) 34 Cal.4th 915 (*Elsner*).)

In *Elsner* the court held that "Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions." Under *Elsner* and Labor Code sections 6304.5 and 6400, an employer has a duty to maintain a safe work environment where that employer (1) exposes an employee (not necessarily its own) to a hazard, (2) creates the hazard, (3) is required to remedy the hazard, or (4) "was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)."

Understanding the OSHA guidelines can help shed the light on liability of the general contractor. Along with OSHA reports you should be looking into California Business Codes, Labor Codes, even things like engineering codes or roofing codes and guidelines. Any related codes that can put you in a better position to lock in liability on the general contractor and defeat *Privette* should be examined. Once you obtain the applicable codes and standards, you can apply the facts of your particular construction site to create clarity on areas where the general contractor cannot shift liability to a subcontractor and use *Privette* as a safe haven.

The production of documents

Analyzing the production of documents is a key to assuring you get past the MSJ stage in these cases. Often, referring attorneys send over cases where they have not thoroughly reviewed the contents of the production. This is where you find the gems. It is important to retrieve and review the contractual agreement between the general contractor and the subcontractor. Within the agreement it carves out the scope of work and responsibilities of the respective parties. However, the agreement is not the be-all end-all.

On the construction sites you will often learn that subcontractors and general contractors will deviate from what the prospective responsibilities carve out in the contract. General contractors will sometimes ask subcontractors to do things that are not within the scope of work delineated in the contract, but very closely related to what the subcontractor is tasked with doing. It also can happen in the converse where the general contractor sometimes will retain control over something that the subcontractor was tasked with handling in the agreement. This can open the door to liability on behalf of the general contractor.

So how do you find out if they are deviating from the contractual terms? This information can be retrieved by requesting and reviewing all of general contractor's, and subcontractors' daily logs and reports on the site. These logs and reports shed light on the responsibilities of subcontractors vs. the general contractor. They can indicate the areas of control of a particular site. They can also indicate who is ordering whom to do specific tasks, as well as who actually handled the task. This becomes important if you want to establish that although a subcontractor was tasked with handling something, it was still under the direction and control of the general contractor. You can utilize the daily logs and reports to show this. Thus, you would argue that the general contractor exercised retained control in a manner that affirmatively contributed to the injury.

Another key to defeating *Privette*, especially at the MSJ stage, is to hire a construction-liability expert to help establish a triable issue of fact. His or her opinions would utilize OSHA guidelines

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and other related codes, industry standards and the facts that surround the incident and construction site to establish that the general contractor either maintained control of a particular area, or directed the injured person in a way that makes the general contractor liable. Along with helping you understand the various codes and standards, they can draft a declaration that makes it substantially more likely for you to get past the defendants' MSJ.

Avoid the open chair at trial

It is extremely important that you are not pressured into a nominal settlement because of the defendant's pressure of an MSJ under a threat of a *Privette* defense. While each case is different, generally speaking, you will do yourself and your client a disservice if you settle for a nominal amount with a general contractor to avoid losing at MSJ. When this happens, you have effectively created an "empty chair" at trial. (An "empty chair" is when there is a defendant who has been dismissed from an action whereby at trial, another defendant can point the finger at that defendant in an attempt to shift liability.)

Any portion of fault the jury allocates to the empty chair defendant is not recoverable because they have already been dismissed. When pressed with a motion for summary judgment if you believe you do not have a good chance at winning, you should still consider Code of Civil Procedure section 437c, subdivision (i) which states, "in an action arising out of an injury to the person or to property, if a motion for summary judgment is granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to, or comment on, the absence or involvement of the defendant who was granted the motion. (Code Civ. Proc. § 437c, subd. (i).)

This is extremely important because if you allow for the court to grant the MSJ, the other defendants are barred from shifting fault to the general contractor and you will prevent an allocation for percentage of fault for the general contractor on the verdict form.

Although the *Privette* doctrine can be damaging to some cases, it is not absolute and continues to be shaped with the Court carving out exceptions. Utilize these exceptions to your advantage as they have and will continue to lead to increased verdicts against general contractors.

Byron J. Abron (B.J.) is the Founding Attorney of Abron Law P.C., *and a civil trial attorney with experience in general tort liability, wrongful death, catastrophic personal injury, premises liability, warranty of habitability, NFL concussion litigation, and police brutality.*