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## Look to the contract to defeat implied delegation

DO NOT LET *PRIVETTE'S* IMPLIED DELEGATION SHIFT THE COST OF DEFENDANT'S HARM ONTO PLAINTIFFS AND WORKERS' COMPENSATION CARRIERS

The roof of a large commercial building owned by Owner Inc. needs repair after a rainstorm. Owner's property manager calls Acme Roofing to make the repairs. Acme's representative walks the site, gives an estimate, a contract is signed, and Acme starts working. Throughout the day, Acme employees enter and exit the building's roof via an internal staircase. The stairs are not properly maintained by Owner and as a result have lost some of their slip resistance. The Acme roofers have been working in and around puddles of water. Roofer Ricky needs to head downstairs to get a tool. When Ricky's slightly wet boot contacts the step that no longer has adequate slip resistance, he slips, falls down the stairs, and suffers serious injuries. Had Owner properly maintained the stairs, Ricky would not have been injured.

Under California law, a property owner has a non-delegable duty to protect

persons on the premises of the property from dangerous conditions. (*Srithong v. Total Investment Co.*, (1994) 23 Cal.App.4th 721, 726.) "Simply stated, the duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable." (*Id.*)

The property owner owes a duty to properly maintain the staircase and failed to do so. Ricky Roofer can sue Owner Inc. and Acme's workers' compensation carrier can also seek to recover via a lien or a direct action the hundreds of thousands of dollars it has paid out in worker's compensation benefits to Ricky. Open and shut case, right? Not so fast. In *Privette v. Superior Court* (1993) 5 Cal.4th 689 the California Supreme Court carved out an exception to the non-delegable duty owed by landowners.

### Implied delegation

While the original supporting rationale of *Privette* was based on the

perceived unfairness of relegating some workers to a worker's compensation remedy while allowing others to pursue a tort claim, the Supreme Court has acknowledged that it has re-framed *Privette's* rationale to one of implied delegation. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 41.) Under this view, "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 specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements." (*SeaBright Insurance Company v. US Airways Inc.*, (2011) 52 Cal.4th 590, 594, emphasis added.)

In *Gonzalez v. Mathis*, 12 Cal.5th at p. 38, the Supreme Court went so far as to say, "Our case law makes clear that, where the hirer has effectively delegated its

duties, there is no affirmative obligation on the hirer's part to independently assess workplace safety."

Although courts continue to stretch the boundaries of delegation, there is nothing new about the delegation analysis. As explained by the California Supreme Court in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671 "[a] useful way to view the [*Privette* and its progeny] is in terms of delegation."

*Privette*, *Kinsman*, *SeaBright*, and *Gonzalez* all reach the same conclusion. A landowner's non-delegable duties to protect an employee working on its property may either be explicitly or implicitly delegated to the employer. If such an explicit or implicit delegation is found, the employee's claim does not survive unless it fits under one of the recognized exceptions to *Privette*. Examples of such exceptions include the "Concealed Danger" exception of *Kinsman*, the "Retained Control" exception of *Hooker*, or the "Defective Equipment" exception of *McKown*.

Going back to our case of *Ricky Roofers vs. Owner Inc.*, Owner may argue that it implicitly delegated to Ricky's employer, Acme, the duty to ensure that Owner's staircase was safe enough for Ricky to use. Even if Ricky Roofers can claim that the poorly maintained staircase was a concealed danger under *Kinsman*, Owner might still argue that it was Acme's job to detect the danger and deal with the danger (as opposed to the entity responsible for actually creating the danger, Owner).

Think about the ridiculousness of this situation from a public-policy perspective. Owner Inc. owns the staircase. Owner Inc. is in the best position to detect a problem with the staircase and correct the problem. If a member of the public slips on the staircase, Owner Inc. is responsible and can't delegate away that responsibility. If an Owner Inc. employee slips on the staircase, Owner Inc. is responsible. And yet, because Ricky Roofers is an employee of Acme Inc., an independent contractor hired by Owner, Inc., suddenly Owner Inc. can claim that the implied delegation

doctrine gives it a free pass. In this context, Ricky Roofers and Acme's workers' compensation carrier are essentially providing a free subsidy to protect Owner Inc. from paying for the consequences of its own negligence.

### Look to the contract to defeat implied delegation

So, is there anything Ricky Roofers' lawyer and Acme's workers' compensation carrier can do in this situation? Every *Privette* and delegation case has its own unique facts and circumstances and potential exceptions. To detail every possible scenario would consume the rest of this issue. So, we will focus here on one particular area that plaintiff's lawyers and workers' compensation carriers sometimes miss.

Recall that we have been talking about *implied* delegation. However, many aspects of the relationship between Acme and Owner are not implied. Some parts of the relationship are *expressly* written out in the contract the two entered into before Ricky Roofers set foot on the property. If there is something *expressly* agreed to in the contract between Acme and Owner that contradicts a claim of implied delegation, the contract can be used as a potential tool to defeat claims of delegation by Owner.

In this case, Ricky and Acme will claim that Owner cannot invoke a *Privette* delegation defense because the contract between Owner and Acme precludes such a delegation. The contract clearly provides that Owner is responsible for all aspects of the roof unrelated to the hole in the roof Acme has been hired to repair. Paragraph 4 of the contract is entitled "Exclusions" and states that Acme "*is not responsible for routine or mechanical maintenance of the building,*" unrelated to the scope of roof repair listed in scope of work in attachment A to the contract. Paragraph 8 of the contract is entitled "CUSTOMER RESPONSIBILITIES." In this case, the Customer is Owner. Paragraph 8 states that "Customer shall: *Provide safe and reasonable equipment access and a safe work environment.*"

Under basic principles of contract law, where there is an express contractual provision (such as the one here which specifically negates delegation of responsibility from the property owner to the plaintiff's employer), there can be no such implied term inconsistent with that express provision. (*Series AGI West Linn of Appian Group Investors DE LLC v. Eves* (2013) 217 Cal.App.4th 156, 168 ["Implied terms 'are justified only when they are not inconsistent with some express term of the contract..."].) Accordingly, the express provision under which defendants retained complete responsibility for the worksite negates the implied delegation, which is the rationale of *Privette*.

It is worth mentioning several cases where the courts clearly articulated the significance of the contract between the landowner and the independent contractor in determining whether the landowner was entitled to assert a workers' compensation exclusivity defense. For instance, in *Kinsman* the California Supreme Court cited *Ray v. Silverado Construction* (2002) 98 Cal.App.4th 1120, as an example of a case where the lack of delegation defeated a *Privette* defense. (*Kinsman*, *supra*, at p. 671 ["In other words, the general contractor may have been liable because its delegation of workplace safety to the subcontractor, the plaintiff's employer, *was limited* and did not authorize the subcontractor to undertake the one safety measure that might have saved the plaintiff's life."].)

In turn, in *Ray* the Court of Appeal explained:

[A]ffirmative 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.*

(*Id.* at p. 1129, emphasis added.)

In *Ray*, the plaintiff (an employee of subcontractor Rados) was killed when he

was struck by wood that fell from a highway during a windstorm. The plaintiff claimed that if the general contractor Silverado had closed the road leading to the overpass, plaintiff would not have been struck by the wood. Silverado defended under *Privette*, claiming that the plaintiff's employer had the duty to protect all Rados workers in the area. (*Id.* at 1131-32.)

*Ray* held that, even though the subcontractor was responsible for the safety of its employees, Silverado improperly failed to exercise its *independent retained duty* to shut down the roads during a windstorm. The court noted that "the critical provision of the subcontract [with Silverado] *prohibited* Rados from erecting any barricades without the advance written permission of Silverado." The court found that, because Silverado had the duty to close the road and failed to exercise that duty, it could not invoke *Privette*. (*Id.* at 1132-34.)

In *Gonzalez*, the Supreme Court referenced the *Hooker* retained-control exception to the *Privette* doctrine and framed the exception in terms of delegation. "The hirer in *Hooker* had contractually retained the right to correct certain dangerous conditions on the worksite that were created by the contractor's work." (*Id.* at 42.)

*Gonzalez* also cast the *Kinsman* concealed-danger exception to *Privette* in terms of delegation. "We explained that, while a landowner delegates to an independent contractor the duty to protect its workers against hazards on the worksite, such delegation 'is ineffective when the hirer, as landowner, fails to provide the contractor with the information – the existence of a latent hazard – necessary to fulfill that responsibility.'" (*Id.* at 43.) Again, depending on how the contract is written, the contractor can potentially prevent or at least reduce the argument that it was delegated the duty to protect against all hazards are written.

The big takeaway from this article is that any time you have a case where a

*Privette*/delegation argument is being made, look to the contract between the Defendant and the employer. The contract may provide you with a potential gold mine of information about the relationship between the employer and the Defendant and it may potentially help you defeat the claims of implied delegation.

In the case against Owner, we were able to use the contract with Acme, along with other facts and arguments, to defeat *Privette* and the claim of implied delegation. For example, the property manager of Owner admitted it was his responsibility to inspect the stairs, maintain the stairs, and make sure the stairs were sufficiently slip resistant. He claimed that he had actually checked the steps for slip resistance a few months earlier and felt the stairs had adequate slip resistance. (He was obviously wrong and affirmatively did a poor job.) He also stated that Acme had no ability to do any work on the stairs and they couldn't put down a mat or anything else on the stairs without his express authorization. Acme's vice president testified that under the terms of the contract the only thing he and his people had to worry about was the hole in the roof. Access to the roof and the stairs was strictly under the jurisdiction of Owner. Those facts, together with the Acme contract, helped put together a compelling argument against delegation.

Just remember, the contract is not always king. Contracts can potentially be poorly written or amended by subsequent words and/or conduct. The contract can also have language that may, at first glance, hurt your case. However, the contract is not infallible. For example, the Court in *Ray* declined to apply *Privette* even though the contract in *Ray* also stated the subcontract with plaintiff's employer Rados made Rados "solely responsible for the safety of its employees and other persons who were in the area where Rados was working." (*Id.* at 1132.) As discussed above, it turned out Silverado took actions that meant they still had retained control.

## Plaintiff's lawyers and WC carriers need to work together

So, why am I addressing this article to workers' compensation carriers as well as plaintiffs' lawyers? Simple. Workers' compensation carriers, if you want to get some of those medical expenses you paid out reimbursed more often, you need to be more proactive. Insist that the contractors you insure include language in their contracts that better arm plaintiff's lawyers against claims of implied delegation. The Defense wants to argue that all aspects of worksite safety are impliedly delegated to the employer? Insist the contractor include language in that contract that expressly prevents or limits that kind of wildly broad claim of delegation.

In the case of Ricky the Roofer, I must have written over 50 times that Paragraph 8 of the Acme contract states that "Customer shall: *Provide safe and reasonable equipment access and a safe work environment*" to fight off *Privette* and delegation defenses. (I still had to show the Defendant did something wrong to affirmatively cause the injury.) However, it was a helpful arrow to have in my arsenal and was part of the reason I was able to pay off that workers' compensation lien when the case successfully settled.

Let's be clear about what we are facing. The *Privette* doctrine and specifically the concept of delegation is designed to treat injured workers and contractors as second-class citizens. It also treats workers' compensation carriers as insurers for clients who are not paying premiums. In *Gonzalez*, the California Supreme Court used delegation to advocate that the contractor should shoulder the cost of harm created by an unavoidable danger created by the Defendant. The Court's chief rationale to support its holding as well as an over-aggressive use of implied delegation is that the contractor can protect itself and its workers by securing workers' compensation insurance. One fallacy of this argument is that California is a comparative-fault state, and an over-

aggressive use of implied delegation shifts 100% of the fault on to the contractor and the workers' compensation carrier, even if the defendant has a significant percentage of fault.

The *Gonzalez* Court paid lip service to the second-class citizenship status of contractors and their carriers by stating, "We acknowledge that there will sometimes be financial and other real world factors that might make it difficult for an independent contractor to raise safety concerns with the hirer or to simply walk away from a job it has deemed to be unsafe. *But independent contractors can typically factor the cost of added safety precautions or any increased safety risks into the contract price.*" (*Id.* at p. 51.) (The California Supreme Court clearly does not have much real-world experience of having to engage in a bidding war to obtain a contract.)

Workers' compensation carriers have the power to incentivize and/or force contractors who carry their insurance to insist on contractual terms that will help fight claims of delegation and *Privette*. You don't want your workers' compensation lien wiped out because the Defendant is claiming it impliedly delegated to the roofer the duty to check to see if the staircase was slip resistant? Add some language to the contract to attack the argument. The courts are increasingly creating a need to take matters into our own hands during the contracting stage to improve our chances of success.

### Conclusion

Read the contract. Cite the contract. Add helpful language to the contract. Make the contractor put something in the contract that states that owner is required

to provide contractor with safe access to the roof and that contractor is not responsible for dangerous conditions of property created by the negligence of the building owner. We all know the contractor doesn't want to raise prices and be outbid. Adding delegation-defeating terms into the contract is a way to potentially help reduce the abuse of workers and workers' compensation carriers by the *Privette* implied-delegation doctrine.

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