

# Construction Hirer Liability: The *Privette* Doctrine

The California Supreme Court has erected formidable barriers under what is known as the *Privette* doctrine. (*Privette v. Superior Court*, (1993) 5 Cal.4th 689, 691.)

When a construction worker is injured on the job, the exclusive remedy of workers' compensation usually bars suit against the immediate employer. (Labor Code Section 3601.) However, as to suit against other contractors, owners and developers, injured workers typically face limited relief if the defendant is a "hirer" of the injured employee's employer.

The *Privette* doctrine has evolved to the point where suit is barred unless the plaintiff can show that: the hirer retained control of the details of the work and affirmatively contributed to the accident (*Hooker v. Dept. of Transportation*, (2002) 27 Cal.4th 198, 202); or the hirer furnished equipment that was defective and the defect affirmatively contributed to the accident (*McKown v. Wal-Mart Stores Inc.* (2002) 27 Cal.4th 219, 222); or a landowner-hirer knew or reasonably should have known of a concealed, preexisting hazardous condition; the contractor employing the injured worker did not know and could not reasonably ascertain the condition; and the landowner failed to warn the contractor (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664.)



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Prior to *Privette*, nonnegligent hirers were held liable under the peculiar risk doctrine. One justification was that spreading risk to the person that ultimately benefits from the work promoted greater workplace safety. But the *Privette* doctrine rests upon the premise that extending liability to the hirer is no longer justified given workers' compensation. One rationale is preventing a double recovery in the form of damages against the hirer. The *Privette* doctrine also assumes that the immediate employer is often culpable while the hirer is not. Yet under the workers' compensation statutes, the hirer cannot file a cross-complaint against the culpable employer for equitable indemnity.



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In the wake of *Privette*'s exclusions, plaintiffs increasingly turn to safety regulations and statutes - under the nondelegable duty doctrine - to reach the hirer's pocket. "[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).) As the Supreme Court put it, nondelegable duties provide "a financially responsible defendant" to compensate a plaintiff, even if the defendant's independent contractor caused the harm. Indeed, *Maloney*, decided before *Privette*, cites cases that made up the pre-*Privette* law, holding construction hirers liable under various Restatement of Torts subsections. But the *Privette* doctrine expressly superseded the peculiar risk doctrine in large part because workers' compensation provides the same assurance of compensation the Supreme Court was concerned with in *Maloney*. Yet the high court has not addressed the tension between *Privette* and application of the non-delegable duty doctrine to on-the-job accident cases.

As a result, when it comes to hirer liability, the appellate courts harmonize the nondelegable duty doctrine with *Privette* by holding that even if a safety statute is nondelegable, the injured plaintiff must demonstrate an affirmative contribution to the injury. By doing so, the courts have implicitly recognized workers' compensation coverage has usurped

the original rationale behind the nondelegable duty doctrine. For example, in *Millard v. Biosources, Inc.* (4th Dist., 2007) 156 Cal.App.4th 1338, a subcontractor's employee was injured while working in an attic - he fell when the lights went out. *Millard* rejected plaintiff's contentions that Cal-OSHA regulations provided a duty of care immune from *Privette*'s affirmative contribution requirement. Safety statutes, standing alone, cannot circumvent *Privette*.

The 1st and 2nd Districts agree. (*Madden v. Summit View* (1st Dist, 2008) 165 Cal.App.4th 1267, 1280; *Padilla v. Pomona College* (2d Dist., 2008) 166 Cal.App.4th 661, 673-74 (OSHA regulations alone insufficient to create duty on part of college and general contractor absent affirmative contribution to injury when pressurized pipe burst).) In *Madden*, the subcontractor's employee fell from a raised patio. (165 Cal.App.4th at p. 1270.) *Madden* rejected the plaintiff's contention that Cal-OSHA regulations provided the requisite duty and affirmative contribution by the general contractor. *Madden* agreed with *Millard*, "which held that Labor Code [S]ection 6304.5 [the Cal-OSHA regs]...did not in any way abrogate the *Privette* [ ] doctrine, nor expand a general contractor's duty of care...." *Madden* rejected the notion that "the Legislature intended to bring about sweeping enlargement of tort liability...by making [hirers] civilly liable for Cal-OSHA or other safety violations." Safety regulations create a duty only where additional evidence establishes affirmative contribution to the injury.

So even where Cal-OSHA regulations are concerned, affirmative contribution is required, right? Yes if the defendant is a hirer, otherwise no. In December, Division Four of the 1st District decided *Suarez v. Pacific Northstar Mechanical*, 2009 DJDAR 17625. In *Suarez*, two of the general contractor's employees were injured by an ungrounded light fixture. They sued subcontractor Pacific Northstar on the theory that Pacific's foreman knew about the condition and failed to report it. But Pacific did not create the hazard, nor did it have anything to do with Pacific's work.

*Suarez* first rules that Pacific had neither a common law nor a contractual duty to take affirmative steps to protect other employers' employees from a hazard that Pacific did not create. The remaining issue was whether Pacific had a statutory duty under the same OSHA regs considered by *Millard* and *Madden*. *Suarez*, like *Millard*, *Madden* and *Padilla*, examined the Supreme Court's decision in *Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 (holding that 1999 amendments to OSHA regulations made them admissible in negligence actions to demonstrate duty or standard of care). But *Suarez* concludes that Pacific's failure-to-act, alone, violated the OSHA regulations and that such nonfeasance creates triable issues as to duty and breach. *Millard*, *Madden* and *Padilla* all concluded that an affirmative contribution was also required.

At first blush, *Suarez* appears to easily avoid *Privette*'s application. After all, unlike *Privette*, the injured employees in *Suarez* work for the general contractor and sued a subcontractor, not a "hirer." But *Suarez* demonstrates a double-standard. By dint of the conflicting rationales resulting from applying the nondelegable duty doctrine to on-the-job injury cases, *Suarez* demonstrates the unequal application of tort liability on multiparty construction sites. Liability for nonfeasance turns on the mere happenstance of classification - whether the defendant is a "hirer."

Remember, the *Privette* doctrine evolved to prevent holding a nonnegligent hirer liable given the existence and impacts of workers' compensation. The doctrine also embraces nonfeasance. In contrast, the nondelegable duty doctrine turns on ensuring that when a negligently caused harm occurs, the injured party will be compensated. But as *Madden* observed, the Supreme Court "found that the admission of Cal-OSHA [Section 6304.5] provisions would not expand the...common law



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duty of care toward the plaintiff employee...." *Madden* found "no indication in *Elsner*...or in [S]ection 6304.5 that the Legislature intended to bring about a sweeping enlargement of tort liability...." But *Suarez* first similarly recognizes that Pacific had no common law duty to report, but then reverses summary judgment based on the OSHA regulation alone - for failure to report.

So it all comes down to classifications of defendants on a construction job. Does that seem logical or fair? Pacific did not create the hazard. Pacific had no common law duty to report it. The injured employees are covered by workers' compensation and Pacific was no more culpable than CalTrans was in *Hooker* (failure to prevent an unsafe practice) or the defendants in *Millard*, *Madden*, and *Padilla*. Yet in *Suarez*, the OSHA regulations alone are sufficient to hold Pacific liable. But the OSHA regulations are silent as to the distinctions between a hirer and a subcontractor in terms of duty. In *Hooker* the high court says, "[A] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct." When it comes to subcontractor nonfeasance, *Suarez* proves, at least for now, that the opposite is not true.