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The *Privette* deposition

With a construction-site injury, your *Privette* deposition seeks evidence of defendant's ability to control worksite conditions and the actual exercise of that control

By Oliver Vallejo

A *Privette*-based summary-judgment motion looms. What to do? First, understand the *Privette* doctrine. Next, obtain documents. Finally, depose the defendant to obtain evidence to defeat the motion. This article explains how to execute the last step.

Understand the *Privette* doctrine

Before you take a *Privette* deposition, you need to understand the doctrine. Numerous cases and articles explain the *Privette* doctrine.

Generally, the *Privette* doctrine precludes vicarious liability against a non-negligent hirer. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 702.) But an employee of an independent contractor can sue the hirer for work-related injuries, if the hirer negligently exercised retained control over worksite safety and "affirmatively contributed" to the injury, or some other exception applies. Regardless of the liability theory, the employee must show that the hirer caused the injury.

To show that the hirer caused the injury, a plaintiff must establish that the hirer's conduct was a substantial factor in causing the plaintiff's harm. (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594-595 [affirming substantial-factor test]; see, CACI 1009A, 1009B and 1009D [each instruct on substantial-factor test].)

Causation can come from an omission. (*Regalado*, *supra*, 3 Cal.App.5th at 594-595.) For example, in *Strouse v. Webcor Constr., L.P.* (2019) 34 Cal.App.5th 703, 718, a general contractor, Webcor, retained overall safety responsibility at a construction project and conducted safety inspections there. The worksite had "expansion joints" or one-foot gaps between concrete sections. Webcor designed, built, and installed safety covers – plywood sheets – to cover the gaps. Webcor later learned that some safety covers had become damaged or unsecured.

Plaintiff's employer, ACCO, a subcontractor on the worksite, had accepted responsibility for providing a safe place to work for its employees. But Webcor did not allow ACCO to repair safety covers, despite complaints about their condition. A safety cover gave way and plaintiff sustained injuries. The trial court instructed the jury on negligent exercise of retained control based on CACI 1009B, which included the substantial-factor test for causation. Webcor appealed and argued that the trial court should have instructed on "affirmative contribution" instead, because it required active conduct to establish causation.

The *Strouse* court held that the substantial-factor instruction sufficed. The Court reasoned that the "'affirmative contribution' requirement simply requires causation between the hirer's conduct and the plaintiff's injury under the 'substantial factor' test." (*Strouse*, *supra*, 3 Cal.App.5th at 715.) The court acknowledged that "there are differing viewpoints among the courts that have touched upon this issue [of whether meeting the substantial-factor test satisfies the affirmative-contribution requirement]." (*Ibid*.) But the *Strouse* court held that the evidence against Webcor established causation, even under a stricter affirmative-contribution test. The Court reasoned that "Webcor's affirmative act of prohibiting subcontractors from maintaining or repairing the safety covers, combined with its retention of control over safety in the general access area and its act of conducting daily inspections, reasonably induced the subcontractors and their employees to rely on the presumed adequacy of the safety covers in the line area" (*Id*. at 717.)

But many courts have declined to hold a hirer liable for its omissions, even if it had the ability to control for safety. (See, e.g., *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 717.) In *Khosh*, Staples was the general contractor for an electrical project at a university. Staples hired an electrical subcontractor, who requested a campus-wide electrical shutdown to do its work. (*Id*. at 714-715.) The subcontractor's employee arrived two and a half hours before the scheduled shutdown, performed work on an energized system, and sustained injury. (*Id*. at 715-716.)

In confirming summary judgment for Staples under the *Privette* doctrine, the *Khosh* court held that the evidence failed to establish a triable issue on affirmative contribution. (*Khosh*, *supra*, 4 Cal.App.5th at 719.) First, the court recognized that "[a]n affirmative contribution may take the form of [a] directing the contractor about the manner or performance of the work, [b] directing that the work be done by a particular mode, or [c] actively participating in how the job is done." (*Khosh*, *supra*, 4 Cal.App.5th at 718.) Next, the court found that "Hooker does not foreclose the potential for liability based on the hirer's omission." (*Id*., citing *Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3; and *Tverberg*, *supra*, 202 Cal.App.4th at p. 1448.) Finally, the court reasoned that although Staples had a general duty to prevent injuries, Staples did nothing to contribute to the plaintiff's injury. (*Id*. at 719.) "Nor did Staples represent that all steps of the construction had passed inspection before Khosh began his work." (*Id*. at 719.) The court explained:

> Staples's agreement with the University imposed only a general duty to prevent accidents. It did not impose specific measures that Staples was required to undertake in response to an identified safety concern. There is no

evidence that Staples refused a request to shut off electrical power or prevented Khosh from waiting until the scheduled shutdown before starting work. There is no evidence Myers or Khosh relied on a specific promise by Staples. There is no evidence of an act by Staples which affirmatively contributed to Khosh's injury. (*Ibid*.)

Recently, the California Supreme Court granted review of a decision that addressed the issue of what constitutes affirmative contribution where the defendant-hirer failed to act. (See, *Horne v. Ahern Rentals*, Inc. (2020 WL 5552029).)

Develop active negligence evidence

Given the "differing viewpoints among the courts" on the issue of which omissions satisfy the affirmative-contribution requirement, evidence of a hirer's active conduct better supports a summary-judgment opposition. As the Court of Appeal has explained, "the *failure* to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a *negligent exercise* of control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446.)

So, develop evidence that the defendant *exercised* its control – over safety, access, work methods. This evidence can involve action, such as directing work, and passive conduct, such as preventing remediation. (See, e.g., *Strouse*, *supra*, 3 Cal.App.5th at 717.)

But before a hirer can exercise control over worksite conditions, the hirer must have the *ability* to control the worksite. So, the first step in a *Privette* deposition is to establish the hirer's role at the project.

Defendant's role at the project

To establish the hirer's role at a project, start the deposition with questions about the hirer's scope of work at the project. Generally, a construction contract puts the general contractor in charge of the project, including project safety. Contract language like that which put Webcor in charge of safety in *Strouse* is common. (See, *supra*, 34 Cal.App.5th 703.)

The "scope of work" or "safety" sections of the contract may require the defendant to prepare, implement and enforce a safety program. The contract may require the defendant to conduct periodic safety inspections; to provide specific safety equipment or protection; or to fix or warn against dangerous conditions or work practices. This gives the defendant the ability to act.

The following questions reveal the defendant's ability to exercise control over project conditions:

1. Who was in charge of the project?
   a. Who was the general contractor?
   b. Who was the project manager?
   c. Who was the safety supervisor?
2. Who hired defendant?
3. What services did defendant agree to provide?
   a. Hire subcontractors?
   b. Sequence the project?
   c. Coordinate trades?
   d. Control for safety?
   e. Maintenance of worksite conditions?
4. Who was in charge of safety at the project?
   a. Where did the buck stop? Who was "captain of the ship?"
   b. Defendant's Injury and Illness Prevention Program (IIPP) required its safety coordinator to periodically inspect the project?
   c. The subcontract gave defendant the right to inspect the subcontractor's work area?
   d. Defendant could shut down the project because of dangerous conditions or practices?
   e. Defendant could remove a subcontractor for violating a safety rule?

After determining the defendant's ability to control project conditions, commit the defendant to rules of the road. These are the safety rules that the defendant was duty-bound to enforce.

Safety rules

To bind the defendant to safety rules, first research which rules applied to the work. These rules can come from Cal- and Fed-OSHA regulations; the Labor Code; CACI; ASME; an expert; and the defendant's own written policies and procedures, such as their IIPP and employee training materials. (See, *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 588 [company's own safety rules can establish standard of care].)

Before committing the defendant to specific safety rules, bind the defendant to general rules, such as:

1. The nature of construction involves a high degree of risk?
   a. This is why OSHA has rules (about fall protection, trenching, etc.)?
   b. For example, Cal-OSHA requires fall protection at 7.5' or more (8 C.C.R. 1621)?
   c. These rules are designed to protect workers?
   d. Because a fall can result in serious injury or death.
2. A general contractor must provide a reasonably safe jobsite?
3. Defendant is committed to doing each job safely?
   a. The commitment to safety applies to defendant's employees?
   b. The commitment to safety applies to subcontractor's employees?
   c. You want them to have a safe workplace?
   d. You expect your employees to work in a safe manner?
   e. You expect your employees not to put others at risk?
4. Defendant must follow workplace safety standards under Cal- and Fed-OSHA.
5. Defendant must follow its own safety rules?

Now, defendant must agree that specific safety rules applied to the project. After committing defendant to the rules, establish what defendant did or failed to do to enforce these rules.

Inspections

Rules enforcement starts with defendant's policies and procedures about the identification, correction and reporting of dangerous conditions and practices. Typically, defendant will designate a safety supervisor to conduct inspections to ensure compliance with safety rules.

But the fact that defendant retained the right and planned to conduct inspections does not suffice to defeat summary judgment. (See, e.g., *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 1096 [distinguishing between "the *contractual right* of control with the *actual exercise* of such control"].) The evidence must show that defendant exercised or discharged control by conducting inspections. So, find examples that show that defendant exercised control over worksite conditions:

1. How was the safety program enforced?
2. How were safety inspections conducted?
   a. Who from defendant conducted safety inspections?
   b. How often did defendant conduct safety inspections?
   c. When did defendant conduct safety inspections?
   d. How did defendant conduct safety inspections?
      i. Did defendant physically examine conditions or just eyeball them?
   e. How did defendant document inspections? (Checklist, iPad, App, Photos, Emails, texts, memos.)
3. What "controlled access zones" existed at the project?
   a. Who controlled these zones?
   b. Who could enter the zones and under which circumstances?
   c. Subcontractors were not allowed to enter to ID or fix dangerous conditions? (See, *Kinsman*, *supra*, stating elements for liability for hidden dangerous condition].)
4. What response was required if a dangerous condition or practice was spotted?
5. When was the last safety inspection before plaintiff's injury?
   a. Who conducted it?
   b. How was the inspection conducted?
   c. How was the inspection documented?
6. What would defendant have done if defendant had seen the dangerous condition or practice?
7. Before plaintiff's injury, had defendant seen or heard about the same type of dangerous condition or practice?
   a. If so, what steps did defendant take to address the condition?

Having established that defendant controlled project conditions, next determine remediation policies, procedures, and practices.

Reporting procedures

To determine remediation practices, explore how workers were expected to address a dangerous condition or work practice that they spotted. The *Strouse* court based its decision in part on the fact that the general contractor did not allow the subcontractor to fix dangerous conditions and ignored its complaints. (*Strouse*, *supra*, 3 Cal.App.5th at 717.) Ask what defendant's and subcontractors' employees were supposed to do if they saw a dangerous condition, and what happened in practice.

Next, turn to the condition that injured plaintiff. Despite safety rules, inspections and reporting procedures, plaintiff was injured. What happened? Defendant should have investigated the incident.

Accidents and investigations

A defendant's safety program will describe how defendant must respond to injuries that occur on a project. A documented investigation must occur. The investigation serves to determine the root cause of the injury and any needed changes to prevent future injuries.

Ask questions to learn about defendant's conclusions and any subsequent remedial measures:

1. It's important to investigate an injury to determine its root cause?
2. It's important to determine the root cause of an injury to prevent future similar injuries?
3. It's important to conduct a complete, thorough and accurate investigation and to document it?
4. How did defendant investigate plaintiff's injury?
   a. Who conducted the investigation?
   b. How was the investigation documented?
   c. What did the investigation conclude?
   d. What was the root cause of the injury?
5. What changes were implemented after plaintiff's injury to prevent future similar events?
6. What other similar accidents occurred at the jobsite?

Also, an employer must notify OSHA of a serious injury or death. (8 C.C.R. § 342.) Ask about defendant's responses to OSHA's investigation and conclusions.

Conclusion

Some depositions serve as discovery tools and others as liability tests. A *Privette* deposition does both. It seeks evidence of defendant's ability to control worksite conditions and the *actual exercise* of that control. So, chase every lead to defendant's active conduct. This evidence will increase your chance of success at the summary-judgment stage.

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Endnotes

[1] For example, see *Construction Site Injuries: Strategies for Defeating the* Privette *Defense* (Wong, Kimberly, Plaintiff Magazine (2015).)

[2] See, *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (negligent exercise of retained control); *Kinsman v. Unocal Corp*. (2005) 37 Cal.4th 659, 675 (concealed-dangerous-condition exception); *McKown v. Wal-Mart Stores, Inc*. (2002) 27 Cal.4th 219, 225 (unsafe-equipment exception); *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146-147 (non-delegable duty exception).

[3] *Strouse, supra*, 3 Cal.App.5th at 715.