

# Those hiring independent contractors are on the hook for nondelegable duties

## Seabright *reaffirms liability for injury to employee of independent contractor*



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The First Appellate District (Justice Ruvolo's panel) has issued another opinion useful in our multi-employer worksite practice, and has reaffirmed that hirers of independent contractors are liable in civil suits for violations of nondelegable duties that affirmatively contribute to an injury to an employee of an independent contractor. (*Seabright Insurance Company v. U.S. Airways, Inc*. (filed March 29, 2010, first Appellate District) 10 CDOS 3936.)

### Background

In *Seabright*, the injured worker, Anthony Verdon Lujon (Verdon), was a conveyor repair worker who worked for a company hired by U.S. Airways as an independent contractor to provide "[p]reventive maintenance and repair" on a conveyor at San Francisco International Airport.[1] The airport owned the conveyor belts, and U.S. Airways used them under a permit. U.S. Airways used the conveyor system to deliver bags to and from airplanes, and relied entirely on Verdon's employer for the maintenance and upkeep of the system. Verdon received all of his training from his employer and his union, and received no training on the conveyor from U.S. Airways.

On the day of the incident, Verdon was performing routine maintenance on the conveyor. The first phase involved observing the conveyor visually while it was running. To do this inspection, Verdon had to work "in a poorly lighted, tight/cramped space close to the conveyor's moving parts," which limited his range of movement. While Verdon was carrying out this visual inspection, his arm became caught in the unguarded head pulley of the conveyer and was seriously injured. At the time of Verdon's injury, no U.S. Airways employees were working with Verdon or his employer on the conveyor belt.

Plaintiffs submitted a declaration by an industrial hazards accident reconstruction expert, who testified that the "head pulley and several tension and take-up pulleys on the subject conveyor were not guarded. This caused the nip points to be fully exposed and a hazard to anyone who worked or passed through the area." The expert cited standards of the American Society of Mechanical Engineers (ASME), which produces and promulgates national standards for conveyor systems, specifying that "nip and shear points" should be guarded, as well as California Code of Regulations, title 8, section 4002, which required guarding on certain machines, and section 3999, which required guarding on belt conveyor head pulleys, tail pulleys, single tension pulleys, and dip take-up pulleys. According to plaintiff's expert, "[t]he subject conveyor did not have guard(s) covering the nip points located at the bottom of the incline area at the point where Anthony Verdon's arm became entrapped. The lack of such guarding constituted a violation of California Title 8 (Cal OSHA) regulations §3999 and §4002," and the lack of proper guarding failed to meet the standard for conveyor safety as promulgated by the ASME.

Seabright was Verdon's workers' compensation carrier, and initiated an action for subrogation against U.S. Airways and other defendants to recover benefits paid on Verdon's behalf. Verdon intervened as a plaintiff in Seabright's action.[2] The plaintiffs alleged that U.S. Airways breached duties to provide a safe working environment, to provide adequate warnings and safety devices, and to maintain a safe premises.

U.S. Airways moved for summary judgment against Seabright and Verdon, contending it had a complete defense under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 200-201 (*Hooker*), one of the *Privette-Toland* progeny. (*Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*); *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253 (*Toland*).)

The trial court, San Francisco Superior Court, Honorable Peter J. Busch, granted summary judgment in favor of U.S. Airways, applying the rule of the *Privette-Toland* line of cases to conclude that U.S. Airways, as the hirer of Verdon's employer, could not be liable for Verdon's injuries. The trial court concluded that appellants had presented no evidence U.S. Airways' affirmative conduct contributed to Verdon's accident, and had not presented admissible evidence concerning the cause of Verdon's injuries.

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The Court of Appeal sided with Verdon and Seabright and reversed. The *Seabright* court held that U.S. Airways had a nondelegable duty to comply with OSHA regulations and properly guard its conveyor, and that a triable issue was raised whether the failure to provide a conveyor with guards affirmatively contributed to Verdon's injuries.

## The *Privette-Toland* Line of Cases

The oft-summarized *Privette-Toland* cases and their progeny were summarized by the *Seabright* court by summarizing the summary in *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 668-670, (*Padilla*) (which may have summarized another summary):

"At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work." (*Privette*, *supra*, 5 Cal.4th at p. 693.) *Privette* addressed one exception to the common law rule, the "peculiar risk doctrine," under which the hirer of an independent contractor to perform inherently dangerous work could be liable for injury to others resulting from the contractor's negligent performance of the work. (5 Cal.4th at p. 691.) *Privette* held that the peculiar risk doctrine did not apply to employers of the independent contractor injured on the job because they could recover worker's compensation for their injuries. (*Id*. at p. 701.)

Subsequently, in *Toland*, *supra*, 18 Cal.4th at p. 264, the court held that *Privette* applies regardless of whether recovery is sought under the theory that the hirer failed to provide for special precautions in the contract (Rest.2d Torts, § 413), or the hirer is liable for the contractor's negligence in spite of providing in the contract that the contractor take special precautions (Rest.2d Torts, § 416). "In either situation, it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage." (*Toland*, *supra*, at p. 267.)

In *Hooker*, *supra*, 27 Cal.4th 198, the Supreme Court extended the rationale of *Privette* to the doctrine of negligent exercise of retained control under the Restatement Second of Torts, section 414. Following the rationale of *Privette* that it would be unfair to impose liability on the hiring person when the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage, *Hooker* concluded that "the imposition of tort liability on a hirer should depend on whether the hirer *exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee." (*Hooker*, *supra*, at p. 210.) Thus, although in the case before it the plaintiff had established the defendant hirer retained control over safety conditions at the worksite, the plaintiff had not established that such retained control was exercised in a manner that affirmatively contributed to the plaintiff 's injuries. (*Id*. at p. 215.) *Hooker* pointed out that a hirer could be liable for omissions as well as affirmative conduct. "There will be times when the 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. 212, fn. 3.)

As noted in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (*Kinsman*), "[a] useful way to view the [*Privette*] cases is in terms of delegation. . . . [I]n *Privette* and its progeny, we have concluded that, principally because of the availability of workers' compensation, [the] policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment." (*Kinsman*, *supra*, 37 Cal.4th at p. 671.)

## Nondelegable duty doctrine

The *Seabright* court discussed cases that have considered whether, in light of the *Privette-Toland-Hooker* line of cases, a hirer remains liable to the employee of a contractor or subcontractor based on breach of a nondelegable duty. "The nondelegable duty doctrine addresses an affirmative duty imposed by reason of a person or entity's relationship with others. Such a duty cannot be avoided by entrusting it to an independent contractor." (*Padilla*, *supra*, 166 Cal.App.4th at p. 671.) In *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1038, the court concluded that "*Privette* does not purport to abolish all forms of vicarious liability in general, or the doctrine of nondelegable duty in particular, as a basis for suits by employees of contractors against the contractors' employer. . . Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others."

The *Seabright* court noted that duties imposed on the hirer of an independent contractor by a regulation (regulatory duties) are nondelegable, and survive the *Privette* line of cases, and discussed the recent case of *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 141-142 (*Evard*), which considered the liability of the owners of a billboard to the employee of an independent contractor, who had fallen from the billboard. The issue before the *Evard* court was whether the billboard owners violated a general industry safety order that required them to provide guardrails or a horizontal safety line, except where the employees were secured to a special purpose ladder. (*Id*. at p. 146; former section 3416, subd. (a).) The *Evard* court first concluded that the doctrine of nondelegable duty survived *Privette*, and that the regulation in question imposed upon the billboard owners a nondelegable duty. (*Evard*, at pp. 146-147.) The *Evard* court concluded that there was a triable issue of fact as to whether the defendants had breached their nondelegable duty to comply with the regulation, stating:

The liability of a hirer or owner for injury to employees of independent contractors caused by breach of a nondelegable duty imposed by statute or regulation continues to be subject to the test in *Hooker*. Under that test, "an owner may be liable if its breach of regulatory duties affirmatively contributes to injury of a contractor's employee" . . . Liability may be predicated on a property owner's "breach of its own regu-

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latory duties, regardless of whether or not it voluntarily retained control or actively participated in the project. For purposes of imposing liability for affirmatively contributing to a plaintiff's injuries, the affirmative contribution need not be active conduct but may be in the form of an omission to act." (*Id*. at p. 147 (citations omitted).) The defendants' omission created "a triable issue of fact as to whether the defendants breached their nondelegable duty in a manner that affirmatively contributed to Evard's injury." (*Id*. at p. 148.)

*Evard*, in turn, relied in part on the well-reasoned case of *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281 (*Barclay*). (*Evard*, *supra*, 153 Cal.App.4th at pp. 147-148.) The plaintiff in *Barclay* was injured by an explosion while cleaning fuel tanks on land owned by the defendant while working for his employer, an independent contractor hired by the owner to clean the tanks. The defendant land owner did not direct, control, or supervise Barclay's work, and did not provide any advice or equipment to Barclay. (*Barclay, supra*, 129 Cal.App.4th at pp. 285-287.) The plaintiff alleged the property owner was directly negligent in breaching nondelegable duties, including a regulation that required portable fire extinguishers to be located within 75 feet of the portion of a petroleum bulk plant facility where fires were likely to occur. (*Barclay*, at pp. 287-288.) The plaintiff further alleged that the owner's breach of that regulatory duty affirmatively contributed to the plaintiff's injuries, which would have been less severe had the property owner complied and provided the required fire extinguishers. (*Ibid.*)

The trial court granted summary judgment in favor of the property owner under the *Privette* doctrine. (*Barclay*, at p. 285.) The *Barclay* court examined Restatement Second of Torts, section 424, which stated that where specific precautions were required by statute or regulation for the safety of others, the party upon whom the duty was imposed was subject to liability to the others for whose protection the duty was imposed,[3] and concluded that the employees of contractors may be "others" for purposes of section 424, subject to the limitation (as in *Hooker*) that the hirer's bad conduct must have affirmatively contributed to the employee's injuries. (*Barclay*, at pp. 290, 295, citing *Hooker*, *supra*, 27 Cal.4th 198.) Thus, *Barclay* held the property owner could be liable if its breach of regulatory duties owed to the plaintiff affirmatively contributed to his injuries, regardless of whether or not it voluntarily retained control or actively participated in the project. (*Barclay, supra*, 129 Cal.App.4th at pp. 298, 301.)

The *Barclay* court went on to hold there was sufficient evidence in the record that the property owner affirmatively contributed to the plaintiff's injuries by violating the requirement to provide adequate fire extinguishers, and rejected the argument that the property owner's duty to have adequately placed fire extinguishers was triggered only by the activity of the contractors. (*Barclay*, at p. 301.)

*Barclay*, in turn, relied for its analysis in part on *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595 (*Park*). (*Barclay*, *supra*, 129 Cal.App.4th at pp. 295-298.) In *Park*, the plaintiff was a truck driver for a company that removed hazardous materials under a contract with the defendant railroad. The plaintiff was injured when a plastic drum containing used batteries exploded. The undisputed evidence demonstrated that the railroad's packaging of the batteries posed no danger, and that a disposal company employee's repacking of the batteries was a superseding cause of the injury. (*Park, supra*, 108 Cal.App.4th at pp. 598-599, 611.) The appellate court concluded the duties imposed on the generator of hazardous waste by statute and regulation were nondelegable duties that survived *Privette*, but that the generator was not liable to an employee of a subcontractor who was employed to dispose of the waste because the generator's conduct did not affirmatively contribute to the employee's injuries, and reversed a judgment against the railroad. (*Park*, at pp. 606-607, 610, 614-15, citing *Hooker*, *supra*, 27 Cal.4th at p. 202.)

### Nondelegable regulatory duties applicable to *Seabright*/ Verdon's claims

In *Seabright*, the court reviewed alleged nondelegable duties found in three state regulations: Section 3999, subdivision (b), applicable to conveyors, which provides: "Belt conveyor head pulleys, tail pulleys, single tension pulleys, dip take-up pulleys, chain conveyor head drums or sprockets and dip take-up drums and sprockets shall be guarded. The guard shall be such that a person cannot reach behind it and become caught in the nip point between the belt, chain, drum, pulley or sprocket;" Section 4002, subdivision (a), which provides: "All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded"; and Section 3317, subdivision (a), which provides: "Working areas, stairways, aisles, passageways, work benches and machines shall be provided with either natural or artificial illumination which is adequate and suitable to provide a reasonably safe place of employment. . ." Importantly, these regulations are found among the "General Industry Safety Orders" (§ 3201), which establish standards applicable to all places of employment (§ 3202).

### Dealing with *Padilla*

The *Seabright* court reviewed situations in which nondelegable duties have been found in the duty "to comply with applicable safety ordinances; and the duty of employers and suppliers to comply with the safety provisions of the Labor Code." (*Maloney v. Rath* (1968) 69 Cal.2d 442, 447 (citations omitted.) The Court of Appeal distinguished *Padilla*, in which the plaintiff, an employee of a subcontractor, was injured when demolishing water pipes when a portion of a pipe he was demolishing came loose, struck a pressurized pipe, and broke it, causing water to erupt from the

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pressurized pipe and knock the plaintiff from his ladder. (*Padilla*, *supra*, 166 Cal.App.4th at pp. 664-665.) The plaintiff in *Padilla* contended that the general contractor failed to follow California Health and Safety Act (Cal-OSHA) regulations requiring utilities to be shut off, capped, or otherwise controlled during demolition. (*Padilla*, at p. 666 & fn. 4; § 1735, subd. (a).)

The *Padilla* court held the regulation did not impose a nondelegable duty on the general contractor and the property owner, concluding that Cal-OSHA regulations did not impose a nondelegable duty in every instance, but that "it is the nature of the regulation itself that determines whether the duties it creates are nondelegable." (*Padilla*, at pp. 672-673.). (*Padilla*, *supra*, 166 Cal.App.4th at pp. 671-674.) To determine whether the regulation in question imposed a nondelegable duty, said the *Padilla* court, "we must look to the language of the regulation itself." (*Id*. at p. 673.) The *Padilla* court concluded that nothing in the regulation mandated it imposed a safety precaution that could not be delegated from the landowner to the general contractor to the subcontractors, noting that the regulation required utility service to be controlled or protected before starting demolition, but "nowhere indicate[d] who must perform these acts and [did] not expressly place the obligation on the landowner." (*Ibid*.) The *Padilla* court distinguished *Evard* on the ground that the regulation at issue in *Evard* pertained to the condition of the landowner's property, and required the owner to maintain a protective railing on the billboard at all times. This ongoing duty required the guardrails to be in place regardless of whether work was being done on the billboard. The regulation, in other words, imposed a permanent obligation on the owner with respect to the condition of the property; no one but the landowner was in a position to ensure that condition. (*Padilla*, at p. 673.) In contrast, the regulation at issue in *Padilla* pertained only to the preparation of the worksite when specific work was being done, that is, when contractors were necessarily present. Therefore, the *Padilla* court concluded, there was no basis to conclude the regulatory duties could not be delegated. (*Ibid*.)

The *Seabright* court held the obligations imposed by the regulations at issue were distinguishable from *Padilla*, and like *Evard* and *Barclay*, because they were not connected to construction or to work that would naturally be done by independent contractors who would control conditions at a construction site. The conveyor regulations in *Seabright* imposed a continuing obligation on U.S. Airways to provide guards and to provide adequate lighting, obligations that inured to the benefit of Verdon and anyone else who entered the area to use or work on the conveyor. Thus, the *Seabright* court held the regulations imposed continuing, nondelegable duties which survived *Privette* and its progeny, and raised a triable issue as to whether U.S. Airways' violation of those duties affirmatively contributed to Verdon's injuries.

## Conclusion

Regulatory duties remain a viable civil theory against hirers of independent contractors under the nondelegable duty doctrine. Make sure to discover all potential regulations, statutes, ordinances and other safety rules that may apply to your multi-employer worksite injury case.

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## Endnotes

[1] The "Services Agreement" specified that Verdon's employer would provide "Preventive Maintenance and repair of conveyor system" which included "monthly services where we will lubricate and adjust all mechanical components as necessary. All belts will be checked for proper tension and tracking and adjusted as necessary. Drive sprockets and chains will be checked for proper alignment, tension and wear and adjusted as necessary."

[2] Seabright and Verdon are referred to jointly as "plaintiffs" for brevity.

[3] Restatement Second of Torts, section 424 provides: "One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."

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