

Who is Liable for Injuries Sustained by an Independent Contractor's Employee Injured as a Result of a Lapse in Workplace Safety Requirements—The “Hirer” or the Independent Contractor?

By Bernadette M. O'Brien and Dona Lee Skeren

Introduction

The California Supreme Court, in *Seabright Insurance Company v. US Airways*,¹ decided the important issue of who is liable for workplace injuries sustained by the employee of an independent contractor when those injuries occur as a result of a lapse in workplace safety requirements on the premises of the hirer (the party that hired the independent contractor)—the independent contractor or the “hirer”? Addressing this key issue, the Court held:

By hiring an independent contractor, the hirer 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. Such delegation does not include the tort law duty the hirer owes to its own employees to comply with the same safety requirements . . .²

In reaching this conclusion, the Court dealt with a long-standing point of confusion regarding which party is liable for failure to comply with a statutory violation that results in a workplace injury. Responding to this uncertainty, the Court emphasized that when someone hires an independent contractor, that party delegates to the independent contractor any duty owed to the independent contractor's workers to ensure a safe workplace. The Court thus rejected a lower court's decision which held that a hirer could be liable for injuries to an independent contractor's employees, when those injuries arise out of the hirer's breach of safety regulations because compliance with such regulations constitutes a “non-delegable” duty of care. However, the Court also

emphasized the following: “such delegation does not include the tort law duty the hirer owes to its own employees to comply with the same safety requirements, but under the definition of employer that applies to California's workplace safety laws (see Lab. Code, § 6304), the employees of an independent contractor are not considered to be the hirer's own employees.”³ Further, as discussed below, under the *Seabright* holding, the scope of delegable duties includes those that the hirer owes pursuant to the Occupational Safety and Health Administration (OSHA).

Background: The “Privette Doctrine”

To better understand the Court's ruling in *Seabright*, it is helpful to review the landmark case of *Privette v. Superior Court*,⁴ in which the California Supreme Court decided that if an employee of an independent contractor is injured, the employee cannot sue the hirer of the independent contractor, even if the injury is caused by a “peculiar risk.” This theory, now referred to as the “Privette Doctrine,” formed the framework for the Court's decision in *Seabright*.

In *Privette*, a property owner hired a roofing company to install a new roof. An employee of the roofing company was burned when trying to carry a bucket of hot tar up a ladder. The issue presented in the case was the peculiar risk exception to the general rule of nonliability, which permitted recovery against those who hired independent contractors, if the work created a peculiar risk of physical harm to others unless special precautions were taken. The peculiar risk doctrine thus ensured that a landowner who chose to engage in inherently dangerous activity on his or her premises could not avoid liability for injuries sustained by a worker simply by hiring an independent contractor. The reasoning was that the doctrine allocated liability to the person for whose benefit the job was undertaken,

¹ *Seabright Insurance Company v. US Airways*, 2011 Cal. LEXIS 8581 (Aug. 22, 2011).

² 2011 Cal. LEXIS 8581, at *2, *3.

³ 2011 Cal. LEXIS 8581, at *3.

⁴ *Privette v. Superior Court* (1993) 5 Cal. 4th 689.

thereby promoting workplace safety and ensuring compensation for third parties injured by such work.

However, in *Privette* the California Supreme Court changed course holding that the peculiar risk doctrine does not extend to an independent contractor's employees unless the hirer conceals a preexisting dangerous condition or engages in some other misconduct that contributes to the worker's injury. The Court reasoned that an independent contractor's employees are covered by workers' compensation for injuries they sustain while on the job, even if caused by a "peculiar risk," and thus holding the hirer liable for the injuries would result in the hirer having greater liability than the independent contractor.

Further, it would be unfair to permit an injured employee to recover damages from the hirer because: (1) the hirer likely paid indirectly for the workers' compensation insurance as part of the contract price; (2) the hirer does not have any right to reimbursement from the independent contractor even if the contractor was primarily at fault; and (3) those workers who happen to work for an independent contractor should not be entitled to damages that are not unavailable to other workers, particularly since workers' compensation is intended to provide the exclusive remedy for the injury or death of an employee.

Seabright Facts

US Airways hired Lloyd W. Aubry Company (Aubry), an independent contractor, to maintain and repair a luggage conveyance system at San Francisco International Airport. US Airways did not direct Aubry's employees or have its employees participate in Aubry's work. Anthony Verdon Lujan (Verdon) was employed by Aubry. While working on the conveyor system, Verdon's arm was caught in the machine's moving parts. Verdon alleged this occurred because the conveyor system lacked certain safety guards. Due to his workplace injuries, Verdon subsequently filed a workers' compensation claim. SeaBright was Aubry's workers' compensation carrier and thus provided Verdon with workers' compensation benefits.

Seabright's Procedural History

Seabright sued US Airways to recover their workers' compensation costs, arguing that the airline was liable for Verdon's workplace injuries because it failed to adhere to the California and Occupational Safety and Health Administration's (Cal-OSHA) regulations on safety guards for conveyors, and compliance would have prevented Verdon's injury. US Airways sought summary judgment based on the *Privette* case,

arguing that it did not affirmatively contribute to Verdon's injury. SeaBright and Verdon countered with a declaration by an accident reconstruction expert who stated that the lack of safety guards on the conveyor violated Cal-OSHA regulations and that the safety guards would have prevented Verdon's injury. The trial court found for US Airways, and Seabright and Verdon appealed. The Court of Appeal reversed, holding that under Cal-OSHA, US Airways had a *nondelegable* duty to ensure that the conveyor had safety guards. US Airways appealed to the California Supreme Court.

The California Supreme Court Holds that a Delegable Duty Existed

In *Seabright*, the California Supreme Court began by analyzing the definition of "employer," noting that the term is now more narrowly defined by the law than it was before 1971 when the California Legislature's definition of the term "employer" included those having direction, management, or control of any employment, place of employment, or employee. However, pursuant to a 1971 amendment to Labor Code section 6304, the California Legislature narrowed this broad definition of "employer" so that an employer is now considered to be someone who has a natural person in service. The Court then focused on whether US Airways could delegate to Aubry (the independent contractor and employer) any duty it owed to Aubry's employees to comply with the safety requirements of Cal-OSHA. On this point the Court noted that, "We have never held *under the present law* that a specific Cal-OSHA requirement creates a duty of care to a party that is not the defendant's own employee." The Court also observed that "Our decisions recognize a presumptive delegation of responsibility for workplace safety from the hirer to the independent contractor, and a concomitant delegation of duty." In other words, the hirer is presumed to have delegated the responsibility of workplace safety to the independent contractor in regards to the contractor's employees. The Court also reviewed an interesting decision in *Tverberg v. Fillner Construction, Inc.*,⁵ in which the Court held that an independent contractor's hirer is not liable for damages in tort even if the independent contractor, as opposed to the contractor's employee, is the one that is injured in the workplace. The Court held that even though the contractor was not entitled to workers' compensation benefits, his claim against the hirer was barred due to the hirer's presumed

⁵ *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal. 4th 518.

delegation to the contractor of responsibility for workplace safety.

In arriving at its decision, the Court relied on a *Privette* line of decisions which have established “that an independent contractor’s hirer presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor’s employees.”⁶ Moreover, in considering the specific issue of whether the hirer could be liable to the contractor’s employees for workplace injuries resulting from the hirer’s failure to comply with the safety requirements of Cal-OSHA, the Court emphasized that:

We reject the premise that the tort law duty, if any, that a hirer owes under Cal-OSHA and its regulations to the employees of an independent contractor is nondelegable. When in this case defendant US Airways hired independent contractor Aubry to maintain and repair the conveyor, US Airways presumptively delegated to Aubry any tort law duty of care the airline had under Cal-OSHA and its regulations to ensure workplace safety for the benefit of Aubry’s employees.⁷

The delegation “is implied as an incident of an independent contractor’s hiring”⁸ and includes the “duty to identify the absence of the safety guards required by Cal-OSHA regulations and to take reasonable steps to address that hazard.”⁹ Thus, the Court refused to limit its holding in *Privette* so as to impose liability on a hirer for injuries to the employee of an independent contractor arising from the hirer’s failure to comply with a statute or regulation, even in situations where

the failure to comply involves Cal-OSHA. This means that independent contractors must ensure the safety of the hirer’s premises so as to provide secure working conditions for their employees.

Note: On September 6, 2011, Seabright filed a “Petition for Rehearing” with the California Supreme Court. The Court has extended the timeframe for denying or granting the petition to November 21, 2011.

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⁶ *Seabright*, 2011 Cal. LEXIS 8581, at *18.

⁷ *Seabright*, 2011 Cal. LEXIS 8581, at *20.

⁸ 2011 Cal. LEXIS 8581, at *20.

⁹ 2011 Cal. LEXIS 8581, at *20.