Editor-in-Chief
Jeffrey I. Ehrlich
THE EHRLICH LAW FIRM

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

Appellate Report

COURT REVIEWS *PRIVETTE* RULE ON RETAINED CONTROL OF JOB SITE

Privette doctrine; retained-control exception; delegation of workplace safety

McCullar v. SMC Contracting, Inc. (2022) __ Cal.App.5th __ (Third Dist.)

The *Privette* doctrine holds that a hirer generally delegates to an independent contractor all responsibility for workplace safety and is not liable for injuries sustained by the contractor or its workers while on the job. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 40.) Here, SMC Contracting, Inc. (SMC) hired Tyco Simplex Grinnell, Inc. (Tyco) to install an automatic fire sprinkler system for a development in South Lake Tahoe. During the installation, a Tyco employee, plaintiff McCullar, arrived at work and found the floor covered in ice. While trying to use a ladder on the ice, McCullar slipped and suffered injuries.

McCullar later sued SMC based on these events. Relying on *Privette*, the trial court granted SMC's motion for summary judgment. On appeal, McCullar argued that the *Privette* doctrine does not protect SMC because SMC retained control over Tyco's work and negligently exercised this control in a way that affirmatively contributed to his injuries. Specifically, he claimed that, because SMC caused the ice to form on the floor and then told him to go back to work after he notified it about the ice, *Privette* did not apply. Affirmed.

In *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, the Court held that a hirer may be liable when it retains control over any part of the independent contractor's work and negligently exercises that retained control in a manner that affirmatively contributes to the worker's injury. This exception to *Privette* includes three key concepts: retained control, actual exercise, and affirmative contribution.

A hirer 'retains control' where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. A hirer might be responsible for the presence of a hazard and even convey an expectation that the contractor perform its work without eliminating that hazard altogether, and yet leave the contractor ample freedom to accommodate that hazard effectively in whatever manner the contractor sees fit. In such instance, the hirer does not necessarily retain a sufficient degree of control over the contractor's manner of performing the contracted work to constitute 'retained control.'

A hirer 'actually exercise[s]' its retained control over the contracted work when it involves itself in the contracted work such that the contractor is not entirely free to do the work in the contractor's own manner. In other words, the hirer must exert some influence over the manner in which the contracted work is performed. Unlike 'retained control,' which is satisfied where the hirer retains merely the *right* to become so involved, 'actual exercise' requires that the hirer in fact involve itself, such as by directing the manner or methods in which the contractor performs the work; interfering with the contractor's decisions regarding the appropriate safety measures to adopt; requesting the contractor to use the hirer's own defective equipment in performing the work; contractually prohibiting the contractor from implementing a necessary safety precaution; or reneging on a promise to remedy a known hazard.

Lastly, "affirmative contribution" means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury. A hirer's conduct satisfies the affirmative contribution requirement when the hirer in some respect induced – not just failed to prevent – the contractor's injury-causing conduct.

Based on these concepts, McCullar's retained-control claim fails. SMC's conduct caused ice to form and required Tyco to take extra safety precautions to account for the ice, but McCullar admits that he was aware of the ice before he suffered his injuries. Once an independent contractor becomes aware of a hazard on the premises, the landowner/hirer delegates the responsibility of employee safety to the contractor and a hirer has no duty to act to protect the employee when the contractor fails in that task.

McCullar claims that SMC ordered him to "go back to work" after he pointed out the ice. But SMC's general direction to go back to work did not interfere with or otherwise impact McCullar's decisions on how to safely perform his work. SMC did not, for example, direct McCullar to place a ladder on the ice and then attempt to climb it. Nor did SMC prohibit McCullar from removing the ice. In addition, SMC's agreement with Tyco authorized it to "immediately correct any and all unsafe acts or conditions that are brought to its attention." It also required Tyco to comply with SMC's safety policy, which obligated "[s]ubcontractor supervisory personnel to review each work area prior to commencing work" and eliminate "any safety hazards prior to commencing work."

"In sum, under our Supreme Court's *Privette* line of cases, we conclude SMC delegated all responsibility for workplace safety to Tyco. This delegation included the responsibility to ensure that Tyco's workers would be able to perform their work safely despite the known presence of ice that increased the risk of falling."

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award."*