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The Privette Limitation of Liability Doctrine Strikes Again: California Appellate Court Holds That Limitation of Liability for Landowner/Hirer Extends to Injuries Sustained By Independent Contractors of Independent Contractors

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In a recent published decision which further defines (and refines) landowner or hirer liability for work place injuries in California, the California Appellate Court, Second Appellate District, ruled in David Michael v. Denbeste Transportation, Inc., et al. (2006) 137 Cal.App.4th 1082 (herein, the "Michael" case) that the Privette limitation of liability doctrine applies to "independent contractors" of independent contractors.

As many are aware, the California Supreme Court has ruled, under what has commonly become known as the Privette limitation of liability doctrine, that where a hirer does not conceal a dangerous condition only reasonably known to it nor retains control over the work site, that hirer will not be legally responsible for any personal injury damages suffered by an employee of an independent contractor retained by the hirer absent the hirer's affirmative fault in causing the accident. Privette v. Superior Court (1993) 5 Cal.4th 689; *see also*, Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253; McKown v. Wal-Mart Stores (2002) 27 Cal.4th 219; Hooker v. Department of Transportation (2002) 27 Cal.4th 198; and Kinsman v. Unocal Corporation (2005) 37 Cal.4th 659.

The Michael case concerned a January 2002 construction site accident wherein plaintiff David Michael ("Michael") was seriously injured after falling approximately ten feet from a loaded trailer to the ground while attempting to install a manual roll tarp over the trailer. Michael was left permanently paralyzed from his chest to his feet.

Michael later filed suit asserting negligent exercise of retained control over the worksite against numerous defendants who had various roles in the construction site. Through counsel, Michael argued that his injuries arose as a result of the defendants' failure to provide tarp racks and to implement adequate fall protection. While not necessarily claiming that adequate fall protection existed, the defendants -- Denbeste Transportation, Inc. (hazardous waster subcontractor and Michael's immediate hirer), Chemical Waste Management, Inc. ("CWM") (Denbeste's hirer), Aman Environmental Construction Inc.

("Aman") (the general contractor and CWM's hirer) and Secor International, Inc. ("Secor") (construction consultant hired by the owner of the property) filed motions for summary judgment arguing no legal liability under the Privette limitation of liability doctrine. All motions were granted by the trial court.

Michael subsequently appealed the summary judgments in favor of the defendants. The Appellate Court affirmed the summary judgment in favor of Aman, CWM, and Secor on the ground that they owed no duty to Michael as a matter of law under the Privette limitation of liability doctrine.¹

The factual setting involving the Michael case reflects the often interwoven and multiple layers of hiring that is all too common in large construction projects. Aman, the prime contractor, was hired to provide decontamination, demolition and remediation services at a facility owned by Filtrol Corporation (not a party to the suit). In its contract, Aman agreed to assume sole responsibility for providing a safe place to work. To that end, Aman prepared a "Site Specific Health & Safety Plan" (the "Plan") and it assumed responsibility for implementing the Plan. The Plan provided that each subcontractor was responsible for implementing the Plan for their own employees. In order to effectuate the work to be performed at the facility, Aman then hired CWM to provide transportation and disposal of waste materials from the facility. CWM in turn hired Denbeste which in turn hired Michael as an "independent contractor" (as discussed below). Secor was hired as the "Oversight Contractor" to provide oversight of the decontamination, demolition and remediation work to be performed at the Filtrol facility.

As for Denbeste, it entered into a "Subhaul Agreement" with Michael who provided his own tractor to pull a trailer owned by Denbeste. The "Subhaul Agreement" characterized Michael as an independent contractor of Denbeste who paid Michael on a per job basis. Also, Denbeste employed its own truck drivers who performed the same work as Michael at the Filtrol facility.

In its decision, the Appellate Court in Michael ruled that under the "Plan", Aman and CWM had "delegated" to Denbeste safety responsibilities with respect to its "personnel" and, as a matter of law, they could reasonably anticipate that Denbeste would insure against the risk of injuries incurred in Denbeste's work, regardless of who performed that work (i.e. regardless of

¹ In an unpublished portion of its opinion, the Appellate Court reversed summary judgment in favor of Denbeste on the grounds that there was a triable issue of fact as to whether Michael was Denbeste's employee or an independent contractor.

whether that work was performed by an employee of Denbeste or an independent contractor hired by Denbeste).

The Appellate Court further noted that Michael did not identify any policy reason why Aman's or CWM's responsibility to him (as an independent contractor) should be greater than their responsibilities to other workers who are actual employees of Denbeste. The Appellate Court further noted that Michael's assertion of legal liability against Aman and CWM was in direct contravention of the common law principle articulated under the Privette limitation of liability doctrine that hirers (here, Aman and CWM) delegating a task to an independent contractor may reasonably expect that, in delegating such responsibility, they have also assigned liability for safety to the independent contractor. See, Kinsman v. Unocal Corporation, supra, 37 Cal.4th at 671.

Accordingly, the Appellate Court determined that Aman and CWM were entitled to the limitations for hirer liability as contemplated under the Privette limitation of liability doctrine. Under the two prongs of the Privette doctrine, as most recently articulated in the Kinsman decision (the first prong being the concealed hazard theory and the second prong being the retained control theory), the Appellate Court held that Aman and CWM were not liable to Michael as a matter of law, namely because the Appellate Court determined that it could not reasonably be maintained that the lack of fall protection or tarp racks constituted a concealed hazardous condition or that Aman and CWM exercised any purported retained control in a manner that affirmatively contributed to Michael's injury.

Also, while the Appellate Court agreed that Secor was not a hirer of Michael (or Denbeste), the Appellate Court identified Secor as an agent of the landowner and, on that basis, the Court found it appropriate to analyze Secor's liability under the Privette limitation of liability doctrine as well. As with Aman and CWM, the Appellate Court ruled that the trial court properly granted summary judgment in favor of Secor.

In summary, by its decision in Michael, the California Appellate Court, Second Appellate District, has determined that, irrespective of whether a worker becomes injured in his or her capacity as an "employee" or "independent contractor", the legal liability of the "hirer" will be the same under the Privette limitation of liability doctrine.

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