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Appellate Reports

PRIVETTE AND ITS APPLICABILITY TO INDIRECT OWNER OF HIRER. ALSO, SPORTS AND ASSUMPTION OF THE RISK; "HEADLESS" PAGA CLAIMS; DANGERS ALONGSIDE HIGH-SPEED ROADWAYS

Privette doctrine; applicability to indirect owner of hirer

Collins v. Diamond Generating Corp. (2024) __ Cal.App.5th __ (Fourth Dist., Div. 3.)

Sentinel Energy Center, LLC (Sentinel) owns a high-pressure natural-gas electrical-generating facility near Palm Springs, called the Sentinel Plant. Defendant Diamond Generating Corporation (DGC) owns an indirect 50% interest in Sentinel. After the plant was built, Sentinel hired DGC Operations (OPS), a wholly owned subsidiary of DGC to run the plant. The decedent, Daniel Collins, was an OPS employee. Collins was killed while performing maintenance on the plant when he unbolted the lid of a high-pressure gas tank, which he mistakenly thought was depressurized.

At trial of their wrongful-death claim, Collins's wife and son asserted a negligent-undertaking claim against DGC. Their theory was that DGC had voluntarily assumed a duty with respect to plant safety, and in particular the safe performance of the "lock-out/tag-out" (LOTO) procedure that was used during maintenance of pressurized components of the gas system. They showed that DGC had hired the plant manager, who was an OPS employee, and had assumed responsibility for managing his job performance, including his performance of his duties concerning LOTO training and procedures. The plant manager was supposed to personally audit LOTO procedures after maintenance was performed to assure that employees performed it in accordance with established procedures, but the plant manager never did this. Had DGC exercised any diligence in its review of the plant manager's performance, it would have easily seen that he was not doing his job. But it consistently gave him high marks for his safety-related responsibilities and paid him annual bonuses.

At trial, DGC argued that plaintiff's claim was barred by the *Privette* doctrine, but the trial court rejected this argument because DGC had not hired OPS; Sentinel had. The jury ruled in favor of plaintiffs, awarding non-economic damages of $150 million. The trial court remitted this figure to $100 million. The Court of Appeal reversed.

It held that, because DGC owned an indirect interest in Sentinel, it was entitled to assert the *Privette* doctrine, even though it was not a "hirer." Had the trial court instructed on *Privette*, then the jury would have had to decide whether the "retained control" exception to *Privette* would have applied. Because the jury was not instructed on *Privette* or the defenses to its application, the judgment for the plaintiff was reversed and the case was remanded for a new trial.

Contact sports; primary assumption of risk; instructor liability; jury instructions

Greener v. M. Phelps, Inc. (2024) __ Cal.App.5th __ (Fourth Dist., Div. 1.)

Jack Greener, a Brazilian jiu jitsu (BJJ) student, suffered a fractured neck and a spinal-cord injury due to a series of moves his instructor, Francisco Iturralde, performed on him while sparring at Del Mar Jiu Jitsu Club (the Club), a BJJ dojo owned and operated by M. Phelps, Inc. Greener sued, alleging Iturralde was negligent and M. Phelps, Inc. (collectively, Appellants) was vicariously liable. Appellants invoked the primary assumption of risk doctrine, contending they had no duty to protect Greener from incurring these injuries in the inherently risky sport of BJJ.

The relevant jury instruction on primary assumption of risk, CACI No. 471, provides two alternative standards under which a sports instructor may be liable to an injured student. The applicable standard depends on the particular facts of each case. Option 1 – the primary assumption of risk doctrine – holds an instructor liable only if the instructor intentionally injured the student or acted so recklessly that the conduct was "entirely outside the range of ordinary activity involved in teaching" the sport. Option 2 – a sports-specific negligence standard – imposes liability if the instructor "unreasonably increased the risks to" the student "over and above those inherent in" the sport. (CACI No. 471.)

The court instructed the jury on option 2, finding it "most applicable for these facts." The special verdict form mirrored this instruction. Following the Directions for Use for CACI No. 471, the court also gave CACI No. 400, which states the elements of negligence. In addition, the court gave CACI No. 401, which defines the basic standard of care in ordinary negligence actions. The jury, by a vote of 9 to 3, found in favor of Greener and awarded him $46 million in damages.

Appellants argue the judgment must be vacated because the trial court, inter alia, prejudicially erred by (a) instructing the jury on CACI No. 471, option 2, and CACI Nos. 400 and 401. In a 2-1 decision, the panel affirmed the judgment.

Although the California Supreme Court has limited liability to option 1 when "it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction" (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 103, (*Kahn*)), Courts of Appeal have applied option 2 in cases where the instructor, for example, (1) "encourag[ed] or allow[ed] the student to participate in the sport when he or she [wa]s physically unfit to participate or" (2) permitted the student "to use unsafe equipment or instruments."

As the majority saw it, while sparring with Greener during a BJJ class, Iturralde gave no demonstration or active instruction. Instead, he acted more like a student coparticipant than an instructor

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when he immobilized and executed a series of maneuvers on Greener. But as an instructor with superior knowledge and skill of BJJ, Iturralde was differently situated from other students, and thus he can – and the court concluded that he should – be held to a different standard. There was evidence Iturralde knew he had created a situation posing heightened risk to Greener's safety beyond that inherent in BJJ and had the time and skill to avoid that risk, yet he consciously chose to proceed. The risk an instructor will perform a maneuver on a student after immobilizing the student and knowing it will injure the student is not an inherent risk of BJJ sparring. On these facts, the majority concluded that the trial court had elected the proper standard – option 2 of CACI No. 471 – under which Iturralde could be held liable under a negligence standard.

The dissent explained that, in *Kahn*, the Supreme Court held that "[i]n order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' ... involved in teaching or coaching the sport." (*Id.* at p. 1011.)

However, because the issue was not presented, *Kahn* did not directly address whether the primary assumption of the risk doctrine *also* applies when a coach in an inherently dangerous sport is the direct physical cause of a student's injury due to the coach's hands-on instruction through co-participation. That is the situation presented by this case. Iturralde caused Greener's injury through his own direct physical action during sparring, which is a core activity of Brazilian Jiu Jitsu, an inherently dangerous sport.

The majority concludes that *Knight*'s intentional/reckless standard is not applicable when an instructor causes an injury during hands-on instruction through co-participation. They explain, "Here, Greener was not injured due to a move *he* was challenged or directed to perform; instead, he was injured by his *instructor's* unilateral choices to immobilize him and apply moves which now unacceptably increased the risk of injury to him. These facts distinguish this case from *Kahn*, where the instructor forced the *student* to perform a skill without training."

The dissent noted that, under *Knight v. Jewett*, a co-participant in a sport is only liable for a resulting injury if that co-participant "intentionally injure[d]" the other person or "engage[d] in conduct that [was] so reckless as to be totally outside the range of the ordinary activity involved in the sport." But under the majority's approach, in any of those instances, if an injury occurs while an *instructor* is involved as a co-participant in the same sport, the primary assumption of the risk doctrine does *not* apply, and the instructor will be liable for an injury resulting from a negligently performed move. In the dissent's view, this approach will chill participation in an instruction in inherently dangerous sports.

PAGA; "headless" PAGA claims; individual vs. representative actions; arbitration

Leeper v. Shipt, Inc. (2024) __ Cal.App.5th __ (Second Dist., Div. 1.)

Shipt, Inc. (Shipt) and its parent company Target Corporation (Target) (collectively, appellants) appealed from an order denying their motion to compel arbitration in an action brought against them by respondent Christina Leeper under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) (PAGA). The trial court denied the motion on the basis that Leeper's PAGA action did not allege any individual claims subject to arbitration under the parties' arbitration agreement.

Based on what the Court of Appeal held was the unambiguous, ordinary meaning of the relevant statutory language and the legislative history of that language, it concluded that *every* PAGA action necessarily includes an individual PAGA claim. Accordingly, the court reversed and directed the trial court to enter a new order (1) compelling the parties to arbitrate Leeper's individual PAGA claim and (2) staying the representative PAGA claim portion.

Shipt is an online ordering platform whose members arrange for Shipt "[s]hoppers" to purchase and provide delivery of goods from local merchants. On March 19, 2019, Leeper entered into an independent contractor agreement with Shipt to provide services as a Shipt shopper. The independent contractor agreement references and incorporates a separate arbitration agreement Leeper and Shipt also executed.

The arbitration agreement obligates Leeper and appellants to "resolve [ ] through mandatory, binding arbitration" "any and all disputes, claims, or controversies of any kind and nature between [them]." The arbitration agreement also delegates to the arbitrator several threshold issues, including "disputes about whether any claims, controversies, or disputes between us are subject to arbitration" and "claims ... regarding the scope, interpretation, validity, and enforceability of any Independent Contractor Arbitration Agreement or this Arbitration Agreement." Appellants refer to these provisions as the "delegation clause."

The agreement provided that it was "made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act [(FAA)]."

Leeper filed a complaint against appellants styled as a "representative complaint for injunctive and declaratory relief, civil penalties, and other relief under [PAGA]." The complaint alleges Shipt "misclassified [Leeper] and other similarly situated [w]orkers as independent contractors and, in so doing, has violated multiple provisions of the ... Labor Code." Leeper is alleged to qualify

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as "an 'aggrieved employee'" under PAGA, because she was "employed by Shipt during the applicable statutory period and suffered the Labor Code violations alleged [in the complaint]." On these bases, Leeper alleged a single count for "[PAGA] non-individual penalties." (Capitalization omitted.) She alleged that she "[brought] this PAGA action on a representative, non-individual basis" and "in [her] representative capacity as an aggrieved employee on behalf of the [s]tate and all similarly aggrieved individuals subjected to the [alleged] violations." Leeper alleged her "claim is typical of the claims of the others whom [she] seeks to represent" and that "[her] claims are representative of and co-extensive with the claims of the other aggrieved individuals." She sought "non-individual civil penalties" and "non-individual injunctive and declaratory relief." In the complaint, Leeper also addressed the arbitration agreement as follows: "Because [Leeper] alleges only non-individual PAGA claims on a representative basis, Shipt cannot compel them to arbitrat[ion]."

Appellants filed a motion to compel arbitration of the individual portion of Leeper's PAGA action and, under the delegation clause, any disputes regarding the enforceability of the arbitration agreement. In her opposition, Leeper argued she had not alleged any individual claims, and thus there was nothing to compel to arbitration. She did not respond to appellants' argument that the agreement delegated to the arbitrator any questions regarding the arbitrability of disputes or the enforcement of the agreement. Appellants' motion further sought a stay of the litigation pending arbitration, which Leeper also opposed.

The trial court denied the motion on the basis that "[the] action [was] solely a representative PAGA suit without any individual causes of action" and "[a]s such, the [c]ourt [had] no individual cause of action it may compel to arbitration."

In pertinent part, Labor Code section 2699, subdivision (a) describes a PAGA claim as "a civil action brought by an aggrieved employee on behalf of the employee and other current or former employees." In the Court's view, "The unambiguous and ordinary meaning of the word 'and' is conjunctive, not disjunctive. Thus, the clause 'on behalf of the employee *and* other current or former employees' . . . means that the action described has *both* an individual claim component (plaintiff's action on behalf of the plaintiff himself or herself) *and* a representative component (plaintiff's action on behalf of other aggrieved employees).

Leeper argued that another part of the statute defeats the plain meaning of this conjunctive language and allows the individual employee the option of bringing only a representative claim. Namely, she points to language in section 2699 stating that civil penalties "to be assessed and collected by the [LWDA] ... for a violation of this code, *may, as an alternative*, be recovered through a civil action brought by an aggrieved employee on behalf of the employee and other current or former employees against whom a violation of the same provision was committed." But the Court concluded that this language is referring to PAGA actions seeking civil penalties otherwise only recoverable by the LWDA as an alternative to the LWDA itself collecting those penalties.

The Court also rejected Leeper's claim that section 2699, subdivision (k)(1), which provides, "Nothing in [PAGA] shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under [PAGA]," entitled her to bring only a representative action without also bringing an individual one. But the Court held that this provision refers to non-PAGA claims – i.e., "other remedies" *besides* those set forth in PAGA. It thus speaks to the right of a PAGA plaintiff to bring a non-PAGA individual claim or a class action claim seeking statutory penalties to compensate the plaintiff or class of plaintiffs – not civil penalties largely payable to the LWDA – in addition to a PAGA claim.

Leeper also relied on two California Supreme Court decisions, *Kim v. Reins Int'l Cal., Inc.* (2020) 9 Cal.5th 73, 81 and *Adolph v. Uber Technologies, Inc*. (2023) 14 Cal.5th 1104, 1113, to support her interpretation of the PAGA statute. But the Court held that *Kim* only addressed whether employees had standing to pursue a claim under PAGA if they settle and dismiss their individual claims for Labor Code violations, and *Adolph* likewise only addressed the requirements for PAGA standing. Neither case discussed the distinct issue of what claims are inherently included within a PAGA action.

Negligence; duty; duties of property owners whose property abuts high-speed roadways

Union Pacific Railroad Co. v. Superior Court (2024) 105 Cal.App.5th 828 (Fifth District).

Union Pacific owned property abutting State Route 99 in Madera County. A eucalyptus tree with an eight-foot diameter grew on its property about 21 feet from the right traffic lane. The decedents were both traveling northbound on Route 99 when their vehicles came into contact, then left the roadway and struck the tree, bursting into flame. Their heirs filed a wrongful-death claim against Union Pacific and CalTrans. Union Pacific moved for summary judgment, arguing that it owed no duty of care. The trial court denied the motion. Union Pacific sought and obtained a writ of mandate reversing the order denying summary judgment and directing the trial court to grant the motion.

The Court of Appeal held that imposing a duty of care on property owners to avoid having obstacles or obstructions on their property that could pose a danger to motorists who left the roadway would effectively operate as a taking of a portion of the property without just compensation. Accordingly, the court held that landowners were categorically exempt from a duty of reasonable care to passing motorists.

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