Modern Application of California's Privette Doctrine Following New California Supreme Court Cases

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INTRODUCTION

On August 19, 2021, and September 9, 2021, the California Supreme Court published two new decisions further limiting exceptions to the Privette Doctrine, which set forth hirer liability for injuries to independent contractors or its workers. This article will outline California's Privette Doctrine, the exceptions to it, and the impact of these two new decisions, particularly from the perspective of a landowner-hirer.

DEFINING CALIFORNIA'S PRIVETTE DOCTRINE

In California, an injured worker's exclusive remedy is through the State's worker's compensation scheme. Absent specific circumstances, which are not the focus of this article, the worker may not sue their employer in civil court for their personal injuries. However, can the injured worker sue the landowner-hirer? This is a frequent issue in construction and the California Supreme Court established the Privette Doctrine to govern this situation.[1]

Following *Privette*, a hiring landowner is generally not liable for injuries sustained by a "contract worker" (referring to an independent contractor personally, the independent contractor's employees, the independent contractor's subcontractors personally, the subcontractors' employees, and so forth) working on their property. The principle established by the California Supreme Court is the strong presumption of delegation rooted in the rationale that landowners usually have no right to control an independent contractor's work, contractors consider the cost of safety precautions and insurance in their contract, contractors can obtain worker's compensation to cover injuries, and contractors are hired for their expertise, which the landowner typically lacks.[2] The Privette Doctrine also furthers the strong public policy of fairness in that it is ordinarily unfair to let a contract worker recover from the hirer for the contractor's negligence.

EXCEPTIONS TO THE PRIVETTE DOCTRINE: EXPOSING THE LANDOWNER TO LIABILITY

In the years following the Privette holding, California courts carved out exceptions to the rule: the *Hooker* and *Kinsman* exceptions. In *Hooker*, if the hirer retained control over any part of the contract worker's work and negligently exercised that control in a manner that contributed to the injury, the landowner may be liable.[3] In *Kinsman*, a landowner may be liable if the landowner knew, or should have known, of a concealed hazard on the property that the contractor did not know of and could not have reasonably discovered, and that landowner failed to warn the contractor of the hazard, then that

landowner may be liable.[4]

These new California Supreme Court holdings further limit the *Kinsman* and *Hooker* exceptions.

KNOWN HAZARDS GENERALLY DO NOT EXPOSE THE LANDOWNER TO LIABILITY

In the first case, published on August 19, 2021, *Gonzalez v. Mathis*, the California Supreme Court was asked to determine if a landowner may be liable for injuries from a known hazard on the premises that neither the contractor nor its workers could have avoided through the adoption of reasonable safety precautions. This is in contrast to the issue of unknown hazards handled in the *Kinsman* holding.

In *Gonzalez*, the injured worker was a skylight washer and had been to the landowners home many times to wash the skylight. He had previously put the landowner on notice of a dangerous condition on the roof, but it had not been repaired prior to the incident. The worker was injured by the dangerous condition when he fell off the roof. The California Supreme Court held that "a landowner presumptively delegates to an independent contractor all responsibility for safety, including the responsibility to ensure the work can be performed safely despite a known hazard on the worksite. For this reason, a landowner will generally owe no duty to an independent contractor or its workers to remedy or adopt other measures to protect them against known hazards on the premises."[5]

In reaching this conclusion, the Court emphasized the issue of delegation as the key principle underlying the Privette Doctrine because the hirer presumptively delegates to the contract worker the authority to determine the manner in which the work is to be performed, the contractor also assumes the responsibility to ensure that the worksite is safe, and the work is performed safely. The principle of delegation is so strong under the Privette Doctrine that this "no duty" rule even applies where the contractor is unable to minimize or avoid the danger through the adoption of reasonable safety precautions.[6]

Even though the focus of *Gonzalez* is to contrast unknown hazards in *Kinsman* from known hazards in *Gonzalez*, some analysis of the *Hooker* exception is necessary too. For an injured worker to prevail under *Hooker*, that worker must establish that the hirer retained control over the work and negligently exercised that control in a manner that contributed to the injury. As decided in *Hooker*, merely allowing a dangerous condition to exist is not enough to overcome the strong presumption of delegation. Put another way, passively permitting an unsafe condition to occur does not constitute affirmative contribution. This is because a landowner will normally be less likely than a general contractor to have knowledge regarding the "methods used and requirements of the work being performed" by an independent contractor and is, therefore, less likely to understand whether and what safety precautions are available to protect the contractor's workers from known hazards on the premises.[7]

FURTHER ELABORATION OF HOOKER'S CONCEPTS: RETAINED CONTROL, ACTUAL EXERCISE & AFFIRMATIVE CONTRIBUTION

In the second case, published on September 9, 2021, *Sandoval v. Qualcomm Inc.*, the California Supreme Court elaborated on the retained control exception established in *Hooker*.

The facts of *Sandoval* are technical and complex and are not the focus of this article but involve the power down process of an electrical plant. Qualcomm planned to upgrade certain machinery and a preliminary step was to determine the amperage capacity of the existing equipment. To do this, Qualcomm hired an electrical engineering firm, that in turn hired an electrical repair specialist firm, to perform the amperage capacity test. Qualcomm oversaw and performed the power down process, but intentionally did not power down all terminals since the contract workers were only to work on the one "dead" terminal. After the power down and after Qualcomm relinquished control of the work site to the contracted workers, the electrical engineer opened one of the live terminals to take a picture and that open and live terminal electrocuted one of the contracted workers.

The issue in *Sandoval* was whether Qualcomm retained sufficient control over the work when it performed the power down process such that it was liable for the worker's injuries. The California Supreme Court held no.

The Court reiterated *Hooker's* three key concepts: retained control, actual exercise and affirmative contribution. All three elements must be present. A hirer "retains control" where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contract worker. In *Sandoval*, the issue was not whether Qualcomm retained control over the power down process, and therefore safety conditions, but rather whether Qualcomm retained a sufficient degree of control over the manner of performing the contracted work, which the Court held it did not.[8]

But retained control alone is not enough, a hirer must "actually exercise" that retained control and does so when it exerts some influence over the manner in which the contracted work is performed. Lastly, a hirer "affirmatively contributes" to the injury when the hirer's exercise of retained control contributed to the injury in a way that is not merely derivative of the contractor's contribution to the injury.[9]

The last clarification from the Court in its *Sandoval* holding, and relevant to landowners, is that the *Hooker* exception does not require the hirer to be a landowner, whereas the *Kinsman* exception does.[10]

CONCLUSION

The most important takeaway from the Privette line of cases is the emphasis by the California Supreme Court on the principle of delegation. The Court reiterates in opinion after opinion the strong presumption of delegation when a landowner hires a contractor to perform work on the property. The exceptions to the Privette Doctrine are also construed narrowly in order to promote the public policy that it is ordinarily unfair to let a contract worker recover from the hirer for the contractor's negligence.

1 *Privette v. Sup. Ct.* (1993) 5 Cal.4th 689.
2 *Id.* at 693-700.
3 *Hooker v. Dept. of Trans.* (2002) 27 Cal.4th 198.
4 *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659.
5 *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 57.
6 *Id.* at 41.
7 *Id.* at 50.
8 *Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 274-276.
9 *Id.* at 276-277.
10 *Id.* at 282.

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