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An update on the *Privette* Doctrine

ANALYZING TWO RECENT CALIFORNIA SUPREME COURT CASES ON THIS DOCTRINE AT THE INTERSECTION OF WORKERS' COMP VS. THIRD-PARTY LIABILITY

In late 2021, the California Supreme Court published *Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256 (*Sandoval*) and *Gonzalez v. Mathis* (2021) 12 Cal.5th 29 (*Gonzalez*). These cases provide some long-overdue guidance for courts and litigants to use in applying the *Hooker* and *Kinsman* exceptions to the "*Privette* Doctrine." Although the Supreme Court held that none of the exceptions to *Privette* applied in *Sandoval* and *Gonzalez*, the focus should be on the Court's actual analysis and discussion in these opinions, rather than the fact and case-specific outcomes.

Brief overview of the *Privette* Doctrine

In 1993, the California Supreme Court published *Privette v. Superior Court* (1993) 5 Cal.4th 689, creating an exception to the peculiar-risk doctrine that shields the hirer of an independent contractor from liability for the death or injury of an employee of the contractor. *Privette* and its progeny (collectively, the "*Privette* Doctrine") are based on the presumption that the hirer of an independent contractor automatically delegates to that contractor the responsibility to perform the specified work safely. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590.) Over the past three decades, the courts in this state have expanded the scope of *Privette*'s protection for property owners and general contractors. (See, e.g., *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253 and *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235.)

To invoke the protection of *Privette*, a defendant must only establish that (1) the injured/deceased person was an independent contractor (or working for one) at the time of the injury or death, and (2) the defendant hired the plaintiff or plaintiff's employer (directly or indirectly).

Once established, *Privette* creates a rebuttable presumption that the defendant delegated all its duties to employees of the contractor to the contractor. To defeat this presumption, the plaintiff must establish that one (or more) of the three exceptions to *Privette* applies. If the plaintiff is able to meet this heavy

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burden, the case is taken out of the scope of *Privette*, and general negligence principles apply.

The Supreme Court's three exceptions to *Privette* and corresponding CACI jury instructions

Approximately twenty years after the Supreme Court issued *Privette*, the Court established three narrow "exceptions" to *Privette*'s rule of nonliability. These exceptions are set forth in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (hirer retains control and affirmatively contributes to injury); *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219 (hirer furnishes unsafe equipment); and *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (hirer fails to warn of latent or concealed hazardous condition).

However, the Court provided little guidance on how to interpret and apply the exceptions established in *Hooker, Kinsman*, and *McKown*. As a result, when *Privette* is raised as a defense in cases involving the injury or death of an independent contractor (or employee of an independent contractor), the plaintiff is forced to rely on a confusing and often conflicting body of law to overcome *Privette*'s shield of liability.

The Judicial Council of California created jury instructions for the exceptions to *Privette* in CACI 1009A (*Kinsman* – unsafe concealed condition), 1009B (*Hooker* – retained control), CACI 1009C (nondelegable duty), and 1009D (*McKown* – defective equipment).

CACI 1009C, "nondelegable duty," was the only exception not based on a California Supreme Court decision. Thus, in *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, the Court granted review to resolve a conflict between divisions of the Court of Appeal concerning whether there was a "nondelegable duty" exception to *Privette*. However, instead of resolving this conflict, the Court created a highly fact-specific rule that *Privette* applies when the party that hired the contractor failed to comply with *workplace safety requirements concerning the precise subject matter of the contract*, and the injury is alleged to have occurred as a result of that failure. (*Id.* at 603.)

The Court in *Seabright* distinguished, but did not disapprove of, the appellate decisions upon which CACI 1009C was based. (See *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137; *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661.) Nevertheless, the Judicial Council revoked CACI 1009C after *Seabright* was published.

After *Seabright*, the Court did not address the exceptions to *Privette* or CACI 1009 in detail again until *Sandoval v. Qualcomm* and *Gonzalez v. Mathis* were published in 2021.

Sandoval v. Qualcomm

In *Sandoval v. Qualcomm*, the plaintiff was burned by an arc flash from a live circuit breaker while working at the defendant property owner's energy plant. The defendant, Qualcomm, had hired TransPower Testing, Inc. ("TransPower") to inspect and verify the amperage capacity of Qualcomm's switchgear equipment. TransPower's approved scope of work with Qualcomm was limited to inspecting the main cogen circuit of the switchgear. TransPower hired plaintiff Sandoval to assist with the inspection.

Qualcomm provided a safety briefing to TransPower's team (including Sandoval), and Qualcomm's employees then performed a power-down process to ensure there would be no live electricity flowing through the section of the switchgear that was going to be inspected. Before leaving, Qualcomm's employees confirmed that TransPower was satisfied with the power-down process and understood which circuits were dead (safe) and which ones were live (not safe).

Unbeknownst to Sandoval, TransPower's president then instructed one of his employees to remove the bolted-on back protective panel from a live section of the switchgear adjacent to the main cogen. When Sandoval went to the back of the equipment, not knowing that a live circuit had been exposed, he inadvertently tried to measure the live busbars instead of the main cogen busbars. His metal tape measure triggered an arc flash from the live, exposed circuit, setting him on fire.

Applying CACI 1009B, the instruction crafted for *Hooker*'s "retained control" exception, the jury found that Qualcomm had retained control *over the safety conditions of the worksite*, negligently exercised that control, and that negligence was a substantial factor in causing the plaintiff's injuries. The trial court denied the defendant's motion for judgment notwithstanding the verdict, but granted a new trial as to apportionment of fault. Both parties appealed, and the Court of Appeal affirmed.

The California Supreme Court granted review "to resolve whether a hirer of an independent contractor may be liable to a contractor's employee based only on the hirer's failure to undertake certain safety measures to protect the contractor's employees, and whether CACI No. 1009B accurately states the relevant law." (*Sandoval, supra*, 12 Cal.5th at 527.)

Sandoval's discussion of Hooker's "retained control" exception and CACI 1009B

In *Sandoval*, the Court explained that in order "to establish a duty under *Hooker*, a plaintiff must establish (1) that the hirer retained control over the manner of performance of some part of the work entrusted to the contractor; and (2) that the hirer actually exercised its retained control over that work in a way that affirmatively contributed to the plaintiff's injury." (*Sandoval, supra*, 12 Cal.5th at 538.) The court elaborated on each requirement.

First, the Court explained that irrespective of whether there is a written or informal agreement, the "retained control" requirement under *Hooker* is only met if the hirer retains a sufficient degree of authority over the manner of performance *of the work entrusted to the contractor* and *the hirer's exercise of that authority sufficiently limits the contractor's freedom to perform the work* in the contractor's own manner.

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However, CACI 1009B refers to control over "safety conditions at the worksite," rather than over "the manner of performance of some part of the work entrusted to the contractor," as used in *Hooker*. Thus, the Court in *Sandoval* held that CACI 1009B does not accurately state the *Hooker* "retained control" exception, and provided suggestions for the Judicial Council to use in revising CACI 1009B to align more closely with the Court's original language and intent in *Hooker*. (See *Sandoval*, *supra*, 12 Cal.5th at 538-539.)

The Court also reiterated that it is not enough for the plaintiff to show that the hirer retained a broad general power of supervision, such as the ability to make suggestions regarding the quality of the work, the right to inspect the work, or even the right to stop the work altogether. To succeed in a retained-control argument, the plaintiff must show that the hirer participated, directed, or induced reliance with respect to the contracted work.

After completing its extensive discussion, the Supreme Court held that Qualcomm's performance of the power-down process was not "retained control" over contracted work, because it was not within the plaintiff's employer's scope of work. (See *Sandoval*, *supra*, 12 Cal.5th at 536.) Thus, the Court reversed and remanded with instructions to enter judgment for the defendant notwithstanding the verdict.

Sandoval's explanation of the "affirmative contribution" requirement of the Hooker exception

The Court in *Sandoval* also spent a substantial amount of time distinguishing "affirmative contribution" under *Hooker* from the concept of "substantial factor." While "substantial factor" is a causation inquiry, "affirmative contribution" relates to duty. "If a plaintiff proves that the hirer actually exercised retained control in a way that affirmatively contributed to the contract worker's injury, the *plaintiff establishes that the hirer owed the contract worker a duty of reasonable care* as to that exercise of control." (See *Sandoval*, *supra*, 12 Cal.5th at 276, emphasis added.) Once this duty is established, *Privette* does not bar liability.

The key element is that for affirmative contribution to exist, the hirer's exercise of retained control needs to contribute to the injury in a way that isn't merely derivative of the contractor's conduct. Where the hirer's exercise of retained control contributes to the injury independently of the contractor's contribution (e.g., the hirer promises to undertake a particular safety measure and fails to do so), the hirer's conduct satisfies the affirmative contribution requirement. (*Ibid*.) However, *if the contractor's (not hirer's) conduct is the immediate cause of injury*, the affirmative contribution requirement can be satisfied only if the hirer in some respect induced – not just failed to prevent – the contractor's injury-causing conduct. (*Id*. at 278.)

Gonzalez v. Mathis

In *Gonzalez v. Mathis*, the plaintiff, a professional window washer, fell from a roof and brought a premises liability lawsuit against the defendant homeowner. The trial court rejected the plaintiff's argument that *Kinsman* should apply to a known hazard under certain circumstances, granting summary judgment in favor of the defendant homeowner. The Second District Court of Appeal reversed. Based on dicta in *Kinsman*, the Appellate Court held that a landowner may be liable "where there were no reasonable safety precautions the independent contractor could have taken to avoid or protect against a known hazard." (*Gonzalez, supra,* 12 Cal.5th at 44.)

The Supreme Court granted review. Similar to *Sandoval,* the Court emphasized that "[t]he *Privette* doctrine is concerned with who owes a duty of care to ensure workplace safety – the hirer or the independent contractor – under principles of delegation. (*Id.* at 53, citing *SeaBright*, *supra*, 52 Cal.4th at 599-600.) The Court explained that other than *Kinsman*, its entire *Privette* line of cases considered, "'whether an employee of an independent contractor may sue the hirer (landowner or other hirer) of the contractor under tort theories covered in chapter 15 of the Restatement Second of Torts.'" (*Id.* at 49, citing *Hooker.*) *Kinsman*, on the other hand, considered whether a landowner (not a general contractor or subcontractor) may be liable for injuries sustained by an independent contractor's workers under the premises liability theories in Chapter 13 of the Restatement Second of Torts.

The Court identified *Hooker* and *Kinsman* as the only two exceptions to *Privette*, referring to *McKown* as a companion case to *Hooker* in which the defendant hirer exercised its retained control in a manner that affirmatively contributed to the injury where it requested the independent contractor to use the hirer's own defective equipment in performing the work. (See *Gonzalez, supra,* 12 Cal.5th at 42.) After a detailed discussion, the Court declined to accept the Appellate Court's extension of *Kinsman*'s exception.

The Court limited its holding in *Gonzalez* to hazards on the premises of *which the independent contractor is aware or should reasonably detect*. (*Id.* at 55.) The Court acknowledged that although under *Kinsman*, a landowner's delegation of responsibility for workplace safety to an independent contractor may include a limited duty to inspect the premises, it would not be reasonable to expect a contractor to identify every conceivable dangerous condition. (*Ibid.*)

In addition, the Court in *Gonzalez* clearly stated that its opinion does not address whether and under what circumstances a landowner might be liable to an independent contractor or its workers who are injured as a result of a known hazard on the premises *that is not located on or near the worksite*. (*Ibid.*)

The Court also expressly noted that it was not deciding the issue of whether there may be situations in which a hirer's response to a contractor's notification that the work cannot be performed safely due to hazardous conditions on the worksite might give rise to liability under *Hooker* (e.g., when a hirer's conduct unduly

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coerces or pressures a contractor to continue the work even after being notified that the work could not be performed safely due to a premises hazard). (*Id.* at 546.) Rather, the Court in *Gonzalez* only decided that under the facts presented in that case, neither the defendant homeowner nor any member of his staff exercised any retained control over the plaintiff's work in a manner that affirmatively contributed to the injury simply by being made aware that the roof was slippery and needed repair.

Applying *Sandoval* and *Gonzalez*

Our firm has had the opportunity to apply the *Sandoval* and *Gonzalez* opinions in oppositions to motions for summary judgment, as well as in a case on appeal. Based on our limited experience applying the latest two opinions in the California Supreme Court's line of *Privette* cases, we believe that it is important to clearly identify the narrow scope of the Court's holding in *Gonzalez*, and to understand and adopt the Court's analysis of *Hooker*'s retained control exception in *Sandoval*.

When *Sandoval* and *Gonzalez* were published, we had a case on appeal from the court granting summary judgment based on *Privett*e. The defendants requested supplemental briefing to address the new opinions, and we agreed. Both sides submitted one supplemental letter brief and one letter reply brief. After the court set oral argument, the defense suggested mediation and the case settled. Although we do not know how the Court of Appeal would have viewed each party's analysis of the new opinions, it was informative to see the approach that the defense took in applying *Sandoval* and *Gonzalez*.

In another of our firm's cases, the defendant's motion for summary judgment based on *Privette* was pending when *Sandoval* and *Gonzalez* were published. At oral argument, the defendant asked for supplemental briefing to address *Sandoval* and *Gonzalez*. The trial court granted the request. However, after supplemental briefing, the court still entered its original tentative ruling and denied the motion.

Sandoval and *Gonzalez* highlight the need for a legislative solution to *Privette*

The California legislature enacted Labor Code section 3852 in order to protect the rights of people who are injured on the job. This section provides, in pertinent part, that "[t]he claim of an employee […] for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer..." (Lab. Code, § 3852.)

The California Supreme Court failed to acknowledge the statutory right provided by Labor Code section 3852 in *Privette* and its subsequent cases expanding it. For nearly thirty years, *Privette* and its progeny have been depriving injured employees of contractors, and families of injured or deceased employees of contractors, of their statutory rights. The California Supreme Court's attempt to clarify and explain the *Privette* doctrine and the exceptions to it in *Sandoval* and *Gonzalez* highlights the need for a legislative fix to return the statutory rights afforded by Labor Code section 3852 to plaintiffs in jobsite injury cases.

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