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PERSPECTIVE

State high court: No new exception to the Privette doctrine

By Alan H. Packer and Jack M. Rubin

While singer Johnny Mathis was in the hospital, a professional window washer was at his house to clean a skylight over an indoor pool of Mathis's home. The window washer, a specialist in hard-to-reach windows and skylights, had cleaned the skylight many times over the years, but slipped and fell from the roof due to known hazards on the roof (slippery conditions that he had previously disclosed to the housekeeper), and sued Mathis for his injuries.

Last month, in *Gonzalez v. Mathis*, 2021 DJDAR8605 (Aug. 19, 2021), the California Supreme Court ruled on who should bear the risk of the injury — the owner of the property, or the independent contractor on whom the owner relied to perform the work in a safe manner. The Supreme Court's ruling in favor of Mathis confirms that landowners are entitled to rely on the expertise of the contractors they hire, even when there are known hazards on the job.

At issue was whether California courts should recognize a new exception to the general rule in California (commonly known as the Privette doctrine) that hirers of independent contractors are generally not liable for injuries sustained by employees of the independent contractors on the job. This rule comes from the California Supreme Court's 1993 decision in *Privette v. Superior Court*, 5 Cal. 4th 689, and its progeny, founded on the principle that a hirer of an independent contractor presumptively delegates to the contractor all responsibility for workplace safety. In Privette, when a schoolteacher hired a roofer to work on his rental home, he was presumed to have delegated responsibility for jobsite safety to the roofer, and he was not liable to an employee of the roofer that was injured on the job (carrying buckets of hot tar up a ladder to the roof).

Before Gonzalez, the California Supreme Court had issued seven decisions since Privette delineating the parameters of the Privette doctrine. In only two of those decisions did the court recognize an exception to the general rule. First, in *Hooker v. Department of Transportation*, 27 Cal. 4th 198 (2002), the court held that a hirer (Caltrans) may be liable when it retains control over jobsite safety and negligently exercises that retained control in a manner that affirmatively contributes to an injury to a worker (a crane operator). Second, in *Kinsman v. Unocal Corp.*, 37 Cal. 4th 659 (2005), the court held that a landowner (Unocal) that hired an independent contractor (working on Unocal's refinery in Wilmington, California) may be liable if the landowner knew, or should have known, of a concealed hazard on the property not known or reasonably discoverable by the contractor, and the landowner failed to warn the contractor of the hazard. (Kinsman worked for a scaffolding contractor; during the course of his work, he was exposed to airborne asbestos produced by other trades removing insulation from pipes and machinery.)

Against this backdrop, Gonzalez involved an injury resulting from a known hazard on the property at issue — slippery roof conditions due to a dilapidated roof, with limited paths of access to the skylight. The appellate court sought to establish a third Privette exception, that a hirer can be liable for injuries sustained by a worker on the job when the work exposes the independent contractor's employees to a known hazard. In a unanimous decision, the California Supreme Court reversed, holding that unless a landowner retains control over the contractor's work and negligently exercises that retained control in a manner that affirmatively contributes to the injury, the landowner will not be liable to an injured worker resulting from a known hazard. Otherwise, the court reasoned, it would force every hirer of a contractor to determine whether the expert contractor it had hired had adopted reasonable safety precautions. The court emphasized that adopting the exception the appellate court proposed would vastly expand hirer liability and create tension with decades of case law establishing a hirer is not liable where it is merely aware of a known hazardous condition or practice on the worksite.

The court did caution, however, that a hirer can be held liable if it exercises retained control over part of the contracted-for work — such as by directing the manner in which the contractor performs the work; interfering with the contractor's decisions regarding what safety measures to adopt; requesting that the contractor use the hirer's own defective equipment; prohibiting the contractor from implementing a safety precaution; or reneging on a promise to remedy a known hazard — in a manner that affirmatively contributes to the injury. Further, the court declined to opine on how it would rule under several different fact patterns, such as if the hirer pressures a contractor to continue the work even after being notified that that work could not be performed safely due to a hazard.

Gonzalez provides an important clarification of how the Privette doctrine applies to situations involving known property hazards. The California Supreme Court confirmed that, in such situations, the hirer of a contractor (whether a commercial landowner, a builder, or even a legendary singer) can rely on the expertise of the contractor it hires, and it will not be liable for jobsite injuries to the contractor's workers unless the hirer retains control and contributes to the injuries. ■

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