Appellate Reports

Privette: The Supreme Court clarifies and narrows its exceptions

By Jeffrey I. Ehrlich

***Gonzales v. Mathis* (2021) 12 Cal.5th 29 (Cal. Supreme)**

Who needs to know about this case: Lawyers litigating cases with potential *Privette* issues.

Why it's important: Holds that landowner – including a residential homeowner – is not liable to an independent contractor or the contractor's employees for injuries resulting from a known hazard on the premises, even if there were no safety precautions that could have been adopted to avoid or minimize the hazard.

Synopsis: Over a five-year period Mathis, a homeowner, hired Gonzales, an independent contractor, to wash a large skylight in the roof. Access to the roof was from a ladder affixed to the house. To the right of the top of the ladder, a three-foot-high parapet wall runs parallel to the skylight. The path between the edge of the roof and the parapet wall is approximately 20 inches wide. Gonzalez would walk between the parapet wall and the edge of the roof and use a long, water-fed pole to clean the skylight. Gonzalez testified that he did not walk on the other side of the parapet wall – i.e., between the parapet wall and the skylight – because air conditioning ducts, pipes, and other permanent fixtures made the space too tight for him to navigate.

On August 1, 2012, at the direction of Mathis's housekeeper, Gonzalez went up on to the roof to tell his employees to use less water while cleaning the skylight because water was leaking into the house. While Gonzalez was walking between the parapet wall and the edge of the roof on his way back to the ladder, he slipped and fell to the ground, sustaining serious injuries.

Gonzalez contended that his accident was caused by the several dangerous conditions on the roof: (1) a lack of maintenance caused the roof to have a very slippery surface made up of "loose rocks, pebbles, and sand"; (2) the roof contained no tie-off points from which to attach a safety harness; (3) the roof's edge did not contain a guardrail or safety wall; and (4) the path between the parapet wall and the roof's edge was unreasonably narrow and Gonzalez could not fit between the parapet wall and the skylight due to obstructing fixtures. Gonzalez testified that he knew of these conditions since he first started cleaning the skylight, although the roof's condition became progressively worse and more slippery over time.

The trial court granted summary judgment for the homeowner. The Court of Appeal reversed. The Supreme Court reinstated the summary judgment.

There is a strong presumption under California law that a hirer of an independent contractor delegates to the contractor all responsibility for workplace safety. (See generally, *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*); *SeaBright Ins. Co. v. US Airways, Inc*. (2011) 52 Cal.4th 590 (*SeaBright*).) This means that a hirer is typically not liable for injuries sustained by an independent contractor or its workers while on the job.

The Court has recognized two broad exceptions to the *Privette* doctrine: (1) in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, the Court held that a hirer may be liable when it retains control over any part of the independent contractor's work and negligently exercises that retained control in a manner that affirmatively contributes to the worker's injury; (2) In *Kinsman v. Unocal Corp*. (2005) 37 Cal.4th 659, it held that a landowner who hires an independent contractor 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 the landowner failed to warn the contractor of the hazard.

The Court granted review in this case to decide whether to recognize a third broad exception – whether a landowner may also be liable for injuries, to an independent contractor or its workers, that result from a known hazard on the premises where there were no reasonable safety precautions it could have adopted to avoid or minimize the hazard. The Court concluded that permitting liability under such circumstances would be fundamentally inconsistent with the *Privette* doctrine.

When a landowner hires an independent contractor to perform a task on the landowner's property, the landowner presumptively delegates to the contractor a duty to ensure the safety of its workers. This encompasses a duty to determine whether the work can be performed safely despite a known hazard on the worksite. As between a landowner and an independent contractor, the law assumes that the independent contractor is typically better positioned to determine whether and how open and obvious safety hazards on the worksite might be addressed in performing the work. Where the hirer has effectively delegated its duties, there is no affirmative obligation on the hirer's part to independently assess workplace safety. Thus, unless a landowner retains control over any part of the contractor's work and negligently exercises that retained control in a manner that affirmatively contributes to the injury, it will not be liable to an independent contractor or its workers for

an injury resulting from a known hazard on the premises.

Sandoval v. Qualcomm Inc. (2021) __ Cal.5th __ (Cal. Supreme.)

Who needs to know about this case: Lawyers litigating *Privette* cases involving a claim that the hirer "affirmatively contributed" to the plaintiff's injuries.
Why it's important: Explains and narrows the scope of the *Hooker* "retained control/affirmative contribution" exception to *Privette*; disapproves CACI No. 1009B, which purports to define the elements of a *Hooker* claim.
Synopsis: Plaintiff Sandoval was an electrical-parts specialist working for an independent contractor (Transpower) hired by the property owner (Qualcomm). Sandoval suffered severe burns when he attempted to inspect a circuit that he did not realize was "live." Transpower had negligently removed a protective cover over the circuit, and was held liable to Sandoval. The issue in the case was whether Qualcomm was also liable on a "retained control/affirmative contribution" theory, because it was involved in powering down the circuits involved.

Qualcomm planned to upgrade its onsite turbine power generators. To accommodate the upgrade, it hired Transpower to inspect and verify the amperage capacity of Qualcomm's existing switchgear equipment. When Transpower was unable to locate some of the "busbars" (metal bars that conduct electricity like power cables) within the main "cogen" circuit, Transpower hired Sandoval to assist Transpower in locating and inspecting the circuit. Qualcomm agreed to the inspection from the front and back of its cabinet, but did not agree to have Transpower inspect or expose any other circuits.

Qualcomm performed the power-down process for the cogen circuit, and before the inspection reminded Transpower's crew that some circuits would remain live. After the power down, and before Sandoval began his work, a Transpower employee directed a crew member to remove the back protective panel from a circuit adjacent to the cogen circuit because he wanted to photograph it for an unrelated prior inspection. He did not tell anyone else that he was exposing a live circuit.

During the inspection, Sandoval had difficulty in judging the size of some of the main cogen busbars from the front, so he walked to the back of the cabinet. The metal tape measure that Sandoval held triggered an arc flash from the live circuit, badly burning Sandoval.

Sandoval sued Qualcomm and Transpower for negligence and premises liability. The jury found for Sandoval, apportioning 45% of the fault to Qualcomm, 45% to Transpower, and 9% to Sandoval. The trial court denied Qualcomm's JNOV motion, but granted a new trial on apportionment. The Court of Appeal affirmed. The Supreme Court reversed, holding that Qualcomm was entitled to JNOV.

The Court acknowledged that, over time, it had recast the underlying rationale for the *Privette* doctrine as based on delegation of the duty to perform the work safely, as opposed to worker's compensation. "Because we typically expect contractors to perform the contracted work more safely than hirers, we have endorsed a 'strong policy' of presuming that a hirer delegates all control over the contracted work, and with it all concomitant tort duties, by entrusting work to a contractor."

"But the *Privette* doctrine has its limits. Sometimes a hirer intends to delegate its responsibilities to the contractor in principle but, by withholding critical safety information, fails to effectively delegate its responsibilities in practice; or a hirer delegates its responsibilities only partially by retaining control of certain activities directly related to the contracted work. When such situations arise, the *Privette* doctrine gives way to exceptions. In *Kinsman*, we articulated the rule that a landowner-hirer owes a duty to a contract worker if the hirer fails to disclose to the contractor a concealed premises hazard. And in *Hooker*, we articulated the rule that a hirer owes a duty to a contract worker if the hirer retains control over any part of the work and actually exercises that control so as to affirmatively contribute to the worker's injury.

Because the record here leaves no question that Qualcomm both turned over control of the worksite and sufficiently disclosed all relevant concealed hazards before Sandoval's injury occurred, the Court presumed that Qualcomm owed Sandoval no tort duty respecting his injury, subject only to the retained-control exception.

The Court ultimately held that the retained-control exception did not apply, "dwell[ing] at some length on the meaning of *Hooker*'s three key concepts: retained control, actual exercise, and affirmative contribution."

A hirer "retains control" where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. "Retained control" refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform (the "contracted work"). A hirer's authority over the contracted work amounts to retained control only if the hirer's exercise of that authority would sufficiently limit the contractor's freedom to perform the contracted work in the contractor's own manner. Hence, the hirer may retain a broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance of the independent contract – including the right to inspect, the right to stop the work, the right to make suggestions or recommendations as to details of the work, the right to prescribe alterations or deviations in the work, – without incurring a retained control duty.

While the parties dispute whether Qualcomm retained control "over safety conditions at the worksite," the key question is whether the hirer retained a sufficient degree of control over the manner of performing the contracted work.

Under *Hooker*, for the plaintiff to succeed, he or she "must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury."

A hirer "actually exercise[s]" its retained control over the contracted work when it involves itself in the contracted work "such that the contractor is not entirely free to do the work in the contractor's own manner." (Rest.3d Torts, *supra*, § 56, com. c, p. 392.) In other words, the hirer must exert some influence over the manner in which the contracted work is performed. Unlike "retained control," which is satisfied where the hirer retains merely the *right* to become so involved, "actual exercise" requires that the hirer in fact involve itself, such as through direction, participation, or induced reliance.

"Affirmative contribution" means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury. Where the contractor'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.

A hirer's conduct also satisfies the affirmative contribution requirement where the hirer's exercise of retained control contributes to the injury independently of the contractor's contribution (if any) to the injury. The critical factor here is the relationship between the hirer's conduct and the contractor's conduct, not whether the hirer's conduct, assessed in isolation, can be described as "affirmative conduct." Importantly, neither "actual exercise" nor "affirmative contribution" requires that the hirer's negligence (if any) consist of an affirmative act. The hirer's negligence may take the form of any act, course of conduct, or failure to take a reasonable precaution that is within the scope of its duty under *Hooker*.

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.

Because the record showed that Qualcomm both retained control over some part of Transpower's work and actually exercised that control in a way that affirmatively contributed to Sandoval's injury, his claim was barred by *Privette* and Qualcomm was entitled to JNOV.


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