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PERSPECTIVE

Ruling says no to new broad exception to Privette doctrine

By Aaron L. Osten

The California Supreme Court recently rejected what it characterized as a "broad third exception" to the long-standing *Privette* doctrine which bars recovery in tort for employees of independent contractors in *Gonzalez v. Mathis*, 2021 DJDAR 8605 (Aug. 19, 2021). *See Privette v. Superior Court*, 5 Cal. 4th 689 (Cal. 1993).

At first blush, *Gonzalez'* 35-page opinion appears lopsided in favor of defendants, doubling down on *Privette's* "strong presumption" of delegation by piling the established duties and responsibilities of landowner-hirers on contractors, the latter of whom are described in blanket fashion as the "experts" in workplace safety.

Yet, once the layers are peeled back, *Gonzalez* proves to be more bark than bite. Despite all its rhetoric, the decision ultimately reaffirms existing law that if a hirer "retains control" over the work in a manner which "affirmatively contributes" to a contractor's injuries, then Privette does not apply (*Hooker v. Department of Transportation*, 27. Cal. 4th 198 (2002)). This exception has existed for decades, providing ample avenues for tort recovery against landowner/ hirers. *Gonzalez* does nothing to alter that.

What *Gonzalez* does provide is a narrow, fact-based holding that addresses "whether a landowner may be liable for injures to an independent contractor … that result from a known hazard on the premises where there were no reasonable safety measures [the contractor] could have adopted to avoid or minimize the hazard."

While answering this question in the negative, *Gonzalez* paints a far broader and over-generalized analysis regarding delegation of workplace safety, almost exclusively piling responsibility for addressing known safety hazards on contractors, even though the hazard cannot be corrected by the contractor through reasonable safety measures: "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." It is from this overbroad legal assumption, as opposed to the case-specific facts such as the applicable work contract, party admissions, and worksite/safety policies and procedures, from which *Gonzalez* primarily operates when casting its pro-hirer theme.

In *Gonzalez*, a landowner hired a window washing contractor to clean a skylight at his private, one-story residence. The contractor advertised his business as specializing in hard to reach skylights. To clean the subject skylight, the contractor had to climb a ladder to reach a flat sand and gravel roof, where a three-foot parapet wall (which was installed by the landowner for aesthetic purposes to obscure air conditioning ducts and pipes) ran parallel to the skylight. The parapet wall left a 20-inch-wide space between the edge of the roof and the parapet wall, where the contractor would be required to stand while using a long water-fed pole to wash the skylight.

The contractor had cleaned the subject skylight for several years before the incident, but the roof, specifically the 20-inch space where workers had to stand, had continued to deteriorate and become slippery over time. Thus, the contractor told the landowner's housekeeper and accountant that the roof was dangerous and needed to be repaired three months before the incident. The landowner did not dispute he had notice, yet did nothing to fix the roof, and the contractor was injured when he slipped off the roof while giving instruction to his workers about cleaning the skylight.

The trial court granted summary judgment for the landowner holding no duty under Privette. The Court of Appeal reversed, relying on *Kinsman v. Unocal Corp.*, 37 Cal. 4th 659 (2005), which provides: "the hirer can be liable when he exposes a contractor to a known hazard that cannot be remedied through reasonable safety precautions," and also held that material disputed facts existed as to whether the contractor could have taken additional safety measures.

The Supreme Court reversed, noting that Privette "holds a strong presumption that a hirer delegates to an independent contractor all responsibility for workplace safety" and "a landowner owes no duty to the contractor … to remedy a known hazard on the premises of take other measures that might provide protection against the hazard." The Supreme Court said that the appellate court was adopting a "third broad exception" to Privette, which would "vastly expand hirer liability and create considerable tension with decades of case law establishing that a hirer is not liable where it is merely aware of the hazardous condition."

Although the landowner was made aware of the dangerous condition and still failed to fix it, *Gonzalez* reasoned the landowner "never promised to repair the roof," the contractor never "requested repairs as a condition of continuing the work," and that "passively permitting an unsafe condition to occur … does not constitute affirmative contribution." Further, the court noted that, should the Court of Appeal decision stand, a Catch-22 situation would arise where a landowner could avoid liability under Hooker by declining to protect against the hazard, only to be potentially liable for failing to do so.

Unique to *Gonzalez* is the discussion of the general principles of premises liability under Section 343A of the Restatement Second of Torts ("Known or Obvious Dangers"), which the court noted does not trigger liability against a landowner for injuries by a contractor. This is because, as the court had previously explained

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in Kinsman, despite Section 343 stating that a landowner is liable for hazards which it knows are on the premises and which persons "will fail to protect themselves against," it does not apply to independent contractors because "once the contractor becomes aware of the … hazard, it becomes the contractor's responsibility to take whatever precautions are necessary to protect itself and its workers from the hazard." However, after relying upon its analysis in Kinsman to refute the applicability of Section 343, the court then paradoxically claims that because Kinsman involved a concealed hazard (as opposed to a known hazard), that decision is inapplicable, and that the Court of Appeal erred by using it "to create a third exception to the Privette doctrine."

Instead of relying on Kinsman, *Gonzalez* focuses heavily on delegation, stating "a rule establishing hirer liability for a known hazard where there were no reasonable safety precautions the contractor could have adopted to protect against the hazard … would turn *Privette's* presumption of delegation on its head by requiring the hirer to affirmatively assess workplace safety." This specious claim begs the question: If the contractor cannot reasonably remedy the hazard, and the landowner has no obligation to fix it, then does the contractor simply work at a dangerous site or just walk away from the job?

Gonzalez recognizes this dilemma, but fails to reconcile it. The court writes, "We acknowledge that there will sometimes be financial and other real world factors that might make it difficult for an independent contractor to raise safety concerns … or to simply walk away from a job it has deemed unsafe. But independent contractors can typically factor the cost of added safety precautions or any increased safety risks into the contract price … They can also purchase workers' compensation to cover any injuries while sustained on the job."

In effect, the Supreme Court is setting aside the traditional "cost to make an injured party whole" legal incentive created through litigation which encourages landowners to maintain their property in a reasonably safe condition for a system by which landowners are permitted to pay some fractional amount of workers' compensation premiums to immunize it from the inevitable (and often severe) contractor injuries.

Telling a contractor to factor in costs for hazards which it cannot reasonably repair, or purchase workers' compensation to cover the inevitable injury to one of its workers, is tone deaf to the "real world factors" *Gonzalez* notes. At times, *Gonzalez* implies that contractors need to just deal with dangerous worksites, and if they get injured, so be it. Workers' compensation will pick up the tab.

Gonzalez relies on a case lineup of the usual suspects: *SeaBright Ins. Co. v. US Airways, Inc.*, 52 Cal. 4th 590 (2011) (due to *Privette's* presumption of delegation to the contractor to control the work, the contractor also assumes the responsibility to ensure that the workplace is safe); *Camargo v. Tjaarda Dairy*, 25 Cal. 4th 1235 (2001) (no liability even where the hirer was partially to blame due to its negligent hiring); *Delgadillo v. Television Center, Inc.*, 20 Cal. App. 5th 1078 (2018) (even where unsafe condition exists on the premises due to the landowner's failure to comply with specific statutory duties landowner is not liable); *Khosh v. Staples Construction Co.*, Inc., 4 Cal. App. 5th 712 (2016) (no liability despite failure by hirer to follow through on a general promise to undertake safety measures); *Brannan v. Lathrop Construction Associates Inc.*, 206 Cal. App. 4th 1170 (2012) (hirer not liable because it never directed contractor to climb over a dangerous scaffold despite scaffold being the only means of access to work); *Madden v. Summit View, Inc.*, 165 Cal. App. 4th 1267 (2008) (hirer not liable despite failing to install a protective railing because it did not prevent the railing from being erected).

Nonetheless, *Gonzalez* finally concedes it has not altered any existing law: "of course, if there is evidence that the landowner exercised any retained control over any part of the contractor's work in a manner that affirmatively contributed to the injury, the landowner's action would fall within the established Hooker exception to the Privette doctrine." While *Gonzalez* could have ended its discussion there, it continues by discussing the "affirmative contribution" factor, overemphasizing that "courts have consistently reaffirmed that '[a] hirer's failure to correct an unsafe condition' in insufficient, by itself, to establish liability," but then again concedes that many courts have recognized and found liability under the affirmative contribution exception. *E.g., McKown v. Wal-Mart Stores, Inc.*, 27 Cal. 4th 219 (2002); *Ruiz v. Herman Weissker, Inc.*, 130 Cal. App. 4th 52 (2005); *Ray v. Silverado Constructors*, 98 Cal. App. 4th 1120 (2002). While such decisions are still perfectly good law arguably capable of supporting a *Gonzalez* holding that upheld the Court of Appeal's ruling, there is scant discussion of them as they obviously do not support the Supreme Court's narrative.

In the end, *Gonzalez* is so narrow in its facts it leaves the door wide open to distinguish. The holding only applies to "landowner-hirers" (not hirers) and known risks which the contractor cannot reasonably correct. Moreover, the Supreme Court notes several case-specific facts underlying its reasoning why there was no delegation of work place safety, such as the contractor specifically advertising his business in hard to reach skylights, that the contractor's "marketing materials stated that he trains his employees to take extra care … with their own safety when cleaning windows," and that the contractor had cleaned the subject skylight for several years prior to the subject incident and not once specifically requested the roof be repaired. While one sore spot in the holding is that the contractor did advise the owner's representatives of the roof's dangerous condition well before the incident, and nothing was done in response, the court clarifies that such an omission by a landowner-hirer is not always outside the bounds of liability, and re-affirms existing law: "We do not decide whether there may be situations, not presented here, 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 … We decide only that neither [the landowner-hirer] nor any member of his staff exercised any retained control over [the contractor's] work in a manner that affirmatively contributed to [the contractor's] injury simply by being made aware that the roof was slippery and needed repair." ■