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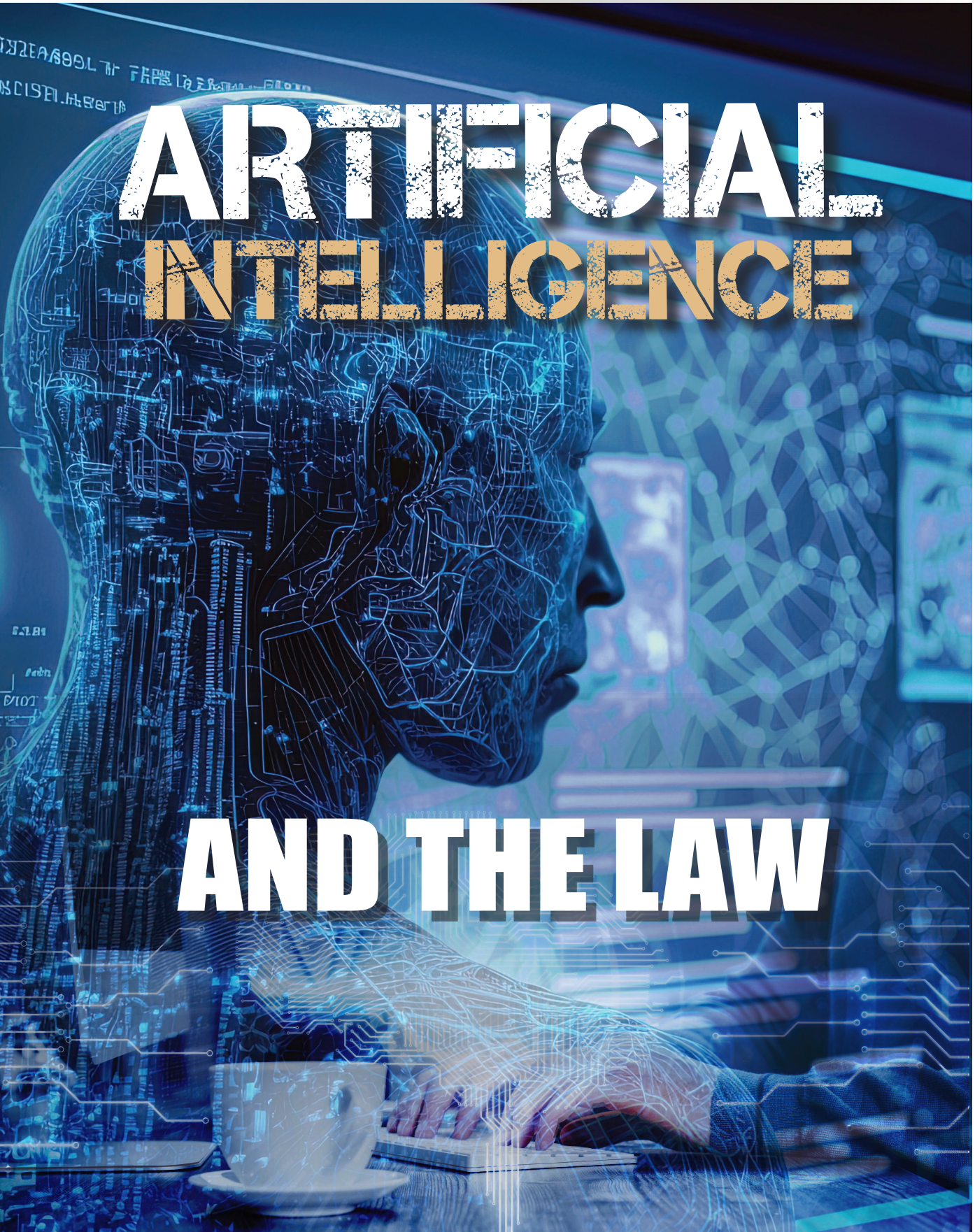

ARTIFICIAL INTELLIGENCE AND THE LAW

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New Developments in Understanding and Avoiding *Privette*

The *Privette* doctrine has been the bane of many a plaintiff lawyer's existence since its creation in 1993. While certain long-standing exceptions to the doctrine exist, the application of those exceptions is often hotly disputed.

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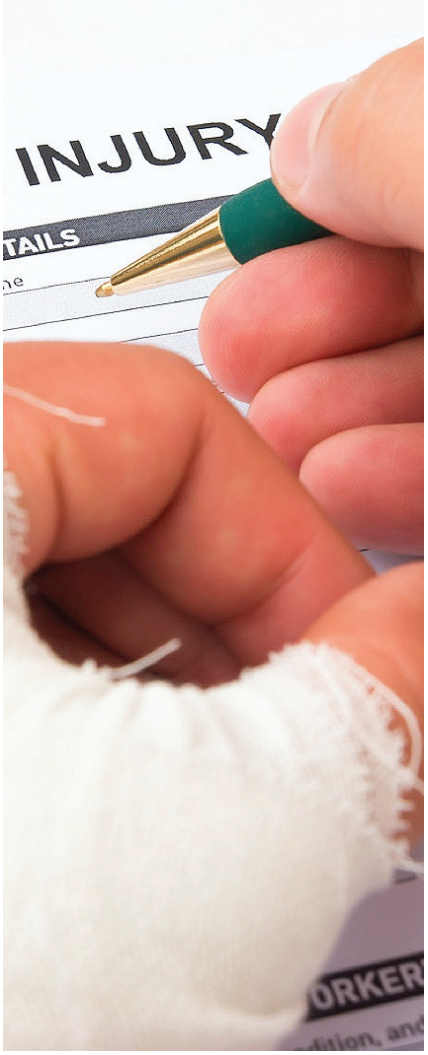

In the past year and a half, multiple California Courts of Appeal published decisions analyzing the applicability of *Privette* and its exceptions. Two of those decisions made it even more difficult for plaintiffs to recover under *Privette*, while three of the decisions made it easier. This article provides a brief overview of *Privette*, its exceptions, and the recent decisions.

Overview of *Privette*

A homeowner is having some work done on his property and hires a roofing contractor, which in turn hires a piping subcontractor. A neighbor walks by, and one of the roofers accidentally drops a brick on the neighbor's head. Can the neighbor successfully sue the roofing contractor? Absolutely. Can the neighbor successfully sue the homeowner that hired the roofing contractor, even though the homeowner was not negligent in dropping the brick? Also yes.

But what happens when the *piping subcontractor's employee* is hit by the brick? Can that employee then successfully recover against the homeowner, or even against the roofing contractor? The answer to that, in light of *Privette*, is no.

Under the peculiar risk doctrine, a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages where the contractor's negligent performance of the work causes injury to others. However, *Privette* created an exception to the peculiar risk doctrine, such that this liability does not extend to employees of an independent contractor, who must instead seek recovery from the workers' compensation system. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 691.)

Privette, and the multitude of cases that have followed and expanded its scope, thus prevent independent contractors, and employees of independent contractors, from recovering against general contractors and property owners who were either directly or indirectly involved in hiring the plaintiff or his employer. (See *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253; *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235; *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590.)

Exception to *Privette*: Retained Control

What if the injured piping subcontractor's employee can show that the homeowner controlled the manner in which the work was to be performed? Then, the *Hooker* exception might apply, allowing the homeowner to be brought back into the case.

In *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, the decedent was working for a contractor hired by the California Department of Transportation ("Caltrans") at the time of his death. The decedent's family filed a wrongful death suit against Caltrans, alleging that Caltrans was responsible because, though it hired an independent contractor to perform the crane work, Caltrans controlled the manner in which the crane work was to be performed. The Court held that a hirer is liable to an employee of a contractor insofar as (1) the hirer retained control *and* (2) the hirer's exercise of retained control *affirmatively contributed* to the employee's injuries. (*Id*. at 202.)

Exception to *Privette*: Concealed Hazard

What if the homeowner's roof has toxic chemicals on it, a hazard which is known to the homeowner but not known to the independent contractor? The concealed hazard exception might apply here, allowing the homeowner to be held liable.

To successfully apply this exception, the plaintiff must prove that (1) the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property; (2) the contractor did not know and could not have reasonably discovered this hazardous condition, and (3) the landowner failed to warn the contractor about this condition. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664.)

Analysis of the Retained Control and Concealed Hazard Exceptions: *Miller v. Roseville Lodge No. 1293* (2022) 83 Cal.App.5th 825

Miller v. Roseville Lodge No. 1293 (2022) 83 Cal.App.5th 825 is one of the new *Privette*-related opinions that is unhelpful for plaintiffs. The facts of the case are as follows: Roseville Lodge hired Gelatini to move an ATM. Miller, who was actually going to perform the work on behalf of Gelatini, arrived on the jobsite to find that there was no ladder. Miller claimed that the Lodge's bartender, Dickinson, told him that they did not have a ladder and that a scaffold on the site was safe to use as a substitute. One of the scaffold's wheels remained unlocked while Miller attempted to use it, causing him to fall and hit his head.

Appealing the trial court's granting of summary judgment with respect to his negligence claims against the Lodge and Dickinson, Miller argued that *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 21 was directly on point insofar as the defendants had provided him unsafe equipment in a manner that affirmatively contributed to his injury.

The Court held that *McKown* was distinguishable because Dickinson did not ask that the scaffold be used—he at best offered the scaffold for use, and "passively permitting an unsafe condition to occur…does not constitute affirmative contribution" within the meaning of the retained control exception. (Miller, *supra*, 83 Cal. App.5th at 837.) "There is a difference between *asking* a contractor to use your equipment and *allowing* a contractor to use your equipment." (*Id*.)

The Court further held that the hazardous condition exception did not apply, because the fact that the scaffold had wheels was not concealed, and the fact that the scaffold could move if the wheels were not locked was reasonably ascertainable to Miller and his employer.

Analysis of the Concealed Hazard Exception: *McCullar v. SMC Contracting, Inc.* (2022) 83 Cal. App.5th 1005

McCullar is yet another defense-friendly case. In *McCullar v. SMC Contracting, Inc.* (2022) 83 Cal.App.5th 1005, SMC hired Tyco to install an automatic fire sprinkler system at a worksite. McCullar, a Tyco employee, arrived at the worksite to find the floor covered in ice due to work that SMC had been performing the night prior. McCullar asked the SMC superintendent, "What are we going to do about the ice situation?" In response, he was told to "go back to work." McCullar also asked Tyco's field superintendent what was going to be done about the ice, and was told, "What can I tell you…Get the job done."

McCullar then proceeded to slip and injure his shoulder while trying to use a ladder on the ice-covered floor, and subsequently brought suit against SMC. McCullar appealed the trial court's granting of summary judgment, claiming that *Privette* did not protect SMC because SMC retained control over Tyco's work and negligently exercised this control by causing the ice to form on the floor, and telling McCullar to go back to work after he notified SMC about the ice.

The Court of Appeal affirmed summary judgment, holding that the *Hooker* exception did not apply. The Court accepted that SMC caused the ice to form on the floor, but concluded that was insufficient to show that SMC's exercise of its retained control affirmatively contributed to McCullar's injuries. Since McCullar acknowledged that he was aware of the ice before he suffered his injuries, the Court found that Tyco was aware of a hazard on the premises and thereby was delegated the responsibility of employee safety.

The Court ultimately ruled that "even when the hirer of a contractor negligently creates a known workplace hazard…the contractor still retains the responsibility for assessing whether its workers can perform their work safely." (*Id*. at 1017.)

Though McCullar argued that SMC's order to "go back to work" affected this issue, the Court held that "SMC's general direction 'to go back to work' did not interfere with or otherwise impact McCullar's decisions on how to safely perform his work." (*Id*. at 1018.) The Court noted that SMC did not direct McCullar to place a ladder on the ice or prohibit McCullar from removing the ice.

Thus, the Court found that Tyco had authority to remove the ice and the responsibility to take the necessary precautions to protect its employees from any hazard posed by the ice.

Analysis of the Retained Control Exception: *Brown v. Beach House Design & Development* (2022) 85 Cal.App.5th 516

Finally, we've reached the recent decisions that are beneficial for plaintiffs. In late 2022, the Second District Court of Appeal provided clarity about the retained control exception. In *Brown v. Beach House Design & Development* (2022) 85 Cal. App.5th 516, a general contractor hired a scaffolding company to erect a scaffolding on a construction project, as well as a carpentry company. During the work, one of the carpenters fell from the scaffolding, which was negligently constructed. The carpenter sued the scaffolding company and the general contractor.

The Court of Appeal reversed the trial court's entry of summary judgment for the defense, ruling that there

were triable issues as to (1) whether the general contractor undertook to supply a scaffolding for the carpenter; (2) whether the general contractor had fully delegated the duty to provide and maintain the scaffolding to a subcontractor; and (3) whether the general contractor had negligently exercised retained control in a manner that contributed to the injury.

Due to numerous reasons–including because the carpentry company was to perform services on the second and third floors of the building, which required the use of scaffolding, because the carpentry company used the scaffolding before and after the incident, and because the general contractor had requested the scaffolding subcontractor make changes to the scaffolding to allow the carpentry company to perform its work–the Court found that there was a reasonable dispute as to whether the general contractor undertook to provide scaffolding for the plaintiff.

The Court further held that the contract between the general contractor and scaffolding company was unclear as to who had the obligation to maintain the safety of the scaffolding. If the general contractor fully delegates to the third party the duty to provide safe equipment, the third party is responsible for any failure to take reasonable precautions to keep the equipment in a safe condition. But if the general contractor does not fully delegate the task of providing safe equipment, the retained control exception may apply.

In light of the above, the Court also held that if a jury were to conclude that the general contractor assumed a duty to provide scaffolding for the carpentry company, and that it failed to fully delegate to the scaffolding subcontractor the duty to maintain the scaffolding in a safe condition, a jury could reasonably conclude that the general contractor's failure to inspect and maintain the scaffolding gave rise to liability.

Analysis of the Retained Control Exception: *Degala v. John Stewart Co.* (2023) 88 Cal.App.5th 158

Earlier this year, the First District Court of Appeal published another beneficial decision on the retained control issue. In *Delgala v. John Stewart Co.* (2023) 88 Cal.App.5th 158,, the court reversed entry of summary judgment because questions of fact existed as to whether the safety measures taken by the owner and the general contractor to prevent criminal activity at the worksite amounted to the actual exercise of retained control over the manner in which the subcontractor performed its demolition work, whether those measures were reasonable, and whether, or to what extent, any unreasonable measures affirmatively contributed to the employee's injuries from being attacked by unknown assailants. Although the owner argued that the subcontractor and the employee could have made alternative

site security arrangements, this argument failed because the owner cited no evidence supporting it.

Analysis of the Concealed Hazard and Retained Control Exceptions: *Ramirez v. PK I Plaza 580 SC LP* (2022) 85 Cal.App.5th 252

In *Ramirez v. PK I Plaza 580 SC LP* (2022) 85 Cal.App.5th 252, Ramirez, a self-employed contractor, was hired by a shopping center's tenant to remove an exterior sign. While performing the work, he fell through an opening built into the floor of a cupola on the shopping center's roof and sustained serious injuries. Ramirez and his wife filed suit against the owners and operators of the shopping center. The Court of Appeal agreed with the plaintiffs' argument that the *Privette* doctrine did not apply and reversed the trial court's entry of summary judgment.

Noting that the defendants did not hire their tenant or Ramirez to perform the work, the Court held that a landlord does not delegate to its tenant a duty to provide a safe workplace for any independent contractor the tenant may hire simply by virtue of the fact that they are in a landlord-tenant relationship. The Court further concluded that, based on an analysis of the lease terms—which specifically reserved for Defendants the exclusive right to use the roof as a "Common Area" for placement of signs or equipment, and called for the tenant to pay Defendants a "Common Area Rent" for maintenance costs related to the roof and other common areas—Defendants did not delegate to the tenant a duty to ensure the safety of the roof or the site where Ramirez performed his work, and instead retained possession and control of the roof, including responsibility for maintenance. The Court noted that it "reject[s] the notion that a landowner may absolve itself of liability for conditions in a space over which it retains possession and control merely by assigning its tenant a task [such as removing a sign] that could involve that space." (*Id*. at 268-269.)

Conclusion

Privette cases can be tricky, but these recent Court of Appeal decisions have provided some fairly clear–though not always favorable–guidance as to the doctrine's application. If you are able to elicit facts within your own case that are consistent with those in the above decisions, you may be able to avoid it entirely.

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