

Navigating *Privette* requires a bit of magic these days

Examining the *Privette* doctrine in light of recent case law on bringing multi-employer jobsite-injury cases or workers' comp crossover cases

By Ryan Casey & Jordan Phillips

Privette, and its progeny, have governed and limited the liability of property owners to contractors for decades with essentially only two exceptions. First, where an owner or contractor exercises retained control over any part of the contractor's work in a manner that affirmatively contributes to the workers injuries. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198.) Second, when an employee is injured by a concealed hazard and two conditions are met: 1) the hazard is unknown and 2) it would not be reasonably ascertainable by the injured contractor or his employer through inspection. (*Kinsman v. Unocal Corporation* (2005) 37 Cal.4th 659.) *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635, is the most recent case in the line of *Privette's* progeny to come down. *Acosta* deals with the second of these exceptions under *Kinsman*.

In *Acosta*, the Court of Appeal overturned a $12.6 million trial verdict obtained by fellow CAALA notables, Dan Kramer and Teresa Johnson, of Kramer Trial Lawyers. In reading the decision in detail, it is clear that Dan and Teresa tried a fantastic case and obtained a great result for their client, which was unfortunately overturned on appeal.

In this article we will provide an overview of *Privette* and how this new caselaw will impact Plaintiffs' cases in the future. Additionally, we have tried to include a few tips and strategies to help achieve success in your cases despite the recent *Acosta* ruling.

A brief summary of *Privette* and its progeny

Before discussing *Acosta* and its effect on the *Privette* doctrine, a brief summary of *Privette* and its progeny is helpful. In *Privette v. Superior Court* (1993) 5 Cal.4th 689, the Supreme Court considered whether a landowner was liable for injuries sustained by an independent contractor's employee who fell off a ladder while carrying hot tar up a ladder to a roof during a roofing installation. In answering this question in the negative, the Supreme Court essentially eliminated the ability of employees of independent contractors to rely on the common-law peculiar risk doctrine to hold the party who hires the employee's employer, or other contractors on the job vicariously liable for the employer's negligence. The rationale was that this approach was somehow unfair because the employee was able to obtain compensation from the workers' compensation system.

Since *Privette*, the Supreme Court has repeatedly reaffirmed this general rule that landowners and those who hire independent contractors are *not* liable for injuries to independent contractors or their workers on the job site, absent exceptions.

The first of these exceptions was created in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198. *Hooker* involved a crane operator, employed by a general contractor that Caltrans had hired to construct an overpass, who suffered a fatal accident on site. The Supreme Court held that "a hirer may be liable if it exercises retained control over any part of the independent contractor's work in a manner that affirmatively contributes to the worker's injuries." (*Id.* at 202.)

The second of these exceptions was created by *Kinsman v. Unocal Corporation* (2005) 37 Cal.4th 659. *Kinsman* involved an action brought by an independent contractor performing scaffolding work at a Unocal refinery, who developed mesothelioma as a result of exposure to asbestos. The Supreme Court held that: "the hirer as a landowner may be independently liable to the contractor's employee even if it does not retain control over the work, if: 1) it knows or reasonably should know of a concealed pre-existing hazardous condition on its premises; 2) the contractor does not know and could not reasonably ascertain the condition; and 3) the landowner fails to warn the contractor." (*Id.* at 675.)

In summary, under *Privette* and its progeny, unless a plaintiff could avail themselves of either 1) the *Hooker* exception and show that the owner exercised retained control over any part of the contractor's work in a manner that affirmatively contributes to the worker's injuries; or 2) the *Kinsman* exception and establish that the employee was

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



injured by a concealed hazard that was both unknown and not reasonably ascertainable, their claim would be barred.

The more recent cases in this line have upheld this general rule and its limited exceptions, emphasizing *delegation* as the key underlying principle, "because the hirer presumptively delegates to the independent contractor the authority to determine the manner in which the work is to be performed, the contractor also assumes the responsibility to ensure that the worksite is safe, and the work is performed safely." (*Seabright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600.) The rule even applies where the hirer is partly to blame due to its negligent hiring (see *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1238) or failing to comply with preexisting statutory or regulatory workplace safety requirements (*Seabright*, 52 Cal.4th at 594), and even to a solo independent contractor who declines to obtain workers' compensation insurance, such that the contractor would receive no coverage for his or her injuries at all. (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 521; *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 41-42.)

As discussed in further detail below, *Acosta* is the most recent of these cases. *Acosta* focused primarily on an in-depth analysis of the *Kinsman* exception and, specifically, the second and third prongs of that test.

Acosta v. MAS Realty, LLC (2023) 96 Cal.App.5th 635

In *Acosta*, an electrical technician's company was contracted by the Defendants to maintain the lights in a commercial building's common areas. (*Acosta*, 96 Cal.App.5th at 640.) Upon a routine inspection, the technician, Acosta, noticed that the exterior lights on one of the buildings remained on, which he attributed to an incorrectly set time clock or a malfunctioning photocell. Not finding a time clock in the building's electrical room, Acosta decided to go onto the roof to inspect the rooftop photocells. After climbing the ladder leading to roof access, Acosta opened the roof access hatch and locked it into place.

In doing so, he noticed that the roof hatch was heavier than expected and that the ladder did not reach all the way to the roof. Nonetheless, he grabbed the frame of the hatch, climbed one leg over, and began to pull his other leg over. As he did so, the hatch released and slammed down on his back, pinning him between the hatch and the frame and causing severe injuries. He was later diagnosed with ruptured discs in his cervical and lumbar spine, leading to two spinal surgeries.

Plaintiff sued the Defendants (the building owner and property manager) for negligence and premises liability, alleging that the roof hatch was defectively unsafe for failing to have a compression cylinder to assist in opening the hatch and to prevent the hatch from free-falling closed.

Plaintiff Acosta testified that he frequently used roof hatches in his job, several times a month, or about 650 times over his 13-year career. He considered himself an expert on the operation and functionality of roof hatches "to a certain extent," but had never personally encountered a broken roof hatch. Acosta also reported that while climbing down the ladder following the incident, he noticed a handwritten note on the wall which said "HATCH BROKEN! WATCH FINGERS AND HEAD #." (*Id.* at 640.) He unfortunately did not see the warning note when climbing up the ladder.

In a post-incident work statement, Acosta said he noticed the spring was broken as soon as he opened the roof hatch. In deposition, he initially testified that he knew the hatch was broken before he climbed through, but later corrected his testimony to state that he remembered the roof hatch being heavier than expected but did not actually know it to be broken until the incident occurred. At trial, he again testified that he did not actually know the hatch was broken prior to the incident.

At the conclusion of Acosta's case, Defendants moved for a directed verdict, arguing if Acosta knew or could reasonably have known there was a defect in the roof hatch, then under *Kinsman*, he assumed the risk and Defendant could not be liable.

The trial court denied the Defendants' motion, finding that there was a factual issue for the jury to decide in determining if Plaintiff appreciated the severity of the dangerous condition. The trial court adopted Plaintiff's proposed special verdict form, based on CACI No. 1009A, which asked whether Defendant(s) knew or reasonably should have known about a preexisting unsafe, concealed condition on the property, whether Plaintiff did not know or could not have reasonably known about the unsafe concealed condition, whether it was part of the work that Plaintiff was hired to perform, whether Defendant(s) failed to warn of the condition, and whether Defendant(s) conduct was a substantial factor in causing harm to Plaintiff.

The jury ultimately found the Defendants liable, apportioning 80% fault on the property manager and 20% fault on the building owner. They found that Acosta did not and could not have reasonably known about the unsafe concealed condition, deeming him 0% responsible and awarding him $12,622,238.75.

The *Acosta* court reversed on appeal. It emphasized that the *Kinsman* exception applies only to concealed hazards that the contractor does not know of and could not reasonably ascertain the condition of. (*Id.* at 652.) The court found that, because Acosta chose to access the building's roof through the ladder and hatch, they were necessarily part of the "work site"

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



and were within Acosta's duty to inspect. (*Id.* at 662.) Next, the court found that undisputed evidence established as a matter of law that Acosta and his employer could reasonably have ascertained the hazardous condition of the hatch and ladder. (*Id.* at 649.)

As to the ladder, the court focused on the facts that Acosta admitted that he perceived the ladder being too short once he opened the hatch, prior to climbing through, and testimony from Plaintiff's safety expert conceding that the shortened nature of the ladder would be apparent before climbing onto the roof. (*Id.* at 660.)

Regardung the roof hatch, the court held that "while there was disputed evidence as to whether Plaintiff actually knew of the dangerous condition prior to the incident, there was undisputed evidence to conclude that the condition was reasonably ascertainable." (*Ibid.*) The court found no evidence that Acosta or his employer conducted a safety inspection of the worksite, but that undisputed evidence demonstrated that an inspection would have revealed its hazardous condition – that it slammed shut as soon as it was unlocked. (*Id.* at 661.)

The *Acosta* Court analogized to two other recent cases involving the *Kinsman* exception which followed this same line of reasoning: *Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617 and *Blaylock v. DMP 250 Newport Center, LLV* (2023) 92 Cal.App.5th 863. In *Johnson*, the court granted summary judgment for the defendant, finding that the alleged hazardous condition could reasonably have been discovered through inspection. The *Blaylock* court also granted summary judgment to defendants, holding that contractors have a duty to inspect the work premises for potential safety hazards and finding that a reasonable inspection would have revealed the dangerous condition.

The *Acosta* court reversed the jury's finding that Acosta did not and could not have reasonably known about the unsafe concealed condition and directed entry of judgment for the Defendants. (*Id.* at 665.)

Acosta's impact on the exceptions to *Privette*

Acosta adds another wrinkle that Plaintiffs' attorneys must keep in mind when dealing with an independent-contractor workplace injury case under the umbrella of *Privette* and its progeny. Fortunately, this holding did not add any further restrictions or strip down the existing exception created in *Kinsman*. However, it did muddy the waters and create an atmosphere of ambiguity and uncertainty that will likely cause consternation and hardship for years to come.

Chief among these issues is that, in rendering its decision, the *Acosta* court appears to have stepped into the shoes of the jury and essentially reviewed the jury's factual findings to reach a different conclusion on those same facts than the jury did. Specifically, the court heavily reviewed the facts of this case through the lens of the second prong of the *Kinsman* exception, whether the contractor could ascertain the hazardous condition through reasonable inspection. This establishes a precedent to be wary of in terms of appellate courts exercising significant liberty in after-the-fact analysis of facts decided by the jury under this exception.

Additionally, the court also inserts into this analysis an ambiguous duty to inspect the premises on the part of the contractor that may or may not be applicable depending on the facts. The court stopped short of adding an additional requirement that in every case there is a duty to inspect all of a landowner's premises, stating "an independent contractor does not have a duty to inspect all of the landowner's property or to identify hazards wholly outside his area of expertise." (*Acosta*, 96 Cal.App.5th at 662.) However, it nonetheless held that there exists "a duty to determine whether its employees can safely perform the work they have been hired to do. That includes a duty to inspect not only the worksite itself, but the means to access the worksite." (*Ibid.*)

The court went on to analyze how, based on the facts of the case in *Acosta*, it felt that this duty had been triggered and thus, as a matter of law, Acosta should have been aware of the condition of the hatch and thus could not avail himself of the *Kinsman* exception. However, one of the biggest issues created by this ruling is that there is no bright-line rule established as to what areas are encompassed in this "duty to inspect." The *Acosta* decision provides only a limited analysis of when the duty to inspect would arise and leaves that issue for subsequent interpretation in future cases.

How to navigate the *Privette* doctrine exceptions post-*Acosta*

First, the holding in *Acosta* does nothing to affect or alter the first exception to the *Privette* doctrine under *Hooker.* In a case under the *Hooker* exception, liability is based on the grounds of "direct negligence" and retention of control in a manner that affirmatively contributes to an injury. As the *Hooker* court explained, "[i]mposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland*, and *Camargo* because the liability of the hirer in such a case is *not*" "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." [Citation.] "To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker*, 27 Cal.4th 198 at 211-12.)

In *Strouse v. Webcor Construction, L.P.* (2019) 34 Cal.App.5th 703, 711, the court applied these principles and

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



held that where a hirer of a contractor "retained exclusive control over the maintenance and repair" of a physical portion of the work area (in *Strouse* that involved wooden safety covers over "gaps" in the floor), "thereby prohibiting the subcontractors from maintaining or repairing the safety covers themselves." As a result, the case fell withing the *Hooker* exception and *Privette* did not bar the claim. In *Strouse*, the court also noted that the cause of the injury occurred in an "area under [hirer's] control … and [hirer] retained control over safety in this area." (*Id.* at 716.) This was sufficient to overcome *Privette* and impose liability. So, if you have a case involving retained control affirmatively contributing to the harm, you are still operating under the same legal standard and analysis.

But if you are looking to pursue and bring a case that would fall under the *Kinsman* exception to *Privette*, involving a concealed hazard, then *Acosta* has made things more uncertain. This impact is most significant in the ambiguous duty to inspect "the work premises" the court establishes and relies upon for barring Acosta from recovering. Again, while the court stopped short of imposing an automatic duty to inspect "all of the land owner's property" or to "identify hazards wholly outside his area of expertise" (*Acosta*, 96 Cal.App.5th at 662), the court certainly left it ambiguous as to what this duty would entail in every case.

The *Acosta* court's description of the duty in reaching its holding is that it is a fact-specific inquiry that will vary on a case-by-case basis. Some of these factors the *Acosta* court explained should be considered were 1) the nature of the work the contractor was hired to perform, 2) the location where that work needed to be performed, 3) necessary points of access to that location, 4) the experience of the contractor, 5) the level of expertise needed to identify a hazard, and 6) whether the hazard could have been uncovered by way of inspection.

Given this ambiguity regarding the duty to inspect imposed by *Acosta*, we have tried to provide some factual guidance to help analyze these factors when evaluating a case under the *Kinsman* exception moving forward.

The first step to analyze is whether the dangerous condition is within the areas that the contractor has a duty to inspect. This includes not only the actual working area but also the areas around and leading to the working area.

Dangers that the contractor does not know about subjectively could very well be irrelevant, if after the fact, they could be deemed to be discovered. What was known or should have been known by means of a reasonable inspection is the key. Basically, the objective, reasonable person standard replaces a subjective lack of actual knowledge. And as seen in *Acosta*, the court can make this determination after the fact and as a matter of law.

The question is, how far do contractors have to go when it comes to inspecting the areas near or around the work site?

Some factual questions you must explore to determine the extent of the duty to inspect in a particular situation are:

- What job was plaintiff hired for?
- What areas would that involve actual work on?
- What areas are adjacent to that actual work?
- What areas/access points would necessarily need to be accessed in order to reach that actual work location?
- What other areas might be included as a part of the overall "job site" that the contractor is working on?

Examine all access points. If examination would have revealed a danger, the court might conclude that *Kinsman* doesn't apply and bar recovery against the hirer. Nevertheless, the *Kinsman* exception will continue to allow recovery in situations involving an unknown concealed dangerous condition that cannot be discovered by reasonable inspection.

Below are a few examples of factual scenarios that would likely still allow recovery under the *Kinsman* exception:

- Contractor injured on site by condition unrelated to their work or expertise, such as a plumber who gets electrically shocked by a plug with hidden faulty wiring;
- Contractor injured on site by a hazard not within their working area, such as a roofer slipping on water from a leaking toilet when using a restroom or other public area entirely distinct from the job; or
- Contractor injured on site by a hazard which could not have been discovered prior to injury, even if it was within the working area, such as a contractor opening a door, which knocks over a stack of supplies improperly stored behind it, which fall, causing injury.

These are but a few examples. The reality is that under *Acosta*, you need to conduct a critical fact-based analysis of your cases at the start to evaluate whether in your specific case a duty to inspect would arise and be applied in review of your Plaintiff's actions.

Conclusion

In summary, *Kinsman* remains good law and a viable way to establish liability in your case. But the viability of your case has now become much more fact dependent and requires significant evaluation at the onset. *Acosta's* biggest impact in this regard is the ambiguity created by its decision to impose a loosely defined duty on independent contractors "to inspect the premises for dangerous conditions." This duty is entirely fact dependent and may or may not be triggered based on the specific facts of any case.

This lack of clarity imposes on plaintiffs' lawyers greater responsibility

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



to fully inspect the facts of cases, not just from the perspective of what actually occurred in their case, but through the lens of hindsight and what in a perfect world may be considered objectively reasonable. This is made even more important when, as seen in *Acosta*, the appellate court may perform its own factual analysis of this duty and overturn a jury's conclusions on the same facts.

Ryan Casey is an attorney in his 15th year at Panish | Shea | Ravipudi LLP. *He is based primarily in Los Angeles but is licensed in California, Arizona, and Nevada. He focuses his practice on complex catastrophic personal injury, product liability, and wrongful-death cases. He may be contacted via email at rcasey@panish.law.*


Casey

Jordan Phillips is an attorney at Panish | Shea | Ravipudi LLP, *focusing on complex personal injury, wrongful death, and product-defect cases. He may be contacted via email at jphillips@panish.law.*


Phillips

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**