Supplement to the Los Angeles and San Francisco
Daily Journal
MARCH 30, 2022

The 2022 CLAY Awards
26TH ANNUAL CALIFORNIA LAWYER ATTORNEYS OF THE YEAR

Affirmatively Repairing a Jury Instruction

CIVIL LITIGATION

Sandoval v. Qualcomm Inc.

STEPHEN E. NORRIS, JASON R. LITT AND JOSHUA C. MCDANIEL
HORVITZ & LEVY LLP

Stephen E. Norris and colleagues at Horvitz & Levy LLP have been trying for years to get one of California's standardized civil jury instructions changed to better align with state Supreme Court precedent that protects property owners from liability for injuries to contractors' workers.

Back in 2009, Norris even wrote a four-page letter to the state panel that writes the pattern civil jury instructions laying out how the problematic instruction could be fixed by adding a single word, "affirmatively." It didn't happen.

Then in September, they finally succeeded by bringing in a unanimous defense victory from the state Supreme Court in *Sandoval v. Qualcomm Inc.*, 12 Cal.5th 256 (Cal. 2021).

The court held that California Civil Instruction No. 1009B "does not properly capture whether the hirer retained control over the manner of performance of some part of the work entrusted to the contractor." Therefore, Justice Mariano-Florentino Cuéllar wrote, "The Judicial Council and its Advisory Committee on Civil Jury Instructions should update this instruction with suitable language consistent with this opinion."

The issue centers on the Privette doctrine established by a 1993 Supreme Court opinion holding that a property owner is not liable when an employee of a contractor hired by the owner is injured doing that work. The main reasons are, as Cuéllar explained in Sandoval, "first, that independent contractors, by definition, ordinarily control the manner of their own work; and second, that hirers typically hire independent contractors precisely for their greater ability to perform the contracted work safely and successfully."

There are a couple of exceptions, including one set out in a case called Hooker that permits liability when the property owner "retains control over any part of the work and actually exercises that control so as to affirmatively contribute to the worker's injury," Cuéllar wrote.

In this case, plaintiff José Sandoval received third-degree burns over a third of his body as he was helping test and evaluate 900-pound circuit breakers that control electrical power to Qualcomm's major San Diego campus. A jury awarded him $7 million, and the appellate court affirmed.

The jury reached that decision because the pattern CACI instruction it received omits a crucial factor required by Hooker. The instruction "doesn't say anything about affirmative contribution," said Norris's partner Jason R. Litt. "And so that's allowed the plaintiffs in these cases to argue something that they really shouldn't be able to argue."

PHOTO CREDIT: JUSTIN STEWART

FROM LEFT TO RIGHT: JASON R. LITT AND STEPHEN E. NORRIS

Norris said the high court's decision reaffirms the principle in Hooker that to hold a property owner liable, "the plaintiff has to show that somehow the property owner intervened or affirmatively contributed in a way that led to the injuries."

In addition, he said, the opinion "definitively held that the jury has to be instructed that affirmative contribution is one of the elements of a retained control claim."

In this case, he added, there was no evidence of any such contribution, so the court ruled Qualcomm owed Sandoval no tort duty. Norris and Litt gave credit to their former associate, Joshua C. McDaniel, now at Harvard Law School, who argued at both the Court of Appeal and Supreme Court.

The opinion is important for a couple of additional reasons, Norris said. First, it reaffirms Privette. That is significant, he said, because the majority of the court's current justices were appointed by Democrats.

"We really didn't know… how this newly constituted Supreme Court was going to view the Privette doctrine generally. We didn't know if the affirmative contribution standard was going to be reaffirmed."

Second, "it establishes that CACI instructions are not necessarily correct just because they are endorsed by the CACI committee," he said.

Final judgment has now been entered in favor of Qualcomm. But the committee has not yet had the opportunity to tackle the problematic instruction.

"But every defense lawyer worth their salt should be citing this case if [the issue] comes up," Litt said. "The court made pretty clear at the end of the opinion that the instruction, as it's written, is wrong."

– DON DEBENEDICTIS