



**Association of Defense  
Counsel of Northern  
California and Nevada**



September 12, 2022

Presiding Justice Andrea Lynn Hoch  
Justice Jonathan K. Renner  
Justice Laurie M. Earl  
California Court of Appeal  
Third Appellate District  
914 Capitol Mall,  
Sacramento, CA 95814

Re: Request for publication of decision in *McCullar v. SMC Contracting, Inc.* (August 29, 2022, No. C093295)

Honorable Justices,

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada (“ADC-NCN”) and the Association of Southern California Defense Counsel (“ASCDC”) (together, the “Associations”) write jointly to urge the Court to publish its decision in this case.

**Interest of the Requesting Organizations**

ADC-NCN numbers approximately 700 attorneys primarily engaged in the defense of civil actions. Members represent civil defendants of all stripes, including businesses, individuals, HOAs, schools and municipalities and other public entities. Members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including issues related to allocation of responsibility for workplace safety. ADC-NCN’s Nevada members are also interested in the

development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Although ASCDC and ADC-NCN are separate organizations, they have some common members and coordinate from time to time on matters of shared interest, such as this letter. Together and separately, they have appeared as *amicus curiae* in many cases before both the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients, a broad cross-section of California businesses and organizations.

No party has paid for or drafted this letter.

### **Why the Court should order publication**

A pillar of law applicable to the activities of hirers and independent contractors is that the contractors are generally responsible for the safety of their own workers. (*Privette v. Superior Court* (1993) 5 Cal.4th 689.) The rule governs nearly every construction project in the state. It applies in many other contexts as well, including to limit the liability of homeowners who hire professionals for maintenance and other projects, and reasonably expect the professionals to be responsible for conducting themselves safely.

This Court's decision in *McCullar* clarifies that responsibility for protecting against a known hazard lies with the contractor, not the hirer, even where the hirer may have contributed to the hazard. The excerpt below, in which this Court declines to follow another Court of Appeal decision based

on intervening Supreme Court precedent, itself demonstrates why courts, counsel and litigants would benefit from publication:

According to McCullar, *Tverberg II* [*Tverberg v. Fillner Constr.* (2012) 202 Cal.App.4th 1439] is “analogous.” Focusing on the first of the court’s three reasons for finding a triable issue of fact, McCullar contends *Tverberg II* is similar because SMC created a hazardous condition and then, after learning of it, nonetheless told him to go back to work without providing direction on how to address the hazard. But to the extent the *Tverberg II* court believed the *Hooker* [*v. Department of Transportation* (2002) 27 Cal.4th 19] exception could apply on these types of facts, we decline to follow it. The *Tverberg II* court, again, found the general contractor might be liable under *Hooker* because it created a workplace hazard (namely, holes in the ground) and then “requir[ed] Tverberg to conduct unrelated work near [the hazard].” (*Tverberg II*, supra, 202 Cal.App.4th at p. 1448.) But in *Gonzalez* [*v. Mathis* (2021) 12 Cal.5th 29], our Supreme Court reached the opposite conclusion on facts that were not too different. Similar to the general contractor in *Tverberg II*, the hirer in *Gonzalez* was responsible for the presence of a workplace hazard (namely, a slippery roof) and asked the contractor to perform unrelated work on the roof. (*Gonzalez*, supra, 12 Cal.5th at pp. 39-40.) Yet the court still, at the summary judgment stage, found the hirer was not liable when the contractor fell from the roof and suffered injuries. (*Id.* at pp. 56-57.) Following our Supreme Court’s reasoning, rather than the Court of Appeal’s reasoning in *Tverberg II*, we apply similar logic to reject McCullar’s negligence claim here.

(Typed opn., pp. 16-17.) This analysis of why *Tverberg II* was wrongly decided, with the benefit of the intervening decision in *Gonzalez*, justifies publication - if for no other reason than as fair counterpoint to *Tverberg II*, which otherwise binds superior courts.

Publication would also allow courts and counsel to have this clear statement of the rule: “[I]t is the contractor’s responsibility, not the hirer’s responsibility, to take the necessary precautions to protect its employees from

a known workplace hazard. And should the contractor fail to take the necessary precautions, as Tyco did in this case when it simply told McCullar to “[g]et the job done” despite the ice, its employees cannot fault the hirer for the contractor’s own failure.” (Typed opn., p. 11.)

The decision thus meets several of the factors justifying publication.

- The decision “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions” (Cal. Rules of Court, rule 8.1105(c)(2)).

- The decision “explains ...with reasons given, an existing rule of law” (Cal. Rules of Court, rule 8.1105(c)(3)), by explaining how the *Hooker* exceptions to *Privette* do not apply in a case where the contractor and worker were aware of the hazard. ““Although we accept that SMC’s conduct caused ice to form and required Tyco to take extra safety precautions to account for the ice, we conclude these facts are insufficient to show that SMC’s exercise of its retained control affirmatively contributed to McCullar’s injuries. As McCullar acknowledges, he was aware of the ice before he suffered his injuries.” (Typed opn., p. 9.)

- The decision “[a]ddresses or creates an apparent conflict in the law” (Cal. Rules of Court, rule 8.1105(c)(5)) by expressly disagreeing with *Tverberg II*.

- The decision “[i]nvolves a legal issue of continuing public interest” (Cal. Rules of Court, rule 8.1105(c)(6)) because of the wide applicability of the *Privette* rule.

- The decision “[m]akes a significant contribution to legal literature by reviewing either the development of a common law rule” (Cal. Rules of Court, rule 8.1105(c)(7)), to wit the rules surrounding the relative liability of hirer and contractor for injuries to the contractor’s employees.

Third Appellate District  
Re: *McCullar* Publication Request  
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The Associations request that this Court order publication.

Respectfully submitted,



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## PROOF OF SERVICE

*McCullar v. SMC Contracting, Inc.* (No. C093295)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, LLP, 1111 Broadway, Suite 1700, Oakland, CA 94607; email: [espiers@grsm.com](mailto:espiers@grsm.com). On the date below, I served the within document(s):

### LETTER REQUESTING PUBLICATION

- VIA E-SERVICE (TrueFiling) on the recipients designated on the electronic service list generated by TrueFiling system.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 12, 2022 at Walnut Creek, California.

/s/ Eileen Spiers  
Eileen Spiers