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SOUTHERN CALIFORNIA  
DEFENSE COUNSEL

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September 21, 2022

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Re: *Miller v. Roseville Lodge No. 1293, et al.*

Court of Appeal Case No. C090751

Request for Publication

Opinion filed September 2, 2022

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Dear Presiding Justice and Associate Justices:

Pursuant to California Rules of Court, rule 8.1120 (a), the Association of Southern California Defense Counsel (hereinafter "ASCDC") request that this Court publish its September 2, 2022 opinion.

### ORANGE COUNTY

David J. Byassee  
Lisa J. McMains

As discussed below, we believe the opinion should be published because it provides guidance concerning the proper application of the *Privette* doctrine and its exceptions, and how legal presumptions should be applied when courts evaluate the parties' respective burdens on motions for summary judgment.

### RIVERSIDE COUNTY

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## INTEREST OF THE ASCDC

The ASCDC is among the nation's largest and preeminent regional organization of lawyers who routinely defend civil actions. It is comprised of more than 1,100

### SAN DIEGO COUNTY

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attorneys in Southern California, who are interested in the development of California law.

The ASCDC affords its members with professional fellowship, specialized continuing legal education and a forum for the exchange of information and ideas. It also acts as a liaison between the defense bar and the courts to provide assistance on issues of interest to its members, having appeared numerous times as amicus curiae in the California Supreme Court and the Court of Appeal. (See e.g. *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375; *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *Rashidi v. Moser* (2014) 60 Cal.4th 718; *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512; *Colony Bancorp of Malibu, Inc. v. Patel* (2012) 204 Cal. App. 4th 410.)

The members of the ASCDC routinely represent clients in cases like *Miller* that involve premises liability claims, the *Privette* doctrine and motions for summary judgment to address such. Last year, the ASCDC appeared as amicus in *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, which is thoughtfully discussed by this Court in its Opinion.

### **REASONS WHY THE OPINION SHOULD BE PUBLISHED**

California Rules of Court, rule 8.1105(c) provides that an “opinion of a Court of Appeal . . . *should* be certified for publication in the Official Reports” if the opinion falls within any *one* of nine categories. (Emphasis added.) Here, the Opinion satisfies several of the enumerated criteria. As discussed below, publication is warranted because it “explains, or criticizes with reasons given, an existing rule of law;” “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions;” “[i]nvolves a legal issue of continuing public interest;” and “[m]akes a significant contribution to legal literature” by reviewing and discussing the law on important and recurring issues. (Rule 8.1105(c) (2), (3), (6) and (7).)

First, this Court provides helpful guidance on the parties’ burdens when moving for summary judgment in cases involving legal presumptions such as the *Privette* doctrine. (Typed Opn. at pp. 8-9.) In this regard, the

analysis on pages 8-9 of the *Miller* Opinion also creates harmony and uniformity when it discusses the “burden shifting analysis” by the Second Appellate District in *Alvarez v. Seaside Transportation Servs. LLC* (2017) 13 Cal.App.5th 635, 642, 644.) The initial burden when moving for summary judgment is often litigated and the subject of dispute when cases are argued in the trial court and appellate court. It need not be, for litigants or courts. The ASCDC believes that publishing this Court’s Opinion will reduce disputes by providing appropriate guidance for all when applying legal presumptions such as the *Privette* doctrine when it is raised in motions for summary judgment. This will also serve the overall purposes of motions for summary judgment, which is “no longer called a ‘disfavored remedy’” because it provides parties with an efficient manner to resolve cases short of trial. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 760–61.)

Second, this Court’s Opinion provides clarity and guidance on the “two exceptions to the *Privette* doctrine referred to as “*the retained control exception*” and “*the concealed hazard exception*.” (Typed Opn. at p. 8; italics in original.) The Opinion provides a clear, concise and thorough legal discussion of the governing rules for these exceptions and how they are properly applied to factual situations such as those involved in *Miller*. (Typed Opn. at pp. 9-18.) This analysis should not be lost in an unpublished opinion. Rather, it should be published so that litigants and trial courts can have the benefit of such for purposes of discovery, settlement, resolution, and motions for summary judgment.

Third, this Court’s Opinion helps to clarify the law on the retained-control exception when discussing that a hirer is not liable when a contractor’s employee is injured from their voluntary use of the hirer’s equipment. As this Court discusses, there is an important distinction “between *asking* a contractor to use your equipment and *allowing* a contractor to use your equipment.” (Typed Opn. at p. 13.) The Opinion also clarifies that, when a claim is based on “merely permit[ing] a dangerous work condition or practice to exist,” that is not sufficient to establish liability under the retained-control exception. (*Ibid.*) That is an oft-asserted claim, as illustrated by this case.

Fourth, this Court’s discussion of *McKown v. Wal-Mart Stores, Inc.*, (2002) 27 Cal.4th 219, provides helpful guidance to explain that a claim for “furnishing unsafe equipment is simply one example of exercising retained control, rather than its own separate exception to the *Privette* doctrine.” (Typed Opn. at pp. 9-11.) Parties often attempt to expand potential liability by blurring or blending legal concepts when making arguments under the retained-control exception and *McKown*. This Court’s Opinion makes a significant contribution to the development of the law by providing needed clarity on this issue and the others discussed above.

**Conclusion:** For the reasons explained above, this Court’s Opinion meets the criteria for publication under rule 8.1105(c) of the California Rules of Court, and therefore should be published. Thus, the ASCDC respectfully requests this Court to order publication of the Opinion.

Respectfully submitted,

**ASSOCIATION OF SOUTHERN CALIFORNIA  
DEFENSE COUNSEL**

By: \_\_\_\_\_



David K. Schultz

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cc: See attached Proof of Service

## **PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and not a party to the within action; my business address is 2049 Century Park East, Suite 2900, Los Angeles, CA 90067.

On September 21, 2022, I served the following document(s) described: “**REQUEST FOR PUBLICATION**” on the interested parties in this action as follows:

### ***SEE ATTACHED SERVICE LIST***

**BY ELECTRONIC SERVICE:** Per a court order, I caused the above-entitled document(s) to be served by electronic submission through TrueFiling website: <https://tf3.truefiling.com> addressed to all parties appearing on the electronic service list for the above-entitled case.

**BY FEDERAL EXPRESS:** I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for pick-up and delivery by Federal Express. The foregoing sealed envelope was placed for pick-up and delivery this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with all charges thereon fully paid with Federal Express at Los Angeles, California, in the ordinary course of such business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.  
Executed on September 21, 2022, at Los Angeles, California.



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Eartha M. Guzman

**SERVICE LIST**

Miller v. Roseville Lodge No. 1293 et al.  
Case Number C090751

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Case Number [C090751](#)

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