# *ARTICLE:*

# EXAMINING THE WAIVER OF RECREATIONAL IMMUNITY BY EXPRESS INVITATION AFTER THE CALIFORNIA SUPREME COURT'S DECISION IN *HOFFMANN V. YOUNG*

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## A. INTRODUCTION

In 1963, the California legislature became concerned that private landowners were "bar[ring] public access to their land for recreational uses out of fear of incurring tort liability."[1] Thus, it enacted Civ. Code, § 846 to encourage private property owners to allow the general public to engage in recreational activities free of charge on their property, with certain specified exceptions.[2] There was very little case law involving § 846 until the early 1990s, and then it usually focused on whether an activity was "recreational" so as to allow a landowner to invoke immunity.[3] In its recent decision in *Hoffmann v. Young*,[4] however, the California Supreme Court has now begun the process of drilling down into how one of the exceptions to immunity operates. (See summary of the case at page 108, below.) This article reviews that case and explores its potential application in other contexts.

## B. SECTION 846

Section 846 provides that "[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purposes or to give any warning or hazardous conditions, uses of, structures, or activities on those premises to persons entering for recreational purposes."[5] The statute accomplishes this goal by eliminating certain duties a landowner would otherwise owe to recreational users, including the duties to (1) keep the premises safe for recreational users, and (2) to warn such users of hazardous conditions, uses of, structures, or activities on the premises.[6] Section 846 thereby makes recreational users responsible for their own safety and reduces landowners' potential exposure to tort liability to most recreational users of private property, thus

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eliminating the disincentive for landowners to allow recreational access to their properties.

Section 846 immunity is broad but is not absolute. In crafting legislation that would prevent the closure of private lands to recreational users because of landowners' liability concerns, "the California Legislature sought to strike a fair balance between the interests of private landowners and those of recreational users."[7] Under § 846(d), there are three exceptions to such recreational immunity: 1) a landowner's "willful or malicious" failure to guard or warn, 2) injury where entry was "for consideration," or 3) injury to those "expressly invited" on the landowner's property. This article focuses on the "express invitee" exception of subsection 846(d)(3) as it has now been interpreted by the California Supreme Court in *Hoffmann v. Young*,[8] and examines how that decision might apply in contexts other than that described in *Hoffmann*.

The "express invitee" exception provides that the recreational immunity provision "does not limit the liability which otherwise exists" for "[a]ny persons who are expressly invited rather than merely permitted to come upon the premises by the landowner."[9] The existence of this exception illustrates that the Legislature was not concerned with encouraging property owners to provide access for the owner's personal guests; property owners do not need governmental encouragement to permit personal guests to come onto their land.[10] The application of the exception has been subject to very few published cases, but a question exists as to whether an "express invitation by the landowner" exists when a person other than the landowner, such as the owner's child, invites a third party onto the land.

The "express invitee" exception has not previously been construed by the California Supreme Court. An earlier decision by a lower court of appeal, *Calhoon v. Lewis*[11] had involved a similar parent-child factual situation and examined whether a son's express invitation to friend to enter upon premises was sufficient to invoke the "express invitee" exception and abrogate the property owner's section 846 immunity. The court there found the stated exception applied despite the parents' contention that the son's friend was not invited for a *recreational purpose*. However, the parents in *Calhoon* did not argue that their son was not *authorize*d to invite the friend. That is the issue that arose in *Hoffmann v. Young*,[12] where the lower court of appeal held that landowners' son was acting as their agent when he invited his friend onto the premises for recreational purposes. The California Supreme Court then granted review.

 

### C. *HOFFMANN V. YOUNG*

Mikayla Hoffmann was invited by her 18-year old friend Gunner Young to the property where he lived, which was owned by his parents. Gunner picked up Mikayla and her motorcycle and drove them to his property, which had its own motocross track. Although there was evidence that Gunner told Mikayla to wait while he warmed up his bike on the track before they continued on to a nearby (offsite) riverbed, Mikayla decided to warm up her bike on the track going the opposite direction from Gunner, and they collided, causing Mikayla severe injuries.

Mikayla sued Gunner and his parents alleging negligent design of the track, but a jury found no liability due to the recreational use immunity defense of Civ. Code, § 846. On appeal, the appellate court ruled that an express invitation by the track owners' 18-year-old son to Hoffmann to use the track was tantamount to an express invitation by the track owners, and thus, the son's invitation abrogated parents' recreational use immunity defense to the negligence claim brought by Hoffman. According to the appellate court, the owners' son was acting as their agent when he extended the invitation to Hoffmann, and this agency relationship was implied from the fact that the son was living together with the landowners on the property with the landowners' consent.

The California Supreme Court granted review to determine "whether to extend an invitation made by a nonlandowner, without the landowner's knowledge or express approval, can satisfy the requirements of section 846(d)(3) and abrogate the landowner's immunity under section 846(a)."[13] The Court summarized the positions of the trial court and court of appeal, finding that the trial court—in requiring only an invitation personally extended to plaintiff by a landowner—read the statute too narrowly. However, it also rejected the court of appeal majority's "implied" agency analysis, agreeing instead with the dissent, who argued "that an invitation by a nonlandowner can, under some circumstances, trigger the exception."[14] The Court stated that the agency approach should be more formal than an "implied agency" approach, requiring "a degree of specificity in a landowner's intentional delegation" of authority. As the Court said, the "most natural reading of [the statutory term landowner] is that it does not inferentially include others, like occupants."[15]

The Court concluded that although landowners can authorize nonowners to

 

expressly invite others onto their property, as required for an invitation from a nonowner to support an exception from recreational immunity and to allow a negligence claim against the landowner, a landowner does not necessarily authorize a child to expressly invite others onto the property merely by allowing the child to live on the property and failing to prohibit the child from extending the invitation. Rather, an invitation onto a landowner's property sufficient to support an exception from recreational use immunity may be made by a landowner's authorized agent, but the existence of such an agency relationship must be proven with "a degree of specificity in a landowner's intentional delegation" of authority,[16] and the person seeking to apply the exception and assert loss of the immunity bears the burden of proof to show such an "intentional delegation" of such authority.[17] (Justice Krueger, in a concurring opinion, expressed concern for children who are guests of other children as well as other "household guests," who under the majority's holding would have no recourse for certain injuries, calling for legislation to address this issue in light of the majority holding requiring proof of "direct authorization" to extend an invitation that negates the homeowner's immunity.)[18]

## D. OTHER APPLICATIONS—INVITATIONS BY OTHER INTEREST HOLDERS

Since this "intentional delegation" standard has only been recently set, it remains to be seen how such standard will interact with other types of relationships such as those involving easement holders, tenants, and trespassers who may extend an "express invitation" to some third party who is injured while recreating on the property. Under § 846, immunity from liability to recreational uses extends not only to the owner of fee simple estate, but also to "any person who has *an estate or an interest* in the real property, whether possessory or nonpossessory." This would include a tenant who has a right of possession, as well as the owner of an easement who has a right of use.[19] For all such parties, liability is based on Civ. Code, § 1714(a), which states that "[e]veryone is responsible, not only for the result of his or her willful acts but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ."[20] The question posed by the Court's analysis in *Hoffmann v. Young* is when a landowner or other interest owner who would otherwise have immunity under § 846 may nevertheless lose that immunity because some other person has been authorized by the landowner and has expressly invited the injured party onto the property.

 

### 1. Easement Holders

#### a. Private easements

One potential application of the *Hoffmann* standard is with respect to an express invitation issued by an easement holder. An easement is an incorporeal, intangible, and nonpossessory right to use the land of another that may be a permanent right, or a right for a limited period of time.[21] Therefore, there is always a burdened parcel whether the easement is appurtenant or in gross.[22] An appurtenant easement requires that there be two parcels: the dominant tenement benefited by the easement and a servient tenement burdened by the easement.[23] A person cannot have an easement in his or her own land.[24] Based on the language of § 846, estate owners and other interest owners are treated equally in being entitled to the recreational immunity, as well as being subject to the "express invitee" exception. That exception, applicable "to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner," has been held to abrogate the immunity of the inviter only and not others who enjoy immunity under the statute.[25]

An oft-cited case, *Jackson v. PG&E*, involved a child who was injured while retrieving a kite from a power line. Despite evidence that the landowner had expressly invited the child onto the property where the power line was located, the court of appeal found that the homeowner's express invitation to the child to enter her property did not abrogate the public electric utility's recreational use immunity. Rather, PG&E was held immune from suit as an easement holder. Specifically, the court explained that "an invitation from a fee owner will [not] extinguish recreational use immunity as to all owners of estates in the property" and that the "express invitee exception in section 846 [abrogates] immunity to the inviter only."[26] In resolving the scope of the invitation exception, the *Jackson* court reasoned principally that its interpretation was "consistent with the Legislature's clear intent to immunize all holders of interest in real property."[27]

Although there has been little authority regarding the application of the recreational immunity to a property owner when an easement owner's guest is hurt on the premises, the *Jackson* decision provides helpful guidance as to this issue. As relevant here, the *Jackson* court ruled that the express invitation applies to abrogate the immunity of the inviter only and not others who enjoy immunity under § 846. Thus, if the facts were reversed and a guest was expressly

 

invited only by an easement holder, the express invitation exception should abrogate only the easement holder's immunity and should not similarly abrogate the property owner's immunity, absent any evidence that the invitation was authorized by the landowner.

Furthermore, the *Jackson* court opined that "an easement is a nonpossessory interest of limited extent, [and therefore] an easement holder often will not have the power to invite guests onto the property."[28] Specifically, "an easement holder's ability to invite guests onto property is limited by: (1) in the case of an express easement, the definition of the easement holder's right of access set forth in the appropriate instrument; and (2) the principle that an easement holder must use his easement and rights in such a way as to impose as slight a burden as possible on the underlying property."[29] It can be inferred from the court's explanation that an easement holder generally does not act as a landowner's agent when she extends her invitation to a third party onto the property. In fact, an easement holder's authority to invite a guest onto the property is generally limited to the scope of her easement.[30] In other words, unless there is an express agency relationship between the fee owner and the easement holder, there is assumed to be no such relationship between them. This reading aligns with the *Hoffmann* decision, in which "a degree of specificity in a landowner's intentional delegation" of authority would be required in order to construe the easement holder's invitation as being on behalf of the landowner.[31]

### b. Public easements

A property owner is immune from liability under subsection 846(d)(3) even though the property is subject to a public easement for recreational use. For example, in *Collins v. Tippett*, 156 Cal. App. 3d 1017, 203 Cal. Rptr. 366 (4th Dist. 1984), a sunbather who was injured on a beach subject to a public easement brought an action against the owner of the beach for negligent maintenance of the cliff overlooking the beach. The court of appeal ruled that section 846 granted the landowner immunity from suit even though she opened her beach to the public. The court explained that "construction of the statute allowing a landowner to retain immunity even if she permits public use . . . is more likely to achieve the Legislature's goal of keeping as much private land as possible open for public recreational use."

In *Ravell v. U.S.*, 22 F.3d 960 (9th Cir. 1994), a member of the general public who came onto an Air Force base to view a military air show tripped and fell

 

and thereafter brought a negligence suit against the United States. The court relied on section 846 recreational immunity and ruled in favor of the United States. According to the court, "an advertisement or other invitation to the general public was not an express invitation to anyone in particular," and "the [express invitee] exception is limited to 'those persons who were personally selected by the landowner.' "[32]

In *Phillips v. U.S.*, 590 F.2d 297 (9th Cir. 1979), a hiker brought suit against the United States for personal injuries that he sustained when he fell to the base of a waterfall while hiking in a National Forest. The Ninth Circuit found that the United States was immune from suit. The court concluded that section 846, read in conjunction with section 813, is meant to protect "landowners whose property is already dedicated to public use, such as the owner of public parks" from negligence liability when the public use such private property for recreational activities.[33]

Additionally, the *Phillips* court provided that "all recreational use could be made permissive . . . by the landowner's filing a notice of consent to recreational use of his land."[34] Read in tandem with the *Hoffmann* decision, which would require some explicit language in order to create an agency relationship between a public agency and a landowner, there can be no implied agency relationship arising out of a landowner's formal consent to recreational use of his land because the landowner has given permission to the general public. Thus, public easements simply make recreational users of private property permissive entrants and not "express invitees" for the purposes of section 846 immunity exception.[35]

In summary, the *Hoffmann* decision does not seem to interact with the case law regarding public easements, since public easements generally do not invoke the "express invitee" exception that was at the core of the *Hoffmann* decision. The case law regarding public easements remains intact and effective law, even after *Hoffman*.

### 2. Tenants

A second area of potential application of the *Hoffmann* standard is in the landlord tenant context. A lease is an agreement that grants to the tenant the rights of exclusive possession and use of real property for a specified period of time. It creates a possessory estate in real property. While the lease vests the exclusive possession of the leasehold in the lessee against all persons, including

 

the owner of the fee, the owner of the underlying fee retains the rights of possession, subject to the holder's use. Courts have concluded that "[t]he proper test to be applied to the liability of a possessor of land" rests on "whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others . . .," which "requires persons 'to maintain land in their possession and control in a reasonably safe condition.' "[36] There is no requirement that a person hold title to the property in order for liability to be imposed. "[T]he duties owed in connection with the condition of land are not invariably placed on the person [holding title] but, rather, are owed by the person in possession of the land [citations] because of [the possessor's] supervisory control over the activities conducted upon, and the condition of, the land."[37] Because each have potential liability, tenants and landowners can both claim immunity under § 846, and courts have confirmed that a leasehold interest is sufficient to trigger immunity for the tenant under Civ. Code, § 846.[38]

Although a tenant may have liability to its guest within the leased premises,[39] the party in possession of property is only liable where it also had control over the dangerous condition.[40] Thus, there are also situations in which a landlord is liable despite a tenant being in possession. A landlord has an affirmative duty to maintain premises in a reasonably safe condition,[41] and this duty includes an inspection to discover any dangerous condition that can be reasonably discovered.[42] It follows that landlords generally have liability for the common areas due to the landlord's control of those areas and ability to correct problems.[43] This is where the majority of cases involving recreation would be expected to arise.

As noted earlier, very few cases have addressed the invitation exception to recreational immunity under § 846. " 'Express invitation' in section 846 refers to a direct, personal request by the landowner to persons whom the landowner personally selects to come onto the property."[44] A landlord and tenant each have potential liability to guests for injuries. Both also have potential immunity under § 846. However, assuming § 846 was interpreted as providing immunity only where there could have been liability to begin with, an invitation by one party may not abrogate immunity for the other. For example, a landlord would most likely be liable for injuries in common areas, and thus would have immunity under § 846 for injuries to recreational users in common areas.

The issue arises when a tenant has invited a guest to use common areas, where tenant immunity presumably would not extend because it is the landlord

 

that has control and the ability to correct defects in those areas. This was Justice Krueger's concern in a hypothetical she posed in her concurring opinion: "A guest is injured and sues the landlord for negligent maintenance of the swimming pool. The landlord did not personally invite the guest. Is the guest left without any remedy for her injury?"[45] Justice Krueger is likely correct, because the landlord's immunity would remain intact if the tenant is not liable for common areas. This is one reason a tenant's invitation is unlikely to result in landlord liability for a guest's recreational injury.

Further, the *Hoffmann* court made clear that while the invitation exception to recreational immunity may be invoked when the invitation was made by a landowner's authorized agent, the agency relationship must be proven with "a degree of specificity in a landowner's intentional delegation" of authority.[46] Agency is "a relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act. Absent mutual consent, therefore, there can be no agency."[47] Moreover, the primary test of an agency relationship is the right of control.[48] There is no case law interpreting a lease, by itself, as a manifestation of express agency between landlord and tenant.[49]

On the other hand, because a tenant does not have authority or control over common areas, one might argue that the tenant is the landlord's implied agent based on the landlord's permission to use the common areas. While actual agency is generally created by express agreement or ratification, agency can also be implied by the conduct of the parties.[50] Because the Supreme Court in *Hoffmann* rejected the implied agency theory employed by the court of appeal in finding a son to be the agent of his parents, it is unlikely that a tenant would be found to be the implied agent of its landlord, particularly since "[t]he hallmark of an agency relationship is that one person agrees to act on behalf of another and subject to his control."[51]

Finally, as in the easement context, at least one court has found that the express invitation applies to abrogate the immunity of the inviter only and not others who enjoy immunity under § 846.[52] Were a tenant's invitation found to abrogate whatever immunity the *tenant* may have otherwise enjoyed under § 846, the landlord's immunity may well remain protected under *Jackson*'s broad application of the invitation exception, which that court found to be "consistent with the Legislature's clear intent to immunize all holders of interest in real property."[53] Assuming the recreational activity occurred in the common area,

 

for which the landlord would otherwise have liability, the landlord's immunity under § 846 would likely protect the landlord.

Returning to Justice Krueger's hypothetical, many California cases have found landlord liability for tenant's guest's use of a swimming pool.[54] However, while swimming is surely a recreational activity, to date none of those cases addressed the concept of recreational immunity under § 846. *Wang v. Nibbelink*[55] addressed the issue of swimming pools only cursorily. In response to plaintiff there citing *Johnson v. Prasad*,[56] the *Wang* court noted only that *Johnson* did not involve recreational use immunity, and found liability only under Civ. Code, § 1714. But just because the defendant in *Johnson* did not invoke § 846 immunity does not mean a future defendant with similar facts could not do so, particularly in light of Justice Krueger's question in *Hoffmann*.[57]

### 3. Trespassers

A third conceivable application of the *Hoffmann* standard is that a trespasser could extend an express invitation to someone to recreate on property such that the immunity of the landowner or other person with a possessory or nonpossessory interest would be compromised. This seems unlikely, however, as the trespasser would need to have the authority to extend the invitation him or herself, or would need to be acting as the agent of someone with a legitimate possessory or nonpossessory interest in the property. A trespasser, by definition, is ordinarily a person who willfully enters without the written permission of the landowner, the owner's agent, or the person in lawful possession, and is therefore subject to criminal penalties and removal.[58] Thus, the trespasser could not be construed as someone with a legitimate possessory or nonpossessory interest in the property because they are not in lawful possession.[59] Further, due to the lack of permission, the trespasser could not be acting as the agent of anyone with a legitimate possessory or nonpossessory interest because agency requires consent by the person for whom the trespasser would be acting as an agent, as well as control of the trespasser by that person.[60] Someone injured while recreating on property at the invitation of a trespasser could make no such showing on either count. Under the Court's view that a mere "occupant" is not included in the term "landowner" for purposes of § 846,[61] an invitation extended by a mere trespasser should not alter the landowner's general immunity under that section.

## E. TRUE AGENTS WITH AUTHORITY TO INVITE

*Hoffmann v. Young* involved a parent-child relationship with no written or

 

oral agency agreement and only a contention, rejected by the Court, that the landowner's child *implicitly* has the authority to invite others. Thus, the Court did not address circumstances when an actual agency may exist and be provable, but the *scope of the agent's authority* may be in doubt. For example, an owner may engage a property manager, real estate broker, apartment house manager, or other contracting parties with express agency powers and authority. In these situations, the question will not be whether an agency exists, but whether that agent's authority permits it to extend an invitation that effectively negates the landowner's immunity.

As noted by the Court, there is no indication the Legislature intended that *only* the landowner can extend the invitation.[62] The Court disapproved cases that require a "direct, personal request" from the landowner.[63] However, while providing that agency principles may apply, the Court did not establish any clear guidelines as to the degree of specificity the owner's authorizations to an express agent must be to give the agent authority to negate § 846 immunity by extending an express invitation to recreate the others. The Court's opinion does require that the landowner must have "properly authorized an agent to extend, on his or her behalf, an invitation to enter the land,"[64] but does not in so many words require an express authorization to do so in a manner that explicitly authorizes the agent to waive § 846 immunity. The Court requires an explicit delegation of authority to the nonlandowner "to invite guests on the landowner's behalf,"[65] but does not require a direct acknowledgment that the invitation extended by the agent will have the effect of abrogating the immunity. All the Court says in this regard is that "an invitation communicated by *the landowner's properly authorized agent* can activate the section 846(d)(3) exception."[66] (emphasis added).

## F. CONCLUSION

The Supreme Court's decision in *Hoffmann* clarified but also narrowed the ability of those injured while recreating on someone else's property to claim the express invitation exception to abrogate the immunity of the landowner under § 846. Per the Court, an invitation from someone other than the actual landowner does not abrogate the immunity of the landowner unless that person is an agent of the landowner, and that agency must be shown with "a degree of specificity in a landowner's intentional delegation" of authority.[67] Because it is unlikely that a court would find this standard to be met in the context of either a dominant and servient easement holder, a landlord and tenant, or a land-

 

owner and trespasser, it is similarly unlikely that the agency required for an easement holder, tenant, or trespasser to issue an invitation would be found sufficient to abrogate a landowner's immunity. Moreover, courts have held that the loss of immunity of one property interest holder does not abrogate the immunity of another.[68] This is another reason that landowner immunity would likely not be disturbed in any of these three contexts. On the other hand, where the person extending the invitation to the injured person is a party with whom the landlord has an express agency relationship (such as a property manager or leasing agent authorized by the owner to act for the landowner in operating, maintaining or leasing the property) the potential for loss of the landowner's immunity due to the agent's "express invitation," while still not fully delineated by reported case law, is much greater.

**ENDNOTES:**

[1]*Hubbard v. Brown*, 50 Cal. 3d 189, 193, 266 Cal. Rptr. 491, 785 P.2d 1183 (1990).

[2]*Id*.

[3]See, e.g., *Valladares v. Stone*, 218 Cal. App. 3d 362, 267 Cal. Rptr. 57 (3d Dist. 1990) (climbing tree for play is recreational purpose within meaning of section 846); *Harmon v. St. Joseph's Catholic Church*, 15 Cal. Rptr. 2d 1 (App. 2d Dist. 1992) (bike riding); *Iverson v. Muroc Unified School Dist.*, 32 Cal. App. 4th 218, 38 Cal. Rptr. 2d 35 (5th Dist. 1995) (soccer match as part of school physical education class).

[4]*Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022).

[5]Civ. Code, § 846.

[6]*Klein v. United States of America*, 50 Cal. 4th 68, 78, 112 Cal. Rptr. 3d 722, 235 P.3d 42 (2010).

[7]*Id*. at 82.

[8]*Hoffmann v. Young, supra,* 297 Cal. Rptr. 3d at 615-616.

[9]Civ. Code, § 846, subd. (d)(3).

[10]*Jackson v. Pacific Gas & Elec. Co.*, 94 Cal. App. 4th 1110, 1118, 114 Cal. Rptr. 2d 831 (1st Dist. 2001), as modified, (Jan. 7, 2002) and (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)).

[11]*Calhoon v. Lewis*, 81 Cal. App. 4th 108, 96 Cal. Rptr. 2d 394 (4th Dist. 2000).

[12]*Hoffmann v. Young*, 56 Cal. App. 5th 1021, 271 Cal. Rptr. 3d 33 (2d Dist. 2020), review granted, see cal. rules of court 8.1105 and 8.1115, 275 Cal.

 

Rptr. 3d 2, 480 P.3d 550 (2021) and rev'd and remanded, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022).

[13]297 Cal. Rptr. 3d at 612.

[14]297 Cal. Rptr. 3d at 615-616.

[15]297 Cal. Rptr. 3d at 617.

[16]*Id.*

[17]297 Cal. Rptr. 3d at 620.

[18]297 Cal. Rptr. 3d at 629-630 (concurring opinion of Justice Krueger).

[19]6 Miller & Starr, California Real Estate 4th, § 19:70 (2022).

[20]Civ. Code, § 1714, subd. (a).

[21]6 Miller & Starr, Cal. Real Est. 4th, § 15:4 (2022).

[22]6 Miller & Starr, Cal. Real Est. 4th, § 15:5 (2022).

[23]*Id.*

[24]*Id.*

[25]*Jackson v. Pacific Gas & Elec. Co.*, 94 Cal. App. 4th 1110, 1118, 114 Cal. Rptr. 2d 831 (1st Dist. 2001), as modified, (Jan. 7, 2002) and (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022), to the extent it held that a qualifying invitation under section 846(d)(3) may only be extended by the landowner personally).

[26]*Id.* at 1119.

[27]*Id.* at 1118. See *Johnson v. Unocal Corp.*, 21 Cal. App. 4th 310, 26 Cal. Rptr. 2d 148 (2d Dist. 1993) (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)) (employee who was injured on land which property owner had made available to his employer to use for company picnic did not qualify as property owner's "express invitee" by virtue of hold harmless agreement executed by his employer on property owner's behalf).

[28]*Jackson v. Pacific Gas & Elec. Co.*, 94 Cal. App. 4th 1110, 1118, 114 Cal. Rptr. 2d 831 (1st Dist. 2001), as modified, (Jan. 7, 2002) and (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)).

[29]*Id.*

[30]Civ. Code, § 806 ("The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired."); see also *Jackson v. Pacific Gas & Elec. Co.*, 94 Cal. App. 4th 1110, 1118, 114 Cal. Rptr. 2d 831 (1st Dist. 2001), as modified, (Jan. 7, 2002) and (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)) ("[A]n easement holder's ability to invite guests onto property is limited by . . . the definition of the easement holder's right of access set forth in the appropriate instrument.").

 

[31]*Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635, 644 (2022).

[32]*Ravell v. U.S.*, 22 F.3d 960, 1020 (9th Cir. 1994).

[33]*Phillips v. U.S.*, 590 F.2d 297, 299 (9th Cir. 1979).

[34]*Id.*

[35]*Id.* ("[A]ll recreational use could be made permissive . . . by the landowner's filing a notice of consent to recreational use of his land . . . thereby making all users permissive users, rather than express invitees.").

[36]*Alcaraz v. Vece*, 14 Cal. 4th 1149, 1156, 60 Cal. Rptr. 2d 448, 929 P.2d 1239 (1997).

[37]*Id.* at 1157-1158.

[38]*Gordon v. Havasu Palms, Inc.*, 93 Cal. App. 4th 244, 255, 112 Cal. Rptr. 2d 816 (4th Dist. 2001) (citing *Ornelas v. Randolph*, supra, 4 Cal. 4th at pp. 1102-1103).

[39]See Civ. Code, § 1714(a).

[40]*Soto v. Union Pacific Railroad Co.*, 45 Cal. App. 5th 168, 178, 258 Cal. Rptr. 3d 529 (2d Dist. 2020).

[41]*Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 674, 25 Cal. Rptr. 2d 137, 863 P.2d 207 (1993).

[42]*Schreiber v. Lee*, 47 Cal. App. 5th 745, 758, 260 Cal. Rptr. 3d 859 (1st Dist. 2020), review denied, (July 22, 2020) (citing 6 Miller & Starr, Cal. Real Estate (4th ed. 2019) § 19:53, pp. 19-245 to 19-247).

[43]See, e.g., *Morlin Asset Management LP v. Murachanian*, 2 Cal. App. 5th 184, 189, 206 Cal. Rptr. 3d 195 (2d Dist. 2016) (tenant's indemnification in commercial lease did not apply to common areas, the control of which is expressly reserved to the landlords).

[44]*Wang v. Nibbelink*, 4 Cal. App. 5th 1, 32, 208 Cal. Rptr. 3d 461 (3d Dist. 2016) (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)).

[45]297 Cal. Rptr. 3d at 631-632 (concurring opinion of Justice Krueger); (Cf. *Johnson v. Prasad*, 224 Cal. App. 4th 74, 76, 168 Cal. Rptr. 3d 196 (3d Dist. 2014).).

[46]297 Cal. Rptr. 3d at 617.

[47]*Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward*, 200 Cal. App. 4th 81, 91, 133 Cal. Rptr. 3d 155 (1st Dist. 2011); Civ. Code, § 2295 ("an agent is one who represents another . . . in dealings with third persons").

[48]*Cox v. Kaufman*, 77 Cal. App. 2d 449, 452, 175 P.2d 260 (1st Dist. 1946).

[49]Compare *Scutt v. Dorris*, 2021 WL 206356 (D. Haw. 2021) (no agency relationship between landlord and tenant that carried out certain tasks like

 

opening mail and cleaning common areas).

[50]*Van't Rood v. County of Santa Clara*, 113 Cal. App. 4th 549, 562, 571, 6 Cal. Rptr. 3d 746 (6th Dist. 2003) ("Agency is generally a question of fact").

[51]See *In re Coupon Clearing Service, Inc.*, 113 F.3d 1091, 1099 (9th Cir. 1997) (applying California law).

[52]*Jackson v. Pacific Gas & Elec. Co.*, 94 Cal. App. 4th 1110, 1118, 114 Cal. Rptr. 2d 831 (1st Dist. 2001), as modified, (Jan. 7, 2002) and (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)).

[53]*Id*. See *Johnson v. Unocal Corp.*, 21 Cal. App. 4th 310, 26 Cal. Rptr. 2d 148 (2d Dist. 1993) (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)) (employee who was injured on land which property owner had made available to his employer to use for company picnic did not qualify as property owner's "express invitee" by virtue of hold harmless agreement executed by his employer on property owner's behalf).

[54]See, e.g., *Grant v. Hipsher*, 257 Cal. App. 2d 375, 64 Cal. Rptr. 892 (4th Dist. 1967); *Mundt v. Nowlin*, 44 Cal. App. 2d 414, 112 P.2d 782 (2d Dist. 1941); *Kasunich v. Kraft*, 201 Cal. App. 2d 177, 19 Cal. Rptr. 872 (2d Dist. 1962).

[55]*Wang v. Nibbelink*, 4 Cal. App. 5th 1, 32, 208 Cal. Rptr. 3d 461 (3d Dist. 2016) (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)).

[56]*Johnson v. Prasad*, 224 Cal. App. 4th 74, 168 Cal. Rptr. 3d 196 (3d Dist. 2014).

[57]It should be noted that one unpublished case has applied a different novel approach to recreational immunity in the context of a tenant's guest. *Hurtado v. Century Housing Corporation*, 2012 WL 5193784 (Cal. App. 2d Dist. 2012), unpublished/noncitable, found that the tenant's payment of rent was sufficient to trigger the "consideration" exception to the landlord's recreational immunity.

[58]Pen. Code, §§ 602, 602.5.

[59]*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC*, 14 Cal. App. 5th 343, 406, 222 Cal. Rptr. 3d 83 (4th Dist. 2017) (trespass requires the invasion of a superior possessory interest in property).

[60]See Restatement Second, Agency §§ 1, 3; Restatement Third, Agency, § 1.01, com. d. ("manifestation of assent" required for creation of agency); *Edwards v. Freeman*, 34 Cal. 2d 589, 592, 212 P.2d 883 (1949) ("In the absence of the essential characteristic of the right of control, there is no true agency").

[61]297 Cal. Rptr. 3d at 617.

[62]297 Cal. Rptr. 3d at 616.

[63]297 Cal. Rptr. 3d at 616, n. 13.

[64]297 Cal. Rptr. 3d at 617.

 

[65]297 Cal. Rptr. 3d at 620.

[66]297 Cal. Rptr. 3d at 616.

[67]297 Cal. Rptr. 3d at 616.

[68]*Jackson v. Pacific Gas & Elec. Co.*, 94 Cal. App. 4th 1110, 1118, 114 Cal. Rptr. 2d 831 (1st Dist. 2001), as modified, (Jan. 7, 2002) and (disapproved of by, *Hoffmann v. Young*, 13 Cal. 5th 1257, 297 Cal. Rptr. 3d 607, 515 P.3d 635 (2022)).

 