SUPREME COURT
FILED

JAN 23 2019

Jorge Navarrete Clerk

Deputy

S247677

IN THE SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,

v.

JOHN R. MATHIS and JOHN R. MATHIS AS TRUSTEE OF THE JOHN R. MATHIS TRUST,
Defendants and Respondents.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN
CASE NO. B272344
CALIFORNIA SUPERIOR COURT, COUNTY OF LOS ANGELES CASE NO. BC542498

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF ON BEHALF OF DEFENDANT AND RESPONDENT JOHN R. MATHIS

LECLAIRRYAN, LLP
WILLIAM A. BOGDAN (BAR NO. 124321)
44 MONTGOMERY STREET, SUITE 3100
SAN FRANCISCO, CALIFORNIA 94104
(415) 391-7111 • FAX: (415) 391-8766
william.bogdan@leclairryan.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

IN THE SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,

v.

JOHN R. MATHIS and JOHN R. MATHIS AS TRUSTEE OF THE JOHN R. MATHIS TRUST,
Defendants and Respondents.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF DEFENDANT AND RESPONDENT JOHN R. MATHIS

Pursuant to California Rules of Court, rule 8.520(f), The Associated General Contractors of California ("AGC") requests permission to file the attached amici curiae brief in support of defendant John R. Mathis

AGC represents more than 1,500 individuals and companies in California. Its members are general contractors, subcontractors, and material suppliers who perform construction work for public entities and private owners throughout California, along with others whose professions support the construction industry. AGC's Mission Statement reads as follows: "The mission of the Associated General Contractors of California is to be the recognized leader in providing business

opportunities, education, training, resources, and advocacy for its members while advancing sound public policy for the construction industry."

As an advocate for its members, AGC is involved with legislation concerning all aspects of the construction industry. It also monitors lawsuits concerning the construction industry and files amicus curiae briefs in significant cases before federal and state courts, including this Court, on issues that will impact its members and the construction industry generally. AGC is recognized as the "voice of the construction industry" in California.

AGC has participated as amicus curiae in numerous cases before this Court affecting the construction industry,[1] including *Hooker v. Department of Transportation*, 27 Cal. 4th 198 (2002), the decision which has served as the cornerstone for the analysis of a hirer's liability to injured independent contractor employees. AGC stands in a position to offer a unique perspective on this specific area of law and hopefully aid this Court is resolving the

---

[1] See, e.g., *Cleveland National Forest Foundation v. San Diego Ass'n of Governments*, 3 Cal. 5th 497 (2017); *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority*, 57 Cal. 4th 439 (2013); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012); *Los Angeles Unified School District v. Great American Ins. Co.*, 49 Cal. 4th 739 (2010); *Brodie v. Workers' Comp. Appeal Bd.*, 40 Cal. 4th 1313 (2007); *Professional Engineers in California Government v. Kempton*, 40 Cal. 4th 1016 (2007); *Lewis Jorge Const. Mgmt., Inc. v. Pomona Unified School Dist.*, 34 Cal. 4th 960 (2004); *Hooker v. Department of Transportation*, 27 Cal. 4th 198 (2002); *Amelco Electric v. City of Thousand Oaks*, 27 Cal. 4th 228 (2002); *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority*, 23 Cal. 4th 305 (2000); *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352 (1999).

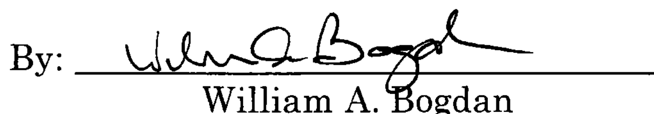
conflict that has arisen between the lower court decision and those in prior cases.

The AGC Legal Advisory Committee has reviewed the appellate briefs in this case, and the Executive Committee of the State Board of Directors of AGC has authorized the filing of this amicus brief in order to assist this Court in reaching a decision that will benefit not only its members but the entire construction industry.

No party or any counsel for a party in the pending appeal has authored this proposed amicus brief in whole or in part. Nor has any party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or its counsel in the pending appeal has made a monetary contribution intended to fund the preparation or submission of this brief.

We therefore request that this Court accept for filing the accompanying amicus curiae brief in support of Mr. Mathis.

January 9, 2019

By: 
William A. Bogdan

Attorneys for Amicus Curiae
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

IN THE SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,

v.

JOHN R. MATHIS and JOHN R. MATHIS AS TRUSTEE OF THE JOHN R. MATHIS TRUST,
Defendants and Respondents.

AMICUS CURIAE BRIEF ON BEHALF OF DEFENDANT AND RESPONDENT JOHN R. MATHIS

TABLE OF CONTENTS

Page

I. Introduction. 1

II. Summary of argument. 1

III. Legal argument. 2

A. Skylight professionals are mandated to protect themselves when working at heights. 3

1. Protection of all workers at heights. 4

2. Protection of skylight workers. 5

3. Gonzalez failed to present evidence of unfeasibility or increased hazard. 5

4. The hirer is presumed to delegate responsibility for compliance to the specialty contractor. 7

B. Gonzalez's failure to address the known safety risks entitles Mr. Mathis to summary judgment in his favor 8

IV. Conclusion. 16

TABLE OF AUTHORITIES

Page

Cases

Brannan v. Lathrop Const. Assoc., Inc.
(2012) 206 Cal.App.4th 1170 11

Browne v. Turner Construction Co.
(2005) 127 Cal.App.4th 1334 12

Delgadillo v. Television Center, Inc.
(2018) 20 Cal.App.5th 1078 12

Fernandez v. Lawson
(2003) 31 Cal.4th 31 15

Gravelin v. Satterfield
(2011) 200 Cal.App.4th 1209 11

Hooker v. Department of Transportation,
27 Cal. 4th 198 (2002) 12, 14, 15

Kinsman v. Unocal Corp.
(2005) 37 Cal. 4th 659 .... 8, 10, 11, 13

Madden v. Summit View, Inc.
(2008) 165 Cal.App.4th 1267 11

Ortega v. K-Mart Corporation
(2001) 26 Cal.4th 1200 15

Osborn v. Mission Ready Mix (1990)
224 Cal.App.3rd 104 12

Privette v. Superior Court
(1993) 5 Cal. 4th 689 .... 1, 2, 7

Ruiz v. Herman Weissker, Inc.
(2005) 130 Cal.App.4th 52 7

SeaBright Ins. Co. v. US Airways Inc.
(2011) 52 Cal.4th 590 .... 7, 8

Statutes

8 CCR § 1670 4

8 CCR § 1671.1 6

8 CCR § 1671.2(b) 6

8 CCR § 3212(d)(1) 5

8 CCR §336.10 15

Labor Code §6400 7

I. Introduction.

General contractors, like homeowners, hire specialty contractors for specialty work. Though a general contractor engages specialty contractors in part because of contractor licensing laws, the overriding motivation is that specialty contractors can perform the intricacies of their work cognizant of the hazards presented and equipped to take the necessary safety precautions. A homeowner's expectation in hiring such trained professionals is no different.

The holding below not only ignores the statutory safety requirements mandated of skylight professionals, it fundamentally rejects a consistent body of law dating back 25 years. The law prior to the decision below absolved the hirer of liability to an independent contractor's injured employee either (1) where the hirer did not affirmatively contribute to the injured worker's harm, or (2) where the specialty contractor was aware of a hazard on the premises yet proceeded without the necessary safety precautions.

The decision below, if affirmed, will dramatically affect all general contractors in this state by exposing them to liability that they have not faced since this Court's seminal decision in *Privette v. Superior Court* (1993) 5 Cal. 4th 689. This inevitably will lead to an increase in insurance costs for all contractors and for all project owners and developers who wish to build any project.

II. Summary of argument.

A. The State of California recognizes that work at heights is an intrinsic part of skylight work and establishes what

reasonable precautions a skylight contractor must take in response;

B. The hirer of a specialty contractor is entitled to summary judgment when (1) the hirer does not affirmatively contribute to the hazard that caused the injury, and (2) the contractor is aware of a hazard yet fails to take sufficient safety precautions.

III. Legal argument.

Mr. Gonzalez would have this Court believe that roof gravel caused his paraplegia. On the contrary, his injury occurred as a result of him accessing his work on a roof without the mandated fall protection.

A layer of gravel, or small stones, is routinely applied on top of the final coating of asphalt to protect a roof from the elements, including ultraviolet rays and hail. The weatherproofing layer of gravel gives the roof's surface a longer life and helps prevent cracking, blistering and degradation, which could lead to leaks or other material failures over time. In fact, this Court's seminal decision in *Privette v. Superior Court* (1993) 5 Cal. 4th 689 arose in the context of a hirer's alleged responsibility for providing safe access to an independent contractor installing a tar and gravel roof. Gonzalez's alleged surprise at encountering gravel and sand on Mr. Mathis's roof in Malibu is belied not only by his years of experience in the skylight industry, but his decades of work on that very roof.

Mr. Mathis has submitted comprehensive briefs explaining why, on a myriad of grounds, Gonzales's liability theories all fail

as a matter of law. In this brief, AGC focuses and expands on arguments touched upon in the briefing, but with emphasis as to how the lower court's ruling will detrimentally affect the construction industry.

A. Skylight professionals are mandated to protect themselves when working at heights.

Gonzalez repeatedly suggests that an injured worker's ability to establish liability against a hirer is dependent on the *hirer* proving that the independent contractor has "the ability to *reasonably* avoid a given risk" (Gonzalez's Answer Brief (AB) 31, emphasis in original), and that the law requires a contractor to only take reasonable safety efforts. (AB 39) As he interprets the duty he owed himself and his workers, an independent contractor's responsibility "does not encompass responsibility to take precautionary measures for *every* danger on the property, but only those which are the subject of retention or reasonably entailed by the nature of he contracted work . . ." (AB 29-30, emphasis in original).

In reality, Mr. Mathis need not establish what steps are reasonable for Mr. Gonzales to take when the law has already deemed what is reasonable for him as owner of Hollywood Hills Window Cleaners: OSHA has established that every specialty contractor who exposes its employees to a risk of falling is itself responsible to take precautions to avoid that hazard. Those requirements and responsibilities do not get determined on a case-by-case basis through litigation.

Safety regulations controlling those who perform their duties at heights spring from one undeniable fact: gravity works every time. Title 8 of the California Code of Regulations not only demands protection for all those working at heights generally, but reinforces those protections by prescribing specific requirements for those working in the skylight industry.

1. Protection of all workers at heights.

Section 1670 requires that any employee exposed to a risk of falling in excess of 7½ feet from the perimeter of a structure or edge be provided a personal fall arrest, personal fall restraint or positioning system. If an employee's duties require horizontal movement, rigging shall be provided so that the attached lanyard will slide along with the employee. The fall protection must comply with ANSI standards. All contractors working at heights are charged with addressing that risk.

It is estimated that Mr. Gonzales fell 8 ½ feet. (1 AA 66:7-8, 114:11-115:24) If that measurement is correct, he and his employees violated the regulation while working on the roof. The point, however, is not whether Gonzales should have been issued a citation based on the distance he fell. Rather, it is that the Department of Industrial Relations recognizes, and all skylight contractors thus should understand, that the risk of heights while working on roofs is inseparable from the risk of working on skylights and must be addressed by that contractor.

2. Protection of skylight workers.

OSHA mandates additional protections for skylight workers in recognition that work at heights are inherent in their trade. Section 3212(d)(1) requires guardrails at locations where there is a routine need for any employee to approach within six feet of the edge of a roof. When intermittent work is being done at risk, safety belts and lanyards, or an approved fall protection system, may be provided in lieu of guardrails. However, where fall protection is used, safety lines and/or lanyards shall be attached to roof tie-backs or equivalent anchorages. In addition, those working within six feet of a skylight must be protected by skylight screens, guardrails, personal fall protection, covers or nets.

3. Gonzalez failed to present evidence of unfeasibility or increased hazard.

Incredulously, Gonzalez claims that these requirements do not apply to him because "the roof edge was not where the work was done." (AB 57) He claims having to access the roof exposed him "to dangers beyond that incident to [his] normal trade . . " (AB 13) The use of fall protection, he argues, limits mobility, and prevents him from doing his job because "when going to or from the ground to the skylight, mobility is essential." (AB 57) Installation of such devices, in his mind, would be impractical because the exposure to a fall hazard would exist only "briefly," and access to the skylight requires "freedom of movement which such devices are designed to restrict." (AB 39)

Presumably, OSHA took such considerations into account when drafting the regulations. However, after being confronted with numerous reports of skylight workers maimed or killed by falls from roofs, OSHA decided whatever hindrance skylight workers might encounter when using a fall restraint was worth the benefit of having them return home healthy when the workday was done.

Gonzalez failed to present any evidence that the OSHA mandates to protect him and his workers from danger were impossible to implement. Nevertheless, OSHA provides alternatives in circumstances where standard fall protection is impracticable or creates a greater hazard. Section 1671.1 allows the contractor to have a qualified person create a fall protection plan specific to the site. The plan has to be implemented by a competent person, and document why conventional fall protection is infeasible or would create a greater hazard. In the alternative, Section 1671.2(b) permits the contractor to implement a safety monitoring system where a competent person monitors the safety of other employees by warning an employee who is unaware of a fall hazard or is acting in an unsafe manner.

Rather than providing evidence sufficient to exempt him from the standard fall protection requirements, Gonzalez instead suggests that complying would be too expensive for "lower-cost" specialty contractor to provide. (AB 12) To the contrary, general contractors bid their projects with the expectation that the specialty contractor will include the cost of safety precautions in

the price of the work, just as the cost of worker's compensation premiums should be included. *Privette, supra* at 699.

4. **The hirer is presumed to delegate responsibility for compliance to the specialty contractor.**

Rather than demonstrate compliance with the safety regulations, Gonzalez argues instead that the responsibility to provide the protections mandated by OSHA belongs to the homeowner alone. On the contrary, though Labor Code §6400 requires all employers to furnish a place of employment that is safe and healthful for employees, that requirement "is only imposed on the employee's immediate employer and those who contract with the immediate employer and retain control over the work place." *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 64. As noted by that court, Labor Code §6400 should not be construed as meaning that, "where a general contractor or owner of premises does nothing more with respect to work done by an independent contractor than exercise general supervision and control to bring its satisfactory completion, it is his responsibility to assure compliance with all applicable safety provisions of the code and regulations issued thereunder." *Id.*

As recognized by this Court in *SeaBright Ins. Co. v. US Airways Inc.* (2011) 52 Cal.4th 590, "we have never held under the present law that a specific Cal-OSHA requirement creates a duty of care to a party that is not a defendant's own employee." *Id.* at 597. Any tort law duty a hirer owes under Cal-OSHA to the

employees of an independent contractor is presumptively delegated to that contractor. *Id.* at 601.

Skylights by definition are installed and serviced at heights, not at ground level. Gonzalez concedes that his claim would fail under *Privette* if "the hirer has performed its non-delegable duty by retaining a contractor specifically tasked and qualified to remedy the danger, and hence charged with avoiding the dangers inherent in that very work." (AB 11) Yet Mr. Mathis did exactly that: he retained a specialty contractor who the law specifically tasked with remedying the danger of falls and who was charged with the duty to address the dangers inherent in performing at heights generally, and on skylights specifically.

B. Gonzalez's failure to address the known safety risks entitles Mr. Mathis to summary judgment in his favor

Having failed to protect himself or his workers as required by OSHA regulations, Gonzalez asks this Court to affirm an aberrant decision which ignores this Court's rulings in *Seabright, supra,* and *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659. Each prior court asked to push the responsibility for worker safety from the specialty contractor back to the hirer, particularly where the contractor is aware of very hazard presented, has refused to hold the hirer responsible. This Court should reject that same request.

The heart of Gonzalez's brief stems from misreading the *Kinsman* decision as "non-delegation to the contractor may be found where the owner should reasonably repair rather than rely

on a warning or the obviousness of the danger." (AB 35) In reality, *Kinsman* dealt head on with the issue confronted by the court below: is an injured independent contractor entitled to pursue a civil claim against a hirer when the contractor fails to take precautions to avoid a hazard not directly created by the contractor's actual work, but known to that contractor?

Kinsman arose in the context of an instructional error dispute. Mr. Kinsman was a carpenter specializing in building scaffolds. He neither installed nor removed asbestos. Yet he believed he was exposed to asbestos because workers who used his scaffold would cause asbestos to gather on the planks, other trades would dislodge asbestos in the environment, or asbestos could have potentially been dislodged while scaffolds were being installed or removed. The trial court refused to instruct the jury that they could find for the hirer if it was proved that the dangers of asbestos were so well known that his employer should have taken safety precautions -- in this case an inexpensive respirator -- to ameliorate what the scaffold contractor knew to be a hazard.

This Court reversed the verdict in Kinsman's favor. Recognizing the sea change prompted by *Privette*, this Court acknowledged that the old rules regarding a premises owner's liability needed to be re-written where the injured claimant was an employee of an independent contractor:

> In view of the above, the usual rules about landowner liability must be modified, after *Privette,* as they apply to a hirer's duty to the employees of independent contractors. As noted, the Restatement Second of Torts, section 343, states that the landowner's duty is triggered when it "(a)

> knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and [¶] (b) should expect that they will not discover or realize the danger, *or will fail to protect themselves against it.*" (Italics added.) In light of the delegation doctrine reaffirmed by *Privette,* the italicized phrase does not seem applicable to landowner liability for injuries to employees of independent contractors. Because the landowner/hirer delegates the responsibility of employee safety to the contractor, the teaching of the *Privette* line of cases is that a hirer has no duty to act to protect the employee when the contractor fails in that task and therefore no liability; such liability would essentially be derivative and vicarious.

Kinsman at 505-506.

Because the hirer would have no liability to Kinsman for asbestos exposure if his employer knew or should have known that asbestos posed a threat, the case was remanded for a new trial:

> We conclude that the failure to properly instruct the jury in this case was prejudicial. Although the jury, in finding Unocal negligent under a premises liability theory, implicitly found that Unocal knew or should have known of the hazard of asbestos dust on its property, it made no finding about whether Kinsman's employer, Burke & Reynolds, or any other contractor working at the same time as Kinsman, knew or should have known of the hazard, and whether Unocal was or should have been aware that these contractors did not know of the hazard. As discussed, a finding that these contractors did know that the dust in the refinery was asbestos and was hazardous to an employee like Kinsman, would, under the principles articulated in the *Privette* line of cases and in this opinion, completely relieve Unocal of liability for any resultant employee injury.

Kinsman at 512-513. In other words, so long as the independent contractor knew or should have known of the danger posed by asbestos, even though as a scaffold contractor it neither installed or removed asbestos, that independent contractor would be solely responsible to take the necessary precautions to provide its employees a safe place to work.

The lessons of *Kinsman* have been repeatedly and consistently applied in circumstances where access or egress by the contractor to its work, not the contractor's work itself, presented a known risk to the contractor:

- *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267 -- Summary judgment for hirer affirmed where electrician fell from raised patio used for access. Electrician's argument that he would need permission to install safety precautions and had no money to implement them was unavailing;

- *Brannan v. Lathrop Const. Assoc., Inc.* (2012) 206 Cal.App.4th 1170 -- Summary judgment for hirer affirmed where bricklayer injured while crawling through wet scaffold to access worksite with consent of his foreman who believed the wet scaffold did not present a safety concern;

- *Gravelin v. Satterfield* (2011) 200 Cal.App.4th 1209 -- Summary judgment for hirer affirmed where cable installer fell through roof used to access worksite. The roof extension was fit for its intended and obvious purpose, and became hazardous only when the contractor selected it as an access point. The contractor was responsible for choosing a safe access point and created the danger by his poor choice to proceed in an unsafe manner;

- *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078 -- Summary judgment for hirer affirmed where window washer chose to access his work area without required safety protection on building lacking adequate anchor points.

Gonzalez falls squarely within the holding of these four decisions. Mr. Mathis's roof as a roof functioned appropriately. At the time Gonzales chose to use the edge of the roof as a passageway, he was aware of both the height and condition of the roof, having performed skylight work on Mr. Mathis's roof for decades. He is presumed to know and comply with the safety regulations delegated to him when he is hired by the homeowner and imposed on him by OSHA. He not only failed to inform Mr. Mathis of his inability to take the required safety precautions, he apparently allowed his employees to proceed in the face of the danger Gonzalez knew existed.

Gonzalez's citation to *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3rd 104 and *Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334, both of which pre-date *Kinsman,* does not aid Gonzalez's cause. Neither decision has been relied upon for the proposition asserted by Gonzalez since the *Kinsman* decision, although the existence of the *Osborn* decision is acknowledged in a *Madden* footnote. In any event, both cases involved circumstances where the hirer physically removed access previously provided to contractors. Though *Osborn* did not discuss affirmative contribution because it was decided before *Hooker*, the *Browne* court found that removal of access could be

considered to have affirmatively contributed to the harm and thus reversed an order granting summary judgment to the hirer.

If *Browne* and *Osborn* are still relevant after *Kinsman*, it is conceivable that an owner may owe a duty where the hirer removes access and the independent contractors fail to protect themselves against this danger. However, this Court recognized in *Kinsman* that the *Osborn* analysis would not apply in the circumstances presented here. ["As noted, the Restatement Second of Torts, section 343, states that the landowner's duty is triggered when it . . . ' (b) should expect that they will not discover or realize the danger, *or will fail to protect themselves against it.*' In light of the delegation doctrine reaffirmed by *Privette,* the italicized phrase does not seem applicable to landowner liability for injuries to employees of independent contractors." *Kinsman* at 505-506.]

To adopt the reasoning of the lower court here is to encourage the hirers of independent contractor to take safety measures into their own hands and speculate as to what precautions might be necessary for the specialty work involved. Homeowners on a fixed income who hire a skylight contractor might climb up to their own roofs to meet Gonzalez's expectation that roof access to the skylight should be broom clean. Such self-help remedies may actually subject the specialty contractor to greater danger.

Should the current ruling stand, what was once objective will have become subjective: now the homeowner must determine what reasonable precaution needs to be taken, and

speculate as to whether the specialty contractor can take that precaution rather than delegating safety decisions to the independent contractor. As a result, the hirer would now retain control over all safety, and bear potential liability for the specialty contractor's failure to take precautions, eviscerating the holdings in *Privette*, *Kinsman*, and *SeaBright*.

This Court's ruling in *Hooker* is also endangered, and the distinction between negligence and premises liability will blur. Under the current state of the law, a hirer who does not affirmatively contribute to the harm cannot be liable to the injured employee of an independent contractor. Only if the hirer inadequately asserts control over subcontractor safety or fails to act in the face of a non-delegable duty can liability be established. However, under the rubric fashioned by the court below, the hirer now must act to take the precautions required by the specialty work, or face liability for having not done so. Under the resulting Catch-22, the hirer can avoid *Hooker* liability to the injured contractor by not exercising control that affirmatively contributes to the harm, only to be subject to *Kinsman* liability (as interpreted by the court below) for failing to affirmatively control contractor safety. The hirer could avoid *Kinsman* liability by assuming the contractor's safety duties, only to incur *Hooker* liability if the contractor is injured despite those efforts. By this Court's decisions in *Hooker* and *Kinsman*, the hirer was never intended to be placed in such a paradox.

The decision below also presents a threat to general contractors beyond the expanded risk imposed on homeowners.

Though individuals who hire contractors to work on a personal residence are not subject to OSHA, *Fernandez v. Lawson* (2003) 31 Cal.4th 31, general contractors are subject to OSHA regulations regarding multi-employer worksites. If the decision below is affirmed, the hirer on a commercial project would be subject to the argument that it is always the creating, controlling and correcting employer whenever an independent contractor failed to take the necessary steps to meet the hazards that independent contractor knows to exist. 8 CCR §336.10.

The lower court's decision here would create for the hirer of a contractor a level of responsibility that the legislature never intended: The hirer would become the insurer of every contractor's safety. See *Ortega v. K-Mart Corporation* (2001) 26 Cal.4th 1200, 1205 (Owner is not the insurer for whatever befalls a patron visiting property). Such an interpretation would result in a strict liability standard, rather than one where the hirer's liability is determined by its actual negligent conduct in affirmatively contributing to the harm, as this Court required in *Privette* and *Hooker*.

The court below held that Mr. Mathis was required to prove as a matter of law that Gonzalez could have *reasonably* implemented the safety precautions necessary in order to avoid the harm he suffered, even though he was already mandated by law to take those very precautions. This new and unprecedented requirement not only is contrary to this Court's prior decisions, it will prevent summary judgment in virtually every case where an

injured worker seeks to hold the hirer of his employer responsible for a workplace injury.

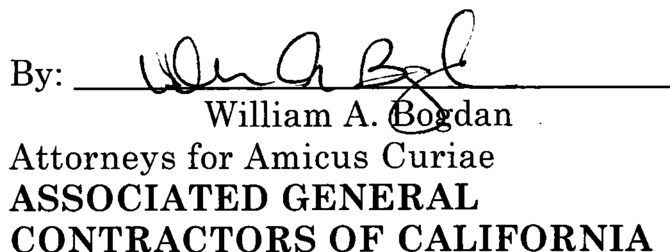
This is not the result prescribed by *Privette* and its progeny. Should this decision be affirmed, general contractors will immediately face far greater liability than is currently the case, resulting in higher insurance costs and higher costs for the owners of all their construction projects.

IV. Conclusion.

Skylight professionals are to provide a safe place to work for their employees and price their services accordingly. The safety orders cannot be skirted as a price-cutting technique to undercut competitors who protect their personnel as required. The suggestion that the owner of skylight maintenance contractor is excused from that responsibility because he terms himself a "lower-cost and lower-skill" contractor finds no basis in the law and defies logic.

Gonzalez knew of the condition and the risks involved in his work generally, and on this roof particularly. The law requires him, not Mr. Mathis, to respond accordingly. A contractor who proceeds with the work cognizant of the hazards without first taking the necessary safety precautions cannot foist liability on the hirer for any resulting harm.

January 9, 2019

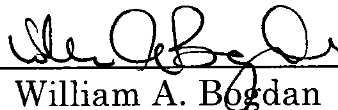


By: ______________________
William A. Bogdan
Attorneys for Amicus Curiae
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this **AMICUS CURIAE BRIEF ON BEHALF OF DEFENDANT AND RESPONDENT JOHN R. MATHIS** contains **3,930** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

January 9, 2019



William A. Bogdan

PROOF OF SERVICE

Gonzalez v. Mathis
Supreme Court Case No. S247677

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 44 Montgomery Street, Suite 3100, San Francisco, CA 94104.

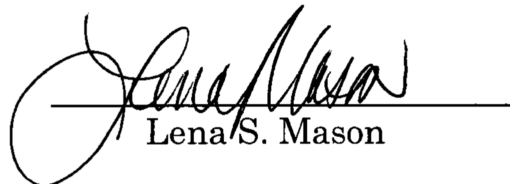
On January 9, 2019, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF ON BEHALF OF DEFENDANT AND RESPONDENT JOHN R. MATHIS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY REGULAR MAIL: on the parties in said cause, by placing true and correct copies thereof enclosed in sealed envelopes addressed to the above addresses and causing said envelopes, with postage thereon fully prepaid, to be deposited in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed January 9, 2019.



Lena S. Mason

SERVICE LIST
Gonzalez v. Mathis
Supreme Court Case No. S247677

Evan D. Marshall Herzog, Yuhas, Ehrlich & Ardell 11400 West Olympic Blvd. Suite 1150 Los Angeles, CA 90064 em@avlaw.info	Attorneys for Plaintiff and Appellant Luis Gonzalez
Wayne McClean Law Offices of Wayne McClean 21650 Oxnard St. Suite 1620 Woodland Hills, CA 91367 law@mcclean-law.com	Attorneys for Plaintiff and Appellant Luis Gonzalez
Brian J. Panish Panish, Shea & Boyle LLP 11111 Santa Monica Blvd. Suite 700 Los Angeles, CA 90025 panish@psblaw.com	Attorneys for Plaintiff and Appellant Luis Gonzalez
Marvin S. Putnam Robert J. Ellison Latham & Watkins 10250 Constellation Blvd. Suite 1100 Los Angeles, CA 90067 marvin.putnam@lw.com robert.ellison@lw.com	Attorneys for Defendants and Respondents John R. Mathis and John R. Mathis as Trustee of the John R. Mathis Trust
Michael E. Bern Latham & Watkins 555 Eleventh Street, NW Suite 1000 Washington, D.C. 20004 michael.bern@lw.com	Attorneys for Defendants and Respondents John R. Mathis and John R. Mathis as Trustee of the John R. Mathis Trust
Los Angeles County Superior Court Stanley Mosk Courthouse 111 North Hill Street Los Angeles, CA 90012	