No. S247677

In the Supreme Court of the State of California

LOUIS GONZALEZ,
Plaintiff and Appellant,

v.

JOHN R MATHIS, et al
Defendants and Respondents.

After a Decision by the Court of Appeal,
Second Appellate District, Division Seven, Case No. B272344

The Superior Court of Los Angeles County,
Case No. BC542498, Honorable Gerald Rosenberg, Judge

APPLICATION TO FILE AN AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING PLAINTIFF

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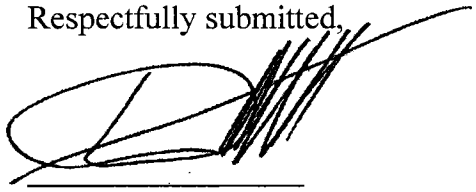
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Under California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. Amicus curiae and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that amicus curiae and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: January 24, 2019

Respectfully submitted,



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APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of California ("CAOC") respectfully seeks permission to file the accompanying brief as friend of the Court. (Cal. Rules of Court, rule 8.520(f)(1).)

Founded in 1962, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. CAOC's members represent individuals and small businesses in various types of cases including class actions and individual matters affecting such individuals and entities such as claims for personal injuries and property damage. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees, and injured victims in both the courts and the Legislature.

CAOC has participated as amicus curiae in precedent-setting decisions shaping California law. *See, e.g., Ramos v. Brenntag Specialties, Inc.,* 63 Cal.4th 500 (2016), *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348 (2014), *Rose v. Bank of America, N.A.,* 57 Cal.4th 390 (2013); and *In re Tobacco II Cases,* 46 Cal.4th 298 (2009).

CAOC is familiar with the parties' briefing. Here, CAOC seeks to assist the Court "by broadening its perspective" on the context bounding the issues presented: Whether a negligent homeowner should be held liable for dangerous conditions on his property which cause injury to a housecleaner-

window washer, a business invitee, who was on Defendant's property to clean, and not repair or remediate the dangerous, injury causing, condition. *Connerly v. State Personnel Bd.* 37 Cal.4th 1169, 1177 (2006), citation omitted.[1]

[1] No party or its counsel authored any part of CAOC's amicus curiae brief and, except for CAOC and its counsel here, no one made a monetary or other contribution to fund its preparation or submission. (Cal. Rules of Court, rule 8.520(f)(4).)

SUMMARY OF ARGUMENT

The standard of review is *de novo*. *Ennabe v. Manosa*, 58 Cal. 4th 697, 705 (2014). This Court's task is to liberally construe the evidence in support of the party opposing summary judgment and to resolve doubts concerning the evidence in favor of that party. *Id.*

Whether Defendant Mathis's property was in a dangerous condition is a question of fact. Therefore, summary judgment is only appropriate if, after viewing the evidence most favorably to the Plaintiff, no reasonable person would conclude the condition of Defendant's roof created a substantial risk of injury when properly used with due care in a reasonably foreseeable manner.

The starting point for a property owner's liability for his or her own negligence to others is statutorily defined under Civil Code, § 1714, subd. (a) ("The general rule in California is that "[e]veryone is responsible ... 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...").

Public policy is served when homeowner-hirers are required to take responsibility for their own neglect in failing to correct or remediate known dangerous conditions on their property. Here, Defendant, as the property owner, had a duty to protect invitees from the known dangerous condition that existed on the pathway to the worksite, the narrow catwalk on the way

to the skylight on Defendant's roof. Thus, this Court's analysis should be limited to assessing whether Defendant had a duty to maintain his property – the rooftop path to the worksite – in a reasonably safe condition and whether Defendant took steps to keep the premises reasonably safe.

The Peculiar Risk Doctrine and the legal debate that has followed since 1857 is a natural circumstance of the numerous economic realities involved in the hirer and service worker dichotomy. Thus, an examination of the facts of the service arrangement between the landowner-hirer and Plaintiff, a housecleaner-window washer, must be evaluated. CAOC also provides an examination of the facts in *Privette* and its progeny for the Court to recall the history concerning this area. In particular, this case does not involve the "anomalous result" which propelled this Court's decision in *Privette* and its progeny. Rather, this case concerns the landowner-hirer's own negligence as to his property and there is no possibility of an anomalous result here.

There is no countervailing public policy stronger than one that encourages property owners to take steps to eliminate known dangers. The instant case teaches, just because a worker might be classified as an "independent contractor," does not mean the worker is qualified or legally permitted to have duties delegated to him or her, implicitly or explicitly, outside of his or her area of work or specialty. Here, Plaintiff was a

housecleaner-window washer with limited qualifications and therefore, cannot be deemed to have assumed, through implied delegation, responsibility for repairing or remediating Defendant's roof or specifically, the pathway Defendant created to access the skylight.

Here, roofing work was not included in the contract and thus, any duty to repair or remediate Defendant's dilapidated roof could not have been delegated to Plaintiff. In California, roofing work requires a license (qualifications) and thus, not having a license to perform roofing work, there can be no legal implication that Plaintiff assumed duties and responsibilities to make Defendant's roof safe. Moreover, any presumption that the risks involved in making the pathway to the job site on Defendant's roof safe falls onto Plaintiff, is equally flawed because a workers' compensation policy depends on the risks involved in the work and there is nothing in the record establishing the risks involved in roofing are included within the tasks required of a housecleaner-window washer. Thus, it cannot be presumed that the contract between Defendant and Plaintiff to clean his house included sufficient funds to pay for the risks involved in roofing. The opposite is more likely, that the amount paid for the housecleaning did not reflect risks involved in roofing because roofing is at the high end of the scale of premiums paid.

Here, the question is whether Defendant legally and actually delegated to Plaintiff, a housecleaner-window washer, the duty to make the pathway across the roof to the jobsite safe. Any such duty could not have been delegated expressly since it is illegal in California to perform roofing work without a license. Moreover, because Plaintiff lacked the skill and license to fix, repair or remediate the dangerous condition on the roof, Defendant, by operation of law, was unable to rely on an inference or presumption of delegation. Thus, control over the pathway could not have been delegated to Plaintiff. Accordingly, the label "independent contractor" does not mean a negligent landowner-hirer *ipso facto* delegates all duty concerning safety of the premises merely because a worker is hired to perform a discrete task such as house cleaning.

Assuming *arguendo* that the *Privette* rule applies, the Court of Appeal below correctly found a triable issue of fact existed as to the "hazardous condition" Defendant created and maintained on his property. The Court of Appeal correctly recognized that in premises liability actions, the reasonableness of a party's actions is generally a question of fact for the jury to decide. The Court of Appeal correctly concluded that the evidence did not conclusively establish that Plaintiff could have or reasonably should have used the cluttered area of the roof on the inside of the decorative parapet. Indeed, there is no evidence in the record that Defendant provided any

warnings at either the permanently affixed metal ladder or at the top of the ladder where an invitee, such as Plaintiff, was to choose the path to the skylight. Moreover, there was no barricade or "warning" to Plaintiff not to take the route he took which resulted in him falling and sustaining severe injuries, here quadriplegia. Thus, Defendant and *amici*'s arguments that Plaintiff should have taken the interior cluttered path to the worksite fail. At best, it raises a factual issue in dispute for the finder of fact to determine by comparative fault.

However, the Court of Appeal should have concluded that Defendant only delegated the responsibility insofar as was necessary for Plaintiff, a business invitee, to do what he contracted to do – clean Defendant's house and wash windows. The Court of Appeal below failed to appreciate that Plaintiff was a business invitee on Defendant's property to clean his home, not repair the dangerous condition on Defendant's roof that Defendant knew or should have known about. Rather, the Court of Appeal myopically focused on Defendant's agent's direction to use less water and narrowly construed this evidence in the light most favorable to Defendant, not Plaintiff, as it should have. The fact that the dangerous condition included not only the deteriorated roof but also a complete failure to direct business invitees like Plaintiff to traverse the interior cluttered path instead of using the catwalk to access the skylight, where the work was to be performed, are

facts, evidenced by the photographs of Defendant's roof (App. at 639, 642) that the Court of Appeal apparently failed to consider or appreciate.

Here, Plaintiff does not seek to hold Defendant Mathis vicariously liable. Rather, Plaintiff seeks to hold Defendant directly liable for his own negligence and thus, neither *Privette* nor any of its progeny support a rule denying Plaintiff a recovery. Public policy is served when it encourages landowner-hirers to address known dangerous conditions on their property. Triable issues of fact exist as to Defendant's active control of the premises and the hazardous condition which caused, at least in part, Plaintiff's injuries.

California's pure comparative fault system is aptly equipped to resolve the tension between Defendant's negligence and the possibility that Plaintiff was, to some extent, at fault. After hearing all of the evidence, the trier of fact (the jury), may find Defendant liable, for at least his part in failing to adequately maintain a safe route to the skylight that Defendant installed, or, at minimum, failing to provide an adequate warning as to the route business invitees were to take to access the skylight. The jury, after hearing the evidence, may also apportion some degree of fault on Plaintiff.

The opinion of the Court of Appeal should be upheld with respect to its holding concerning Defendant's negligence that caused or contributed to Plaintiff's injuries. The Court of Appeal should be reversed as to Defendant's retained control over his premises. Responsibility for one who

suffers injury as a result of another's negligent conduct should be based on the actual conduct of the parties viewed in the context of the obligations that tort law imposes, not an arbitrary rule that forces all injuries that occur on or near a workplace into the Workers' Compensation System; or, as here, into a situation where no remedy exists.

STANDARD OF REVIEW

Review of a trial court's decision to grant summary judgment is *de novo*, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. *Ennabe v. Manosa*, 58 Cal. 4th 697, 705 (2014). This Court "owes the superior court no deference in reviewing its ruling on a motion for summary judgment; the standard of review is *de novo*." *Coral Construction, Inc. v. City & County of San Francisco*, 50 Cal.4th 315, 336 (2010) (citations omitted.).

To determine whether triable issues of fact exist, the appellate court independently reviews the record that was before the trial court when it ruled on defendants' motion, viewing the evidence in the light most favorable to plaintiffs as the losing parties and resolving evidentiary doubts and ambiguities in their favor. *Elk Hills Power, LLC v. Board of Equalization*, 57 Cal. 4th 593, 606 (2013).

The issue here, whether the Defendant's property was in a dangerous condition, is a question of fact. Therefore, summary judgment is only appropriate if the trial or appellate courts, viewing the evidence most favorably to the plaintiff, determine no reasonable person would conclude the condition created a substantial risk of injury when properly used with due care in a reasonably foreseeable manner. *Sambrano v. City of San Diego*, 94 Cal.App.4th 225, 234 (2001). "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.'" *Cerna v. City of Oakland*, 161 Cal.App.4th 1340, 1347 (2008), citing *Bonanno v. Central Contra Costa Transit Authority*, 30 Cal.4th 139, 148 (2003).

ARGUMENT

A. California's History of Hirer Liability for Their Negligence to Workers[2] and Third Parties in California.

1. The starting point: *Boswell v. Laird*

Ever since this Court's decision in *Boswell v. Laird*, 8 Cal. 469 (1857), California has adhered to the general rule of non-liability of the hirer for the torts of an independent contractor. However, the starting point for a property owner's liability for his or her own negligence to others is statutorily defined under Civil Code, § 1714, subd. (a) ("The general rule in California is that "[e]veryone is responsible ... 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...."); *see also Cabral v. Ralphs Grocery Co.*, 51 Cal.4th 764, 771 (2011). As this Court has also "explained, however, in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.'" *Cabral, supra* at 771.

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[2] Historically, the term "worker" includes both employees and independent contractors. *See New Prime Inc. v. Oliveria*, ____ U.S. ____, Case No. 17-340, Syllabus ¶2 (Jan. 15, 2019) (Slip Opinion) ("Evidence that Congress used the term 'contracts of employment' broadly can be found in its choice of the neighboring term 'workers,' a term that easily embraces independent contractors."). Here, plaintiff was on defendant's property to work—clean Mathis' house and wash his windows and skylight on the roof.

2. Public policy is served when homeowner-hirers are required to take responsibility for their own neglect in failing to correct or remediate dangerous conditions on their property.

Civil Code section 1714 provides 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, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (Civ. Code, § 1714, subd. (a).) The statute "'establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others.'" *Kesner v. Superior Court*, 1 Cal.5th 1132, 1142 (2016) (*Kesner*).

Absent special circumstances, "[t]he elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury." *Kesner*, *supra* at 1158. As a consequence of this general duty, landowner-hirers have a duty to maintain their premises in a reasonably safe condition. *Ortega v. Kmart Corp.*, 26 Cal.4th 1200, 1205 (2001) [store proprietor]; *Alcaraz v. Vece*, 14 Cal.4th 1149 (1997) [possessor of land]. To comply with this duty, a person who controls property must "inspect [the premises] or take other proper means to ascertain their condition" and, if a dangerous condition exists that would have been discovered by the exercise of reasonable care, has a duty to give adequate warning of or remedy it. *Salinas v. Martin*, 166 Cal.App.4th

404, 412 (2008), italics omitted; *see also Ortega*, *supra* at 1206-1207; *Chance v. Lawry's, Inc.*, 58 Cal.2d 368, 373 (1962)

Unlike the elements of breach, causation, and injury, all of which are fact-specific issues for the trier of fact, the existence and scope of a duty are questions of law. *Kesner, supra* at 1142, 1144; *Alcaraz, supra at* 1162, fn. 4 (1997). To assess the scope of a duty, a court must "identify the specific action or actions the plaintiff claims the defendant had a duty to undertake. 'Only after the scope of the duty under consideration is defined may a court meaningfully undertake the balancing analysis of the risk and burdens present in a given case to determine whether the specific obligations should or should not be imposed.'" *Castaneda v. Olsher,* 41 Cal.4th 1205, 1214 (2007).

Here, Defendant, as the property owner, had a duty to protect invitees from the dangerous condition that existed on the pathway to the worksite, the narrow catwalk on the way to the skylight on Defendant's roof. Defendant and *amici* suggest that Plaintiff should have taken an interior route, a path behind a purely decorative parapet that was cluttered with air conditioning equipment and pipes. Respondent's Opening Brief ("ROB") at 16, 17; Appendix (App.) at 639, 642 (photos). However, Defendant and *amici* fail to mention, much less address, that Defendant Mathis himself used the permanently affixed ladder, walked along the outer edge (catwalk) and

testified that it was impracticable to walk in the interior, cluttered area inside the parapet. (App. at 394-96; 426-28; 451-52.) Mathis expected workers to use the permanently affixed metal ladder and *admitted* that it was impracticable to use the interior path to the skylight. (App. at 395, 399, 406, 452.)(Emphasis added.) Moreover, nothing in the record suggests that Defendant placed a sign to warn workers (gardeners and housecleaners) (App. at 440) or placed a barricade to prevent workers from taking the narrow path on the outside of the parapet where Plaintiff slipped and fell on the deteriorating roof. Given that the photographs submitted below do not show any warning or direction for invitees to take once they traversed up the permanently affixed ladder, CAOC strongly believes that an issue of fact exists as to the foreseeability an invitee would take the narrow catwalk (as Mathis admitted, App. at 395, 399, 402, 428, 433-34, 440, 452), as opposed to the equipment-cluttered interior path inside the parapet, to access the skylight Defendant hired Plaintiff to clean. *See Ballard v. Uribe*, 41 Cal.3d 564, 572, n.6 (1986).

Thus, this Court's analysis should be limited to assessing whether Defendant had a duty to maintain his property (the path to the worksite) in a reasonably safe condition and whether Defendant took steps to keep the premises reasonably safe. *Verdugo v. Target Corp.*, 59 Cal.4th 312, 336-337 (2014). Because the record shows that Defendant failed to correct or repair

the dangerous condition and did not warn or place a barricade for invitees not to access the skylight via the narrow catwalk on the outside of the parapet, Defendant's failure to protect invitees from the foreseeable use of the narrow catwalk is an issue of fact for the jury to decide. (App. at 433-34). However, where, as here, there is no "'*statutory provision* establishing an exception to the general rule of Civil Code section 1714, this Court has held that courts should create one only where "clearly supported by public policy."' *Kesner supra* at 1143. (Italics added.) CAOC is unaware of any public policy that supports the maintenance of dangerous conditions on a landowner-hirer's property that is foreseeable to cause serious injury, here, quadriplegia. (App. 115, 575-78.) As will be discussed below, the underlying public policy considerations in *Privette* and its progeny do not outweigh the strong public policies of safety and the duty of care landowners owe to invitees. Thus, CAOC does not believe *Privette* and its progeny apply to the facts presented here where a landowner hired an unlicensed house cleaner (not a roofing contractor) who was injured as a result of the landowner's direct negligence.

3. The Peculiar Risk Doctrine and the legal debate that has followed since *Boswell* in 1857 is a natural circumstance of the numerous economic realities involved in the hirer—service worker dichotomy.

As this Court recently observed in *Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903 (2018), "[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case

to case." *Id.* at 932 citing *S.G. Borello & Son, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 256 (1989) ("*Borello*"):

> Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

Dynamex, supra at 927 citing *Board v. Hearst Publications,* 322 U.S. 111, 121 (1944). In spite of these economic realities in the hirer—service worker dichotomy, Defendant and *amici* California Association of REALTORS® ("CAR") and the California Building Industry ("CBIA") argue for a bright-line rule of non-liability or immunity for property owners presumably because if a property owner or builder is immune from liability, that will lower real estate prices and building costs. ROB at 41; CAR at 8; and CBIA at 12. *See* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the U.S., 1900-2017*, 69 Rutgers U.L.Rev. 891, 1006-7 (2017) (observing that the goal of the workers' compensation "Grand Bargain" was a "quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance," however, "[t]oday, many injured workers never receive compensation – but they are nonetheless foreclosed from bringing tort actions."); *see also id.* at 1007

("The result is that employers are getting a better and better deal, the program is not paying adequately for the injuries and illnesses that are caused at work, and many workers are receiving inadequate benefits (or no benefits at all)."). This is why business interests want to further burden the deeply troubled workers' compensation system by expanding it to include injury incidents, like the instant case, that were never intended to be covered by the workers' compensation scheme.

In *Borello*, this Court observed that "[t]he Worker's Compensation Act (Act) extends only to injuries suffered by an "employee," which arise out of and in the course of his [or her] 'employment" ... but do[es] not include independent contractors." *Borello*, *supra* at 349 (1989). Yet, in *Privette*, this Court broadened the Act's reach to include "independent contractors" in certain circumstances that were specifically excluded under the Act. *See Privette v. Superior Court*, 5 Cal.4th 689, 698 (1993) ("When an independent contractor causes injury to the contractor's own employee, the Act's 'exclusive remedy' provision shields the contractor from further liability for the injury.") "Yet ... this expansive view produces the anomalous result that that a *nonnegligent person's liability is greater than that of the person whose negligence caused the injury*, it has been widely criticized." *Privette, supra* at 698 (italics added.) Further, "[t]he property owner should not have to pay for *injuries caused by the contractor's*

negligent performance of the work when workers' compensation statutes already cover those injuries." *Id.* at 699 (italics added).

This case concerns the negligence of Defendant Mathis, and does not present the "anomalous result" which propelled the *Privette* court to expand coverage of the Act to exclude the landowner-hirer of "independent contractors" from tort liability to the contractor's employees for a contractor's negligence. This case concerns Defendant landowner-hirer's direct negligent maintenance and failure to warn or remediate a dangerous condition on his property and there is no possibility of an anomalous result here. Plaintiff will either be able to present his case to the trier of fact and let it decide and apportion liability or not. This Court should not grant landowner-hirers blanket immunity without considering that such a decision essentially precludes any opportunity for recovery by workers such as Plaintiff, who are not skilled nor licensed to do roofing work. There is simply no possibility of a windfall here. Thus, the policies that propelled this Court in *Privette* are not present here. The issue here is whether to give landowner-hirers blanket immunity for their direct negligence. CAOC strongly opposes immunity in cases such as this one because there is no valid reason to provide immunity for landowner-hirers and shield them from liability for their direct negligence.

While CAOC understands the desire for and convenience of predictability and certainty, CAOC also strongly believes this Court should not adopt a draconian rule that denies recovery in cases involving unlicensed and unqualified workers, such as the instant case, and otherwise permits recovery in similar premises liability cases involving invitees. Predictability at the expense of justice is unfair. The rule adopted by this Court should be fair and consistent in its application and not single out unlicensed and unqualified workers and deny them recovery for injuries caused by the direct negligence of the landowner-hirer. There is simply no countervailing public policy stronger than one that encourages property owners to either take steps to eliminate or guard against the danger or warn invitees of a dangerous condition on their property. *See Swanberg v. O'Mectin*, 157 Cal.App.3d 325, 330 (1984) (A landowner "has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.") Under such a rule, many unlicensed and unqualified workers would unfairly be denied recovery.

As the instant case teaches, just because a worker might be classified as an "independent contractor," does not mean the worker is qualified or legally permitted to have duties delegated to them, implicitly or explicitly,

outside of their area of work or specialty. For example, when a homeowner acts as a General Contractor (which requires a Class B license) and hires subcontractors to perform discrete tasks (e.g. Roofing which requires a C-39 license), any duty assumed by the subcontractor under contract or otherwise should be limited to the worker's skill or trade. Here, Plaintiff, a housecleaner, cannot been deemed to have assumed, through implied delegation, responsibility for repairing Defendant's roof or the pathway Defendant created to access the skylight. As noted above, roofing requires a Class C-39 license, which Plaintiff did not have.

As this Court observed in *Dynamex*, this area of the law requires an in-depth review of the history and its development which oftentimes requires this Court to revisit its previous decisions and adjust its direction. *Dynamex, supra* at 932. Indeed, that is precisely what this Court did in *Privette* when it reviewed and re-evaluated applicability of the Peculiar Risk Doctrine. *Privette*, *supra* at 693-97. Presumably, that is also why *amici,* the Civil Justice Association of California ("CJAC"), supplies an incomplete version of the history of this Court's adoption of the Peculiar Risk Doctrine in *Boswell* and its progeny and this Court's "sea change reversal" in *Privette*. CJAC at 15-20. Two sayings from Jurist Roscoe Pound come to mind: "Law is experience developed by reason and applied continually to further

experience" and "[t]he law must be stable, but it must not stand still." https://www.azquotes.com/author/44160-Roscoe_Pound.

With these principles in mind, in order to understand the development of hirer liability for their direct negligence, it is important to consider the facts underlying the seminal cases that created exceptions to the general rule of non-liability of hirers of independent contractors in certain circumstances and this Court's elimination of the peculiar risk doctrine in *Privette*.

4. The factual underpinnings of *Boswell* and its progeny: The law in this area has always been in flux.

Boswell involved the construction of a dam that gave way during a storm and caused damage to downstream merchants who had erected a store "on the margin of Deer Creek, and put therein a large stock of goods." *Boswell v. Laird*, 8 Cal. 469, 470 (1857). Plaintiffs sued defendants "Laird and Chambers, who were merely miners, [who] would have been deemed reckless had they undertaken, unaided, such a work." Laird and Chambers hired co-defendant architects Moore and Foss to build a dam, forty feet in height "to fill a basin of about one hundred acres, immediately above the dam, with water, that could be used for mining purposes, during the summer season." *Id.* Before the dam was completed, "a sudden storm and freshet" carried the unfinished dam downstream causing damage to plaintiff's store. *Id.* The co-defendant architects also *expressly guaranteed in the contract that the dam would "withstand floods and freshets, for a period of two*

years." *Id.* (italics added). The jury returned a verdict for plaintiffs against both co-defendants. This Court held that "the liability of Laird and Chambers [the hirer-miners] must depend on the character of the relation between them and Moore and Foss [architects], and the refusal of the instructions based upon that relation, was error, for which a new trial must be had." *Id.* at 499.

In 1933, the legal debate as to when a hirer should be liable for the negligence of an independent contractor was summarized in Harper, Law of Torts (1933), § 292 ("'the distinction between 'collateral' or 'causal' negligence and negligence of the contractor so intimately connected with the work to be done that the employer-contractee is liable therefor is a shadowy one at best.'") The debate was later recognized by this Court in *Snyder v. Southern Cal. Edison Co.*, 44 Cal.2d 793, 799-801 (1955).

In 1962, this Court in *Woolen v. Aerojet General Corp.*, 57 Cal.2d 407 (1962), citing sections 413 and 416 of the Restatement of Torts, recognized that the law in California, at that time was such that:

> One who employs an independent contractor to do work which the employer should recognize as necessarily creating, during its progress, conditions containing an unreasonable risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the absence of such precautions, if the employer (a) fails to provide in the contract that the contractor shall take such precautions (as to which see § 416), or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Id., citing *Courtell v. McEachen*, 51 Cal.2d 448, 456 (1959).

In *Woolen*, an employee of an independent contractor was killed by an explosion while painting a tank owned by the defendant. The trial court gave a jury instruction that, "if defendant was an inviter of [the plaintiff], it had a duty to make reasonable inspections to see that the tank remained a reasonably safe place for him to work." *Id.* at 411. This Court reversed because the instruction "failed to take into consideration the elements required under the rule of section 413 of the Restatement of Torts..." *Id.* at 411-12. This Court's decision in *Woolen* was the first case in California that made a hirer liable to an employee of an independent contractor. Nothing in this Court's decision in *Privette* or its progeny have upset the general duty to maintain or provide a safe premises, at least as to conditions which are not the subject of the contractor's work.

In the three decades following this Court's decision in *Woolen*, this Court decided many other cases consistent with its holding in *Woolen*, allowing employees of an independent contractor to seek recovery from the hirer of the independent contractor regardless of whether the basis of liability was direct liability or vicarious liability. *See Privette*, *supra* at 697 (citing cases).

5. This Court's drastic change of hirer liability under the Peculiar Risk Doctrine – *Privette v. Superior Court.*

In 1993, this Court in *Privette* overturned its earlier decisions and drastically changed hirer liability under the Peculiar Risk Doctrine. In *Privette*, the defendant property owner hired a roofing contractor to reroof a rental property, a duplex, "only after checking references and determining that [the contractor] was licensed and carried workers' compensation insurance for its employees." *Privette*, *supra* at 692-93. An employee of the *licensed contractor* was injured when he attempted to carry a bucket of hot tar up a ladder to the roof. *Id.* at 692 (emphasis added.) "While performing this task, [the plaintiff] fell off the ladder and was burned by hot tar." *Id.* The plaintiff "sought workers' compensation benefits for his injuries. He also sued Privette ... alleging ... that Privette had been negligent in selecting" his employer and that, because of the inherent danger of working with hot tar, Privette should, under the doctrine of peculiar risk, be liable for his injuries that resulted from his employer, the roofing contractor's negligence. *Id.*

The roofing contractor initially directed its employee to transport the hot tar to the roof of the duplex with a kettle and pumping device in the driveway next to the duplex. *Id.* at 692-93. After a "gravel truck arrived, the [contractor] moved the kettle and pumping device to make room for the truck." *Id.* After the gravel was deposited on the roof, employees of the

roofing contractor determined that they needed 50 more gallons of tar to complete the job. *Id.* At that point, the roofing contractor directed its employee to carry ten five-gallon buckets of hot tar up a ladder to the roof. *Id.* While carrying the buckets of hot tar up the ladder, the employee fell, suffering burns from the hot tar. *Id.*

After discussing several policy considerations, this Court in *Privette* held:

> When, as here, the injuries resulting from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis for the employee to seek recovery of tort damages from the person who hired the contractor *but did not cause the injuries.*

Privette, supra at 703. The *Privette* Court therefore intended to eliminate vicarious liability against *faultless* hirers. *Id. Privette* did not seek to provide immunity to negligent landowner-hirers who, like Defendant here, directly and personally failed to take steps to keep their premises reasonably safe to invitees like Plaintiff. Nevertheless, while *Privette* was not intended to provide immunity to landowner-hirers for their direct negligence, an examination of the policy considerations underlying *Privette* is helpful to understand the limited circumstances under which the *Privette* rule applies or, as is relevant here, does not apply.

The two policy considerations behind this Court's decision in *Privette* were that an employee of an independent contractor should not be able to bring an action against the hirer because: 1) "the hirer has indirectly paid the cost of such coverage inasmuch as it was presumably calculated into the contract price;" and 2) "permitting such a recovery would give employees of [negligent] independent contractors an unwarranted windfall..." *Camargo v. Tjaarda Dairy*, 25 Cal.4th 1235, 1244 (2001) citing *Privette*, *supra* at 699-700.

6. Here, roofing was not included in the contract and thus, any duty to repair or remediate Defendant's dilapidated roof could not have been delegated to Plaintiff.

Here, Plaintiff, an unlicensed house cleaner-window washer, was not licensed to fix, alter or repair Defendant's roof, nor could he legally undertake such repairs. It is unlawful for any person to engage in the business or act in the capacity of a roofing or construction contractor within California without a license. (Bus. & Prof. Code, § 7028.) The Contractors' State License Board (Bus. & Prof. Code § 7000), in recognition of the fact that the construction industry embraces numerous specialized crafts requiring certain arts and skills, has expressly listed among the "classified specialists" coming within the scope of the licensing statutes "roofing" contractors. (Cal. Code Regulations, title 16, § 832; see roofing requiring C-39 license.) The Contractors' State License Law "reflects a strong public

policy of protecting the public from dishonest and incompetent contracting services." *See Hunt Building Corp. v. Bernick*, 79 Cal.App.4th 213, 217 (2000), review denied. Thus, any express or implied delegation of duty necessarily depends on the character of the relation between the landowner-hirer and the worker. Stated differently, the mere fact that a worker may be classified as an "independent contractor" does not, *ipso facto*, mean the landowner-hirer can legally, expressly or by implication, delegate all duties concerning his property simply because the work performed is by contract and not on an hourly basis. As this Court observed long-ago in *Boswell,* the nature and character of the work to be performed and the experience and qualification (license) of the independent contractor and the landowner-hirer needs to be taken into consideration. *See*, *Boswell, supra* at 499.

According to the Workers' Compensation Insurance Rating Bureau of California, roofers pay four to ten times above the average workers' comp insurance premium. *See California Roofers Face New Workers' Comp Regulations*, Insurance Journal (Jun. 5, 2006)[3]; *see also* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 Rutgers U.L. Rev. 891, 959 (2017) (observing that workers' compensation insurance premiums are high in the construction

[3] Available at: https://www.insurancejournal.com/magazines/mag-features/2006/06/05/151992.htm.

industry, generally). Here, there is nothing in the record to even suggest that Defendant had expressly delegated his duty to provide a safe pathway to the worksite, the skylight on Defendant's roof. At best, the record below shows that Plaintiff orally contracted with Defendant to perform a three-day "deep clean" on the house, which included washing the skylight on Defendant's roof. (App. 74-75). On the third day of the three-day "deep clean," Defendant's agent, Carrasco, ordered Plaintiff "to go up and tell them (the other house cleaners) not to put a lot of water because the water was falling inside." (App. 75, 3-6). Plaintiff climbed up the metal ladder Defendant had permanently fixed to the side of the house. (App. 452, 570-572.) Defendant's agent, Carrasco, followed Plaintiff up onto the roof, further instructing Plaintiff to talk to Defendant's accountant about the project. (App. 571-573, 575.) There is no evidence in the record that Defendant's agent, Carrasco, who was on the roof with Plaintiff, instructed Plaintiff to take the path behind the decorative parapet as argued by Defendant and *amici*. ROB at 16, 17; see also App. at 639, 642 (photos). Defendant Mathis expected workers to take (i.e., foreseeability) the dangerous path along the ledge, and not behind the decorative parapet. (App. at 395, 399, 428.) Because Defendant affirmatively affixed the metal ladder to the side of his house, it was plainly foreseeable that workers (house cleaners and gardeners) would access the roof using the ladder Defendant placed on his house. (App.

at 406, 440, 452). At the top of the ladder, it was also foreseeable that workers and invitees would take the route on the outside of the decorative parapet. Because there was no warning or barricade to prevent invitees from taking the outer catwalk to access the skylight and plants on Defendant's roof, a triable issue of fact exists as to whether Defendant should have: 1) repaired or fixed the dangerous condition; or 2) at least provided a warning or barricade preventing invitees from accessing the skylight area via the narrow catwalk.

The first assumption in *Privette* is that the cost of the risks associated with the work at issue were "presumably" included in the contract price is not and cannot be assumed here. Unlike Privette, who was an employee of a licensed independent contractor that carried workers' compensation for its employees, here, Plaintiff was an unlicensed housecleaner. The cost of insurance for a roofer is presumably much higher than the cost of insurance for a housecleaner. Thus, by classification, it is highly doubtful that the costs associated with the risks of roof repair or remediation, were included in the contract price for cleaning Defendant's home.

Here, even if the contract included correcting or repairing Defendant's roof, to make it safe, as noted above, that would result in an inference based on a legal impossibility to infer delegation of a duty to Plaintiff to correct or repair the roof when to do so is forbidden by law. Thus, based on the facts

at issue here, it cannot be assumed that the cost of the risk to perform roofing work was included in the price Defendant paid Plaintiff for housecleaning.

The second public policy argument underlying *Privette* is that "permitting such a recovery would give employees of independent contractors an unwarranted windfall, something that is denied other workers – the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment." *Privette, supra* at 700.

This second policy consideration in *Privette* is similarly not present here. There simply is no tenable basis to find that permitting Plaintiff to have his case tried before a jury would provide him with even a possibility of an "unwarranted windfall." In fact, the opposite is more accurate, Defendant should not be given an "unwarranted windfall" by insulating him from liability for his own negligent acts.

7. The factual underpinnings of this Court's decisions that have followed *Privette.*

In *Toland*, the plaintiff was working for a framing subcontractor at a housing development under construction. *Toland v. Sunland Housing Group, Inc.*, 18 Cal.4th 253, 257 (1998) ("*Toland*"). While helping other workers raise a very large and heavy framed wall, the plaintiff was injured when the wall fell on him. *Id.* The plaintiff sought recovery from his employer, the framing subcontractor, under the Workers' Compensation Act.

Id. He also sued the project owner and general contractor, "alleging that raising the wall created a peculiar risk of injury for which Sunland should have required subcontractor CLP to take special precautions." *Id.* This Court held:

> [T]hat when the injuries resulting from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, the peculiar risk doctrine affords no basis for the employee to seek recovery of tort damages from the person who hired the contractor *but did not cause the injuries*.

Toland, *supra* at 270 (italics added).

Here, a triable issue of fact exists as to whether Defendant's affirmative conduct of affixing a metal ladder to the side of his house, failing to provide a warning or barricade to invitees, such as Plaintiff, not to access the work site via the narrow catwalk but rather, via the cluttered area inside the decorative parapet, was a cause of Plaintiff's injuries. Thus, *Toland* does not present the facts at issue here where an unlicensed house cleaner was injured as a result of a dangerous condition, which Defendant affirmatively created and directly maintained on his property.

In *Camargo*, the plaintiff was an employee of Golden Cal Trucking who was hired by the defendant, Tjaarda Dairy, to scrape manure out of its corrals and to haul it away in exchange for the right to purchase the manure at a discount. *Camargo v. Tjaarda Dairy*, 25 Cal.4th 1235, 1238 (2001).

"Camargo was killed when his tractor rolled over as he was driving over a large mound of manure in a corral belonging to Tjaarda Dairy." *Id.* His wife and five children sued defendants "on the theory, among others, that they were negligent in hiring Golden Cal Trucking because they failed to determine whether Camargo was qualified to operate the tractor safely." *Id.*

This Court held that an employee of a contractor is barred from seeking recovery from the hirer under the theory of negligent hiring. *Id.* at 1244-45. Negligent hiring is not an issue in the underlying case; instead, the issue is Defendant's negligent maintenance of his property and failure to warn invitees to not gain access to the skylight via the narrow catwalk.

In *Hooker*, an employee of a general contractor hired by the California Department of Transportation (Caltrans) was killed while operating a crane during the construction of an overpass. *Hooker v. Department of Transportation*, 27 Cal.4th 198, 202 (2002). The widow of the deceased employee received workers' compensation benefits from the general contractor's insurer. *Id.* at 203. The plaintiff's widow also sued Caltrans on the theory that Caltrans had negligently exercised control it retained over safety conditions at the jobsite. *Id.* The trial court granted summary judgment for defendant, the Court of Appeal reversed, and this Court reversed the Court of Appeal, holding that:

> The imposition of tort liability on a hirer for injuries to an independent contractor's employee depends on whether the hirer exercised the retained control in a manner that affirmatively contributed to the injuries. By merely permitting traffic to use the overpass, defendant did not affirmatively contribute to the decedents' death.

Id. at 215.

Simply put, Plaintiff, an unlicensed house cleaner-window washer could not have legally assumed responsibility to fix or repair or remediate Defendant's roof, the situs of the dangerous condition, because he was not a licensed roofing contractor and therefore, prohibited by law from assuming the risk for that area of work. *See Mendoza v. Brodeur*, 142 Cal.App.4th 72, 77 (2006) ("Accordingly, the presumption that the person who employs the unlicensed contractor is the employer is conclusive. [Citations.]") Further, as demonstrated by Defendant's agent, Carrasco, following Plaintiff up to the roof, Defendant retained direct control over the actions of Plaintiff, including the manner in which the work was performed. (App. 570-573, 575.) The fact that Defendant, through his agent, Carrasco, dictated the order of the work, interceded and told Plaintiff not to use so much water (because it was leaking into the house) and followed Plaintiff up Defendant's permanently affixed ladder to the roof strongly suggests that Defendant, through his agent, Carrasco, maintained control over the premises. Moreover, the facts presented here are best resolved as an issue of

comparative fault which includes whether Defendant breached his duty to Plaintiff.

In *McKown*, an employee of a contractor hired by the defendant Walmart to install sound systems in its stores was injured by an unsafe forklift provided by Walmart. *McKown v. Walmart Stores, Inc.*, 27 Cal.4th 219, 223 (2002). The matter was tried before a jury and the jury found that Walmart was negligent in providing unsafe equipment, allocating 55 percent of the responsibility to McKown's employer, 23 percent to Walmart, 15 percent to the manufacturer of the equipment and 7 percent to the plaintiff, McKown. This Court affirmed the judgment against the property owner who had asked the plaintiff's employer, an independent contractor, to use the owner's forklifts whenever possible, and who had supplied an unsafe forklift, causing injury to the plaintiff. "[W]here the hiring party actively contributes to the injury supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor." *Id.* at 225. As is relevant here, the hirer, Walmart, was not relieved of liability by the fact that it did not insist on, but merely requested, use of the defective equipment. The contractor was "presumably loath to displease" the owner, "the world's largest retailer," with whom the contractor had several contracts. *Id.* It therefore was reasonable to assume that refusal to use the forklift "would

have generated ill will" including delaying the project for at least 24 hours. *Id.* at 226.

Here, Plaintiff had worked for Defendant for 20 years and, because he depended on this work, would have been similarly "loath to displease" Mathis by refusing to conduct the work as directed. ROB at 54; CJAC at 9 (citation omitted.) The work, washing the skylight on Defendant's roof, was in progress. But for Defendant's agent, Carrasco, telling Plaintiff to tell the other workers to use less water because it was leaking into the inside of the house due to the lack of maintenance of the roof, Plaintiff would not likely have gone up to the roof and would not likely have been injured. (App. 76:3-6; 76:20-22; 114:13-18, 568-570.) Plaintiff reasonably used the metal ladder Defendant permanently affixed to the side of the property. However, once on top of the ladder, the pictures of the scene of the incident depict no warning or barricade to prevent access the work area, the skylight via the catwalk on the outside of the parapet. (App. at 639, 642.) While Defendant and his *amici* go to great lengths to suggest that Plaintiff should have taken the interior route to the worksite, a route that is cluttered with pipes and equipment, there is nothing in the record to indicate that Defendant took any measures to direct Plaintiff toward that route or prevent Plaintiff from using the dangerous catwalk. If the interior, equipment-cluttered, route was the route Defendant wanted Plaintiff and the workers to use to access the work

site, there would have reasonably been a sign providing directions to do so. *Id.* The pictures of the roof area do not show that there was a sign directing invitees to access the skylight area via the cluttered, interior path. *Id.* Nor is there anything in the record to suggest that a sign or barricade existed at the time of the incident. Finally, there is no evidence that a roofer or licensed contractor was performing work on the roof at the time. No one, other than Defendant, was responsible for the safety of the roof or dangerous conditions thereon. Accordingly, CAOC believes triable issues of fact exist as to whether the contract to hire Plaintiff included a delegation of the duty to inspect the path to the skylight, beyond the metal ladder Defendant permanently affixed to his home, and either fix or remediate the dangerous condition or, at minimum, to warn foreseeable users not to use the dangerous narrow catwalk on the outside of the parapet.

In *Kinsman*, defendant Unocal hired contractor Burke & Williams, to build and dismantle scaffolding at its refinery that was used by other trades including pipefitters and insulators. *Kinsman v. Unocal Corp.*, 37 Cal.4th 659, 664-65 (2005). Plaintiff "Kinsman worked on many occasions as a carpenter at defendant Unocal's refinery." *Id.* at 664. "This work exposed him to airborne asbestos, which was produced by other trades—particularly insulators—during their application and removal of asbestos-containing insulation from pipes and machinery." *Id.* at 665. "Years later, Kinsman

developed mesothelioma, an asbestos-induced malignant cancer of the lining of the lungs." *Id.* Kinsman sued "product manufacturers and distributors, as well as several premises owners. Ultimately, the case proceeded to a jury trial against Unocal, a 'premises defendant,' alone." *Id.* Following a jury trial, the trial court entered judgment awarding damages to the employee. *Id.* The Court of Appeal reversed. *Id.* This Court, holding that a landowner may be liable to contractor's employee for a concealed hazardous condition on property, reversed and remanded for new trial based on the jury instruction given. *Id.* at 683. Here, the condition of the roof was a hazardous condition and was Defendant's responsibility to make safe. At minimum, the condition of the roof and the Defendant's responsibility were questions of fact for the jury.

In *Tverberg*, "defendant Fillner Construction Company was the general contractor for the expansion of a commercial fuel facility operated by Ramos Oil." *Tverberg v. Fillner Const, Inc.*, 49 Cal.4th 518, 522 (2010). Defendant Fillner hired subcontractor Lane Supply, which delegated the work to build a metal canopy over some fuel pumping units to Perry Construction Company. *Id.* Perry Construction hired Tverberg who "held a state contractor's license" as "a sole proprietorship consisting exclusively of Tverberg." *Id.* Although subcontractor Perry paid plaintiff on an hourly basis, it apparently was not disputed that plaintiff was an independent

contractor presumably because he held a valid license. *Id.* The trial court granted summary judgment. *Id.* at 518. The Court of Appeal reversed and remanded. *Id.* This Court held that the independent contractor could not hold the general contractor vicariously liable for workplace injury under the Peculiar Risk Doctrine and reversed and remanded to the Court of Appeal. *Id.* at 529. This Court also sent the case back to the lower court because there were potential issues as to the hirer's negligence and liability. *Id.* ("[N]oteably whether defendant could be held *directly* liable on a theory of retained control over safety conditions at the jobsite.") (Emphasis in original.) Plaintiff is not seeking to hold Defendant vicariously liable for the negligence of others he employed, but rather for Defendant's own negligent failure to maintain his roof and/or warn invitees as to the condition.

Here, Plaintiff was an unlicensed housecleaner—window washer, not a licensed roofing contractor. Therefore, the holding that Tverberg, a *licensed contractor*, could not assert liability against the general contractor is irrelevant to Plaintiff's case. What *Tverberg* does teach is that the relationship of the parties and the qualifications (skill) of an "independent contractor" is an important consideration to evaluate when determining whether a duty is, by implication, delegated to the "independent contractor."

In *SeaBright*, defendant US Airways hired contractor, Lloyd W. Aubry Co., "to maintain and repair" a luggage conveyor US Airways used to

move luggage at San Francisco Airport. *SeaBright Ins. Co. v. US Airways, Inc.*, 52 Cal.4th 590, 594 (2011) ("*SeaBright*"). "The conveyor lacked certain safety guards required by applicable standards." *Id.* While inspecting the conveyor, Verdon, an employee of the independent contractor, was injured "when his arm got caught in its moving parts." The contractor's workers' compensation insurer paid plaintiff Verdon based on the injury and then sued defendant US Airways, claiming the airline caused the injury, and sought to recover what it paid in benefits. *Id.* 594-95. The trial court granted summary judgment. *Id.* at 590. The Court of Appeal reversed. *Id.* This Court held that the plaintiff in *SeaBright* could not recover in tort from the hirer, US Airways, on a theory of "a nondelegable duty under Cal-OSHA regulations to provide safety guards on the conveyor." *SeaBright, supra* at 603.

The *SeaBright* court observed that "*Privette* ... and its progeny" recognize a presumption that an independent contractor's hirer delegates to that contractor the responsibility to perform the specified work safely, noting that the policy favoring "delegation of responsibility and assignment of liability" is very "strong in this context," and a hirer generally "has no duty to act to protect the [contractor's] employee when the contractor fails in that task." *SeaBright*, supra at 601-602 (citations omitted.) Within the presumption of a delegation of duty in *SeaBright* is the assumption that the

independent contractor, Lloyd W. Aubry Co., possessed the skill and was legally able "to maintain and repair" the luggage conveyor at San Francisco Airport. Here, the question is whether Defendant legally and actually delegated to Plaintiff, a housecleaner, the duty to make the pathway across Defendant's roof and ledge safe. As noted above, since there does not appear to have been a written contract, any such duty could not have been delegated, expressly. Moreover, as noted above, because Plaintiff lacked the skill and required license to fix, repair or remediate the dangerous condition on the roof and ledge, Defendant, by operation of law, was unable to rely on an inference of delegation. Indeed, the CSLB provides guidance to homeowners as to how to select a qualified contractor and provides a ready and easy way to confirm whether the "independent contractor" is qualified and licensed to provide the work needed. *See, e.g.*,

http://www.cslb.ca.gov/Consumers/.

B. Based on the Evidence Presented Below, Defendant Did Not and Could Not Delegate the Responsibility for the Dangerous Roof Condition to Plaintiff, an Unlicensed Housecleaner-Window Washer That Was Not Licensed to Perform Roof Repairs.

Defendant and *amici* argue that Mathis delegated his duty to correct or provide alternative safety measures as to the dangerous condition that Defendant created on the roof of his home to Plaintiff. ROB at 51 ("[H]irers are entitled to delegate to independent contractors the responsibility to

provide a safe workplace for their employees."); CAR at 8 ("The [*Privette*] doctrine plays an important role in the construction industry, where owners and general contractors hire subcontractors with *specialized skill and knowledge to perform various types of construction work at projects.*") However, there is no evidence in the record that Defendant expressly delegated his duty to correct or provide alternative safety measures as to the dangerous condition that Defendant created on the roof of his home. Moreover, if Defendant attempted to contract his duty to correct or provide alternative safety measures and the work required to fulfill those duties required specialized skills which required a contractor's license, any such attempt to delegate those duties would be illegal and against the strong public policy that construction workers in their respective trades be licensed. Plaintiff is not a licensed roofer and the law should not infer what the law forbids.

Here, Plaintiff Gonzalez was an unlicensed housecleaner, not a roofer. *See* CJAC at 32 ("Gonzalez ... had authority to determine the manner, method, timing and equipment to be used in the cleaning of the skylight on Mathis's home" tacitly recognizing the limited reach of an alleged delegation of any duty to fix, repair or remediate the dangerous condition on defendant's roof.) Under Insurance Code § 2750.5, an unlicensed worker performing services for which a license is required is not an independent contractor. This

means that when an unlicensed contractor is hired by a homeowner, the contractor, and any employees of that contractor, is considered to be an "employee" of the homeowner.

In *Mendoza v. Brodeur*, 142 Cal. App. 4th 72 (2006), the Court of Appeal held that an unlicensed roofer not covered by workers' compensation could sue the homeowner in tort. *Id.* at 81. In *Mendoza*, a homeowner hired a neighbor to do a roofing project. *Id.* at 75. That neighbor fell and was seriously injured. *Id.* at 74. The neighbor sued the homeowner. *Id.* The Court of Appeal affirmed that simply because the neighbor's status was not within the statutory definition of "employee" as set forth in Insurance Code §§3351 and 3352, he was nonetheless an employee of the homeowner and could sue the homeowner as his employer. *Id.* at 76-77.

As observed in *Mendoza*, "[s]ection 2750.5 is not a part of the workers' compensation law, but is contained in Division 3 of the Labor Code—which deals with the employer-employee relationship [which] by its own terms the statute supplements, and applies to, workers' compensation law." *Mendoza*, supra at 77 citing *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.*, 40 Cal.3d 5, 9–15 (1985).

Here, Defendant and *amici* argue that Plaintiff was an "independent contractor" and *ipso facto*, all duties and responsibilities concerning the dangerous condition on Defendant's roof was delegated to Plaintiff. The

argument fails to appreciate and address the fact that the Legislature mandates specific licensing for the various trades and skills in the construction industry (Bus. & Prof. Code § 7000) and that Insurance Code § 2750.5 deems, by operation of law, an unlicensed worker performing services for which a license is required is not an independent contractor. Insurance Code § 2750.5 also creates a rebuttable presumption that the unlicensed worker is an employee of the hirer. *See Jones v. Sorenson*, 25 Cal.App.5th 933, 941, 942 (2018) citing *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.*, 40 Cal.3d 5, 13-15 (noting rebuttable presumption of employee status and "policy to compensate injured workers outweighs burden on homeowners to ensure they are licensed, in part because comprehensive personal liability policies contain workers' compensation coverage.")

Thus, if Defendant and *amici* are correct in their assumption that Defendant Mathis delegated all duty and responsibility to repair or remediate the dangerous condition on Mathis' roof then, pursuant to Insurance Code § 2750.5, Plaintiff Gonzalez must be deemed Defendant Mathis' employee because Plaintiff is neither qualified nor licensed to correct or repair the dangerous condition on Defendant's roof. Thus, under Defendant and *amici's* theory of implied delegation, Plaintiff should be able to sue Defendant in tort for Mathis' own negligence in failing to correct, remediate

or provide alternative safety measures for the dangerous condition on Defendant's roof.

Neither *Privette* nor any of its progeny, discussed above, ever considered the strong public policies behind holding negligent property owner-hirers responsible for their own torts. Neither *Privette* nor any of its progeny considered the strong public policy behind forbidding those not qualified to perform construction work, such as roofing, without a license in relation to the implied delegation of duties to "independent contractors," regardless of their skill, qualification or license. The strong public policy behind holding property owner-hirers responsible for their own negligent acts and the strong public policy making it illegal to contract to do roofing without a license strongly support the conclusion that *Privette* does not apply here. Moreover, neither *Privette* nor any of its progeny have addressed the situation presented here, of an unlicensed house cleaner—window washer assuming or allegedly being delegated a duty to do work that is forbidden by law to perform. These facts that the Court of Appeal underplayed would enhance the need for a jury to decide this case.

C. The Label "Independent Contractor" Does Not Mean A Negligent Property Owner-Hirer *Ipso Facto* Delegates All Duty Concerning Safety of the Premises Merely Because A Worker Is Hired to Perform A Discrete Task Such has House Cleaning.

The Court of Appeal below observed that "[i]n his opposition, Gonzalez acknowledged he was an independent contractor." *Gonzalez v. Mathis*, 20 Cal.App.5th 257, 264 (2018), review granted ("*Gonzalez*"). However, the overarching public policy issue to resolve is whether the homeowner-hirer, Defendant Mathis, should be held accountable for his creation and maintenance of the dangerous condition on his roof. Defendant's sole basis on his motion for summary judgment below was that the slippery roof was known and that Defendant had no duty to Plaintiff because Plaintiff was an "independent contractor." (App. 14-35.) The expert testimony submitted in opposition to Defendant's motion summarized Defendant's creation and maintenance of the dangerous condition. See App. at 625-28 ("The dangerous condition of the roof can be summarized in three categories: (1) the parapet wall and narrow catwalk, (2) the slippery and unmaintained roof surface, and (3) lack of fall protection including railings and tie-offs. Considering that Mr. Mathis constructed the kitchen addition, parapet wall and catwalk, it is my opinion that he created this dangerous condition. The built-in ladder invites people to access the roof at this location, upon which, the only reasonable way to walk on the roof is on the

narrow catwalk. Adding to this danger is the fact that the roof had not been maintained in many years creating a situation where the catwalk roof surface was slippery and made a dangerous condition even more dangerous as a fall risk."); *see also* App. at 631-33 ("Based on the dilapidated condition of the roof, it is my opinion that the roof likely had not undergone any significant maintenance in more than 20 years" and "[f]rom my experience and expertise in the roofing industry, it is my opinion that it would be dangerous and extremely difficult to walk behind the equipment screen.")

Plaintiff is not and was not a licensed roofing contractor. Nor was Plaintiff a Class-B General Contractor. Therefore, it would be entirely unfair to burden Plaintiff with an implied duty of responsibility for the dangerous condition on Defendant's roof, without finding any duty upon Defendant for the condition; instead, a jury should determine and apportion responsibility as the finder of fact. Moreover, the above testimony establishes that it was foreseeable for Plaintiff to take the path along the narrow catwalk on the outside of the decorative parapet. (App. at 396, 399.) While the pictures of the ladder Defendant permanently affixed to his house show a hand rail on the ladder (App. 637), the pictures depicting the narrow catwalk do not show any other precautionary measures were taken by Defendant. (App. 639-41). Based on this evidence, a jury could easily find Defendant negligent for

failing to take precautionary measures to prevent the injury that occurred here.

D. Assuming *Privette* Applies, The Court of Appeal Correctly Reversed the Trial Court's Grant of Summary Judgment.

Upon its review of the evidence presented to the trial court below, the Court of Appeal correctly found a triable issue of fact existed to the "hazardous condition" exception to the *Privette* rule, "that a hirer is not liable for an on-the-job injury to an independent contractor's employee." *Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257 (*Gonzalez*), *rev. granted*; *Privette v. Superior Court* (1993) 5 Cal.4th 689.

The Court of Appeal correctly recognized that "[a] motion for summary judgment is properly granted only when 'all the papers submitted show that there is no triable issue as to any material fact and that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' [Citation]." *Gonzalez, supra* at 266 (citations omitted.)

The Court of Appeal also correctly recognized that "[i]n premises liability actions [such as the instant matter], the reasonableness of a party's actions is generally a question of fact for the jury to decide." *Gonzalez*, supra at 842-843 (citations omitted.). After reviewing the evidence submitted on the motion, the Court of Appeal correctly concluded that the evidence did not conclusively establish that Plaintiff could have or reasonably should have

used the cluttered area of the roof on the inside of the decorative parapet. Indeed, there is no evidence in the record that Defendant provided any warnings at either the permanently affixed metal ladder or at the top of the ladder where an invitee, such as Plaintiff, was to take the interior path to the skylight suggested by Defendant. Moreover, apparently there was no barricade or "warning" to Plaintiff not to take the route he took which resulted in him falling and sustaining severe injuries.

E. Even Under *Privette*, the Court of Appeal Should Have Concluded That Defendant Only Delegated the Responsibility Insofar as Was Necessary for Plaintiff, the Business Invitee, to Do What He Contracted to Do - Wash Windows.

The instant case is not one where the business invitee was injured performing the work he was invited onto the landowner's premises to perform—clean the house and wash windows including a skylight on Defendant's roof. Plaintiff was not injured washing Defendant's skylights, watering the plants on the roof or vacuuming and cleaning Defendant's home. Instead, Plaintiff was injured on his way to the very thing that he was directed to clean, Defendant's skylights, which required him to either traverse a cluttered morass of equipment on the inside of a decorative parapet or, as he did, walk along a less cluttered narrow edge. It therefore is CAOC's opinion that triable issues of fact exist as to whether it was foreseeable that Plaintiff would take the narrow catwalk on the outside of the parapet to access the skylight, whether Defendant warned Plaintiff and other invitees

not to take that path to the skylight, and whether Defendant took any alternative measures to remediate the dangerous conditions on Defendant's roof.

The Court of Appeal reviewed evidence that Defendant's agent, Carrasco, "directed him [Plaintiff] to perform various cleaning tasks in a specified order." *Gonzalez, supra* at 264. That Defendant's agent also specifically ordered Plaintiff to "get on the roof to tell his employees to use less water" cleaning the skylight. *Id.* The Court of Appeal also reviewed uncontroverted evidence that Defendant "was the only party who had authority to fix [or remediate] the dangerous conditions on the roof." *Id.*

The Court of Appeal, however, failed to appreciate that Plaintiff was a business invitee on Defendant's property to clean his home, not repair the dangerous condition on Defendant's roof that Defendant knew or should have known about. Rather, the Court of Appeal myopically focused on agent Carrasco's direction to use less water and narrowly construed this evidence in the light most favorable to Defendant, not Plaintiff, as it should have. The fact that the dangerous condition included not only the deteriorated roof but also a complete failure to direct business invitees like Plaintiff to traverse the interior portion of the roof instead of using the catwalk to access the skylight, where the work was to be performed, are facts, evidenced by the photographs

of Defendant's roof (App. at 639, 642), that the Court of Appeal apparently failed to consider or appreciate.

In *Markley v. Beagle,* 66 Cal.2d 951 (1967), this Court found that a landowner was liable to a business invitee who was on the defendant's property to go up on the roof to service a fan on the ventilation system. *Id.* at 955. While on his way to the roof, the plaintiff was injured when a railing "gave way and he fell to the floor below." This Court found that, "[u]nder these circumstances, there is no basis for limiting the owner's responsibility to comply with the safety orders." *Id.* at 957. While *Markley* predates *Privette*, and its progeny, nothing in *Privette* or its progeny have upset the correctness of this Court's holding in *Markley*. *See Kinsman v. Unical Corp.,* 37 Cal.4th 659, 675 (2006) ("Nothing in the *Privette* line of cases suggests that *Markley* is no longer good law.") On its facts, *Markley* aligns much more closely to Plaintiff's case than does *Privette*, which is readily distinguishable.

As explained by this Court in *Tverberg v. Filner Const.,* 49 Cal.4th 518 (2010), *Privette* held that the hirer is not vicariously liable to an employee of a contractor who sustains "on-the-job injuries arising from a special or peculiar risk inherent in the work." *Id.* at 521. Here, Plaintiff seeks to hold Defendant liable for his negligence in regard to the dangerous condition that existed on his property. Plaintiff here does <u>not</u> seek to hold

Defendant vicariously liable. Thus, *Tverberg* is neither helpful or dipositive of the issue presented here. Additionally, as discussed above, Tverberg was a licensed contractor, which further negates the applicability of the *Tverberg* holding here. Common sense dictates that a skilled, qualified and licensed contractor is able to assume much greater duties than an unlicensed (and unqualified) house cleaner. Thus, if anything, *Tverberg* stands for the proposition that the skill, trade or license at issue is highly relevant in the determination of whether the *Privette* rule should apply.

F. Public Policy is Served When It Encourages Landowner-Hirers to Address Dangerous Conditions on their Property.

This Court should adopt a rule that encourages landowner-hirers to remove or eliminate dangerous conditions on their premises. Public safety will not be served by a draconian rule that provides landowner-hirers with immunity for their direct negligence. That is what Defendant proposes here.

Defendant proposes an inflexible rule that all landowner-hirers delegate all responsibility for all workplace safety and are immune from liability when they hire an "independent contractor," regardless of the job or work the worker is invited onto the landowner's premises to perform and irrespective of whether the contractor is legally able to perform the work. (ABOM, pp. 22-25.) Distilled to its essence, Defendant's concern is that the courts are ill-equipped to resolve issues of foreseeability, duty and causation

in the context of injuries sustained by the negligence of the landowner. Defendant's concern is without merit. *See Ballard, supra at* 572, n.6.

The answer to Defendant's concern is not the imposition of a blanket rule that would categorically force all injuries that occur on a hirer's property to burden the workers' compensation scheme or society in general.[4] Rather, the answer is to allow each case to be analyzed under general tort principles and allow the courts to decide whether, in any given case, the defendant landowner owed a duty separate and apart from the work contract, whether the injuries sustained were foreseeable, and whether the defendant breached that duty. By viewing each case through the prism of tort principles, the courts are able to provide relief to those injured as a result of another's negligent conduct, to impose liability on parties responsible for the harm, and to deter others from committing harmful acts. The society at large benefits from the removal or remediation of dangerous conditions. There is no

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[4] The "State Fund is California's largest provider of workers' compensation insurance and a vital asset to California businesses." https://content.statefundca.com/news/News2018/050318-AnnualReport.asp However, it does not appear from this Court's docket that the State Fund has weighed in on this debate. Therefore, CAOC suggests that the Court request the State Fund, through the Attorney General, to weigh in on the debate as to when an "independent contractor" is qualified and legally able to accept any implied delegation of duty with regard to work on a landowner's premises and whether the State Fund should be burdened by such cases.

overarching benefit achieved by a rule which promotes dangerous conditions to continue, unabated, with immunity.

Tort law and its guiding principles have successfully resolved an array of claims, including those that could be considered "limitless" without the need of "bright-line rules." The case of Mrs. Palsgraf comes to mind as she stands on a platform waiting for her train. Two gentlemen run to board their train, one successfully hops onto the car but the other, carrying a package, begins to lose his balance. The conductor grabs him and in doing so, jostles the man's arm causing him to drop his package. The package, which is filled with fireworks, hits the train tracks, explodes and the concussion causes a set of scales to fall on Mrs. Palsgraf. *Palsgraf v. Long Island Railroad Co.,* 248 N.Y. 339 (1928).[5] See also *Bryant v. Glastetter,* 32 Cal.App.4th 770, 778-784 (1995) (Heirs of a tow truck driver had no claim against drunk driver whose car the tow truck driver was removing when an errant vehicle struck and killed the tow truck driver because "there is no logical cause and effect relationship between that negligence and the harm suffered by decedent

[5] Prosser, *Palsgraf Revisited* (1953) 52 Mich. L.Rev. 1, 32 ("What is the true reason that so many of us feel that the [*Palsgraf*] case was correctly decided, and that Mrs. Palsgraf should not recover?" "It is that what ... happen[ed] to her is too preposterous. Her connection with the defendant's guards and the package is too tenuous; in the old language, she is too remote. The combination of events and circumstances necessary to injure her is too improbable, too fantastic.").

except for the fact that it placed decedent in a position to be acted upon by the negligent third party"); *Wawanesa Mutual Ins. Co. v. Matlock,* 60 Cal.App.4th 583, 586-588 (1997) (reversing judgment for property damage against a teenager who bought two packs of cigarettes from a gas station and gave one to a pal who then trespassed onto private property, sat on a pile of logs to smoke, and dropped the cigarette into the logs after being accidentally hit in the arm by another pal, causing the logs to catch fire because "the concatenation between Timothy's initial act of giving Eric a packet of cigarettes and the later fire is simply too attenuated to show the fire was *reasonably* within the scope of the risk created by the initial act." (Emphasis in original); *Novak v. Continental Tire No. Am.,* 22 Cal.App.5th 189 (2018) (affirming summary judgment in wrongful death action against tire manufacturer and mechanic for failing to warn about the dangers of rubber degradation in old tires which led to a tire blowout that injured a passenger, and those injuries impaired his mobility causing him to use a motorized scooter with limited maneuverability, which led to his death when the scooter was struck by a vehicle in a crosswalk six years after the original accident). *Cf. Cabral v. Ralphs Grocery Co.,* 51 Cal.4th 764, 771-773 (2011) (affirming judgment for negligence against tractor-trailer driver by the heirs of a driver killed after his car hit the tractor-trailer which was parked alongside a freeway because the claim was not too indirect or attenuated).

Whatever the rationale employed by the courts in denying or allowing liability for an injury that follows from an unfortunate series of events that occurred on a landowner's property, whether it is resolved as a question of duty or foreseeability or lack of causation, the courts have capably handled the issues on a case-by-case basis rather than through the creation of "no-duty rules" that categorically eliminate classes of cases or classes of claimants.

G. Triable Issues of Fact Exist as to Defendant's Active Control of the Premises and the Hazardous Condition Which Caused, at Least in Part, Plaintiff's Injuries.

In *Kinsman,* this Court opined that there "may be situations ... in which an obvious hazard for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part *to remedy the hazard because knowledge of the hazard is inadequate to prevent injury.*" While the facts presented in *Kinsman* did not enable the Court to squarely resolve this issue, those facts are presented here. As the Court of Appeal held: "[A] hirer can be held liable to when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." (Op. at 18-19.)

Here, the scope of Plaintiff's work was to clean the house, including the skylights on the roof. Not to fix or repair the roof. As discussed above, Plaintiff was neither licensed nor qualified to perform that type of

construction. Thus, it cannot be said, as a matter of law, merely because Defendant contracted with Plaintiff to clean his house that Defendant delegated all of his duties and obligations to Plaintiff to inspect and make the premises safe. *Kinsman, supra* at 678. Here, even if any duty of inspection was delegated to Plaintiff, Plaintiff discharged that duty when he reported to Defendant's agent, Carrasco, that the roof needed repair. (App. 303-304.) As discussed above, Plaintiff was precluded by law from doing any roof repair himself. Thus, no delegation of duty concerning the dangerous roof condition can be inferred here merely because a homeowner-hirer hires an unlicensed and unqualified house cleaner. Defendant was "the only party who had authority to fix the dangerous condition on the roof," (Op. at 16) and no inference of delegation of responsibility to fix or repair the roof could possibly be delegated to Plaintiff because to do so would be in violation of the State's licensing scheme for construction workers. (Bus. & Prof. Code § 7000.)

H. California's Pure Comparative Fault System is Aptly Equipped to Resolve the Tension between Defendant's Negligence and the Possibility that Plaintiff Was, To Some Extent, At Fault.

Rather than wait for the Legislature to act, in 1975, this Court adopted its current pure comparative fault system. *See Li v. Yellow Cab Co.*, 13 Cal.3d 804 (1975); *American Motorcycle Assn. v. Superior Court*, 20 Cal.3d 578, 582 (1978) (expanded to include multiple tortfeasors); *see also* CACI

405 (Comparative Fault of Plaintiff) and CACI 406 (Apportionment of Responsibility.) Under California's pure comparative negligence system, each defendant is only liable for his or her percentage of fault. A plaintiff is still able to recover damages under pure comparative negligence, even if he or she was partly at fault in contributing to the incident. The ultimate allowance of damages for a plaintiff will be reduced by his or her own percentage of fault. Attempting to perform this calculation through judicially-created rules of liability would "[u]rsurp the factfinding and fault allocation functions assigned to the jury under our comparative fault system." *Hooker*, 27 Cal.4th at 216, J. Werdegar dissent. (Emphasis added.)

After hearing all of the evidence, the trier of fact, the jury, may find Defendant liable, for at least his part in failing to inspect the premises, failing to adequately maintain a safe route to the skylight that defendant installed, or, at minimum, failing to provide an adequate warning as to the route business invitees were to take to access the skylight. The jury, after hearing the evidence, may also apportion some degree of fault on Plaintiff.

Defendant does not explain why a landowner-hirer's duty to adequately maintain his roof would be assumed by a housecleaner. Nor could he legally do so. As discussed above, Plaintiff was not licensed to perform roofing work and therefore, any delegation of duty for that area of work is prohibited by law from performing and thus, not susceptible to an

implied delegation simply because Plaintiff may be deemed an "independent contractor."

Defendant agrees that "[t]he scope of landowner's general duty to keep his premises safe is limited by, among other things, the foreseeability of harm." RB at 27 *citing Vasilenko v. Grace Fam. Church,* 3 Cal.5th 1077, 1085 (2017). Permanently affixing a metal ladder with handrails on one's home strongly, if not conclusively, suggests that business invitees such as gardeners to water the potted plants on Defendant's roof and house cleaners to clean the skylight would be ordered up to the roof and take the route provided to them by Defendant and his agent, Carrasco. (App. at 452.) Defendant's argument that it was "not foreseeable that an ordinary invitee will climb onto and walk on a homeowner's roof" is therefore misguided and contradicted by the evidence. (App. at 395, 399, 406, 428, 433-34, 440, 452.) Defendant has failed to negate foreseeability as a matter of law.

CONCLUSION

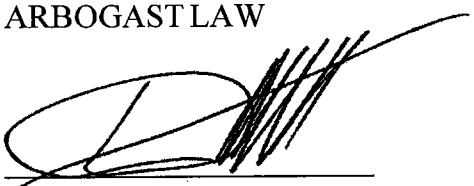
The opinion of the Court of Appeal should be upheld. With respect to the issue of Defendant's negligence that caused or contributed to Plaintiff's injuries, that should be determined by the jury. The opinion of the Court of Appeal should be reversed as to Defendant's retained control over his premises. This Court should find that as to the issue of Defendant's retained control over the premises there are triable issues of fact. One who

suffers injury as a result of another's negligent conduct should be based on the actual conduct of the parties viewed in the context of the obligations that tort law imposes, not an arbitrary rule that forces all injuries that occur on or near a workplace into the Workers' Compensation System; or, as here, into a situation where no remedy exists.

Dated: January 24, 2019

Respectfully submitted,

ARBOGAST LAW



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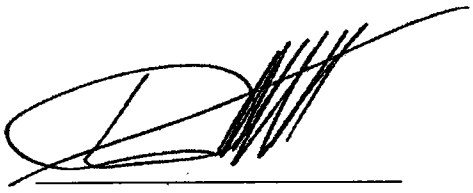
CERTIFICATE OF COMPLIANCE

Under California Rule of Court 8.204(c)(1), counsel of record certifies that this Application to File Amicus Curiae Brief of Consumer Attorneys of California Supporting Petitioner is produced using 13-point Roman type, including footnotes, and contains 13,555 words, which is less than the 14,000 words permitted by Rule 8.204(c)(4). Counsel relies on the word count provided by Microsoft Word word-processing software.

Dated: January 24, 2019



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DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is, and was at the time of service, a citizen of the United, over the age of 18 years, and not a party to, or interested in, this legal action; and that declarant's business address is 933 Woodland Avenue, San Carlos, CA 94070.

2. That on January 24, 2019, declarant caused to be served this **APPLICATION TO FILE AN AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING PLAINTIFF AND APPELLANT** by depositing a true copy as shown below with the U.S. Post Office, Priority Overnight for delivery overnight on the next business day. The copies were placed in sealed envelopes with postage fully prepaid, addressed to the following interested parties and courts:

SEE ATTACHED SERVICE LIST

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

Executed on this 24th day of January, 2019, within the United States.

DAVID M. ARBOGAST

SERVICE LIST

Gonzalez v. Mathis
Supreme Court Case No. S247677

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