Supreme Court No. S 247677
2nd Civil No. B 272344

SUPREME COURT
FILED
MAR 19 2019
Jorge Navarrete Clerk
Deputy

# IN THE SUPREME COURT
# OF THE STATE OF CALIFORNIA

LUIS GONZALEZ,

Plaintiff and Appellant,

vs.

JOHN R. MATHIS, et al.,

Defendants and Respondents.

Supreme Court No. S 247677

2nd Civil No. B 272344
LASC Case No. BC 542498

From a Decision of the Second District Court of Appeal
Division Seven, 2nd Civil No. B 272344

## APPELLANT'S REPLY TO BRIEFS *AMICUS CURIAE* OF CALIFORNIA ASSOCIATION OF REALTORS; CALIFORNIA BUILDING INDUSTRY ASSOCIATION; CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL; AMERICAN INSURANCE ASSOCIATION AND U.S. CHAMBERS LITIGATION CENTER; AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENTS JOHN R. MATHIS, ET AL.


Evan D. Marshall [Bar No. 82444]
**Attorney**
11400 West Olympic Blvd., Suite 1150
Los Angeles, CA 90064
(310) 458-6660/Fax: (310) 458-9065





Wayne McClean [Bar No. 66764]
**LAW OFFICES OF WAYNE MCCLEAN**
21650 Oxnard Street, Suite 1620
Woodland Hills, CA 91367
(818) 225-7007/Fax (818) 225-7557

Brian J. Panish [Bar No. 116060]
Spencer R. Lucas [Bar No. 232498]
**PANISH SHEA & BOYLE LLP**
11111 Santa Monica Boulevard, Suite 700
Los Angeles, CA 90025
(310) 477-1700/Fax (310) 477-1699

Attorneys for Plaintiff and Appellant Luis Gonzalez

Supreme Court No. S 247677
2nd Civil No. B 272344

# IN THE SUPREME COURT

# OF THE STATE OF CALIFORNIA

| | |
|---|---|
| LUIS GONZALEZ,<br><br>Plaintiff and Appellant,<br><br>vs.<br><br>JOHN R. MATHIS, et al.,<br><br>Defendants and Respondents. | Supreme Court No. S 247677<br><br>2nd Civil No. B 272344<br>LASC Case No. BC 542498 |

From a Decision of the Second District Court of Appeal
Division Seven, 2nd Civil No. B 272344

## APPELLANT'S REPLY TO BRIEFS *AMICUS CURIAE* OF CALIFORNIA ASSOCIATION OF REALTORS; CALIFORNIA BUILDING INDUSTRY ASSOCIATION; CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL; AMERICAN INSURANCE ASSOCIATION AND U.S. CHAMBERS LITIGATION CENTER; AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENTS JOHN R. MATHIS, ET AL.


Evan D. Marshall [Bar No. 82444]
**Attorney**
11400 West Olympic Blvd., Suite 1150
Los Angeles, CA 90064
(310) 458-6660/Fax: (310) 458-9065

Wayne McClean [Bar No. 66764]
**LAW OFFICES OF WAYNE MCCLEAN**
21650 Oxnard Street, Suite 1620
Woodland Hills, CA 91367
(818) 225-7007/Fax (818) 225-7557

Brian J. Panish [Bar No. 116060]
Spencer R. Lucas [Bar No. 232498]
**PANISH SHEA & BOYLE LLP**
11111 Santa Monica Boulevard, Suite 700
Los Angeles, CA 90025
(310) 477-1700/Fax (310) 477-1699

Attorneys for Plaintiff and Appellant Luis Gonzalez

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Other Authorities**

## 1. INTRODUCTION

The gist of Amicis' briefs is that the "delegation" of duty to contractors should be divorced from the concerns that underlie *Privette v. Superior Court* (1993) 5 Cal.4th 689: the unfairness of imposing vicarious liability on an owner or hirer who was *not at fault* for the accident because a contractor had assumed responsibility for the danger in question. This a case, however, where the defendant's own fault – his refusal to hire and to "delegate" the repair of his roof to a competent contractor – is the basis for direct liability under settled law.

*Privette* decisions have repeatedly affirmed that the doctrine concerns vicarious liability for the neglect of a contractor, and does not apply where direct owner neglect is a causal factor. Owners and hirers are not relived of the ordinary duty of care, including the duty not to increase the risks inherent in the specific work, and such liability is in no sense vicarious.

Because Mathis' liability rests entire only his own negligence, and there is no attempt to impute to him liability for any supposed neglect by Gonzalez, this case does not infringe upon *Privette* in any way.

Amici's rationale for exempting hirers from any ordinary duty of care to workers rests on demonstrably unsound premises:

> The false assumption that any contractor is in a better position than any owner to prevent worker injury from hazards of any sort, and that an owner has no duty to hire the appropriate specialist for conditions demanding specialist skills.

> The proposition that an owner has no duty to workers to correct open hazardous conditions despite a severe risk that workers or other visitors not tasked with correcting the condition will suffer injury by accidentally or deliberately encountering the condition.

> The unfounded notion that imposing liability to workers for the owner's failure to maintain imposes a burden beyond that already

imposed by the duty of ordinary care.

> The assumption that comparative fault principles are inapplicable where injury is the combined result of both contractor and hirer neglect.

> The effort to shift the cost of hirer and owner negligence – the cost of risks not inherent in the contracted work but resulting from the hirers' lack of ordinary care – from liability insurance to a workers compensation system which was designed only to bear the cost of contractor/employer neglect.

What the Amici Briefs illustrate is the necessity for defining the "peculiar" or inherent risks and duties delegated to contractors, and distinguishing the duties which an owner or hirer has as to all visitors and which he cannot "delegate" except to a contractor actually tasked with and capable of fulfilling that duty.

## 2. *AMICI* FAIL TO DISTINGUISH THE DUTIES AND RISKS INHERENT IN THE CONTRACTED WORKS AND THUS SUBJECT TO *PRIVETTE* FROM THOSE ARISING INDEPENDENTLY OF THE WORK AND OWED TO VISITORS AT LARGE

### A. Gonzalez' Claim is Based on Multiple Acts of Negligence by Mathis and His Agents, Not on Derivative Liability

A common theme in the Amicus Briefs is that liability for every known danger encountered in the course of contracted work must be assumed by the contractor as the party with direct authority over the worker's conduct – regardless of whether the danger is the subject of the work or created by neglect of the hirer/owner in which the contractor played no role. The aim is to obliterate the distinction between direct liability and the vicarious liability which was the focus

of *Privette*. Amici likewise fail to recognize that an injury resulting from the concurrence of hirer neglect preceding and unrelated to the contracted work (direct negligence unaffected by *Privette*), and contractor neglect in management of his worker (fault not imputed to the hirer under *Privette*) is ordinary comparative fault.

While Amici insist that Gonzalez seeks to impose on Mathis liability for Gonzalez' supposed failure to take precautionary measures (whose availability was doubtful in the circumstances), the only liability asserted against Mathis is *for his own fault as a negligent property owner*. If any neglect by Gonzalez contributed to the injury, comparative fault will account for it.

While Amici propose various theories under which Gonzalez allegedly acted without due care, they do not question Mathis's own breach of the common law duty to maintain and repair his roof, or that his neglect had a direct causal link to Plaintiff's injury in multiple ways:

> Mathis let his roof deteriorate through decades of neglect, through aware of its poor condition, creating the slippery gravel responsible for Gonzalez' loss of footing. (App. 115, 426-440, 479-498)

> Mathis failed to hire a roofer competent to fix the condition even after being advised of that necessity by Gonzalez. (App. 303-304)

> The lack of roof maintenance led to an emergency situation that required Gonzalez to hastily climb on the roof — at the direction of Mathis' housekeeper Carrasco – without time to take precautions. (App. 74-76, 568-578) This illustrates the foreseeabilty of a worker encountering the slippery catwalk out of expediency notwithstanding patency of the condition.

The cased is a poster-child for direct hirer liability. Nothing in Gonzalez' case rests on imputed or vicarious liability, and for summary judgment purposes any fault by Gonzalez is irrelevant.

## B. *Amici* Confuse Duties by a Contractor to Its Employee With Duties Owed By an Owner/Hirer to All Visitors

Amici claim that the retention of a contractor delegates all responsibility for protective measures for any condition on the property to the contractor based upon the latter's superior skill and experience, and his presumably greater ability to avoid open dangers and require safety measures.

The argument confuses two distinct duties. On the one hand, the duty to take precautionary measures for worker safety – such as OSHA rules – lies with the contractor/employer. Appellant does not advocate that Mathis is vicariously or otherwise responsible for any loss attributable to the lack of safety appliances ***if*** (and this is a very conditional concession) such measures were in fact required for a worker moving from the skylight to the ground, ***except*** insofar as the emergency created by the leaking roof and Carrasco's orders directly influenced Gonzales to climb to the roof in haste and without an opportunity for full preparation[1] – *i.e.*, direct negligence by defendant and his agent affecting performance of the work.

With that proviso, it can be conceded that the contractor's duty to see that work is done safely runs only from the contractor to the worker. If a worker is injured, his complaint about the contractor's neglect usually lies in the realm of worker compensation.

A property owner's general duty of due care to visitors, on the other hand, is independent of a contractor's duty to his workers. The contractor's breach of duty to his worker does not alter the owner's duty to maintain a safe property for

---

[1] Events that are "themselves derivative of defendants' allegedly negligent conduct . . . do not diminish the closeness of the connection between defendant's conduct and plaintiff's injury for purposes of determining the existence of a duty of care." *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1148, quoting *Beacon Residential Cmty. Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 583.

all visitors. "A hirer has a duty to maintain its premises in a reasonably safe condition for the employees of its independent contractors." *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 63; *Markley v. Beagle* (1967) 66 Cal.2d 951, 955–956; *Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1129.

"Nothing in the *Privette* line of cases suggests that *Markley* is no longer good law." *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 673–674. *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1040 (notwithstanding plaintiff's inability to rely on non-delegable duty doctrine, the jury was "free to consider whether [general contractor] was directly negligent in failing to correct any foreseeable, dangerous condition . . . which may have contributed to the cause of [plaintiff's] injuries"); *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281 (owner's breach of duty to have fire extinguishers available may have contributed to burn injuries sustained by subcontractor's employee.)

*Browne v. Turner Construction Company* (2005) 127 Cal.App.4th 1334, rejects the argument that a defendant did not affirmatively contribute to plaintiff's fall because of plaintiff's own negligence. The Court noted that given the doctrine of comparative fault, the focus must be on the extent to which the hirer's own negligence contributed to the happening of the accident. Of special pertinence to this case, the Court noted that "the evidence raises the strong possibility, at least, that defendants not only actively contributed to plaintiff's injuries, but actually created the situation in which they were likely to occur." (*Id.* at 1346)

*Browne* went on to state that "a plaintiff's (or his employer's) negligence does not categorically insulate the employer's hirer from liability where its own negligence affirmatively contributes to the harm. Accordingly, even if the plaintiff's decision to perform the work was negligent . . . the facts before us would afford no basis for summary judgment." (*Id.* at 1348)

Contractor and hirer/owner duties must accordingly be assessed independently.

> In trying to fit this case within the nondelegable duties doctrine, the Court of Appeal here distinguished between those Cal–OSHA requirements that arise from the work performed by the independent contractor and those that predate the contractor's hiring and apply to the hirer "by virtue of [its] role as property owner." In the view of the Court of Appeal, the latter requirements are nondelegable. Conversely, tort law duties that "only exist because construction or other work is being performed" can be delegated to the contractor hired to do the work. We acknowledge the distinction, but for the reasons given below, we conclude that the Court of Appeal did not apply the distinction correctly.
> [*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 603]

*Seabright* found OSHA duties delegable since they existed *only* because of the contracted work and were born *only* by the contractor as employer of the injured worker, not by the hirer. *SeaBright,* 52 Cal.4th at 603. Owners are not liable for such employer neglect because the duty is not theirs. *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, *Tverberg v. Filner Constr.* (2010) 49 Cal.4th 518, and *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, all turn on whether the duty in question arose out of the work– and thus lay on the contractor as employer – or existed independently of the contracted work.

These questions form the start of any *Privette* analysis:

> Is the duty one arising from the work, and is the risk one inherent in the contractor's speciality, or

> Does the duty in question exist apart from the work, and apart from the defendant's status as hirer and the injured worker's status as employee of the contractor; and does the breach pose a risk beyond that which a worker in that speciality would encounter as a normal incident of his work?

### C. Nothing in *Privette* Immunizes Hirers From Liability for Ordinary Neglect Causing Injury to Workers Resulting From Dangerous Conditions Never Delegated to a Contractor

> . . . the court has made clear that the policies underlying the limitations on the peculiar risk doctrine are not violated when a hirer is held liable to a contractor's employee based on the hirer's own affirmative negligence. "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is not '"in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." [Citation.] To the contrary, the liability of the hirer in such a case is direct in a much stronger sense of that term.
> [*Hooker, supra*, 27 Cal.4th at 211–212. See also *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1128–1129]

"The nondelegable duties doctrine . . . applies when the duty preexists and does not arise from the contract with the independent contractor." *SeaBright Ins. Co., supra*, 52 Cal.4th 600–601.

In *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, the defendant owner worked with a contractor to modify entry and exit points to a underground vault, ran a propane line to the vault, and obtained permits. Plaintiff's injury occurred when he ignited the propane heater in the inadequately ventilated vault. The owner was negligent in the creation of the danger, breaching a duty independent of the contracted work and creating a danger preceding the work.

The failure in *Regalado* to obtain permits and to assure proper installation is

not in essence different from Mathis' failure to maintain or hire a qualified contractor to fix the roof. While phased somewhat misleadingly in terms of "retained control," both are instances of independent duties never assigned to a contractor and negligently performed by the owner.

In *Evard v. S. California Edison* (2007) 153 Cal.App.4th 137, a regulation that required the owner of a billboard to maintain horizontal safety lines imposed an ongoing, nondelegable duty. (*Id.* at 148) "The regulation [in *Evard*] imposed a permanent obligation on the owner with respect to the condition of the property; ***no one but the [owner] was in a position to ensure that condition***." *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 673, emphasis added. *Ray v. Silverado Constructors, supra,* 98 Cal.App.4th 1134-1135, found a triable issue as to direct liability to a worker based on the general contractor's common law and statutory duties to protect the traveling public from injury on the roadways comprising the project.

*Kinsman* endorsed the reasoning of *Ray*, and specifically the reliance on the contractor's duty to exercise due care to protect the traveling public, which "may have included the responsibility to close the road to prevent motorists from being harmed by the wayward construction materials." (*Kinsman*, 37 Cal.4th at 671) The *Ray* court concluded there was a triable issue as to whether the general contractor retained the sole authority to close the road, and whether its failure to do so led directly to the employee's injury. Mathis had an equivalent duty to protect visitors.

### D. Recent *Privette* Jurisprudence Affirms the Distinction Between Vicarious and Direct Liability

The Brief most illustrative of the need to distinguish duties and risks is that of the California Civil Justice Association, which contends that under *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, and *Camargo v. Tjaarda*

*Dairy* (2001) 25 Cal.4th 1235, a hirer is immune even for direct liability. (CJAC Brief 21-23) This misconstrues the cases and is impossible to reconcile with the Court's subsequent assertion that "[i]mposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is not 'in essence "vicarious" or "derivative" in the sense that it derives from the "act or omission" of the hired contractor.'" (*Hooker*, *supra*, 27 Cal.4th at 211–212)

*Camargo* held that an employee of an independent contractor was barred from suing the hirer for negligent hiring, since any injury derived from the act or omission of the hired contractor and thus rested on the contractor's duty to the worker arising out of dangers created by the contracted work. Negligent retention is simply a form of vicarious liability in that it imputes liability to a principal or employer.[2] *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 871 (negligent retention "should not impose additional liability"; "the employer's liability cannot exceed [that] of the employee.") *Camargo* says nothing about the breach of independent duties resting solely on a hirer/owner.

*Toland* held that a hirer could not be held liable for failing to provide for special precautions or for the contractor's negligence where the contractor had

---

[2] Negligent retention is thus immaterial when vicarious liability is undisputed since it only serves to make the principal liable for the agent's negligence, not to create independent or increased liability. *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1152. As in *Privette* and *Toland*, negligent retention imposes 100% liability on the principal rather than proportionate liability. See *Diaz* at 1160, disapproving application of the theory where it "would subject the employer to a share of fault in addition to the share of fault assigned to the employee, for which the employer has already accepted liability. To assign to the employer a share of fault greater than that assigned to the employee whose negligent driving was a cause of the accident would be an inequitable apportionment of loss."

required special precautions but the contractor failed to observe such requirements. Any duties arose only by reason of the contracted work, so the hirer's liability was derivative of the contractor's neglect towards its worker, rather than an independent breach of duty to the worker.[3] "Liability under both [Rest. 2nd §§413 and 416] is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work." (18 Cal.4th 265)

Importantly, it does not appear that owner liability in *Toland* would have been mitigated by comparative fault: rather, it would be coequal with the contractor, and the owner could not have sought indemnification from the negligent contractor.

Neither case has dissuaded this or other courts from recognition that a worker may maintain a cause of action against an owner based on the owner's negligence. See *Kinsman*, *Ray*, *Hooker*, *Evard v. S. California Edison*, *supra*, 153 Cal.App.4th 137, *Zaragoza v. Ibarra* (2009) 174 Cal.App.4th 1012, 1022–1023.

### 3. *KINSMAN* AND OTHER CASES AFFIRM A POSSESSOR'S DUTY TO CORRECT EVEN OPEN DANGERS PRESENTING A SEVERE RISK OF INJURY TO WORKERS

Amici contend that the contractor assumes all responsibility for any open danger on the work site without regard to nature of the hazard, the risk of injury to visitors, and whether the hazard is or is not the subject of the contract. American Property Casualty Brief at 39-48; Civil Justice Association Brief at 15-20.

---

[3] *Toland* notes that use of the terms "direct" and "vicarious" is often imprecise and misleading. (18 Cal.4th 265-266)

### A. *Kinsman* Does Not Imply Delegation of Every Hirer Duty, Including the Duty to Remedy Patent Hazards

The result in *Kinsman* is readily explicable on its facts. *Kinsman* involved two theories of liability. One was concealment of a known hazard, a form of direct liability which turned on factual issues. The other theory alleged the hirer's failure to protect workers from a hazard created by the work itself. Kinsman was engaged in an asbestos removal project, which required him to work in an asbestos-laden environment, so the danger was inherent and created by the contracted work.

Assuming it did not conceal the hazard, Unocal did nothing to increase the inherent or peculiar risk: it was charged, rather, with failure to protect against an inherent risk. But the duty for such risks lay with the contractor, who had an easily available protective measure in the form of respirators. Of note, *Kinsman* states that even as to an inherent risk, the hirer might have a duty to correct an open hazard if correction was beyond the measures that the contractor could reasonably be expected to take: if the danger was "one that can be remedied ***by taking reasonable safety precautions***, the landowner who has delegated job safety to the independent contractor only has a duty to the employee if the condition is concealed." (37 Cal.4th at 673)

*Kinsman* acknowledges the duty to correct even an open hazard in circumstances when injury is foreseeable:

> 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.) . Because the the italicized phrase does not seem applicable to landowner liability for injuries

> to employees of independent contractors. 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.). 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*, 37 Cal.4th at 674, emphasis added]

*Amici* contend that the above abolishes liability for any risk for which there is any protective measure. But *Kinsman* deals here with limiting liability for *the contractor's duty of care to the worker* in the context of a danger that was inherent in the work and hence presumably delegated.[4] It did not address the hirer's breach of his personal duty of care arising independently of the contract – and owed to all visitors.

When *Kinsman* says that *"in light of the delegation doctrine reaffirmed by*

---

[4] "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered." *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.

*Privette,"* language in *Res.2nd Torts*, §343 regarding the duty to correct open dangers had to be modified to recognize that the primary duty was on the contractor, it is speaking of a contractor who was hired to remediate the open danger, to whom the duty of worker safety was accordingly delegated, and who undoubtedly had the capacity to take such measures.

The Draft *Restatement 3rd* notes the difference between duties delegated because created by the work and those arising independently of the work and retained by the owner except when they are the very subject of that work:

> First, this duty limitation [to a contractor's workers] does not negate or diminish the hirer's duty of reasonable care in other phases of the retention and the work (such as selection, instruction, advising of relevant safety conditions, etc.). Rather, the duty limitation applies only with respect to allegations that the hirer has failed to use reasonable care as to work relinquished to the independent contractor and now under its control.
> [*Rest.3d Torts: Phys. & Emot. Harm* §56, Tent. Draft No 7 (2011)]

See *Example 1* to §56, noting that the duty limitation would not apply where the allegation is of owner negligence in regard to the condition of the property, not failure to use reasonable care as to the work itself

The signal feature of the instant case - what sets it apart from *Privette*, *Kinsman*, *Hooker* and other cases - is that only *Mathis* could have hired a roofer to correct a danger for which a warning was insufficient, so he could not have reasonably "delegated" his duty to a contractor incapable of doing so.

B. **Owner/Hirer Responsibility for Life Threatening Dangers – Patent or Latent – Demanding Correction Cannot Be "Delegated" to Those Neither Tasked Nor Equipped to Remedy the Danger**

> When the hirer is also a landowner, part of that delegation includes taking proper precautions to protect against obvious hazards in the workplace. ***There may be situations, as alluded to immediately above, 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.***
> [*Kinsman*, 37 Cal.4th at 673, emphasis added]

> [I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger.
> [*Kinsman*, 37 Cal.4th at 673]

Certain dangers present such a high risk of injury even when known to visitors that the possessor has a duty to correct – not just warn. Examples are exposed electrical wires, leaks of flammable gas, and conditions that are conducive to falls or other injuries because of the likelihood that they will be encountered by visitors. *Kinsman, Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184; *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121–122. "This duty arises, for example, when it is foreseeable that the third person will encounter the dangerous condition by practical necessity. It is foreseeable that

even an obvious danger may cause injury if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances a person might choose to encounter the danger." 6 Miller & Starr, *Cal. Real Estate 4th* §19:45.

The Chamber of Commerce dismisses *Kinsman*'s citation of *Osborn* as inconsistent with *Privette*. But it is simply acknowledgment that ordinary rules of negligence and comparative fault will govern where ordinary neglect has enhanced or created a risk not inherent in the contract – as it was in the contemporaneous decision in *McKown v. Wal-Mart Stores* (2002) 27 Cal.4th 219.[5]

The owner's liability for resulting injuries is not vicarious in any sense, whoever the victim may be.

It is absurd to assert that responsibility for such dangers is delegated to a worker or contractor who is not hired or capable of fulfilling the duty to correct. Indeed, the worker who is sent to work in the vicinity of a danger which demands correction rather than warning is the very person to whom the duty to correct runs because he is the person most likely to be injured by the failure to correct.

The duty to correct is thus owed to workers. *Florez v. Groom Development Co.* (1959) 53 Cal.2d 347, 355, in discussing the principle that "although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy," posed the example of a worker who fell while using a short or narrow plank. Assuming the defect was obvious, such a worker faces practical necessities and so bears a reduced quantum of care when working in a dangerous position. Because the practical necessities of the situation make his decision to use the plank readily foreseeable, the general contractor had a duty *to that worker*

---

[5] The rule is identical in occupational risk cases: the defendant will be liable if "the police officer or firefighter has come to a specific location to perform a specific immediate duty, and the defendant's unrelated negligent or intentional conduct increases the risks inherent in performing that duty. . ." *Seibert Security Services, Inc. v. Superior Court* (1993) 18 Cal.App.4th 394, 411.

*to correct, even if the danger was open and obvious.* "The jury [is] entitled to balance the [plaintiff's] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue." (*Florez*, 53 Cal.2d at 358–359)

> Thus, although the obviousness of a danger may obviate the duty to warn of its existence, if it is foreseeable that the danger may cause injury despite the fact that it is obvious (for example, when necessity requires persons to encounter it), there may be a duty to remedy the danger, and the breach of that duty may in turn form the basis for liability, if the breach of duty was a proximate cause of any injury.
>
> The duty Kosha owed is analogous to the duty an owner or occupant of real property owes to a worker on the premises: 'The general rule in that regard is that an owner or occupier of premises, who, by invitation express or implied, whether the invitation is pursuant to a written contract or otherwise, induces, or knowingly permits, a workman to enter the premises for the performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work.' [Citation.]' (*Kingery v. Southern Cal. Edison Co.* (1961) 190 Cal.App.2d 625, 632.)
> [*Reyes v.Kosha* (1999) 65 Cal.App.4th 451, 462]

As in *Florez* and *Osborn*, the foreseeability of a cleaner crossing the slippery roof without protective measures because of the practical necessity of swiftly reaching the skylight imposed a duty to correct, not just warn, and that duty ran to the very worker who was faced with such practicalities. *Kinsman* accepts this principal and thus rejects the premise that there is no duty to any worker who

will foreseeably be endangered by a high-risk condition notwithstanding their knowledge of it.

Here, the practical situation that induced Gonzales to confront the roof edge without safety equipment (assuming there was such equipment) was created by Carrasco's demand and the leakage which followed from Mathis' failure to maintain the roof and skylight. The duty to correct ran to Gonzalez becasue he was the very person induced to encounter the slippery roof.

*McKown* and *Kinsman* follow *Osborn* and *Florez* and many other cases in eschewing any blanket rule of hirer non-liability for open dangers, instead looking to the nature and practicalities of the relationship. The present action presents a manifestly triable issue given that the duty to correct the roof ran to Gonzalez and imposed no greater burden than Mathis already bore as owner of the premises, that Mathis was apprised of the need to hire a roofer, and that he and his agent Carrasco created the "practical necessity of encountering the danger." *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393.

### C. The Duty to Correct Dangers Regardless of Patency is Most Acute as to Workers Threatened by Hazardous Conditions Not the Subject of Their Work

Amici's contention that the duty to correct open hazards to protect endangered visitors does not run to contract workers runs afoul of the long-standing recognition that workers engaged in such sites are the persons most threatened by hazardous conditions. Amici assert that hirers should have a diminished duty to workers because contractors presumably have greater capacity to avoid accidents, but precedent finds that accidents are *more foreseeable* as to workers involved in hazardous occupations, enhancing the hirer's duty to provide a safe work place precisely because even a well trained and supervised worker is

liable to make a mistake or reasonably encounter a danger.

As *Knight v. Jewett* (1992) 3 Cal.4th 296, 315, holds, whether the defendant owes a legal duty to protect plaintiff from a particular risk does not depend on the reasonableness or unreasonableness of plaintiff's conduct, or on plaintiff's subjective knowledge of the specific risk posed by defendant's conduct.

*Florez* notes, citing *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 239, that "where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case." Consequently, a general contractor who takes possession of premises has a duty to use ordinary care to see that premises are in reasonably safe condition for workmen by virtue of the general contractor's status as occupier of premises. *Dingman v. A. F. Mattock Company* (1940) 15 Cal.2d 622, 624; *Revels v. S. Cal. Edison Co.* (1952) 113 Cal.App.2d 673, 678.[6] The owner acting as his own general contractor has the same duty.

The argument for shifting the risk of every danger on the premises to the contractors rests on the fallacious notion that every contractor is better equipped than every owner to reduce every risk on any property. When the owner's duty is

---

[6] "[W]here a general contractor knows from matters coming to his attention that work done by a subcontractor has created a type of dangerous condition which may reasonably be expected to recur unless precautions are taken and that employees of other subcontractors may be exposed to the danger without being aware of its existence, he has a duty to exercise reasonable care to protect those employees and may be held liable if his failure to do so is a proximate cause of injury to them." *Kuntz v. Del E. Webb Constr. Co.* (1961) 57 Cal.2d 100, 105.

"When liability is imposed in such a situation, it is predicated upon no vicarious or derivative relationship between general contractor and independent contractor. Rather, it is the affirmative duty of the contractor himself, independent of any contractual relationship with others, which duty is owing to all those persons who reasonably might be expected to come on the premises." *Caswell v. Lynch* (1972) 23 Cal.App.3d 87, 91–92.

to correct a hazardous but patent condition which threatens workers, then a cleaner or other contractor lacking the skill and capacity to correct it is obviously not better situated to ameliorate the risk than the owner having sole authority and duty to hire a qualified specialist.

Justice Werdegar's concurring and dissenting Opinion in *Toland* observes

> In most circumstances, the contractor, rather than the hirer, will be the best accident avoider, since an independent contractor, by definition, is generally responsible for planning and executing the details of contractual performance. "In some cases, however, the job the owner contracts out is 'likely to create . . . a peculiar unreasonable risk of physical harm.' Restatement (Second) of Torts §413 (1965). In these cases there is a special reason to place initial responsibility on the [hirer] if he is 'more likely to consider the risk' and better able to assess ways to mitigate the risk. Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L.J. 656 (1975)."
> [*Toland,* 18 Cal.4th at 275 (Werdegar, J.), quoting *Nelson v. United States* (9th Cir. 1980) 639 F.2d 469, 478.)

The issue in *Toland* was whether a hirer might be liable under the peculiar risk doctrine for failure to specify and require adequate safety precautions for inherently dangerous work. The *Toland* majority rejected Justice Werdegar's proposed standard of "superior knowledge" as an unworkable basis for imposing such a duty because its practical effect would be to impose vicarious liability to workers under *Rest. 2nd Torts* §413. The majority did not, however, differ with the proposition that an owner sometimes is in a better position than a contractor to assess or prevent the danger, and did not undercut the owner's common law duty to maintain the premises for the safety of workers, independent of any duty arising by reason of the particular work.

Where a hirer's duty to the worker does not derive from the work, but from a general tort duty to exercise due care as to the property, the owner is already charged with the duty and authority to inspect and correct for ordinary defects. He is *a fortiori* in a superior position and has superior authority to implement corrective measures. In terms of *Privette*, the owner is always "the one primarily responsible" to correct conditions which are not the subject of the contractor's retention, and is in a far superior position than a contractor practicing a trade which is not qualified to correct the hazard.

If a plumber is hired to fix pipes in an area with exposed electrical cables, he cannot be expected to have the same skill and equipage to avoid electrocution as the electrician who should have been hired to correct the matter.[7] A plumber or house cleaner whose work brings then into the proximity of power lines whose insulation has become dangerously – and visibly – worn has no special skill to deal with it. The hirer is in a superior position to alleviate the danger by (1) depowering the lines; (2) calling a qualified electrician, as is his duty; (3) creating some sort of protective barrier for at least the duration of the plumber's or cleaner's work. This is no more than the existing duty of an owner/possessor.

The plumber or cleaner charges for the plumbing or cleaning, not for electrical work or special hazardous duty pay for dangers which enhance whatever risk his work normally entails. When the danger is not within the contractor's speciality but his work requires proximity to it, there is every reason to believe that, by reason of accident or practicality, the worker will encounter the hazard even when open and obvious. This is exactly the circumstance in which a mere warning is inadequate to satisfy the owner's duty of due care.

If the condition is normally dealt with by some other type of specialist, there

---

[7] The fact pattern is essentially that in *Evard v. S. California Edison, supra,* 153 Cal.App.4th 137, in which a tree-trimmer contacted the power lines of a billboard, and the court held that the property owner's duty *qua* billboard operator established a basis for direct liability to the worker, unaffected by *Privette.*

can be no presumption that the contractor is better equipped or situated than the hirer to avoid it.

Amici make much of the fact that cleaners, because they sometime work on roofs or high windows, sometimes make use of harnesses. From this, they infer that any risk of falling from a roof or elevated position must be assumed by any worker who performs any task at any time at elevation. But the cleaner whose task is made more risky because the risk of falling is enhanced is no different than a cleaner whose risk of electrocution is enhanced. The owner neglect is equivalent, and the rules of premises liability and comparative fault must be the same.

In short, the duty to correct even overt dangers posing a foreseeable risk has particular justification as to workers engaged in hazardous occupations.

### 4. OSHA DUTIES IMPOSED ON EMPLOYERS DO NOT ALTER OR DIMINISH THE HIRER'S COMMON LAW DUTIES, BUT PRESENT ONLY AN ISSUE OF COMPARATIVE FAULT

Associated General Contractors contend that Gonzales violated various OSHA duties regarding elevated work, and for that reason *Seabright* and *Ruiz* prohibit recovery against Mathis.[8] (ACG Brief 5-8)

Any OSHA violation is irrelevant to the existence and breach of a common law duty owed by Mathis to Gonzalez, and is relevant only to comparative fault. Whether Gonzalez actually violate an OSHA regulation is, on this record, far from clear since Mathis did not properly raise the issue below.

---

[8] Working at an elevation does not in itself seem to present an inherent or peculiar risk. "[T]he use of a scaffold . . . does not constitute an inherently dangerous or peculiar activity. . .' *Anderson v. Chancellor Western Oil Dev. Corp.* (1975) 53 Cal.App.3d 235, 243, citing *Hard v. Hollywood Turf Club* (1952) 112 Cal.App.2d 263, 275.

### A. Any Contractor Violation of OSHA is Immaterial to the Hirer's Breach of a Duty Owed to All Visitors

*Ruiz* and *Seabright* stand only for the proposition that because OSHA duties are imposed only on an employer and arise only because of the contracted work, they do not impose a non-delegable duty on the hirer. Nothing therein suggests that OSHA somehow obviates an owner's common law duties.

Since OSHA is intended to govern the conduct of skilled contractors, it imposes a higher standard of care and more specific duties on the employer/ contractor than is required by common law of a landowner or by the duty of reasonable care. OSHA was not enacted to relieve hirers or owner of liability for ordinary neglect. It applies to specialist contractors and imposes standards which owners may be ill-equipped to understand or to comply with. *Rosas v. Dishong* (1998) 67 Cal.App.4th 815, 826. OSHA does not relive the owner of the more basic responsibility for ordinary maintenance or repair.

It has been repeatedly held that liability for common law negligence is distinct from strict liability for *Labor Code* or OSHA violations. *Ramirez v. Nelson* (2008) 44 Cal.4th 908, 911-912 (action against homeowner for death of tree trimmer was properly submitted under common law negligence theory, and instruction on *Penal Code* §385(b) and negligence *per se* properly refused); *Zaragoza v. Ibarra* (2009) 174 Cal.App.4th 1012, 1023 (though OSHA does not apply, there may be triable issues of ordinary negligence by homeowner.)

*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928, held that while Cal–OSHA provisions did not expand a general contractor's duty of care toward the employee of a subcontractor, it left that duty intact as a basis for direct liability assessed pursuant to comparative fault.

> When a hirer of an independent contractor, by negligently furnishing unsafe equipment to the

> contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequence of the hirer's own negligence.'
>
> At trial, this case proceeded on a single theory: Uveges negligently furnished unsafe scaffolding that contributed to Elsner's injury. That Frey, Uveges's agent, constructed the scaffolding from which Elsner fell was undisputed. Also undisputed was that when Uveges furnished scaffolding for the construction project, he had a common law duty to furnish safe scaffolding. The principal issues were breach, causation, and comparative negligence: whether the scaffolding met the standard of care, whether any defects contributed to Elsner's injuries, and whether Elsner's own conduct contributed to his injuries. Thus, Uveges cannot complain that the jury verdict in this case arose from a retroactive expansion of his duty of care.
> [*Elsner, supra*, 34 Cal.4th at 937]

*Elsner* recognized that a claim based on ordinary negligence which increased the risk of injury in no way contravenes *Privette*. *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348, analyzing *Elsner* in light of *Hooker* and *Labor Code* §6304.5, found that OSHA regulations did not abrogate the *Privette* doctrine, nor expand a general contractor's duty of care to an injured employee of a subcontractor. Rather *Privette* was not at issue in *Elsner* because the plaintiff sought to impose direct liability on the general contractor for its own affirmative conduct in providing unsafe equipment, not for vicarious liability. *Millard*, at 1350–1352.[9]

---

[9] *Millard* found a claimed Labor Code safety violation insufficient to create a triable issue as to the general contractor's negligence where there was no

As *Browne v. Turner Construction, supra,* 127 Cal.App.4th 1334, held, under comparative fault the focus must be on the extent to which the hirer's own negligence contributed to the happening of the accident, especially where (as here) "the evidence raises the strong possibility, at least, that defendants not only actively contributed to plaintiff's injuries, but actually created the situation in which they were likely to occur." (*Id.* at 1346)

> [A] plaintiff's (or his employer's) negligence does not categorically insulate the employer's hirer from liability where its own negligence affirmatively contributes to the harm. Accordingly, even if the plaintiff's decision to perform the work was negligent. . . the facts before us would afford no basis for summary judgment. [127 Cal.App.4th at 1348]

See *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1332 ("Under comparative negligence principles, we see no impediment to imposing premises liability on a hirer whose employees' own actions contribute to or exacerbate a hazard, even if the hazard was created at least in part by the plaintiff's employer."); *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 ("Plaintiff's conduct in proceeding to traverse the stairs despite full appreciation of the risk created by such negligence was no more than a species of contributory negligence, to be considered by the jury in apportioning comparative fault."); *Osborn v. Mission Ready Mix, supra,* 224 Cal.App.3d at 120 (whether plaintiff acted reasonably in encountering obvious risk is fact question for jury), and *Florez, supra,* 53 Cal.2d 347 (where plaintiff's duties required him to obtain water and the faucet in question was the only place where he knew he could obtain it, jury is entitled to balance the necessity against the danger, even if obvious.)

---

evidence it contributed to the plaintiff's injuries. (*Id.* at 1352-1353)

## B. Whether Gonzalez was Negligent in Any Degree, or Violated An OSHA Regulation, Was Not Timely Raised by Mathis and Presents a Triable Issue

In moving for summary judgment, Mathis asserted only that Gonzalez had knowingly encountered the slippery catwalk, and that Mathis had no duty toward Gonzalez to inspect or assure that the roof was safe. (App. 14-35) He did not allege that Gonzalez had violated any regulation, failed to use available safety equipment, or even that his encountering the roof was negligent under the circumstances – which were not elaborated upon by his motion. He thus failed to allege neglect by Gonzalez. The motion rested entirely on the alleged lack of duty for a patent danger.

A claim of negligence based on Gonzalez' route across the roof and his failure to use safety devices was raised only in Mathis' reply papers in response to Gonzalez's evidence of Mathis' deliberate failure to repair the roof despite knowledge that it was in bad condition[10] and Carrasco ordering Gonzalez up on the roof to stop the water leakage.

Mathis thus failed to carry his initial burden of negating all potential factual bases for liability. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; *Lopez v. Superior Court, supra*, 45 Cal.App.4th 705, 715-716. He did not make a *prima facie* showing repudiating allegations of his neglect, and no burden shifted to Gonzalez. *C.C.P.* §437c, subd. (p)(2); *Nazaretyan v. Cal. Physicians' Service* (2010) 182 Cal.App.4th 1601, 1614. To belatedly assert that plaintiff could not prove some other issue never mentioned by the moving papers, based on facts outside defendant's separate statement, is litigation by ambush. "[I]t violates the

---

[10] The failure to take intervening action to improve the safety of facilities, "if established, also indicate[s] that there is moral blame attached to the defendants' failure to take steps to avert the foreseeable harm." *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 814.

statutory scheme and is fundamentally unfair to turn a summary judgment proceeding into a device by which defendants can force a plaintiffs hand without first satisfying their own burden to demonstrate a prima facie case." *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 948:

The American Property Casualty Insurance Association contends at 201 to 22 of its Brief that *Alvarez v. Seaside Transp. Services LLC* (2017) 13 Cal.App.5th 635, 642-644, creates a presumption that the hirer has delegated to the contractor the hirer's tort law duty to provide a safe workplace for the contractor's employees. Consistent with the distinction between duties created by the work and owed by the contractor, and those arising independently and born by the owner to all visitors, *Alvarez* would at best impute delegation of responsibility only for the peculiar risks address by *Privette*, and would not imply the delegation of duty for every possible condition on the property – especially those as to which the contractor was incapable of performing the owner's duty.

In any event, Gonzalez' evidence rebutted any implication of delegation since Gonzalez had told Mathis that he needed to hire a roofer, Gonzalez had no capacity to remediate as required of the property owner, and Gonzalez did not base his claim on any failure of Mathis to provide for safety precautions, but on creation of a condition so serious that it threatened injury unless corrected.

Mathis' evidence that Gonzalez had worked on other buildings with safety barriers or attachment points for safety harnesses, which Mathis' house lacked (App. 140, 532-533, 627), or that it was theoretically possible for him to approach or leave the skylight via another route, was far from sufficient to establish negligence as a matter of law given the following:

> Gonzalez was not working on the catwalk but merely traversing it, and it is unknown whether he could have worn a harness (even were attachment points available) while trying to get down from the roof, as opposed to working *in situ*;

> Carrasco and Mathis expected workers accessing the roof to use the attached ladder which invited them to travel along the roof edge; Mathis himself always walked outside the parapet and along the edge. (App. 426-428, 439-440, 452, 486-487, 557-560, 614-618)

> The roof area inside the parapet was a mass of pipes and conduits which would induce anyone trying to reach the skylight – and especially anyone carrying hoses and cleaning equipment – to use the roof edge rather than trying to reach it directly from the area of the ladder. (App. 48-58, 392) Mathis acknowledged that the parapet was only cosmetic. (App. 446-447)

> There is no evidence of the cost to Gonzalez of equipping the roof with safety devices that Mathis – who regularly had workers on the roof – should himself have provided. Cleaning is a low-margin businesses whose economics may dictate completing a short-term job which is nearly finished despite the absence of safety devices.

It is a classic scenario in which a worker reasonably encounters a danger. See *Scott v. John E. Branagh & Son* (1965) 234 Cal.App.2d 435, 442 (evidence supported inference that worker "was faced with the practical necessity of throwing the steel from an unguarded portion of the roof edge," despite the apparent risk, so that "the jury ought to have been allowed to balance the necessity with the danger"); *Reyes v. Kosha, supra*, 65 Cal.App.4th 461-463.

Whether Gonzalez' route across the roof edge was reasonable or not is a jury issue given the confusion of pipes, parapets and equipment on the roof and Carrasco's demand for immediate action.[11] (App. 76, 114, 567-575) His neglect, if

---

[11] Even assuming that OSHA called for a safety harness while coming down from the work location, a violation raises only a rebuttable presumption. *Nevarrez v. San Marino Skilled Nursing & Wellness Centre* (2013) 221 Cal.App.4th 102, 126; *Evidence Code* §669(b)(1). See also *Ramirez v. Nelson, supra,* 44 Cal.4th 908, 911–912, upholding the trial court's decision to instruct on ordinary

any, is immaterial on summary judgment. *Browne v. Turner Const., supra,* 127 Cal.App.4th 1334; *Palermo v. Luckenbach S. S. Co.* (1957) 355 U.S. 20, 20–21, 78 S. Ct. 1, 2, amended sub nom. *Palermo v. Luckenbach Steamship Co., Inc.* (1958) 355 U.S. 910, 78 S. Ct. 337 ("The petitioner's alleged choice of a more dangerous route did not, under the proofs, operate to bar recovery as a matter of law. The jury was properly instructed that the petitioner's negligence, if any, was to be considered in mitigation of damages under the rule applicable in actions for personal injuries arising from maritime torts.")

A jury may well find no neglect by Gonzalez and that fault lay only with the hirer, in which case immunizing Mathis under *Privette* would have the perverse effect of shielding one directly liable to a faultless worker.

### 5. *AMICI* MISCHARACTERIZE "RETAINED CONTROL," WHICH IS THE BREACH OF A DUTY OWED DIRECTLY BY THE HIRER TO VISITORS OR WORKERS

While sometimes described as an "exception" to *Privette*, "retained control" as described in *Hooker* refers to certain situations in which the hirer's conduct creates a duty directly to the worker, making the hirer directly rather than vicariously liable. For such liability, *Privette* is inapplicable. Amici characterize "retained control" as some sort of additional casual element that requires the hirer's immediate presence and participation in the work. (American Property Casualty Insurance Brief, 22-36) Amici, moreover, endeavor to apply Hooker's "retained control" – consisting of a voluntary undertaking that increases the risk to workers when the hirer had no duty to act – to a situation where the hirer *always*

---

negligence and to reject a negligence per se instruction based on violation of statute making it a misdemeanor to move any tool within six feet of a high voltage overhead power line.

*had the duty to act*, but failed to do so.

The instant case is not quite of the *Hooker* variety since the duty to repair existed independently of the work and was owed to all visitors, and Mathis never surrendered control or responsibility for the danger to Gonzalez or any one else. Unlike *Hooker*, Mathis always had an affirmative duty to correct, not just an optional authority.

### A. "Retained Control" Consisting of the Power to Remedy Without the Duty Imposes No Direct Liability on Hirers

In *Hooker*, the hirer "retained authority" to order correction of dangerous conditions created by the work, but assumed no duty to do so. This concept derives from *Rest. Torts 2nd* §414.[12] In this scenario, the primary responsibility for the safety of workers performing contracted work – with respect to dangers arising from that work – lies with the contractor, and the hirer merely retains an option to act which does not diminish the contractor's primary responsibility. Hooker holds that the hirer's failure to exercise that power did not create the dangerous condition or alter the risk faced by the worker. "The mere failure to exercise a power to compel the subcontractor does not, without more, violate any duty owed to the plaintiff." (*Hooker*, *supra*, 27 Cal.4th at 209.)

> The fairness rationale at the core of *Privette* and *Toland* applies equally to preclude imposition of liability on a hirer for mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice, where such

---

[12] See Comment a to *Rest 2nd* §414, stating that retained control liability can be based on retention of "the power to direct the order in which the work shall be done or to forbid its being done in a manner likely to be dangerous . . ."

> liability would exceed that imposed on the injured plaintiff's immediate employer, who created the hazard. [*Hooker*, *supra*, 27 Cal.4th at 211]

As *Toland* describes it, the hirer "has no obligation to specify the precautions an independent hired contractor should take for the safety of the contractor's employees." *Toland,* 18 Cal.4th 253, 267.

Where the hirer has the power to act *without an obligation to do so*, and *does act*, he must do so with due care for persons foreseeably endangered by such conduct. This is the rule for anyone having no duty but voluntarily undertaking to act. 6 Witkin, *Summary of Cal. Law 9th*, *Torts*, §868. Liability for negligence in performing such services may extend to the person to whom the service is provided (*Rest.2d Torts*, §323) or to a third person if the actor should recognize that the services are necessary for the protection of that third person (*Rest. 2d Torts*, §324A). *Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 614; *Williams v. State of California* (1983) 34 Cal.3d 18, 23 (volunteer may be liable if failure to use due care increases risk of harm to another.) A worker on the site whose safety is affected by the owner's voluntary undertaking is among these to whom the duty of care is owed.

Absent exercise of a merely discretionary power to act, the hirer has no duty to supervise worker safety for dangers which arise out of the work. Any hirer liability would derive from the contractor, making it vicarious. The critical features of *Hooker* "retained control" thus are:

(a) "retained control" which imposed on the hirer no positive duty to act as to dangers created by (peculiar to) the work and thus delegated to the contractor.

(b) the hirer did not negligently create additional dangers or aggravate dangers inherent in the work.

(c) the hirer breached no duty independent of the contracted work by

creating or maintaining a dangerous condition which enhanced the danger to visitors, including workers who themselves had no duty to cure the condition.

This is the characteristic pattern of the "retained control" cases.

### B. An "Affirmative Contribution" under *Hooker* is Simply the Exercise of Authority in a Manner That Increases the Risk to Others

Amici Insurers contend that "affirmative contribution" under Hooker requires some sort of immediate intervention or presence at the moment of injury. (If so, such an immediate contribution would be found in Carrasco's order that Gonzalez mount the roof). *Amici* further assert that to show the hirer "affirmatively contributed" to his injury, the plaintiff must show the hirer "engaged in some active participation" by specific direction of the employee as to the manner of performance, or active participation in how the job was to be done. *McKown, supra*, 27 Cal.4th at 222; *Khosh, supra*, 4 Cal.App.5th at 718.

Amici's requirement of some temporal or direct involvement at the moment of injury would free owners of liability for longstanding dangers that they failed to correct – *i.e.* for direct rather than imputed fault. The proposed temporal element misses the point where there is failure to perform an existing duty.

As discussed above, "affirmative contribution" under *Hooker* means the actual exercise of retained authority in a manner that affects the risk to others and creates an affirmative a duty to them, and which is in fact a causal factor. Inaction by a hirer having no affirmative duty to act is, under *Hooker*, not a breach of duty and not a legal cause of injury since it does not affect the danger to which the contractor's neglect has exposed the worker. If the general contractor in *Hooker* had issued a direction under its optional authority which impeded safe operations,

it would have been liable regardless of whether the general was on site of the order was issued long before the accident.

But *Hooker* observes that an "affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (27 Cal.4th at 212, fn. 3) But if the hirer *already* has a duty to correct a dangerous condition, a promise is unnecessary, just as it would be if the hirer carelessly created dangers during the work. This is such a case.

### C. A Hirer Who Fails to Act With Due Care to Remedy Dangers Arising Independent of the Contracted Work, and Who Never Delegates His Duty, is Directly Liable to Anyone Injured, Including Workers

This is not a "retained control" case in the *Hooker* mold since Mathis never surrendered authority over the roof edge, which he could only have done by hiring someone to correct the condition and thus satisfy his duty. It is not a case of a theoretical ability to act without a concommitant duty, but of failure to comply with an existing duty to maintain his property and to engage a specialist to do essential repairs which were beyond a house cleaner's writ.

Gonzalez had no power to exclude anyone from the roof edge or to alter it, and no legal fiction of "control" over the roof during his work could divest Mathis of actual control and primary responsibility for the condition. "Sharing control is not relinquishing control." *Fabi Const. Co. v. Secretary of Labor* (D.C. Cir. 2007) 508 F.3d 1077, 1083 (addressing a hazardous condition facing a worker.)

*Kinsman* briefly averts to the case "when the hirer does not fully delegate

the task of providing a safe working environment" (37 Cal.4th 671), as does *Tverberg*[13] and other cases. It cites the concurring and dissenting opinion in *Toland* for the observation that "when conditions within the special knowledge ***or control of the hirer*** create a danger inherent and peculiar to the work, there is no justification in statute, policy or precedent to immunize the hirer from tort liability for his or her own failure to require reasonable precautions be taken against the danger." (*Id.* at 678, emphasis added.) It did not address Unocal's failure to remediate since remediation – removal of asbestos – was the very object of the project, and the plaintiff's complaint was about failure to intervene in work conditions, rather than violation of a general premises duty.

The case against Mathis is about liability for dangers arising from breach of an existing ordinary duty of care, not about the dangers created by the specific work or by failure to control workers exposed to those peculiar risks.

*Kinsman* cites *Ray v. Silverado Constructors, supra,* 98 Cal.App.4th 1120, for the holding that a highway contractor's duty to exercise due care to protect the traveling public may include responsibility to close the road, which duty could extend to the worker because no one else was authorized to take the essential safety measure.

> In other words, the general contractor [in Ray] may have been liable because its delegation of workplace safety to the subcontractor, the plaintiff's employer, was limited and did not authorize the subcontractor to undertake the one safety measure that might have saved the plaintiff's life.
> [*Kinsman* at 671]

*Kinsman* cites *Austin v. Riverside Portland Cement, supra*, 44 Cal.2d 225,

---

[13] "when the hirer does not fully delegate the task of providing a safe working environment. . ." *Tverberg v. Fillner Constr.* (2012) 202 Cal.App.4th 1439, 1146.

as a case where "the hirer had not delegated to the contractor the authority to undertake a critical employee safety measure, and the contractor's employee was injured as a result of that measure not being undertaken . . ."

Mathis gave ***no one*** authority to correct the roof, and hence did not delegate his duty to keep the property in safe condition. His direct liability has nothing to do with the exercise of control over the work, but with his failure to correct or to authorize correction of a condition that demanded correction.

Gonzalez's hiring carries none of the *indicia* of a delegation of duty. Implied authority depends upon the duties with which the agent is intrusted (*N.O. Nelson Mfg. Co. v. Rush* (1918) 178 Cal. 569, 573), and normally depends on "evidence of the orders or direction given him or of the rules adopted for his guidance by the principal. If there were no such evidence available, it would be proper to describe the work performed by the agent in the course of his employment, bringing it home to the knowledge and implied acquiescence of the principal, or, . . . 'tracing it to some word or act of the alleged principal.'" *Forgeron Inc. v. Hansen* (1957) 149 Cal.App.2d 352, 359, quoting *Waniorek v. United Railroads* (1911) 17 Cal.App. 121, 132.[14]

Mathis had no implied authority as to the roof, and nothing in the skill set of a house cleaner implies that he has assumed the owner's common law duties. This is reinforced by Gonzalez's advisory that Mathis needed to hire a roofer, and Carrasco's exercise of authority to send Gonzalez up on the roof with directions to instantly control the use of water (App. 76, 14:13-18, 568-570), notwithstanding that the only way to immediately do so was to traverse the slippery area.

When Gonzalez notified Mathis's housekeeper of the problem, he was taken to the business manager to discuss the need for a roofer to do repair work,

---

[14] Whether implied authority or delegation exists is a factual issue for the jury. *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 412; *Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 355.

and they together called and spoke to Mathis's accountant. The upshot of that discussion was not that Gonzalez was told it was his problem, but that it was left in the hands of Mathis or his staff. Thus, there was an implicit recognition of Mathis' continuing duty, not an implicit transfer of authority and responsibility. The record thus shows *retention* of control and responsibility and so supports liability for negligent failure to correct. (*Hooker*, *supra*, 27 Cal.4th at 212, fn. 3)

See *Secretary of Labor v. Sasser Electric & Manufacturing Co.* (Rev. Comm'n 1984) 11 O.S.H. Cas. (BNA) 2133, 2136, observing that a hirer could be at fault for reliance upon a specialist to prevent hazards outside the contractor's area of knowledge and over which the contractor has little or no control.

Mathis' control was not "retained" in *Hooker*'s sense of a power retained without undertaking a duty: it was never surrendered, and his duty to correct never delegated.

### D. The Decisions Turn on the Existence of a Duty from Hirer to Worker, Not on Whether the Breach is Active or Passive

The active/passive theory advocated by the property insurers is inapposite when there is a failure to comply with an existing owner duty which was never delegated by the owner. Gonzalez could not have assumed responsibility for making the site safe when it could only have been made safe by a professional roofer. The fault is in no sense derivative or vicarious, and the cases relied on by Amicus are in no sense on point.

*Delgadillo v. Television Ctr., Inc.* (2018) 20 Cal.App.5th 1078, 1088, found that the owner's failure to install statutorily-required roof anchors did not constitute affirmative contribution to the death of the worker because where the liability was alleged to arise from "a statutory duty pursuant to Cal-OSHA and other regulations to install roof anchors to which window washers could attach their gear." As in

*Seabright*, that duty only applied to the employer/contractor, and came into play only because of the work being done, and "the failure to provide safety equipment does not constitute an 'affirmative contribution' . . ."

The failure in *Hooker* and in *Delgadillo* was passive only in the sense of failure to intervene to exercise control over safety conditions *in the hands of the contractor*. In *Hooker*, the contractor decided when traffic would pass. In *Delgadillo*, the contractor decided on its own to suspend the worker from the roof.

Similarly, in *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, the duty to comply with a Cal–OSHA regulation requiring utilities to be shut off, capped, or otherwise controlled during demolition work was delegable because it only applied when the specific work was being performed. *Padilla, supra*, 166 Cal.App.4th at 671; *Khosh v. Staples Constr. Co., Inc.* (2016) 4 Cal.App.5th 712, 720. There was no affirmative duty and no danger not created by and inherent to the work itself, and thus no duty not delegated.

Other cases cited by the Insurers at 26 to 28 are similarly inapposite since in none of them did the hirer breach a duty which arose regardless of the work and which could not have been delegated since the contractor was incapable of correcting the danger.

> *Khosh v. Staples Constr. Co., supra,* 4 Cal.App.5th 712, 720: since the alleged duty 'only existed because of the work . . . that [the independent contractor] was performing for the [hirer],' it 'did not fall within the nondelegable duties doctrine.'"

> *Millard v. Biosources, Inc., supra*, 156 Cal.App.4th 1338: a claimed Labor Code safety violation was insufficient to create an issue as to the duty of care of a general contractor who had no role in the power failure.

> *Ruiz v. Herman Weissker, supra*, 130 Cal.App.4th 52, 66: no affirmative contribution where Labor Code imposed no duty on non-employer contractor who merely failed to exercise a retained right (as in

*Hooker*) without creating or enhancing the inherent danger which had been contractually assigned to a subcontractor.

> *Kinney v. CSB Const., Inc.* (2001) 86 Cal.App. 4th 840: no liability for failure to exercise a general supervisory power to require contractor to correct an unsafe procedure of the contractor's own making, and no evidence that the hirer's conduct contributed to the employer's negligent performance.

In each case, the danger was created by the subject work and the duty thereby implicitly assumed by the contractor controlling the work. The decisive factor was the existence *vel non* of a direct duty on the part of the hirer. Characterizing the owner's failure to comply with his ordinary duty to maintain and remove dangers as merely "passive" is to vitiate the duty altogether.

*Amici* also attempt to shoe-horn into *Hooker*'s "retained control" concept the fact that Gonzalez was ordered by Carrasco to climb on a roof which she knew to be unsafe. The insurers contend that Mathis took no "affirmative action" because (1) he was in the hospital and (2) he did not prevent Gonzalez from taking safety measures. As to the first point, Mathis was affirmatively negligent in the creation of a danger threatening all visitors, as was his agent Carrasco in ordering Gonzalez onto the roof – an act attributed to her principal Mathis. Carrasco's actions directly and negatively influenced Gonzalez, vitiating any Privette delegation defense, and presenting a ground of direct liability separate from the failure to maintain or correct the roof.

The second point, adopted by the Court of Appeal, is simply untrue insofar as the relevant "corrective measures" required a qualified roofer, not a house cleaner. It obscures the fact that Mathis' neglect resulted in several distinct acts exposing Gonzales to a danger which could not have been impliedly delegated to a house cleaner, and it bears only on comparative fault.

## 6. THE UNFAIR CONSEQUENCES OF VICARIOUS LIABILITY WHICH *PRIVETTE* SOUGHT TO ALLEVIATE ARE ABSENT WHEN THE HIRER'S DIRECT LIABILITY IS SUBJECT TO COMPARATIVE FAULT

Vicarious liability imposes 100% liability on a possibly innocent principal. *Miller v. Stouffer* (1992) 9 Cal.App.4th 70, 84. Since the hirer's vicarious liability is not governed by comparative fault (*Civil Code* §1431.2(a)), Proposition 51 does not limit the hirer's noneconomic damages liability. *Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 728; *Koepnick v. Kashiwa Fudosan America, Inc.* (2009) 173 Cal.App.4th 32, 37-40. But where the hirer is charged with direct negligence, his liability to a worker will be proportionately reduced under comparative fault.

Hence, *Privette*'s concern that the hirer's vicarious liability would exceed that of a negligent contractors has no basis when liability is direct and apportioned according to fault. Where liability rests on owner negligence, and particularly where a worker or contractor may bear little or no blame for a hazard outside the scope of their work, there is no concern that an innocent owner's liability will extend beyond that of a contractor who was primarily at fault. *Privette*, 5 Cal.4th at 698. This is the very purpose of comparative fault.

Just as the all-or-nothing rule of contributory negligence imposed unfairness and misallocated the costs of injuries (*Horn v. Gen. Motors Corp.* (1976) 17 Cal.3d 359, 374–376), failure to impose proportionate liability where a hirer's breach of a duty to invitees causes injury to a worker (or anyone else) is unjust and unsound policy.

An appropriate instruction would advise the jury that Mathis's liability is to be determined according to his negligence in creating, maintaining and failing to repair his roof, and Carrasco's conduct influencing him to climb up, without

attributing to him any potential negligence by Gonzalez in failing to use safety equipment or devising an alternative route around the slippery catwalk. No *Privette* concern is implicated.

## 7. RECOGNITION THAT CONTRACT WORKERS DO NOT ASSUME ALL RISKS ENCOUNTERED DURING THEIR WORK IMPOSES NO ADDITIONAL COST OR DUTY ON HOMEOWNERS OR HIRERS

The California Building Industry Association contends that imposing liability for injury resulting from hirer negligence would impair the housing market and aggravate the housing shortage. (CBIA Brief 5-12) In part, this rests on the erroneous assumption that this case challenges *Privette*'s prohibition on giving workers the benefit of the peculiar risk rule, and thereby imposes extended liability on hirers. As explained above, the case does not implicate *Privette.*

Mathis is charged only with breach of the duty of ordinary care born by every owner regardless of any contracted work.

The Builders assert that imposing liability in this case will impact the cost of housing, but do not explain how. Since Appellant alleges only a failure to comply with ordinary common law duties, no further burden is imposed beyond that already incumbent upon possessors of land to avoid exposure of persons thereon to an unreasonable risk of harm. *Rogers v. Jones* (1976) 56 Cal.App.3d 346, 350.

*Kesner v. Superior Court, supra*, 1 Cal.5th 1132, rejecting categorical exemptions from liability for failure to exercise ordinary care, observes that the most relevant burden in assessing duty is the cost to the defendants of *upholding, not violating, the duty of ordinary care.*

> In evaluating defendants' concerns, we begin by observing that the relevant burden in the analysis of duty is not the cost to the defendants of compensating individuals for past negligence. To the extent defendants argue that the costs of paying compensation for injuries that a jury finds they have actually caused would be so great that we should find no duty to prevent those injuries, the answer is that shielding tortfeasors from the full magnitude of their liability for past wrongs is not a proper consideration in determining the existence of a duty. Rather, our duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care.
> [*Kesner*, 1 Cal.5th at 1152]

Requiring a hirer or owner to exercise ordinary care for a safe work site "impose[s] no obligation on him greater or more onerous than that ordinarily required of him by the law. This being so, it added nothing to his responsibility under the contract, and consequently could not have tended in any degree to increase the cost of the work and thereby burden the property owner beyond the statutory requirements." *Locke v. Cowan* (1917) 34 Cal.App. 581, 583, citing *Blochman v. Spreckels* (1902) 135 Cal. 662, 665.

Amici seem to reason that owners will be encouraged to hire specialized contractors if they have no duty to protect those contractors against negligently created dangers which the owner fails to correct, and which the contractor himself will not correct. This would legitimate dangerous conduct. Unless we assume that there is a general practice of *not hiring appropriate specialists* to address specialized risks, so that construction costs are lowered by shifting the risk of such neglect to contractors, the cost of compliance with the hirer/owner duty will not change.

The homeowner who has performed his duty to (1) maintain, (2) inspect and identify dangers on the premises, and (3) either repair himself or hire a qualified contractor to repair and known danger will have no liability.

## 8. THE WORKERS COMPENSATION RATIONALE OF *PRIVETTE* IS UNSOUND WHEN THE HIRER HAS BREACHED A DUTY OF ORDINARY CARE OWED TO THE PUBLIC AT LARGE

As noted in Appellent's Brief on the Merits, *Hooker* repudiates the contention that the cost of hirer neglect should be born by workers compensation.

> While it is true that the cost of workers' compensation insurance coverage is as likely to have been calculated into the contract price paid by the hirer in a retained control case as it is in peculiar risk or negligent hiring cases, ***the contract price could not have reflected the cost of injuries that are attributable to the hirer's affirmative conduct.*** The contractor has no way of calculating an increase in the costs of coverage that are attributable to the conduct of third parties, which is why the employee, despite the existence of the workers' compensation system, is not barred from suing a third party who proximately causes the employee's injury. . . . [*Hooker*, *supra*, 27 Cal.4th at 212-214]

A commentator elaborates:

> "[T]he contractor's cost of securing compensation is likely to be passed through to the hirer in the contract price, that price does not reflect the costs of injuries inflicted by the hirer's own failure to exercise

reasonable care." The price merely reflects the independent contractor's cost of doing business and workers' compensation insurance that covers the independent contractor's negligence, not the hirer's negligence. This is because the workers' compensation insurance, as discussed above, is a result of the compromise between the employer and the employee. The workers' compensation insurance is not a result of a compromise between a third party and the employee. By including the cost of the hirer's direct negligence within the price of the contract, the court is unilaterally implementing a "compromise," or release of common law claims against the hirer onto the employee without the employee receiving any extra benefit. The employee did not agree to this compromise. Nor does the employee receive benefits from this unilaterally imposed compromise. This is unfair to the employee because the employee takes on a greater risk of injury and because of the fact that the employee is susceptible to the negligence of both the employer and the hirer without receiving any added security.

Rather, by allowing the hirer to have the cost of his personal negligence included in the price of the contract, the hirer has very little incentive to attempt to prevent injury to the employees of the independent contractor. Thus, the court is promoting what can be deemed "efficient negligence." This means that a hirer can be more economically efficient if an employee of independent contractor is injured, rather than doing the work himself and injuring himself. If the employee is injured, the hirer saves money because he does not have to compensate the employee for his injures. But if the hirer either did the work himself or hired his own employees and the hirer or his employee became

> injured, it would cost the hirer more money in medical insurance and workers' compensation insurance.
>
> This rule circumvents the accident-prevention functions of tort law. Tort law serves as a deterrence to negligent conduct. However, allowing the hirer to escape liability by concluding that he has paid for the compensation of his negligent conduct in the contract price promotes negligence.
> [Turner, *Toland v. Sunland Housing Group, Inc.*: *the California Supreme Court Erroneously Takes "Liability" Out of "Direct Liability"*, 27 W.St.U.L.Rev. (2002) 425, 459-460]

When the negligently created danger is the subject of the contractor's work (or created by the contracted work, as in *Privette, Kinsman* and *Hooker*), it can fairly be said that the cost of injury is calculated in the relevant workers comp insurance and the hirer has indirectly paid for coverage for the inherent risk. When hirer neglect is unrelated to the work, there is no such presumption.

In her concurring and dissenting Opinion in *Toland*, Justice Werdegar noted that

> Although, as we observed in *Privette*, the contractor's cost of securing compensation is likely to be passed through to the hirer in the contract price (*Privette, supra*, 5 Cal.4th at p. 699), that price does not reflect the costs of injuries inflicted by the hirer's own failure to exercise reasonable care. In the case of personal negligence on the hirer's part, therefore, workers' compensation liability will not adequately serve the cost-internalization and accident-prevention functions of tort law, as *Privette* argued it would do in the case of vicarious liability. (*Id.* at p. 701.)
> [*Toland, supra*, 18 Cal.4th at 279 (Werdegar, J., Conc. & Dissent.]

The workers comp rationale is also unsound in view of the availability of comparative fault in cases of direct hirer negligence. The comp system will bear the relatively predictable cost of contractor error or accidents resulting without fault, while liability insurance bears the cost of owner negligence, as it should. This is exactly the allocation contemplated by the legislative scheme reflected in *Labor Code* §3852[15] permitting third party claims not just against strangers to the contract but against negligent general contractors or hirers. *Aluma Sys. Concrete Constr. of California v. Nibbi Bros. Inc.* (2106) 2 Cal.App.5th 620, 626.

Where a careless owner has enhanced the risks of the contracted work by failing in the duty to maintain, there is no windfall to the worker in holding the hirer liable for the his share of the resulting injury. While the workers compensation system may serve the same purpose as the "peculiar risk" theory of vicarious liability – to assure compensation without regard to fault for risks inherent or peculiar to the work – it cannot serve as insurer for third-party or hirer neglect, or substitute for the risk-spreading *and risk-reduction* functions of the liability insurance system, which would be disrupted by exempting hirers from their neglect of public safety just because the victim was a contractor's employee. To do so effectively turns the contractor and his comp carrier into the hirer's general liability insurer – not a fair or efficient risk-spreading arrangement.

Making workers comp the exclusive remedy for hirer negligence spreads the cost to hirers who are not negligent and do not benefit from the hirer's conduct, and does not encourage industrial safety if worker comp exclusivity precludes any effect on the hirer's conduct *Cf. Seabright, supra*, 52 Cal.4th at 603.

Indeed, the effect is to make the contractor and his comp carrier *vicariously liable for the hirer's general neglect* – a result contrary to *Privette.*

---

[15] "The claim of an employee . . . for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer." *Labor Code* §3852.

Workers comp premiums do not vary accord to the loss history or the risk incident to the hirer's enterprise or activity, but according to the risk inherent in the contractor's trade. The comp system deals with costs of the contractor's enterprise, not the negligent hirer's, and the hirer who pays nothing for his neglect in maintaining premises – neither the costs of repair nor the costs of injuries – has no reason to change.

## 9. CONCLUSION

The irony of this case is that while *Privette* was intended to exempt hirers from liability where they were *not at fault*, it is now advanced as a ground for freeing them of liability where they *are* at fault.

The "strong policy of delegation" averted to by Amici is intended to promote safety by encouraging the retention of specialists to maintain and repair, not to "delegate" the owner's duty of due care by shifting the cost and responsibility for hazardous conditions to contractors neither hired nor capable of making the site safe. Such a delegation encourages irresponsible conduct by owners and immunizes direct negligence for no discernible policy reason.

Respectfully Submitted,

**EVAN D. MARSHALL**
**LAW OFFICES OF WAYNE MCCLEAN**
**PANISH SHEA & BOYLE LLP**

Dated: March 18, 2019

By: _____
Evan D. Marshall
Attorney for Plaintiff and Appellant
Luis Alberto Gonzalez

## CERTIFICATE OF COMPLIANCE

Counsel certifies that pursuant to *C.R.C.* Rule 8.204(c)(1), the enclosed ANSWER TO BRIEFS AMICUS CURIAE is produced using 13 point Roman type and contains 13,802 words, which is less than the 14,000 words permitted by Rule 8.204(c)(4). Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: March 18, 2019

_____

Evan D. Marshall

## PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am employed at 11400 West Olympic Blvd., Suite 1150, Los Angeles, CA 90064. On March 18, 2019, I served the attached APPELLANT'S REPLY TO BRIEFS AMICUS CURIAE OF CALIFORNIAASSOCIATION OF REALTORS; CALIFORNIA BUILDING INDUSTRYASSOCIATION; CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL; AMERICAN INSURANCE ASSOCIATION AND U.S. CHAMBERS LITIGATION CENTER; AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENTS JOHN R. MATHIS, ET AL. on the parties in this action by placing a true copy in a sealed envelope, addressed as follows, and depositing it in the mail with sufficient first class postage at Los Angeles, California:

| | |
|---|---|
| Wayne McClean<br>Law Offices of Wayne McClean<br>21650 Oxnard Street, Suite 1620<br>Woodland Hills, CA 91367 | Counsel for Plaintiff Luis Gonzalez |
| Brian J. Panish<br>Spencer R. Lucas<br>PANISH SHEA & BOYLE LLP<br>11111 Santa Monica Boulevard, Suite 700<br>Los Angeles, CA 90025 | Counsel for Plaintiff Luis Gonzalez |
| Marvin S. Putnam<br>Robert J. Ellison<br>Latham & Watkins LLP<br>10250 Constellation Blvd., Suite 1100<br>Los Angeles, CA 90067 | Counsel for Defendant John R. Mathis and John R. Mathis as Trustee of the of the John R. Mathis Trust |
| Michael S. Bern<br>Latham & Watkins LLP<br>555 Eleventh Street NW, Suite 1000<br>Washington, DC 20004 | Counsel for Defendant John R. Mathis And John R. Mathis as Trustee of the John R. Mathis Trust |
| Stephen E. Norris<br>Joshua C. McDaniel<br>Horvitz & Levy, LLP<br>3601 West Olive Avenue, 8th Floor<br>Burbank, CA 91505-4681 | Counsel for *Amicus* American Property Casualty Insurance Association and Chamber of Commerce of the United States |
| Alan H. Packer<br>Jack R. Rubin<br>Newmeyer and Dillion LLP<br>1333 North California Boulevard, Suite 6<br>Walnut Creek, CA 94596 | Counsel for Amicus California Building Industry Association |
| Fred J. Hiestand<br>Counselor at Law<br>3418 Third Avenue, Suite 1<br>Sacramento, CA 95817 | Counsel for Amicus Civil Justice Association of California |

| | |
|---|---|
| Eleanor S. Ruth<br>Edward L. Xanders<br>Greines Martin Stein & Richland<br>5900 Wilshire Boulevard, 12th Floor<br>Los Angeles, CA 90036 | Counsel for Amicus Association of Southern California Defense Counsel |
| Neil Kalin<br>June Babiracki Barlow<br>California Association of Realtors<br>525 South Virgil Avenue<br>Los Angeles, CA 90020 | Counsel for Amicus California Association of Relators |
| William A. Bogdan<br>Attorney at Law<br>170 Columbus Avenue, 5th Floor<br>San Francisco, CA 94133 | Counsel for Amicus Associated General Contractors of California |
| David M. Arbogast<br>Arbogast Law<br>933 Woodland Avenue<br>San Carlos, CA 94070 | Counsel for Amicus Consumer Attorneys of California |
| Steven M. Bronson<br>The Bronson Firm APC<br>600 West Broadway, Suite 930<br>San Diego, CA 92101-3352 | Counsel for Amicus Consumer Attorneys of California |

I declare under penalty of perjury, that the foregoing is true and correct. Executed at Los Angeles, California on March 18, 2019.

_____

Supreme Court No. S 247677
2nd Civil No. B 272344

# IN THE SUPREME COURT

# OF THE STATE OF CALIFORNIA

| | |
|---|---|
| LUIS GONZALEZ,<br><br>Plaintiff and Appellant,<br><br>vs.<br><br>JOHN R. MATHIS, et al.,<br><br>Defendants and Respondents. | Supreme Court No. S 247677<br><br>2nd Civil No. B 272344<br>LASC Case No. BC 542498 |

From a Decision of the Second District Court of Appeal
Division Seven, 2nd Civil No. B 272344

## *SUPPLEMENTAL PROOF OF SERVICE*

**APPELLANT'S REPLY TO BRIEFS *AMICUS CURIAE* OF CALIFORNIA ASSOCIATION OF REALTORS; CALIFORNIA BUILDING INDUSTRY ASSOCIATION; CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL; AMERICAN INSURANCE ASSOCIATION AND U.S. CHAMBERS LITIGATION CENTER; AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENTS JOHN R. MATHIS, ET AL.**


Evan D. Marshall [Bar No. 82444]
**Attorney**
11400 West Olympic Blvd., Suite 1150
Los Angeles, CA 90064
(310) 458-6660/Fax: (310) 458-9065

Wayne McClean [Bar No. 66764]
**LAW OFFICES OF WAYNE MCCLEAN**
21650 Oxnard Street, Suite 1620
Woodland Hills, CA 91367
(818) 225-7007/Fax (818) 225-7557

Brian J. Panish [Bar No. 116060]
Spencer R. Lucas [Bar No. 232498]
**PANISH SHEA & BOYLE LLP**
11111 Santa Monica Boulevard, Suite 700
Los Angeles, CA 90025
(310) 477-1700/Fax (310) 477-1699

Attorneys for Plaintiff and Appellant Luis Gonzalez

**PROOF OF SERVICE**

I am over the age of 18 and not a party to this action. I am employed at 11400 West Olympic Blvd., Suite 1150, Los Angeles, CA 90064. On March 18, 2019, I served the attached *SUPPLEMENTAL PROOF OF SERVICE*: APPELLANT'S REPLY TO BRIEFS AMICUS CURIAE OF CALIFORNIAASSOCIATION OF REALTORS; CALIFORNIA BUILDING INDUSTRYASSOCIATION; CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL; AMERICAN INSURANCE ASSOCIATION AND U.S. CHAMBERS LITIGATION CENTER; AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENTS JOHN R. MATHIS, ET AL. on the parties in this action by placing a true copy in a sealed envelope, addressed as follows, and depositing it in the mail with sufficient first class postage at Los Angeles, California:

Clerk
Second District Court of Appeal
Division Seven
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Court of Appeal

Clerk for
Hon Gerald Rosenberg, Judge
Los Angeles Superior Court
1725 Main Street, Dept. K
Santa Monica, CA 90401

Trial Court

I declare under penalty of perjury, that the foregoing is true and correct. Executed at Los Angeles, California on March 18, 2019.