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

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

Los Angeles County, Hon. Gerald Rosenberg, Judge presiding
[LASC Case No. BC 542498]

ANSWER TO PETITION FOR REVIEW

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1. ADDITIONAL ISSUES FOR REVIEW

1. Where a house cleaner is injured because he reasonably went to the work location by traversing a portion of the hirer's property which is dangerous as a result of the hirer's negligent failure to maintain the property, and the cleaner has no authority or ability to restrict access or make changes to the dangerous location, has the hirer "retained control" and affirmatively contributed to the cleaner's injury under *Privette v. Superior Court* (1993) 5 Cal.4th 689, such that he may be held liable to the cleaner?

2. INTRODUCTION

The decisions of this Court formulate the *Privette* doctrine as follows: where a contractor fails to take reasonably available measures to protect against known dangers incident to the work contracted for, the responsibility for resulting injuries lies primarily with the contractor, not the hirer, and the cost of such injuries is properly born by the workers compensation system, premiums for which are presumably included within the contractual price.

Those decisions have imposed liability on a hirer who is aware of but fails to disclose to the contractor concealed dangers, and who hirer affirmatively contributes to the injury or retains responsibility for taking particular protective measures. But they have never suggested that there is blanket hirer immunity simply because a dangerous condition – and especially a dangerous condition created by neglect of the hirer – was known to the contractor. Rather, under the rationale of *Privette*, if a contractor encounters a known danger created by the hirer, but protective measures are not reasonably at hand, then it can hardly be

said that the contractor is primarily at fault, and the cost of such accidents are properly born by the negligent hirer's liability or premises insurance.

The concept, advocated by respondent John Mathis, that a negligent hirer should be free of liability to a contractor who acted reasonably whenever the risk is known is not just inconsistent with the premise of *Privette*, but contrary to general fault principles as announced in the *Privette* cases. Public policy has never called for hirers or anyone else to be immune from responsibility for the dangers created by their own negligence simply because they are open and obvious. The instant Opinion is not, as Mathis asserts, a novel new exception to Privette, but a logical limitation on the "delegation" concept underlying that case, for it make no sense to delegate to a contractor responsibility for dangers outside his speciality and competence, on parts of the property which are not placed under his control, and which are a consequence of hirer neglect which the contractor is not hired to remediate.

The Opinion herein simply holds that John Mathis can be liable for a injuries which resulted from his negligent creation of a dangerous roof where a jury might find that Alberto Gonzales – a house cleaner, not a roofer – encountered the danger at the insistence of the owner and in circumstances where feasible protective measures were not reasonably available.

3. SUMMARY OF THE CASE

Luis Alberto Gonzalez suffered severe injury, including paraplegia, after falling from the edge of defendant's roof while returning from a skylight which was being cleaned. The fall was due to (1) lack of maintenance over several decades which left the cantilevered roof edge covered with loose sand and gravel,

(2) the configuration of the property that led Gonzalez to travel along a narrow and slippery roof edge to reach the skylight, (3) the absence of practicable means to protect himself against the dangerous condition, and (4) the influence of defendant's agent, who insisted that Gonzalez mount the roof immediately.

John Mathis owned the residence for over 50 years and remodeled the property several times, adding a roof over the enclosed pool and replacing the original pool skylight some 40 years ago. (App. 391) In 1972, Mathis installed a "parapet wall" to conceal equipment on the roof, including air conditioning, duct work and wiring. (App. 626, 632; 52-58) This left a cantilevered catwalk of about 20" between the parapet and roof edge. (App. 436-437 626, 641)

Since the 1972 remodel, no major work had been done to the skylight (App. 391-392), though it and the roof were in very poor condition. (App. 115:2-13) The skylight was about 85' x 85' and occupied much of the roof: one end reached the edge of the building and the rest was boxed in by pipes, conduits and ventilation equipment. (See photos at App. 48, 52, 56, 58, 392) There was thus no direct clear route to the skylight once one reached the roof.

In addition to the obstructions created by the roof equipment and parapet, the property presented limited means of access to the roof. Access via the front of the house was impractical due to a 9 foot drop and an ornamental façade some 10 to 15 feet higher than the roof. (App. 412-416) A metal ladder permanently bolted to the west side of the house with a hand railing reached over onto the roof surface. (App. 626, 408-410) At the bottom of the ladder was a spigot for water used to clean the skylight (App. 626), and presumably used by gardeners to water plants which had been on the roof for several years. (App. 406-407, 54, 58) The ladder was the usual access point for air-conditioning workers, gardeners and

others working on roof equipment. (App. 438-440) Workers were never told not to use it (App. 440), and Mathis understood that anyone washing the skylight would use that ladder to access and exit from the roof. (App. 451-452)

Mathis and his housekeeper had never tried to walk on the side of the parapet away from the catwalk and didn't know if it was safe or if someone could fit in it given the presence of the pipes. (App. 495-498) Mathis himself had not been on the roof in five years; he used the ladder on the west side when he did climb up (App. 394-395), at which time he walked around the circumference. (App. 395-396) He never walked in the area behind the parapet where the ducts and air conditioning were located, finding it too constricted. (App. 399-400)

The roof was composed of an asphalt composite, originally with a sand and gravel coating. (App. 627) The cat walk surface was covered with loose sand and gravel as a result of years of neglect of maintenance, with material sloughing off into the gutters. A roofing expert attested that the roof composition, an asphalt cut-back with a granule surface, required maintenance every 3 to 5 years so that the granule surface does not become loose. (App. 631-633) The house had a long history of roof leaks in various places and the skylight above the pool was in a state of disrepair, and likely had not undergone any significant maintenance for more than 20 years.

Mathis and his agents knew of the dangerous condition. (App. 557-560, 615) His housekeeper had known that the catwalk was dangerous for the past 44 years and had warned the gardeners who accessed the roof on a weekly basis about the danger, but never warned Plaintiff. (App. 479, 486-489) Despite knowledge of the dangerous condition on the roof for decades, and knowledge that the ladder was used by “everybody” going on the roof (App. 439-440, 452),

Mathis never remedied the problem and never instructed anyone not to use the ladder or catwalk. There were no provisions for safety equipment along the parapet and cat walk, such as tie-offs, hooks or places to harness a worker. (App. 140, 627)

T some point in the preceding 20 years hired a roofer to fix leakage. (App. 432-431) The last time was "a very long time ago, I would say over 30 years, at the same time the skylight was replaced." (App. 432)

Gonzalez first worked on property as an employee of another cleaning company. In 2005, he started his own business, and Mathis's housekeeper Carrasco hired him for cleaning jobs. (App. 102, 491-492) During the years Gonzalez worked on the Mathis property, he had only known workers to use the permanent ladder to reach the roof. (App. 136-137)

Several months before the accident, Gonzalez told Carrasco that the roof needed repairs because it was in a dangerous condition. (App. 303-304) Carrasco got Mathis's accountant on the phone so Gonzalez could explain the need for repairs. (App. 304)

On July 30, 2012, Plaintiff began a 3-day job doing a "deep clean" on Defendant's house, with the skylight to be cleaned on the third day. (App. 74-75) On the third day, Carrasco told Gonzalez that she wanted some people to clean the skylight and others to clean inside. (App. 74, 550-551, 567) On Carrasco's order, Plaintiff sent two workers to the roof. (App. 567) About an hour later, Carrasco told Gonzalez that the skylight was leaking inside. She instructed him "to go up to tell them not to put a lot of water because the water was falling inside." (App. 76:3-6) "She just told me or sent me up above to tell them not to

put a lot of water. That's why I went up." (App. 76:20-22; 114:13-18, 568-570) Following Carrasco's instructions, Plaintiff climbed to the roof via the attached ladder, with Carrasco following him onto the roof. (App. 570-572) While on the roof, Carrasco continued to give Gonzalez instructions, telling him to talk with the accountant about his work. (App. 571-573, 575)

After speaking with his workers, Gonzalez began to return to the ladder along the narrow catwalk, where he slipped and fell towards the awning. (App. 115; 575, 577-578) His foot went out from under him on the loose sand and gravel. (App. 118-119) Gonzalez was walking along the roof edge towards the ladder because "that's the only way to get through because you have the AC equipment, and to get to the ladder you have to walk by the edge." (App. 116:1-7)

4. THE PETITION RESTS ON MISSTATEMENT OF THE *PRIVETTE* JURISPRUDENCE, WHICH CONSISTENTLY LIMITS THE CONTRACTOR'S RESPONSIBILITY TO REASONABLY FEASIBLE MEASURES, REGARDLESS OF WHETHER THE DANGER IS OPEN AND OBVIOUS

The Petition asserts that this Court has held that there are just two narrow exceptions to a rule of otherwise complete immunity for the hirers of independent contractors: (1) concealment of a hidden danger known only to the hirer, and (2) negligent exercise of retained control by the hirer. Because the premise is wrong, the issues presented by the Petition are spurious.

Mathis cites *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, for the supposedly exclusive nature of the two exceptions. *Kinsman*'s analysis is considerably more complex. First, *Kinsman* observed that *Privette* immunity rests

on the premise that responsibility for the danger at issue can realistically be found to have has been delegated to the contractor.

> A useful way to view the above cases is in terms of delegation. . . Nonetheless, when the hirer does not fully delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort to the employee. [*Kinsman*, 37 Cal.4th at 671]

Second, *Kinsman* indicates that delegation of full responsibility is unlikely to be found where the contractor is not specifically retained to cure the dangerous condition and the nature of his trade is not such as to qualify him to take essential protective measures. *Kinsman* cites *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, as a case where delegation was incomplete because the hirer had not given the contractor authority to undertake a critical employee safety measure. (37 Cal.4th at 672) And it observes that while independent contractors may explicitly or implicitly assume duties, the scope of that assumption is closely associated with the nature of the contractor's employment and expertise.

> Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming

> that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. *Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability*.
> [*Kinsman,* 37 Cal.4th 677-678]

Kinsman thus recognizes that the scope of "delegation" to the contractors is often fact-specific, and does not encompass responsibility to take precautionary measures for *every* danger on the property. Moreover, it states that a contractor is only required to take such reasonable measures as the circumstances permit.

A. **A "Feasibility" Limitation Has Been Repeatedly Expressed in this Court's Formulation of *Privette* Delegation**

Kinsman states that delegation of the duty to take protective measures is implied only in so far as a contractor has failed to take reasonable or feasible protective measures. This appears throughout the *Privette* jurisprudence. The concept of "delegation" is thus not a get-out-of-jail-card for every negligent hirer or owner, but is informed by the circumstances of the contractor's work and the extent to which the work undertaken entails the ability to *reasonably* avoid a given risk – especially a risk not among those the contractor was hired to remedy.

As the Opinion herein notes, *Kinsman* deemed feasibility a central factor in assessing the scope of implied delegation:

> . . . when there is a known safety hazard on a hirer's premises that can be addressed through ***reasonable safety precautions on the part of the independent contractor***, . . . the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so. [*Kinsman, supra*, 37 Cal.4th at 673-674, emphasis added.]

Tverberg v. Filner Construction (2010) 49 Cal.4th 518, similarly notes that *Privette* was concerned with delegating responsibility for the contractor's failure to take ***reasonable*** safety measures.

> The independent contractor receives this authority over the manner in which the work is to be performed from the hirer by a process of delegation. This delegation may be direct, when the hirer has contracted with the independent contractor, or indirect, when the hirer contracts with another contractor who then subcontracts the work to the independent contractor. . . . As this court stressed in *Kinsman [v. Unocal Corp*. (2005)] 37 Cal.4th 659, when the hirer of an independent contractor delegates control over the work to the contractor, the hirer also delegates 'responsibility for performing [the] task safely.' [Citations.] Therefore, a hired independent contractor who suffers injury resulting from risks inherent in the hired work, after having assumed responsibility for all ***safety precautions reasonably necessary to prevent precisely those sorts of injuries***, is not, in the words of *Privette*, *supra*, at page 694, a 'hapless victim' of someone else's misconduct. In that

> situation, the reason for imposing vicarious liability on a hirer – compensating an innocent third party for injury caused by the *risks inherent in the hired work* – is missing."
> [*Tverberg*, 49 Cal.4th at 528, emphasis added]

> As noted earlier, a hirer's liability under the doctrine of peculiar risk is vicarious. . . This means that, irrespective of the hirer's lack of negligence, the hirer incurs liability for the hired contractor's act or omission in ***failing to use reasonable care*** in performing the hired work.
> [*Tverberg*, 49 Cal.4th at 528, emphasis added]

Hooker v. Department of Transportation (2002) 27 Cal.4th 198, and its predecessors similarly affirmed that delegation of responsibility to the contractor is implied only as to risks avoidable by reasonable safety measures.

> ". . . under both [Rest 2nd] sections 411 and 413, the liability of the hirer 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 caused the injury ***by failing to use reasonable care in performing the work***."
> [*Hooker*, 27 Cal.4th at 205, quoting *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 265]

That the contractor is charged under *Privette* only with the duty to take *reasonable* protective measures is thus well-settled, and in no manner undermined by the Opinion herein.

Put differently, *Privette* provides immunity from hirer liability under the peculiar risk doctrine, and therefore applies to protect a landowner who is *not at fault* from liability for an accident resulting primarily from the contractor's negligent failure to take precautions. If the contractor has used reasonable care, and the hirer is at fault for the danger, the rationale of *Privette* does not apply.

Mathis asserts that the instant Opinion conflict with *Hooker* because "a hirer who *delegates* control of the worksite and *does not* affirmatively contribute to the injury may now be liable." (Petition pg. 7) Of course, Mathis did negligently contribute to the injury, or Gonzalez would have no claim against him. But more to the point, *Hooker* states that the delegation relied on by Mathis only applies in so far as "the hired contractor . . . caused the injury by failing *to use reasonable care* in performing the work." (27 Cal.4th at at 205)

Thus, the instant Opinion thus does not create a "third exception," but applies the limits of delegation as described in this Court's decisions.

This is an especially appropriate case for application of that concept. Even if falls are foreseeable, the enhanced danger of a deteriorated roof is not a risk peculiar to the activities or results for which a cleaner is hired, but is due to breach of the general duty of the property owner to alleviate risks that threaten any number of foreseeable invitees. A cleaner has no particular skill or authority to alleviate a risk which requires structural changes or repairs, so the homeowner could hardly have "delegated" safety measures to the contractor. In no meaningful sense could it be said that Mathis surrendered control of the accident site to Gonzalez.

In the paradigmatic *Privette* case the contractor is specifically engaged to encounter the subject danger so there is a clear explicit or implicit delegation of the owner/hirer's otherwise non-delegable duty of care. Often, the delegation is specified in contractual arrangements among the hirer, general contractor and subcontractors which allocate duties and responsibility for workplace safety. Absent an express agreement, delegation is implied from the nature of the undertaking, by the contractor's specialized skills or duties, by industry customs and practices as to allocation of safety procedures, or from the nature of the danger which the contractor is peculiarly suited to redress or avoid, or the contractor's assumption of control over an entire work site. In such archetypical cases, the scope of delegation is delineated by the nexus between the contractor's skills, the danger inherent in the particular engagement, and the contractor's special competence in avoiding the danger.

A house cleaner does not take exclusive control of the house, does not have plenary authority over every dangerous aspect of the house he is cleaning, and hence the scope of delegation is necessarily confined to what he can reasonably do. In the case of contractors hired for limited purposes and low-skill tasks, this raises a fact issue as to what protective measures he reasonably be expected to take, consistent with the principle that the extent of 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 depends on "evidence of the orders or direction given him or of the rules adopted for his guidance by the principal." *Forgeron Inc. v. Hansen* (1957) 149 Cal.App.2d 352, 359.

B. The Feasibility Limitation Recognized by this Court and Applied in the Instant Opinion Specifically Concerns Dangers Known to the Contractor

Logically, the feasibility of protective measures concerns *known* risks rather than unknown risks. If a risk is unknown, then it makes no sense to talk of the contractor "reasonably" taking protective measures. *Kinsman* is clear that when it talks about feasibility, it is concerned with open or known dangers.

> . . . when there ***is a known safety hazard*** on a hirer's premises that can be addressed through ***reasonable safety precautions on the part of the independent contractor***, . . . the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so.
> [*Kinsman, supra*, 37 Cal.4th at 673-674]

It therefore cannot be the rule that the hirer is immune from liability for every known danger.

C. *Privette* Jurisprudence Consistently Holds that There is No Blanket Hirer Immunity for Known or Obvious Dangers

Mathis's assertion that this Court has eliminated hirer liability for any danger known to the contractor is inconsistent with the decisions. As noted, the Court has expressly held that a known danger may be the basis of hirer liability where it cannot be avoided "through reasonable safety precautions on the part of

the independent contractor." Applying general premises liability principles, *Kinsman* notes that while an obvious danger might serve as its own warning,

> this is not true in all cases. '[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.'" *(Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393 [duty to protect against obvious electrocution hazard posed by overhead electrical wires]; see also *Rest.2d Torts*, § 343A [possessor of land liable for obvious danger if "the possessor should anticipate the harm despite such . . . obviousness"].)
> [*Kinsman*, 37 Cal.4th at 673, emphasis added.]

> As we have discussed, the hirer generally delegates to the contractor responsibility for supervising the job, including responsibility for looking after employee safety. 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***. But that is not this case, since Kinsman acknowledges that reasonable safety precautions against the hazard of asbestos were readily available, such as wearing an inexpensive respirator. Thus, when there is a known safety hazard on a hirer's premises that can be addressed ***through reasonable***

> ***safety precautions*** on the part of the independent contractor, a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so.
> [*Kinsman*, 37 Cal.4th 673-674, emphasis added.]

Non-delegation to the contractor may therefore be found where the owner should reasonably repair rather then simply warn: in such cases, the relative burden on the owner is slight and the necessity and foreseeability of the contractor encountering the danger is high. See *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 716 (reversing summary judgment where it was possible that even if produce debris on floor was obvious, it might be sufficiently common as to require clearing rather than relying on invitees to notice it), and *Donohue v. San Francisco Housing Auth*ority (1993) 16 Cal.App.4th 658, 664-665, noting that the "obvious danger" defense is a recharacterization of the former secondary assumption of risk doctrine, now subsumed into comparative fault.

D. There is No Conflict Between the Holding of the Instant Case and Other Decisions of this Court

Mathis claims that *Tverberg* rejects the proposition that the hirer may be liable for risks which the contractor cannot reasonably avoid. As noted above, *Tverberg* in fact confirms that delegation of the landowner's responsibilities rests on the extent to which a contractor can reasonably take precautionary measures. *Tverberg*, 49 Cal.4th at 528. *Tverberg* says nothing inconsistent with the instant Opinion. While in *Tverberg* no one raised the issue of feasability or the scope of implied delegation, its language confirms that *Privette* concerns delegation of responsibility for a contractor's failure to take ***reasonable*** safety measures.

Review was granted in *Tverberg* to resolve a disagreement among intermediate courts as to whether the *Privette* doctrine applied to shield a general contractor against injuries suffered by an independent sub-contractor. The plaintiff in *Tverberg* was an independent contractor who sued the general contractor after he fell into an uncovered hole dug for a bollard footing adjacent to an area where plaintiff was to erect a canopy. The fall was deemed an inherent risk of the canopy work because the work had to take place immediate adjacent to the hole, and – more importantly – the independent contractor had been granted control over the hired work through a chain of delegation from the general contractor through a subcontractor. *Tverberg* is the pardigmatic case of a contractor having control over the work site and vested with the power to take safety measures. It was unconcerned with the feasability of protective measures, probably because the independent contractor had himself modified the work site by removing certain stakes (*Id.* at 523), and did not contend that he was unable to take other protective measures.

Significantly, the Court recognized in *Tverberg* that the injured employee could maintain a direct liability claim based on retained control over the premises and remanded for the lower court to resolve that issue. (49 Cal.4th at 529) On remand, the Court of Appeal held that the general contractor's affirmative contribution to the accident could consist of (1) directing another subcontractor to dig the bollard holes in the first place, (2) Fillner's determination that there was no need to cover or barricade the bollard holes, or (3) Fillner's failure to cover the holes after Tverberg twice asked that it do so. *Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1448. While these were phrased in terms of "affirmative contribution" or retained control by the hirer, they illustrate limitations on *Privette* delegation which, like feasibility, present triable issues of fact.

Nor does *SeaBright Insurance Company v. U.S. Airways* (2011) 52 Cal.4th 590, create the blanket exemption from "any tort duties" for which Respondent cites it. *SeaBright* applied rather than overruled or limited *Kinsman* and *Hooker* in resolving the question of whether duties imposed by OSHA on a hirer were "delegable" and thus subject to the *Privette* rule. *SeaBright* nowhere touches upon the issue of whether the hirer may be liable when it presents the independent contractor with a danger the contractor cannot reasonably avoid. And the claim that *Seabright* eliminated *all tort duties* from hirer to contractor is absurd: a hirer who assaults a contractor, violates a voluntarily assumed duty, or commits a direct tortious act which imposes liability beyond the peculiar risk rule can certainly be held responsible.

See *Vargas v. FMI, Inc*. (2015) 233 Cal.App.4th 638, 651, rejecting the argument that "under *Privette*, *Tverberg*, and *SeaBright*, a hirer can never be liable for injuries to an independent contractor because "the duty to provide a safe working environment is implicitly and presumptively delegated in all independent contractor agreements" unless the hirer is actively negligent, and *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1038, stating that "*Privette* does not purport to abolish all forms of vicarious liability in general, or the doctrine of nondelegable duty in particular, as a basis for suits by employees of contractors against the contractors' employer. Cases are not authority for propositions not discussed."

Mathis advances a parade of public policy horribles, none of which are presented by the instant Opinion or by the facts of the case.

First, the Opinion allegedly undermines *Hooker* because "a hirer who *does not* retain control over the job site and does not affirmatively contribute to the

injury at all can now be liable," and that this requires "a lesser showing to impose liability on a hirer who is delegated more control for safety to an independent contractor . . ." (Petition, page 20) This claim rests heavily on the indiscriminate use of the notions of "control" and "delegation." Obviously Gonzales did not control the roof edge, and responsibility for the condition of the roof which was not delegated to him in any reasonable sense. He was merely traversing the roof edge to reach the work site. How can it be said that the contractor who has no control over the existence of the dangerous condition and is not hired to remedy the condition has "more control" that the property owner? Gonzalez had explicitly told Mathis's agent that Mathis needed to hire a roofer to correct the problem.

There is no inconsistency with *Hooker*, which only extended the rationale of *Privette* to the doctrine of negligent exercise of a broadly retained control under *Restatement 2d, Torts*, §414.10, in so far as the hirer failed to actually exercise control theoretically retained under the agreement with the contractor. The instant opinion simply recognizes that there are realistic limits to the notion of delegation, and that the hirer cannot expect a contractor to assume responsibility for conditions which the contractor will reasonably encounter without protective measures.

Mathis confuses two issues: retained control is a basis for liability under *Hooker* where it contributes to the injury, but that notion is in no way inconsistent with *Kinsman's* observation that delegation of duty under *Privette* may be limited by the feasibility of protective measures, even where the danger is open and obvious. These are two different but consistent limitations on *Privette* immunity. This confusion infects the entirety of Mathis's policy arguments.

> The rule of workers' compensation exclusivity 'does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury.' (Privette, supra, 5 Cal.4th at p. 697), and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer.
> [*Hooker*, 27 Cal.4th at 214]

As *Hooker* notes, imposing liability on a hirer whose conduct affirmatively contributes to injury to an employee of an independent contractor is consistent with Privette because the hirer's liability is direct, not derivative of the contractor's acts – not because the risk it creates is open and obvious. (*Id*. at 212)

Mathis also misstates *Hooker* in suggesting that it held that it is immaterial that the owner negligently created the danger. *Hooker,* like *Privette,* is concerned with liability which is "vicarious" in the sense that it derives from the negligence of the hired contractor who caused the injury by failing to use reasonable care in performing the work. *Hooker* thus confirms, with the present Opinion, that delegation of responsibility to a contractor is implied only as to risks which the contractor can avoid by reasonable safety measures. *Hooker*, 27 Cal.4th at 205; *Toland v. Sunland Housing Group*, *supra*, 18 Cal.4th at 265

Mathis then advances the odd claim that imposing liability on the owner for a deteriorated condition which the contractor was neither hired nor competent to remedy will somehow penalize homeowners and discourage them from hiring specialized contractors competent to correct the conditions.

> Such a rule will produce bizarre results, freeing a hirer from liability for injuries that could have been

> prevented had the hirer complied with statutory obligations while imposing liability when the hirer violates no rule and has no reason to believe the independent contractor is at risk. Those results will particularly harm homeowners, who typically will be unable to gauge their exposure to liability because the availability of reasonable safety precautions often is uniquely within a skilled contractor's competence, rather than their own . . .
> [Petition 23]

This case belies such claims. Mathis knew that he needed a roofer to correct the dangerous condition, knew that he was violating his duty as a property owner. He was specifically told by Gonzalez about the need to hire a roofer and tacitly assumed that duty. Exempting a property owner from liability to contractors or anyone else for a dangerous condition due to their failure to observe basic due care in the management of their property will reward them for *not* hiring competent and qualified specialists. To suggest that responsibility for a deteriorated roof should be shifted from the property owner to a house cleaner is offensive to public policy, and finds no justification in workers compensation law since the cost of injuries imposed by negligent maintenance of property should be borne by property liability insurance, not by the workers compensation system.

In short, liability in this case rests firmly on the hirer's own fault and his knowing refusal to hire a qualified contractor to deal with a known risk resulting from the hirer's neglect extraneous to the work to be performed. Nothing in public policy supports exempting such a defendant from liability.

5. THERE IS NO CONFLICT WITH DECISIONS OF THE COURTS OF APPEAL

Mathis selects certain cases having a superficial factual resemblance to the instant case, claiming they present a conflict requiring review. None of them address *Kinsman*'s feasibility limitation on the scope of implied *Privette* delegation. Cases do not stand for propositions never considered by the court. *Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." *Ginns v. Savage* (1964) 61 Cal.2d 520, 524 fn. 2.

All of these cases focus on the hirer's conduct and contribution (or lack of contribution) to the accident, not on the *Kinsman* issue: was the danger created by the hirer one which under the circumstances the worker reasonably encountered.

Delgadillo v. Television Ctr., Inc. (2018) 20 Cal.App.5th 1078, nowhere addresses the reasonableness or feasibility limitation expressed in *Kinsman* and other cases. The Appellant contended that the hirer/owner had provided defective tools or equipment to the contractor's employee and that the owner retained control of the workplace in a way that affirmatively contributed to decedent's death. He did not raise any issue as to whether the employee reasonably encountered a known danger created by the hirer. Significantly, the cleaner's job was to work on the vertical outside surface of the building: *i.e.,* the danger was the very one contracted for and at the very location where the work was to be done – the exterior windows – which required the worker to be suspended from the side of the building. The danger was exactly the risk contracted for and

within the contractor's actual control, unlike the instant case, where the danger of loose roof material was not contracted for and not the object of the work. The relationship between delegation and the contractors work is articulated in *Grahn v. Tosco Corp*. (1997) 58 Cal.App.4th 1373, 1396,[1] which observed that the hirer's duty to maintain its premises in a reasonably safe condition is delegated

> [w]here the operative details of the work are not under the control of the hirer and the dangerous condition causing injury is either *created by the independent contractor or is, at least in part, the object of the work of the independent contractor* . . . .
> [*Grahn v. Tosco*, *supra*, 58 Cal.App.4th at 1398, emphasis added.]

The issue in *Madden v. Summit View, Inc*. (2008) 165 Cal.App.4th 1267, was whether the hirer's failure to comply with Cal-OSHA regulations rendered it liable for an injury to a contractor's employees *even if the hirer's actions did not affirmatively contribute to the injury*. The court held that the hirer could not be liable unless it had somehow affirmatively contributed to the injury (*Id.* at 1280) and also found as a factual matter that there was no evidence that the failure to comply with the regulation played a role in plaintiff's injury. (*Id*. at 1281)

Madden says nothing about the reasonableness limitation on delegation. The accident occurred at the very place the contractor had to perform his work – the location of the wires he was working on – and there was no evidence that the danger had been created or aggravated by the general contractor's neglect, or that the contractor failed to correct a condition which it had negligently created. There was "no evidence that before his accident Summit View, Berry, or Tschantz ever

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[1] *Grahn* was disapproved on other grounds in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1243-1245, and *Hooker*, *supra*, 27 Cal.4th at 209–210, 214.

participated in any discussion about placing a safety railing along the patio, became aware of any safety concern due to the lack of such a railing, or intervened in any way to prevent such a railing from being erected." There was no triable issue of affirmative contribution because "there is no evidence that [the general contractor] or its agents directed that no guard railing or other protection against falls be placed along the raised patio, or that it acted in any way to prevent such a railing from being installed." Here, Gonzalez told Mathis's business manager of the need to hire a roofer – *i.e.,* that Gonzalez was not taking responsibility for the condition.

Of interest, *Madden* contradicts the contention that the obviousness of a danger obviates any duty.

> The obviousness of the hazard does not in and of itself relieve Summit View of any duty it might have to eliminate it. (See *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122.) It does, however, negate any claim by Madden that Summit View induced him to believe the hazard did not exist or that the hazard was otherwise concealed from him but known to Summit View.
> [*Madden*, 165 Cal.App.4th at 1277, fn. 3]

Padilla v. Pomona College (2008) 166 Cal.App.4th 661 (decided by the same panel that heard the instant case), held that the failure to comply with OSHA regulations did not affirmatively contribute to the injuries of a plumbing worker, and that the regulation imposed no duty on the general contractor/defendant. The court found no concealment of a dangerous condition in circumstances *where the worker or his employer had specific means of alleviating the danger and exclusive control over the work site*. Plaintiff's employer contracted with a

general contractor to demolish water pipes in the basement of a dormitory, and the injury occurred when a fragment of the pipe being demolished fell and punctured a pressurized pipe. Plumbing was thus within the competence and scope of work of the contractor, and the injury was a direct result of the demolition itself, of the specific work contracted for – not incidental to a danger outside the scope of the contractor's work. Most importantly, the scope of delegation from the general to independent contractor was clear: the employer expressly agreed "to protect items that remained in the employees' work area," and the plans which pipes would remain and which would be demolished. (166 Cal.App.4th at 665) Since the pipe had to remain pressurized, it was undisputed that the dangerous condition was inherent in the pipe removal work – not a result of the hirer's neglect. (*Id.* at 674) Responsibility for the subject danger in *Padilla* was thus explicitly delegated to the subcontractor, and it was undisputed that the subcontractor had the ability to take reasonable protective measures and complete control over the location and the danger. (*Id.* at 671)

6. THE OPINION PRESENTS NO ISSUE AS THE BURDEN OF SHOWING FORESEEABILITY OR FEASIBILITY

Mathis argues that a land-owner should not be required to anticipate that his negligent creation of a danger posing a general risk to invitees might be reasonably encountered by a contractor without safety precautions. His theory is that the hirer should be allowed to assume that *any contractor* will be competent and equipped to meet *any negligently created danger* on the premises since contractors are better equipped to evaluate risks. (Petition 30-31)

As *Kinsman* notes, there can be no such general assumption, since the scope of the duty to take precautions is constrained by the nature of the

contractor's retention and expertise. While "an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment," if the same employee "fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer."

> *Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability*. [*Kinsman,* 37 Cal.4th 677-678]

In this case, Mathis knew that a professional roofer was required, knew that workers of all sorts were accessing the roof for gardening, cleaning, air conditioning work, etc., and knew professional roof work was required

Mathis also contends that Gonzales had the burden of showing that he had actual knowledge of the limitations on the contractor's ability to take reasonable precautionary measures. The issue is not before the Court. Mathis had the burden on summary judgment of negating any basis for liability, and that initial burden extends even to issues as to which plaintiff might have the burden at trial. No issue of scienter appeared in his moving papers. Gonzalez had no obligation to show that a triable issue of fact existed as to Mathis' state of mind or any other

defensive issue not tendered by the moving papers. *C.C.P.* §437c(p)(2); *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468; *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 743-744.

The decisions discussed above placing a "reasonableness" limitation on the delegation concept nowhere hint that a hirer's subjective state of mind or knowledge is relevant. The general rule as to landowner liability imputes to the owner such knowledge as a reasonable owner would have. *Rest. 2nd Torts*, §343, which Mathis cites, imposes liability on the possessor who "knows or by the exercise of reasonable care would discover" the dangerous condition, and "should realize that it involves an unreasonable risk of harm to such invitees." This is an objective or "reasonable man" standard, as illustrated by *Markley v. Beagle* (1967) 66 Cal. 2d 951, where the employee of an independent contractor, en route to repair a ventilation fan on the landowners' roof, was injured when a mezzanine railing inside the building gave way. The owners were liable because "[t]hey knew or should have known that [the worker] would use the mezzanine to get to the fan on the roof . . ." (*Id.* at 955–956)

Mathis also contends that the record shows reasonable safety precaution that Gonzalez could have taken: "repairing the roof and installing safety hooks." Of course, the duty to repair lay with Mathis, and was expressly impressed upon him by Gonzalez. While other premises had safety hooks or tie-offs which allow the use of a safety harness, such devices are only useful when working in place – and the roof edge was not where the work was done. A harness prevents falls by limiting mobility; when going to or from the ground to the skylight, mobility is essential. Nothing suggests that a harness or other device could have reasonably been worn while Gonzales was walking the roof edge to reach the ladder,

Had the issue been properly tendered, there would plainly be a triable issue. Mathis and his agents knew of the deteriorated condition of the roof, and months before the accident, Gonzalez had told Carrasco that the roof need to be repaired because it was in a dangerous condition. (App. 303-304) Mathis knew of the physical characteristics of the roof, the profusion of equipment and pipes surrounding the skylight with a fixed ladder inviting workers to reach the skylight via the roof and edge, and that workers traveling along the edge would have no ready means of securing themselves against slipping due to loose gravel.

Mathis repeats in support of this argument the canard that it would be unfair to impose liability on him for danger in a location over which the hirer has not retained control." (Petition page 37) In what manner did Mathis surrender control, or Gonzalez assume control, of a roof edge where the contractor's work was not located, and which was being used by Gonzalez only to transit to the real work location? Carrasco herself followed Gonzalez up on the roof to give him instructions (App. 570-571), and nothing in the record suggests that Mathis, his employees or his other workers such as gardeners watering the plants (App. 406-407) were excluded or under Gonzalez's authority if they wished to walk on the roof while the skylight was being cleaned.

Padilla illustrates a genuine "surrender" of control: workers other those employed by the independent subcontractor were excluded from the area where the pipes were being demolished and the subcontractor "agreed to protect items that remained in the employees' work area." (*Padilla*, *supra*, 166 Cal.App.4th 665-666) Nor is this a case like *Hooker* where a general contractor on a large scale construction project necessarily takes control over the premises from the owner because the scope of work encompasses an entire property.

7. REVIEW IS NEEDED TO CLARIFY CIRCUMSTANCES IN WHICH A HIRER HAS RETAINED CONTROL AND AFFIRMATIVELY CONTRIBUTED TO THE ACCIDENT

As with the delegation issue, this case does not easily fit the mold of the classic *Privette* cases in which the contractor either negotiates the scope of his safety responsibilities or is hired to create or remediate a hazardous condition. Nothing suggests that Mathis surrendered control of the entire premises, or the roof edge, in the manner in which control is surrendered where there is new construction or a large-scale project.

> When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury.
> [*Tverberg*, 202 Cal.App.4th 1439, 1446]

Recognition of a duty under *Hooker's* retained control analysis turns on an inquiry as to whether Mathis contributed to Gonzalez's unsafe practices or procedures "'by direction, induced reliance, or other affirmative conduct.'" (*Hooker*, *supra*, 27 Cal.4th at 209, quoting *Kinney v. CSB Construction, Inc*. (2001) 87 Cal.App.4th 28, 39) The issue is whether neglect – by commission or by omission to perform a duty – contributed to the injury.

> In fairness, as the *Kinney* court recognized, the imposition of tort liability on a hirer should depend on whether the hirer exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee. "We are

> persuaded that the holdings of *Privette* and *Toland* should also apply to employees' claims under section 414 at least where, as here, (1) the sole factual basis for the claim is that the hirer failed to exercise a general supervisory power to require the contractor to correct an unsafe procedure or condition of the contractor's own making, and (2) ***there is no evidence that the hirer's conduct contributed in any way to the contractor's negligent performance by, e.g.***, ***inducing injurious action or inaction through actual direction***, ***reliance on the hirer*****, or** ***otherwise***.
> [*Hooker*, 27 Cal.4th at 210–211]

Retained control contemplates a variety of circumstances by which the contractor is influenced – either omission or failure to act. *Hooker*, *supra*, 27 Cal.4th at 212, fn. 3. The use comment to *CACI* 1009B states:

> the affirmative contribution need not be active conduct but may be in the form of an omission to act. . . . The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.
> [*Judicial Council, California Civil Jury Instruction* 1009B]

This illustrates the imprecision of the concept under present law.

The cases do not explain how it could be said that Mathis surrendered control of a site where the work was ***not*** being done, but was a mere path to the

work site, or why the knowing maintenance of a danger which the contractor had advised the hirer to correct is not an affirmative contribution to the injury. The determination of no "retained control" or affirmative contribution is especially difficult to reconcile with the Court of Appeal's holding in *Tverberg v. Fillner Construction, supra,* 202 Cal.App.4th at 1448, that the general contractor's affirmative contribution could consist of (1) directing another subcontractor to dig holes, (2) determination that there was no need to cover or barricade the holes, or (3) failure to cover the holes after asked that it do so. The analogy to Gonzalez' request to Mathis to make repairs seems complete.

8. CONCLUSION

Far from conflicting with other decisions, the present Opinion is the natural elaboration of a "feasibility" limitation on implied delegation of duties under *Privette* and its progeny. That limitation is established in the jurisprudence and does not support Mathis' absolutist rule that *any obvious danger* on the property is the delegated responsibility of *any contractor* on the property.

The Petition should accordingly be denied.

Respectfully Submitted,

Dated: April 6, 2018

By: _____

Evan D. Marshall
Attorney for Plaintiff/Appellant
Luis Alberto Gonzalez

CERTIFICATE OF COMPLIANCE

Counsel certifies that pursuant to *C.R.C.* Rule 8.204(c)(1), the enclosed Appellant's *Answer to Petition for Review* is produced using 13 point Roman type and contains approximately 8,383 words, which is less than the 8,400 words permitted by Rule.8.204(c)(4). Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: April 6, 2018

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 April 6, 2018, I served the attached ANSWER TO PETITION FOR REVIEW 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:

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I declare under penalty of perjury, that the foregoing is true and correct. Executed at Los Angeles, California on April 6, 2018.

Evan D. Marshall

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S247677**
Lower Court Case Number: **B272344**

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/s/Evan Marshall

Signature

Marshall, Evan (82444)

Last Name, First Name (PNum)

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