Case No. S247677

IN THE
SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,

v.

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

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

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

OPENING BRIEF ON THE MERITS

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S247677 - GONZALEZ v. MATHIS

Full Name of Interested Entity/Person	**Party/Non-Party Nature of Interest**
Not Applicable	Not Applicable

Dated: May 25, 2018

Respectfully submitted,

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ISSUES PRESENTED

The following issues were presented in the Petition for Review (Pet.) at p. 5:

1. Whether a hirer who delegates responsibility for worksite safety to an independent contractor nonetheless may be liable in tort for injury sustained by the contractor's employee when the hirer does not retain control over the worksite and the hazard causing the injury was known to the contractor.

2. Whether, even assuming a hirer may be liable in such circumstances, the Court of Appeal properly held that the hirer is entitled to summary judgment only if the hirer establishes as a matter of law that the contractor could unilaterally have taken reasonable safety precautions to remedy the hazard causing the injury.

The following additional issue was presented in the Answer to the Petition for Review (Ans.) at p. 5:

3. 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?

INTRODUCTION

Over the last 25 years, beginning with *Privette v. Superior* Court (1993) 5 Cal.4th 689, this Court has carefully defined and limited the circumstances in which an independent contractor's employee may recover in tort from the party hiring the contractor. Under those decisions, when employees of independent contractors are injured at a worksite, they generally cannot sue the party that hired the independent contractor. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594.)

This Court has identified two exceptions to *Privette*'s general rule: (1) when the hirer retains control over the contractor's work and affirmatively contributes to the injury (see *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198); and (2) when the hirer fails to warn the contractor of a concealed hazard (see *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659). Absent those narrow exceptions, this Court has explained that "[b]y hiring an independent contractor, the hirer implicitly delegates to the contractor *any tort law duty* it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*Seabright, supra*, 52 Cal.4th at p. 594, italics added.) As a result, "when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*Ibid.*, citation omitted.)

Applying those principles, the trial court held that the employee of an independent contractor (plaintiff Luis Gonzalez) could not recover against a homeowner (defendant Johnny Mathis) for injuries sustained when he fell while cleaning a skylight

located on the roof of Mathis's one-story home—a skylight Gonzalez had been cleaning without incident for 20 years. Because Mathis delegated control over the worksite to Gonzalez and did not affirmatively contribute to Gonzalez's injury, and any hazards were well known to Gonzalez, the trial court held that neither of *Privette*'s exceptions applied, and that Mathis was not liable for Gonzalez's injuries as a matter of law.

The Court of Appeal reversed, sharply departing from *Privette*'s settled framework by reading dicta in this Court's 20-year old decision in *Kinsman* to establish a third, previously unrecognized exception to *Privette*'s general rule. Pursuant to this new exception, the Court of Appeal held that a homeowner or other hirer is liable for injuries sustained by an independent contractor's employee "when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." (Opinion of the Court of Appeal, Second Appellate District, Division Seven, filed Feb. 6, 2018 at p. 19, attached hereto as Exhibit A (Op.).)

The Court of Appeal's new exception would work a sea change in California law that would eviscerate *Privette*'s careful framework and undermine its important policies. As *amici* representing the interests of homeowners, builders, the real estate industry, contractors, and insurers, among others, have explained, the Court of Appeal's decision would frustrate *Privette*'s goals and increase the costs of millions of transactions in California each year. This Court should prevent those consequences and reverse the Court of Appeal's decision for four principal reasons.

First, the Court of Appeal's new exception is fundamentally incompatible with this Court's own caselaw. In *Hooker*, the Court held that a hirer who retains control of a worksite is not liable for injuries sustained by an independent contractor's employee unless the hirer affirmatively contributes to the injury. (27 Cal.4th at p. 202.) But under the Court of Appeal's decision, a hirer who *delegates* control of the worksite and *does not* affirmatively contribute to the injury would now be liable. Penalizing property owners for delegating responsibility for safety to contractors not only makes little sense, it contradicts California's "strong policy 'in favor of delegation of responsibility and assignment of liability' to independent contractors." (*SeaBright, supra*, 52 Cal.4th at p. 596, citation omitted.)

The Court of Appeal's exception also contradicts *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 521. There, this Court unanimously held that unless *Hooker*'s retained control exception applied, an independent contractor could not recover from a hirer for injuries sustained by an open hazard, even though the employee claimed that he lacked "the ability to" remedy the hazard. (Answering Brief on the Merits, *Tverberg, supra*, 49 Cal.4th 518 (July 6, 2009, S169753) (hereafter *Tverberg*, Merits Ans. Br.), at p. 53, citations omitted.) Under the Court of Appeal's new exception, however, the opposite result would follow. Such an outcome would expose unwitting homeowners to catastrophic liability—even when the homeowner has no reason to believe the contractor cannot take reasonable precautions against any risk. And it is fundamentally inconsistent with *Seabright*'s clear

guidance that a hirer may delegate "any tort law duty it owes *to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract." (52 Cal.4th at p. 594.)

Second, the Court of Appeal's decision contravenes the important policies underlying *Privette*'s rule. By sharply restricting a hirer's ability to delegate responsibility for safety at the worksite to an independent contractor, while substantially expanding homeowners' and other hirers' liability for injuries sustained by an independent contractor's employees, the Court of Appeal's decision undercuts the essential underpinnings of the *Privette* doctrine. As *amici* explain, the Court of Appeal's decision would discourage reliance on independent contractors, reduce workplace safety, interfere with the exclusivity of workers' compensation, and "arbitrarily favor some claimants with work-related injuries over others"—results fundamentally at odds with what the *Privette* doctrine is designed to accomplish. (See Ltr. of Amicus Curiae, California Assn. of Realtors at pp. 3–5 (Apr. 6, 2018); Ltr. of Amicus Curiae, California Bldg. Assn., et al. at pp. 2–5 (Apr. 5, 2018); Ltr. of Amicus Curiae, American Insurance Assn. at p. 3 (Apr. 12, 2018); Ltr. of Amicus Curiae, Associated Gen. Contractors of California at pp. 1–6 (Apr. 13, 2018); see also Pet. at p. 24.)

Moreover, the Court of Appeal's exception would trigger harmful consequences that Californians can ill afford to bear—increasing construction prices, driving up insurance premiums, exposing homeowners to heightened risk of "catastrophic loss," and

substantially "increas[ing] the costs of purchasing or maintaining homes." (*Id.*)

Third, because *Privette*'s framework affects millions of transactions across California each year, the importance of fashioning rules in this area that provide clarity to hirers, independent contractors, and employees is paramount. But the Court of Appeal's decision would frustrate that important goal, replacing a settled and well-working framework with a rule that will be difficult to apply, and is certain to prolong litigation and render summary judgment effectively impossible in the many cases that implicate *Privette*'s rule.

Finally, the Court of Appeal's exception is premised on a misreading of *Kinsman*'s dicta that ignores the actual *holding* of that case and fails to account for important distinctions between common law premises liability principles and the very different context of hirer liability for an independent contractor's employee.

For all these reasons, the Court of Appeal's decision is wrong as a matter of law and policy, and should be reversed.

STATEMENT OF THE CASE

A. Factual Background

1. Defendant Johnny Mathis, one of the most well-recognized American recording artists of the twentieth century, has lived in the same one-story house in Los Angeles for 56 years.

(2-AA-317.[1]) The home has a flat roof, part of which is covered by a large skylight. (*Ibid.*)

Plaintiff Luis Gonzalez cleaned Mathis's skylight for roughly 20 years prior to the events at issue in this case. According to his marketing materials, Gonzalez has been a professional window and skylight cleaner "since 1988." (1-AA-162; 3-AA-667.) He began cleaning Mathis's house in the 1990s while working for Beverly Hills Window Cleaning. (2-AA-257–258.) In the mid-2000s, he started his own cleaning business, Hollywood Hills Window Cleaning, which he advertised as a professional, expert company that "[s]pecialized in hard to reach windows and skylights." (3-AA-669; see 1-AA-162.) By 2012, Gonzalez's company had 200-300 customers and seven employees. (3-AA-670, 674.) The company's advertisements touted his "[m]eticulous and careful workers" and represented that his employees were trained "to take extra care in his clients' homes, as well as with their own safety when cleaning windows." (3-AA-669.) Although he also represented that his company was bonded and carried insurance, Gonzalez never actually obtained workers' compensation insurance, in violation of California law. (3-AA-669, 675; see Cal. Lab. Code, div. 4, pt. 1, ch. 4, § 3700.)[2]

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[1] "AA" refers to Appellant's Appendix, and "RA" refers to Respondent's Appendix.

[2] Had Gonzalez obtained workers' compensation insurance for his business, he would have received workers' compensation for his injuries. Having failed to acquire the insurance that he was required to obtain by California law, he looks instead to Mathis for recovery.

Shortly after opening his new business, Gonzalez contacted Marcia Carrasco, Mathis's longtime housekeeper, about hiring Hollywood Hills Window Cleaning rather than Gonzalez's former employer to clean Mathis's skylights, windows, and house. (3-AA-667.) Carrasco ultimately hired Gonzalez's company as an independent contractor to clean Mathis's skylight. (Op. at p. 5) From 2007 until December 2012, Hollywood Hills Window Cleaning was "regularly hired ... to wash the skylight and perform other services on the property."[3] (*Id.* at pp. 2–3.)

Gonzalez relied on his expertise and decades of experience to oversee the cleaning of the skylight. Neither Mathis nor Carrasco ever told Gonzalez "how [his] company should do the services" or "how to clean the skylight[]." (1-AA-104; 2-AA-307; 3-AA-561.) Nor could they have supervised this work—Carrasco, then in her 70s, was a housekeeper who had been on the roof only three or four times in the entire 40 years she worked for Mathis. (3-AA-677–679.) Mathis, meanwhile, was almost 80 years old and recovering in the hospital from hip surgery at the time of Gonzalez's accident. (2-AA-317.)

2. Having cleaned Mathis's skylight for 20 years, and accessed the roof "many, many times," Gonzalez knew the details

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[3] The Court of Appeal loosely referred to Gonzalez (rather than his company) as the independent contractor, but it is undisputed that Mathis contracted with Gonzalez's company to clean the skylight. (See 2-AA-319). In any event, the *Privette* framework applies to injuries sustained by either "the contractor himself" or "the contractor's employee." (*SeaBright*, *supra*, 52 Cal.4th at p. 600, italics omitted.)

of Mathis's roof well. (3-AA-673; see Op. at p. 3.) A one-story ladder accessing the roof is permanently affixed to the west side of the house. (Op. at p. 3.) An approximately three-foot high parapet wall begins near the top of the ladder, separating the main, interior part of the roof, including the skylight, from an exposed outer ledge, roughly two feet wide.[4] (*Id.* at p. 2.) Although ventilation pipes and other mechanical equipment somewhat limit mobility, Mathis presented video and photographic evidence that individuals can walk inside of the parapet wall, even side-by-side. (See 4-AA-838–841; see also 1-RA-1.)

Unbeknownst to Mathis, Gonzalez and his employees "always" used the ledge on the outside of the three-foot parapet wall to access the skylight. (Op. at p. 3.) Gonzalez "knew [that] the ledge lacked any protective features," such as guard rails. (*Id.* at p. 4; see also 3-AA-673). Gonzalez also stated that "[e]verybody knew" that the presence of loose pebbles and sand on the roof made it "slippery." (1-AA-144–146; see 3-AA-673.) Indeed, Gonzalez claimed that he discussed these conditions with his employees for years prior to his fall. (3-AA-673.) But there is no evidence that Gonzalez or his employees took numerous possible safety precautions against that purported hazard—such as sweeping up the alleged loose pebbles or sand, holding onto the parapet wall, walking on the inside of the parapet wall, putting up a ladder closer to the skylight, setting up a safety net near the workspace, using a harness, or other potential precautions. Instead, neither

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[4] Photographs of the ladder, parapet wall, and ledge are available at 1-AA-48–58.

he nor his employees ever attempted to take any safety measures other than not walking too close to the ledge. (3-AA-564–565, 582).

Gonzalez even admitted below that there were at least "two preventive measures available in the instant case[:] repairing the roof and installing safety hooks." (Appellant's Opening Brief, Court of Appeal, filed Jan. 12, 2017, at p. 25.) But he did not allege nor point to any evidence that he ever asked Mathis or Carrasco to install safety hooks. And although Gonzalez claimed that he told Mathis's housekeeper that certain portions of the roof needed repair (Op. at p. 3), there is no evidence that he directed his employees not to clean the skylight in the meantime, or ever told Mathis or Carrasco that he could not safely clean the skylight absent those repairs.

3. In the summer of 2012, Carrasco once again hired Gonzalez to clean the house and the skylight. (3-AA-693.) While two of Gonzalez's employees were cleaning the skylight, Carrasco noticed water leaking into the house. (3-AA-568.) She asked Gonzalez to tell his employees on the roof to use less water so as to not damage the interior of the home. (3-AA-570.) After he spoke to his employees, Gonzalez decided to leave the roof. (1-AA-115; 3-AA-673.) In so doing, he chose to walk on the two-foot ledge outside the parapet wall, rather than walking inside of it. (*Ibid.*) He did not try to hold on to the parapet wall or take any safety precaution other than trying not to walk too close to the ledge. (3-AA-564–565, 3-AA-582.) Gonzalez lost his footing and fell to the ground, sustaining serious injury. (3-AA-580–583.)

B. Procedural Background

1. On April 11, 2014, Gonzalez sued Mathis, asserting claims based on premises liability and negligence. (1-AA-1–5.) After full briefing and a hearing, the trial court granted Mathis's motion for summary judgment on March 8, 2016, holding that under *Privette* and its progeny, Mathis was not liable for Gonzalez's injury.[5] (4-AA-870–871.) In so ruling, the court held that neither of *Privette*'s two exceptions applied. The court found *Hooker*'s retained-control exception inapplicable because neither Mathis nor Carrasco controlled the operative details of Gonzalez's work or affirmatively contributed to his injury. (4-AA-870.) The court likewise found *Kinsman*'s concealed-hazard exception inapplicable because "[n]one of the conditions were concealed to" Gonzalez, as Gonzalez readily admitted that he "knew of the purported dangerous conditions." (4-AA-871.)

2. The Court of Appeal reversed. (Op. at p. 2.) The court agreed with the trial court that Gonzalez was hired "as an independent contractor," and that his "claims are therefore subject

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[5] The trial court also sustained Mathis's objections to declarations submitted by Gonzalez's purported "experts" Brad Avrit (3-AA-625–629) and Ernest Orchard (3-AA-629–635). (See 1-RA-4–6; 4-AA-849–856.) Although Gonzalez did not appeal this ruling, he nonetheless impermissibly has sought at times to rely on the excluded evidence. (See Gonzalez Answer to Petition for Review, filed Apr. 6, 2018, at pp. 8–9, citing 3-AA-627, 631–633.) To the extent he attempts to do so again here, it is improper. (See *Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 334, citation omitted [court reviewing grant of summary judgment shall not consider "evidence . . . to which objections have been made and sustained"].)

to *Privette* and its progeny." (*Id.* at p. 14.) The court further agreed that an independent contractor's employees are generally prohibited from suing the contractor's hirer for workplace injuries. (*Id.* at p. 4.)

The court next analyzed whether either of the "two exceptions" to *Privette*'s rule articulated in *Hooker* and *Kinsman* applied. (Op. at p. 9.) The court first held *Hooker*'s retained control exception was inapplicable because Gonzalez presented no evidence that Mathis retained control over the worksite in a manner that affirmatively contributed to his injuries. (*Id.* at pp. 14–17.) The court rejected Gonzalez's argument that Mathis retained control because Mathis was allegedly "the only party who had authority to fix the dangerous conditions on the roof." (*Id.* at p. 16.) As the court explained, "'[p]assively permitting an unsafe condition to occur'" is "not sufficient to establish liability under *Hooker*." (*Ibid.*, citation omitted.) The court also reiterated that a homeowner's "failure to institute specific safety measures is not actionable unless there is some evidence the hirer . . . had agreed to implement these measures." (*Ibid.*, citation omitted.) Because Gonzalez "presented no evidence showing that Mathis ever agreed to remedy the conditions on the roof," the court held that Mathis could not be liable under *Hooker* for Gonzalez's injuries. (Op. at pp. 16–17.)

The court next turned to *Kinsman*. Because Gonzalez admitted that he was well aware of the purported hazards on the roof, *Kinsman's* exception for concealed hazards indisputably did not apply. The Court of Appeal, however, believed that *Kinsman*

provides for an additional exception. Relying on language it conceded to be "technically dicta" (Op. at p. 18, fn. 1), the court pointed to *Kinsman*'s acknowledgment that there "'may be situations . . . in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part to remedy the hazard because knowledge of the hazard is inadequate to prevent injury'" (*id* at p. 12, quoting *Kinsman*, *supra*, 37 Cal.4th at p. 673). Although *Kinsman* had no occasion, given the facts of that case, to decide whether or in what circumstances landowners *would* owe such a duty—or more importantly, whether that duty could be delegated like "any tort law duty the hirer owes to the contractor's employees" (*Seabright*, *supra*, 52 Cal.4th at p. 594), the Court of Appeal held that *Kinsman* created a third exception to *Privette*, resulting in the following rule: Although a "hirer cannot be held liable for injuries resulting from open or known hazards the contractor could have remedied through the adoption of reasonable safety precautions," a "hirer can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." (Op. at pp. 18–19.)

Applying this newfound rule, the court held that summary judgment was now unavailable to Mathis unless he could "establish[] as a matter of law that [the contractor] could have remedied the dangerous conditions of the roof through the adoption of reasonable safety precautions." (Op. at p. 20.)

Although the court acknowledged that video and photographic evidence of Mathis's roof "certainly cast doubt on

Gonzalez's assertion" that he could not have avoided the ledge simply by walking on the inside of the parapet wall, the court found that such evidence could not "conclusively establish[]" that fact. (Op. at p. 21.) The court speculated that Gonzalez's "ability to traverse the area inside the parapet wall" "might" have been affected by "his size" or the possibility that he was "required to carry equipment that rendered the pathway impassable." (*Id.* at p. 22.) Although Gonzalez presented no evidence to support those theories, one of which contradicted Gonzalez's own testimony that he was not carrying anything when he fell (3-AA-582), the court believed that it was Mathis's obligation to "present[] evidence *negating* ... factors that might have affected Gonzalez's ability to traverse the area inside the parapet wall." (Op. at p. 22, italics added.)

The court did not address the safety precautions that even Gonzalez admitted could have remedied the risk. The court also rejected any inquiry into whether Gonzalez's claimed inability to take precautions was foreseeable to Mathis, holding that "a hirer's liability for injuries resulting from an open hazard is not dependent on the foreseeability that a contractor might encounter the hazard." (Op. at p. 19, fn. 2.) Instead, the court reversed the district court's judgment and remanded for trial. (*Id.* at p. 23.)

3. Mathis filed a petition for rehearing, which the Court of Appeal denied on March 2, 2018. Mathis filed a Petition for Review in this Court on March 19, 2018. This Court granted the Petition on May 16, 2018.

ARGUMENT

I. HIRERS WHO DELEGATE RESPONSIBILITY FOR WORKPLACE SAFETY TO CONTRACTORS ARE NOT LIABLE FOR INJURIES RESULTING FROM OBVIOUS WORKPLACE HAZARDS

The *Privette* doctrine affords homeowners and other hirers the "right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 269.) "By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*SeaBright, supra*, 52 Cal.4th at p. 594, italics omitted.) "[A]ssignment of liability to the contractor follow[s] that delegation." (*Kinsman, supra*, 37 Cal.4th at p. 671, citing *Privette, supra*, 5 Cal.4th at p. 693.) As a result, "when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*SeaBright, supra*, 52 Cal.4th at p. 594, citation omitted.)

This Court has long recognized two exceptions to *Privette*'s rule, under which an independent contractor's employee may recover in tort from a hirer. But both narrow exceptions spring from situations in which a hirer effectively *declines* to delegate responsibility for safety at the worksite to the contractor, either by: (1) retaining control over the worksite and affirmatively contributing to the employee's injury, or (2) actively concealing from the contractor the hazard that produces the injury. Where, as here, however, a homeowner or other hirer exercises his or her

right to "delegate[] 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." (*Kinsman*, *supra*, 37 Cal.4th at p. 674, citation omitted.)

Because the Court of Appeal's new exception would upend that settled framework and undermine *Privette*'s important policies, this Court should reject it and reverse the decision below.

A. Under *Privette*'s Framework, Hirers Have The Right To Delegate Responsibility For Ensuring Workplace Safety To Hired Contractors

1. At common law, "when a hirer delegated a task to an independent contractor, it in effect delegated responsibility for performing that task safely, and assignment of liability to the contractor followed that delegation." (*Kinsman*, *supra*, 37 Cal.4th at p. 671, citation omitted); see Rest.2d Torts, § 409.) Over time, however, courts "severely limited the hirer's ability to delegate responsibility and escape liability." (*Kinsman*, *supra*, 37 Cal.4th at p. 671, citation omitted.)

In particular, courts fashioned the "peculiar risk doctrine," an "'exception to the general rule of nonliability'" designed "'to ensure that *innocent third parties* injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries.'" (*Kinsman*, *supra*, 37 Cal.4th at p. 668, italics added, quoting *Privette*, *supra*, 5 Cal.4th at p. 694.) "Gradually, the peculiar risk doctrine was expanded to allow the hired contractor's

employees to seek recovery from the nonnegligent property owner for injuries caused by the negligent contractor." (*Privette*, *supra*, 5 Cal.4th at p. 696.)

In *Privette*, however, this Court recognized that "the justifications for the peculiar risk doctrine did not apply to situations in which a contractor's employee is injured and workers' compensation is available." (*Kinsman*, *supra*, 37 Cal.4th at p. 668.) As this Court explained:

> [T]he peculiar risk doctrine "seeks to ensure that injuries caused by contracted work will not go uncompensated, that the risk of loss for such injuries is spread to the person who contracted for and thus primarily benefited from the contracted work, and that adequate safety measures are taken to prevent injuries resulting from such work. But in the case of on-the-job injury to an employee of an independent contractor, the workers' compensation system of recovery regardless of fault achieves . . . identical purposes . . . . It ensures compensation for injury by providing swift and sure compensation to employees for any workplace injury; it spreads the risk created by the performance of dangerous work to those who contract for and thus benefit from such work, by including the cost of workers' compensation insurance in the price for the contracted work; and it encourages industrial safety."

(*Privette*, *supra*, 5 Cal.4th at p. 701, original alterations, citation omitted.) *Privette* thus restored the right of a hirer "'to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment.'" (*SeaBright*, *supra*, 52 Cal.4th at pp. 600, 602, citation omitted.)

Since *Privette*, this Court has "extended and elaborated" on its rule, explaining that *Privette*'s holding is not limited to cases

asserting a "peculiar risk" theory, but broadly applies to all manner of tort suits under which an independent contractor's employee attempts to recover from the hirer. (See, e.g., *Toland*, *supra*, 18 Cal.4th at p. 268 [rejecting hirer liability despite hirer's allegedly "superior knowledge" of proper safety precautions]; *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244–1245 [rejecting hirer liability where hirer allegedly was responsible for "negligent hiring" of contractor that led to injury].)

Privette's resulting framework entitles a hirer to "delegate[] to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*Seabright*, *supra*, 52 Cal.4th at p. 594, italics omitted.) So long as the hirer exercises his right to delegate, "when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*Ibid.*, citing *Privette*, *supra*, 5 Cal.4th at p. 689.)

2. The *Privette* doctrine "reflect[s] a strong policy 'in favor of delegation of responsibility and assignment of liability' to independent contractors." (*SeaBright*, *supra*, 52 Cal.4th at p. 602, quoting *Kinsman*, *supra*, 37 Cal.4th at p. 671.) As this Court's cases establish, *Privette*'s framework is informed by a number of important policy considerations.

First, the *Privette* doctrine "'encourages industrial safety'" by prompting homeowners and other hirers to delegate work and responsibility for worksite safety to an independent contractor. (*Kinsman*, *supra*, 37 Cal.4th at p. 668, citation omitted.) "'Independent contractors are frequently, if not usually, hired

because the landowner is aware of his own lack of expertise and seeks to have the work performed as safely and efficiently as possible by hiring those possessing the expertise he lacks.'" (*Monk v. Virgin Islands Water & Power Authority* (3d Cir. 1995) 53 F.3d 1381, 1393, citation omitted; *cf. Gagne v. Bertran* (1954) 43 Cal.2d 481, 489 (Traynor, J.) ["The services of experts are sought because of their special skill."].) Gonzalez illustrates the point, inviting customers to hire his company because it "*specialized* in hard to reach windows and skylights" and because he and his workers were "[m]eticulous," "careful," and could "get the job done thoroughly and quickly." (3-AA-669, italics added.)

Compared to a homeowner or hirer, "the contractor better understands the nature of the work and is better able to recognize risks peculiar to it." (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 840; see, e.g., Douglas, *Vicarious Liability and Administration of Risk I* (1929) 38 Yale L.J. 584, 601 (Douglas) [noting that between the hirer and the contractor, the contractor "stands in the more strategic position to be cognizant of the various devices available to lessen the probability of injury"].) By encouraging businesses (and homeowners) to "hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees" (or do it themselves), *Privette* promotes workplace safety. (*Privette, supra*, 5 Cal.4th at p. 700, citations omitted.)

Second, "central" to *Privette*'s rule is the recognition that a homeowner or hirer generally "ha[s] 'no right of control as to the mode of doing the work contracted for.'" (*Privette, supra*, 5 Cal.4th at p. 693, citation omitted; see also *SeaBright, supra*, 52 Cal.4th at

p. 599.) "When an independent contractor is hired to perform inherently dangerous construction work, that contractor, unlike a mere employee, receives authority to determine how the work is to be performed" and "assumes a corresponding responsibility to see that the work is performed safely." (*Tverberg, supra*, 49 Cal.4th at p. 528.) Because the manner in which the resulting work is to be done is "the contractor's own enterprise" (*Privette, supra*, 5 Cal.4th at p. 693), *Privette*'s rule reflects that the contractor, "rather than the [hirer], is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it" (Prosser & Keeton, Torts (5th ed. 1984) § 71, p. 509).

Thus, under *Privette*, a contractor delegated control over a worksite is responsible for identifying the risks inherent in the work and distributing that risk to hirers by including "the cost of safety precautions and insurance coverage" in the contract price. (*Privette, supra*, 5 Cal.4th at p. 693, citations omitted.) That arrangement reflects that a contractor is "better able than the person employing the contractor to absorb accident losses" in the first instance (*ibid.*), while leaving the hirer to pay for the cost of insuring against those loses "as part of the price of the contract" (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 13).

Third, the *Privette* doctrine is rooted in the availability and exclusivity of workers' compensation. (See *Privette, supra*, 5 Cal.4th at p. 697.) Under California's workers' compensation scheme, an "'employer assumes liability for . . . personal injury or death without regard to fault,'" including injuries attributable to

"the employer's failure to provide a safe workplace." (*Ibid.*, citations omitted). Recovery under workers' compensation is designed to be the "exclusive remedy" for workplace injuries. (*Id.* at p. 698.) Independent contractors (who have the primary responsibility for workplace safety) are not liable in tort for their employees' injuries; employees are instead limited to recovering workers' compensation. (*Ibid.*)

Privette's framework recognizes that "'the rule of workers' compensation exclusivity . . . should equally protect the property owner who, in hiring the contractor, is indirectly paying for the cost of such coverage, which the contractor presumably has calculated into the contract price.'" (*Camargo*, *supra*, 25 Cal.4th at pp. 1239–1240, quoting *Privette*, *supra*, 5 Cal.4th at pp. 699–700.) To impose greater liability on "a person who hires an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees." (*Privette*, *supra*, 5 Cal.4th at p. 700, citation omitted.)

Finally, and relatedly, *Privette* recognizes that permitting injured employees of independent contractors to sue hirers "would give [those employees] an 'unwarranted windfall'" that is unavailable to employees who do not work for contractors—"the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment." (*Camargo*, *supra*, 25 Cal.4th at p. 1245, citation omitted.)

3. This Court has recognized only two exceptions to *Privette's* general rule, each of which implicate scenarios in which

a hirer chooses *not* to delegate responsibility for safety at a worksite to the independent contractor.

a. First, in *Hooker*, this Court recognized that a hirer "'who entrusts work to an independent contractor, but who retains the control of any part of the work'" may be liable for the injuries of an independent contractor's employees when "[the] hirer's exercise of retained control affirmatively contribute[s] to the employee's injuries." (27 Cal.4th at p. 201–02, citation omitted.) *Hooker* sensibly recognizes that when a hirer "actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury," the hirer has "not fully delegate[d] the task of providing a safe working environment" to the contractor and may therefore "be liable in tort to the employee." (*Kinsman*, *supra*, 37 Cal.4th at p. 671; see *Hooker*, *supra*, 27 Cal.4th at p. 210.)

Hooker was careful to reiterate, however, that because the liability of the contractor—the person primarily responsible for workplace safety—is limited to providing workers' compensation coverage, "it would be unfair to impose tort liability on the hirer of the contractor merely because the hirer retained the *ability* to exercise control over safety at the worksite." (27 Cal.4th at pp. 210–211, italics added.) As such, the Court held that even a hirer who retains control over a worksite may be liable only where the hirer's "exercise of retained control *affirmatively contributed* to the employee's injuries" by "'e.g., inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise.'" (*Id.* at pp. 210–212, italics added, citation omitted; see

also *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225 [hirer affirmatively contributed to injury by providing defective equipment to contractor's employees].)

Hooker makes clear that "'passively permitting an unsafe condition to occur . . . does not constitute affirmative contribution.'" (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1092–1093, petn. for review denied June 13, 2018, italics & citations omitted.) As a result, a homeowner or other hirer is not liable in tort to a contractor's employee merely because it fails "'to prevent the creation or continuation of a hazard.'" (*Hooker*, *supra*, 27 Cal.4th at pp. 210–211, quoting *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 36.)

b. The Court recognized a second exception to *Privette*'s general rule in *Kinsman*, holding that "the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (37 Cal.4th at p. 675.) As the Court explained, "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." (*Id.* at p. 674, citation omitted.) *Kinsman* found that "the rule must be different," however, where a hirer affirmatively conceals a hazard of which the independent contractor neither is aware, nor reasonably could

be expected to discover. (*Ibid.*) In such a case, the Court recognized that it makes little sense to fix responsibility for injuries stemming from the hidden hazard on the independent contractor, because a hirer that conceals a hazard from an independent contractor cannot be said to delegate responsibility to the contractor to safely avoid that hazard. (See *id.* at pp. 674–675.)

3. Both of *Privette*'s exceptions fit comfortably within the doctrine's overall framework and accord with the "strong policy" underlying *Privette* to *promote* the delegation of responsibility to independent contractors. (*SeaBright, supra*, 52 Cal.4th at p. 596, citation omitted.) Where, however, a homeowner or other hirer exercises her "right to delegate to independent contractors the responsibility of ensuring the safety of their own workers" (*Toland, supra*, 18 Cal.4th at p. 269), this Court has consistently reaffirmed that the hirer "'has no duty to act to protect the [contractor's] employee when the contractor fails in that task'" (*SeaBright, supra*, 52 Cal.4th at pp. 601–602, quoting *Kinsman, supra*, 37 Cal.4th at pp. 671, 674).

B. The Court of Appeal's New Exception Is Incompatible With *Privette*'s Framework And Should Be Rejected

The Court of Appeal recognized that neither of the two recognized exceptions to *Privette* apply in this case: Mathis did not retain control over the worksite in a manner that affirmatively contributed to Gonzalez's injury, and any hazard associated with working on Mathis's roof was well known to Gonzalez. (See *supra* at pp. 17-18.) The court nevertheless believed that certain language in *Kinsman* that it recognized was "technically dicta"

"indicate[d]" that the "principles of delegation" set forth in *Privette* and its progeny established a third exception to *Privette*'s general rule, under which a hirer "can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." (Op. at pp. 18–19 & fn. 1.)

Far from promoting California's "strong policy 'in favor of delegation of responsibility and assignment of liability' to independent contractors[]" (*SeaBright*, *supra*, 52 Cal.4th at p. 596, quoting *Kinsman*, *supra*, 37 Cal.4th at p. 671), the Court of Appeal's new exception deeply undermines it. The exception is fundamentally inconsistent with *Privette's* framework, and incompatible with this Court's decisions in *Hooker*, *Tverberg*, and *Seabright*. Moreover, as the numerous *amici* who supported the petition for review in this case have explained, the Court of Appeal's rule would frustrate *Privette*'s goals and precipitate myriad harmful consequences—discouraging reliance on expert contractors, "arbitrarily favor[ing] some claimants with work-related injuries over others," and exposing homeowners and other hirers to increased risk of "catastrophic loss"—results likely to "substantially increas[e] the costs of purchasing or maintaining homes," drive up insurance premiums, and increase construction costs. (See Ltr. of Amicus Curiae, California Assn. of Realtors at pp. 3–5; Ltr. of Amicus Curiae, California Bldg. Assn., et al. at pp. 2–5; Ltr. of Amicus Curiae, American Ins. Assn. at p. 3; Amicus Curiae, Ltr. of Associated Gen. Contractors of California at pp. 1–6; see also Pet. at p. 24.)

This Court should reject those results. No other California appellate court has adopted the Court of Appeal's reading of *Kinsman* dicta in the twenty years since that decision. And for good reason. Not only is it incompatible with *this Court's* decisions both before and after that case, it is fundamentally at odds with *Privette*'s important policies, unworkable in practice, and inconsistent with *Kinsman* itself.

1. The Court Of Appeal's New Exception Is Incompatible With This Court's Decisions

Privette affords hirers the "right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Toland, supra*, 18 Cal.4th p. 269.) "[T]he 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[.]" (*Kinsman, supra*, 37 Cal.4th at p. 674, citation omitted.) The Court of Appeal's new exception contravenes that principle and would eviscerate the careful framework developed by this Court over the last three decades.

a. First, the Court of Appeal's novel reading of *Kinsman* renders *Hooker*'s important limitations a nullity. Under *Hooker*, an independent contractor's employees may not recover from a property owner for injuries sustained from known hazards—even if the hirer retains control over that jobsite—unless the hirer affirmatively contributes to the injury. (27 Cal.4th at p. 202, fn. 2.) Under the Court of Appeal's decision, however, a hirer who *does not* retain control over the jobsite and *does not* affirmatively contribute to the injury can now be liable. Requiring a lesser showing to impose liability on a hirer who has delegated more

control for safety to an independent contractor not only is imprudent, it is impossible to reconcile with California's "strong policy 'in favor of delegation of responsibility and assignment of liability' to independent contractors." (*SeaBright*, *supra*, 52 Cal.4th at p. 596, citation omitted.)

As this case illustrates, the Court of Appeal's new rule renders *Hooker*'s limitations meaningless. Gonzalez conceded that "Mathis and Carrasco had never told him how he should clean the skylight." (Op. at p. 15.) And Gonzalez could not show how either Mathis or Carrasco affirmatively contributed to his injury. Instead, Gonzalez alleged nothing more than that Mathis, at most, passively allowed unsafe "conditions on the roof . . . to persist." (*Id.* at pp. 16–17.) *Hooker* made clear that "'passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution.'" (*Delgadillo*, *supra*, 20 Cal.App.5th at 1092–1093, citation omitted; see also *Hooker*, 27 Cal.4th at pp. 210–211, citation omitted [holding that a hirer may not be held liable merely because he fails "'to prevent the creation or continuation of a hazard'"].)

While *Hooker* provides that hirers like Mathis cannot be held liable, the Court of Appeal's newfound exception holds the reverse, even in cases (like this one) where the hirer delegated responsibility to a contractor. In so doing, the court's new exception permits liability for "passively permitting an unsafe condition to occur rather than directing it to occur" (*Delgadillo*, *supra*, 20 Cal.App.5th at 1092–1093, citation omitted)—precisely what *Hooker* squarely rejected.

b. Second, the Court of Appeal's decision cannot be reconciled with *Tverberg*. In *Tverberg*, an independent contractor (Tverberg) was hired by a general contractor to erect a metal canopy at a construction site next to eight large "bollard" holes that had been dug for another component of the construction project. (49 Cal.4th at pp. 522–523.) The bollard holes "had no connection to the building of the metal canopy." (*Id.* at p. 523.) Although Tverberg twice asked the general contractor to cover the holes, the general contractor did not do so, and Tverberg was injured after falling into one of the holes. (*Ibid.*)

This Court unanimously held that unless Tverberg could satisfy *Hooker*'s retained-control exception, he could not recover. As this Court explained, "an independent contractor, by virtue of the contract, has authority to determine the manner in which inherently dangerous construction work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." (*Tverberg, supra*, 49 Cal.4th at p. 522.)

As a result, this Court found that "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*, a 'hapless victim' of someone else's misconduct" (*ibid.*, quoting *Privette, supra*, 37 Cal.4th at p. 694). Moreover, this Court explained that those injuries "are covered by workers' compensation insurance, the cost

of which is generally included in the contract price for the project." (*Id.* at p. 521, citation omitted.)

The Court of Appeal's decision is incompatible with *Tverberg*. Much like Gonzalez argues he lacked the ability to remedy the asserted hazard on Mathis's roof, Tverberg argued it was not his "responsibility to cover the holes" and he lacked "the ability to" do so. (*Tverberg*, Merits Ans. Br. at p. 53.) Indeed, Tverberg *twice* identified the hazard posed by the bollard holes to the general contractor and asked him to address it. (49 Cal.4th at p. 523.) But although the bollard holes posed an open and obvious hazard that Tverberg could not remedy himself, this Court *unanimously* held that Tverberg could not recover tort damages from his injury absent a showing that *Hooker*'s retained control exception applied.[6] The Court of Appeal's newfound exception cannot be reconciled with that result.

c. Finally, the Court of Appeal's exception is inconsistent with *Seabright*'s clear rule. The Court of Appeal rooted its new exception in dicta in *Kinsman* noting that "[t]here may be situations . . . in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part to remedy the hazard." (37 Cal.4th at 673.) Whether or not such situations give rise to a *duty*, however, is not dispositive of liability.

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[6] Although "[t]he bollards had no connection to the building of the canopy," this Court recognized that "the possibility of falling into one of those holes constituted an inherent risk of the canopy work," because it was a "risk[] inherent in the nature or the location of the hired work." (*Tverberg*, *supra*, 49 Cal.4th at pp. 523, 528–529.)

Rather, as *Seabright* explained, "[b]y hiring an independent contractor, the hirer implicitly delegates to the contractor *any tort law duty* it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (52 Cal.4th at p. 594, italics added.) "Absent an obligation, there can be no liability in tort." (*Toland, supra*, 18 Cal.4th at p. 267, citation omitted.)

The comprehensive delegation envisioned by *Privette* even includes "any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements." (*Seabright, supra*, 52 Cal.4th at p. 594.) Thus, in *Seabright*, this Court held that the employee of an independent contractor could not recover from the hirer (US Airways), notwithstanding the employee's claim that his injuries stemmed from US Airways' failure to add safety guards to its conveyor belts as required by Cal-OSHA regulations. (*Id.* at pp. 594–595.)

The Court of Appeal's new exception sharply contradicts *Seabright*'s reasoning and would produce bizarre results—making a hirer immune 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, delegates control of the worksite to the independent contractor, and has no reason to believe that the contractor is incapable of taking reasonable precautions. Those results would 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 (hence the underlying premise of delegating workplace safety to the more knowledgeable contractor in the first place).

For each and all of these reasons, the Court of Appeal's exception would swallow *Privette*'s rule and wreck the framework carefully developed by this Court over the last quarter century.

2. The Court Of Appeal's New Exception Undermines *Privette*'s Important Policies

By exposing those who hire expert independent contractors to greater tort liability than either the contractors primarily responsible for worksite safety or those who rely on their own less-skilled workers to complete the job, the Court of Appeal's exception would also significantly frustrate the policies underlying *Privette*'s framework.

a. First, the Court of Appeal's new rule would discourage delegation to skilled independent contractors by "penaliz[ing] those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees." (*Privette*, *supra*, 5 Cal.4th at p. 700, citation omitted.) That result would diminish workplace safety and contradict *Privette*'s "strong policy 'in favor of delegation of responsibility and assignment of liability' to independent contractors." (*SeaBright*, *supra*, 52 Cal.4th at p. 596, citation omitted.)

b. Second, the Court of Appeal's exception disregards that when a hirer engages an independent contractor to complete a task, "control over the performance of the work" belongs to the contractor—not the hirer. (*Tverberg*, *supra*, 49 Cal.4th at p. 528.) The hirer, by contrast, "not only fails to occupy [the contractor's] strategic position in respect to the prevention of the risks, but is

relatively unqualified to pass judgment on what safety devices should be employed, what the conditions of work should be, what the labor qualifications are, and so on." (Douglas, *supra*, 38 Yale L.J. at p. 602.)

Imposing a *greater* tort law duty on a hirer to protect the safety of its contractors' employees as compared to the duty placed on the contractor actually in control of the employees' performance makes little sense. It would require the hirer to "identify and protect against dangers best known and apparent to the experts he has hired to do the job," notwithstanding that "the special risks involved and the protections necessary to avoid the risk are often beyond the owner's expertise." (*Zueck v. Oppenheimer Gateway Properties, Inc.* (Mo. 1991) (en banc) 809 S.W.2d 384, 387.) "This inequity in expertise and awareness of dangers is never greater than where," as here, the hirer is "a residential landowner." (*Id.* at p. 388, fn. 1; see also Ltr. of Amicus Curiae, California Assn. of Realtors at pp. 3–5 [noting that independent contractors will generally have a "vastly superior understanding" of their work and the hazards involved relative to homeowners]; Ltr. of Amicus Curiae, American Insurance Assn. at p. 3 [same].)

Under the Court of Appeal's new exception, however, a homeowner would be forced at peril of "financial ruin," to protect independent contractors' employees from the dangers attendant to countless tasks (*Zueck*, *supra*, 809 S.W.2d at p. 388, fn. 1.)—from washing a skylight or hard-to-reach window, to fixing a roof, to rewiring an electrical outlet. That is so even though the homeowner hired the independent contractor precisely because he

or she lacked the expertise to do the work in the first place, let alone the expertise to (1) anticipate how in particular the contractor plans to complete the work, (2) identify what safety precautions are available given that plan, (3) assess whether those safety precautions are reasonable, and (4) implement the precautions. That novel regime is directly at odds with *Privette*'s recognition that because an independent contractor is delegated control of the work—it is better suited to "ensure the safety of the specific workplace that is the subject of the contract." (*SeaBright*, *supra*, 52 Cal.4th at p. 594).

Third, the decision frustrates reliance on the availability and exclusivity of workers compensation as the remedy for workplace accidents. (See *Privette*, *supra*, 5 Cal.4th. at pp. 697–699.) As this Court has explained, a contractor is generally better situated to absorb accident losses and distribute that risk by "'indirectly including the cost of safety precautions and insurance coverage in the contract price.'" (*Hooker*, *supra*, 27 Cal.4th at p. 213, citations omitted.) *Privette* recognizes that "it would be unfair to permit the injured employee to obtain full tort damages from the hirer" because (1) the hirer already "paid indirectly for the workers' compensation insurance as a component of the contract price"; (2) "the hirer has no right to reimbursement from the contractor even if the latter was primarily at fault"; and (3) it would afford an inequitable and arbitrary windfall to some workers but not others based on the happenstance of whether they work for an independent contractor. (*Seabright*, *supra*, 52 Cal.4th at p. 599, citation omitted.)

It would be particularly perverse to impose tort liability on a homeowner, while limiting a contractor's exposure to workers' compensation, in a scenario in which the contractor *knowingly* exposes his employees to hazards against which—unbeknownst to the hirer—the contractor believes no adequate safety precautions are available. (See, e.g., *Rasmus v. Southern Pacific Co.* (1956) 144 Cal.App.2d 264, 268, citation omitted ["[I]f the employer knows . . . that the third party's premises are dangerous, the employer may be liable for the employee's injuries there."].) But the Court of Appeal's exception promotes just that result.

3. The Court of Appeal's New Exception To *Privette* Is Unworkable

Privette and its progeny recognize the importance of fashioning rules that provide clarity to hirers, independent contractors, and employees. Because *Privette*'s principles affect millions of transactions across California each year, the need for clear rules is obvious. And because *Privette* prioritizes reliance on workers' compensation rather than protracted litigation to compensate employees for workplace injuries, rules that encourage and prolong litigation in this context are disfavored.

For that reason, this Court has eschewed proposals to adopt rules that are difficult to apply in practice or under which a hirer "will never be able to prevail on a motion for summary judgment." (*Hooker*, *supra*, 27 Cal.4th at p. 212; see also *Toland*, *supra*, 18 Cal.4th at pp. 268–269; *Kinsman*, *supra*, 37 Cal.4th at p. 679.) Thus, in *Toland*, this Court refused to condition the availability of *Privette* on whether a hirer had "'superior knowledge ... of a special risk or the precautions ... to avoid it[]'" because—among other

things—that proposal's "practical application present[ed] considerable difficulties" and the rule would "not be amenable to summary judgment[.]" (18 Cal.4th at pp. 268–269, original alterations & citation omitted.)

The same problem exists here. To begin with, the Court of Appeal's rule would make it nearly impossible for a hirer to prevail on summary judgment unless *the hirer* can demonstrate as a matter of law that the contractor "could have remedied [the allegedly] dangerous conditions [producing the injury] through the adoption of reasonable safety precautions." (Op. at p. 20). This case illustrates just how difficult it would be to meet that standard. Mathis presented photographic and video evidence that Gonzalez could have walked inside the parapet wall—one among any number of precautions available to him, but which he chose not to take. Although admitting that "[t]he video and the photographs certainly cast doubt" on Gonzalez's story, the court nonetheless held summary judgment was improper unless Mathis could "conclusively establish[]" that a reasonable precaution was available. (*Id.* at p. 21.)

Not only would the Court of Appeal's rule make it nearly impossible to resolve tort claims on summary judgment, it would be difficult to apply in practice. Indeed, the court offered no guidance on how a trier of fact is supposed to determine whether a contractor had "reasonable safety precautions" available to it, leaving unanswered questions such as:

- In the context of an independent contractor's work, what constitutes a "*reasonable* safety precaution"? (Op. at p. 21,

fn. 3, italics added.) Does it turn on the cost of the precaution? Or does that not matter since the cost can always be passed along to the hirer in the contract price?

- Is a "reasonable safety precaution" available if beyond the unilateral control of the contractor?
- Is a "reasonable safety precaution" one that eliminates the risk altogether or simply reduces it? The Court of Appeal in this case, for example, appeared to assume that the *only* possible precaution was for Gonzalez to "avoid the ledge" altogether. (Op. at p. 21, fn. 3; see *id.* at pp. 20–22.)
- Is the "reasonableness" of the safety precaution judged from the perspective of the hirer or the contractor? If the hirer, does it depend on the hirer's knowledge of the particular work? And if the contractor, does it depend on industry custom?
- Does it matter whether *other* contractors could have taken reasonable safety precautions? The Court of Appeal speculated in this case, for instance, that Gonzalez's "size" "might" have prevented him from walking on the inside of the parapet wall. (Op. at p. 22.) Would the availability of that precaution change if a different employee could have fit on the inside of the wall?
- How dangerous must a hazard be before a homeowner's duty to remedy it is triggered?
- How must the homeowner determine the scope of the contractor's worksite for purposes of determining what

hazards he or she must inspect and potentially remedy before the contractor's work is performed?

- What if a homeowner, as here, is elderly and lacks the ability to inspect a given worksite, like a roof, to determine whether reasonable safety precautions are available? Must the homeowner hire someone to inspect before hiring the contractor for the work? Must the homeowner explicitly ask the contractor to identify whether precautions are available before the work is permitted to begin?

This sample of issues illustrates the considerable practical problems with the Court of Appeal's new rule and the concomitant uncertainty that homeowners, contractors, and insurers will face in its wake.

4. Nothing In *Kinsman* Supports The Erroneous Decision Below

In adopting its exception, the Court of Appeal addressed *none* of the considerations above—considering neither whether its exception could be reconciled with this Court's case law or *Privette*'s policies, nor how the rule ought to be applied in practice. Instead, the Court of Appeal drew its new exception solely from dicta in *Kinsman*. That dicta cannot bear the weight that the Court of Appeal assigned to it.

a. In *Kinsman*, in reviewing the history of premises liability principles at common law, the Court noted that "[t]here may be situations . . . in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part to remedy the hazard because knowledge of the

hazard is inadequate to prevent injury." (37 Cal.4th at p. 673; Rest.2d Torts, § 343A.)

Kinsman had no occasion, given the facts of that case, to decide whether or in what circumstances landowners would owe such a duty—or more importantly, whether that duty could be *delegated* like "any tort law duty the hirer owes to the contractor's employees" (*Seabright, supra*, 52 Cal.4th at p. 594). Nonetheless, the Court of Appeal held that *Kinsman*'s dicta should be understood to provide for an exception to *Privette*'s general rule under which a "hirer can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." (Op. at p. 19.)

b. As explained, *supra*, the Court of Appeal's reading of *Kinsman*'s dicta is incompatible with this Court's decisions and inconsistent with *Privette*'s policies. That alone is more than sufficient to reject it. But it is even at odds with *Kinsman*'s actual holding itself. Having addressed the scope of premises liability at common law, *Kinsman* did not adopt them wholesale; rather this Court concluded that "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." (*Kinsman, supra*, 37 Cal.4th at p. 674, italics added.)

As *Kinsman* noted, a landowner's duty was triggered at common law when (a) she knew or should have known of a hazard involving an unreasonable risk of harm to her invitees, and (b) she should have expected that the invitees "'will not discover or realize the danger, *or will fail to protect themselves against it.*'"

(37 Cal.4th at p. 674, quoting Rest.2d Torts, § 343.) This Court held that "[i]n light of the delegation doctrine reaffirmed by *Privette*, the italicized phrase does not seem applicable to landowner liability for injuries to employees of independent contractors. Because the landowner/hirer delegates the responsibility of employee safety to the contractor, the teaching of the *Privette* line of cases is that a hirer has no duty to act to protect the employee when the contractor fails in that task and therefore no liability." (*Ibid.*, citation omitted.)[7]

By excluding that italicized language, the Court limited the ability of an independent contractor's employee to recover under a premises liability theory to situations in which the hazard in question was concealed. It thus specifically *rejected* an employee's ability to recover in tort from injuries sustained from open and obvious hazards, even in a case—unlike this one—where the hirer *knows* that the contractor will fail to protect its employees. The Court reiterated the same point in a footnote, approvingly citing to *Glenn v. United States Steel Corp., Inc.* (Ala. 1982) 423 So.2d 152, 154, for the proposition that a hirer is "not liable for defects that

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[7] The principles of delegation on which the Court relied in *Kinsman* distinguish cases involving an independent contractor's employee from those like *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, which involved the scope of a lessor's "duty to exercise due care to protect *third persons* . . . who came onto the leased premises." (7 Cal.App.4th at p. 392, italics added.) *Privette*'s rule permits a landowner to delegate to a contractor any tort law duty to provide for the safety of the contractor's employees. (*Seabright, supra*, 52 Cal.4th at p. 594.) A landowner's responsibility to innocent third parties is a different matter.

the contractor reasonably should have been aware of."[8] (*Kinsman, supra*, 37 Cal.4th at p. 676, fn. 4.)

Kinsman itself cautioned against affording outsized importance to stray "'language in a judicial opinion,'" noting that "'[a]n opinion is not authority for propositions not considered.'" (37 Cal.4th at p. 680, citation omitted.) This case illustrates why. By reading *Kinsman*'s dicta to sanction a broad and novel exception to *Privette* for injuries resulting from obvious hazards, the Court of Appeal strayed not only from this Court's caselaw before and after *Kinsman*, but also from the ultimate holding of *Kinsman* itself.

c. The policies underlying the premises liability rule addressed by *Kinsman*'s dicta underscore why that rule is inapplicable with respect to a hirer's responsibility to the employees of her independent contractors.

First, under the common law rule, a landowner could only be liable to an invitee for injuries sustained by an invitee when the landowner would "'anticipate the harm despite [its] obviousness.'" (*Kinsman, supra*, 37 Cal.4th at p. 673, quoting Rest.2d Torts, § 343A.) In other words, a landowner's liability turned on whether it was foreseeable to the landowner that the invitee faced an unreasonable risk of harm notwithstanding the open and obvious nature of the hazard. (See *Krongos, supra*, 7 Cal.App.4th at p. 394

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[8] That of course accords with the default common law rule that a landowner "is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them." (Rest.2d Torts, § 343A(1).)

[stating that "[t]he most important policy consideration" is "foreseeability"].)

When the landowner delegates to the contractor the "responsibility to see that the work is performed safely[,]" however, a landowner generally has no reason to anticipate that a contractor's employee will suffer harm from obvious hazards—rather, the landowner anticipates that the contractor will fulfill its delegated responsibility to take "*all* safety precautions reasonably necessary to prevent" injury. (*Tverberg, supra*, 49 Cal.4th at p. 528, italics added; see *Kinsman, supra*, 37 Cal.4th at p. 673 [contractor's delegated responsibility "includes taking proper precautions to protect against obvious hazards in the workplace"].)[9]

Second, "[t]he law of premises liability" is grounded in the landowner's "'supervisory control over the activities conducted upon, and the condition of, the land.'" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1160, citation omitted.) "*The crucial element is control.*" (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1158, original italics, citation omitted.) But that crucial element is missing in this context, because the "hirer of an independent contractor *delegates* control over the work to the contractor" as well

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[9] Gonzalez relied in his Answer on language in this Court's cases affirming that a contractor assumes responsibility for "all safety precautions reasonably necessary to prevent [injuries]" stemming "from risks inherent in the hired work." (Ans. at p. 13, citations omitted.) Such statements merely reflect that a contractor who implements all reasonably necessary tort precautions would fulfill the tort law duty of care delegated to it. (See Reply iso Pet'n for Review, filed Apr. 16, 2018 at pp. 7-10.)

as "'responsibility for performing [the] task safely.'" (*Tverberg, supra*, 49 Cal.4th at p. 528, italics added, quoting *Kinsman, supra*, 37 Cal.4th at p. 671.) Indeed, the "'central'" component of nonliability for hirers of independent contractors is that the hirer "ha[s] 'no right of control.'" (*Hooker, supra*, 27 Cal.4th at p. 213, italics & citations omitted.)

Third, premises liability is based on the landowner's "superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property." (*Mautino v. Sutter Hosp. Assn.* (1931) 211 Cal. 556, 561, citations omitted.) But while a landowner's knowledge of hazards on his property might be superior to an ordinary invitee, that is not typically true when the invitee is an expert independent contractor. To the contrary, homeowners and businesses hire independent contractors *because* they are better equipped to identify and take precautions against risks associated with a particular job.[10] That is precisely why "the responsibility for job safety delegated to independent contractors" generally includes a duty "to engage in inspections of the premises implicitly or explicitly delegated to it." (*Kinsman, supra*, 37 Cal.4th at p. 677.)

d. In the over twenty years since *Kinsman* was decided, no other California appellate court has understood *Kinsman* to

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[10] Noting its potential to "eviscerate" *Privette*'s framework, this Court in *Toland* firmly rejected the suggestion that a hirer should be liable to an independent contractor's employees even in the unusual case where a hirer *does* have "superior knowledge ... of a special risk or the precautions ... to avoid it. (18 Cal.4th at pp. 268.)

establish the exception announced by the Court of Appeal in this case. To the contrary, other California courts have consistently rejected that understanding—even in cases with nearly identical facts to this case. Thus in *Delgadillo*, the family of an independent contractor's employee sued a commercial property owner after the employee fell to his death while washing the property's windows. (20 Cal.App.5th at p. 1081.) As in this case, the *Delgadillo* plaintiffs claimed the property owner failed to take adequate safety measures, including by failing to install safety anchors for the employee's use. (*Id.* at p. 1080.) Although the plaintiff presented evidence that there had been "'no safe method of cleaning that building'" at the time of the accident (*id.* at p. 1083), *Delgadillo* nonetheless held that the property owner could not be liable as a matter of law.

Madden v. Summit View, Inc. (2008) 165 Cal.App.4th 1267, reached a similar result. That case held that a subcontractor's employee could not recover against a hirer for injuries sustained when the employee fell from a raised, unenclosed patio—another factual scenario similar to that presented here. (*Ibid.*) The plaintiff alleged that his fall was caused by the defendant's failure to remedy a known hazard by installing a guardrail along the open side of the patio. (*Id.* at p. 1270.) As here, the plaintiff alleged that the subcontractor "would have required [the hirer's] approval" to address the hazard, *i.e.* by "install[ing] a railing." (*Id.* at p. 1271.) The court nonetheless granted summary judgment to the hirer—just as in *Delgadillo*.

Such examples are not exhaustive. But they underscore the manner in which the Court of Appeal's decision in this case sharply departs from other courts' understanding of the *Privette* doctrine.

* * *

The new rule adopted by the court below proposes to establish an unbounded exception to *Privette* that threatens to unravel the *Privette* doctrine and frustrate its important policy aims. The Court should reject this new exception and instead reaffirm that hirers are entitled to delegate to independent contractors the responsibility to provide a safe workplace for their employees.

II. AT A MINIMUM, THIS COURT SHOULD NARROW THE SCOPE OF THE COURT OF APPEAL'S NEW EXCEPTION

The Court of Appeal's newfound exception to *Privette* is fundamentally flawed and should be rejected. The Court of Appeal based its new exception on dicta in *Kinsman*, which in turn addressed the scope of a landowner's *duty* to invitees for open hazards under common law premises liability principles. (See Rest.2d Torts, § 343A, cited in *Kinsman*, *supra*, 37 Cal.4th at p. 673.) Those principles have little application, however, when the landowner has *delegated* "any tort law duty it owe[d] to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*Seabright*, *supra*, 52 Cal.4th at p. 594, italics omitted.) As such, they do not justify imposing liability against a hirer at all.

Even if this Court were to adopt a new exception founded on those principles, however, the Court of Appeal's exception is

manifestly overbroad for at least two reasons. First, as the common law principles underlying *Kinsman*'s dicta make clear, a landowner had a duty to protect invitees from open hazards only when it was *foreseeable* that they would be unable to take precautions against the open hazard at issue. By expressly rejecting any foreseeability requirement, the Court of Appeal completely severed the reach of its exception from the principles upon which it is supposedly based. To impose greater liability on a homeowner for injuries sustained by an independent contractor's employees than on any other invitee at common law is a nonsensical result fundamentally at odds with the *Privette* doctrine. Second, the Court of Appeal departed from longstanding California law and practice by placing the burden on the hirer at summary judgment to establish as a matter of law that no exception to *Privette* applies.

Absent narrowing, the Court of Appeal's exception would render summary judgment virtually impossible, imposing significant new costs on homeowners and hirers, as well as the courts who will now be forced to adjudicate these oft-filed claims to trial. Although this Court should not endorse an exception at all, it should at minimum narrow the scope of any new such exception to avoid further damage to *Privette*'s framework.

A. Any Exception Should Require The Contractor To Demonstrate His Inability To Take Precautions Was Foreseeable

In announcing its new exception to *Privette*, the Court of Appeal declared that "a hirer's liability for injuries resulting from an open hazard is not dependent on the foreseeability that a

contractor might encounter the hazard." (Op. at p. 19, fn. 2.) In so holding, the court sharply deviated from the common law premises liability principles underlying the dicta from *Kinsman* upon which the Court of Appeal purportedly relied.

At common law, a landowner was generally "not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them[.]" (Rest.2d Torts, § 343A(1); see also *Kinsman*, *supra*, 37 Cal.4th at p. 673.) Rather, a landowner owed a duty to protect his invitees from ordinary hazards only when the landowner "should [have] anticipate[d] that the [hazard] will cause physical harm to the invitee notwithstanding its known or obvious danger." (Rest.2d Torts, § 343A, com. f.) The key inquiry was not, therefore, whether "reasonable safety precautions" were available to the invitee, but whether it was *foreseeable* to the landowner that the invitee could not or would not take reasonable precautions to avoid the risk. (*Id.* at cmts. e–f.) Absent foreseeability, no duty of care would arise.

In the context of a landowner's delegation of authority to an independent contractor, it is ordinarily reasonable for a landowner to assume that an independent contractor will take reasonable safety precautions to protect their employees from obvious hazards. As Mathis did here, a landowner generally hires an independent contractor specifically because the contractor has superior knowledge, skill, and experience, and is better equipped to complete the work correctly and safely. Because a hirer reasonably expects that an independent contractor will "protect

against obvious hazards in the workplace" (*Kinsman, supra,* 37 Cal.4th at p. 673), a contractor's employee would have to make an extraordinary showing to overcome that expectation—demonstrating the property owner should have anticipated that the contractor could not protect against obvious hazards.

Had the court required Gonzalez to demonstrate that it was foreseeable that he could not take reasonable safety precautions, he could not have done so. Mathis was entitled to reasonably assume that Gonzalez—who had cleaned Mathis's roof for *twenty years* without incident, and held himself out as an expert "[s]pecializ[ing] in hard to reach windows and skylights," who "t[ook] extra care ... with [his] own safety when cleaning windows." (3-AA-667–669—could and was taking reasonable safety precautions against the evident danger of falling off the roof while accessing and cleaning the skylight. Indeed, Gonzalez admitted that he never even told Mathis that he considered the roof dangerous. (3-AA-552:10–12.) And although Gonzalez claims that he told Carrasco that the roof was slippery and should be repaired (2-AA-303:22–304:4), he did not allege, let alone offer evidence, that he informed either Mathis or Carrasco that his employees could not safely clean the skylight. Nor did he decline to perform the work absent further action from Mathis to ameliorate the purported hazard. Instead, he willingly deployed his employees to clean the skylight, and undertook no precautions for their safety (or his own) aside from trying to avoid walking too close to the ledge.

B. The Burden To Overcome *Privette*'s Presumption Belonged To Gonzalez, And He Failed To Satisfy It

In addition to jettisoning the common law foundation underpinning its new rule, the court below also saddled *Mathis* with the burden to "establish[] as a matter of law that Gonzalez could have remedied the dangerous conditions on the roof through the adoption of reasonable safety precautions." (Op. at p. 20.) Despite Gonzalez's failure to present any evidence regarding his inability to take reasonable safety precautions, the court reversed summary judgment because, according to the court, Mathis did not "present[] evidence *negating*" all imaginable "factors that might have affected Gonzalez's ability" to perform his work safely. (*Id.* at p. 22, italics added.) That was error.

1. In relieving Gonzalez of his burden to produce *any* evidence on this point, the court below ignored the fact that "[t]he *Privette* line of decisions establishes a presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.'" (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642, quoting *SeaBright, supra*, 52 Cal.4th at p. 600.)

That presumption "affects the burden of producing evidence." (*Alvarez, supra*, 13 Cal.App.5th at pp. 642–643.) As this Court has explained, a "presumption which shifts the burden of proving evidence entitles [the movant] to summary judgment if [the opposing party] fails to produce evidence to rebut the presumption." (*Engalla v. Permanente Medical Group, Inc.* (1997)

15 Cal.4th 951, 977, citation omitted; see *Alvarez, supra*, 13 Cal.App.5th at p. 644, citation omitted ["[O]n summary judgment, a moving party need only show it is entitled to the benefit of a presumption affecting the burden of producing evidence in order to shift the burden of proof to the opposing party to show there are triable issues of fact."].) As a result, it should have been Gonzalez's burden to present evidence that no safety precautions were available.

By instead requiring Mathis to "present[] evidence negating" the possibility that no reasonable safety precautions were available (Op., at 22), the Court of Appeal's approach was "directly contrary to the state's summary judgment [rules]," which make clear that "'a moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party's case.'" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780, citation omitted; see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 847, citations omitted [describing rejected rule that "a defendant moving for summary judgment had to 'conclusively negate' . . . an element of the plaintiff's cause of action" by "present[ing] evidence"].)

"'Instead, the moving defendant may point ... to *the absence of evidence to support the plaintiff's case.* When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact.'" (*Saelzler, supra*, 25 Cal.4th at p. 780, original italics, citation omitted; accord *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 322–323 [summary judgment is "mandat[ory]" when the non-movant "fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"].)[11] And, "to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings ... but, instead, shall set forth the specific facts showing that a triable issue of material fact exists.'" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274, citation omitted.)

2. Under these longstanding principles, summary judgment for Mathis was proper. Gonzalez did not produce *any* evidence showing that he was unable to take reasonable safety precautions to avoid injury. He offered no evidence showing that he could not have (1) walked more slowly; (2) held on to the parapet wall; (3) used his own ladder rather than the one affixed to the house; (4) swept any purportedly slippery loose pebbles or sand from his path; or (5) installed a temporary guardrail of the kind described in *Madden*, *supra*, 165 Cal.App.4th at p. 1278. In fact, Gonzalez himself has *admitted* to several possible safety precautions, such as the addition of "tie-offs, hooks or places to harness a worker" (Ans. at p. 9), or the placement of a "railing or barrier" along the ledge (2-AA-341). Yet Gonzalez failed to pursue any of those measures[12] or tell Mathis that, without them, his employees could not clean the skylight safely.

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[11] "[S]ummary judgment law in this state now conforms, largely but not completely, to its federal counterpart as clarified and liberalized in *Celotex* . . . ." (*Aguilar*, *supra*, 25 Cal.4th at p. 849.)

[12] Rather than address those many possible safety precautions—including those that Gonzalez himself had identified—the court

The Court also disregarded that Gonzalez's injury could have been prevented had Gonzalez simply walked inside the parapet wall. The Court found insufficient video and photographic evidence establishing that it was possible to walk inside the wall because it believed it was Mathis's duty to go further and "present[] evidence negating other factors that might have affected Gonzalez's ability to traverse the area inside the parapet wall," such as "his size" or "whether he was required to carry equipment." (Op. at p. 22).[13] But it was *Gonzalez*'s burden, not Mathis's, to show that this reasonable safety precaution was unavailble to him. His failure to introduce any such evidence should have been dispositive.

3. The Court of Appeal's application of its new exception underscores its inherent unworkability and impracticality. A homeowner or hirer often hires an independent contractor in order to complete work beyond his or her expertise. In so doing, the hirer delegates control over the worksite and responsibility for doing that job safely to the contractor. But under the Court of Appeal's exception, it would be the hirer's duty to protect an independent contractor's employee from hazards which he cannot foresee, from

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below apparently assumed that the only possible safety precaution would have been for Gonzalez "to avoid the ledge" altogether by walking on the inside of the parapet wall. (Op. at p. 21, fn. 3; see *id.* at pp. 20–22.) Gonzalez, however, introduced no evidence that that was the only precaution available—indeed, he admitted otherwise.

[13] The Court pointed to no evidence that either of these considerations affected Gonzalez's ability to walk inside the parapet wall. And Gonzalez himself admitted he was not carrying any equipment at the time of the accident. (3-AA-582.)

a workplan over which he has no control, and ensure the availability of reasonable precautions that he has no experience identifying, let alone implementing. And upon being sued for his alleged failure to protect the employee, it would be the hirer's duty to introduce evidence disproving the availability of any and all possible precautions as a matter of law to avoid going to trial on every claim.

Given those consequences, it is not difficult to understand why the Court of Appeal's exception would discourage reliance on independent contractors and significantly undermine *Privette*'s framework, nor why *amici* representing homeowners, builders, the real estate industry, contractors, and insurers, among others have joined Mathis in urging this Court to reject that result and reverse the decision below.

III. UNDER *HOOKER*, MATHIS DID NOT RETAIN CONTROL OR AFFIRMATIVELY CONTRIBUTE TO GONZALEZ'S INJURY

Implicitly recognizing that the Court of Appeal's new exception to *Privette* is incompatible with existing doctrine, Gonzalez included in his Answer to the Petition for Review an "additional issue" that asks this Court to review whether Mathis "'retained control' and affirmatively contributed" to Gonzalez's injuries. (Ans. at p. 5.) The answer to that question is no.

As the Court of Appeal held, Gonzalez failed to "demonstrate [that] Mathis retained control of how Gonzalez cleaned the skylight" or that Mathis "'affirmatively contributed' to the injuries he suffered." (Op. at p. 15.) Indeed, Gonzalez "*admitted* that Mathis and Carrasco never told him how he should clean the

skylight." (*Ibid.*, italics added.) Instead, the only instructions that Gonzalez could point to receiving at all were: (1) guidance from Carrasco about the order in which he should perform the various projects for which he had been hired, and (2) a request by Carrasco to use less water to prevent leaks into the house. (*Ibid.*)

Gonzalez suggests that "[r]etained control contemplates" instances involving the hiring party's "omission or failure to act." (Ans. at p. 33.) But *Hooker* makes clear that a hirer is not liable "'for mere failure to exercise a general supervisory power to prevent the creation *or continuation* of a hazardous practice.'" (27 Cal.4th at p. 211, italics added, quoting *Kinney*, *supra*, 87 Cal.App.4th at p. 36; see Op. at pp. 16–17 ["Merely allowing [allegedly dangerous] conditions to persist is not sufficient to demonstrate retained control within the meaning of *Hooker*."].) Rather, the injured employee must "show that the hirer of the contractor affirmatively contributed to the employee's injuries" (*Hooker*, *supra*, 27 Cal.4th at p. 214) by "'direction, induced reliance, or other affirmative conduct'" (*id.* at p. 209, citation omitted.)

As a result, "a hirer will be liable for its omissions" *only* when "the hirer promises to undertake a particular safety measure," in which case the contractor would necessarily rely on the hirer's promise. (*Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3; see *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718–719, review den. Feb. 1, 2017 [collecting cases where the hirer made "no specific promise"].) Gonzalez does not—and cannot—argue that

Mathis or Carrasco undertook any such promise. (See Op. at p. 16.)

Gonzalez did not invite this Court to overrule *Hooker* or claim that *Hooker* was wrongly decided. And for good reason. *Hooker* did not simply invent the requirements of "retained control" and "affirmative contribution" out of whole cloth. Rather, these concepts arise from the longstanding common law rule that a hirer is ordinarily not liable for injuries resulting from the work of an independent contractor's employee. (*Hooker*, *supra*, 27 Cal.4th at p. 213.) "Central to this rule of nonliability was the recognition that a person who hired an independent contractor had 'no right of control as to the mode of doing the work contracted for.'" (*Ibid.*, italics omitted, quoting *Green v. Soule* (1904) 145 Cal. 96, 99.) Only in a circumstance where a hirer declines to delegate control and affirmatively contributes through his retained control to the injury of an independent contractor's employee is liability appropriate.

Both the trial court and Court of Appeal were correct to hold that Mathis did not retain control of the worksite and affirmatively contribute to Gonzalez's injury. This Court should hold the same.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: July 16, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c)(1))

The text of this brief consists of 13,877 words as counted by the Microsoft Office Word 2016 word-processing program used to generate the brief.

Dated: July 16, 2018

Respectfully submitted,

LATHAM & WATKINS LLP

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EXHIBIT A

Filed 2/6/18

FOR PUBLICATION IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LUIS GONZALEZ, Plaintiff and Appellant, v. JOHN R. MATHIS et al., Defendants and Respondents.	B272344 Los Angeles County Super. Ct. No. BC542498)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Reversed.

Evan D. Marshall, for Plaintiff and Appellant.

Latham & Watkins, Marvin S. Putnam, Jessica Stebbins and Robert J. Ellison, for Defendants and Respondents.

Luis Gonzalez, a professional window washer, filed a premises liability action against John Mathis. Mathis moved for summary judgment, arguing that Gonzalez's status as an independent contractor precluded his claims. The trial court granted the motion. We reverse, concluding there are triable issues of fact whether Mathis can be held liable for Gonzalez's injuries.

FACTUAL BACKGROUND

A. Summary of Mathis's Property

Defendant John Mathis owned a residence that contained an indoor pool. The pool was located in the northwest corner of the home, and covered by a large, rounded skylight that protruded through the flat roof. The section of roof located to the west of the skylight was divided by a three-foot-high parapet wall that ran parallel to the skylight. The area of roof between the skylight and the east side of the parapet wall was partially obstructed by a series of ventilation pipes and mechanical equipment. The area of roof on the west side of the parapet wall consisted of an exposed ledge, approximately two feet in width. Mathis had constructed the parapet wall to screen from view the piping and mechanical equipment positioned next to the skylight.

A ladder affixed to the west side of the house provided access to the roof. The top of the ladder was located near the beginning of the parapet wall.

B. Gonzalez's Accident

Plaintiff Luis Gonzalez owned and operated Hollywood Hills Window Cleaning Company, which advertised itself as a specialist in "hard to reach windows and skylights." Beginning in 2007, Mathis's housekeeper, Marcia Carrasco, regularly hired

Gonzalez's company to wash the skylight and perform other services on the property.

On August 1, 2012, two of Gonzalez's employees were on the roof cleaning the skylight when Carrasco informed him water was leaking into the house. Carrasco instructed Gonzalez to go on the roof, and tell his employees they should use less water. Gonzalez climbed onto the roof using the affixed ladder. He then walked along the ledge on the west side of the parapet wall, and spoke with his employees. While walking back toward the ladder along the ledge, Gonzalez lost his footing, and fell off the roof.

C. Trial Court Proceedings

1. Summary of complaint and Gonzalez's deposition

In April of 2014, Gonzalez filed a negligence action against Mathis asserting that "loose rocks, pebbles and sand on the roof of the property" constituted a "dangerous condition" that had caused Gonzalez to fall. In a subsequent interrogatory response, Gonzalez clarified he was seeking damages for three dangerous conditions on the roof. First, he alleged that the construction of the parapet wall forced persons who needed to access the skylight and other parts of the roof to walk along the exposed two-foot ledge, which had no safety railing. Second, he contended the roofing shingles were dilapidated, resulting in slippery and loose conditions. Third, he asserted the roof lacked "tie-off" points that would enable maintenance workers to secure themselves with ropes or harnesses.

At his deposition, Gonzalez testified that he had been on Mathis's roof many times, and had always used the ledge along the west side of the parapet wall to access the skylight. Gonzalez further testified that he knew the roof shingles were dilapidated

and slippery, and had told Carrasco the shingles should be replaced. Gonzalez also admitted he knew the ledge lacked any protective features, and that the roof had no tie-off points.

When asked why he had chosen to walk along the ledge outside the parapet wall, rather than in the area inside the wall, Gonzalez explained that the ledge was "the only way to get through because you have the AC equipment [on the other side]." Gonzalez later clarified that he was unable to walk in the area of roof inside the parapet wall because "there was a lot of equipment," and he "couldn't fit in there." Gonzalez also testified that he and his employees had always walked along the ledge, rather than inside the parapet wall, and that he had never seen anyone walk inside the wall.

2. Mathis's motion for summary judgment

Mathis filed a motion for summary judgment arguing that Gonzalez's claims were precluded under the rule set forth in *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and its progeny, which generally prohibits an independent contractor or his employees from suing the hirer of the contractor for workplace injuries. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594 ["Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work"]; *Tverberg v. Fillner Const., Inc.* (2010) 49 Cal.4th 518, 521 (*Tverberg*) [the hiring party is generally not liable for workplace injuries suffered by an independent contractor or the contractor's employees].)

Mathis argued there were only two exceptions to the *Privette* rule: when the hirer exercised control over the contractor's work in a manner that had contributed to the injury

(see *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*),) and when the hirer failed to warn the contractor of a concealed hazard on the premises. (See *Kinsman v. Unocol Corp.* (2005) 37 Cal.4th 659 (*Kinsman*).) Mathis contended neither exception applied because Gonzalez had specifically admitted that he was not told how to clean the skylight, and that he was aware of the dangerous conditions on the roof.

In his opposition, Gonzalez acknowledged he was an independent contractor, but argued there were triable issues of fact pertaining to both *Privette* exceptions. First, Gonzalez asserted there were "disputed issues of material fact as to whether [Mathis] retained control over the worksite." Gonzalez cited evidence showing Carrasco had directed him to perform various cleaning tasks in a specified order, and had also ordered him to get on the roof to tell his employees to use less water. Gonzalez also argued Mathis had retained control because he was the only party who had authority to fix the dangerous conditions on the roof.

Alternatively, Gonzalez argued there were triable issues of fact whether Mathis was liable under the hazardous condition exception set forth in *Kinsman*, *supra,* 37 Cal.4th 659. Gonzalez contended that, contrary to Mathis's assertion, *Kinsman* permitted hirer liability for concealed hazards, as well as open or known hazards the contractor could not have remedied through the adoption of reasonable safety precautions. Gonzalez further asserted that although he was aware of the dangerous conditions on the roof (namely, the exposed ledge and dilapidated shingles), there were disputed issues of fact whether he could have reasonably avoided those hazards. In support, he cited to his deposition testimony that he had walked along the ledge outside

the parapet wall because the piping and mechanical equipment positioned next to the skylight prevented him from walking inside the wall. According to Gonzalez, these statements raised triable issues of fact whether he was required to "access the skylights [by] . . . walk[ing] across the slippery, unprotected and narrow catwalk," or whether it was "feasible to go [along the other side of] the wall."

In his reply brief, Mathis argued that Carrasco's statements to Gonzalez were insufficient to show Mathis had retained control over the manner in which Gonzalez cleaned the skylight. Mathis also argued that merely retaining the authority to remedy the conditions on the roof, without actually exercising that authority in some manner that contributed to Gonzalez's injury, was insufficient to impose liability pursuant to the retained control theory.

Mathis disputed the assertion that *Kinsman* permits hirer liability for open hazards. He also argued that even if *Kinsman* did extend to open hazards the contractor could not have remedied through reasonable safety precautions, the evidence showed Gonzalez could have avoided the dangerous conditions on the roof by walking inside the parapet wall. In support, Mathis submitted photographs and a video that had been taken during an inspection of Mathis's roof. The visual evidence showed multiple people climb the ladder attached to the west side of the house, and then traverse the section of roof inside the parapet wall by stepping over and around the ventilation pipes and other mechanical equipment. According to Mathis, "[t]he video and photographic evidence conclusively establish[ed]" that Gonzalez's statements that he was required to walk along the ledge were false, and should be disregarded.

At the hearing, the court informed the parties that its tentative ruling was to grant the motion for summary judgment pursuant to *Privette, supra,* 5 Cal.4th 689, and *Kinsman, supra,* 37 Cal.4th 659. The court explained that the evidence showed Mathis's agent had "told" Gonzalez "to clean the skylight and to access the roof by way of the ladder. The agent also told [him] there had been leaks on the roof. These instructions or statements by the agent do not establish that [Mathis] had control over the worksite. Gonzalez had walked on the narrow walkway many times before the fall. . . . [He] knew of the [dangerous] conditions on the roof. . . . None of the conditions were concealed to [him]."

Gonzalez's counsel argued that the court's proposed ruling failed to address that Mathis was the only party who had the authority to remedy the injury-causing conditions on the roof. According to counsel, Gonzalez had been unable to mitigate those hazards because "[h]e [was] simply there to clean," and because Mathis never "delegated that key safety measure of redoing the roof to [him]."

Gonzalez's counsel also argued that although plaintiff was aware of the dangerous conditions on the roof, there was nonetheless a question of fact whether he could have reasonably avoided those conditions: "In order to do the job, [Gonzalez] had to go [out onto the ledge]. And that's something for the jury to deal with. . . . Because [Mathis is] saying [Gonzalez] knew about it, he encountered the danger. But [Gonzalez] couldn't do it any other way." Counsel further asserted that while Mathis "[wanted] the court to rule on this fact . . . [based on the video] submitted in reply," the evidence was not conclusive. After hearing argument, the court adopted its tentative order, granted

Mathis's motion for summary judgment and entered a judgment in his favor.

DISCUSSION

A. Standard of Review

"A motion for summary judgment is properly granted only when 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.] We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citation.]" (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1301 (*Chavez*) [footnote omitted]; see also Code of Civ. Proc., § 437c, subd. (c); *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348].) In making this assessment, "[w]e view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's." [Citation.]" (*Chavez, supra,* 207 Cal.App.4th at p. 1302.)

B. Summary of the Privette Doctrine

Under the common law "'doctrine of peculiar risk, a person who hires an independent contractor to do inherently dangerous work can be held liable for tort damages when the contractor causes injury to others by negligently performing the work. The doctrine serves to ensure that innocent bystanders or neighboring landowners injured by the hired contractor's negligence will have a source of compensation even if the contractor turns out to be insolvent.'" (*Hooker, supra,* 27 Cal.4th at p. 204.)

In *Privette, supra,* 5 Cal.4th 689, the California Supreme Court limited the breadth of the peculiar risk doctrine, concluding that it "does not extend to a hired contractor's employees." (*Hooker, supra,* 27 Cal.4th at p. 204 [summarizing holding in *Privette*].) The Court reasoned that "[b]ecause the Workers' Compensation Act [citation] shields an independent contractor from tort liability to its employees, applying the peculiar risk doctrine to the independent contractor's employees would illogically and unfairly subject the hiring person, who did nothing to create the risk that caused the injury, to greater liability than that faced by the independent contractor whose negligence caused the employee's injury. [Citation.] . . . . '[T]he property owner should not have to pay for injuries caused by the contractor's negligent performance of the work when workers' compensation statutes already cover those injuries.' [Citation]." (*Hooker, supra,* 27 Cal.4th at p. 204.)

In subsequent cases, the Court established two exceptions to the "*Privette* doctrine." (*Kinsman, supra,* 37 Cal.4th at p. 666.) In *Hooker, supra,* 27 Cal.4th 198, the Court considered whether a hirer may be held liable to a contractor's employees under the "'retained control theory' as described in the Restatement Second of Torts, section 414, which states: 'One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.'" (*Kinsman, supra,* 37 Cal.4th at p. 670 [summarizing holding in *Hooker*].)

The defendant in *Hooker* argued the term "others" should not be read to include "a contractor's employees," and that such

employees should be barred from recovery "even when the hirer retains control over safety conditions." (*Kinsman*, supra, 37 Cal.4th at p. 670.) The Court disagreed, explaining that *Privette* was predicated in part on "'the recognition that a person who [has] hired an independent contractor ha[s] "'no right of control as to the mode of doing the work contracted for.'" On the other hand, if a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer." (*Hooker*, *supra*, 27 Cal.4th at p. 213.)

The Court clarified, however, that "it would be unfair to impose tort liability on the hirer of the contractor merely because the hirer retained the ability to exercise control over safety at the worksite. In fairness, . . . 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." (*Hooker*, *supra*, 27 Cal.4th at p. 210.) Thus, under *Hooker*, "a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but . . . is liable . . . insofar as a hirer's exercise of retained control affirmatively contributed to the employee's injuries." (*Id.* at p. 202.)

In *Kinsman*, 37 Cal.4th 659, the Court considered whether a hirer who did not retain control over worksite conditions could nonetheless be held "liable to an employee of [a] contractor who is injured as the result of hazardous conditions on the landowner's premises." (*Id.* at p. 664.) The plaintiff in *Kinsman* was exposed to airborne asbestos while working for a contractor who had been

hired to perform maintenance at a refinery. After developing mesothelioma, the plaintiff filed a personal injury action against the refinery alleging that: (1) the refinery was negligent in the exercise of the control it had retained over plaintiff's work; and (2) the refinery was negligent in exposing plaintiff to a concealed hazardous condition at the workplace (asbestos). The jury rejected the first theory of liability, but awarded the plaintiff damages for exposure to a hazardous condition. The Court of Appeal reversed, concluding that under *Privette* and *Hooker*, the refinery could not be held liable to "a contractor's employee . . . under [a premises liability] theory unless the landowner had [retained] control over the dangerous condition and affirmatively contributed to the employee's injury." (*Id.* at p. 666.) The Supreme Court granted review to assess how the "doctrine of landowner liability . . . relates to the *Privette* doctrine." (*Id.* at p. 672.)

The Court began its analysis by reviewing the general principles that govern a landowner's liability for hazards on the premises. The Court explained that a landowner normally has a duty to warn of concealed hazards that present "an unreasonable risk of harm to those coming in contact with it." (*Kinsman*, *supra*, 37 Cal.4th at p. 672.) With respect to open hazards, the Court explained: "[I]f a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. [Citation.] However, 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.'" (*Kinsman*, *supra*, 37 Cal.4th at p. 673.)

The Court then addressed "how these general principles apply when a landowner hires an independent contractor whose employee is injured by a hazardous condition on the premises." (*Kinsman*, *supra*, 37 Cal.4th at p. 673.) The Court concluded that under the reasoning of *Privette* and *Hooker*, "a 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 . . . 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. . . . 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." (*Id.* at pp. 673-674.)

The Court noted that in the case before it, the plaintiff had "acknowledge[d] that reasonable safety precautions against the hazard of asbestos were readily available, such as wearing an inexpensive respirator." (*Kinsman*, *supra*, 37 Cal.4th at p. 673.) The plaintiff's theory, however, was that the refinery could be held liable because the refinery knew (or should have known) of the risks of asbestos, but failed to warn the contractor.

The Court agreed, explaining: "A landowner cannot effectively delegate to the contractor responsibility for the safety of its employees if it fails to disclose critical information needed to fulfill that responsibility, and therefore the landowner would be liable to the contractor's employee if the employee's injury is attributable to an undisclosed hazard. . . . [¶] . . . [¶] We therefore disagree with the Court of Appeal in the present case inasmuch as it held that a landowner/hirer can be liable to a contractor's employee only when it has retained supervisory control and affirmatively contributes to the employee's injury in the exercise of that control. Rather, . . . the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman*, *supra*, 37 Cal.4th at p. 674-675.) Thus, "when, . . . the 'dangerous or defective condition' is 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." (*Id.* at p. 682.)

Finally, in *Tverberg, supra,* 49 Cal.4th 518, the Court addressed whether the *Privette* doctrine extends to claims an independent contractor brings against a hirer on his or her own behalf. The Court of Appeal concluded *Privette* did not apply to such claims because, unlike his or her employees, an independent contractor is not subject to mandatory coverage for workplace injuries under California's workers' compensation system.

The Supreme Court reversed, holding that although "the availability of workers' compensation insurance . . . was central to [*Privette's*] holding that the hirer should not incur . . . liability for on-the-job injury to an independent contractor's employee," (*Tverberg, supra,* 49 Cal.4th 527), a different rationale warranted extension of the rule to claims brought by a contractor: "Unlike a mere employee, an independent contractor, by virtue of the contract, has authority to determine the manner in which inherently dangerous construction work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions. Having assumed responsibility for workplace safety, an independent contractor may not hold a hiring party vicariously liable for injuries resulting from the contractor's own failure to effectively guard against risks inherent in the contracted work." (*Id.* at p. 521.)

C. Mathis Failed to Establish Gonzalez's Claims Are Precluded Under the Privette Doctrine

Gonzalez argues the trial court erred in concluding his claims are precluded under the *Privette* doctrine. Gonzalez does not dispute Mathis hired him as an independent contractor, and that his claims are therefore subject to *Privette* and its progeny. He contends, however, that there are triable issues of fact whether Mathis can be held liable under the "retained control" exception set forth in *Hooker*, and the "hazardous condition" exception set forth in *Kinsman*.

1. Gonzalez failed to present evidence showing there is a triable issue of fact regarding the retained control exception

At his deposition, Gonzalez admitted that Mathis and Carrasco had never told him how he should clean the skylight. Despite this admission, Gonzalez asserts that two categories of evidence nonetheless show there is a triable issue of fact whether Mathis retained control over the manner and means of Gonzalez's work.

First, Gonzalez argues that statements Carrasco made to him on the day of the incident demonstrate retained control. Specifically, he cites evidence showing that Carrasco told him what order he should perform "the various projects [he] had been hired for," and also instructed him to tell his employees they should use less water to clean the skylight. Neither statement is sufficient to establish that Mathis "retained control" within the meaning of *Hooker*.

The first statement merely shows Carrasco specified when Gonzalez should clean the skylight in relation to the other tasks he had been hired to perform; it does not demonstrate Mathis retained control of how Gonzalez cleaned the skylight. Carrasco's second statement suggests Mathis did retain some level of control over the amount of water that should be used to clean the skylight. Gonzalez, however, has presented no argument explaining how Carrasco's instruction to use less water "affirmatively contributed" to the injuries he suffered. (See *Kinsman*, *supra*, 37 Cal.4th at p. 671 [under retained control exception, "when the hirer . . . 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"]; *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 145 ["the hirer must do more than retain control over worksite safety conditions. The hirer must exercise that

retained control 'in a manner that affirmatively contributed to the injury of the contractor's employee'"].) Gonzalez has alleged his injury occurred because the configuration of the roof forced him to walk along the exposed ledge, not because of the amount of water his employees used to wash the skylight. There is no evidence Mathis or Carrasco ever directed him to walk on the ledge.

Gonzalez next argues that there are triable issues regarding the retained control exception because the evidence shows Mathis was the only party who had authority to fix the dangerous conditions on the roof. Gonzalez appears to contend that because Mathis was the only person who could have remedied the conditions, he necessarily maintained control over safety at the worksite. As explained above, however, "retain[ing] the ability to exercise control over safety at the worksite" is not sufficient to establish liability under *Hooker*. (*Hooker*, *supra*, 27 Cal.4th at p. 210.) Rather, the hirer must have exercised that retained authority in a manner that affirmatively contributed to the injury. "[P]assively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. [Citations.] The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer . . . had agreed to implement these measures." (*Tverberg v. Fillner Construction Inc.* (2012) 202 Cal.App.4th 1439, 1446; see also *Hooker*, *supra*, 27 Cal.4th at p. 211 [hirer not liable under retained control theory "for mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice"].) In this case, Gonzalez has presented no evidence showing that Mathis ever agreed to remedy the conditions on the roof. Merely allowing those conditions to

persist is not sufficient to demonstrate retained control within the meaning of *Hooker*.

1. Mathis failed to establish there is no triable issue of fact whether he can be held liable under Kinsman

Gonzalez also contends there are triable issues of fact whether Mathis can be held liable under the hazardous condition exception set forth in *Kinsman*. According to Gonzalez, *Kinsman* allows hirer liability for injuries resulting from two distinct types of hazards: (1) a hazard that is known to the hirer, but concealed from the contractor; and (2) a known or open hazard that "cannot be practically avoided" by the contractor. Gonzalez further asserts that in this case, there is conflicting evidence whether he could have avoided the condition that caused his injury, namely the narrow ledge along the west side of the parapet wall.

Mathis, however, argues that *Kinsman* "apples only when 'a hazard is concealed from the contractor, but known to the landowner.'" Alternatively, Mathis asserts that even if *Kinsman* does permit hirer liability for open or known conditions that a contractor could not have reasonably avoided or remedied, the photographic and video evidence he submitted to the trial court establishes as a matter of law that Gonzalez could have traversed the roof by walking along the interior of the parapet wall, rather than along the exposed ledge.

We first address Mathis's assertion that *Kinsman* only permits hirer liability for hazardous conditions that are concealed to the contractor, and therefore precludes liability for any condition that is "'open and obvious,' or otherwise known to the contractor." *Kinsman* separately analyzes what duty a hirer owes to a contractor for concealed hazards as opposed to open or

known hazards. With respect to the latter, *Kinsman* explained that "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 pp. 673-674.) With respect to concealed hazards, the Court explained that liability attaches only if the condition was known to the hirer, but unknown to the contractor. Thus, according to the Court, "when . . . the 'dangerous or defective condition' is 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." (*Id.* at p. 682.)

Kinsman therefore indicates that under the "principles of delegation" set forth in *Privette* and its progeny (*Tverberg, supra,* 49 Cal.4th at p. 527), a hirer cannot be held liable for injuries resulting from open or known hazards the contractor could have remedied through the adoption of reasonable safety precautions.[1]

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[1] We acknowledge that *Kinsman's* statements regarding when a hirer can be held liable for contractor injuries resulting from open hazards on the property is technically dicta because the question decided in the case involved the circumstances under which a hirer can be held liable for injuries resulting from latent hazards. (See *Stockton Theaters Inc. v. Palermo* (1956) 47 Cal.2d 469, 474 ["The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum . . . ."].) However, we generally consider California Supreme Court dicta to be "highly persuasive." (*People v. Wade* (1996) 48 Cal.App.4th 460,

As a corollary, the hirer can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions.[2]

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467 ["Dicta of our Supreme Court are highly persuasive"]; *Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, 272].) "'When the Supreme Court has conducted a thorough analysis of the issues or reflects compelling logic, its dictum should be followed.' [Citation.]" (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169 (*Hubbard*); see also *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 925 ["Even if the court's conclusions technically constitute dicta, we will not reject dicta of the Supreme Court without a compelling reason"].) *Kinsman's* discussion and analysis of a hirer's liability for open hazards was thorough, and appears to have been "carefully drafted. It was not '. . . inadvertent, ill-considered or a matter lightly to be disregarded.' [Citation]." (*Hubbard, supra,* 66 Cal.App.4th at p. 1169.)

[2] In portions of his brief, Gonzalez appears to argue we should interpret *Kinsman* more broadly to permit hirer liability whenever it is "foreseeable that the [open or known] danger will be encountered by the workmen." *Kinsman* did acknowledge that a landowner can generally be held liable for an open hazard when it is "'foreseeable'" that a person may "'choose to encounter the danger.'" (*Kinsman, supra,* 37 Cal.4th at p. 673.) As discussed above, however, the Court further observed that when a landowner hires an independent contractor, the hirer delegates responsibility to the contractor to remedy any open hazard that can be addressed through the adoption of reasonable safety precautions. (*Ibid.*) Thus, under *Kinsman,* a hirer's liability for injuries resulting from an open hazard is not dependent on the foreseeability that a contractor might encounter the hazard, but rather on whether the hazard was one that the contractor could have remedied through the adoption of reasonable safety precautions.

We next address whether Mathis has established as a matter of law that Gonzalez could have remedied the dangerous conditions on the roof through the adoption of reasonable safety precautions. In his deposition, Gonzalez stated that he was required to walk outside the parapet wall, along the exposed ledge, because piping and mechanical equipment prevented him from walking inside the wall. Mathis, however, asserts the video and photographic evidence "conclusively establish that Gonzalez's self-serving [statements] claiming he could not fit through the interior portion of the roof . . . is false." The photographs and video were taken during an inspection of the roof that Gonzalez's experts and lawyers conducted in October of 2015, more than three years after the incident. The images show several individuals maneuvering around the piping and electrical equipment positioned between the skylight and the parapet wall.

In premises liability actions, the reasonableness of a party's actions is generally a question of fact for the jury to decide. (See *Neel v. Mannings, Inc.* (1942) 19 Cal.2d 647, 656 [in premises liability action, "[w]hether plaintiff's action was reasonable and prudent under the circumstances was for the jury to decide as an issue of fact']; *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1207 ["Whether a dangerous condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury"]; *Carson v. Facilities Development* Co. (1984) 36 Cal.3d 830, 843 ["The questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury"].) Such questions "cannot be resolved by summary judgment" (*Onciano v. Golden Palace Restaurant, Inc.* (1990) 219 Cal.App.3d 385, 395) "unless reasonable minds can

come to but one conclusion." (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810.)

The video and the photographs certainly cast doubt on Gonzalez's assertion that the piping and other equipment along the skylight prevented him from walking on the inside of the parapet wall. We disagree, however, that such evidence conclusively establishes Gonzalez could have reasonably utilized that area on the date of the incident.[3] Mathis has presented no

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[3] At oral argument, Mathis's counsel argued that the record also contained evidence establishing Gonzalez could have taken any number of alternative precautions to avoid the ledge. The only other specific precaution that counsel identified, however, consisted of placing a ladder on the east side of the house (the side opposite of where the ledge was located), and then walking across the roof to access the skylight. Mathis did not raise this argument in his appellate briefing, and raised the argument only in the reply brief he filed in the trial court proceedings. The only evidence he cited in support of the argument was Gonzalez's statement at deposition that he did not use a ladder to climb up the east side of the house because "[i]t would have been farther away to walk on the roof and to get to the same edge anyway." This single statement is insufficient to prove as a matter of law that Gonzalez could have reasonably avoided the ledge by placing a ladder on the east side of the house, and then walking across the roof. To the contrary, Gonzalez's statement that he would "get to the same edge anyway" suggests he would have been forced to encounter the ledge even if he had placed a ladder on the east side of the house.

Mathis also argues Gonzalez could have reasonably avoided the ledge by declining to accept the job altogether. Mathis presents no legal authority in support of his assertion that declining to perform a job qualifies as a reasonable safety precaution. If accepted, this argument would effectively preclude hirer liability for any injury resulting from an open or known

evidence that the video, taken in 2015, accurately depicts the condition of the roof as it was at the time of the incident in 2012. Nor has Mathis presented evidence negating other factors that might have affected Gonzalez's ability to traverse the area inside the parapet wall, including, for example, his size in relation to the persons depicted in the video, or whether he was required to carry equipment that rendered the pathway impassable. Standing alone, photographs and videos showing different people maneuvering along the inside of the parapet wall three years after the date of the incident is insufficient to prove as a matter of law that Gonzalez could have reasonably done the same.[4]

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hazard because a contractor always has the option of declining to accept a job. The language of *Kinsman* indicates, however, that a hirer is immune from liability for open hazards only "when . . . the 'dangerous or defective condition' is one that can be remedied by taking reasonable safety precautions." (*Kinsman*, *supra*, 37 Cal.4th at p. 682.)

[4] In a footnote to the introductory section of his respondent's brief, Mathis argues we may affirm the trial court's judgment on an alternative ground, asserting that "Gonzalez is estopped from recovery because he mispresented [sic] himself as having worker's compensation insurance, as required by California state law, and which would have compensated him for his injuries, and improperly seeks to require Mathis to compensate him for an injury that should have been covered by his own claimed insurance." Mathis's brief presents no further argument on this issue. "We . . . need not address . . . contention[s] made only in a footnote." (*Building Maintenance Service Co. v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014, 1028; *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 71 ["We may decline to address arguments made perfunctorily and exclusively in a footnote"]; see also *People v. Lucatero* (2008) 166 Cal.App.4th

DISPOSITION

The judgment in favor of Mathis is reversed. Appellant shall recover his costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

BENSINGER, J.*

1110, 1115 ["A footnote is not a proper place to raise an argument on appeal"].)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111.

On July 16, 2018, I served the following document:

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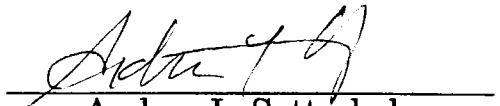
I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 16, 2018, at San Francisco, California.



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