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

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

From a Decision of the Second District Court of Appeal
Division Seven, 2nd Civil No. B 272344
Los Angeles County, Hon. Gerald Rosenberg, Judge presiding
[LASC Case No. BC 542498]

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PARTIES

This certificate is submitted by Appellant Luis Gonzalez

There are no interested persons or entities required to be identified under *C.R.C.* Rule 8.208.

Respectfully Submitted,
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Dated: September 17, 2018

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1. INTRODUCTION

Privette v. Superior Court (1993) 5 Cal.4th 689 was intended to relieve hirers of vicarious liability for injury to contractors where the hirer has discharged his duty as a landowner by retaining the contractor for the purpose of curing the danger which caused the injury, or where the danger is created by the very project for which the contractor was retained. The premise of *Privette* is that the hirer has performed its non-delegable duty by retaining a contractor specifically tasked and qualified to remedy the danger, and hence charged with avoiding the dangers inherent in that very work. Far from creating a general exemption from the duty of care, *Privette*

> holds that the hirer of an independent contractor is not ***vicariously liable*** to the contractor's employee who sustains on-the-job injuries arising ***from a special or peculiar risk inherent in the work.***
> [*Tverberg v. Filner Construction* (2010) 49 Cal.4th 518, 521, emphasis added]

Privette further assumes that the hirer has not increased risk beyond that inherent in the work by negligently influencing the manner or circumstances of performance. And *Privette* jurisprudence has always recognized that "delegation of duty" places on the contractor only such risks as are reasonably avoidable given the circumstances.

In this case, defendant John Mathis urges that he should be shielded from liability for garden variety neglect – failure to maintain the roof on his home in safe condition – which injured a contractor hired to clean his house, not to fix his roof. This immunity arises, he claims, simply because one item to be cleaned happened to be a skylight, and the poor condition of the roof happened to be

known to the worker. He regards as immaterial his own fault and the fact that his agent ordered Gonzalez to immediately climb the roof, impelling him into the known risk.

Mathis' contention represents "delegation" run amok: Mathis deliberately did not hire a contractor to correct the danger, despite Gonzalez's plea to retain a professional roofer, foreclosing the claim that such responsibility was delegated or assumed by Gonzalez

Mathis' proposed extension of *Privette* is anathema to the policies underlying that decision. It would diminish public safety by encouraging owners *not to cure conditions* by hiring qualified contractors, but instead leave the risk to be assumed by lower-cost and lower-skill workers neither tasked nor qualified to remedy the condition. Under Mathis' theory, *Privette* shifts the cost of such neglect to contractors never retained or paid to address the danger, and to a workers compensation system never designed to bear the costs of hirer/owner negligence not inherent in the contracted work. And it does so by relieving the hirer of the duty to hire contractors qualified to and charged with correcting known existing dangers.

The real issues are unfortunately obscured by the Opening Brief:

> What risks are inherent in contracted work and hence implicitly or explicitly delegated to or assumed by a contractor?

> How can a hirer or owner delegate to contractors having limited specializations and limited time and budgets the duty to control dangers which are not the subject of their work and which are only encountered in transit to the work site?

> By refusing to retain a specialist competent to correct a preexisting danger on the premises, does a hirer retain control of that condition?

> When a hirer explicitly directs a worker to act in manner that

exposes the worker to dangers beyond that incident to their normal trade, or causes the worker to immediately confront a risk not at the locus of the work, how can the hirer deny having exercised control?

> Does *Privette* "delegation of duty" recognize limitations imposed on the contractor by time, resources, skill-sets and customer demands which constrain a worker's options in confronting a dangerous condition?

2. STATEMENT OF THE CASE

Luis Alberto Gonzalez suffered paraplegia after falling from the edge of defendant's roof while returning from a skylight which was being cleaned. The fall was due to (1) lack of maintenance over decades which left the passable portion of the roof - a 20" strip - covered with loose sand and gravel; (2) a configuration of the property that induced Gonzalez to use the narrow and slippery roof edge to reach the skylight, and (3) the influence of defendant's agent, who insisted that Gonzalez mount the roof immediately to deal with leakage also caused by lack of proper maintenance.

A. The Deteriorated Roof and Skylight

During the 50 years he owned the single-story residence, John Mathis had remodeled several times, adding a roof over the pool and replacing the original pool skylight some 40 years ago. (App. 391) In 1972, Mathis installed a "parapet wall" to conceal air conditioning, duct work, pipes and other equipment on the roof. (App. 48, 626, 632; 52-58) The parapet was purely cosmetic (App. 446-447), leaving a 20" catwalk between parapet and roof edge. (App. 54, 436-437, 626, 641) The catwalk itself was cluttered with pipes and wires. (See photos at App.

54, 56, 58, 639-642) The skylight was about 85' x 85' and occupied much of the roof: one end reached the edge of the building and the rest was boxed in by pipes, conduits, etc. (See photos at App. 48, 52, 56, 58, 392) There was thus no direct clear route to the skylight.

Since the 1972 remodel, no major work had been done to the skylight. (App. 391-392) At some point, Mathis had hired a roofer to fix leakage. (App. 432-431) This was "a very long time ago, I would say over 30 years, at the same time the skylight was replaced." (App. 432) The roof and skylight had a long history of problems with leaks; they were "in really bad condition" with leaks around the skylight and elsewhere. (App. 115:2-13; 430-432)

In addition to obstructions due to the roof equipment, the low-rise home presented limited means of roof access. Access at the front was impractical due to a 9' drop and an ornamental façade some 10' to 15' higher than the roof. (App. 412-416) The rear of the house had a low elevation. (App. 644) A metal ladder bolted to the west side with a hand railing reached over onto the roof created an obvious route. (App. 50, 58, 408-410, 626, 637) This was the "only reasonable access point" to the skylight. (App. 626) At the bottom of the ladder was a spigot for water used to clean the skylight (App. 626), and presumably used by gardeners to water plants on the roof. (App. 406-407, 54, 58) The ladder was the usual access point for air-conditioning workers, gardeners and others working on the roof. (App. 438-440) Workers were never told not to use it (App. 440), and Mathis understood that anyone washing the skylight would use the ladder to reach the roof. (App. 451-452)

Mathis and his housekeeper had never tried to walk on the side of the parapet away from the catwalk, and didn't know if it was safe or if someone could fit in it given the profusion of equipment. (App. 495-498) Mathis himself had not

been on the roof in five years, but used the ladder on the west side when he did climb up. (App. 394-396) He never walked in the cluttered area behind the parapet, finding it too constricted. (App. 399-400) There were no safety devices along the catwalk, such as tie-offs, hooks or places for harnesses. (App. 140, 627)

The roof was composed of an asphalt composite, originally with a sand and gravel coating. (App. 627) The catwalk surface was covered with loose sand and gravel as a result of years of neglect, with material sloughing off into the gutters. (App. 627, 632-633) A roofing expert attested that the roof composition (an asphalt cut-back with a granular surface) required maintenance every 3 to 5 years so that the granules do not become loose. (App. 631-633)

Mathis and his agents knew of the dangerous condition. (App. 557-560, 615) Mathis admitted that the catwalk was dangerous, and that this condition had existed since the parapet wall was constructed. (App. 426-428) His housekeeper Marcia Carrasco had known that the catwalk was dangerous for some 44 years and had warned gardeners who accessed the roof on a weekly basis about the danger, but never warned plaintiff. (App. 479, 486-489) Despite knowledge of the danger and that the ladder was used by "everybody" going on the roof (App. 439-440, 452), Mathis never remedied the problem, never installed safety hooks or devices, and never instructed anyone not to use the ladder or catwalk.[1] (App. 425-426, 440 500, 609-612, 614-618)

B. Gonzalez Advises Mathis to Hire a Roofer

Several months before the accident, Gonzalez told Carrasco that the roof needed repairs because it was in a dangerous condition. (App. 303-304) Carrasco

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[1] Mathis thought a railing or safety barrier would "ruin the look" of the house. (App. 445)

got Mathis's accountant on the phone so Gonzalez could explain the need for expert repairs. (App. 304)

C. **Gonzalez' Cleaning Job**

Gonzalez had first worked on property as an employee of another cleaning company. In 2005, he started his own business, and Mathis's housekeeper Carrasco hired him for cleaning jobs. (App. 102, 491-492) Gonzalez was not licensed as a house cleaner since there is no such license category. *Business & Professions Code* §§7055 *et seq.* He did not have worker compensation coverage. (App. 257)

Over the years Gonzalez worked on the property, he had only known workers to use the permanent ladder to reach the roof. (App. 136-137) He was occasionally enlisted to do odd jobs besides cleaning: *e.g.*, moving a sofa and fixing a lamp. (App. 418-419) Carrasco would tell Gonzalez what to do and the sequence in which to do it – *e.g.* to do the skylight first. (App. 133-134)

On July 30, 2012, Plaintiff began a 3-day "deep clean" on the house. (App. 74-75) On the third day, Carrasco told Gonzalez that she wanted some people to clean the skylight and others to clean inside. (App. 74, 550-551, 567) On Carrasco's order, Plaintiff sent two workers to the roof. (App. 567)

About an hour later, Carrasco told Gonzalez that the skylight was leaking and instructed him "to go up to tell them not to put a lot of water because the water was falling inside." (App. 76:3-6) "She just told me or sent me up above to tell them not to put a lot of water. That's why I went up." (App. 76:20-22; 114:13-18, 568-570)

Following Carrasco's instructions, Plaintiff climbed up the side ladder. Carrasco followed him onto the roof (App. 570-572), where she continued to instruct Gonzalez, telling him to talk with the accountant about his work. (App.

571-573, 575)

After speaking with his workers, Gonzalez returned along the roof edge towards the ladder, "the only way to get through because you have the AC equipment, and to get to the ladder you have to walk by the edge." (App. 115, 116:1-7, 575-578) As he walked towards the ladder, his foot slipped out from under him on the loose sand and gravel and he fell through the awning to the ground. (App. 115, 575-578)

D. **Motion for Summary Judgment**

Mathis moved for summary judgment on the ground that Gonzalez was an independent contractor and had voluntarily encountered the slippery catwalk. (App. 14-35) His moving papers made no issue of the roof condition, whether the property configuration induced workers to use the catwalk, or whether Gonzalez had authority to remedy the deteriorated surface. He did claim, however, that control of the roof had been "surrendered" to Gonzalez, that Carrasco's role was "passive" (App. 31-32), and that Gonzalez was aware of the width of the catwalk, that it did not have rails or tie-offs, and of the loose sand and gravel. (App. 24)

Plaintiff's opposition asserted Mathis's breach of the duty to maintain his property in a safe condition, and that Gonzalez' knowledge of roof condition did not relieve Mathis of all duties given the foreseeability that workers would access the roof even in the absence of safety devices. Plaintiff further asserted that *Privette* was inapplicable since Mathis' liability was not vicarious but based on his own neglect. (App. 321-345)

In reply, Mathis presented a new declaration claiming the parapet was there to prevent falls (App. 809), contradicting his previous testimony that it was "purely for looks" (App. 446:11-16) and that no structure on the roof protected against

falls. (App. 447) He also contradicted his prior admission that he found it difficult to walk among the roof ducts and equipment, claiming it was easy to do so. (App. 818-819)

The trial court granted summary judgment on the grounds that Gonzales had been on the roof previously and knew the roof edge was slippery, and that as a contractor he was owed no duty by Mathis. (App. 870-871)

3. *PRIVETTE* DOES NOT EXEMPT HIRERS FROM LIABILITY FOR NEGLIGENCE WHICH ENHANCES RISKS OR CREATES DANGERS NOT INHERENT IN THE CONTRACTED WORK

Mathis contends that there are just two narrow exceptions to a rule of otherwise complete immunity for hirers of independent contractors: (1) concealment of hidden dangers known to the hirer, and (2) negligent exercise of retained control. This is supposedly justified by the contractor's superior skill and knowledge. But Mathis does not explain why a property owner's duty with respect to roof maintenance would be assumed by a house cleaner, nor address the real point of *Privette,* which is the elimination of *vicarious liability* as to risks for which a contractor is actually retained.

Privette held that an employee of an independent contractor could not employ the "peculiar risk" doctrine to subject a non-negligent hirer to greater liability than the contractor actually at fault for the injury, but whose tort liability is limited by workers' compensation: "a non-negligent person's liability for an injury" should not be "greater than that of the person whose negligence actually caused the injury." (5 Cal.4th at 698) As *Toland v. Sunland Housing Group, Inc.* (1998) 18

Cal.4th 253, 265 explains, *Privette* eliminated a form of no-fault liability: "peculiar risk liability is not a traditional theory of direct liability for the risks created by one's own conduct: Liability under both [*Rest.2nd Torts* §§413 and 416] is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work." *Privette* did not eliminate common law duties owed by the hirer, or create immunity for hirer neglect simply because the danger is some premises where work is being done.[2]

This case is a "perfect storm" of hirer neglect, illustrating the array of conduct against which *Privette* does *not* protect hirers and owners.

A. *Privette* Frees a Hirer of Liability Only for Risks Inherent in the Contracted Work and Hence Within the Contractor's Speciality

"Peculiar risk" imposes vicarious liability only for injury resulting from risks inherent in the contracted work. The cases thus consistently formulate *Privette* in terms of risks created by, or which are the subject of, the particular work for which the contractor is retained.

> When, as here, the injuries ***resulting from an independent contractor's performance of inherently dangerous work*** are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis for the

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[2] *Toland* applied the rule of *Privette* to derivative liability under *Rest.2nd Torts* §§413 and 416. *Toland, supra*, 18 Cal.4th at 270. *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244, held that "negligent hiring" is a form of vicarious liability since it is the contractor's acts or omissions that directly caused the injury.

> employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries.
> [*Privette*, 5 Cal.4th at 702, emphasis added]
>
> . . . the hirer of an independent contractor is not vicariously liable to the contractor's employee who sustains on-the-job injuries ***arising from a special or peculiar risk inherent in the work***.
> [*Tverberg v. Filner Construction* (2010) 49 Cal.4th 518, 521]
>
> . . . a hired independent contractor who suffers injury resulting ***from risks inherent in the hired work***, after having assumed responsibility for all safety precautions reasonably necessary to prevent precisely ***those sorts of injuries***, is not, in the words of *Privette*, *supra*, at page 694, a "hapless victim" of someone else's misconduct. In that situation, the reason for imposing vicarious liability on a hirer – compensating an innocent third party for ***injury caused by the risks inherent in the hired work*** – is missing.
> [*Tverberg*, 49 Cal.4th at 528, emphasis added]

While Mathis persistently claims that *SeaBright Insurance Co. v. U.S. Airways* (2011) 52 Cal.4th 590, held that *all hirer duties* are delegated to any contractor, *SeaBright* actually endorses the distinction between non-delegable duties imposed by reason of defendant's ownership and "tort law duties that 'only exist because construction or other work is being performed'," which are delegable to the contractor hired to satisfy those very duties. (*Id.* at 602) *SeaBright* found that since the regulation in question imposed a duty to install railings only on

employers towards **employees**, and the injured worker was employed by the contractor rather than the possessor of the premises, the duty to install guardrails lay on the contractor hired to do **the very work that required the railings.** The contract implicitly "included a duty to identify the absence of the safety guards required by CalOSHA regulations and to take reasonable steps to address that hazard," since the duty to install guards "only existed because of the work (maintenance and repair of the conveyor) that [the contractor] was performing for the airline, and therefore it did not fall within the nondelegable duties doctrine." (*Id.* 603)

Seabright's formulation of the issue is informative:

> Here, we consider whether the *Privette* rule applies when the party that hired the contractor (the hirer) failed to comply with workplace safety requirements *concerning the precise subject matter of the contract,* and the injury is alleged to have occurred as a consequence of that failure. We hold that the *Privette* rule does apply in that circumstance.
> [*SeaBright*, 52 Cal.4th at 594, emphasis added]

As *Khosh v. Staples Constr. Co., Inc.* (2016) 4 Cal.App.5th 712, 720, notes, *Seabright* held that *Privette* applies "'when the party that hired the contractor (the hirer) fail[s] to comply with the workplace safety requirements *concerning the precise subject matter of the contract.*' *SeaBright*, 52 Cal.4th 590, 594. Because the alleged duty 'only existed because of the work . . . that [the independent contractor] was performing for the [hirer],' it 'did not fall within the nondelegable duties doctrine.'"

> Similarly, in *Padilla* [*v. Pomona College* (2008) 166 Cal.App.4th 661], the duty to comply with a Cal–OSHA regulation requiring utilities to be shut off, capped, or otherwise controlled during demolition work was a delegable duty. The regulation only applied when specific work was being performed. (*Padilla, supra*, 166 Cal.App.4th at p. 671.) [*Khosh*, 4 Cal.App.5th at 720]

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

Privette "should not be viewed as a separate concept, but as an example of the proper application of the doctrine of assumption of risk, that is, an illustration of when it is appropriate to find that the defendant owes no duty of care." *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538–39 (finding firefighter's rule subject to duty analysis of *Knight v. Jewett* (1992) 3 Cal.4th 296.)

B. Inherent Risks Are Those Which Are the Subject of the Contractor's Retention or Created by the Contract Work Itself

"Inherent risk" has been explicated in the context of primary assumption of the risk and the related "firefighters rule." Under these cases, the "inherent risks"

as to which a plaintiff is owed no duty are those necessarily entailed by the particular activity – not every risk that happens to exist concurrently or in the path of the work.

Like *Privette*, the firefighter's rule limits duty with respect to risks inherent in services provided by public safety workers. Those responsible for the emergency confronted by the safety worker have no duty as to the danger posed by the emergency itself (the reason the worker is called), but retain the duty not to enhance risks or create dangers independent of the emergency. The scope of the "inherent risks" assumed by emergency workers is analogous to that assumed by contractors.

> In *Walters* [*v. Sloan* (1970)] 20 Cal.3d 199, 204–205, we expressed the view that it is somehow unfair to permit a firefighter to sue for injuries caused by the negligence that made his or her employment necessary. (See also *Knight, supra*, 3 Cal.4th at p. 309, fn. 5) Many courts have agreed with this observation. The illustration of this point given in *Walters, supra*, 20 Cal.3d 199, and other cases, is of a contractor who is hired to remedy a dangerous situation; such a private contractor, as a matter of fairness, should not be heard to complain of the negligence that is the cause of his or her employment (*Id.* at p. 205, . . .) *In effect, we have said it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.*
> [*Neighbarger*, 8 Cal.4th at 541-542, emphasis added]

Neighbarger adopted the reasoning of the New Jersey Supreme Court:

> "[I]t is the fireman's business to deal with that very hazard [the fire] and hence, perhaps by analogy to the contractor engaged as an expert to remedy dangerous situations, he cannot complain of negligence ***in the creation of the very occasion for his engagement.*** In terms of duty, it may be said ***there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid.*** Probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences. Hence, for that risk, the fireman should receive appropriate compensation from the public he serves both in pay which reflects the hazard and in workmen's compensation benefits for the consequences of the inherent risks of the calling." (*Walters*, *supra*, 20 Cal.3d at p. 205, quoting *Krauth v. Geller* (1960) 31 N.J. 270, 157 A.2d 129, 130–131.)
> [*Neighbarger*, 8 Cal.4th at 541-542, emphasis added.]

"Occupational" assumption of the risk similarly extends only to the very dangers the worker is hired to confront. *Gregory v. Cott* (2014) 59 Cal.4th 996, 1001 (liability to healthcare worker for dangerous patent where defendants "otherwise increase the level of risk beyond that inherent in providing care, or where the cause of injury is unrelated to the symptoms of the disease.") *Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1119-1120 (dog handlers.)

The "no-duty" rule as to contractors accordingly encompasses only risks

that are the subject of their retention. *Jones v. Chevron* (Wyo. 1986) 718 P.2d 890, 894; *Cassano v. Aschoff* (1988) 226 N.J.Super. 110, 543 A.2d 973, 976 ("landowner liability does not extend to employees of an independent contractor whose injury results from the very risks which are inherent to the work they were hired to perform.") *Cf. Lamborn v. Phillips Pac. Chem. Co.* (1978) 89 Wash.2d 701, 707, 575 P.2d 215, 220 (owner owes servant of independent contractor retained to work on his premises duty to avoid endangering worker by owner's neglect.)

C. A Hirer Retains a Duty Not to Enhance Inherent Dangers or Expose Workers to Risks Unnecessary to Performance of the Work

"Delegation" under *Privette* is essentially a form of primary assumption of the risk. Under *Knight v. Jewett, supra*, 3 Cal.4th 296, and related cases, duty in unavoidably hazardous activities is defined by the risk implicit in the activity, and there is an affirmative duty to not increase the risk above the level inherent in the activity.

> It may be accurate to suggest that an individual who voluntarily engages in a potentially dangerous activity or sport "consents to" or "agrees to assume" the risks inherent in the activity or sport itself, such as the risks posed to a snow skier by moguls on a ski slope or the risks posed to a water skier by wind-whipped waves on a lake. But it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the

possibility that such misconduct may occur.
[*Knight*, 3 Cal.4th 296, 311, emphasis added]

Primary assumption of the risk thus applies "where 'conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport [or activity] itself.'" *Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 867, quoting *Knight, supra*, 3 Cal.4th at 315.

> . . . there are circumstances in which the relationship between defendant and plaintiff gives rise to a duty on the part of the defendant to use due care not to increase the risks inherent in the plaintiff's activity. For example, a purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage. [Citations.] Likewise, a coach or sport instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student.
> [*Kahn v. E. Side Union High School Dist.* (2003) 31 Cal.4th 990, 1005–1006]

A slippery roof is not inherent in a house cleaner's work. *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 329, held that, assuming that falling is a risk inherent in dancing, dance hall operators had a duty to maintain the dance floor free of slippery substances which increase the risk of falling. As in dancing, the risk of falling due to a misstep while walking at elevation to the work site is a measurably different risk from that of slipping due to a deteriorated surface.

Because there is a duty to refrain from enhancing risks, a plaintiff who "unreasonably undertakes to encounter a specific known risk imposed by a

defendant's negligence" is not barred from recovery; instead, the recovery of such a plaintiff simply is reduced under comparative fault principles. "When a risk of harm is created or imposed by a defendant's breach of duty, and a plaintiff who chose to encounter the risk is injured, comparative fault principles preclude automatically placing all of the loss on the plaintiff, because the injury in such a case may have been caused by the combined effect of the defendant's and the plaintiff's culpable conduct." *Knight, supra*, 3 Cal.4th at 310-311, citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 824.

This principle applies in *Privette* cases. *Zamudio v. City & Cty. of San Francisco* (1999) 70 Cal.App.4th 445, 455 ("As long as CCSF did not act affirmatively to create or increase the risk of injury or did not retain control over the specific injury-causing activities of the injured worker's employer, *Privette* and *Toland* bar recovery."); *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1401 (hirer is immune if "the condition is the subject of at least a part of the work contemplated by the independent contractor; or . . . the contractor creates the dangerous condition on the hirer's property and the hirer does not increase the risk of harm by its own affirmative conduct."); *Browne v. Turner Const. Co.* (2005) 127 Cal.App.4th 1334, 1346-1347 (general contractor furnishing safety systems assumed duty not to negligently increase risk of harm to subcontractor employees.)

D. A Dangerous Surface is Not an "Inherent Risk" of Cleaning Work Simply Because a Cleaner Happens to Encounter It

Donohue v. San Francisco Housing Authority (1993) 16 Cal.App.4th 658, allowed a firefighter to sue when negligent maintenance resulted in slippery steps causing him to fall during an inspection. "The negligent conduct was [defendant's] failure to install nonslip adhesive treads on the stairs, coupled with the improper maintenance practice of hosing down the stairs. Neither of these acts was the

reason for plaintiff's presence." (*Id.* 663)

> . . . slippery steps was not a danger inherent in the nature of the activity at bar. There was nothing about plaintiff's inspection of the building from which it can be inferred that the property owner's normal duty to keep its public areas in safe condition would be relaxed.
> [*Id.* at 666]

As *Donohue* and *Bush* demonstrate, the increased risk of falling due to a poorly maintained roof is independent of the dangers inherent in merely working on a roof. A deteriorated roof was not "the very occasion for [Gonzalez'] engagement," nor the condition which made his employment necessary, nor the "special services for which he is trained and paid."

Kinsman v. Unocal Corp. (2005) 37 Cal.4th 659, reflects the above notions. *Kinsman* observed that *Privette* immunity rests on the premise that responsibility for the danger at issue can, under the particular circumstances, realistically be found to have has been delegated to the contractor.

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

Kinsman notes that delegation of responsibility is unlikely to be found

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

> Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability.
> [*Kinsman,* 37 Cal.4th 677-678]

Kinsman thus recognizes that the scope of "delegation" is fact-specific, and does not encompass responsibility to take precautionary measures for *every* danger

on the property, but only those which are the subject of retention or reasonably entailed by the nature of the contracted work – *e.g.*, the duty of a roofing contractor to inspect the roof he is repairing.

Mathis suggests that because the skylight was on the roof, the risk of *any fall* from the roof is necessarily delegated. But the relevant danger is the one created by breach of the landowner's duty to keep the entire premises safe for invitees. For purposes of duty analysis, the risk of slipping while crossing the roof to reach the skylight is no more "inherent" in a cleaner's work that the risk of slipping on the same loose gravel while walking to the front door. *Donohue*, *supra*, 16 Cal.App.4th at 666. *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122, found that a landowner could be liable to a deliveryman who tripped while walking across obvious rubble since plaintiff's employment required him to pass the hazardous area to do his work, making it foreseeable that a worker might fall even if the hazard was obvious. *Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184-1186, similarly held that an "open and obvious" wet pavement may have excused the duty to warn, but not the duty to cure where it was the principal access route to a public office. How plaintiff navigated the area posed an issue of contributory negligence, but did not warrant relieving the owner of all duty.

The roof obstructions and ladder/catwalk formed an invitation to workers to use the catwalk to reach the skylight, making Gonzalez' trip across the roof edge readily foreseeable, imposing a duty to repair rather than just warn. *Johnson v. De la Guerra Properties* (1946) 28 Cal.2d 394, 399-400 (where invitee has been led to believe that a route is a ready means of reaching the business, "he is entitled to the protection of a visitor while using such passageway or door. . ."); *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 149-151

(placement of bus stop influenced users to expose themselves to risk of adjacent crosswalk); *Joyce v. Simi Valley Unified School District* (2003) 110 Cal.App.4th 292, 299.

4. DELEGATION OF DUTY UNDER *PRIVETTE* REQUIRES ONLY MEASURES FEASIBLE GIVEN THE CIRCUMSTANCES AND NATURE OF THE CONTRACTOR'S TRADE

Mathis denies that there is any feasibility or practicability limitation on *Privette* delegation: the contractor is charged with exclusive responsibility regardless of the practicalities of the work and the foreseeability of encountering a negligently created risk. He characterizes feasability as a novel "exception" to *Privette* which imposes a special burden on plaintiff – as if Mathis' version of *Privette* was not itself an exception to the general duty of care. But implied delegation, retained control, inherent risk, concealed dangers, and the feasibility of safety measures are all factors going into the analysis of duty. *Rowland v. Christian* (1968) 69 Cal.2d 108, 113; *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214; *National Realty & Const. Co. v. Occupational Safety & Health Review Comm'n* (D.C.Cir. 1973) 489 F.2d 1257, 1267 (OSHA duty to provide a workplace "free" of recognized hazards only requires feasible measures.)

A. Reasonableness is Fundamental to *Privette* Analysis

"Delegation" is not a get-out-of-jail-card for every negligent hirer or owner, but is informed by the circumstances of the contractor's work and skills, and the extent to which the work undertaken entails the ability to *reasonably* avoid a given risk, and by circumstances which influence the worker to encounter even a known risk.

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

Tverberg, supra, 49 Cal.4th 518, observes that *Privette* was concerned with delegating responsibility for the contractor's failure to take ***reasonable*** safety measures.

> [A] hired independent contractor who suffers injury resulting from risks ***inherent in the hired work***, after having assumed responsibility for all ***safety precautions reasonably necessary to prevent precisely those sorts of injuries***, is not, in the words of *Privette, supra*, at page 694, a 'hapless victim' of someone else's misconduct. In that situation, the reason for imposing vicarious liability on a hirer – compensating an innocent third party for injury caused by the ***risks inherent in the hired work*** – is missing."
> [*Tverberg*, 49 Cal.4th at 528, emphasis added]

> ". . . under both [Rest 2nd] sections 411 and 413, the liability of the hirer is 'in essence "vicarious" or "derivative" in the sense that it derives from the "act or omission" of the hired contractor, because it is the hired contractor who caused the injury *by failing to use reasonable care in performing the work*."
> [*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 205, quoting *Toland, supra*, 18 Cal.4th at 265]

See also *Seabright*, 52 Cal.4th at 601: "The delegation – which . . . is implied as an incident of an independent contractor's hiring – included a duty to identify the absence of the safety guards required by Cal–OSHA regulations and to take *reasonable steps* to address that hazard."

Crucially, the preceding statements impose a "reasonableness" limitation on the contractor's duty to avoid risks *which are the reason for the contractor's presence – i.e.*, inherent in the work. It is only as to such risks that the owner is relieved of all duty. As noted above, the owner's common law neglect and any unreasonable conduct by the contractor or worker in encountering a negligently created danger which is independent of the contacted work fall outside *Privette* and are a matter of comparative fault.

B. Under *Kinsman*, the Feasability Limitation on Contractor Duty Applies to Known Dangers

Kinsman expressly states that the feasibility limitation on *Privette* delegation is concerned with ***known*** dangers. This is only logical: if a risk is unknown, it makes no sense to talk of the contractor "reasonably" taking protective measures. When *Kinsman* talks about feasibility, it is concerned with open or known dangers, and hence it indicates there is no general immunity for negligently created but open and obvious dangers:

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

Mathis (OBM 44-45) construes *Kinsman* to resuscitate as regards contractors

the now discredited rule that the owner is relieved of any duty if the threat is known to the worker. But *Kinsman* plainly recognizes that even independent contractors are governed by the modern rule that a known danger may be the basis of liability where it cannot be avoided "through reasonable safety precautions on the part of the independent contractor" - as where it is outside the scope of retention or where conditions imposed by the hirer impede safety measures.

> "[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger." *(Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393 [duty to protect against obvious electrocution hazard posed by overhead electrical wires]; see also *Rest.2d Torts*, §343A [possessor of land liable for obvious danger if "the possessor should anticipate the harm despite such . . . obviousness"].)
> [*Kinsman*, 37 Cal.4th at 673, emphasis added.]

> . . . ***There may be situations, as alluded to immediately above, in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part to remedy the hazard because knowledge of the hazard is inadequate to prevent injury.*** But that is not this case, since Kinsman acknowledges that reasonable safety precautions against the hazard of asbestos were readily available, such as wearing an inexpensive respirator. Thus, when there is a known safety hazard on a hirer's premises that can be addressed ***through reasonable safety precautions*** on the part of the independent contractor, a corollary of *Privette* and its

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

Kinsman did not explore the distinctions between inherent, independent and enhanced risks, and seems to have regarded as an inherent risk the environmental problem faced by a plaintiff whose work erecting scaffolding for asbestos removal itself released asbestos. *Kinsman* found no hirer liability for that danger because there was admittedly an easy fix – masks – available to the contractor. It therefore cannot be the rule that the hirer is immune from liability for every known danger.

Under *Kinsman* and preceding decisions, non-delegation to the contractor may be found where the owner should reasonably repair rather than rely on a warning or the obviousness of the danger. In such cases, the relative burden on the owner is slight and the necessity and foreseeability of the contractor encountering the danger is high. See *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 716 (reversing summary judgment where it was possible that even if produce debris on floor was obvious, it might be sufficiently common as to require clearing rather than relying on invitees to notice it); *Donohue, supra*, 16 Cal.App.4th 658, 664-665 (noting that "obvious danger" defense is a recharacterization of the former secondary assumption of risk doctrine, now subsumed into comparative fault.) Also *McKown v. Wal-Mart Stores* (2002) 27 Cal.4th 219 (applying comparative fault to open risk), and *Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, discussed below.

There is no more reason to make "obviousness" an absolute bar in contractor cases than in firefighter cases.

Kinsman did not distinguish risks which are within the contractor's expertise from those merely present on the premises but outside the scope of the contractor's

retention. Nor did *Kinsman* examine the extent of the "workplace" for which hazards might be delegated, since the risk of asbestos was environmental rather than a localized danger

Nor did *Kinsman* address enhanced risks created by a hirer, as to which the court has repeatedly rejected "implied assumption" of the risk as a basis for denying duty as to affirmative neglect "even where the participating individual is aware of the possibility that such misconduct may occur." *Knight v. Jewett, supra*, 3 Cal.4th at 311. See also *McKown*, as flatly inconsistent with the claim that patency eliminates all hirer duties to workers, and *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1277 fn. 3, applying *Privette* and observing that "the obviousness of the hazard does not in and of itself relieve Summit View of any duty it might have to eliminate it. (See *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122.)"

Mathis claims that *Krongos* only applies to third parties –a contention that begs credibility given *Kinsman*'s endorsement of the modern rule in the context of a contractor's claim. *McKown* as well teaches that whether a contractor could have theoretically taken measures to protect against the hirer's negligent exercise of retained control, or the hirer's creation of a enhanced or extrinsic danger, is at most a matter of comparative fault. That contractor had the option of using other equipment, but such theoretical ability to avoid the enhanced danger was no reason for relieving the hirer of all consequences of his negligent contribution to the accident: "[a]dmittedly, [hirer] was not the only one at fault, but then the jury's verdict reflected that" *McKown*, 27 Cal.4th at 222–223, 225–226.

Mathis asserts that *Kinsman* excluded all liability for known dangers by citing the rule of *Rest.2nd Torts* §343, comment e, that an owner will be liable for a known danger if he should have expected that the invitee "will not discover or realize the danger, *or will fail to protect themselves against it.*" His theory is that *Kinsman* found

the italicized language inapplicable to contractors on the grounds that contractors assume responsibility for *all known risks*. But under *Privette*, assumption of duty extends only to inherent risks, which would generally be those recognized and known to the contractor since they are those which arise in the normal exercise of his trade. As to extrinsic or enhanced risks, the contractor is in a position like that of other invitees who realistically will encounter the hazard.

C. *Kinsman*'s Feasability Limitation Does Not Impose Liability on Faultless Hirers or Owners

Mathis asserts that the instant Opinion conflict with *Hooker* because "a hirer who *delegates* control of the worksite and *does not* affirmatively contribute to the injury may now be liable." Wrong. A hirer is liable only when he has negligently created or maintained a danger ***and*** has exposed a contractor or worker who is not charged with correcting that condition to the risk. Such hirer has exposed a worker to a danger not inherent in the contractor's retention (not implicitly assumed because it is the subject of the contracted work), and has failed not only to maintain and correct, but failed in the duty to hire a qualified specialist to correct that very condition, as discussed below. There is no scenario under the instant Opinion or *Kinsman* in which a faultless hirer will be liable.

Put differently, *Privette* provides immunity from liability under the peculiar risk doctrine, and therefore protects a landowner who is *not at fault* from liability for an accident resulting from the contractor's negligent failure to take precautions for the very risks he contracted to remedy. If the hirer is at fault for the danger and for not hiring a contractor to fix it, the rationale of *Privette* does not apply.

McKown v. Wal-Mart, supra, 27 Cal.4th 219, illustrates how circumstances of the work – including demands of the hirer for action which increased the risk of falling – impose practical limitations on a contractor's ability to take protective

measures. McKown was employed by an independent contractor to run sound system wires through a ceiling. Wal–Mart requested the contractor to use Wal–Mart's forklift when possible to accelerate the work, though it lacked a safety chain. When the forklift hit a pipe with McKown on the platform, he fell to the floor. Though Wal–Mart only requested that the contractor use its forklift, this Court found the importance to the contractor of its relationship with Wal–Mart and the practical difficulties in procuring a replacement lift justified apportioning liability to Wal–Mart, though some risk of falling was certainly inherent in such work. Its liability was not derivative.

In language probative of Gonzalez' decision to climb immediately to the roof at Carrasco's insistence, McKown rejected Wal–Mart's contention that the all safety duties lay with the contractor.

> The contractor had several contracts with Wal–Mart for the installation of sound systems in Wal–Mart stores, and Wal–Mart, the world's largest retailer, was a customer the contractor was presumably loathe to displease. (The chief executive officer of the contractor testified that Wal–Mart had requested that the contractor use Wal–Mart's forklifts whenever possible, and "[a]s a businessman I found that if a customer has a legitimate request, it's usually best to do what the customer asks.") Wal–Mart presumably believed the forklift it provided was safe, and plaintiff may well have believed that refusal to use it would have generated ill will. The extra expense of renting a forklift would have been chargeable to Wal–Mart. Moreover, renting a forklift would have entailed delaying the installation project for at least 24 hours for the following reasons: The installation work was to occur at night when the store was closed.

> Wal–Mart provided the forklift to the contractor's employees around midnight. At that time of night rental yards, where substitute equipment might have been obtained, were closed. Admittedly, Wal–Mart was not the only one at fault, but then the jury's verdict reflected that. [*McKown*, 27 Cal.4th 225–226]

The parallels with Gonzalez are unmistakable: he was ordered by Carrasco to mount the roof immediately in response to leakage; he was on the last day of a three day job with no time and no budget to stop and install protective devices; he had already told Mathis to get a roofer and Mathis had failed to do so; he had no other practicable route; and it is doubtful that he could have practicably installed safety devices since workers crossed the roof only briefly to get to the skylight, requiring the freedom of movement which such devices are designed to restrict.

D. Foreseeability in Duty Analysis is an Objective Standard Concerning the General Risk, Not the Defendant's Personal Knowledge

Mathis contends that a worker carries the burden of an "extraordinary showing" that the impracticality of safety measures was actually known to the particular hirer (OBM 54), and that the instant Opinion requires owners to analyze the capacity of particular contractors to avoid a given risk.

Footnote 2 to the Opinion does not, as Mathis claims, impose a new duty on hirers to avoid accidents regardless of whether injury is foreseeable. Rather, it asserts that as to ***open hazards*** (open to the owner as well as to the worker), *Kinsman* requires only reasonable safety efforts by the contractor. The owner has a duty to inspect and hence at least constructive knowledge of any open hazard, and a duty to hire a contractor to fix it. That owner will incur no liability as to any contractor hired

to correct it, since such danger is the very subject of the contract. Foreseeability of injury is no burden on the landowner who performs his ordinary duties. Contractors retained for work independent of the danger are owed only the duty owed to any invitees with respect to an open hazard, subject to a regime of comparative fault.

The landowner who hires a contractor unequipped to the open danger has neither satisfied nor delegated his duty with regard to that danger, and must anticipate that a contractor not specializing in such risks will encounter it, open or not, as a practical necessity of accomplishing unrelated work. *Osborn v. Mission Ready Mix*, *supra*, 224 Cal.App.3d at 122.

Mathis asserts that under *Rest.2nd Torts* 343(A)(1) and *Krongos*, the key inquiry is whether it was foreseeable ***to the particular owner*** that an invitee would not take measures to avoid an open danger, and that one who hires a contractor is entitled to assume that a contractor's superior knowledge renders him capable of avoiding *any risk* encountered. (OBM 53-4) *Krongos* illustrates Mathis' error. In *Krongos*, a worker was killed when the boom truck on which he was working contacted overhead electrical power lines. The Court observed that "the practical necessity of encountering the danger (*i.e.*, the necessity of using the boom truck to move materials), when weighed against the apparent risk involved (electrocution by contact with electrical wires), is such that under the circumstances, a person might (and in fact did) choose to encounter the danger."

> We stress, however, that we find the injury "foreseeable" only as it pertains to a general duty of care. "[A] court's task – in determining 'duty' – is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind

> of harm experienced that liability may appropriately be imposed on the negligent party." *(Ballard v. Uribe* (1986) 41 Cal.3d 564, 572–573, fn. 6; *Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 82.) [*Krongos*, 7 Cal.App.4th at 394]

For purposes of duty analysis, foreseeability is concerned with the potential for injury generally, not with the conduct of the particular parties or foreseeability of the particular act causing injury. It comprehends "'whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' [W]hat is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence." *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57–58. It is an objective standard. *Markley v. Beagle* (1967) 66 Cal.2d 951, 955–956.[3]

The foreseeability question, then, is simply whether – in general terms – a low-skill contractor confronted with a danger which is outside the scope of his expertise and retention, and which increases the inherent risk of his work, might foreseeably encounter that danger, even if known. In the case of a house cleaner and a roof requiring professional repair, such foreseeability is high, and it is precisely the situation in which a duty to warn is insufficient.

Mathis asserts that the hirer can assume that a contractor is capable of taking protective measures against any danger on the premises. That assumption bears little weight when the risk is outside the contractor's work, the hirer enhances the risks, or

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[3] "'California law looks to the entire "category of negligent conduct," not to particular parties in a narrowly defined set of circumstances,' and leaves to the jury the fact-specific question of whether or not the defendant acted reasonably under the circumstances." *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 774.

circumstances dictate the worker confronting a danger even without all possible safety measures, as in *Krongos*, *McKown*, and *Martinez*. As to such dangers, the hirer has no expectation that a contractor who is not hired or equipped to correct the condition will assume responsibility.

Foreseeability here is informed by the fact that house cleaners do *not* take control of the entire premises as does a general contractor, and does not have plenary authority over every dangerous aspect of the property. The scope of delegation is necessarily confined to what he can reasonably do. In the case of contractors hired for limited purposes and low-skill tasks, it is a fact issue as to what protective measures the contractor can reasonably be expected to take, following the principle that the extent of implied authority depends upon the duties with which the agent is intrusted and the rules on him. *N.O. Nelson Mfg. Co. v. Rush* (1918) 178 Cal. 569, 573; *Forgeron Inc. v. Hansen* (1957) 149 Cal.App.2d 352, 359.

E. Public Policy is Offended By a Rule Which Rewards an Owner's Failure to Repair and Shifts the Cost of Accidents to Those Neither Equipped Nor Paid to Address the Danger

Mathis insistently cites the "strong policy in favor of delegation" of hirer duties. That policy is intended to encourage hirers and owners to remediate dangerous conditions by hiring experienced contractors tasked with the duty and with the expertise to correct and take precautionary measures, thereby enhancing public safety.

If a landowner is free to subject contractors of *any speciality* to *any risk* on the premises, immunizing him from common law neglect, the owner will be incentivized to leave the danger intact to be confronted by the next worker, to whom the hirer will also owe no duty. It is far cheaper to hire cleaners and gardeners and shift the risk of accidents to such workers than to hire a professional roofer; it is always cheaper to

shift the risk of injury for open dangers to low-skill contractors than to hire specialists suited to the requirements of a complex danger. Exempting hirers from liability for neglect which creates dangers independent of the contractor's work thus diminishes public safety.

Privette reasoned that hirers should be encouraged to delegate hazardous work which requires specialized skills rather then leaving it to non-expert employees. Mathis' proposed rule replicates the danger identified by *Privette* by permitting delegation to contractors unsuited to the danger at hand. Moreover, as discussed below, the hirer of a low-skill contractor has not realistically paid via the worker comp system for medical, disability and other benefits resulting from hirer negligence which enhances the dangers normally incident to low-skill and low-risk work.

5. MATHIS RETAINED CONTROL OF THE ROOF CONDITION BY FAILING TO HIRE A ROOFER AND DIRECTING PERFORMANCE OF GONZALEZ' WORK

The claim that Mathis delegated to Gonzalez all duties with respect to the slippery catwalk stretches "delegation" beyond any sensible meaning. How did Mathis "surrender control" of an area where the work was ***not*** being done, but was a mere path to the work site? Why is the knowing maintenance of a danger which the contractor had advised the hirer to correct not an affirmative contribution to the injury? When the owner orders the immediate act which exposes the worker to dangers negligently created by the owner, how has the hirer ***not*** affirmatively exercised control?

In the classic *Privette* case, a general contractor take possession of the entire premises, contractors work according to detailed plans which allocate work responsibility among specialists, and contractors negotiate the scope of their safety

responsibilities such that one can identify the locus of their work and the extent of their control. A contractor with a limited task does not assume control over the entire project premises. *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120; *Austin v. Riverside Portland Cement, supra,* 44 Cal.2d 225. Nothing suggests that Mathis surrendered control of the entire premises or the entire roof.

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

Under the "retained control" concept, a hirer/owner will be liable for neglect which influences performance of the work if it is causally related to the injury. Such neglect may consist of failure to properly perform a duty retained or undertaken by the hirer (thereby negating any implied delegation), or affecting the manner in which the work is performed so as to increase the risk. *Hooker, supra,* 27 Cal.4th 209-214.

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

Liability under "retained control" exists when the hirer contributes to unsafe conditions or procedures "by direction, induced reliance, or other affirmative

conduct." *Hooker, supra*, 27 Cal.4th at 209, quoting *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 39.

> Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury.
> [27 Cal.4th 212, fn. 3]

The use comment to *CACI* 1009B states:

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

A. An Owner Who Refuses to Hire a Contractor Capable of Remedying a Known Danger Has Not Delegated His Duty For that Condition

The premise of *Privette* is that an owner hiring a contractor to perform specific work has satisfied his duty *as to that very work* by retaining a specialist suitable to

the condition to be remedied – *i.e.*, the hirer has actually directed a contractor to correct it. "The Second Restatement of Torts has appropriately summarized this duty by stating that the employer must choose '. . . a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others . . .' *Restatement (Second) of Torts* s 411 (Comment a)." *W. Stock Ctr., Inc. v. Sevit, Inc.* (Colo. 1978) 195 Colo. 372, 376. Also *Ozan Lumber Co. v. McNeely* (Ark. 1949) 214 Ark. 657, 663, 217 S.W.2d 341; *Joslin v. Idaho Times Pub. Co.* (1939) 60 Idaho 235, 91 P.2d 386, 388; *DiMaggio v. Crossings Homeowners Ass'n* (1991) 219 Ill.App.3d 1084, 1090, 580 N.E.2d 615.

Mathis assumes that he has satisfied his duty by hiring a contractor incapable of correcting the condition simply because the contractor is aware of the danger, and despite Gonzalez' statement that a professional roofer was needed. But the owner who knowingly refuses to hire a specialist competent to address the danger is the equivalent of an owner who retains control over that danger.

In *Jessee v. Amoco Oil Co.* (1992) 230 Ill.App.3d 337, 343, 594 N.E.2d 1210, Amoco chose to hire a contractor whose bid failed to include duct work which Amoco knew was an important part of the project. This allowed the jury to conclude "that Amoco knew that duct work was necessary but hired a contractor whose bid did not include the duct work, and that in so doing, Amoco retained the control and the responsibility of installing the duct work." *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, upheld a theory of negligence liability for injuries resulting from defendant's negligent failure to hire contractors (other than decedent's employer) competent to work safely with or around the asbestos-containing materials on defendants' premises, and to warn of or mitigate an asbestos hazard where the there

was no reasonable expectation that the hazard would form part of the contractor's work. See also *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 596-597 (homeowner who controlled permitting process and installation of pool equipment retained control and could be liable to landscape and pool worker.)

Mathis was more culpable than the hirers in *Jessee* and *Grahn*, since he was told by Gonzalez of the need for a roofer (which he already knew) and did nothing. Inferentially, Mathis and Gonzalez both recognized that the duty as to the roof remained with Mathis.

B. The Owner's Duty to Retain a Specialist Suitable to Known Dangers is Non-Delegable

Mathis seems to contend that a homeowner is not competent to select the type of specialist required for a given task.[4] It is a ludicrous claim since Gonzalez told Mathis exactly what kind of contractor he needed: a roofer. (App. 303-304) Gonzalez thus performed his duty while Mathis failed in his. Perhaps in some case a homeowner can fault a contractor for failing to advise that another type of specialist is required – but not *this* case.

In a complex construction project, the owner either hires a general contractor to select specialists or acts as his own general, and thereby assumes direct responsibility for contractor selection. *Baldwin-Lima Hamilton Corp. v. United States* (Ct.Cl. 1970) 434 F.2d 1371, 1389 ("[W]hen the [owner] awarded ... separate prime contracts for the construction of the power units, [it] became in effect the prime contractor, with some residual responsibility for coordinating the efforts of its

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[4] "Peculiar risk" doctrine imposes liability on homeowners as well as professional builders (*Privette,* 5 Cal.4th at 701) as does the general duty to keep premises in repair, so a homeowner has no reasonable expectation that hiring a contractor unsuited to the task at hand will satisfy his common law duty.

contractors.") Specialized insurance for such owners is available. Galganski, *Owners and Contractors Protective Liability: An Insurance Tool in Construction, Construction Law* (Jan. 1995) 8.[5]

It usually takes no sophistication to identify the type of contractor required for a given residential project, or to appreciate the distinct functions of house cleaner and roofer.[6] "The fact that defendants were not builders or demolishers does not compel a conclusion that they should not have been expected to recognize the risk and take or require the taking of reasonable precautions." *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 510, overruled on other grounds by *Privette*, 5 Cal.4th 689. Mathis did not give Gonzalez the authority of a general contractor over the premises, much less the authority to hire other contractors.

Nor is a homeowner exempt from such duties by reason of age or personal limitations. *Rest. 2nd Torts* §343, for instance, imposes liability on the possessor who "knows or by the exercise of reasonable care would discover" the dangerous condition, and "should realize that it involves an unreasonable risk of harm to such invitees." This is an objective standard. *Markley v. Beagle, supra,* 66 Cal.2d 955–956 (where worker, en route to repair ventilation fan on roof, was injured when a mezzanine railing inside the building gave way, owners were liable because

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[5] Owners also have an implicit duty to coordinate performance when they have retained multiple contractors. *APAC-Georgia, Inc. v. Dep't of Transp.* (1996) 221 Ga.App. 604, 607, 472 S.E.2d 97; *Shea–S&M Ball v. Massman–Kiewit–Early* (D.C.Cir. 1979) 606 F.2d 1245, 1251; *Paccon, Inc. v. United States* (Ct.Cl. 1968) 399 F.2d 162, 170 (once notified of problem, owner must "direct or require the necessary cooperation from the contractor whose activities were hurting the plaintiff.")

[6] The relevant legal principal would be "you don't need a weatherman to know which way the wind blows." *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001, quoting Bob Dylan, *Subterranean Homesick Blues.*

"[t]hey knew or should have known that [the worker] would use the mezzanine to get to the fan on the roof . . .") California's contractor licensing scheme allows the average homeowner to verify the contractor's license speciality through a 24-Hour number and web site. www.cslb.ca.gov

C. Mathis' Exercise of Control Over Performance of the Work Increased the Risk and Contributed to the Injury

Affirmative contribution occurs when the hirer "is actively involved in, or asserts control over, the manner of performance of the contracted work." *Hooker, supra*, 27 Cal.4th at 215. Carrasco expressly directed Gonzalez to send workers to the roof to wash the skylight whose poor condition (evidencing Mathis's negligent maintenance) resulted in leakage. That emergency – created by Mathis – prompted Carrasco to order Gonzalez to immediately ascend to the roof. Fully aware of the roof problem, Carrasco followed him, continuing to give him instructions even when he was on the roof.

McKown v. Wal–Mart Stores, supra, 27 Cal.4th 219, discussed above, upheld a verdict for an injured worker where the hirer had encouraged the contractor to use the hirer's defective forklift in circumstances in which the contractor was naturally reluctant to resist the request. Gonzalez faced a similar if not more insistent and immediate customer demand for specific action, as well as time and budget constraints.

In *Tverberg*, an independent contractor sued the general contractor after falling into an uncovered hole dug for a bollard footing adjacent to where plaintiff was to erect a canopy. The fall was deemed an inherent risk of the work since he canopy had to be raised immediately adjacent to the hole, the independent contractor had been granted control over that specific task through a chain of delegation, and the contractor had in fact altered the immediate site to modify the risk. Yet this

Court found that the worker could maintain a direct liability claim based on retained control over the premises and remanded. (49 Cal.4th at 529)

On remand, the Court of Appeal held that the general contractor's affirmative contribution to the accident could consist of (1) directing another subcontractor to dig the bollard holes in the first place, (2) Fillner's determination that there was no need to cover or barricade the bollard holes, or (3) Fillner's failure to cover the holes after Tverberg twice asked that it do so. *Tverberg v. Fillner Construction*, *supra*, 202 Cal.App.4th at 1448.

Here, Mathis and not the contracted work created the danger; Mathis implicitly retained control of the roof and the duty to repair or hire a roofer; Mathis failed to honor Gonzalez' request that he hire a roofer; and Mathis' agent Carrasco intervened to direct specific action by the contractor which knowingly exposed him to the negligently maintained risk.

This presents a less inferential case for exercise of control than *McKown* or *Tverberg*, where the contractors more completely controlled and occupied the work site than did Gonzalez. The *Mckown* and *Tverberg* workers did not face a risk outside the scope of their specialization, and were not directly commanded at the site to engage in the very act which caused injury. The facts accordingly present a triable issue as to retained control. *Tverberg*, 202 Cal.App.4th at 1448; *Hooker*, 27 Cal.4th at 212 (finding a triable issue as to whether defendant retained control over safety conditions based on its practice of retracting outriggers to permit traffic to pass and placement of an engineer onsite with authority to punish subcontractors for noncompliance with safety requirements, though such control did not contribute to the accident.)

6. AVAILABILITY OF WORKERS COMPENSATION COVERAGE PROVIDES NO JUSTIFICATION FOR EXEMPTING HIRERS FROM LIABILITY FOR DIRECT NEGLIGENCE

Mathis relies on the insurance rationale of *Privette*: that the hirer has presumably paid a premium for workers compensation coverage as part of the contract price, and that imposing liability in excess of such benefits on a faultless hirer would give the worker otherwise limited to comp benefits a windfall. The "faultlessness" of Mathis is disproven above. The presumption that workers compensation premiums are calculated to include his neglect is equally faulty.

The cost of hirer neglect is not included in comp premiums, and should not be shifted to the workers comp system, or to faultless owners and contractors. Compensation premiums reflect the cost of workplace injuries incident to dangers necessarily entailed by the risk - not the cost of hirer or third party neglect.

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

> Similarly, if an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an unwarranted windfall.
> [*Hooker, supra*, 27 Cal.4th at 212-214]

Workers compensation premiums reflects risks inherent in the work, not extraneous hirer neglect. *Hooker, supra*, 27 Cal.4th at 210-213. And workers compensation does not advance the public safety objectives served by premises liability and common law duties of care since (under Mathis' theory) limiting liability to comp benefits eliminates the incentive for owners to remove existing hazards. *Privette*, 5 Cal.4th at 692.

Shifting the cost of hirer neglect to workers compensation – rather than premises liability or construction liability insurance – places the cost of hirer neglect on workers, contractors and other hirer/owners who are not at fault – contrary to *Privette*'s intent. By contrast, where the danger in question is the reason the contractor was hired, the risk of injury can fairly be said to be calculable and the cost to have been incorporated in the workers comp premium.

An owner who fails to disclose a concealed danger, or negligently exercises retained control, is liable without regard to comp benefit limits, even if the injury is compensable as work-related. This is only explicable on the grounds the cost of the hirer's negligence is *not* part of the premium or contract price.

It is particularly unreasonable to expect workers compensation coverage to protect a hirer who breached the duty to hire a contractor qualified to address the very danger which caused the injury – instead placing the risk on a lower-cost and less sophisticated contractor. Mathis saved the cost of hiring a roofer while passing

the cost of that failure on to the injured worker, and hence did not indirectly pay any premium associated with the risk of roof repair. Workers Compensation is not intended to protect a hirer against liability for dangers on the property which the contractor is not hired to address and which do not arise because of the contracted work, but exist independently of the work.

7. MATHIS' FAILURE TO DISPROVE HIS NEGLIGENCE AS A CAUSE OF INJURY MANDATED DENIAL OF SUMMARY JUDGMENT

Mathis did not negate the central allegation of the Complaint: that he created and maintained a dangerous condition consisting of loose rocks, pebbles and sand on the roof. (App. 4, 5) Since *Privette* creates no immunity and implies no delegation for risks outside the contractor's retention, Mathis failed to demonstrate the absence of duty – the premise of his motion.

A. A "Presumption of Delegation" Will Not Support Summary Judgment Where the Hirer fails to Negate His Affirmative Neglect or Retained Control

Ray v. Silverado Constructors, *supra*, 98 Cal.App.4th at 1130, rejects Mathis' theory that the "burden of persuasion" allowed him to carry his initial burden merely by arguing that he had no duty under *Privette*.

> . . . *Privette* and *Toland* are not properly construed to mean a cause of action for direct negligence can never be maintained against the property owner and general contractor. Thus, to the extent TCA and Silverado based their motion on those cases, they fell short of meeting their burden of showing a complete defense. Second, to the extent their motion is based on the

> assertions that they had no duty of care, they did not breach any duty, or causation was lacking, Appellant succeeded in raising triable issues of material fact as to each point.
> [98 Cal.App.4th at 1130]

Mathis' "presumption of delegation" does not create a presumption that he satisfied all his own duties with respect to the work or premises, nor create a presumption that every risk created by the hirer can reasonably be avoided under all circumstances created by the hirer. See *Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1063, reversing summary judgment where, although the plaintiff musician conceded that falling off a stage was an inherent risk for stage performers, the defendant the country club "did not attempt to show it had not increased the risk of falling and failed to present any evidence to refute Fazio's claim its construction of the stage increased that risk. . . The burden, therefore, did not shift to Fazio to raise a triable issue of fact as to whether the stage posed risks beyond those inherent in performing on stage."

It is absurd to claim that there is no evidence rebutting any presumption of delegation where the record shows Mathis' negligent maintenance and conduct impelling Gonzalez to encounter the risk of the deteriorated roof. Mathis knew that the configuration of the roof was such that workers would travel along the roof edge. He admittedly had notice of the dangerous roof (App. 426-428, 486-487, 557-560, 614-618), knew that the ladder was the customary route, used by "everybody" ascending to the roof so that invitees would travel along the roof edge. (App. 439-440, 452) He took no remedial measures despite knowledge a roofer was needed (App. 425-426, 440, 500, 609-612), that the parapet was only cosmetic (App. 446-447), that it was impractical to walk behind the parapet. These

circumstances present a jury question. *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 364–366 (while falling is an inherent risk of skiing, whether artificial jumps increased inherent risk was question for jury.)

While Mathis asserts that Gonzalez did not prove that he could not have crawled along the roof, installed a temporary guardrail, or grasped the ornamental parapet (OBM 57), this is an argument about comparative fault. *Donohue, supra,* 16 Cal.App.4th 658, 665 ("Plaintiff's conduct in proceeding to traverse the stairs despite full appreciation of the risk created by such negligence was no more than a species of contributory negligence . . ."); *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 591-593; *Lopez, supra,* 45 Cal.App.4th at 716 (reversing summary judgment where it was possible that even if produce debris on floor was obvious, it might be sufficiently common as to require clearing rather than relying on notice.) Absent a return to contributory fault, Gonzalez' failure to take a particular measure does not demonstrate lack of duty from Mathis to Gonzalez, much less lack of negligence by Mathis.

As *Privette* rests upon a showing that responsibility has been delegated, the burden is upon the party asserting that claim. *Aspen Pictures, Inc. v. Oceanic S. S. Co.* (1957) 148 Cal.App.2d 238, 253. Implied authority and delegation are normally a jury issue. *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 412; *Smith v. Deutsch* (1948) 89 Cal.App.2d 419, 425.

Nor did Gonzales have the burden of showing Mathis' "actual knowledge" of limitations on Gonzalez' ability to take reasonable precautionary measures. Mathis had the burden of negating any basis for liability even for issues as to which plaintiff might have the burden at trial. No issue of *scienter* appeared in the moving papers, and Gonzalez had no obligation to rebut issues not properly tendered. *C.C.P.* §437c(p)(2); *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th

454, 468; *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 743-744.

Mathis suggests that he carried his burden by demonstrating that plaintiff could not show that safety features were unavailable (which would only show comparative fault). While the initial burden may be met by demonstrating that an "opponent's discovery responses are devoid of evidence to support an element of the opponent's case" (*Rio Linda School District v. Superior Court* (1997) 52 Cal.App.4th 732, 735), it is not enough to simply argue that plaintiff cannot prove its case since this would place the initial burden on the resisting party. *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 955-957, 960; *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 81, 83. The movant is required to make an affirmative showing of the ***absence of evidence*** to establish *a prima facie* case by "direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a *prima facie* case." *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 186. The burden does not shift until a review of all direct, circumstantial and inferential evidence establishes the absence of any evidence to support the plaintiff's case. *Scheiding, supra*, 69 Cal.App.4th 81.

Since that *prima facie* showing was not made in the moving papers, it was unnecessary even to examine the opposing evidence. *C.C.P.* §437c(p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.

B. The Record Does Not Establish the Reasonable Availability of Protective Devices or that Gonzalez Acted Negligently

Mathis contends that the record shows reasonable safety precaution that Gonzalez could have taken: "repairing the roof and installing safety hooks," crawling on the roof, grabbing protrusions, etc. Since Mathis admitted the parapet was merely cosmetic (App. 446-447) and the roof was visibly disordered (App. 48,

54, 56, 58), the general proposition that hooks can be installed on buildings reveals nothing about their feasability or usefulness on *this roof* when the work was not at the edge of the roof.[7]

While other premises had safety hooks or tie-offs for safety harness, such devices are only useful when working in place – and the roof edge was not where the work was done. A harness prevents falls by limiting mobility; when going to or from the ground to the skylight, mobility is essential. It does not appear as a matter of fact how a harness could have reasonably been worn while walking to the ladder, or if the parapet was designed to, or structurally capable of, supporting the weight of a harnessed worker. (App. 54, 56, 58)

Instead of addressing the issue of feasibility, Mathis' motion only argued the risk was known. Had it been properly tendered, feasability and standard of care would plainly have presented triable issues. Expert testimony as to risks and "customary practices in an arena of esoteric activity" is admissible for purposes of determining whether the inherent risks of the activity were increased by defendant's conduct. *Kahn v. E. Side Union High Sch.*, *supra*, 31 Cal.4th 990, 1017–18; *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995 fn. 23; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37.

Contrary to Mathis' concerns about workability and the ease of securing

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[7] *Cf. Delgadillo v. Television Ctr., Inc.* (2018) 20 Cal.App.5th 1078, where the contractor first planned on using ladders and poles to clean the exterior of a three story commercial building (not a single-story residence, as here), then decided on its own to suspend the workers from the roof. The window cleaner's work was on the vertical surface of the building, so the danger was the very one contracted for and at the very location where the work was to be done, and the hirer did not influence the manner of performance. As in *Kinsman*'s example of a roofer's duty to inspect the roof he was retained to repair, Delgadillo's employer assumed duties as to the condition of the attachment points essential to the specific work.

summary judgment (assuming that procedural ease and not justice is the reason for *Privette*), summary judgment continues to be readily available in true "no duty" situations where the injury is due to risks which are the reason for retaining the contractor, and there is no affirmative neglect by the hirer. What is not available is automatic immunity to negligent hirers who interfere in the work or never bother to hire a contractor capable of remedying their neglect.

8. CONCLUSION

Far from conflicting with other decisions, the present Opinion is the natural elaboration of accepted and just limitations on implied delegation of duties under *Privette* and its progeny, none of which supports Mathis' absolutist rule that *any obvious danger* on the property is the delegated responsibility of *any contractor* on the property.

Privette serves public safety only when owners hire contractors to actually fix and maintain properties in a safe condition – not when they shirk that responsibility by shifting the risk to those unqualified and unauthorized to perform the owner's duty.

Respectfully Submitted,

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Dated: September 17, 2018

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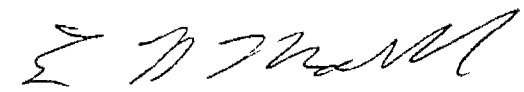
CERTIFICATE OF COMPLIANCE

Counsel certifies that pursuant to C.R.C. Rule 8.204(c)(1), the enclosed ANSWER BRIEF ON THE MERITS is produced using 13 point Roman type and contains 13,972 words, which is less than the 14,000 words permitted by Rule.8.204(c)(4). Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: September 17, 2018



Evan D. Marshall

PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am employed at 11400 West Olympic Blvd., Suite 1150, Los Angeles, CA 90064. On September 17, 2018, I served the attached ANSWER BRIEF ON THE MERITS on the parties in this action by placing a true copy in a sealed envelope, addressed as follows, and depositing it in the mail with sufficient first class postage at Los Angeles, California:

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I declare under penalty of perjury, that the foregoing is true and correct. Executed at Los Angeles, California on September 17, 2018.

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