Case No. S247677

SUPREME COURT
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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

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REPLY BRIEF ON THE MERITS

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INTRODUCTION

This Court could not have stated the baseline rule of the *Privette* doctrine any more clearly: "Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*SeaBright Ins. Co. v. U.S. Airways, Inc.* (2011) 52 Cal.4th 590, 594 [citing *Privette v. Superior Court* (1993) 5 Cal.4th 689].) But one would hardly guess from reading Gonzalez's Answering Brief on the Merits (ABM) that this is the general rule. Instead, Gonzalez insists that the *Privette* doctrine is limited to cases in which a "landowner retain[s] a 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"—and only then when the contractor is "specifically tasked and qualified to remedy the danger." (ABM 11.)

Gonzalez's unabashed rewriting of *Privette*'s framework not only is completely irreconcilable with this Court's cases, it also is nowhere to be found in the Court of Appeal's decision in this case—which rested on entirely different grounds. Gonzalez's late pivot to an alternative argument speaks volumes about his inability to defend the actual basis for the Court of Appeal's decision. And it also underscores the stakes of this case, by which Gonzalez seeks to upend a settled framework developed by this Court over 25 years that impacts millions of transactions each year and promotes myriad important policies. Nothing in Gonzalez's Answering Brief provides any justification for that unwarranted and problematic result. This Court should reverse the decision below and reject

Gonzalez's alternative invitation to rewrite the *Privette* doctrine altogether.

First, for the reasons set forth in Mathis's Opening Brief on the Merits (OBM), this Court should hold that the Court of Appeal erred by adopting a new exception to *Privette*'s framework that is sharply at odds with this Court's precedents and *Privette*'s policies. Gonzalez does not even address the Court of Appeal's rationale until almost halfway through his brief. And when he does, he makes little attempt to reconcile it with this Court's holdings in *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198, *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 521, and *Seabright, supra*. Nor does he credibly respond to the charge that the Court of Appeal's new exception 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—precisely the kinds of results that *Privette*'s framework is intended to avoid.

Second, this Court should reject Gonzalez's convoluted alternative argument, which purports to define the contours of *Privette*'s framework by invoking caselaw addressing assumption of risk, the liability of firefighters, and other areas of law having little to do with the issues at hand. Whatever its source, Gonzalez's alternative argument ultimately reduces to the claim that *Privette*'s framework is applicable only to injuries stemming from risks *inherent* in work done by contractors who specialize in remediating those particular risks. Gonzalez thus argues that he is not an expert in roof repair and the risk of falling from slippery conditions on an aging roof was not an inherent risk of cleaning skylight at Mathis's house, and that therefore his injuries fall outside *Privette*'s scope.

Gonzalez's dubious characterization of *Privette*'s framework was not even addressed, much less adopted, by the Court of Appeal. And it is wholly unmoored from and incompatible with this Court's precedents, which have never limited *Privette*'s reach (or the concept of inherent risk) in that fashion. In *Tverberg*, for instance, the Court held that the possibility of falling into certain construction holes was an inherent risk of building a metal canopy—even though the contractor was not hired to remediate that risk, had no expertise in doing so, and encountered the risk simply because it was "located next to the area" where he was building the canopy. (49 Cal.4th at p. 518.) This Court should reject Gonzalez's dangerous invitation to fundamentally rewrite *Privette* in a manner that would destabilize millions of transactions and deeply undermine its policy aims.

Because the Court of Appeal's new exception is inconsistent with this Court's precedents and creates all the wrong incentives, the Court should reject it entirely. But for the reasons identified in Mathis's Opening Brief, any exception should, at minimum, be narrowed to incorporate concepts of foreseeability that are essential to the premises liability principles on which the court's exception is purportedly based. Moreover, this Court should confirm that—as other California decisions make clear—it was properly Gonzalez's burden at summary judgment to introduce evidence establishing that an exception to *Privette* could apply, rather than Mathis's burden to negate that possibility. Gonzalez offers no credible opposition, agreeing that foreseeability is relevant, and failing even to address the authority on which Mathis relies for who bears the burden.

Finally, this Court should reject Gonzalez's contention that Mathis exercised retained control of the work in a manner that affirmatively contributed to Gonzalez's injury. The trial court and Court of Appeal both correctly found this argument meritless. Mathis never controlled how Gonzalez and his workers got to and from the skylight, and—as a matter of settled California law—his *passive* failure to have his roof repaired did not constitute an *affirmative* contribution to Gonzalez's injury. (See *Hooker, supra,* 27 Cal.4th at pp. 210–211.)

ARGUMENT

I. THE COURT SHOULD REJECT GONZALEZ'S ATTEMPT TO REWRITE THE *PRIVETTE* DOCTRINE

As Mathis explained in his Opening Brief, the Court of Appeal's newfound exception is incompatible with this Court's precedents and the policies underlying *Privette*'s framework. It is also unworkable in practice. Gonzalez's Answering Brief fails to seriously address those issues. Instead, Gonzalez devotes most of his brief to advancing an entirely new theory of liability that the Court of Appeal did not adopt and which suffers from the same fatal problems. This Court should reject both efforts—the Court of Appeal's below, and Gonzalez's here—to radically reshape the *Privette* doctrine.

A. Gonzalez's Defense Of The Court Of Appeal's New Exception Is Unpersuasive

The Court of Appeal held there to be a third exception to the *Privette* doctrine 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.) Mathis explained at length in his Opening Brief why the Court of Appeal was wrong to conclude that this third exception exists. (OBM 31–51.) Gonzalez fails to show otherwise.

1. This Court's Decisions Provide No Support For The Court of Appeal's New Exception

a. As Mathis's Opening Brief demonstrated, the Court of Appeal's new exception is inconsistent with this Court's decisions in *Hooker*, *Tverberg*, and *SeaBright*. (OBM 33–38.)

Under *Hooker*, a hirer cannot be liable for injuries resulting from known hazards unless the hirer retains control over the jobsite and affirmatively contributes to the injury. (27 Cal.4th at p. 202.) Yet the decision below permits liability for a hirer who *neither* retains control over the jobsite *nor* affirmatively contributes to the injury. (See OBM 33–34.) *Tverberg*, in turn, held that a contractor who was injured as the result of an open hazard that he lacked the ability to remedy could not recover from the hirer unless he showed that *Hooker*'s retained control exception applied. (49 Cal.4th at p. 529.) The Court of Appeal, however, held that Gonzalez's purported inability to remedy the hazard would allow him to recover even though it held that *Hooker*'s retained control exception did *not* apply. (See OBM 35–36.) Finally, the decision below contradicts *SeaBright*'s holding that the hirer of an independent contractor "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; see also OBM 36–38.)

Gonzalez barely confronts those conflicts. He asserts (ABM 37) that Mathis is wrong to claim that the Court of Appeal's exception permits liability against a hirer "who delegates control of the worksite and does not affirmatively contribute to the injury"—a result squarely at odds with *Hooker.* But the Court of Appeal's decision holds just that—concluding that Mathis may be liable here even though he delegated control to Gonzalez and did not affirmatively contribute to his injuries. (Op. at pp. 14–17.)

Gonzalez next insists that under the Court of Appeal's decision, "[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." (ABM 37.) But Gonzalez makes these limitations up from whole cloth; he cites nothing in the Court of Appeal's opinion so holding. In any event, such a rule would be irreconcilable with *Hooker*, in which this Court held that a hirer was entitled to summary judgment notwithstanding that (1) the hirer was alleged to have negligently created a risk at the worksite and (2) the contractor's employee was not charged with correcting the risk that gave rise to his injuries. (See 27 Cal.4th at pp. 214–215.)

As to *Tverberg* and *Seabright*, Gonzalez has even less to say. He makes no attempt to reconcile the Court of Appeal's exception with the actual holdings of those cases. Nor could he. (See OBM 35–38.) Instead, Gonzalez pivots to language from those decisions and others addressing a contractor's responsibility to take "reasonable" or "reasonably necessary" safety precautions. (ABM 32–33.) Gonzalez asserts that these statements evince a "feasibility limitation on *Privette* delegation." (*Id.* at p. 33.) Not so. As Mathis previously has explained (see, e.g., OBM 48, fn. 9; Reply iso Pet'n for Review, filed Apr. 16, 2018 at pp. 7–10), such language does not show that the scope of a hirer's delegation is limited to situations in which feasible safety precautions are available. Rather, it merely reflects that the tort law duty of care *delegated* to the contractor requires him to take all reasonably necessary safety precautions at the worksite to protect his employees.

b. Gonzalez also makes two further attempts to justify the result below that run headlong into this Court's precedents.

First, Gonzalez suggests that the decision below and the notion of a feasibility limitation are bolstered by *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219. (See ABM 37–39.) But it is unclear why Gonzalez thinks *McKown* is helpful. *McKown* held that a hirer who affirmatively provides unsafe equipment to a contractor may be held liable under *Hooker* because it has retained control in a manner that affirmatively contributed to the injury. (27 Cal.4th at pp. 222, 225.) That issue has no relevance to this case. Indeed, the Court of Appeal found *Hooker*'s exception inapplicable here (and never even cited *McKown*).

Second, Gonzalez contends that *Privette* and its progeny protect a hirer only from *vicarious* liability and therefore pose no barrier here, since Gonzalez purportedly seeks to hold Mathis *directly* liable for his own negligence. (See ABM 11, 17, 18.) That too misses the mark. This Court has made clear that "*Privette* extends to cases where the hirer is *directly* negligent in the sense of having failed to take precautions against the peculiar risks involved in the work entrusted to the contractor." (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1243.) Gonzalez's claim here is no different.

Properly understood, moreover, Gonzalez's claim *does* rest on a theory of vicarious liability. Under *Privette*, a homeowner who hires a contractor "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.) Having delegated that responsibility, "a hirer has *no duty* to act to protect the employee when the contractor fails in that task and therefore no liability; *such liability would essentially be derivative and vicarious.*" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674, italics added [citing *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 268–270].)

As in *Camargo*, the direct cause of Gonzalez's injury here was the contractor's "'fail[ure] to use reasonable care in performing the work.'" (25 Cal.4th at p. 1244, citation omitted.) If, as Gonzalez insists, traversing Mathis's one-story roof exposed his employees to danger for which no reasonable safety precautions were available, directing his employees to take that risk anyways entailed a failure to use reasonable care. (See *Rasmus v. Southern Pacific Co.* (1956) 144 Cal.App.2d 264, 268 ["[I]f the employer knows . . . that the third party's premises are dangerous, the employer may be liable for the employee's injuries there."]; *Ericksen v. Southern Pacific Co.* (1952) 39 Cal.2d 374, 380 [employer properly liable for exposing his employee to unsafe conditions at a third party's site].)

Notwithstanding Gonzalez's characterization of his claim, he in fact seeks to impose liability on Mathis for an alleged violation of the duty of care Mathis *delegated* to Gonzalez's company. As *Camargo* makes clear, characterizing his claim as one alleging that Mathis was directly negligent does not remove it from *Privette*'s ambit.

2. The New Exception Undermines *Privette*'s Policies

Mathis's Opening Brief noted that the Court of Appeal's new exception would frustrate the policies underlying *Privette*. (OBM 38–41.) Gonzalez does not even respond to, let alone deny, those charges. Instead he makes two policy arguments of his own. Neither withstands scrutiny.

First, Gonzalez argues that public safety will be undermined "[i]f a landowner is free to subject contractors of *any specialty* to *any risk* on the premises" because he "will be incentivized to leave the danger intact." (ABM 42.) That is wrong. To start, *Privette* permits a homeowner to delegate responsibility for safety only with respect to risks *known* to the contractor. In the face of a known risk, an expert contractor is best positioned to implement appropriate precautions to protect its employees. To the extent that a contractor cannot take necessary precautions without further action by the homeowner, a reasonable contractor will not proceed with the work until those actions are taken. That state of affairs will promote action to *fix* the danger, not leave it intact.

The Court of Appeal's decision, by contrast, incentivizes hirers to assign their own less-skilled employees to complete potentially dangerous tasks rather than hiring expert contractors—exactly the result *Privette* sought to avoid. (See *Privette, supra,* 5 Cal.4th at p. 700; OBM 38.)[1]

Second, Gonzalez claims that the availability of workers' compensation does not justify application of the *Privette* doctrine in this case because, he says, compensation premiums do not reflect "the cost of hirer or third party neglect." (ABM 51.) But a contractor approaching a job that exposes its employees to obvious hazards will *of course* factor the risk of injuries from such hazards, and the resulting cost of workers' compensation insurance, into the price of its contract—irrespective of whether those hazards are the result of the hirer's negligence. Gonzalez's suggestion that contractors would charge less to face open hazards precipitated by the negligence of a hirer or third party has no basis in fact or logic.

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1 Under Gonzalez's rule, for instance, Mathis could have immunized himself from tort liability by assigning his longtime housekeeper to clean the skylight, rather than hiring a company (like Gonzalez's) that specialized in performing such work safely. Such results are antithetical to *Privette*'s policy aims.

Gonzalez's view is also flatly contradicted by *SeaBright*. In *SeaBright*, a hirer failed to install safety guards that were affirmatively required by Cal-OSHA regulations. (52 Cal.4th 590.) As a result, the contractor was exposed to additional hazards at the worksite that would have been avoided had the hirer simply complied with its statutory responsibilities. (*Ibid.*) Even so, this Court had little difficulty finding that the "cost of workers' compensation insurance . . . [wa]s presumably included in the contract price" and that the availability of workers' compensation cut firmly against hirer liability. (*Id.* at p. 603.) Likewise, this Court recognized that to permit the contractor's employee to recover in tort when the hirer's own employees would be restricted to workers' compensation would be inequitable. The same considerations apply here.

3. The New Exception Is Unworkable And Would Render Summary Judgment A Practical Impossibility

Mathis explained in his Opening Brief that the Court of Appeal's new exception to *Privette* is unworkable in practice. (OBM 41–44.) Mathis offered a sampling of the numerous and difficult practical questions raised by the decision below. For example:

- What constitutes a "reasonable" safety precaution? Does it turn on the cost of the precaution? Must it eliminate the risk altogether, or simply reduce it?
- Is "reasonableness" judged from the perspective of the hirer or the contractor?

- How does a hirer determine the which hazards must be considered and potentially remedied?
- What if, as here, the hirer is elderly and lacks the ability to inspect a worksite to determine whether reasonable safety precautions are available?

(See OBM 42–44.) Gonzalez makes no effort to respond to these or the many other difficult questions raised by the decision below, underscoring that courts would be left rudderless.

Nor does Gonzalez seriously contest that the Court of Appeal's new exception would render summary judgment a practical impossibility. To the contrary, he himself proposes that summary judgment be reserved for only the few cases where it is undisputed that the injury is caused by a risk that is "the reason for retaining the contractor" and there is "no affirmative neglect by the hirer." (ABM 58.) Because of the ease with which a nonmoving party could and would dispute those issues, among others (see OBM 41–44), the Court of Appeal's new exception will drive every ordinary case towards trial, imposing significant new costs on homeowners and hirers, as well as courts.

4. *Kinsman* Itself Provides No Support For The Court of Appeal's Decision

Although the Court of Appeal purported to follow *Kinsman*, Mathis explained in his Opening Brief that the decision below is inconsistent with *Kinsman*'s ultimate holding. (OBM 44–51.) Gonzalez barely responds to Mathis's detailed discussion of *Kinsman*, spending only one paragraph on Mathis's points. (ABM 36–37.) And that one paragraph is not a defense of the Court of

Appeal's treatment of *Kinsman*. Instead, Gonzalez argues that Mathis's analysis of *Kinsman* is simply irrelevant because delegation under *Privette* "extends only to inherent risks," not "extrinsic or enhanced risks." (*Id.* at p. 37.) But as explained in the next section, Gonzalez is fundamentally mistaken about the concept of inherent risk—as *Kinsman* itself demonstrates.

B. Gonzalez's Invitation To Affirm On Alternative Grounds Should Be Rejected

It is telling that Gonzalez's primary argument in his Answering Brief is not a defense of the Court of Appeal's reasoning, but an invitation to affirm the judgment on an entirely different basis that would fundamentally rewrite and upend *Privette*'s framework. Specifically, Gonzalez argues that falling off Mathis's roof was not an "inherent risk" of the work that his company had been hired to perform, and that therefore the *Privette* doctrine does not apply in the first place. (ABM 18–31; see also *id.* at p. 12 [citing this as the first "real issue[]" presented].) It is not apparent that Gonzalez even raised this argument in his Answer to the Petition. And the Court of Appeal did not even discuss, much less embrace, this idea either. For good reason: Falling off the roof manifestly *was* an "inherent risk" of cleaning Mathis's rooftop skylight. This Court's precedents confirm that commonsense conclusion. And none of Gonzalez's arguments to the contrary is persuasive. The Court should reject this late-breaking bid for affirmance on alternative grounds.

1. Gonzalez's "Inherent Risk" Argument Is Incompatible With This Court's Cases

As summarized in the first sentence of his brief, Gonzalez's alternative argument boils down to the proposition that the *Privette* doctrine applies only where a contractor has been hired "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." (ABM 11; see also, e.g., *id.* at p. 29 [suggesting the contractor must be "specifically retained to cure the dangerous condition"]; *id.* at p. 52 [suggesting "the danger in question [must be] the reason the contractor was hired"].) Only then, in Gonzalez's view, is the danger in question an "inherent risk" of the contracted work for which a hirer may not be held liable. And even then, Gonzalez claims that a hirer may delegate responsibility for addressing those inherent risks only to those "specifically tasked and qualified" to remedy them. (*Id.* at p. 11.) In Gonzalez's view, the risk of slipping on loose sand or gravel on Mathis's roof was neither a risk he was hired or qualified to cure, nor one inherent to cleaning the skylight on Mathis's roof. He therefore claims the *Privette* doctrine is inapplicable.

Gonzalez's remarkable rewriting of *Privette*'s framework is as audacious as it is wrong. Consider *Kinsman*. If Gonzalez were right—if the only risks that come within *Privette*'s scope are those that a contractor has the expertise to remedy or that are entailed by the very nature of the contractor's task—*Kinsman* would have been a trivially easy case. The danger at issue in *Kinsman* was exposure to asbestos. Kinsman's employer neither had expertise in asbestos remediation nor was hired for a task necessarily entailing asbestos exposure; it was hired simply to build and dismantle scaffolding. (37 Cal.4th at pp. 664–665.) Accordingly, if Gonzalez were correct, this Court would have easily concluded that the risk was not inherent in Kinsman's work and held the hirer liable. But that is not what happened. Instead, the Court concluded that if a jury found that Kinsman's employer knew or should have known of the asbestos hazard, then the hirer would *not* be liable. (*Id.* at p. 683.)

Tverberg likewise squarely rejects Gonzalez's interpretation of inherent risk. There, the Court held that falling into a bollard hole was an inherent risk for an independent contractor (Tverberg) who had been hired to build a metal canopy. (*Tverberg, supra,* 49 Cal.4th at pp. 528–529.) That was so even though "[t]he bollards had no connection to the building of the metal canopy, and Tverberg had never before seen bollard holes at a canopy installation." (*Id.* at p. 523.) Location alone was sufficient: "Because the bollard holes were located next to the area where Tverberg was to erect the metal canopy, the possibility of falling into one of those holes constituted an inherent risk of the canopy work." (*Id.* at p. 529.)[2]

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[2] Gonzalez suggests in passing that *Tverberg* deemed the risk inherent in part because "the contractor had in fact altered the immediate site to modify the risk." (ABM 49.) That is incorrect. Although the opinion's background mentions that Tverberg removed a few stakes marking some of the bollard holes (*Tverberg, supra,* 49 Cal.4th at p. 523), that fact plays no role in the Court's explanation of why the risk of falling into the holes was inherent in Tverberg's work (see *id.* at pp. 528–529).

Kinsman and *Tverberg* confirm that an "inherent risk" under *Privette* is any risk arising "either from the nature *or the location* of the work." (*Privette, supra,* 5 Cal.4th at p. 695, italics added.) That is, any risk present at the jobsite where the contractor is working qualifies, even if it is *not* a risk "necessarily entailed" (ABM 23), by the nature of the work itself. Scaffolding and canopy construction do not "necessarily entail" the risks of, respectively, asbestos exposure and bollard holes, but because those dangers were present at the worksites in *Kinsman* and *Tverberg*, they qualified as inherent risks. That accords with *Seabright*, where this Court affirmed that independent contractors presumptively have a "duty to provide a safe workplace" (52 Cal.4th at p. 600)—not just safety from the risks they are "retained to cure" (ABM 29).

This Court's cases thus make it abundantly clear that slipping off Mathis's roof was an inherent risk of the job Gonzalez had been hired to perform. Gonzalez was hired to clean a rooftop skylight, which Gonzalez *himself* claims could only be accessed for cleaning from the roof. The rooftop was therefore the jobsite, and so *any* known risks that were present there fall squarely within the *Privette* doctrine. And Gonzalez's argument that the precise spot where he slipped "was a mere path to the work site" (ABM 43), is meritless. *Tverberg* demonstrates (as common sense would suggest) that the "work site" is not limited to the precise spot where the contractor performs his task. (49 Cal.4th at pp. 518–519.) The bollard holes in *Tverberg* were located "next to the area where Tverberg was to erect the metal canopy" (*id.* at p. 529), and he fell into one while "walk[ing] from his truck toward the canopy" (*id.* at p. 523). Tverberg's injury nonetheless qualified as occurring "at the jobsite." (*Ibid.*) So does Gonzalez's.

Indeed, compared to *Tverberg* or *Kinsman*, the inherent risk question here is easy. *Of course* falling off a roof is a risk inherent in cleaning the exterior of a skylight on that roof. The task involves climbing onto and off of the roof, and doing so entails a danger of falling—whether because of a stubbed toe, a misplaced foot, slippery conditions (as Gonzalez alleges here), or a simple loss of balance. Gonzalez's own marketing materials—materials he never mentions in his Answering Brief—drive the point home. Gonzalez held himself out as a "special[ist] in hard to reach windows and skylights" whose employees "take extra care . . . with their own safety when cleaning windows." (3-AA-669.) The reason for him and his employees to take extra care with their own safety is, of course, because cleaning hard-to-reach skylights entails climbing onto and working on rooftops, which carries the risk of falling.

2. Gonzalez's Counterarguments Concerning Inherent Risk Fail

Gonzalez makes several arguments aimed at showing that falling off Mathis's roof was not an inherent risk of his job, but none is persuasive.

a. First, Gonzalez purports to find support for his narrow understanding of inherent risk in a passage from *Kinsman*. (See ABM 28–29.) There the Court said that a roofer could not recover from a hirer if he fell through a defective roof, but could recover if a defective wall supporting his ladder gave way. (ABM 29 [quoting

Kinsman, supra, 37 Cal.4th at pp. 677–678].) From this, Gonzalez concludes that the scope of a contractor's delegated duty is limited to the ultimate subject of his contracted work.

Gonzalez misconstrues the point of this discussion in *Kinsman*, which merely affirms that a hirer may be liable "when a *hidden* hazard leads directly to the employee's injury." (*Kinsman, supra*, 37 Cal.4th at pp. 677–678, italics added.) In contrast, *Kinsman* explains that where (as here) the hazard is open and obvious, "a hirer has no duty to act to protect the employee." (*Id.* at 674.) It is that distinction the Court was relying on in *Kinsman*, not whether the risks at issue were inherent in the contractor's work.[3]

b. Next, Gonzalez proposes that the doctrine of assumption of risk is somehow relevant and bolsters his argument about the scope of inherent risks. "'Delegation' under *Privette*," he posits, "is essentially a form of primary assumption of the risk."

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[3] *Kinsman* also explained that even as to hidden hazards, "the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises." (37 Cal. 4th at p. 677.) As a result, the court explained that an employee of a contractor hired to repair a defective roof generally could not complain of a *hidden* defect on the roof (because it was part of his delegated responsibility). By contrast, *Kinsman* affirmed that such an employee could sue the hirer for a *hidden* defect in the wall supporting the ladder, at least "assuming that this defect was not related to the roof under repair." (*Id.* at p. 678.) By contrast, this case involves open and obvious hazards that were part and parcel of Gonzalez's contractual responsibility to access and clean the skylight on Mathis's roof. (Cf. 3-AA-667 [Gonzalez advertising his "[s]pecializ[ation] in hard to reach windows and skylights"].)

(ABM 25.) But Gonzalez cites no authority for this assertion, and none is to be found. None of this Court's decisions has ever described the delegation of tort duties under the *Privette* doctrine as a "form of," or in any way related to, primary assumption of risk. Nor, in fact, does any decision cited anywhere in Gonzalez's brief.[4]

That is because Gonzalez is wrong. The doctrine of primary assumption of risk addresses whether, in certain circumstances, a plaintiff is owed a duty of care *at all.* (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 308–309; *Mosca v. Lichtenwalter* (1997) 58 Cal.App.4th 551, 553 ["Primary assumption of risk is a policy-driven legal concept where the courts declare there is no duty at all."].) By contrast, as its name indicates, the doctrine of delegation under *Privette* addresses *who* owes a duty of care, assuming one exists: does it remain with the hirer, or has it been delegated to the independent contractor? Gonzalez's invocation of primary assumption of risk is thus a pointless distraction.

c. Equally unavailing is Gonzalez's characterization of the risk at issue here as "increased" or "enhanced." (E.g., ABM 26.) The risk here was no more "increased" or "enhanced" than were the risks in *Tverberg* (large man-made holes) and *SeaBright* (missing safety guards required by Cal-OSHA regulations). If anything, loose sand and gravel stemming from ordinary roof deterioration is *less* of an "enhanced" risk than the dangers faced in those cases. It is, in fact, exactly the sort of risk that a window-

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[4] Gonzalez quotes *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532 in a manner that might suggest that it links the *Privette* doctrine to assumption of risk. (ABM 22.) It does not; *Neighbarger* never mentions *Privette.*

cleaner specializing in hard-to-reach skylights would be likely to encounter.

In connection with his "enhanced" risk argument, Gonzalez cites a trio of Court of Appeal decisions, none of which—to the extent they even remain good law—supports liability here. (See ABM 27.) Mathis did not "act affirmatively to create or increase the risk of injury" here (*Zamudio v. City and County of San Francisco* (1999) 70 Cal.App.4th 445, 455, citation omitted), or "increase the risk of harm by [his] own affirmative conduct" (*Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1401).[5] And he certainly did not "arrange and supply . . . safety systems and devices, which [he] then withdrew before the work was completed." (*Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334, 1345.) At most he did not "'prevent the . . . continuation of a hazardous'" situation—precisely what *Hooker* explains is *not* enough to justify hirer liability. (27 Cal.4th at p. 211, citation omitted; see also *id.* at pp. 207–209 ["passivity or nonaction" in the face of a hazard insufficient to impose liability on a hirer].)

d. Finally, Gonzalez relies throughout his brief on ordinary premises liability cases that do not involve independent contractors. (E.g., ABM 27–28, 30–31.) That is a non-starter. As

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[5] Insofar as *Grahn* suggests that only those dangers that are "the very subject of the work to be performed" come within the scope of the *Privette* doctrine (58 Cal.App.4th at p. 1400), it is plainly inconsistent with this Court's subsequent decisions in *Tverberg* and *Kinsman*. This Court has in fact repeatedly found *Grahn*'s analysis of the *Privette* doctrine flawed. (See *Hooker, supra,* 27 Cal.4th at pp. 208–210; *Camargo, supra,* 25 Cal.4th at pp. 1242–1245.)

Kinsman confirms, "the usual rules about landowner liability must be modified" with respect to injuries sustained by an independent contractor's employees. (*Kinsman*, *supra*, 37 Cal.4th at p. 674.) That is because when hiring an independent contractor, a homeowner can, and presumptively does, delegate responsibility for workplace safety to the contractor. (*Id.* at pp. 673, 679; see also *SeaBright*, *supra*, 52 Cal.4th at p. 597.) Ordinary premises liability cases like *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658 and *Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179 (neither of which involved independent contractors) are therefore simply inapposite.[6]

Furthermore, Gonzalez is wrong about the origin and nature of any potential duty in this case. Gonzalez seems to think that Mathis has a freestanding duty to the world at large to ensure that his roof is not slippery. (See ABM 30.) Not so. The scope of a landowner's general duty to keep his premises safe is limited by, among other things, the foreseeability of harm. (See, e.g., *Vasilenko v. Grace Fam. Church* (2017) 3 Cal.5th 1077, 1085.) A typical homeowner has no duty to protect ordinary invitees against purportedly slippery conditions on his roof because it is generally not foreseeable that an ordinary invitee will climb onto and walk on a homeowner's roof.

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[6] Although *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104 [cited at ABM 30, 40] did involve the employee of a contractor, it predates *Privette* and its analysis fails (understandably) to address the delegation principles this Court has since explicated.

As in *SeaBright*, any tort law duty that Mathis owed to Gonzalez and his employees did not "predate" Gonzalez's contract to clean the skylight; "rather, it arose *out of the contract*," existing "only . . . because of the work" that Gonzalez and his employees were hired to complete. (52 Cal.4th at p. 603, italics added.) As *SeaBright* makes clear, therefore, Mathis was entitled by hiring Gonzalez's company to delegate that duty of care—like "any tort law duty it owes to the contractor's employees to ensure the[ir] safety" at the worksite. (*Id.* at p. 594.)[7]

II. AT A MINIMUM, THE COURT OF APPEAL'S NEW EXCEPTION TO THE *PRIVETTE* DOCTRINE MUST BE NARROWED

For the reasons explained in Mathis's Opening Brief and above, this Court should reject the Court of Appeal's conclusion that there is a new, third exception to the *Privette* doctrine. But at a minimum, the Court of Appeal's new exception is manifestly overbroad. First, any exception based on common law premises liability principles should not impose liability on a hirer unless the contractor's inability to take reasonable safety precautions was foreseeable. Second, it should be plaintiff's burden to make that showing. Gonzalez fails to demonstrate otherwise.

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[7] Gonzalez's passing reliance (ABM 22) on *Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 651, and *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1038, adds nothing. These cases simply stand for the unremarkable proposition that certain statutes and regulations impose nondelegable duties. There is no argument here that any tort duty that Mathis might owe is nondelegable.

A. The Contractor's Inability To Take Precautions Must Have Been Foreseeable To The Hirer

As Mathis explained in his Opening Brief, although the Court of Appeal's new exception is supposedly derived from the common law of premises liability, it omits a key element of such liability: foreseeability. (OBM 52–54.) Traditionally, a landowner owed a duty to protect invitees from obvious hazards *only* where it was foreseeable that the invitees could not or would not protect themselves. (*Id.* at p. 53 [citing Rest.2d Torts, § 343A].) Ordinarily, however, it is not foreseeable that a contractor will fail to protect its employees against obvious hazards. Absent a contrary showing, therefore, a landowner should not be liable under ordinary premises liability principles—*even if* those principles fully applied to an independent contractor's employees (which they do not). (See, e.g., *Kinsman, supra*, 37 Cal.4th at p. 674.)

Gonzalez does not dispute that the Court of Appeal's new exception to *Privette* must incorporate a foreseeability requirement. Instead he primarily quibbles with (1) the level of generality at which the foreseeability inquiry should be conducted, and (2) the outcome of a foreseeability inquiry in this case. (ABM 39–41.) Neither response is persuasive.

Gonzalez first attacks a strawman—accusing Mathis of defining the key inquiry as whether "it was foreseeable *to the particular owner*" that the contractor would avoid a hazard. (ABM 40.) But Mathis has never disputed that courts should evaluate foreseeability from the objective standpoint of a reasonable person in Mathis's shoes—rather than conduct some inquiry into Mathis's subjective expectations. (See, e.g., Reply iso Pet. for Review 18–19.) In conducting that inquiry, however, it is entirely proper to consider the particular facts known to the hirer. (See., e.g., Rest.2d Torts, § 343A [evaluating whether "the possessor has reason to expect" that the invitee will "fail to protect himself"].)

Gonzalez next insists that the proper foreseeability inquiry in this case should have examined whether "a low-skill contractor confronted with a danger which is outside the scope of his expertise and retention . . . might foreseeably encounter that danger." (ABM 41.) But Gonzalez's preferred inquiry ignores both the law and the facts. First, the question under premises liability is not whether it is foreseeable to the landowner that an invitee will *encounter* a danger, but instead whether it is foreseeable that the invitee "will not discover or realize the danger, or *will fail to protect themselves against it*" (*Kinsman, supra,* 37 Cal. 4th at p. 673, italics added.)[8]

Second, Gonzalez cannot run from the facts in this case. The undisputed record shows that Gonzalez (1) advertised that he "[s]pecializ[ed] in hard to reach windows and skylights" and "train[ed] his employees to take extra care . . . with their own safety when cleaning windows" (3-AA-667–669); (2) cleaned the skylight at issue without incident for 20 years (2-AA-257–258); and (3) never indicated to Mathis or his housekeeper that he was

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[8] As noted above, however, *Kinsman* recognizes 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." (37 Cal. 4th at p. 674.) As a result, it expressly holds that a landowner has "no duty to act to protect the employee" even when he anticipates that a contractor "will fail to protect [its employees] against" harm. (*Ibid.*, italics omitted.)

unable to perform the job safely. Contrary to his claims, he was no mere "low-skill contractor." Under premises liability, the operative question is whether it should have been foreseeable to someone in Mathis's shoes that Gonzalez was incapable of taking safety precautions despite those considerations. The answer is no.

B. Gonzalez Had The Burden To Show That No Reasonable Precautions Were Available

In addition to ignoring foreseeability, the Court of Appeal wrongly held that *Mathis* had the burden at summary judgment to present evidence conclusively negating the possibility that no precautions were available. (OBM 55–59.) Allocating the evidentiary burden to Mathis in this way conflicts with settled California law. As multiple courts have explained, once a defendant has shown that a contractor's employee is injured at the worksite, such that *Privette*'s presumption is implicated, it becomes the *plaintiff's* burden to present evidence to show that an exception to *Privette*'s doctrine applies. (See, e.g., *Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642–643 & fn. 3; *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1275–1276; see also Evid. Code, § 601 [noting "rebuttable presumption" may "affect[] the burden of producing evidence"].)

Gonzalez does not even discuss, let alone distinguish, *Alvarez* or the other cases Mathis cited concerning the summary judgment framework for cases involving the *Privette* doctrine. Gonzalez instead asserts (ABM 53–54) that Mathis's burden argument was "reject[ed]" by *Ray v. Silverado Constructors* (2002)

98 Cal.App.4th 1120, 1130. But *Ray* was denied summary judgment because an independent contractor's employee "presented sufficient *evidence* to create a triable issue of fact" as to whether an exception to *Privette*'s general rule applied. (*Id.* at 1137, italics added.) That accords with *Alvarez* rather than contradicting it.

Gonzalez also points to numerous cases that he claims establish that a "movant is required to make an affirmative showing of the *absence of evidence*" to prevail on summary judgment. (See ABM 56.) But Gonzalez's cases are far off point. None even addresses the *Privette* doctrine, let alone addresses who bears what burden on summary judgment when *Privette*'s presumption is implicated.

Gonzalez makes no effort to demonstrate that he met what should have been his burden: to present evidence that no reasonable safety precautions were available. Even now, he offers no evidence to show that he was unable to take any of many potential precautions. (OBM 57 [listing potential safety measures].) Instead, Gonzalez argues that his "failure to take a particular measure" is immaterial to liability. (ABM 55.) But even under the Court of Appeal's flawed new exception, whether the hazard can "be remedied through reasonable safety precautions" is key to whether *Privette* applies. (Op. at p. 19.)

Gonzalez's failure to show reasonable safety precautions were not available is damning. For instance, although Gonzalez claims that loose pebbles and sand made the roof slippery (ABM 17), Mathis has repeatedly noted that Gonzalez simply could have swept any such materials from his path, walked more slowly, or held on to the parapet wall. (OBM 57; Pet. for Review at p. 36; Ct. App. Petition for Rehearing at p. 25, fn. 5.) Gonzalez neither claims otherwise, nor points to any evidence that such precautions were unavailable. To the contrary, although Gonzalez acknowledges that workers routinely worked on Mathis's roof, and that he himself did so for 20 years (see, e.g., ABM 14; 2-AA-257–258), he points to no evidence that anyone had difficulty taking adequate safety precautions before the day of his accident.

Nor did Gonzalez offer evidence contradicting video evidence establishing that it was possible for him to walk on the inside of the parapet wall. Gonzalez claims on appeal to this Court that "it was impractical to walk behind the parapet," but tellingly points to no *evidence* for that proposition. (ABM 54.) Nor did he do so below. The Court of Appeal dismissed Mathis's evidence by speculating that the condition of the roof might have been different at the time of the accident or that Gonzalez's size or need to carry equipment might have prevented him from walking behind the parapet. (OBM 58.) But it was Gonzalez's burden to provide *evidence* of these possibilities, which he did not do.

Even if the Court of Appeal was right to create a new exception to *Privette*, California law required Gonzalez to present evidence to create a dispute about whether reasonable safety precautions were not available to him. His failure to point to *any* evidence for that proposition should have been dispositive even in the face of the Court of Appeal's vast expansion of the *Privette* doctrine.

III. MATHIS DID NOT EXERCISE RETAINED CONTROL OR AFFIRMATIVELY CONTRIBUTE TO GONZALEZ'S INJURY

Both the trial court and the Court of Appeal held that Gonzalez failed to raise a triable issue regarding the retained control exception to the *Privette* doctrine. (Op. at pp. 7–8, 14–17.) Hoping the third time is the charm, Gonzalez renews his argument before this Court. (ABM 43–50.) It fares no better here.

1. Gonzalez argues that this case falls within *Hooker*'s retained control exception essentially for three reasons, alleging that Mathis: (1) did not "'surrender control'" of the roof; (2) "fail[ed] to hire a roofer"; and (3) "direct[ed] performance of Gonzalez' work." (ABM 43 [capitalization altered].) Gonzalez is wrong on all three points.

a. To begin with, Gonzalez's attempt to redirect the inquiry into whether Mathis "'surrender[ed] control'" of the roof is flawed from the outset.[9] As *Hooker* explains, "because the liability of the contractor, the person primarily responsible for the worker's on-the-job injuries, 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 p. 210, italics added.) Rather, *Hooker* directs that "the imposition of tort liability on a hirer should depend on whether the hirer *exercised*

[9] Why Gonzalez puts this phrase in quotation marks is a mystery, as it does not appear in any of this Court's decisions, the Court of Appeal's decision, or any filing by Mathis.

the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee." (*Ibid.*)

To the extent that Gonzalez means to suggest that he assumed no responsibility for his employees' safety while they worked to access Mathis's skylight, that too is a non-starter. (ABM 44.) To the contrary, Gonzalez specifically invited homeowners to hire his company because it "[s]pecialized in hard to reach windows and skylights." (3-AA-669.) The record is clear, moreover, that neither Mathis nor his housekeeper 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.) Rather, Gonzalez alone told his workers how to access the skylight, including what safety precautions to take. (See, e.g., 3-AA-673 [noting that he discussed the allegedly slippery conditions on Mathis's roof with his employees].) Gonzalez's claim that he lacked any responsibility for his employees' safety except when fixed in position at the skylight is inconsistent with *Privette*'s recognition that a hirer has "the right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Toland, supra*, 18 Cal.4th at p. 269.)[10] Moreover, it would discourage worksite safety

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[10] It is also difficult to reconcile Gonzalez's argument with his admission that *Delgadillo v. Television Center Inc.* (2018) 20 Cal.App.5th 1078 was rightly decided. (*See* ABM 57, fn. 7.) In that case, a contractor's employee fell while cleaning windows on the side of a building. Although the employee argued that the hirer was negligent for failing to maintain his *roof* in a manner that afforded safe access to the windows to be cleaned, Gonzalez admits that the contractor had assumed responsibility and that the injury was caused by a risk "at the very location at which the work was to be done." (*Ibid.*)

and contradict California's "strong policy 'in favor of delegation of responsibility'" to independent contractors. (*SeaBright*, *supra*, 52 Cal.4th at p. 596, citation omitted.)

b. Next, Mathis's alleged failure to hire a roofer is not enough to make *Hooker*'s retained control exception applicable. This Court made clear in *Hooker* that the "'mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice'" is not enough for hirer liability. (27 Cal.4th at p. 211 (citation omitted), see also, e.g., *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 ["A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (citing *Hooker, supra*, 27 Cal.4th at p. 215)].) Gonzalez does not argue that anything more happened here.

c. Finally, Mathis did not control Gonzalez's work in a manner that contributed to his injury. The evidence shows only that Mathis's housekeeper told him to instruct his workers on the roof to use less water. (See ABM 16.) She did not tell Gonzalez how to get onto and off of the roof, where to walk on the roof, or what safety precautions to use. Any purported "control" she exercised did not contribute to his injury. (Op. at pp. 15–16.)

2. Gonzalez also argues that the Court of Appeal's decision in *Tverberg* on remand from this Court demonstrates that there is a triable issue on the retained control exception here. (ABM 50 [citing *Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439].) That too is wrong. The Court of Appeal in *Tverberg* saw three grounds on which a jury might conclude that

the hirer (a general contractor) exercised retained control in a manner affirmatively contributing to Tverberg's injury. But none of those grounds is applicable here.

First, the hirer in *Tverberg* had affirmatively ordered the creation of the bollard holes that caused the contractor's injury. (202 Cal.App.4th at pp. 1447–1448.) In contrast, Mathis did not affirmatively cause the slippery conditions on his own roof. *Second*, the hirer in *Tverberg* affirmatively undertook certain safety measures, but was negligent in doing so, leaving Tverberg worse off. (*Id.* at p. 1448.) Mathis, on the other hand, never purported to exercise any responsibility for safety measures on the jobsite. *Third*, there was evidence that the hirer in *Tverberg* had promised to undertake additional safety measures (covering the holes) but failed to do so. (*Ibid.*) Nothing comparable happened here. Although Gonzalez claims that Mathis "failed to honor Gonzalez' request that he hire a roofer" (ABM 50), there is in fact no evidence that Mathis ever promised to hire a roofer—and no evidence that Gonzalez ever said that he could not perform his job safely unless Mathis did so. (Op. at p. 16.) The Court of Appeal's decision in *Tverberg* does nothing to call into question the lower courts' sound conclusion that the retained control exception is inapplicable here.

CONCLUSION

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

Dated: November 8, 2018 Respectfully submitted,

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Dated: November 8, 2018 Respectfully submitted,

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