IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Case No. S247677

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 DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIV. SEVEN, CASE NO. B272344; LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC542498, THE HON. GERALD ROSENBERG, JUDGE.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California ("CJAC") welcomes the opportunity as amicus curiae[1] to address the issue this case presents:

> **Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor?**

In reversing the trial court's summary judgment for the homeowner-hirer, the appellate court answered "yes" to this question. In doing so, it also set the evidentiary bar so high for defendant homeowners and others who hire independent contractors that they rarely, if ever, can prevail in a summary judgment motion based on the "peculiar risk" doctrine. The appellate court did this by ruling that

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[1] By separate application accompanying the lodging of this brief, CJAC asks the Court to accept if for filing.

"whether[, under a purported "corollary" of the peculiar risk doctrine,] a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for [the contractor to take] preventive measures" are factual issues for the jury, not for the court, to decide. *Gonzalez v. Mathis* (2018) 228 Cal.Rptr.3d 832, 843.

If allowed to stand, this opinion will muddy the waters about when, under the "peculiar risk" and cognate doctrines, summary judgment may be obtained by hirers of independent contractors sued for negligence by the contractors' employees injured on the job. The result will be an increase in litigation and unnecessary trials over hirer liability of contractors for home construction and other services, including repairs and upkeep, and a concomitant increase in the cost of home construction, maintenance, repair and insurance for home owners and businesses who hire independent contractors for various specialized services.

CJAC is a longstanding non-profit organization whose business, professional association and financial institution members are dedicated to making more fair, economical and certain the laws for determining who pays, how much, and to whom when the conduct of some occasions harm to others. Many of our members hire independent contractors to undertake services that entail peculiar risks for which the contractors have expertise or training that our members' employees do not. Consequently, we have participated as amicus curiae in cases concerning the scope and application of the peculiar risk doctrine at

issue here. See, *e.g.*, *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235 ("*Camargo*"); *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198 ("*Hooker*") and *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219 ("*McKown*").

SUMMARY OF FACTS

The facts animate and inform the legal rules which, as limned and applied by the Court, will decide this case and shape its opinion. Accordingly, the following factual summary is taken from the briefs of the parties and the appellate opinion to provide useful context for legal analysis.

When petitioner Johnny Mathis, "master of the velvet vibrato,"[2] hired plaintiff Luis Gonzalez in 2012 to clean the skylight on the flat roof of his single-story Los Angeles home, "chances [were] awfully good"[3] that things would turn out hunky-dory. After all, Gonzalez had been doing this same job for Mathis for the past 20 years without incident, first as an employee of the independent contractor, Beverly Hills Window Cleaning, and then in the mid-2000s as an employee of his own company, Hollywood Hills Window Cleaning (HHWC). Gonzalez advertised his own company as "specializ[ing] in hard to reach windows

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[2] Karen Heller, *Johnny Mathis, the Voice of the '50s, was Always Ahead of this Time. Now he's Ready to Talk about it*, THE WASHINGTON POST, August 2, 2018.

[3] "Chances Are," co-written by Al Stillman and Robert Allen, became Johnny Mathis's first number one hit in 1957.

and skylights," through trained employees who took "extra care in his clients' homes, as well as with their own safety when cleaning windows."

After Gonzalez opened his new business, he contacted Mathis's longtime housekeeper, Marcia Carrasco, and urged her to hire his company in place of his former employer for future cleaning of Mathis's skylight, windows and property. Gonzalez represented that his company was bonded and insured, but failed to clarify that the "insurance" he had did not include workers' compensation. Carrasco, on behalf of Mathis, agreed to hire Gonzalez's company and from 2007 until 2012 HHWC was "regularly hired . . . to wash the skylight and perform other services on [Mathis's] property."

The skylight was on the northwest corner of the home, overlooking an indoor pool. The section of roof located west of the skylight was divided by a three-foot high parapet wall that ran parallel to the skylight. The area of roof between the skylight and east side of the parapet wall was partially obstructed by a series of ventilation pipes and mechanical equipment. The area of roof on the west side of the parapet wall consisted of an exposed ledge, approximately two feet in width. Mathis had the parapet wall constructed to screen from view the piping and mechanical equipment positioned next to the skylight. A ladder affixed to the west side of the house provided access to the roof. The top of the ladder was located near the beginning of the parapet wall.

On August 1, 2012, two of Gonzalez's employees were on the roof cleaning the skylight when Carrasco informed him water was leaking from the roof into the house. She asked Gonzalez to tell his employees about this, suggesting they use less water. In response, Gonzalez climbed onto the roof using the affixed ladder. He then walked along the ledge on the west side of the parapet wall closest to the edge of the roof instead of the inside of the wall closer to the skylight, and spoke with his employees. While walking back toward the ladder along the outer ledge, Gonzalez lost his footing and fell off the roof, sustaining serious injury. *Gonzalez, supra*, 228 Cal.Rptr.3d at 834.

PROCEEDINGS BELOW

Gonzalez sued Mathis for negligence in 2014. He alleged the worksite – the roof on Mathis's home – was dangerous. Specifically, he charged that the parapet wall, which had been a feature of the home before Gonzalez first cleaned the skylight more than 20 years ago, was dangerous, that the roofing shingles were dilapidated, resulting in slippery and loose conditions, and that the roof lacked "tie-off" points that would enable maintenance workers to secure themselves with ropes or harnesses.

At deposition, Gonzalez admitted he had been on the roof numerous times to clean the skylight, that he always used the west, or outside area from the parapet wall to access the skylight rather than the space between the inside wall of the parapet and the skylight, had known the roofing surface was dilapidated and slippery and that the

ledge lacked any protective features, including tie-off points. He also conceded he could have, but did not, decline to clean the skylight until the roofing surface was repaired and protective features were installed.

Mathis moved for summary judgment, arguing Gonzalez's claims were precluded by *Privette v. Superior Court* (1993) 5 Cal.4th 689 ("*Privette*") and its progeny. These opinions define the liability of hirers to employees of independent contractors injured while taking peculiar risks during their work. The trial court agreed and granted summary judgment for Mathis, but the appellate court reversed in part.

The opinion acknowledged that *Hooker*'s "retained control" exception to the non-liability of hirers for injuries to employees of independent contractors did *not* apply under the facts of this case. But, it also held Mathis "failed to establish there is no triable issue of fact" whether he can be held liable under what it called *Kinsman*'s[4] purported "corollary" exception to the non-liability rule for hirers under *Privette* and companion authorities, declaring that 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." 228 Cal.Rptr.3d at 842.

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[4] *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 ("*Kinsman*").

SUMMARY OF ARGUMENT

California has long protected the right of homeowners and other hirers to delegate to independent contractors the responsibility for ensuring the safety of their own workers. This court's landmark *Privette* opinion safeguarded this right 25 years ago when it declared and explained why hirers of independent contractors should not be liable to the contractors' employees for on-the-job injuries resulting from special or "peculiar risks" inherent in their work. More recent opinions by the Court have repelled or restricted a variety of legal theories – *e.g.*, "negligent hiring," "retained control," "non-delegable duties" – intended to weaken this right and shift costs onto homeowners and other kinds of hirers and away from contractors.

This case focuses on a new theory designed to demolish the bedrock principle that hirers of independent contractors should not, except in highly limited circumstances not applicable here, be held liable for injuries to contractors or their employees resulting from their own negligence. Concocted by the appellate opinion from nothingness, this new theory would impose liability upon homeowners and other hirers for injuries sustained by an independent contractor's employee whenever the contractor (or its employees) is exposed to a known hazard that cannot be remedied through "reasonable safety precautions."

If accepted by the Court, this new theory would upend current law that hirers who retain control of worksites are not liable for

injuries to the independent contractor's employees unless the contractors *affirmatively contribute* to the injuries; it would do away with the "affirmative contribution" test by supplanting it with the vague "reasonable safety precaution" standard bound to spawn new and open-ended litigation over its meaning. This new theory would also eviscerate the current legal requirement that independent contractors cannot recover from a hirer for injuries sustained by their employees from "open hazards" and known hazards whenever the employees and contractors claimed they lacked the ability to remedy the hazards. The list goes on and on as the briefs of the petitioner and his *amici* point out in describing the ruinous consequences recognition of this new theory will inflict on homeowners, hirers and workplace safety.

It is important that bright-line rules define the liability of hirers to independent contractors for injuries occasioned to the contractors and their employees from their own negligence. That is the lesson imparted by *Privette* and its progeny; it is the surest way to clarity, certainty and stability in the law and important economic relations. The new theory propounded by the appellate opinion in this case rends existing bright-line rules this Court carefully crafted over the past quarter century and invites chaos. It should be repudiated regardless of whether the independent contractor has workers' compensation insurance.

ARGUMENT

I. HOMEOWNERS AND OTHERS WHO HIRE INDEPENDENT CONTRACTORS AND DELEGATE TO THEM RESPONSIBILITY FOR THE SAFETY OF THEIR OWN EMPLOYEES SHOULD NOT BE LIABLE FOR INJURIES TO THOSE EMPLOYEES RESULTING FROM OBVIOUS WORK HAZARDS IRRESPECTIVE OF WHETHER THE CONTRACTORS HAVE WORKERS' COMPENSATION INSURANCE.

A. California's Jurisprudential Evolution of the "Peculiar Risk" Doctrine Shows why the Court should not Impose Liability on Hirers of Independent Contractors for Injuries to the Contractors' Employees Occasioned by Obvious Work Hazards and the Contractor's Negligence.

California has experienced a topsy-turvy jurisprudential ride regarding the liability of hirers for injuries to third-parties by employees of independent contractors and to the employees themselves.[5] Understanding and learning from this history is important lest we become doomed to return whence the law stood 25 years ago.

1. The Fluctuation in California Law from 1857 through 1992 on Hirer Liability to Employees of General Contractors and Third Parties Injured by Employee Negligence.

In the beginning, California adhered to the general common law rule that a hirer of an independent contractor is not liable for the torts of the contractor or the contractor's employees acting within the scope of the contract. *Boswell v. Laird* (1857) 8 Cal. 469, distinguished by the

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[5] "'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as the result of his work only and not as to the means by which such result is accomplished." Lab. Code § 3353.

"peculiar risk" doctrine exception as explained in *Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 250 ("*Van Arsdale*").

One policy underlying that rule is "since the [hirer] has no right of control over the manner in which the work is to be done, [the work] is to be regarded as the contractor's own enterprise, and [the contractor], rather than the [hirer], is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it." W. Page Keeton, et al., *PROSSER AND KEETON ON THE LAW OF TORTS* § 71, at 509 (5th ed. 1984). Another policy supporting the rule is that the amount paid by the hirer to the independent contractor inherently includes the cost of safety precautions and insurance coverage. *Privette, supra,* 5 Cal.4th at 693.

As so often occurs with bright-line rules, however, exceptions driven by what courts view as exigencies and complication creep in to modify them. One of these exceptions was the "peculiar risk" doctrine. "Under that doctrine, a person who hires an independent contractor to do inherently dangerous work can be held liable for tort damages when the contractor causes injury to others by negligently performing the work. The doctrine initially served to ensure that innocent bystanders or neighboring landowners injured by the hired contractor's negligence will have a source of compensation even if the contractor turned out to be insolvent." *Camargo, supra,* 25 Cal.4th at 1238-1239.

"Peculiar risk" was recognized early in this country by *Chicago City v. Robbins* (1862) 67 U.S. 418. There, an independent contractor was hired by Chicago City to excavate a sidewalk next to the hirer's adjoining property. A passerby fell into the excavated area and was injured. The Court held the hirer liable for the tortious conduct of the independent contractor. *Id.* at 429. As *Van Arsdale* explained about the policy reasons underlying the "peculiar risk" exception to the general non-liability rule of the hirer:

> Some of the principal [reasons] are that the enterprise, notwithstanding the employment of the independent contractor, remains the [hirer's] because he is the party primarily to be benefitted by it, that he selects the contractor, is free to insist upon one who is financially responsible, and to demand indemnity from him, that the insurance necessary to distribute the risk is properly a cost of the [hirer's] business, and that the performance of the duty of care is of great importance to the public.

68 Cal.2d at 245.

The "peculiar risk" doctrine morphed into an expansive exception to the non-liability of hirers of independent contractors for injuries inflicted on others, including the contractors' employees, from the contractor's negligence. That doctrine, along with other "apparent exceptions" came to "overshadow in importance and scope" the [non-liability rule] applicable to hirers of general contractors. *Id.* at 250. Eventually the rule, embraced by California and a *minority* of jurisdictions in this country, served to rhythmically shield independent

contractors who caused injury to their own employees from liability for those injuries beyond the exclusive remedy of workers' compensation. In other words, the peculiar risk exception and its related doctrines came to swallow the non-liability rule for hirers of independent contractors.

Yet, at the same time, the *hirer* of the independent contractor could also be held liable in tort for the same injury-causing conduct of the contractor. "As a matter of fact, for nearly three decades, California allowed employees of independent contractors to seek recovery from the *hirers* of the independent contractors regardless of whether *direct* . . . or *vicarious* liability was the basis of the claim." Aaron Love Turner (Comment), *Toland v. Sunland Housing Group, Inc.: the California Supreme Court Erroneously Takes "Liability" out of "Direct Liability"* (1999-2000) 27 *W. ST. U. L. REV.* 425, 435 (emphasis added).

2. ***Privette's* Sea Change Reversal on the Liability of Hirers for Employee Injuries Occasioned by their own Negligence or that of the General Contractor.**

In 1993, *Privette, supra*, 5 Cal.4th 689 was decided, a watershed opinion on liability of independent contractors hired for jobs entailing "peculiar risks" that result in injuries to their employees. The defendant, a schoolteacher who owned several rental properties, hired an independent contractor to install a new tar and gravel roof on his duplex. The contractor initially transported hot tar to the roof of the duplex by use of a kettle and pumping device parked in a nearby

driveway. But "[w]hen the gravel truck arrived, the [contractor] moved the kettle and pumping device to make room for the truck." *Id.* at 692. Once the gravel was deposited on the roof, the contractor's employees determined they needed 50 more gallons of tar to complete the job. The contractor directed one of his employees to carry 10 five-gallon buckets of hot tar up a ladder to the roof. While carrying the buckets up the ladder, the employee fell, suffering burns from the hot tar. He sought workers' compensation benefits and tort damages against the defendant property owner, Franklin Privette.

Privette, having lost in the trial and appellate court, petitioned this Court to reconsider its line of previous opinions that allowed hired contractors' employees to seek recovery from a property owner for injuries occasioned by the contractors' conduct. See, *e.g.*, *Woolen v. Aerojet General Corp.* (1962) 57 Cal.2d 407, 410-411 and other authorities cited in *Privette, supra*, 5 Cal.4th at 696. The Court obliged petitioner, clarifying in its opinion that "peculiar risk" means neither risk that is abnormal to the type of work done, nor risk that is abnormally great; but simply means special, recognizable danger that arises out of the work itself. *Id.* at 695. More importantly, the Court provided several reasons for reversing the peculiar risk exception to the non-liability rule for hirers of independent contractors.

First, *Privette* explained it was anomalous and a highly criticized policy to continue to shield independent contractors from liability for

their employees' injuries occasioned by the contractors' negligence while permitting employees to also recover in tort against the hirer for its negligence. *Privette* reasoned that "the 'principal' who hires an independent contractor should be subject to no greater liability 'than its independent contractor agent,' whose exposure for injury to an employee is limited to providing workers' compensation insurance." 5 Cal.4th at 728, citing to and quoting from *Olson v. Kilstofte and Vosejpka, Inc.* (D. Minn. 1971) 327 F.Supp. 583, 587.

Second, to "impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work . . . penalize[s] those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees." *Privette, supra*, 5 Cal.4th at 729.

Third, "our conclusion in *Woolen v. Aerojet General Corp., supra*, 57 Cal.2d 407 that peculiar risk liability should extend to the employees of the independent contractor does not withstand scrutiny; such a broad extension of . . . peculiar risk is inconsistent with the approach taken by a majority of jurisdictions, and with the view expressed by the drafters of the Restatement Second of Torts." *Privette, supra*, 5 Cal.4th at 702.

3. ***Toland* and *Camargo* Clarify that *Privette's* Modification of the "Peculiar Risk" Doctrine Applies whether the Negligence of the Hirer is "Vicarious" or "Direct."**

Next came *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253. Plaintiff Timothy Toland was employed as a carpenter by CLP Construction, a framing contractor that was working in a subdivision owned by defendant Sunland Housing. On a day when conditions were muddy and wet, Toland assisted other CLP employees in manually raising a framed wall into place, which fell back, injuring him. Toland filed a workers' compensation claim against CLP and sued Sunland alleging that since raising the rain-soaked wooden wall created a peculiar risk of injury, Sunland was negligent in not providing in the contract, or in some other manner, for CLP to take special precautions to prevent his injury. Toland argued that Sunland's negligence was "direct"[6] as opposed to "vicarious;"[7] claiming that *Privette* was limited solely to vicarious liability, he argued that its application of the "peculiar risk" doctrine did not apply to bar plaintiff's lawsuit.

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[6] "Direct liability" is based on some fault of the hirer and is more difficult to prove than indirect or vicarious liability because the employee must prove a cause of action of negligence against the hirers of the independent contractors.

[7] With indirect or vicarious liability, the employee of the independent contractor only has to prove a duty based on the hirer-independent contractor relationship, the first element of a negligence cause of action. However, *Privette* has made it very difficult to impose such no-fault liability.

Toland held, however, that "contrary to [plaintiff's] assertion, . . . *Privette* bars employees of a hired contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, irrespective of whether recovery is sought under the peculiar risk set forth in . . . [Restatement 2d] section 413 [direct liability] or . . . section 416 [indirect liability]." *Id.* at 267.

Camargo buttresses *Privette* and *Toland* by prohibiting farm worker employees of an independent contractor from suing the farm owner for its "negligent hiring," a form of "direct" liability, of the contractor who had little or no knowledge of California's Heat Illness Prevention Regulation and consequently did nothing to protect its farm worker employees from unhealthy exposure to blistering hot employment conditions. In refusing to allow recovery under the "negligent hiring" provision of section 411 of the Restatement 2d, *Camargo* again obliterated any viable distinction between vicarious and direct liability. "Liability under both sections [416 and 413 of the Restatement 2d] 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." *Camargo, supra*, 25 Cal.4th at 1241, quoting *Toland.*

4. ***Hooker* and *McKown* further Limit the Liability of Hirers by Holding that their "Retained Control" of the Contractor's Work must Affirmatively Contribute to the Employee's Injury by, for instance, Requiring the Employee Perform the Work in a Negligent Manner or Providing Equipment for the Employee's use that is Defective.**

Hooker, *supra*, 27 Cal.4th 198 holds that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer "retains control" over safety conditions at a worksite, but is liable only insofar as the hirer's exercise of retained control *affirmatively contributes* to the employee's injuries.

The facts in *Hooker* are instructive for this case. A crane operator employed by a general contractor hired by Caltrans was killed when the crane he was operating tipped over. His widow filed suit against Caltrans, alleging it was liable for her husband's death because Caltrans "retained control" over the worksite. Specifically, the plaintiff relied upon the existence of a Caltrans safety manual that set forth various guidelines for jobsite safety. Caltrans's motion for summary judgment under *Privette* and *Toland* was granted by the trial court, but the court of appeal reversed. The Court granted review to consider the issues that arise when the hirer retains control of the worksite.

Hooker found the crane tipped over because the operator withdrew the outriggers on it to let other vehicles pass on the narrow overpass where the crane was operated. When the outriggers were withdrawn and the boom on the crane was swung, it became

precariously balanced, causing its tipping and the operator's death. Key to determining if there was sufficient "retained control" by Caltrans to allow for a direct tort suit against it by the estate of the contractor's deceased employee was whether Caltrans *permitted* or *required* the crane operator to operate it by withdrawing the outriggers and simultaneously swinging the boom in the manner he did. 27 Cal.4th at 215.

The Court was unpersuaded by the argument that "Caltrans, by *permitting* traffic to use the overpass while the crane was being operated, *affirmatively contributed* to Mr. Hooker's death." *Id.* at 215; emphasis original. While conceding plaintiff raised triable issues as to whether defendant retained control over safety conditions at the worksite, *Hooker* found the plaintiff failed to raise triable issues as to whether defendant *actually exercised* the retained control so as to *affirmatively contribute* to the death of plaintiff's husband. *Id.*; emphasis added. In other words, retained control alone was insufficient to come within an exception to *Privette*'s non-liability rule; the retained control must also be affirmatively exercised by defendant to cause injury to the employee.

McKown presented a related issue to *Hooker* – whether a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of *unsafe equipment* affirmatively contributes to the employee's injury. Plaintiff McKown was an employee for the

independent contractor hired by defendant Wal-Mart Stores, Inc. ("Wal-Mart") to install sound systems in its stores. In working on the installation of a sound system in the Chino store, Wal-Mart provided plaintiff use of a forklift. The forklift turned out to be unsafe, which caused an accident injuring plaintiff, who sued Wal-Mart in tort based on the retained control provision of section 411 of the Restatement 2d.

A jury found Wal-Mart negligent for providing unsafe equipment and allocated 55% of the responsibility for the accident to McKown's employer, 23% to Wal-Mart, 15% to the manufacturer of the equipment, and 7% to McKown. The Court affirmed the judgment, explaining that "when a hirer of an independent contractor, by *negligently furnishing unsafe equipment* to the contractor, *affirmatively contributes* to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence." *McKown, supra,* 27 Cal.4th at 225; emphasis added. *McKown* quoted approvingly from the appellate opinion: "where the hiring party *actively contributes* to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor." *Id.*; emphasis added.

5. Kinsman, Tverberg[8] and Seabright[9] are the Most Recent Opinions to Confirm the Narrow Liability of Hirers for Injury to Employees of Independent Contractors.

Kinsman, supra, 37 Cal.4th 659 addressed the conditions under which a landowner who hires an independent contractor is liable to an employee of that contractor injured from exposure to hazardous conditions on the landowner's premises. Specifically, the Court was faced with deciding whether a carpenter employed by an independent contractor that installed scaffolding for workers who replaced asbestos insulation in an oil refinery facility may sue the refinery owners for injuries caused by exposure to asbestos, when only the refinery owner and not the independent contractor knew the carpenter was being exposed to a hazardous substance. *Id.* at 664.

The Court's answer to that question is clear and concise: "[A] landowner that hires an independent contractor may be liable to the contractor's employee if the following conditions are present: the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous

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[8] *Tverberg v. Fillner Construction Inc.* (2010) 49 Cal.4th 518 ("*Tverberg*").

[9] *Seabright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590 ("*Seabright*").

condition, and the landowner failed to warn the contractor about this condition." *Id.*

Kinsman elaborated on this answer by explaining "when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so." *Id.* at 673-674. Only "if the hazard is *concealed* from the contractor, but known to the landowner, [must] the rule . . . be different" and liability attach to the landowner. *Id.* at 674; emphasis added.

Tverberg holds the hirer of an independent contractor is not liable in tort even if the contractor *himself,* rather than the contractor's *employee,* is the one who is injured in the workplace. *Tverberg, supra,* 49 Cal.4th at 528-529. The case arose when, after getting injured at a construction job site, an independent contractor hired by a subcontractor sued the general contractor. The trial court granted summary judgment for defendant general contractor, a decision with which this Court ultimately agreed.

Although the contractor in *Tverberg* was not, as here, entitled to workers' compensation benefits, his claim against the hirer still failed because of the hirer's presumed delegation to the contractor of

responsibility for workplace safety. *Id.* at 527-528. The independent contractor, *Tverberg* clarified, "has authority to determine the manner in which inherently dangerous . . . work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." *Id.* at 522. "Unlike a mere employee," the Court's opinion explained, "an independent contractor, by virtue of the contract, has authority to determine the *manner* in which inherently dangerous construction work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." *Id.*; emphasis added.

Seabright, supra, 52 Cal.4th 590 further emphasizes this protection for hirers in holding that "[b]y hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes *to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract." *Id.* at 594; emphasis original. In *Seabright*, US Airways, under a permit with the San Francisco International Airport, was responsible for the maintenance of a baggage conveyor owned by the airport but operated by US Airways. The conveyor lacked safeguards required by California Division of Occupational Safety and Health (Cal-OSHA) regulations. Plaintiff, an employee of US Airways's maintenance contractor, Aubry, was injured due to the lack of the required safeguards. Plaintiff

asserted that US Airways's breach of Cal-OSHA regulations was a breach of a duty owed to him. *Seabright* concluded otherwise:

> When in this case defendant US Airways hired independent contractor Aubry to maintain and repair the conveyor, US Airways presumptively delegated to Aubry any tort law duty of care the airline had under Cal-OSHA and its regulations to ensure workplace safety for the benefit of Aubry's employees. 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.

52 Cal.4th at 601.

B. The Aforementioned Opinions Underscore there is No Liability against Petitioner for Plaintiff's Injuries, a Conclusion that Stands Regardless of whether Plaintiff's Employer has Workers' Compensation Insurance.

Taken together and applied to the facts informing this case, the foregoing opinions of this Court preclude recovery for plaintiff Gonzalez against petitioner Mathis. According to the transformative *Privette* opinion, the "peculiar risk" doctrine no longer permits employees of independent contractors injured at a worksite to sue in tort those who hired the contractor. It is undisputed that Gonzalez is an employee of the independent contractor HHWC, his own company, and that Mathis hired that company to clean his skylight.

Nor, as *Toland* and *Camargo* make clear, can Mathis be successfully sued for negligence regardless of whether plaintiff bases

his claims against him on grounds of "vicarious" or "direct" liability. See discussion *ante* at pp. 18-19.

Neither can plaintiff prevail against Mathis on the "retained control" exception to the non-liability rule for hirers of independent contractors. See *ante* at pp. 20-21. The facts are clear, and the appellate court agreed in matching them to controlling law, that Mathis never told plaintiff how to clean his skylight or do any other part of his job; he left that responsibility solely to plaintiff, who had been doing the same job for petitioner for many years before he slipped, fell and was injured. Mathis provided no equipment to plaintiff for his use in cleaning the skylight or doing anything else respecting petitioner's roof. See discussion *ante* at pp. 21-22.

There was no "hidden" hazard on the roof known to Mathis that he failed to disclose to plaintiff pursuant to *Kinsman*, *ante* at pp. 22-23. In fact, the location and configuration of the parapet was well-known to plaintiff; he had worked with and around it for years and there were no changes made to it by Mathis before or after plaintiff fell. Ditto for the slippery roof surface, about which plaintiff mentioned to Mathis's housekeeper before his accident. If, however, Gonzalez felt that condition made his work in cleaning the skylight perilous for him or his employees, he could have insisted the slipperiness be remedied by Mathis before he cleaned the skylight; but he made no such request. In sum, absent any contract language to the contrary, which plaintiff has not produced, Mathis "presumptively delegated to him as

an independent contractor . . . any tort law duty of care [he] . . . had [as a hirer] to ensure workplace safety for the benefit of" plaintiff and his employees. See *Seabright ante* at p. 24.

To be sure, lurking in the background of this case like an "alligator in the bathtub" is the absence of workers' compensation insurance. *Privette* and previous authorities discussed make much about the "compensation bargain" workers' compensation insurance plays in shaping the current rules shielding hirers of independent contractors from liability for workplace injuries to the contractor's employees. Does or should, then, the absence of workers' compensation change the equation of the "compensation bargain" and the rules that have evolved starting with *Privette* and extending to *Seabright*?

Amicus submits the answer is "No" for two reasons. First, as *Tverberg* teaches, "the presence or absence of workers' compensation coverage" is not key to resolving whether *Privette* operates to bar peculiar risk liability against hirers for workplace injuries of an independent contractor or the contractor's employees. *Tverberg, supra,* 49 Cal.4th 521-522. Remember that the injured independent contractor plaintiff in *Tverberg,* like the injured plaintiff here, did not have workers' compensation coverage, a lacuna the opinion attributes in footnote two to Insurance Code § 11846. This statute provides that "independent contractors such as plaintiff may, but are not required

to, obtain coverage for workplace injury by purchasing a workers' compensation insurance policy." *Id.*

What is determinative, *Tverberg* holds, is not the presence or absence of workers' compensation insurance, but "whether an independent contractor . . . has authority to determine the manner in which inherently dangerous . . . work is to be performed, . . . thus assum[ing] legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions. Having assumed responsibility for workplace safety, an independent contractor may not hold a hiring party *vicariously* liable for injuries resulting from the contractor's own failure to effectively guard against risks inherent in the contracted work." *Id.* at 522. There is no question here that Gonzalez, and not the elderly Mathis or his housekeeper, had authority to determine the manner, method, timing and equipment to be used in the cleaning of the skylight on Mathis's home.

Second, as a seasoned practitioner has pointed out,[10] nowhere in *Privette, Toland*, and *Camargo*, does the Court state that its holdings do not apply if the independent contractor does not have workers' compensation coverage. Instead, the Court repeatedly refers in these opinions to the redundancy of the peculiar risk doctrine because the workers' compensation "statutory scheme" and workers' compensation

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[10] Daniel L. Germain, *A Status Report on the Peculiar Risk Doctrine in California* (2002) 25 *L.A. LAWYER*, p. 16.

"system of recovery" apply. See, *e.g.*, *Privette, supra*, 5 Cal.4th at 692-97; *Toland, supra*, 18 Cal.4th at 261; and *Camargo, supra*, 25 Cal.4th at 1239.

These repeated references in the opinions to the workers' compensation "scheme" and "system" are no mistake. As the Court recognizes, even when an employer fails to obtain or maintain workers' compensation insurance coverage, an injured employee may still receive compensation under the state's uninsured employers fund, established "to create a source of benefits to the employee who otherwise would receive no benefits because of the failure or refusal of his or her employer to obtain workers' compensation liability coverage." *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 389; Lab. Code § 3716.

In addition to the right to receive compensation from the uninsured employers fund, the injured employee may also sue the uninsured contract employer for damages pursuant to Labor Code § 3706. Moreover, under Labor Code § 3708, the independent contract employer is presumed negligent and the ordinary affirmative defenses of contributory negligence and assumption of risk are unavailable. In this way, California law guarantees that an employee of an uninsured employer is compensated regardless of the employer's lack of insurance coverage or ability to pay. If the Court intended to limit the application of *Privette* only to cases in which the employer maintained workers' compensation insurance coverage, why refer to the uninsured

employers fund? *Toland* suggests why this is not the Court's intention.

Toland specifically referred to the uninsured employers fund, which it described as providing "workers' compensation benefits to workers employed by uninsured employers."18 Cal.4th at 261. *Toland* also distinguished the vastly different situations of neighboring property owners or innocent bystanders who may be injured by the negligence of an independent contractor from that of the contractor's employees. *Toland* stated, "The neighboring landowner or innocent bystander may have no other source of compensation for injuries resulting from the contractor's negligence in doing the inherently dangerous work. In contrast, an employee of the negligent contractor can, for workplace injury caused by the contractor's negligence, recover under the workers' compensation system regardless of the solvency of the contractor." *Toland*, 18 Cal.4th at 261.

By repeatedly referring to the uninsured employers fund in discussing the application of the peculiar risk doctrine to hirers of independent contractors, the Court signaled that employees of uninsured contractors may not recover from the hirers of independent contractors under the peculiar risk doctrine any more than employees of contractors carrying workers' compensation insurance may. This distinguishes employees from innocent bystanders and neighboring landowners, who "may have no other source of compensation for their injuries resulting from the contractor's negligence" except from the

hirer of the contractors. *Id.*

In sum, there is no rational basis for the Court to permit what the plaintiff seeks here: a "windfall" recovery that allows him and a similarly situated class of individuals to thwart the reasonable limits imposed by the workers' compensation system merely because the worker's independent contractor employer failed to carry workers' compensation coverage. This is especially so when, as here, the hirer was not responsible for the injury-causing event and played no role in the failure of the independent contractor plaintiff to obtain or maintain workers' compensation coverage.

II. THE APPELLATE OPINION COMMITTED REVERSIBLE ERROR BY DENYING SUMMARY JUDGMENT FOR PETITIONER.

The appellate court reversed the trial court's grant of summary judgment on two legally erroneous grounds. First, it misconstrued *dicta* in *Kinsman* from which it then created an ostensible "corollary" to conjure up a needless dispute of material fact. Second, the appellate court failed to follow this Court's guidance about how to ascertain if there are genuine disputes of material fact that preclude summary judgment.

The *dicta* to which the court in this case refers and attributes to *Kinsman* was extrapolated by this court from *Kinsman*'s express holding. That holding states, "[W]hen . . . the 'dangerous or defective condition' is one that can be remedied by taking reasonable safety precautions, the landowner who has delegated job safety to the

independent contractor only has a duty to the [contractor and his employees] if the condition is *concealed.*" *Kinsman*, 18 Cal.4th at 682; emphasis added.

From this proposition, the appeals court then jumps to the conclusion that *Kinsman* "therefore *indicates* that under the 'principles of delegation' set forth in *Privette* and its progeny . . ., a hirer *cannot* be held liable for injuries resulting from open or known hazards the contractor could have remedied through the adoption of reasonable safety precautions." *Gonzalez, supra*, 18 Cal.4th at 842; emphasis added. This supposed "indication" the appellate court labels as "dicta" in footnote one asserting that because it comes from an opinion of this Court it is entitled to great weight. The indicated *dicta*, however, appears nowhere in the *Kinsman* opinion itself, but is the appellate court's interpretation of what it somehow believes is *dicta* from *Kinsman.*

As a "final" step in converting this straw man "dicta" into something quite different, the opinion concocts a "corollary" of *Kinsman* that "the hirer *can be* held liable when he or she exposes a contractor (or its employees) to a 'known' hazard [whether concealed or not] that cannot be remedied through reasonable safety precautions." *Id.*; emphasis added.

Through this clever three-step verbal manipulation we end up with a rule substantially different from where we began. We started

with *Kinsman*'s holding that to avoid liability a landowner who knows of a dangerous condition on his property that is *concealed*, but can be remedied by reasonable precautions, must disclose that condition to the independent contractor to whom he is delegating job safety responsibilities, a disclosure duty that runs to the contractor's employees. We end up, however, with "corollary" liability by the hirer to the independent contractor for delegating "known," whether concealed or not, conditions that cannot be remedied by reasonable safety conditions.

From this purported corollary proposition the appellate court then focuses on what constitutes "reasonable safety precautions," a matter it says is understandably subject to debate thus making for a "dispute" of material fact not susceptible to summary judgment.

Plainly, the meaning of *Kinsman*'s holding does not equate with its supposed corollary created out of whole cloth by the appellate court. One is reminded of Lewis Carroll's riddle, "Does 'I see what I eat' mean the same as 'I eat what I see'"? Or does "I like what I get" mean the same thing as "I get what I like"? Or, as a further example, does "I breathe when I sleep" mean the same thing as "I sleep when I breathe?" Lewis Carroll, *ALICE'S ADVENTURES IN WONDERLAND*, Chap. VII, "A Mad Tea Party" (1866) p. 98. The answer to all of these queries is "No," or, at the very least, maybe yes and maybe no, but not necessarily so. This same answer also applies to the comparison in meanings between *Kinsman*'s holding and the fanciful corollary the

appellate opinion magically derives from it.

A "corollary" is a "natural consequence or result, something that follows *logically* after something else is proved." *OXFORD AMERICAN DICTIONARY* (1980), p. 142; emphasis added. Logic is lost in the metamorphosis from *Kinsman*'s holding to the appellate opinion's "corollary." What we get in the end is a proposition clearly at odds with the holdings of *Tverberg* and *Seabright.* Those holding are, with the exception of *concealed and non-disclosed* dangers known to the hirer, "the hirer implicitly delegates to the [independent] 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 594; emphasis added.

The second legal error the appellate opinion makes is in not complying with the requirements for summary judgment. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 ("*Aguilar*") is the guiding authority on summary judgment, but it is not even cited in the appellate opinion, let alone followed. *Aguilar* holds that California summary judgment law does not require the moving defendant to conclusively negate an element of plaintiff's cause of action, but merely to establish that plaintiff does not offer sufficient evidence of that element to create an issue of fact. 25 Cal.4th at 854. In *Aguilar*, the Court "largely but not completely" adopted the federal summary judgment standard of *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, with

defendants required to not just deny plaintiffs' allegations, but come forward with specific evidence as to why the defense would prevail at trial. *Id.* at 855. However, once the defense presents evidence meeting its initial burden of persuasion to make a *prima facie* showing of the absence of an element or presence of a dispositive affirmative defense, the burden then switches to the plaintiff to produce evidence that would allow a jury to find the existence of the claim "more likely than not" or create triable issues on the affirmative defense. *Id.* at 845.

Here, petitioner presented undisputed evidence in his motion for summary judgment that plaintiff was an independent contractor, that he had cleaned petitioner's skylight on roof of his room for many years, that plaintiff was well aware the roof was slippery, and that plaintiff had walked on the outer ledge of the parapet on the roof many times over the years without incident. Petitioner also presented a video showing there was sufficient room on the inside of the parapet for people to walk between it and the skylight. All of this, combined with the authority of *Privette* and other opinions, established a presumption that petitioner delegated to plaintiff petitioner's "tort law duty to provide a safe workplace" for the contractor and his employees. *Seabright, supra,* 52 Cal.4th at 600; *Alvarez v Seaside Transportation Services, LLC* (2017) 13 Cal.App.5th 635, 642.

As petitioner points out, that "presumption affects the burden of producing evidence," and by "shift[ing] the burden of producing

evidence entitles [petitioner] to summary judgment if [plaintiff] fails to produce evidence to rebut the presumption." Opening Brief on the Merits, p. 55, citing *Alvarez, supra*, 13 Cal.App.5th at 644 and *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977. Accordingly, plaintiff should have been required to present evidence that no reasonable safety precautions were available to him.

Instead, in reliance on its own concocted duty "corollary" owed by petitioner to Gonzalez, the appellate opinion required petitioner to "conclusively establish" that Gonzalez could have reasonably utilized the area between the inside of the parapet wall and the skylight on the date of the incident. *Gonzalez, supra*, 228 Cal.Rptr.3d 843-844. But all petitioner need do is point "to the absence of evidence" to support the plaintiff's case. When that is done, as it was here, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. *Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 780.

Plaintiff did not satisfy his required burden, which is why the trial court properly granted Mathis's summary judgment motion. Indeed, plaintiff presented no evidence to show he could not have avoided injury by holding on to the parapet wall, sweeping away any slippery and loose pebbles on the roof, or installing a temporary guard rail.

The appellate opinion conceded the video presented by petitioner arguably showed, contrary to plaintiff's contention, that he could have

walked inside the parapet wall and avoided injury; but deemed it evidentially insufficient because it was taken three years after the accident and the people shown walking inside the parapet wall were perhaps smaller than Gonzalez. Yet plaintiff presented no evidence that conditions had changed on the parapet since his fall or that he was larger than those shown walking inside it. Plaintiff's failure to produce evidence that would allow a jury to find the existence of the claim "more likely than not" or create triable issues on the affirmative defense, required affirmance of the trial court's summary judgment ruling for petitioner. *Aguilar, supra*, 25 Cal.4th at 845.

CONCLUSION

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

Dated: December 10, 2018

Respectfully submitted,

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Fred J. Hiestand, General Counsel
Civil Justice Association of California

CERTIFICATE OF WORD COUNT

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Date: December 10, 2018

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Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 3rd Avenue, Suite 1, Sacramento, CA 95817.

On December 10, 2018, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Defendants and Respondents in *Gonzalez v. John R. Mathis, et al.,* S247677 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 10th day of December 2018 at Sacramento, California.

_____

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