SUPREME COURT
FILED

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Deputy

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

LUIS ALBERTO GONZALEZ,	) Supreme Court Case # S247677
	)
Plaintiff and Appellant	) Second Appellate District,
	) Division 7, Case # B272344
vs.	)
	) Superior Court of Los Angeles
	) County, Case # BC 54249
JOHN R. MATHIS, AND	)
JOHN R. MATHIS AS TRUSTEE	)
OF THE JOHN R. MATHIS TRUST	)
	)
Defendants and Respondents	)

ON REVIEW AFTER A DECISION BY THE SECOND APPELLATE DISTRICT

SUPERIOR COURT OF LOS ANGELES COUNTY,
THE HONORABLE GERALD ROSENBERG, JUDGE

**APPLICATION OF CALIFORNIA ASSOCIATION OF REALTORS®
FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS**

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I. INTRODUCTION AND NATURE OF C.A.R.'S INTEREST

The California Association of REALTORS® ("C.A.R.") respectfully files this application pursuant to Rule 8.520(f) of the California Rules of Court, to submit the attached *amicus curiae* brief in support of Defendants.

C.A.R. is a voluntary trade association whose membership consists of approximately one hundred and eighty-five thousand (185,000) persons licensed by the State of California as real estate brokers and salespersons and the local Associations of REALTORS® to which those members belong.

C.A.R. advocates for the real estate industry in court by bringing to a court's attention the perspective of the industry rather than the singular perspective of a litigant. C.A.R. also advocates in this same way on behalf of property owners. C.A.R. does so for two reasons, among others. First, C.A.R.'s mission includes preservation of real property rights as one of its goals.[1] Second, because C.A.R.'s members' business interests depend upon owners of property, it also serves C.A.R.'s purpose, in appropriate cases, to stand up for the owners' assertion of their own property rights.[2] Given the magnitude of the number of residential homes present in California (see attached brief) it may come as a surprise that,

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[1] https://car.org/en/aboutus/mission
[2] Id.

more often than not, there is no other representative body to do so. C.A.R. fills that gap.

In this case, not only is the property owner at risk for more claims, and potentially increased liability or insurance costs, but so are real estate licensees because the case can affect all who hire independent contractors to perform work on real property. Members of C.A.R. assist the public in buying, selling, leasing and managing residential real estate. As part of the process of listing a home for sale, a real estate licensee is often looked-to by the seller of the property for recommendations to service providers who may make inspections or repairs that become necessary during the sale. It is not uncommon for a property owner to delegate to the real estate licensee the task of hiring an approved service provider. Performing that hiring task, even at the direction of the property owner, exposes the real estate licensee under the rule espoused by Plaintiff and adopted by the Court below. Given that, as established in the attached brief, the number of residential properties sold in California is well in excess of 400,000 per year, it is understandable that C.A.R. has an interest in the outcome of this case.

As this case potentially impacts real estate licensees (directly and indirectly), C.A.R. has an interest in supporting Defendants. The industry perspective that C.A.R. can contribute is not duplicative of arguments already made to this Court and should be helpful to the Court in reaching a just decision.

II. IDENTIFICATION OF AUTHORS AND MONETARY CONTRIBUTORS

No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or part, and no party or counsel for a party in the pending appeal made a monetary contribution intended to fund the preparation or submission of the brief. C.A.R. has entirely funded the preparation and submission of this proposed *amicus* brief without any monetary contribution from any other person or entity.

III. REQUEST FOR PERMISSION TO FILE

C.A.R. has read Plaintiff's and Defendants' briefs and believes that, as a representative body of the real estate brokerage community, it can provide an important perspective to this Court. Therefore, C.A.R. respectfully requests that this Court accept for filing the accompanying *amicus curiae* brief in support of Defendants.

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®
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NEIL KALIN, ASSISTANT GENERAL COUNSEL, SBN 119920

By: /s/
Neil Kalin

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AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

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I. INTRODUCTION AND FACTUAL SUMMARY

Hirers of independent contractors to perform work on real estate can, under appropriate circumstances, be held liable for on-the-job injuries to those independent contractors. This case does not contain any of the appropriate circumstances.

Here, Plaintiff has desperately searched for supporting law, no matter how tenuous, that could conceivably fit the situation permitting liability against the homeowner. As Defendants have shown in their Opening and Reply Briefs, the non-precedential *dicta* in the case of *Kinsman v. Unocal Corp.*, (2005) 37 Cal.4th 659 is inapplicable here and does not support holding Defendants responsible for Plaintiff's injuries.

The facts have been adequately expressed in detail in the briefs of both Plaintiff and Defendants. But at their core, the facts can be simplified as follows: Plaintiff was hired to clean a skylight on Defendants' roof. Plaintiff climbed onto the roof. Plaintiff walked close to the edge of the roof. Plaintiff fell off the roof.

As any parent who has scolded a child will attest, it is common knowledge that walking on a roof is dangerous. And, the most dangerous part of being on a roof is walking along the edge of the roof. If an adventurous child were to go up to the roof to retrieve a baseball or frisbee, one can easily imagine hearing the cries of a worried parent urging, "Stay away from the edge!"

What the parent knows, and the child may not, is the risks of a slip and a fall are inherent in the activity. There can be loose gravel, dust, dirt, leaves, water, and other hazards that pose a danger. The person on the roof can get dizzy, lose one's balance, trip, stumble, etc. The parent knows there are precautions that can be taken – e.g., wear rubber soled shoes, hold on or tether yourself to something sturdy, crawl on all fours, walk slowly, and first sweep away debris, to name a few. The parent is aware of the danger and the precautions because the parent has more education and life experience. In short, the parent knows better.

If this Supreme Court follows the approach used in the Appellate Opinion below, a complete role reversal will take place. The person with the least knowledge will be required to tell the person with superior knowledge how to avoid injury. Meanwhile, the person with the most knowledge and the most experience, the person who should know better, will be given free rein to seek compensation from the novice. The parent, as it were, will be allowed to sue the child.

If Plaintiff's position is adopted, there is a realistic potential to unnecessarily expose hundreds of thousands of unexpecting residential property owners to the risk of devastating consequences such as a greater number of lawsuits and increased costs of liability insurance. In addition to the residential property owners, their hired staff and agents will also become potential targets for lawsuits. The reach of this Court's decision will be far and wide and may not have been sufficiently considered by the Appellate Court. Further, the judicial policy

espoused by the Appellate Opinion is flawed when applied in the instant case and numerous other similar circumstances.

II. THE POTENTIAL IMPACT OF THE COURT OF APPEAL'S DECISION IS HUGE, AFFECTING NOT JUST RESIDENTIAL PROPERTY OWNERS WHO ARE IMPROVING OR MAINTAINING THEIR HOMES BUT ALSO THE OWNERS AND REAL ESTATE AGENTS WORKING ON OVER 400,000 RESIDENTIAL SALES EVERY YEAR.

The U.S. Census Bureau estimates that there are over 9,000,000 (attached and detached) single family residences in California.[1] The homeowners living in these residences maintain their properties, improve their properties, remodel their properties, and fix their properties.

There's no doubt that some of the owners of these 9,000,000 homes attempt to care for their properties on their own but common-sense dictates that the bigger the project or the greater the perceived complexity or dangerousness of the project, the more likely it is that the homeowners will hire a professional to do the job for them. Why is this?

It does not matter whether one is a lawyer or an accountant, a mechanic or a mechanical engineer, a jurist or a journalist, or a butcher or a baker; we all make a living in our chosen field. We earn money, save money, buy a house if we can and enjoy our lives. When something goes wrong, we generally hire an expert to take care of the problem or expect an insurance company to do so. In some cases, a few

[1] https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk

hardy, or some would say "fool-hardy," souls venture to tackle the project themselves. The do-it-yourselfers who act outside of their area of expertise take a gamble in a way – they trade off expertise for something learned and maybe money saved. Those who hire an expert make another type of trade-off: Whether out of necessity, convenience or other reason, they shift the burden to those possessing an area of expertise. It does not matter if the job is to fix a refrigerator or wash a skylight. It may cost a little more but the person who hires an expert takes comfort in the belief that the expert knows more, is trained to assess the situation and its risks, and can price the job accordingly to factor into account the circumstances.

It is not just those persons staying in their homes who make these decisions. Yearly, (based on 2016 statistics) C.A.R. calculates that 417,000 single family residences are sold in California.[2]

When listing a property for sale, the form most often used in California to document that relationship is the C.A.R. Residential Listing Agreement (Exclusive Authorization and Right to Sell), Form "RLA." The RLA authorizes the real estate broker ("broker") to order reports and inspections that would be relevant in a subsequent sale. As real estate licensees often have contact lists and more knowledge than sellers about the local professionals who provide such services to homeowners, it is not uncommon for those same licensees to recommend service professionals to the owner and then contact and hire the service professional on

[2] C.A.R. website – Housing Market Forecast page, https://www.car.org/en/marketdata/marketforecast (slide# 84 in the SCRIBD section)

behalf of the owner.

Almost every sale of residential property involves at least a general property inspection and pest control (termite) inspection. Often these inspections lead to specialty inspections such as ones for roof, electrical, plumbing, foundation, pool and the like. Therefore, if the Opinion below were to be upheld, since it is explicitly applicable not just to property owners but also to those who hire service providers for those property owners, yearly hundreds of thousands of homeowners and their real estate brokers could be impacted if an injury occurs.

III. THE JUDICIAL POLICY OF REQUIRING AN UNKNOWING HOMEOWNER TO IDENTIFY SAFETY PRECAUTIONS FOR A MORE KNOWLEDGEABLE SERVICE PROVIDER IS ANTITHETICAL TO THE DOCTRINE ESPOUSED BY *PRIVETTE* AND ITS PROGENY. THE BURDEN SHOULD BE ON THOSE WITH THE MOST EXPERTISE, NOT THE LEAST.

In *Privette v. Superior Court,* (1993) 5 Cal.4th 689, the California Supreme Court held that while the hirer of an independent contractor to perform inherently dangerous work may be liable to third parties who are injured by those performing the work, the same rule does not apply to injured employees of the independent contractor. In the former case, the injured innocent bystander is entitled to recovery as against the hirer or property owner, as there may be no means of recovery if the independent contractor is insolvent. In the latter case, statutory compensation should already be provided through the California Workers'

Compensation system and it would be unfair to impose greater liability on the property owner than the contractor whose negligence led to the injury. (Opinion, below at p. 9)

Two cases subsequently decided by the High Court limited the circumstances in which a property owner can avoid liability for injury to an employee of a contractor performing work on the hirer's property. In *Hooker v. Dept. of Transportation,* (2002) 27 Cal.4th 198, the High Court determined that the property owner may nonetheless be liable, notwithstanding *Privette*, if the property owner retained control over the worksite. And, in *Kinsman v. Unocal Corp., supra,* it was decided that the property owner could nonetheless incur liability for failure to disclose a concealed dangerous condition.

What do *Privette*, *Hooker* and *Kinsman* have in common? The more knowledgeable person (the owner who maintains authority over the worksite; the owner who is aware of a concealed danger; the independent contractor expert) is held responsible. The injured person with less information (the innocent passerby, or the worker not given full information) is entitled to recovery.

As in the example provided in the Introduction section above, the parent is responsible, the child is not. In this case, Gonzalez is the adult and should have known better. He should not be able to impose liability on Mathis, the property owner, or Carrasco, the housekeeper who actually hired Gonzalez. Plaintiff Gonzalez is the professed expert. He had more experience with the roof than either the property owner or hirer, neither of whom controlled the worksite. Nothing was

concealed and there was no special knowledge that either Mathis or Carrasco had that would put them in a superior position to Gonzalez. In short, Defendants were no different than any of the other 9,000,000 residential property owners, or the 400,000+ owners preparing their properties for sale, or their agents, who hire an expert to perform work on the owner's property.

A quarter of a century ago, and since, this Court allocated responsibility for injury to those who are in a better position to prevent or guard against injury or at least insure around it through the Workers' Compensation system. This Court should not use an unfortunate incident to reverse that long-standing, logical approach.

IV. CONCLUSION

For all the reasons specified in this brief and those specified in Defendants' Opening and Reply briefs, C.A.R. urges this Court to reverse the decision of the Court of Appeal and reinstate that of the trial court.

Dated: November 30, 2018

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court Rule 8.204(c)(1))

The text of this brief consists of **2,076** words (including footnotes) as counted by the Microsoft Office Word 2016 word-processing program used to generate this brief.

Dated: November 30, 2018

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®
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PROOF OF SERVICE BY MAIL

I, **Cheryl Strong**, am employed in the City and County of Los Angeles, and over the age of eighteen years. I am not a party to the within action. My business address is: 525 South Virgil Avenue, Los Angeles, California, 90020.

On December 3, 2018, I served the within letter, addressed to the Supreme Court of the State of California from the California Association of REALTORS® regarding:

Luis Alberto Gonzalez v. John R. Mathis, and John R. Mathis as Trustee of the John R. Mathis Trust

Supreme Court of the State of California, Case No. S247677
Second Appellate District, Division 7, Case # B272344
Superior Court of Los Angeles County, Case # BC 54249

APPLICATION OF CALIFORNIA ASSOCIATION OF REALTORS® FOR LEAVE TO FILE A BRIEF, AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS

and

BRIEF OF CALIFORNIA ASSOCIATION OF REALTORS® AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS

on interested parties in this action by placing one true copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Postal Service, addressed as follows:

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Second Appellate District, Div 7
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I am readily familiar with this company's practice for collection and processing envelopes for mailing. On the same day that envelopes are placed for collection and mailing, they are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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

Executed on December 3, 2018`1 at Los Angeles, California.

/s/
Cheryl Strong