S247677

IN THE SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,

v.

JOHN R. MATHIS et al.,
Defendants and Respondents.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SEVEN
CASE NO. B272344

APPLICATION TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE BRIEF

INTRODUCTION

The Court of Appeal opinion in this case is a study in contradiction. On the one hand, the court held that it would be contrary to the policies underlying *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) to permit a contractor to recover from a homeowner under a retained control theory arising from the contractor's slip and fall injury that occurred while the contractor was working on the homeowner's roof. In so holding, the court concluded that the *Privette* doctrine *precludes* the contractor from recovering merely because the hirer has passively permitted a purportedly unsafe condition to occur. On the other hand, the court held that a property owner may be liable to a contractor under a premises liability theory when the contractor is injured by an obvious hazard that is known to the contractor but "cannot be remedied through reasonable safety precautions." (*Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257, 273 (*Gonzalez*).) In so holding, the court concluded that the *Privette* doctrine *permits* the contractor to recover where the hirer has passively permitted an unsafe condition to occur.

This case thus brings into sharp focus the issue whether the hirer of a contractor should be liable for an obvious hazard. Based on the policies underlying the *Privette* doctrine—the presumption that a hirer delegates to the contractor the duty to ensure that the contractor's work is performed safely—there is no basis for holding the hirer liable for injuries caused by a hazard that is known to or

reasonably discoverable by the contractor absent evidence that the hirer affirmatively interfered with the contractor's ability to take precautionary measures.

Gonzalez contends that he has raised a triable issue based on two claims, retained control and premises liability, but Mathis is entitled to judgment as a matter of law on both theories.

Under the retained control theory, the hirer of a contractor cannot be liable unless the hirer engaged in a form of misconduct that affirmatively contributed to injuries sustained by the contractor or a contractor's employee. As the Court of Appeal concluded, Gonzalez offered no such evidence. Mathis did nothing to prevent Gonzalez from inspecting the roof, taking remedial measures to make the roof safe, or delaying the start of the project so any defective conditions could be corrected before the cleaning. Nor did Mathis induce Gonzalez's reliance by promising to undertake any safety measures on Gonzalez's behalf.

Gonzalez's premises liability theory is also without merit. As this Court held in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671 (*Kinsman*), a hirer has no duty to warn a contractor of a dangerous condition unless the hirer knows of the dangerous condition (or can reasonably discover it) *and* the contractor neither knows of the dangerous condition nor has reason to discover it. As is implicit in *Kinsman*'s holding, the hirer has no duty to warn the contractor of readily apparent hazards because the contractor, as the expert in his field, is in the best position to evaluate whether a known hazard can be avoided through reasonable safety precautions.

The same reasoning applies when an injured worker claims a hirer should be liable for failing to *remedy* a dangerous condition at the worksite. If the condition is known to the contractor, or reasonably discoverable by the contractor, the hirer delegates to the contractor responsibility for determining whether the work can be safely performed by undertaking precautions. Once again, the contractor, as the expert in his field, is in the best position to evaluate whether safety precautions can be taken to allow the work to proceed notwithstanding the dangerous condition, or whether the contract work must be delayed until the hirer remedies the dangerous condition. Under *Privette*'s framework, as applied in *Kinsman*, if the contractor elects to proceed with work in the face of an obvious hazard, the hirer is not liable absent evidence the hirer affirmatively contributed to the accident.

The internal contradiction in the Court of Appeal's opinion can be resolved by applying, in a consistent manner, the fundamental principle of delegation this Court has repeatedly reaffirmed in the *Privette* line of cases. That principle compels reversal of the Court of Appeal's decision on the premises liability issue.

LEGAL ARGUMENT

I. A hirer owes no duty of care to protect a contractor from dangerous conditions known to the contractor or reasonably discoverable by the contractor.

Under the *Privette* doctrine, "[g]enerally, 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. US Airways, Inc.* (2011) 52 Cal.4th 590, 594 (*SeaBright*).) Likewise, when contractors themselves are injured in their work, they generally cannot sue the hirer. (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 522 (*Tverberg I*); *Gravelin v. Satterfield* (2011) 200 Cal.App.4th 1209, 1214 (*Gravelin*).

The *Privette* doctrine was initially based largely on the rationale that the hirer, in retaining and paying the contractor, essentially paid for the workers' compensation benefits available if a work-related injury occurs.[1] (See *Privette, supra*, 5 Cal.4th at

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[1] This public policy applies here even though Gonzalez was self-employed. A self-employed contractor may "*opt* to obtain" a workers' compensation policy, covering injuries to the contractor himself, from the State Compensation Insurance Fund. (Ins. Code, §§ 11843, 11846; *State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 204.) Insurance Code section 11846 specifically provides that workers' compensation policies "*may likewise be sold to self-employing persons*." (Emphasis added; see generally 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed. 2015) § 1.20[2], pp. 1-82.8 to 1-83.) Such persons "shall be deemed to be *employees* within the meaning of the workers' compensation law." (Ins. Code, § 11846, emphasis added.)

pp. 699, 701-702.) Over time, this Court has explained that the doctrine is further justified because one who hires a contractor specializing in a particular trade *delegates* to the contractor all responsibility for taking precautions needed to protect against the hazards presented by the work. (*Kinsman*, *supra*, 37 Cal.4th at p. 671.)

This delegation of responsibility for performing dangerous work safely, which is "implied as an incident of an independent contractor's hiring," is founded on the premise that contractors are typically in the best position to know what safety precautions should be taken to ensure their work can be performed safely. (*SeaBright, supra*, 52 Cal.4th at pp. 600-601; accord, *Tverberg I*, *supra*, 49 Cal.4th at p. 522 [contractor "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"].) "The policy favoring delegation of responsibility and assignment of liability *is very strong* in this context [citation], and a hirer generally has no duty to act to protect the [contractor's] employee when the contractor fails in that task." (*SeaBright*, at p. 602, emphasis added, internal quotation marks omitted.)[2]

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[2] As discussed in detail in the amicus brief of the Association of Southern California Defense Counsel, the effect of the *Privette* doctrine is similar to that of the primary assumption of the risk doctrine, which, like *Privette*, encourages the hiring of experts to perform hazardous work by precluding a contractor's negligence claims against the hirer arising from hazardous work the contractor has undertaken. As explained below, this Court has (continued...)

Because of the public policy discussed in *Privette* and its progeny, the general test for determining duty, set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108, is not controlling. Similarly, Civil Code section 1714, subdivision (a)—which provides that everyone is responsible "for an injury occasioned to another by his or her want of ordinary care or skill"—does not apply. Instead, under this court's *Privette* line of cases, *special rules* apply where the plaintiff is a contractor's employee and the defendant is the hirer of the contractor. (See *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1278 (*Madden*) [recognizing that, when a contractor has authority to take safety measures, the *Privette* doctrine supersedes *Rowland*].)

In keeping with the strong policy of delegation underlying the *Privette* doctrine, this Court has recognized only a few, narrow exceptions to the general rule of hirer nonliability.

One limited exception arises where the hirer retains control of some aspect of the contractor's work *and affirmatively contributes* to a worker's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 213 (*Hooker*).) A finding of *affirmative* contribution (involving active misconduct or induced reliance as opposed to a passive failure to take some action to protect the contractor's employees) is required for a contractor's

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developed unique protections that apply to hirers of contractors, which derive from this state's very strong policy of delegation of workplace safety to contractors, who are experts in their trade and who are best qualified to determine when precautions are needed to avoid injury to themselves and their employees. The *Privette* doctrine therefore provides even broader protection than the primary assumption of the risk doctrine.

employee to recover from the hirer because "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." (*Id.* at p. 210.)

A second limited exception arises where the hirer fails to warn of a latent concealed hazard not known to, or reasonably discoverable by, the contractor. (*Kinsman*, *supra*, 37 Cal.4th at pp. 664, 674-675.) In *Kinsman*, this Court held that ordinary principles of premises liability should *not* apply in an action against a hirer based on allegations that the hirer failed to warn of a preexisting dangerous condition on the hirer's property. (*Id.* at p. 674 ["*the usual rules* about landowner [premises] liability *must be modified*, after *Privette*, as they apply to a hirer's duty to the employees of independent contractors" (emphases added)].) Under *Kinsman*'s modified rule, a hirer is liable for failing to warn only if (i) the hirer knew or should have known of a dangerous condition on the hirer's property, (ii) the contractor did not know and could not reasonably have ascertained the existence of the hazardous condition, and (iii) the hirer failed to warn the contractor of the latent dangerous condition. (*Id.* at pp. 664, 674-675.)

As we explain below, neither of these two limited exceptions allows a hirer to be held liable to a contractor (or the contractor's employees) for failing to remedy a known, or reasonably discoverable, dangerous condition on the hirer's property, particularly where the hirer did nothing to prevent the contractor from undertaking measures to protect against the danger posed by

the preexisting condition. Before doing so, we demonstrate that it is the plaintiff who bears the burden of offering evidence to support applying *Privette*'s exceptions.

II. The plaintiff bears the burden of producing evidence to support application of an exception to the *Privette* doctrine.

When opposing a hirer's motion for summary judgment in a *Privette* case, the plaintiff bears the burden of producing evidence to support one of the exceptions to the *Privette* doctrine. (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642-643 (*Alvarez*); see *Madden*, *supra*, 165 Cal.App.4th at pp. 1275-1276.)

As explained in *Alvarez*, *Privette*'s "presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees' . . . affects the burden of producing evidence." (*Alvarez, supra*, 13 Cal.App.5th at p. 642, citation omitted.) Once the defendant hirer offers evidence it hired a contractor and that the plaintiff is a contractor (or contractor's employee) who was injured while working at the site, the defendant "establish[es] that the *Privette* presumption applie[s]" and "shift[s] the burden to plaintiff to raise a triable issue of fact" that one of the exceptions to the *Privette* doctrine applies. (*Id*. at p. 644; see also Evid. Code, § 601 [noting that a "rebuttable presumption" may "affect[ ] the burden of producing evidence"].) If the plaintiff cannot do so, the

defendant hirer is entitled to summary judgment. (*Alvarez*, at pp. 644-645.)

Gonzalez contends, contrary to *Alvarez*, that Mathis had to prove that the exceptions to the *Privette* doctrine do not apply. (See ABOM 53-58.) But in so arguing, Gonzalez fails to cite *Alvarez* or to explain why it should not apply. Under *Hooker*, "affirmative contribution" is indisputably an element of the plaintiff's claim without which the plaintiff may not recover. (*Hooker, supra*, 27 Cal.4th at p. 213.) And under well-established law, the plaintiff must prove the elements of his or her claim. (Evid. Code, § 500; *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 234 ["Under Evidence Code section 500, the plaintiff normally bears the burden of proof to establish the elements of his or her cause of action"]; *Fillmore v. Irvine* (1983) 146 Cal.App.3d 649, 661 (*Fillmore*).)

"In determining whether the normal allocation of the burden of proof should be altered, the comment to Evidence Code section 500 notes that courts consider a number of factors, including the knowledge of the parties concerning the particular fact, the availability of evidence to the respective parties, and the most desirable result in terms of public policy." (*Fillmore, supra*, 146 Cal.App.3d at p. 661.) Here, Gonzalez has not attempted to establish that the factors cited in section 500 support burden-shifting. They do not. There is no reason the hirer of a contractor would have superior knowledge whether the hirer affirmatively contributed to the contractor's injuries and there is no reason the hirer would have better access to relevant evidence. Likewise,

there is no public policy supporting a shifting of the burden of proof from the contractor (or its employees) to the hirer.

Here, it was undisputed that Mathis hired Gonzalez (or the company that employed him) and that he was injured while working at the site. (*Gonzalez, supra*, 20 Cal.App.5th at p. 262.) This evidence was "sufficient to establish that the *Privette* presumption applied" and shifted to Gonzalez the burden of raising a triable issue under one of *Privette*'s narrow exceptions. (*Alvarez*, *supra*, 13 Cal.App.5th at p. 644.)

III. Gonzalez cannot recover on a retained control theory.

A. A hirer is not liable to a contractor under a retained control theory unless the hirer *affirmatively* contributed to the accident by interfering with the contractor's delegated responsibility to provide a safe worksite.

Gonzalez contends the evidence he offered raised a triable issue of fact under the "retained control" exception to hirer nonliability established in *Hooker*. To prevail under this exception, however, Gonzalez would have to show evidence not only that Mathis retained control over some aspect of Gonzalez's work, but also that he negligently exercised his retained control in a manner that *affirmatively contributed* to Gonzalez's injury. (See *Hooker, supra*, 27 Cal.4th at p. 213.)

"Affirmative contribution occurs where a [hirer] is actively involved in, or asserts control over, the manner of performance of the [contractor's] work." (*Millard v. Biosources, Inc.* (2007)

156 Cal.App.4th 1338, 1348 (*Millard*), quoting *Hooker*, *supra*, 27 Cal.4th at p. 215, internal quotation marks omitted.) A hirer affirmatively contributes to injury where, for example, the hirer " '*directs* that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work.' " (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1092 (*Delgadillo*), emphasis added.)

"By contrast, 'passively permitting an unsafe condition to occur rather than directing it to occur does *not* constitute affirmative contribution.' " (*Delgadillo, supra*, 20 Cal.App.5th at pp. 1092-1093.) There must be "some active participation" by the hirer. (*Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446 (*Tverberg II*), citing *Hooker*, *supra*, 27 Cal.4th at p. 215.)

"There will [also] be times when a hirer will be liable for its *omissions*" (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3, emphasis added), but to constitute actionable affirmative contribution, such omissions *must* be coupled with an affirmative promise by the hirer to undertake a safety measure (thus inducing the contractor's reliance on the promise), an affirmative direction by the hirer *not* to take a safety measure, or some equivalent active conduct. (See *id*. at p. 211 [affirmative contribution can occur by " 'inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise' "].)

In *Hooker* and the many cases following it, courts have consistently held that where the only alleged omission is the hirer's passively permitting an unsafe condition to exist or the

hirer's failure to supervise the contractor's employees or implement safety measures to prevent them from injuring themselves, there is no basis for finding that the hirer affirmatively contributed to the injuries sustained by the contractor's employee. (See, e.g., *Hooker, supra*, 27 Cal.4th at p. 215; *Delgadillo, supra,* 20 Cal.App.5th at pp. 1092-1093; *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 666-667 (*Padilla*).)

In *Hooker*, for example, this Court held the hirer (Caltrans) did not affirmatively contribute to an accident that occurred when a crane operator failed to reextend his outriggers, causing the crane to topple. (*Hooker, supra*, 27 Cal.4th at p. 202.) The plaintiff contended that Caltrans contributed to the accident by failing to close the overpass where the plaintiff was working, which required the operator to retract and reextend the outriggers. (*Hooker, supra*, 27 Cal.4th at pp. 202-203, 214-215.) In holding that Caltrans did not affirmatively contribute, this Court concluded Caltrans was at most "aware of an unsafe practice and failed to exercise the authority [it] retained to correct" that practice. (*Hooker, supra*, 27 Cal.4th at p. 215.)

The Court of Appeal's recent decision in *Delgadillo* is also instructive. There, the owner of a multistory commercial building hired a window washing service to clean its windows. (*Delgadillo, supra,* 20 Cal.App.5th at p. 1081.) The building owner did not provide Cal-OSHA-required "anchor points" to which the contractor's descent apparatus could be attached, so the contractor had his employees rappel down the side of the building using a bracket on an HVAC unit as a single makeshift anchor point.

(*Ibid.*) The attachment to the bracket failed, causing the employee to fall to his death. (*Ibid.*)

The Court of Appeal affirmed a summary judgment in the owner's favor, holding the owner engaged in no affirmative misconduct. (*Delgadillo, supra,* 20 Cal.App.5th at p. 1093.) The court noted that the owner "did not suggest or request that [the contractor] use the anchor points," and that when the contractor had its employees rappel off the roof using the bracket on the HVAC units, "it did so without direction by, consultation with, or notice to [the building owner]." (*Ibid.*) Although the court agreed it was "undeniable that [the building owner's] failure to equip its building with roof anchors contributed to decedent's death," the owner did not *affirmatively* contribute because this Court has "repeatedly rejected the suggestion that the passive provision of an unsafe workplace is actionable." (*Ibid.*; see also *id.* at p. 1092 [explaining that affirmative contribution occurs when the hirer " 'interferes with the [contractor's] means and methods of accomplishing the work' "].)

Padilla is also illustrative There, the plaintiff, an employee of a subcontractor hired to demolish a dormitory, was dismantling an overhead pipe when a piece of that pipe fell, causing a pressurized PVC pipe to burst. (*Padilla*, *supra*, 166 Cal.App.4th at p. 665.) The force of the water knocked the plaintiff from a ladder, injuring him. (*Ibid.*) The plaintiff alleged the owner of the dormitory and its general contractor were liable because they retained control of the project and failed to warn the plaintiff that the pipes were pressurized. (*Ibid.*)

On appeal from a summary judgment in the defendants' favor, the Court of Appeal held the defendants did not affirmatively contribute to the plaintiff's injuries because even though the defendants were the only ones with the ability to physically turn off the water to the pipes, such "control [did] not rise to the level of control necessary to impose liability under *Privette*," given that the subcontractor took control of the safety of the project, made no request to turn off the water, and was not restricted from taking its own measures to prevent pressurized water from causing injury. (*Padilla*, *supra*, 166 Cal.App.4th at p. 671.)

Delgadillo and *Padilla* follow a long line of cases recognizing that the hirer delegates worksite safety to its contractor and may be held liable for workplace injuries only if it affirmatively interferes with the contractor's discharge of that responsibility. The overwhelming majority of these authorities have held *as a matter of law* that hirers' alleged omissions—including the "passive provision of an unsafe workplace" (*Delgadillo*, *supra*, 20 Cal.App.5th at p. 1093)—do not constitute affirmative contribution:

- *Gonzalez*, *supra*, 20 Cal.App.5th at pages 270-271 (Mathis did not affirmatively contribute to Gonzalez's injuries because Mathis never agreed to replace worn shingles or to install safety gear such as a guardrail or anchor points that might have prevented accident);

- *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718-719, 721 (*Khosh*) (construction company did not affirmatively contribute to arc flash incident where it never agreed to shut off electrical power and did not prevent plaintiff from waiting until scheduled shutdown before starting work that led to the arc flash);

- *Madden*, *supra*, 165 Cal.App.4th at pages 1280-1281 (general contractor did not affirmatively contribute to subcontractor's employee's fall from patio deck because the general contractor did not prevent the subcontractor from setting up guardrails or other fall-prevention measures);

- *Millard, supra,* 156 Cal.App.4th at page 1348 (hirer did not affirmatively contribute to injury sustained by HVAC subcontractor's employee who fell when lights unexpectedly went out in attic because hirer "did not control the means and methods" of subcontractor's work and was not present at the worksite at the time of the accident);

- *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 66 (hirer did not affirmatively contribute to worker's electrocution absent evidence that hirer "had agreed to implement" safety measures on behalf of contractor, such as providing proper equipment for electrician's work); and

- *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 36 (hirer did not affirmatively contribute to subcontractor's employee's fall from scaffolding at a construction project

because "there [wa]s no evidence that the hirer's conduct contributed in any way to the contractor's negligent performance by, e.g., inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise").

In the relatively few cases in which courts have found hirers liable under a retained control theory, the courts (with only one exception in a case in which this Court recently granted review) have consistently identified *active misconduct* by the hirer that contributed to the injury—by doing something unsafe, directing the contractor to do something unsafe, or promising to undertake a safety measure and then failing to keep that promise. (See, e.g., *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 597 [homeowner affirmatively contributed to subcontractor's injuries by misrepresenting to the subcontractor that an improperly installed underground vault for a pool propane tank had passed county safety inspections]; *Tverberg II*, *supra*, 202 Cal.App.4th at pp. 1447-1448 [triable issue whether general contractor affirmatively contributed to subcontractor's injury by undertaking to protect subcontractor from exposed holes in the ground and then negligently discharging that assumed responsibility by concluding that putting up safety ribbon was enough]; *Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334, 1345-1346 [hirer affirmatively contributed to injury where it agreed to provide safety equipment, but then abruptly removed it before the work was completed]; *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1128-1129, 1133 (*Ray*) [triable issue whether general contractor affirmatively contributed to injuries sustained

by subcontractor's employee where general contractor had contractually prohibited subcontractor from erecting road barricades that could have prevented the accident].)[3]

B. Mathis did not affirmatively contribute to Gonzalez's accident.

1. Mathis was not actively involved in Gonzalez's work and did nothing to prevent him from protecting against the purported dangerous condition of the roof.

The Court of Appeal correctly found as a matter of law that Mathis took no actions that affirmatively contributed to Gonzalez's accident. (*Gonzalez, supra*, 20 Cal.App.5th at p. 271.) Mathis could not have done so, for two reasons. First, Mathis was hospitalized during the accident and thus could not have been directly involved. (OBOM 15.) Second, Mathis did nothing that would have prevented Gonzalez from undertaking corrective

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[3] The only exception to this otherwise unbroken line of cases is a case in which this Court recently granted review. (*Sandoval v. Qualcomm, Inc.* (2018) 28 Cal.App.5th 381, review granted Jan. 16, 2019, S252796.) The Court of Appeal in *Sandoval* found a hirer liable under a retained control theory for failing to personally warn a subcontractor about energized circuits, even though the danger arose only later when the contractor exposed the circuits for his own reasons and without the hirer's knowledge, direction, or inducement of reliance. (*Id.* at pp. 417-418.) The Court of Appeal held that it was unnecessary for the court or the jury to find any evidence of affirmative contribution (as *Hooker* requires) because "affirmative contribution," according to the court, means nothing more than substantial factor causation. (*Ibid.*)

measures that would have made the roof safe for crossing. Moreover, Gonzalez failed even to offer evidence that he alerted Mathis that, in order for the work to go forward safely, corrective measures had to be completed *before* the work commenced.

The present case is thus directly analogous to *Hooker*, *Delgadillo,* and the many other cases discussed above in which courts have held that hirers do not affirmatively contribute to a worker's injury merely by failing to intervene to somehow protect the worker from the contractor's negligence.

Delgadillo is on point. Just as the plaintiff in *Delgadillo* argued that the building owner affirmatively contributed by failing to equip his building with anchor points to which the window washers could tie their lines (see *Delgadillo, supra,* 20 Cal.App.5th at p. 1093), Gonzalez contends that Mathis's roof lacked anchor points and a guardrail for his safety (see ABOM 15). But like the property owner in *Delgadillo*, Mathis is not liable because, under *Privette*, he delegated to Gonzalez the duty to ensure the roof was safe for him to proceed with the cleaning of the skylight. Like the building owner in *Delgadillo*, Mathis did not affirmatively contribute to the accident because Gonzalez acted without direction by Mathis or reliance on any promise by Mathis to undertake a particular safety measure. (See *Delgadillo*, *supra*, 20 Cal.App.5th at p. 1093.)

Padilla is also applicable here. Gonzalez knew of the danger posed by the roof conditions because he had worked on the roof and was familiar with it. (OBOM 14-16.) He therefore could have requested that Mathis either take remedial measures before the

cleaning work began or permit Gonzalez to take such measures himself; he also could have refused to proceed with the job. Mathis in no way impeded Gonzalez from taking whatever measures Gonzalez deemed necessary to make the roof safe for the cleaning operations. Thus, like the defendant property owner and general contractor in *Padilla*, Mathis did not affirmatively contribute to Gonzalez's injury, even if Mathis did not inspect the roof before Gonzalez's work began.

Gonzalez contends that Mathis's housekeeper affirmatively contributed to his injuries merely by instructing Gonzalez to go to the roof to assist in stopping the water leakage. (ABOM 39.) But a hirer does not affirmatively contribute to injuries simply because it tells the contractor what work needs to be done. (See *Gonzalez, supra*, 20 Cal.App.5th at pp. 270-271.) If that were the rule, every hirer would be subject to liability whenever it hired an independent contractor, as hirers must always tell contractors what work needs to be done for a job.

Gonzalez also contends that Mathis affirmatively contributed to his injuries because Mathis was aware of at least one of the dangerous conditions on the roof. He claims that "[s]everal months before the accident," he told Mathis's housekeeper that "the roof needed repairs because it was in a dangerous condition." (ABOM 15-16, 47.) But, as *Hooker* and other cases make clear, a hirer's mere knowledge of a dangerous practice or condition is insufficient to establish liability. (See *Hooker*, *supra*, 27 Cal.4th at p. 215 [Caltrans did not affirmatively contribute even though it was "aware of an unsafe practice" that it

failed to correct, because "Caltrans did *not* direct" the unsafe practice]; see also *Gravelin*, *supra*, 200 Cal.App.4th at p. 1212 [homeowner not liable even though contractor told homeowner he intended to access the roof using an awning that was obviously inadequate to support his weight and "she expressed no reservations"].) Under *Hooker* and *Gravelin*, mere awareness that some portion of the roof needed repair did not rise to the level of affirmative contribution because Gonzalez never told Mathis or his housekeeper he could not work around the unsafe condition or take reasonable safety measures. Moreover, Mathis neither directed Gonzalez to walk on any portion of the roof nor prevented Gonzalez from taking safety precautions.

In a pre-*Privette* case with similar facts, *King v. Magnolia Homeowners Assn.* (1988) 205 Cal.App.3d 1312, 1317 (*King*), the Court of Appeal held that a property owner was not liable for injuries sustained by an HVAC technician who fell from a ladder that allegedly lacked sufficient toe space. The court reasoned that the technician "was an independent contractor, not an employee of defendant or of another," and he had "climbed up and down the ladder once" and had immediately observed and appreciated the claimed defect on his initial trip. (*Id.* at p. 1317.) Had the technician believed he could not safely complete his work, the court explained, he was "free to refuse to service the air conditioner after discovering the risk in the ladder." (*Ibid.*) But by climbing the ladder a second time, the technician "voluntarily exposed himself to the danger." (*Id.* at p. 1315.)

As in *King*, Gonzalez had made the trip to the skylight many times and knew of the claimed dangerous condition, yet he voluntarily proceeded with the work without attempting any protective measures. As the *Privette* line of cases clarifies, any duty to implement needed safety measures is presumptively delegated to the contractor, and the hirer cannot be held liable for the contractor's failure to ensure a safe workplace.

In sum, Mathis at most " 'passively permitt[ed] an unsafe condition to occur.' " (*Delgadillo, supra*, 20 Cal.App.5th at pp. 1092-1093.) He did not " 'direct[ ] it to occur,' " and therefore his conduct " 'does *not* constitute affirmative contribution.' " (*Ibid.*; see also *Hooker*, *supra*, 27 Cal.4th at pp. 210-212.)

2. Mathis did not affirmatively contribute by failing to inspect the roof—a duty he delegated to Gonzalez.

Gonzalez contends Mathis affirmatively contributed to his injuries by failing to inspect the roof to ensure it was in a safe condition before Gonzalez started his work. (See ABOM 39 ["[t]he owner has a duty to inspect" and "hire a contractor" to repair dangerous conditions].) But Gonzalez fails to account for *Privette*'s strong policy favoring delegation. By hiring Gonzalez as an experienced contractor, Mathis also delegated to Gonzalez the duty to inspect the roof to ensure that the work could be safely completed. (See *Kinsman, supra*, 37 Cal.4th at pp. 677-678.)

Gonzalez's contention that Mathis had to inspect the roof to ensure that it was safe for Gonzalez to proceed with the cleaning

of the skylights is belied by the fact that Gonzalez himself *had* inspected the roof and therefore *knew* or should have known of any dangers posed by using the catwalk ledge to access the skylights. (See OBOM 16.) Specifically, Gonzalez knew the roof was not equipped with protective features such as guardrails or anchor points, and that (according to his own testimony) loose pebbles and sand on the roof might make the roof slippery. (*Ibid*.) Given Gonzalez's awareness of the danger these conditions posed to him and his crew if he did not take steps to avoid the risk, and given his purported belief that he had to cross the catwalk to reach the skylight, his contention that Mathis needed to protect him by conducting an inspection makes no sense. (See *Padilla, supra,* 166 Cal.App.4th at p. 676 [hirers not liable where contractor "knew of the [pressurized] pipe and failed to take necessary precautions to protect it from harm during the demolition process"].)

Gonzalez argues there was no delegation of the inspection duty here because the *Privette* doctrine applies only to risks inherent in the contractor's work. (ABOM 19-22.) According to Gonzalez, the risk of falling off the roof because of a slip and fall along the parapet wall was not a risk *inherent* in his work. (ABOM 26.) But Gonzalez construes the nature of risks inherent in cleaning skylights far too narrowly. Because cleaning the exterior of the skylights required Gonzalez and his employees to traverse the roof to gain access to the skylights—precisely the skill that Gonzalez claimed to have in his company advertising (*Gonzalez, supra*, 20 Cal.App.5th at p. 262)—it was readily apparent that, to access the skylights safely, Gonzalez needed a clear path to the

skylights. Any contractor would thus have inspected the roof to confirm there was a safe way to access the skylights.

Gonzalez cites *Ray* for the proposition that "[a] contractor with a limited task does not assume control over the entire project premises." (ABOM 44.) But *Ray* is inapposite. There, the Court of Appeal held a general contractor affirmatively contributed to injuries sustained by a subcontractor's employee because the general contractor prohibited the subcontractor from erecting road barricades that would have prevented his injury. (*Ray, supra*, 98 Cal.App.4th at pp. 1128-1129, 1133.) The court also noted that the subcontractor agreed to take all necessary precautions to protect the traveling public from injuries. (*Id*. at pp. 1128-1129.) Mathis, in contrast, did not prevent Gonzalez from undertaking any safety measures and did not expressly undertake any duty of care on behalf of Gonzalez or his employees.

Moreover, Gonzalez cannot reasonably dispute that a contractor hired because of his specialty in cleaning hard-to-reach spaces assumes responsibility to determine if it is safe to traverse the roof to reach such spaces. (See *Gravelin*, *supra*, 200 Cal.App.4th at p. 1218 [holding that the plaintiff contractor, not the defendant homeowners, "assumed responsibility for determining a safe approach to [a] satellite dish" on the roof and inspecting the chosen access route for hazards, and the homeowners could not be held liable for the contractor's "unfortunate miscalculation of an appropriate access route"].)

Nor does Gonzalez's citation to *Tverberg II, supra*, 202 Cal.App.4th at page 1446 help him. (ABOM 44.) There, a

hirer directed a contractor to work next to large bollard holes that the hirer itself had created, and negligently undertook affirmative measures to protect the contractor by placing inadequate stakes and safety ribbons around the holes. (*Tverberg II*, at p. 1448.) These facts established that the hirer had "affirmatively assumed the responsibility for the safety of the workers near the bollard holes, and discharged that responsibility in a negligent manner, resulting in injury." (*Ibid.*) Although the contractor twice requested that the bollard holes be covered, that fact alone did not establish that the hirer had affirmatively contributed, because "the passive permitting of an unsafe condition to occur is not an affirmative contribution." (*Ibid.*) Rather, it was the hirer's *response* to these requests—telling the contractor that the hirer needed to obtain equipment to cover the holes—that created the inference that the hirer had "agreed to cover the holes and then failed to meet this responsibility." (*Ibid.*; see *Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3 [a hirer affirmatively contributes if it "promises to undertake a particular safety measure" and then negligently "fail[s] to do so"].) Here, by contrast, the Court of Appeal correctly recognized that Gonzalez "presented no evidence showing that Mathis ever agreed to remedy the conditions on the roof," and "[m]erely allowing those conditions to persist is not sufficient." (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 271.)[4]

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[4] The court also concluded that the hirer had affirmatively created a safety hazard "by ordering these holes to be created *and* requiring Tverberg to conduct unrelated work near them" (*Tverberg II*, *supra*, 202 Cal.App.4th at p. 1448, emphasis added.)
(continued...)

3. Any reluctance by Gonzalez, for business reasons, to advise Mathis that the contract work could not be performed safely is not a basis for finding that Mathis affirmatively contributed to Gonzalez's injuries.

Gonzalez cites dicta from *McKown v. Wal-Mart Stores* (2002) 27 Cal.4th 219 (*McKown*) to justify imposing liability on Mathis on the theory that Gonzalez might have been reluctant, for business reasons, to advise Mathis that the contract work could not be safely accomplished until roof repairs or other remedial measures were completed. (See ABOM 37-39.) But if a contractor's desire to cultivate business goodwill is sufficient to shift liability from the contractor to the hirer, then the *Privette* rule is virtually extinguished, as all contractors have business incentives to please their hirers.

In any event, *McKown* is not analogous. There, the hirer affirmatively requested that the contractor use the hirer's own equipment—a forklift that was jerry-rigged with a platform

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But there is no similar evidence here. Gonzalez has not shown any evidence that Mathis affirmatively created a safety hazard on the roof or required him to traverse any particular part of the roof—or that Mathis even knew what path Gonzalez intended to take. (But see *Gravelin*, *supra*, 200 Cal.App.4th at p. 1212 [no liability under *Privette* even when a homeowner is aware that the contractor intends to take an unsafe path on the roof]; accord, *Hooker*, *supra*, 27 Cal.4th at p. 215 [no liability under *Privette* even where hirer was "aware of an unsafe practice and failed to exercise the authority [it] retained to correct it"].)

resting on the forks—which was defective and led to the plaintiff's injury. (*McKown, supra*, 27 Cal.4th at p. 223.) This Court held that Wal-Mart could be liable because its conduct affirmatively contributed to the plaintiff's injury. (*Ibid.*) In so holding, this Court rejected Wal-Mart's contention that it should not be liable because the contractor knew or should have known that the forklift was defective. (See *id.* at pp. 225-226.) The Court noted that "Wal-Mart had requested that the contractor use Wal-Mart's forklifts whenever possible," and "Wal-Mart, the world's largest retailer, was a customer the contractor was presumably loathe to displease." (*Id.* at p. 225.) The contractor thus "may well have believed that refusal to use [the forklift] would have generated ill will" because the extra expense of renting a forklift would have been chargeable to Walmart. (*Id.* at p. 226)

Here, Mathis made no request that Gonzalez use any of Mathis's equipment (let alone defective equipment) or do anything unsafe. Therefore, the situation described by this Court in *McKown*, including the risk of ill will arising from a refusal to comply with the type of request made by Walmart, is inapposite here.

IV. Gonzalez cannot recover on a premises liability theory.

A. A hirer is not liable to a contractor for failing to remedy a dangerous condition known to, or reasonably discoverable by, the contractor.

In seeking recovery on a premises liability theory, Gonzalez contends, in effect, that Mathis had to remedy the conditions on the roof before the cleaning work began. (See ABOM 39.) But this Court has never held that a property owner owes contractors and their employees such a duty, which would be contrary to *Privette*'s policy that worksite safety is, as a matter of law, generally delegated to the contractor. (*Kinsman, supra*, 37 Cal.4th at p. 674.) Under *Kinsman*'s holding, a hirer owes no duty to a contractor's employee to correct a dangerous condition known to, or reasonably discoverable by, the contractor. (*Id*. at p. 675.)

The rule articulated in *Kinsman* has been followed by this Court and the Court of Appeal in varying contexts. These cases clarify that a hirer delegates to the contractor any duty to remedy dangerous conditions in the work area:

- *Gravelin*, *supra*, 200 Cal.App.4th at pages 1216-1217 (property owner not liable under a premises liability theory to contractor (satellite dish installer) who fell when he stepped onto a roof extension that obviously could not serve as an access point to the roof);

- *Padilla, supra*, 166 Cal.App.4th at page 676 (property owner and general contractor not liable for injuries to demolition subcontractor's employee caused by damage to pressurized pipe where subcontractor knew that pipe was pressurized and could have taken precautions to prevent injury to employee);

- *Madden*, *supra*, 165 Cal.App.4th at page 1278 (general contractor not liable to electrical subcontractor's employee on a premises liability theory for failing to install guardrails on patio deck where subcontractor could have installed a temporary barrier or cordon); and

- *Sheeler v. GreyStone Homes* (2003) 113 Cal.App.4th 908, 920-921 (hirer's failure to clean debris from a stairway not a basis for liability where hirer never promised the contractor it would do so).

Gonzalez cannot satisfy the elements of a *Kinsman* failure-to-warn claim because he already knew of the roof's condition. He therefore does not contend that Mathis had a *duty to warn* him of the dangerous conditions, but instead argues that Mathis had a *duty to remedy* the dangerous conditions on the roof. The Court of Appeal erroneously agreed with Gonzalez, holding that a property owner may be liable if he exposed the contractor and its employees "to a known hazard that cannot be remedied through reasonable safety precautions." (*Gonzalez, supra*, 20 Cal.App.5th at pp. 272-273.)

The Court of Appeal's holding on the premises liability issue is at odds with the *Privette* doctrine and expands the *Kinsman*

exception to the point of eviscerating *Privette*'s general rule of nonliability. The Court of Appeal's holding must be reversed because, as explained by this Court in *SeaBright*, 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." (*SeaBright, supra*, 52 Cal.4th at p. 594, emphasis omitted.)

SeaBright correctly states the rule that applies here, and under that rule, a homeowner delegates to the contractor any duty it owes to remedy dangerous conditions on the owner's premises that are known to, or reasonably discoverable by, the contractor. To instead impose such a duty on hirers would compel homeowners and business owners to inspect their property on behalf of a contractor, oversee the contractor's work on an ongoing basis, and ensure the contractor's work can be done, and is being done, in a safe manner. But homeowners and most commercial property owners are obviously ill-equipped to make such determinations. Instead of conducting inspections themselves, homeowners reasonably rely on their contractor's expertise and expect the contractor to inform them if any remedial measures need to be taken before the contractor's work can be performed. If such measures are required, it is incumbent on the contractor either to undertake the remedial measures or to condition commencement of the contract work on the homeowner's retention of another competent contractor to perform the work.

Here, assuming the truth of his testimony, Gonzalez had reason to believe that remedial measures were necessary before he

started work because (according to him) the only access he had to reach the skylight was across the ledge where he claims the roof was slippery. But Gonzalez made no attempt to remedy the dangerous condition of the roof. Nor did he request that Mathis hire someone else to undertake remedial measures. Instead, Gonzalez elected to proceed with the work, assuming the risk and indicating to Mathis that nothing about the condition of the roof precluded safe completion of the work. Having so conducted himself, Gonzalez may not now recover from Mathis on the theory Mathis should have remedied conditions on the roof—conditions that Gonzalez never informed Mathis were an impediment to safely completing the work.

B. *Kinsman*'s dicta does not support imposition of a duty to remedy dangerous conditions known to the contractor or reasonably discoverable by the contractor.

Relying on dicta from *Kinsman*, the Court of Appeal held that a hirer may have a duty to remedy a dangerous condition that is known to a contractor. (*Gonzalez, supra*, 20 Cal.App.5th at pp. 272-273.) But *Kinsman*'s dicta should not be understood to mean a hirer may be held liable to a contractor for injuries caused by a dangerous condition where the contractor knew of the danger (or should have known of it) and the hirer did nothing to affirmatively interfere with the contractor's ability to undertake remedial measures or halt the work until such measures are taken.

In *Kinsman*, the plaintiff alleged he was exposed to asbestos-containing insulation while employed by a contractor hired to erect scaffolding at a Unocal plant. (*Kinsman, supra*, 37 Cal.4th at p. 664.) Kinsman sued Unocal, arguing it was liable on a premises liability theory. (*Id*. at p. 665.) The trial court instructed the jury on general negligence principles but did not instruct the jury that Unocal would not be liable if Kinsman's employer knew or should have discovered the danger posed by the insulation. (*Id*. at p. 666.) This Court reversed, holding that the trial court erred by failing to instruct the jury that a contractor's employee may not recover from the hirer based on a dangerous condition where the contractor knew or should have known of the dangerous condition. (*Id*. at p. 664.) In dicta, *Kinsman* noted the background rule that under certain circumstances a landowner might be liable for failing to remedy an obvious or known dangerous condition:

> "Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. [Citation.] However, this is not true in all cases. '[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger.' " (*Krongos v. Pacific Gas & Electric Co*. (1992) 7 Cal.App.4th 387, 393, [9 Cal.Rptr.2d 124] [(*Krongos*)] [duty to protect against obvious electrocution hazard posed by overhead electrical wires]; see also Rest.2d Torts, § 343A [possessor of land liable for obvious

> danger if "the possessor should anticipate the harm despite such . . . obviousness"].)

(*Id*. at p. 673.)

The Court concluded, however, that the rule regarding "obvious" hazards did not apply:

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

(*Kinsman, supra*, 37 Cal.4th at pp. 673-674.)

In addressing the general rule for obvious hazards, this Court cited *Krongos,* which involved a construction worker electrocuted when another employee of the construction company brought a boom cable into contact with an overhead wire. (*Krongos, supra,* 7 Cal.App.4th at p. 391.) But the plaintiff in *Krongos* was suing the lessor of the premises, not a hirer, so the *Privette* rule did not come into play. (See *id*. at pp. 391-392.) The court in *Krongos* thus had no occasion to consider how *Privette*'s

very strong policy of delegation would affect the general rule for obvious hazards that might foreseeably injure a third party. At any rate, it would make no sense to extend the foreseeability rule announced in *Krongos*—that a landowner owes third parties a duty to remedy hazards if "the practical necessity of encountering the danger" is such that "a person might . . . choose to encounter the danger" (*id.* at p. 394)—to the hirer-contractor context. Unlike other landowner-invitee situations, a hirer implicitly delegates to the contractor its tort law duty to identify and remedy hazards at the worksite. (*SeaBright*, *supra*, 52 Cal.4th at p. 601 [holding that US Airways implicitly delegated to its contractor its "duty to identify the absence of . . . safety guards required by Cal-OSHA regulations and to take reasonable steps to address that hazard].) So long as the hazard is known to or reasonably discoverable by the contractor, it is the contractor's delegated responsibility either to remedy the hazard or inform the hirer that the work cannot go forward unless repairs or other remedial measures are taken.

Gonzalez also cites *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104 (*Osborn*) for the proposition that a hirer must remedy a known dangerous condition on behalf of a contractor's employee. (ABOM 30, 40.) But *Osborn*—the lone case cited by *Krongos* on the duty-to-remedy issue—was decided before *Privette*, discusses none of the principles applicable in *Privette* cases, and is factually very different from the present case. The plaintiff in *Osborn* regularly delivered cement to the defendant's Ready-Mix plant. (*Osborn*, at pp. 107-109.) During the course of the contract, the defendant demolished a concrete ramp at the plant, creating

an area strewn with rubble that the plaintiff traversed while unloading his truck. (*Id.* at pp. 109-110.) The driver was injured when he slipped on a piece of concrete, causing him to fall. (*Id.* at p. 110.) The Court of Appeal held it was error to instruct the jury that a "business proprietor . . . cannot be held liable for an injury resulting from a danger which was obvious or which should have been observed in the exercise of ordinary care." (*Id.* at pp. 115, 122, emphasis omitted.) Specifically, the court held the instruction on obvious dangers was improper because a property owner may have "a duty to *remedy*" a hazard if it is foreseeable that it "may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it)." (*Id.* at p. 122.)

The general rule applied in *Osborn* might make sense as to certain third-party actions against business proprietors, such as actions brought by a customer injured while visiting the proprietor's premises. But where the business proprietor is the *hirer of a contractor*, this Court's holdings in *Hooker* and *Kinsman* govern in actions by contractors and their employees against the hirer.

Under these decisions, a hirer should be liable on a premises liability theory only if the contractor did not know of the dangerous condition and could not discover it. (See *Kinsman*, *supra*, 37 Cal.4th at p. 675.) If the contractor knew or had reason to know of the dangerous condition, the hirer cannot be liable under *Kinsman* where the contractor continues with the work in the face of the dangerous condition, an act that implies the contractor believed the work could be performed safely notwithstanding the

dangerous condition. As explained by the Court of Appeal in *Padilla*, *supra*, 166 Cal.App.4th at page 676, "[i]n the case of the obvious hazard, under *Privette* the landowner can delegate the responsibility of safety precautions to the contractor, and the landowner will not be liable for injuries to the contractor for the contractor's failure to take such precautions."

Applying this rule to *Osborn*, if the contractor knew or reasonably should have known that the rubble created a dangerous condition, then it was the contractor's delegated responsibility to take measures to protect against the hazard. If the contractor believed it could not undertake measures to ensure safety, then the contractor should have halted work until the hazard was remedied. Absent such a request, the hirer could assume the contractor determined it could take whatever safety measures were necessary to safely perform the work.

Under the Court of Appeal's reasoning here, however, the hirer can never make that assumption and must therefore look over the expert's shoulder to ensure the contractor is taking all necessary safety precautions, on the off chance the contractor might miscalculate and fail to take some needed measure and later claim that no "reasonable" measure was available. This logic thwarts *Privette*'s strong policy of delegation. (See *Gravelin*, *supra*, 200 Cal.App.4th at p. 1218 [homeowner not liable for a contractor's "unfortunate miscalculation" of the risk].)

Here, Mathis had no reason to believe his expert contractor could not take the precautions necessary to safely complete the work, and he did nothing to affirmatively interfere with Gonzalez's

ability to take such precautions. Consistent with *Privette*'s "very 'strong'" policy favoring complete delegation of responsibility to contractors (*SeaBright*, *supra*, 52 Cal.4th at p. 602), this Court should hold that a hirer delegates to the contractor any tort law duty it owes to identify and remedy obvious hazards, or else demand that the hirer remedy the hazard before the contracted work goes forward.

C. The new *Privette* exception created by the Court of Appeal thwarts the *Privette* doctrine's strong policy of delegation and should be rejected.

Kinsman was decided fourteen years ago, and *Hooker* three years before that. Yet in all the time since those decisions, no lower court (until the Court of Appeal here) has seen fit to craft a new *Privette* exception based on *Kinsman*'s dicta about obvious hazards. No court has done so because no new exception is necessary. *Hooker* and *Kinsman* have provided a workable standard for determining when hirers should be liable to contractors and their employees.

As this Court explained in *Kinsman*, "[a] useful way to view the [*Privette* line of] cases is in terms of delegation." (*Kinsman*, *supra*, 37 Cal.4th at p. 671.) When one hires a contractor, the hirer "delegate[s] responsibility for performing that task safely, and assignment of liability to the contractor follow[s] that delegation." (*Ibid.*) The twin exceptions to *Privette*'s rule of hirer nonliability announced in *Hooker* and *Kinsman* account for situations in which the hirer has not fully delegated responsibility. In *Kinsman*, this

Court explained that, under *Hooker*, when a hirer "actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury," the hirer has not "fully delegate[d] the task of providing a safe working environment." (*Kinsman*, at p. 671.) Likewise, in *Kinsman*, the Court recognized that a hirer "cannot effectively delegate to the contractor responsibility for the safety of its employees if it fails to disclose critical information needed to fulfill that responsibility," and so the hirer is liable "if the employee's injury is attributable to an undisclosed [and undiscoverable] hazard." (*Id.* at p. 674.) This policy of delegation is so strong that it even extends to duties imposed on the hirer by statute or regulation. (See *SeaBright*, *supra*, 52 Cal.4th at p. 603.)

Applying this principle of delegation, lower courts have consistently declined to impose liability on hirers for obvious hazards—even hazards the contractor later claims it could not remedy—unless the hirer *affirmatively* interferes with the contractor's work by directing the contractor to do something unsafe or inducing the contractor's reliance by promising to undertake a particular safety measure. Except in those limited circumstances, courts have recognized that the contractor is the expert best equipped to decide whether to take safety measures itself or halt the work until the hazard is resolved by someone else. (See, e.g., *Delgadillo*, *supra*, 20 Cal.App.5th at p. 1093 [hirer not liable where it failed to provide anchor points to the contractor to safely access a window, leaving the contractor to access the window in an unsafe manner, because the hirer never "directed how the

window washing should be performed or otherwise interfered with the means or methods of accomplishing the work"]; *Khosh*, *supra*, 4 Cal.App.5th at p. 719 [hirer not liable where it never "refused a request to shut off electrical power," made a "specific promise" to undertake safety measures, or "prevented Khosh from waiting until the scheduled shutdown before starting work"]; *Brannan v. Lathrop Construction Associates, Inc.* (2012) 206 Cal.App.4th 1170, 1174, 1180 [hirer not liable for contractor's slip-and-fall injury where nothing prevented contractor from halting work and "[n]o one told Brannan to gain access the way he did" by stepping onto a rung of scaffolding—even though Brannan claimed in litigation "there was no other way to access the area"]; *Gravelin*, *supra*, 200 Cal.App.4th at pp. 1216-1217 [homeowner not liable for contractor's fall from roof where the contractor did not have a ladder long enough to access a satellite dish and used an obviously inadequate roof extension as an access point]; *Padilla*, *supra*, 166 Cal.App.4th at pp. 671, 674 [hirers not liable even though "ultimately only [they] had the ability to physically turn off the pipe" because they never promised to turn the pipe off or "in any way altered or interfered with [the subcontractor's] safety measures"]; accord, *King*, *supra*, 205 Cal.App.3d at p. 1317 [plaintiff HVAC technician "produced no evidence that he was not free to refuse to service the air conditioner after discovering the risk in the ladder"].)

These lower court decisions are all consistent with the *Privette* doctrine's strong presumption favoring complete delegation of responsibility for worksite safety to the contractor.

As even the Court of Appeal here recognized, because a hirer presumptively delegates all responsibility for worksite safety to the contractor, a hirer's failure to take measures to protect against an unsafe condition "is not actionable unless there is some evidence that the hirer . . . had agreed to implement these measures." (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 271.) Because such evidence is missing here, Gonzalez's claim that Mathis failed to take affirmative measures to protect him from a hazardous condition on the roof "is not actionable." (*Ibid.*)

In short, there is no need to create a new exception for obvious hazards that "cannot be remedied through reasonable safety precautions." (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 273.) By delegating all responsibility for worksite safety, including the responsibility to inspect for hazards, a hirer necessarily delegates to the contractor the responsibility to determine how best to address the hazards it discovers. But the new exception created by the Court of Appeal turns this careful framework of delegation on its head, improperly shifting to the hirer the affirmative duty to inspect the worksite, determine how best to resolve obvious hazards, and take safety measures for the contractor on the off chance the contractor might not take such measures. That should not be the law.

CONCLUSION

The judgment of the Court of Appeal should be reversed with directions to enter judgment for defendants John R. Mathis and John R. Mathis as trustee of the John R. Mathis Trust.

January 24, 2019

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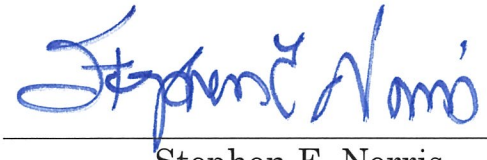
By: 
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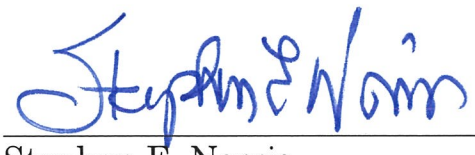
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this amicus brief consists of 9,812 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: January 24, 2019



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PROOF OF SERVICE

Gonzalez v. Mathis et al.
Los Angeles Superior Court Case No. BC542498
Court of Appeal Case No. B272344
Supreme Court Case No. S247677

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On January 24, 2019, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, IN SUPPORT OF RESPONDENTS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is 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 January 24, 2019, at Burbank, California.

Victoria Beebe

Victoria Beebe

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