S247677

Case No. S_____

IN THE
SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,

v.

JOHN R. MATHIS AND JOHN R. MATHIS AS TRUSTEE OF THE JOHN R. MATHIS TRUST
Defendants and Respondents.

After a Published Decision by the Court of Appeal,
Second Appellate District, Division Seven, Case No. B272344

Superior Court for the County of Los Angeles,
Case No. BC542498, Honorable Gerald Rosenberg, Judge

PETITION FOR REVIEW

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1. Whether a hirer who delegates responsibility for worksite safety to an independent contractor nonetheless may be liable in tort for injury sustained by the contractor's employee when the hirer does not retain control over the worksite and the hazard causing the injury was known to the contractor.

2. Whether, even assuming a hirer may be liable in such circumstances, the Court of Appeal properly held that the hirer is entitled to summary judgment only if the hirer establishes as a matter of law that the contractor could unilaterally have taken reasonable safety precautions to remedy the hazard causing the injury.

INTRODUCTION

In a series of important decisions over the last 25 years, beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689 (hereafter *Privette*), this Court has carefully defined and limited the circumstances in which an independent contractor's employee may recover in tort from the party hiring the contractor. Under those decisions, when employees of independent contractors are injured at a worksite, they generally cannot sue the party that hired the independent contractor. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594 (hereafter *SeaBright*).)

This Court has identified two exceptions to the general rule: (1) where the hirer retains control over the contractor's work and affirmatively contributes to the injury (see *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198 (hereafter *Hooker*));

and (2) where the hirer fails to warn the contractor of a concealed hazard (see *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (hereafter *Kinsman*)). Absent those narrow exceptions, this Court has explained 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." (*Seabright*, *supra*, 52 Cal.4th at p. 594 [italics added].)

In this case, the trial court applied those principles to hold that the employee of an independent contractor (plaintiff Luis Gonzalez) could not recover against a homeowner (defendant Johnny Mathis) for injuries sustained when he fell 8.5 feet while cleaning a skylight located on the roof of Mathis's one-story home—a skylight Gonzalez had been cleaning without incident for 20 years. Consistent with *Privette* and its progeny, the trial court held that, because Mathis retained no control over the worksite, and any hazards were well-known to Gonzalez, Mathis was not liable for Gonzalez's injuries as a matter of law.

The Court of Appeal reversed in a significant published decision. In its view, *Kinsman* created a previously unrecognized *third* exception to *Privette*'*s* general rule, under which a hirer is liable in tort "when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." (Opinion of the Court of Appeal, Second Appellate District, Division Seven, filed Feb. 6, 2018 at p. 19, Ex. A attached (hereafter "Op.")) Finding the "reasonableness of a party's actions is generally a question of fact for the jury to

decide," the court concluded that a hirer cannot avoid trial in a suit seeking damages for injuries sustained by an independent contractor's employee unless the hirer can "establish[] as a matter of law that [the contractor] could have remedied [the hazard] through the adoption of reasonable safety precautions." (*Id.* at p. 20.) Accordingly, it remanded for trial.

The Court of Appeal's significant, published decision warrants this Court's review for several reasons.

First, the question of whether and in what circumstances a homeowner or other hirer may be liable to an independent contractor's employee for injuries sustained at the worksite is critically important, affecting millions of transactions in this State annually. (See Cal. Rules of Court, rule 8.500(b)(1).) This Court has repeatedly granted review over the last two decades to address that question. And review is particularly warranted here, because the Court of Appeal's decision eviscerates the careful framework developed by this Court, and the important policies underlying it.

In *Hooker,* the Court held a hirer who retains control of a worksite is not liable for injuries sustained by an independent contractor's employee unless the hirer affirmatively contributes to the injury. (27 Cal.4th at p. 202.) But under the Court of Appeal's decision, a hirer who *delegates* control of the worksite and *does not* affirmatively contribute to the injury may now be liable. Penalizing property owners for delegating responsibility for safety to contractors not only makes little sense, it contradicts California's "strong policy 'in favor of delegation of responsibility

and assignment of liability' to independent contractors." (*SeaBright*, *supra*, 52 Cal.4th at p. 596 [citation omitted].)

The Court of Appeal's novel reading of *Kinsman* also upends decisions by this Court post-dating *Kinsman.* In *Tverberg v. Fillner Const., Inc.* (2010) 49 Cal.4th 518, 521 (hereafter *Tverberg*), this Court unanimously held that a hirer who has not retained control of a worksite is not liable under *Privette* and its progeny for an independent contractor's injuries from a known hazard—even when the injury "result[s] from risks *inherent* in the hired work" (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 528. The same plaintiff would now recover, however, simply by pleading the Court of Appeal's new exception. That result exposes unwitting homeowners to catastrophic liability in countless cases involving inherent hazards—even when the homeowner has no reason to believe the contractor is in danger. And it frustrates *Seabright*'s heretofore clear guidance that a hirer may delegate "any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (52 Cal.4th at p. 594 [italics added].) This Court's review is needed, therefore, to prevent the Court of Appeal's newfound "exception" from swallowing *Privette's* vital rule.

Second, review is warranted to resolve the conflict among California appellate courts resulting from this decision. Indeed, only weeks before this Court's decision, a different division of the same Court of Appeal decided a case involving nearly *identical* facts—an independent contractor's employee who fell off a

building while washing windows—but reached the opposite result. *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, petn. for review pending, petn. filed Mar. 7, 2018 (hereafter *Delgadillo*). In contrast to the court's decision in this case, *Delgadillo* found that because the hirer had delegated responsibility for the safety of the job to the contractor, it could not be held liable for the injuries of the contractor's employee. (*Id.* at pp. *6-7.) As those inconsistent results underscore, this Court's review is "necessary to secure uniformity of decision" among California's courts. (Cal. Rules of Court, rule 8.500(b)(1).)

Because the resolution of the questions presented impacts countless business decisions and carries widespread consequences for homeowners, general contractors, insurance providers, and employees, including the cost of contractor services and property insurance in this State, the need for certainty is acute and this Court's intervention is necessary.

STATEMENT OF THE CASE

This case presents a fact pattern that repeats countless times around California every day—a homeowner's hiring of a skilled independent contractor to perform maintenance or other specialized work at the home.

A. Factual Background

1. 82-year-old Johnny Mathis, one of the most well-recognized American recording artists of the twentieth century, has lived in the same one-story house in Los Angeles for 56 years.

(2-AA-317.[1]) The one-story home has a flat roof, only 8.5 feet from the ground. (Op. at p. 2.) Part of that roof is covered by a large skylight. (*Ibid.*)

Plaintiff Luis Gonzalez cleaned Mathis's skylight for roughly 20 years prior to the events at issue in this case. According to his marketing materials, Gonzalez has been a professional window and skylight cleaner "since 1988." (1-AA-125-126, 162.) He began cleaning Mathis's house in the 1990s while working for Beverly Hills Window Cleaning. (2-AA-257-258.) In the mid-2000s, he started his own cleaning business, Hollywood Hills Window Cleaning, which he advertised as a professional, expert company that "[s]pecialized in 'hard to reach windows and skylights.'" (Op. at p. 2.) By 2012, Gonzalez's company had 200-300 customers and seven employees. (3-AA-670, 674.) His advertisements touted his "[m]eticulous and careful workers" and represented that his employees were trained "to take extra care in his clients' homes, as well as with their own safety when cleaning windows." (3-AA-669.) Although he also represented that his company was bonded and carried insurance (3-AA-669), Gonzalez in fact never obtained workers' compensation insurance for his company or his employees in violation of California law (3-AA-675).

Shortly after opening his new business, Gonzalez contacted Marcia Carrasco, Mathis's longtime housekeeper, about hiring Hollywood Hills Window Cleaning rather than Gonzalez's former

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[1] "AA" refers to Appellant's Appendix.

employer to clean Mathis's skylights, windows, and house. (3-AA-667.) Carrasco ultimately hired Gonzalez's company as an independent contractor to clean Mathis's skylight. (Op. at p. 5.) From 2007 until December 2012, Hollywood Hills Window Cleaning was "regularly hired . . . to wash the skylight and perform other services on the property." (*Id.* at pp. 2-3.)

Gonzalez relied on his expertise and substantial experience to oversee the cleaning of the skylight. "Mathis and Carrasco had never told him how he should clean the skylight." (Op. at p. 15.) Nor would they have known how to supervise this work—Mathis himself was almost 80 years old and hospitalized at the time of the incident and was last on the roof in 2010, while Carrasco, then in her 70s, had been on the roof only three or four times in the entire 40 years she worked for Mathis. (2-AA-317; 3-AA-677-678.)

Having cleaned Mathis's skylight for two decades and accessed the roof "many, many times," Gonzalez knew the details of Mathis's roof well. (3-AA-673; see Op. at p. 3.) A one-story ladder accessing the roof is permanently affixed to the west side of the house. (Op. at p. 3.) An approximately three-foot high parapet wall begins near the top of the ladder, separating the main, interior part of the roof, including the skylight, from an exposed outer ledge, roughly two feet wide. (*Id.* at p. 2.) Individuals may walk inside of the parapet wall, but ventilation pipes and other mechanical equipment present there limit mobility to two adults walking side by side. (*Id.* at pp. 2, 20; see also 1-RA-1.)

Unbeknownst to Mathis, Gonzalez "always" used the ledge on the outside of the three-foot parapet wall to access the skylight, apparently in order to avoid the equipment located inside. (Op. at p. 3.) Gonzalez "knew [that] the ledge lacked any protective features," such as guard rails. (*Id.* at p. 4.) Gonzalez also stated that "[e]verybody knew" that the presence of loose pebbles and sand from aging roof shingles made the roof "slippery." (*Id.* at p. 3-4; see 1-AA-144:11-145:19.) Indeed, Gonzalez discussed these conditions with his employees for years prior to his fall. (Op. at pp. 3-4.) But neither he nor his employees ever attempted to take any safety measures other than not walking too close to the ledge. (3-AA-564-565, 582.)

Gonzalez asserted below that the court should consider "the authority of the contractor to take preventive measures required to eliminate [a] dangerous condition." (Gonzalez C.A. Opening Br. at p. 25.) Gonzalez claimed that there were at least "two preventive measures available in the instant case[:] repairing the roof and installing safety hooks." (*Ibid.*) Gonzalez believed "neither of [those measures] were within the scope of Gonzalez's business." (*Ibid.*) But he did not allege nor point to any evidence that he ever asked Mathis or Carrasco to install safety hooks. And although Gonzalez testified that he told Mathis's housekeeper that certain roof shingles should be replaced (Op. at p. 4), he never told either Mathis or Carrasco that he or his employees could not perform their job safely, or that any slippery conditions could not be ameliorated by simply sweeping up loose pebbles or sand, walking carefully on the ledge, holding onto the

parapet wall, walking on the inside of the parapet wall, putting up a ladder closer to the skylight, or other potential precautions.

2. In the summer of 2012, Carrasco once again hired Gonzalez to clean the house and the skylight. (Op. at pp. 2-3.) While two of Gonzalez's employees were cleaning the skylight, Carrasco noticed water leaking into the house. (*Id.* at p. 3.) She asked Gonzalez to tell his employees to use less water so as to not damage the interior of the home. (*Ibid.*) Rather than proceeding inside the parapet wall, Gonzalez chose to walk on the two-foot ledge outside of the wall. (*Ibid.*) After he spoke to his employees, Gonzalez returned the same way (again choosing to walk along the ledge rather than within the parapet wall). When Gonzalez lost his footing, he fell to the ground 8.5 feet below, sustaining serious injury. (*Ibid.*)

B. Procedural History

1. On April 11, 2014, Gonzalez sued Mathis, asserting claims based on premises liability and negligence. (1-AA-1-5.) After full briefing and a hearing, the trial court granted Mathis's motion for summary judgment on March 8, 2016, holding Mathis owed no duty to Gonzalez due to his status as the employee of an independent contractor. (4-AA-870-871.) In so ruling, the court held that neither of *Privette*'*s* exceptions applied. The court found *Hooker*'*s* "retained control" exception inapplicable because neither Mathis nor Carrasco controlled the operative details of Gonzalez's work or affirmatively contributed to his injury. (4-AA-870.) The court likewise found *Kinsman*'*s* 'concealed hazard' exception inapplicable because "[n]one of the conditions were

concealed to" Gonzalez, as Gonzalez readily admitted that he "knew of the purported dangerous conditions." (4-AA-871.)

2. The Court of Appeal reversed. The court agreed with the trial court that Gonzalez was hired "as an independent contractor," and that his "claims are therefore subject to *Privette* and its progeny." (Op. at p. 14.) The court further agreed that an independent contractor's employees are generally prohibited from suing the contractor's hirer for workplace injuries. (*Id.* at p. 4.)

The court next analyzed whether either of the "two exceptions" to *Privette's* rule articulated in *Hooker* and *Kinsman* applied. (Op. at p. 9.) The court first held *Hooker's* retained-control exception was inapplicable because Gonzalez presented no evidence that Mathis retained control over the worksite in a manner that affirmatively contributed to his injuries. (*Id.* at pp. 14-17.) The court rejected Gonzalez's argument that Mathis retained control because Mathis was allegedly "the only party who had authority to fix the dangerous conditions on the roof." (*Id.* at p. 16.) As the court explained, even "'[p]assively permitting an unsafe condition to occur'" is "not sufficient to establish liability under *Hooker*." (*Ibid.* [citation omitted].) The court also reiterated that a homeowner's "failure to institute specific safety measures is not actionable unless there is some evidence the hirer … had agreed to implement these measures." (*Ibid.* [citation omitted].) Because Gonzalez "presented no evidence showing that Mathis ever agreed to remedy the conditions on the roof," the court found Mathis could not be liable under *Hooker* for Gonzalez's injuries. (Op. at pp. 16-17.)

The court next turned to *Kinsman*. Because Gonzalez admitted he was well aware of the hazards of which he complained, *Kinsman's* exception for concealed hazards indisputably did not apply. The Court of Appeal, however, believed that *Kinsman* provides for an additional exception. Relying on language it conceded to be "technically dicta" (Op. at p. 18, fn. 1), the court pointed to *Kinsman's* acknowledgment that there "'may be situations … 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'" (*id* at p. 12 [quoting *Kinsman*, *supra*, 37 Cal.4th at p. 673]). Although *Kinsman* had no occasion, given the facts of that case, to decide whether or in what circumstances landowners *would* owe such a duty—or more importantly, whether that duty could be delegated like "any tort law duty the hirer owes to the contractor's employees" (*Seabright*, *supra*, 52 Cal.4th at p. 594), the Court of Appeal held that *Kinsman* created a third exception to *Privette*, resulting in the following rule: "[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," but "the hirer can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." (Op. at p. 19.)

Applying its newfound rule, the court held that summary judgment was unavailable to a hirer like Mathis, unless he could "establish[] as a matter of law that [the contractor] could have

remedied the dangerous conditions of the roof through the adoption of reasonable safety precautions." (Op. at p. 20.)

Although the court acknowledged that a video and photographs of Mathis's roof "certainly cast doubt on Gonzalez's assertion" that he could not have avoided the ledge simply by walking on the inside of the parapet wall, the court found that such evidence could not conclusively establish that Gonzalez could have done so. (*Id.* at p. 21.) The court speculated that Gonzalez's "ability to traverse the area inside the parapet wall" could have been affected by "his size" or the possibility that he was "required to carry equipment that rendered the pathway impassable." (*Id.* at p. 22.) Although Gonzalez presented no evidence at all to support those possibilities, the court believed that it was Mathis's obligation to disprove them. Because "Mathis presented no evidence negating [these] factors," the court reversed the district court's judgment. (Op. at pp. 22-23.)

The court did not address the "preventive measures" (i.e. safety precautions) that Gonzalez himself alleged could have remedied the risk, such as safety hooks. (Gonzalez C.A. Opening Br. at p. 25.) The court also rejected any inquiry into whether Gonzalez's claimed inability to take precautions was foreseeable, finding that "a hirer's liability for injuries resulting from an open hazard is not dependent on the foreseeability that a contractor might encounter the hazard." (Op. at p. 19, fn. 2.) Instead, the court remanded for trial.

3. Mathis filed a petition for rehearing on February 21, 2018. On February 23, 2018, the Court of Appeal called for a

response to the petition. On March 2, 2018, the Court of Appeal denied Mathis's petition for rehearing. This petition followed.

LEGAL DISCUSSION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT HIRERS WHO DELEGATE RESPONSIBILITY FOR SAFETY TO CONTRACTORS ARE NOT LIABLE FOR INJURIES RESULTING FROM OBVIOUS HAZARDS

The Court of Appeal read *Kinsman* to establish that "the hirer [of an independent contractor] can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied [by the contractor] through reasonable safety precautions." (Op. at p. 19.) Because that decision destabilizes *Privette's* well-established framework and policies, is hugely consequential for millions of homeowners across the state who hire contractors every day, and squarely conflicts with other published California appellate decisions, this Court should grant review.

A. Review Is Warranted Because The Court of Appeal's Important Decision Undermines *Privette's* Framework And Policies

The *Privette* doctrine "generally prohibits an independent contractor or his employees from suing the hirer of the contractor for workplace injuries." (Op. at p. 4; see also *SeaBright, supra*, 52 Cal.4th at p. 594.) Under its framework, "[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." (*SeaBright, supra*, 52 Cal.4th at p. 594.) Because

"[t]he policy favoring 'delegation of responsibility and assignment of liability' is very 'strong,'" *Privette's* rule establishes that "a hirer generally 'has no duty to act to protect the [contractor's] employee when the contractor fails in that task[.]'" (*Id.* at pp. 601-602 [quoting *Kinsman*, *supra*, 37 Cal.4th at pp. 671, 674].)

This Court has recognized "two exceptions" to *Privette's* rule. (Op. at p. 9.) First, in *Hooker*, this Court recognized that a hirer "'who entrusts work to an independent contractor, but who retains the control of any part of the work'" may be liable for the injuries of an independent contractor's employees when "[the] hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (27 Cal.4th at p. 201-02 [citation omitted].) In so holding, this Court emphasized that "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.) As such, the Court held that a hirer who retains control over a worksite may be liable *only* where the hirer's "exercise of retained control affirmatively contributed to the employee's injuries." (*Id.* at p. 212.)

Hooker specified that "passively permitting an unsafe condition to occur … does not constitute affirmative contribution." (Op. at p. 16 [citation omitted].) Thus, even when a landowner retains control over safety conditions, "[t]he failure to institute specific safety measures is not actionable unless there is some evidence that [he] . . . had agreed to implement these measures." (*id.* [citation omitted].)

The Court later recognized a second exception in *Kinsman*, holding that "the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (37 Cal.4th at p. 675.) As the Court explained, "the teaching of the *Privette* line of cases is that a hirer has *no duty* to act to protect the employee when the contractor fails in that task and therefore no liability; such liability would essentially be derivative and vicarious." (*Id.* at p. 674 [italics added].) *Kinsman* found that "the rule must be different," however, where a hirer affirmatively conceals a hazard of which the independent contractor neither is aware, nor reasonably could be expected to discover. (*Ibid.*) In such a case, the Court recognized that it makes little sense to fix responsibility for injuries stemming from the hidden hazard on the independent contractor, because a hirer that conceals a hazard from an independent contractor cannot be said to delegate responsibility to the contractor to safely avoid that hazard. (See *id.* at pp. 674-675.)

The court below agreed that neither of the exceptions recognized in *Hooker* or *Kinsman* were applicable to this case. (Op. at pp. 14-17.) The court nevertheless found language in *Kinsman*—that it acknowledged was "technically dicta"—to "indicat[e]" that the "principles of delegation" set forth in *Privette* and its progeny established a *third* exception providing 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." (*Id*. at pp. 18-19 & fn. 1.)

a. The Court of Appeal's new exception significantly upsets *Privette*'*s* settled framework.

First, the Court of Appeal's novel construction of *Kinsman* effectively renders *Hooker*'*s* important limitations a nullity. Under *Hooker*, an independent contractor's employees may not recover from a property owner for injuries sustained from known hazards—even if the hirer retains control over that jobsite—unless the hirer affirmatively contributes to the injury. (27 Cal.4th at p. 202, fn. 2.) Under the Court of Appeal's decision, however, a hirer who *does not* retain control over the jobsite and *does not* affirmatively contribute to the injury at all can now be liable. Requiring a lesser showing to impose liability on a hirer who has delegated more control for safety to an independent contractor not only is senseless, it is impossible to reconcile with California's "strong policy 'in favor of delegation of responsibility and assignment of liability' to independent contractors." (*SeaBright*, *supra*, 52 Cal.4th at p. 596 [citation omitted].)

As this case illustrates, the Court of Appeal's new rule renders *Hooker*'*s* limitations meaningless. As Gonzalez conceded, "Mathis and Carrasco had never told him how he should clean the skylight." (Op. at p. 15.) Nor could Gonzalez show how either Mathis or Carrasco affirmatively contributed to his injury. Instead, Gonzalez alleged nothing more than that Mathis, at most, passively allowed unsafe "conditions on the roof … to

persist." (*Id.* at pp. 16-17.) And as *Hooker* makes clear, "passively permitting an unsafe condition to occur" is not a basis for imposing liability even on a hirer who has retained control of the worksite. (*Id.* at p. 16 [citation omitted].) Under the Court of Appeal's newfound exception, however, those exact same facts now result in liability, even where, as here, the hirer delegated responsibility for safety to the contractor.

Second, the Court of Appeal's interpretation of *Kinsman* sharply undercuts *Tverberg*. There, this Court held that an independent contractor could *not* recover from his hirer (unless *Hooker's* retained control exception applied) for injuries sustained from an open hazard encountered when performing inherently dangerous work—*even though the contractor could not remedy the hazard*.

Tverberg, an independent contractor, was hired to erect a metal canopy at a construction site directly next to eight large, four-foot-by-four-foot "bollard" holes dug at the direction of the general contractor for another component of the overall construction project. (*Tverberg, supra,* 49 Cal.4th at pp. 522-523.) Tverberg twice asked the general contractor to cover the holes with large metal plates, but the general contractor failed to do so. Tverberg fell into a bollard hole and was injured.

This Court unanimously held that unless he could satisfy *Hooker's* retained-control exception, Tverberg could not recover. As the Court explained, "[w]hen an independent contractor is hired to perform inherently dangerous … work, that contractor, unlike a mere employee, receives authority to determine how the

work is to be performed and assumes a corresponding responsibility to see that the work is performed safely." (*Id.* at p. 528.) Because "the hirer also delegates 'responsibility for performing [the] task safely,'" the Court found that "a hired independent contractor who suffers injury resulting from risks inherent in the hired work, after having assumed responsibility for all safety precautions reasonably necessary to prevent precisely those sorts of injuries, is not, in the words of *Privette*, a 'hapless victim' of someone else's misconduct." (*Ibid.* [quoting *Privette*, *supra*, 37 Cal.4th at p. 694].) Rather, the Court explained, those injuries "are covered by workers' compensation insurance, the cost of which is generally included in the contract price for the project." (*Id.* at p. 521 [citation omitted].)

In *Tverberg*, "the possibility of falling into one of [the bollard] holes constituted an inherent risk of the canopy work" simply "[b]ecause the bollard holes were located next to the area where Tverberg was to erect the metal canopy." (49 Cal.4th at p. 529.) Although the bollard holes presented an open and obvious hazard that Tverberg could not remedy, the Court held that Tverberg's hirer could not be held liable for his injuries absent a showing that the retained control exception applied. Under the Court of Appeal's newfound exception, however, that case would necessarily have come out the other way—imposing liability on the hirer for Tverberg's injuries.

Third, the Court of Appeal's decision subverts the clear rule set forth by this Court in *Seabright*. Relying on *Kinsman*'s dicta, the Court of Appeal believed that "[t]here may be situations … 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." (37 Cal.4th at 673, [italics added].) Whether or not such situations give rise to a *duty*, however, is not dispositive of liability. Rather, as this Court explained in *Seabright,* "[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." (52 Cal.4th at p. 594 [italics added].) That delegation is so comprehensive that it even includes "any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements." (*Ibid.*)

The Court of Appeal's holding undermines that rule, by sharply limiting the circumstances in which a hirer may delegate any duty it owes to a contractor's employees to ensure the safety of a worksite. Such a rule will produce bizarre results, freeing a hirer from liability for injuries that could have been prevented had the hirer complied with statutory obligations, while imposing liability when the hirer violates no rule and has no reason to believe the independent contractor is at risk. Those results will particularly harm homeowners, who typically will be unable to gauge their exposure to liability because the availability of reasonable safety precautions often is uniquely within a skilled contractor's competence, rather than their own (hence the underlying premise of delegating workplace safety to the more knowledgeable contractor in the first place).

b. The Court of Appeal's heretofore unrecognized exception also undermines the important policies underlying the *Privette* framework. First, by shifting responsibility for ensuring safety at worksites to skilled contractors better equipped to assess safety needs and institute precautions, *Privette* "'encourages industrial safety.'" (*Kinsman*, *supra*, 37 Cal.4th at p. 668 [citation omitted].) Second, by promoting the "delegation of responsibility and assignment of liability' to independent contractors," (*SeaBright*, *supra*, 52 Cal.4th at p. 596 [citation omitted]), the *Privette* rule recognizes that the hirer generally retains "no right of control as to the mode of doing the work contracted for," and the contractor is better situated to absorb accident losses by "indirectly including the cost of safety precautions and insurance coverage in the contract price." (*Hooker, supra*, 27 Cal.4th at p. 213 [italics and citations omitted].) Third, the *Privette* rule recognizes that imposing liability on "a person who hires an independent contractor for specialized work would penalize 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 p. 700.) Fourth, by encouraging reliance on workers' compensation, the *Privette* rule promotes prompt and even recovery for injured workers, while spreading the economic risk of those injuries across the whole population. (*See id.* at pp. 700-702.)

Imposing greater liability on those who hire independent contractors to complete inherently dangerous work than those

who retain control over a jobsite (see *supra* at p. 20) undermines each of these longtime California policies by discouraging delegation to skilled independent contractors, exposing homeowners and others to catastrophic liability for choices outside their control, "penaliz[ing] those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees," and permitting windfalls to some employees while restricting others to workers' compensation. (*Privette*, *supra*, 5 Cal.4th at p. 700.)

B. Review Is Necessary To Secure Uniformity of Decision

Review is also warranted because the Court of Appeal's decision conflicts with other published decisions of California appellate courts—some involving facts almost identical to those presented here. This Court's intervention is therefore necessary to secure uniformity of decision on a frequently recurring issue impacting countless transactions across the state and scores of cases each year.

a. To begin with, the Court of Appeal's decision directly conflicts with *Delgadillo*. In that case, the family of an independent contractor's employee sued a commercial property owner after the employee fell to his death while washing the property's windows. (20 Cal.App.5th 1078 at p. *1.) As in this case, the *Delgadillo* plaintiffs claimed the property owner failed to take adequate safety measures, including by failing to install safety anchors for the employee's use. (*Id.* at pp. *1, *3, *6.) Although the plaintiff presented evidence that there had been

"'no safe method of cleaning that building'" at the time of the accident, (*id.* at p. *3 [quoting declaration]), *Delgadillo* nonetheless held that the property owner could not be liable as a matter of law.

As it explained, "*Privette* and its progeny hold that when a property owner hires an independent contractor, the property owner is not liable for injuries sustained by the contractor's employees unless the defendant's affirmative conduct contributed to the injuries." (*Id.* at *1.) While the property owner in *Delgadillo* possessed a statutory duty to install certain safety anchors on the building's roof, the court nevertheless concluded that the property owner could not be held liable for the employee's injuries because it had delegated responsibility for providing a safe workplace to the independent contractor *as a matter of law*. (*Id.* at *6-7.) That result is incompatible with the Court of Appeal's decision in this case.

b. Other examples abound. In *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267 (hereafter *Madden*), the First Appellate District similarly found that an employee of a subcontractor could not recover against the hirer for injuries sustained when he fell from a raised, unenclosed patio while pulling electrical wire—another factual scenario close to that presented here. The plaintiff alleged that his fall was caused by the defendant's failure to remedy a known hazard by installing a guardrail along the open side of the patio. (*Id.* at p. 1270.) As here, the plaintiff alleged that the subcontractor "would have required [the hirer's] approval to install a railing." (*Id.* at p.

1271.) The court nonetheless granted summary judgment to the hirer—just as in *Delgadillo*.

As the court explained, "the absence of a guardrail was open and obvious" to the employee. (*Id.* at p. 1277.) And the plaintiff had pointed to "no evidence that [defendant] or its agents *directed* that no guardrailing or other protection against falls be placed along the raised patio, or that it acted in any way to *prevent* such a railing from being installed." (*Id.* at pp. 1276-1277.) *Madden* thus found, in words equally applicable here, that the plaintiff's "liability claim [wa]s based on no more than a convenient assumption that his employer lacked the authority to take reasonable precautions to protect him from the kind of accident that occurred." (*Id.* at p. 1278.) Under the Court of Appeal's new rule, however, that same allegation would preclude summary judgment.

The Court of Appeal's decision in this case also conflicts with *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661 (hereafter *Padilla*). In *Padilla*, an employee of a subcontractor was injured by a gush of water from a pipe outside of the subcontractor's control. In seeking to recover from the general contractor, the employee argued that the general contractor, "who retained control over the PVC pipe, should have depressurized, rearranged, or relocated the pipe." (*Id.* at p. 670.) Although the court agreed that "only defendants had the ability to physically turn off the pipe," it held that the employee nonetheless could *not* recover notwithstanding the plaintiff's argument that safety measures were "beyond [his] control." (Brief of Appellants,

Padilla v. Pomona Coll. at p. 29.) Under the Court of Appeal's decision, the opposite result would follow.

c. These examples are not exhaustive. They are, however, sufficient to illustrate that the decision below is substantially at odds with other published appellate California decisions holding that because an "independent contractor 'has authority to determine the manner in which inherently dangerous … work is to be performed, [he] assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions' to protect himself and his employees." (*Gravelin v. Satterfield* (2011) 200 Cal. App. 4th 1209, 1214 [noting rule has "few exceptions"].)

Resolution of this new conflict is urgently needed in light of the profound importance of *Privette's* rule to millions of transactions across the state annually. *Privette* has been cited in almost *14,000* court filings to date, and has been the subject of well over a dozen decisions by this Court and over 100 published Court of Appeal opinions. Moreover, the first question presented by this petition impacts countless decisions across California every day, including who to hire for specialized work, how much to pay, how much the insurance will cost, and so on.

Because resolution of the conflict precipitated by the decision below has weighty consequences both for courts and ordinary Californians, this case merits review.

II. AT MINIMUM, THIS COURT SHOULD GRANT REVIEW TO SHARPLY RESTRICT THE REACH OF THE COURT OF APPEAL'S NEWFOUND EXCEPTION

Even if the Court of Appeal is correct that *Kinsman* intended there to be a third exception to *Privette's* rule when a contractor cannot remedy an obvious hazard by taking reasonable safety precautions, this Court should grant review to limit that exception in several material respects. Absent narrowing, the Court of Appeal's exception will make it nearly impossible for any homeowner or other hirer to defeat a suit by an injured employee of an independent contractor prior to trial. It will, therefore, impose significant new costs on homeowners and hirers, as well as the courts who will now be forced to adjudicate their claims to trial.

Review is particularly necessitated because the Court of Appeal's new exception is fundamentally at odds with the common law principles underlying *Kinsman's* dicta. Those principles, which concern the extent of the duty owed by a landowner to third-party invitees for open hazards, (see Rest.2d Torts, § 343A [cited in *Kinsman*, *supra*, 37 Cal.4th at p. 673]), have little application to a scenario in which the landowner has *delegated* any tort law duty to a contractor's employees to the independent contractor. As such, they do not justify imposing liability against a hirer.

Even if those principles justified the existence of a third exception to the *Privette* rule, however, they dictate that a hirer should not face liability unless the employee meets *his* burden to

establish it was foreseeable to the hirer that the contractor would be unable to adopt reasonable safety precautions. (See Rest.2d Torts, § 343A.) Given the importance of that limitation to the common law principles underlying *Kinsman's* dicta, and the deeply problematic consequences that will follow if this Court does not enforce it, review is also warranted on the second question presented by this petition.

1. As *Kinsman* explained, at common law a landowner was generally under no duty to remedy or warn of an obvious hazard. (37 Cal.4th at p. 673.) A possessor of land, however, could still be liable to innocent third parties for certain obvious hazards, when the landowner would *reasonably anticipate* that the third party would be harmed by the hazard notwithstanding its obviousness. (See, e.g., *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393 [holding "landlord[] owed a general duty of due care to persons coming on his land to protect them from the hazard presented by the high voltage lines"]; see also Rest.2d Torts, § 343A [possessor of land liable for obvious danger if "the possessor should anticipate the harm despite such … obviousness"].)

Pursuant to those principles, a landowner is liable at common law to invitees for obvious hazards only when the landowner "can and should anticipate that the [hazard] will cause physical harm to the invitee notwithstanding its known or obvious danger." (Rest.2d Torts, § 343A, cmt. f.) Because a possessor of land may reasonably assume that an invitee will protect himself from open hazards by the exercise of ordinary

care, a landowner is liable only when he "can or should anticipate" that invitees cannot or will not take the reasonable precautions that invitees ordinarily would take in response to obvious hazards. (*Id.* at cmts. e-f.)

In the context of a landowner's delegation of authority to an independent contractor, it is ordinarily reasonable for a landowner to assume that an independent contractor will take reasonable safety precautions to protect their employees from obvious hazards. A landowner has the "right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 269.) As a result of that delegation, the independent contractor "assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." (*Tverberg*, *supra*, 49 Cal.4th at p. 522.)

In the vast run of cases, a hirer has no reason to believe an independent contractor cannot account for an obvious hazard by adopting reasonable safety precautions. A landowner generally hires an independent contractor specifically because the contractor is better equipped and has superior knowledge, skill, and experience in completing the work correctly and safely and is competent to secure the safety of its workers. This case is illustrative. The defendant in this case is 82 years old and had not been on the roof in almost a decade. (2-AA-317; 3-AA-677) His 72-year-old housekeeper, with whom Gonzalez primarily interacted, had only set foot on the roof a handful of times in four decades. (See 3-AA-677-678.) By contrast, Gonzalez held himself

out as an expert "[s]pecializ[ing] in hard to reach windows and skylights," with twenty-plus years of experience (including on this very roof), who covenanted to "*take extra care … with [his] own safety when cleaning windows*." (3-AA-667-669 [italics added])

Given that Gonzalez had cleaned Mathis's skylights for two decades, held himself out as an expert in safely cleaning hard to reach skylights, and never told Mathis or Carrasco that he could not clean the skylights safely, Mathis had no reason to believe Gonzalez could not take adequate safety precautions to protect against the obvious risk of falling off the roof. Although Gonzalez claims that he told Carrasco that the roof was slippery and should be repaired (2-AA-303:22-304:4), he did not allege, let alone offer evidence, that he informed either Mathis or Carrasco that his employees could not safely clean the skylight. Properly understood, therefore, the common law principles underlying the Court of Appeal's newfound exception should not have supported liability against Mathis.

2. The Court of Appeal departed from the appropriate scope of any exception derived from the common law principles referenced by *Kinsman* in three principal respects.

a. First, the court erred by holding that "a hirer's liability for injuries resulting from an open hazard is not dependent on the foreseeability that a contractor might encounter the hazard." (Op. at p. 19, fn. 2.) In so doing, the court completely severed the reach of its purported exception from the common-law principles addressed in *Kinsman*. Under those

principles, a possessor of land ordinarily "is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them." (Rest.2d Torts, § 343A(1).) Rather, a landowner is liable for injuries sustained by his invitees with respect to open hazards only when the land owner "*should anticipate the harm* despite [the] obviousness" of the hazard. (*Ibid.* [italics added].)

As explained above, a landowner ordinarily would not anticipate that a skilled contractor would be harmed by an obvious hazard. To the contrary, "the hirer generally delegates to the contractor responsibility for supervising the job, including responsibility for looking after employee safety. When the hirer is also a landowner, part of that delegation includes taking proper precautions to protect against obvious hazards in the workplace." (*Kinsman*, *supra*, 37 Cal.4th at p. 673.) Because a hirer reasonably expects an independent contractor to protect against obvious hazards, a contractor's employee cannot recover against the hirer unless the employee establishes that the property owner should have anticipated the harm to the employee, notwithstanding the hirer's delegation of responsibility for the safety of the work in question to the contractor.

Had the Court of Appeal applied that standard here, it too would have been dispositive. Mathis had no reason to believe that Gonzalez was incapable of taking reasonable safety

precautions to protect against the obvious risk of falling off the roof. And Gonzalez presented no evidence to the contrary.[2]

b. Second, the court erred by imposing a burden *on the hirer* at summary judgment to "establish as a matter of law" that the contractor could have "remedied the dangerous conditions" at issue through the adoption of reasonable safety precautions. (Op. at p. 20.) As numerous California courts have explained, "[c]ourts applying the *Privette* doctrine have routinely placed the burden on the plaintiff to raise a triable issue of fact" by presenting evidence establishing a genuine dispute about whether an exception to *Privette* applies. (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 643, fn. 3, review den. (Oct. 11, 2017); see also *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 721, as mod. (Nov. 17, 2016), review den. (Feb. 1, 2017); *Madden, supra,* 165 Cal.App.4th at pp. 1275-1276; *Michael v. Denbeste Transportation, Inc*. (2006) 137 Cal.App.4th 1082, 1096-1097; *Gravelin v. Satterfield* (2012) 200 Cal.App.4th 1209, 1214, 1216; *Padilla, supra,* 166 Cal.App.4th at p. 671.)

By shifting the burden to Mathis to establish there were no reasonable safety precautions that could have been taken, the Court of Appeal departed from the consistent holdings of other

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[2] Although Gonzalez claimed that he told Carrasco that certain roof shingles should be repaired (Op. at p. 4), he never alleged, let alone offered evidence, that he informed either Mathis or Carrasco that he believed he could not safely work on the roof or that no adequate safety precautions were available absent that step. *See* pp. 12-13.

California courts and placed the burden on the wrong party—exacerbating the impact of its decision. Had the court properly placed the burden on Gonzalez to show that reasonable safety precautions were unavailable to him, Gonzalez again could not have established a triable issue of fact.

c. Finally, the Court of Appeal was wrong to disregard the existence of reasonable safety precautions that were allegedly beyond the unilateral control of the contractor. The Court of Appeal itself agreed that "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." (Op. at p. 18.) It disregarded, however, that Gonzalez himself *admitted* that there were "two preventive measures available in the instant case[:] repairing the roof and installing safety hooks." (Gonzalez C.A. Opening Br. at p. 25.) While Gonzalez claimed that those alternatives were beyond his unilateral control, that is immaterial. As other courts recognize, where a reasonable precaution is available, it is no defense for the contractor that it is outside his control. (See, e.g., *Madden*, *supra*, 165 Cal.App.4th at p. 1277 [hirer not liable for fall from patio by contractor's employee notwithstanding contractor's lack of unilateral authority to install safety railings where there was no evidence hirer "ever participated in any discussion about placing a safety railing along the patio, became aware of any safety concern due to the lack of such a railing, or intervened in any way to prevent such a railing from being erected"].) The Court of Appeal's newfound contrary rule discourages workplace

safety and unfairly penalizes the hirer for the contractor's failure to identify a hazard or engage the hirer to help remedy it.

In any event, Gonzalez offered no evidence that he could not have taken any one of numerous reasonable safety precautions, including (1) walking more slowly, (2) holding onto the parapet wall, (3) using his ladder to reach his employees directly rather than using the ladder affixed to the house, (4) sweeping the ledge before walking on it, (5) installing a temporary safety barrier of the sort discussed in *Madden* (165 Cal.App.4th at p. 1278), or perhaps most obviously (6) walking inside the parapet wall.[3] As other courts have made clear, the burden should have been on Gonzalez to establish that no reasonable precautions were available, not on Mathis to disprove it.

3. In this case, the court should not have created a third exception to the *Privette* rule at all. But if this Court were to sanction such an additional exception, it should be substantially narrowed to avoid eviscerating this Court's careful framework. At minimum, therefore, review is needed to cabin the Court of Appeal's departure from the common law principles that

[3] The Court of Appeal dismissed photographic and video evidence establishing that individuals could walk inside the parapet wall [1-RA-1; 1-AA-56; 4-AA-838-841] because the court found that evidence did not address "whether [Gonzalez] was required to carry equipment that rendered the [internal] pathway impassable" (Op. at p. 22.). But Carrasco asked Gonzalez only *to talk* to his employees. (Op. at p. 3.) Gonzalez pointed to no reason why he needed equipment to do that.

supposedly underlie its exception, and other longstanding principles governing *Privette's* application.

III. ALTERNATIVELY, THIS CASE SHOULD BE TRANSFERRED TO THE COURT OF APPEAL WITH INSTRUCTIONS TO MODIFY ITS DECISION

If this Court declines to grant review and request briefing on the merits, this Court should, at a minimum, grant review and transfer this case to the Court of Appeal with directions to modify its opinion. (See Cal. Rules of Court, rule 8.528(d).)

The Court of Appeal's analysis proceeded from its adoption of *Kinsman's* statement that "[t]here may be situations [that] gives rise to a *duty* on a landowner's part to remedy [a known] hazard because knowledge of the hazard is inadequate to prevent injury." (37 Cal.4th at 673 [italics added].) The court failed, however, to address *Seabright's* 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." (*Seabright*, *supra,* 52 Cal.4th at p. 594 [italics added].) Because the Court of Appeal's decision significantly undermines this Court's decisions in *Seabright*, *Hooker*, and *Tverberg*, among others, this Court should, at minimum, grant review and transfer this case to the Court of Appeal with directions to modify its opinion to hold that a hirer is not liable to an independent contractor's employee for injuries sustained from an open and obvious hazard when the hirer does not retain control of a worksite and affirmatively contribute to the injury.

Alternatively, this Court should instruct the Court of Appeal to vacate its decision and consider whether Gonzalez met his burden to present evidence establishing that it was foreseeable to Mathis that Gonzalez (allegedly) could not take any reasonable safety precautions to ameliorate the hazard causing his injury.

CONCLUSION

For the foregoing reasons, the Court should grant review.

Dated: March 19, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(l))

The text of this brief consists of 8359 words as counted by the Microsoft Office Word 2016 word-processing program used to generate the brief.

Dated: March 19, 2018

Respectfully submitted,

LATHAM & WATKINS LLP

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Marvin S. Putnam

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EXHIBIT A

Filed 2/6/18

FOR PUBLICATION IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LUIS GONZALEZ, Plaintiff and Appellant, v. JOHN R. MATHIS et al., Defendants and Respondents.	B272344 Los Angeles County Super. Ct. No. BC542498)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Reversed.

Evan D. Marshall, for Plaintiff and Appellant.

Latham & Watkins, Marvin S. Putnam, Jessica Stebbins and Robert J. Ellison, for Defendants and Respondents.

Luis Gonzalez, a professional window washer, filed a premises liability action against John Mathis. Mathis moved for summary judgment, arguing that Gonzalez's status as an independent contractor precluded his claims. The trial court granted the motion. We reverse, concluding there are triable issues of fact whether Mathis can be held liable for Gonzalez's injuries.

FACTUAL BACKGROUND

A. Summary of Mathis's Property

Defendant John Mathis owned a residence that contained an indoor pool. The pool was located in the northwest corner of the home, and covered by a large, rounded skylight that protruded through the flat roof. The section of roof located to the 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 the 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 constructed the parapet wall 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.

B. Gonzalez's Accident

Plaintiff Luis Gonzalez owned and operated Hollywood Hills Window Cleaning Company, which advertised itself as a specialist in "hard to reach windows and skylights." Beginning in 2007, Mathis's housekeeper, Marcia Carrasco, regularly hired

Gonzalez's company to wash the skylight and perform other services on the property.

On August 1, 2012, two of Gonzalez's employees were on the roof cleaning the skylight when Carrasco informed him water was leaking into the house. Carrasco instructed Gonzalez to go on the roof, and tell his employees they should use less water. Gonzalez climbed onto the roof using the affixed ladder. He then walked along the ledge on the west side of the parapet wall, and spoke with his employees. While walking back toward the ladder along the ledge, Gonzalez lost his footing, and fell off the roof.

C. Trial Court Proceedings

1. Summary of complaint and Gonzalez's deposition

In April of 2014, Gonzalez filed a negligence action against Mathis asserting that "loose rocks, pebbles and sand on the roof of the property" constituted a "dangerous condition" that had caused Gonzalez to fall. In a subsequent interrogatory response, Gonzalez clarified he was seeking damages for three dangerous conditions on the roof. First, he alleged that the construction of the parapet wall forced persons who needed to access the skylight and other parts of the roof to walk along the exposed two-foot ledge, which had no safety railing. Second, he contended the roofing shingles were dilapidated, resulting in slippery and loose conditions. Third, he asserted the roof lacked "tie-off" points that would enable maintenance workers to secure themselves with ropes or harnesses.

At his deposition, Gonzalez testified that he had been on Mathis's roof many times, and had always used the ledge along the west side of the parapet wall to access the skylight. Gonzalez further testified that he knew the roof shingles were dilapidated

and slippery, and had told Carrasco the shingles should be replaced. Gonzalez also admitted he knew the ledge lacked any protective features, and that the roof had no tie-off points.

When asked why he had chosen to walk along the ledge outside the parapet wall, rather than in the area inside the wall, Gonzalez explained that the ledge was "the only way to get through because you have the AC equipment [on the other side]." Gonzalez later clarified that he was unable to walk in the area of roof inside the parapet wall because "there was a lot of equipment," and he "couldn't fit in there." Gonzalez also testified that he and his employees had always walked along the ledge, rather than inside the parapet wall, and that he had never seen anyone walk inside the wall.

2. Mathis's motion for summary judgment

Mathis filed a motion for summary judgment arguing that Gonzalez's claims were precluded under the rule set forth in *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and its progeny, which generally prohibits an independent contractor or his employees from suing the hirer of the contractor for workplace injuries. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594 ["Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work"]; *Tverberg v. Fillner Const., Inc.* (2010) 49 Cal.4th 518, 521 (*Tverberg*) [the hiring party is generally not liable for workplace injuries suffered by an independent contractor or the contractor's employees].)

Mathis argued there were only two exceptions to the *Privette* rule: when the hirer exercised control over the contractor's work in a manner that had contributed to the injury

(see *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*),) and when the hirer failed to warn the contractor of a concealed hazard on the premises. (See *Kinsman v. Unocol Corp.* (2005) 37 Cal.4th 659 (*Kinsman*).) Mathis contended neither exception applied because Gonzalez had specifically admitted that he was not told how to clean the skylight, and that he was aware of the dangerous conditions on the roof.

In his opposition, Gonzalez acknowledged he was an independent contractor, but argued there were triable issues of fact pertaining to both *Privette* exceptions. First, Gonzalez asserted there were "disputed issues of material fact as to whether [Mathis] retained control over the worksite." Gonzalez cited evidence showing Carrasco had directed him to perform various cleaning tasks in a specified order, and had also ordered him to get on the roof to tell his employees to use less water. Gonzalez also argued Mathis had retained control because he was the only party who had authority to fix the dangerous conditions on the roof.

Alternatively, Gonzalez argued there were triable issues of fact whether Mathis was liable under the hazardous condition exception set forth in *Kinsman*, *supra,* 37 Cal.4th 659. Gonzalez contended that, contrary to Mathis's assertion, *Kinsman* permitted hirer liability for concealed hazards, as well as open or known hazards the contractor could not have remedied through the adoption of reasonable safety precautions. Gonzalez further asserted that although he was aware of the dangerous conditions on the roof (namely, the exposed ledge and dilapidated shingles), there were disputed issues of fact whether he could have reasonably avoided those hazards. In support, he cited to his deposition testimony that he had walked along the ledge outside

the parapet wall because the piping and mechanical equipment positioned next to the skylight prevented him from walking inside the wall. According to Gonzalez, these statements raised triable issues of fact whether he was required to "access the skylights [by] . . . walk[ing] across the slippery, unprotected and narrow catwalk," or whether it was "feasible to go [along the other side of] the wall."

In his reply brief, Mathis argued that Carrasco's statements to Gonzalez were insufficient to show Mathis had retained control over the manner in which Gonzalez cleaned the skylight. Mathis also argued that merely retaining the authority to remedy the conditions on the roof, without actually exercising that authority in some manner that contributed to Gonzalez's injury, was insufficient to impose liability pursuant to the retained control theory.

Mathis disputed the assertion that *Kinsman* permits hirer liability for open hazards. He also argued that even if *Kinsman* did extend to open hazards the contractor could not have remedied through reasonable safety precautions, the evidence showed Gonzalez could have avoided the dangerous conditions on the roof by walking inside the parapet wall. In support, Mathis submitted photographs and a video that had been taken during an inspection of Mathis's roof. The visual evidence showed multiple people climb the ladder attached to the west side of the house, and then traverse the section of roof inside the parapet wall by stepping over and around the ventilation pipes and other mechanical equipment. According to Mathis, "[t]he video and photographic evidence conclusively establish[ed]" that Gonzalez's statements that he was required to walk along the ledge were false, and should be disregarded.

At the hearing, the court informed the parties that its tentative ruling was to grant the motion for summary judgment pursuant to *Privette, supra,* 5 Cal.4th 689, and *Kinsman, supra,* 37 Cal.4th 659. The court explained that the evidence showed Mathis's agent had "told" Gonzalez "to clean the skylight and to access the roof by way of the ladder. The agent also told [him] there had been leaks on the roof. These instructions or statements by the agent do not establish that [Mathis] had control over the worksite. Gonzalez had walked on the narrow walkway many times before the fall. . . . [He] knew of the [dangerous] conditions on the roof. . . . None of the conditions were concealed to [him]."

Gonzalez's counsel argued that the court's proposed ruling failed to address that Mathis was the only party who had the authority to remedy the injury-causing conditions on the roof. According to counsel, Gonzalez had been unable to mitigate those hazards because "[h]e [was] simply there to clean," and because Mathis never "delegated that key safety measure of redoing the roof to [him]."

Gonzalez's counsel also argued that although plaintiff was aware of the dangerous conditions on the roof, there was nonetheless a question of fact whether he could have reasonably avoided those conditions: "In order to do the job, [Gonzalez] had to go [out onto the ledge]. And that's something for the jury to deal with. . . . Because [Mathis is] saying [Gonzalez] knew about it, he encountered the danger. But [Gonzalez] couldn't do it any other way." Counsel further asserted that while Mathis "[wanted] the court to rule on this fact . . . [based on the video] submitted in reply," the evidence was not conclusive. After hearing argument, the court adopted its tentative order, granted

Mathis's motion for summary judgment and entered a judgment in his favor.

DISCUSSION

A. Standard of Review

"A motion for summary judgment is properly granted only when 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.] We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citation.]" (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1301 (*Chavez*) [footnote omitted]; see also Code of Civ. Proc., § 437c, subd. (c); *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348].) In making this assessment, "[w]e view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's." [Citation.]" (*Chavez, supra,* 207 Cal.App.4th at p. 1302.)

B. Summary of the Privette Doctrine

Under the common law "'doctrine of peculiar risk, 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 serves 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 turns out to be insolvent.'" (*Hooker, supra,* 27 Cal.4th at p. 204.)

In *Privette*, *supra*, 5 Cal.4th 689, the California Supreme Court limited the breadth of the peculiar risk doctrine, concluding that it "does not extend to a hired contractor's employees." (*Hooker, supra,* 27 Cal.4th at p. 204 [summarizing holding in *Privette*].) The Court reasoned that "[b]ecause the Workers' Compensation Act [citation] shields an independent contractor from tort liability to its employees, applying the peculiar risk doctrine to the independent contractor's employees would illogically and unfairly subject the hiring person, who did nothing to create the risk that caused the injury, to greater liability than that faced by the independent contractor whose negligence caused the employee's injury. [Citation.] . . . . '[T]he property owner should not have to pay for injuries caused by the contractor's negligent performance of the work when workers' compensation statutes already cover those injuries.' [Citation]." (*Hooker, supra,* 27 Cal.4th at p. 204.)

In subsequent cases, the Court established two exceptions to the "*Privette* doctrine." (*Kinsman*, *supra*, 37 Cal.4th at p. 666.) In *Hooker*, *supra*, 27 Cal.4th 198, the Court considered whether a hirer may be held liable to a contractor's employees under the "'retained control theory' as described in the Restatement Second of Torts, section 414, which states: 'One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.'" (*Kinsman, supra*, 37 Cal.4th at p. 670 [summarizing holding in *Hooker*].)

The defendant in *Hooker* argued the term "others" should not be read to include "a contractor's employees," and that such

employees should be barred from recovery "even when the hirer retains control over safety conditions." (*Kinsman*, supra, 37 Cal.4th at p. 670.) The Court disagreed, explaining that *Privette* was predicated in part on "'the recognition that a person who [has] hired an independent contractor ha[s] "'no right of control as to the mode of doing the work contracted for.'"' On the other hand, if a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer." (*Hooker*, *supra*, 27 Cal.4th at p. 213.)

The Court clarified, however, that "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. In fairness, . . . the imposition of tort liability on a hirer should depend on whether the hirer exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee." (*Hooker*, *supra*, 27 Cal.4th at p. 210.) Thus, under *Hooker*, "a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but . . . is liable . . . insofar as a hirer's exercise of retained control affirmatively contributed to the employee's injuries." (*Id*. at p. 202.)

In *Kinsman*, 37 Cal.4th 659, the Court considered whether a hirer who did not retain control over worksite conditions could nonetheless be held "liable to an employee of [a] contractor who is injured as the result of hazardous conditions on the landowner's premises." (*Id*. at p. 664.) The plaintiff in *Kinsman* was exposed to airborne asbestos while working for a contractor who had been

hired to perform maintenance at a refinery. After developing mesothelioma, the plaintiff filed a personal injury action against the refinery alleging that: (1) the refinery was negligent in the exercise of the control it had retained over plaintiff's work; and (2) the refinery was negligent in exposing plaintiff to a concealed hazardous condition at the workplace (asbestos). The jury rejected the first theory of liability, but awarded the plaintiff damages for exposure to a hazardous condition. The Court of Appeal reversed, concluding that under *Privette* and *Hooker*, the refinery could not be held liable to "a contractor's employee . . . under [a premises liability] theory unless the landowner had [retained] control over the dangerous condition and affirmatively contributed to the employee's injury." (*Id*. at p. 666.) The Supreme Court granted review to assess how the "doctrine of landowner liability . . . relates to the *Privette* doctrine." (*Id*. at p. 672.)

The Court began its analysis by reviewing the general principles that govern a landowner's liability for hazards on the premises. The Court explained that a landowner normally has a duty to warn of concealed hazards that present "an unreasonable risk of harm to those coming in contact with it." (*Kinsman*, *supra*, 37 Cal.4th at p. 672.) With respect to open hazards, the Court explained: "[I]f 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.'" (*Kinsman*, *supra*, 37 Cal.4th at p. 673.)

The Court then addressed "how these general principles apply when a landowner hires an independent contractor whose employee is injured by a hazardous condition on the premises." (*Kinsman*, *supra*, 37 Cal.4th at p. 673.) The Court concluded that under the reasoning of *Privette* and *Hooker*, "a hirer generally delegates to the contractor responsibility for supervising the job, including responsibility for looking after employee safety. When the hirer is also a landowner, part of that delegation includes taking proper precautions to protect against obvious hazards in the workplace. There may be situations, as alluded to . . . 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. . . . 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." (*Id*. at pp. 673-674.)

The Court noted that in the case before it, the plaintiff had "acknowledge[d] that reasonable safety precautions against the hazard of asbestos were readily available, such as wearing an inexpensive respirator." (*Kinsman*, *supra*, 37 Cal.4th at p. 673.) The plaintiff's theory, however, was that the refinery could be held liable because the refinery knew (or should have known) of the risks of asbestos, but failed to warn the contractor.

The Court agreed, explaining: "A landowner 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 therefore the landowner would be liable to the contractor's employee if the employee's injury is attributable to an undisclosed hazard. . . . [¶] . . . [¶] We therefore disagree with the Court of Appeal in the present case inasmuch as it held that a landowner/hirer can be liable to a contractor's employee only when it has retained supervisory control and affirmatively contributes to the employee's injury in the exercise of that control. Rather, . . . the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman*, *supra*, 37 Cal.4th at p. 674-675.) Thus, "when, . . . 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 employee if the condition is concealed." (*Id*. at p. 682.)

Finally, in *Tverberg, supra,* 49 Cal.4th 518, the Court addressed whether the *Privette* doctrine extends to claims an independent contractor brings against a hirer on his or her own behalf. The Court of Appeal concluded *Privette* did not apply to such claims because, unlike his or her employees, an independent contractor is not subject to mandatory coverage for workplace injuries under California's workers' compensation system.

The Supreme Court reversed, holding that although "the availability of workers' compensation insurance . . . was central to [*Privette's*] holding that the hirer should not incur . . . liability for on-the-job injury to an independent contractor's employee," (*Tverberg, supra,* 49 Cal.4th 527), a different rationale warranted extension of the rule to claims brought by a contractor: "Unlike a mere employee, 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. 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 p. 521.)

C. Mathis Failed to Establish Gonzalez's Claims Are Precluded Under the Privette Doctrine

Gonzalez argues the trial court erred in concluding his claims are precluded under the *Privette* doctrine. Gonzalez does not dispute Mathis hired him as an independent contractor, and that his claims are therefore subject to *Privette* and its progeny. He contends, however, that there are triable issues of fact whether Mathis can be held liable under the "retained control" exception set forth in *Hooker*, and the "hazardous condition" exception set forth in *Kinsman*.

1. Gonzalez failed to present evidence showing there is a triable issue of fact regarding the retained control exception

At his deposition, Gonzalez admitted that Mathis and Carrasco had never told him how he should clean the skylight. Despite this admission, Gonzalez asserts that two categories of evidence nonetheless show there is a triable issue of fact whether Mathis retained control over the manner and means of Gonzalez's work.

First, Gonzalez argues that statements Carrasco made to him on the day of the incident demonstrate retained control. Specifically, he cites evidence showing that Carrasco told him what order he should perform "the various projects [he] had been hired for," and also instructed him to tell his employees they should use less water to clean the skylight. Neither statement is sufficient to establish that Mathis "retained control" within the meaning of *Hooker*.

The first statement merely shows Carrasco specified when Gonzalez should clean the skylight in relation to the other tasks he had been hired to perform; it does not demonstrate Mathis retained control of how Gonzalez cleaned the skylight. Carrasco's second statement suggests Mathis did retain some level of control over the amount of water that should be used to clean the skylight. Gonzalez, however, has presented no argument explaining how Carrasco's instruction to use less water "affirmatively contributed" to the injuries he suffered. (See *Kinsman*, *supra*, 37 Cal.4th at p. 671 [under retained control exception, "when the hirer . . . actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort to the employee"]; *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 145 ["the hirer must do more than retain control over worksite safety conditions. The hirer must exercise that

retained control 'in a manner that affirmatively contributed to the injury of the contractor's employee'"].) Gonzalez has alleged his injury occurred because the configuration of the roof forced him to walk along the exposed ledge, not because of the amount of water his employees used to wash the skylight. There is no evidence Mathis or Carrasco ever directed him to walk on the ledge.

Gonzalez next argues that there are triable issues regarding the retained control exception because the evidence shows Mathis was the only party who had authority to fix the dangerous conditions on the roof. Gonzalez appears to contend that because Mathis was the only person who could have remedied the conditions, he necessarily maintained control over safety at the worksite. As explained above, however, "retain[ing] the ability to exercise control over safety at the worksite" is not sufficient to establish liability under *Hooker*. (*Hooker*, *supra*, 27 Cal.4th at p. 210.) Rather, the hirer must have exercised that retained authority in a manner that affirmatively contributed to the injury. "[P]assively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. [Citations.] The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer . . . had agreed to implement these measures." (*Tverberg v. Fillner Construction Inc.* (2012) 202 Cal.App.4th 1439, 1446; see also *Hooker*, *supra*, 27 Cal.4th at p. 211 [hirer not liable under retained control theory "for mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice"].) In this case, Gonzalez has presented no evidence showing that Mathis ever agreed to remedy the conditions on the roof. Merely allowing those conditions to

persist is not sufficient to demonstrate retained control within the meaning of *Hooker*.

1. Mathis failed to establish there is no triable issue of fact whether he can be held liable under Kinsman

Gonzalez also contends there are triable issues of fact whether Mathis can be held liable under the hazardous condition exception set forth in *Kinsman*. According to Gonzalez, *Kinsman* allows hirer liability for injuries resulting from two distinct types of hazards: (1) a hazard that is known to the hirer, but concealed from the contractor; and (2) a known or open hazard that "cannot be practically avoided" by the contractor. Gonzalez further asserts that in this case, there is conflicting evidence whether he could have avoided the condition that caused his injury, namely the narrow ledge along the west side of the parapet wall.

Mathis, however, argues that *Kinsman* "apples only when 'a hazard is concealed from the contractor, but known to the landowner.'" Alternatively, Mathis asserts that even if *Kinsman* does permit hirer liability for open or known conditions that a contractor could not have reasonably avoided or remedied, the photographic and video evidence he submitted to the trial court establishes as a matter of law that Gonzalez could have traversed the roof by walking along the interior of the parapet wall, rather than along the exposed ledge.

We first address Mathis's assertion that *Kinsman* only permits hirer liability for hazardous conditions that are concealed to the contractor, and therefore precludes liability for any condition that is "'open and obvious,' or otherwise known to the contractor." *Kinsman* separately analyzes what duty a hirer owes to a contractor for concealed hazards as opposed to open or

known hazards. With respect to the latter, *Kinsman* explained that "when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, . . . the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so." (*Kinsman*, *supra*, 37 Cal.4th at pp. 673-674.) With respect to concealed hazards, the Court explained that liability attaches only if the condition was known to the hirer, but unknown to the contractor. Thus, according to the Court, "when . . . 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 employee if the condition is concealed." (*Id*. at p. 682.)

Kinsman therefore indicates that under the "principles of delegation" set forth in *Privette* and its progeny (*Tverberg*, *supra*, 49 Cal.4th at p. 527), 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.[1]

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[1] We acknowledge that *Kinsman's* statements regarding when a hirer can be held liable for contractor injuries resulting from open hazards on the property is technically dicta because the question decided in the case involved the circumstances under which a hirer can be held liable for injuries resulting from latent hazards. (See *Stockton Theaters Inc. v. Palermo* (1956) 47 Cal.2d 469, 474 ["The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum . . . ."].) However, we generally consider California Supreme Court dicta to be "highly persuasive." (*People v. Wade* (1996) 48 Cal.App.4th 460,

As a corollary, the 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.[2]

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467 ["Dicta of our Supreme Court are highly persuasive"]; *Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, 272].) "'When the Supreme Court has conducted a thorough analysis of the issues or reflects compelling logic, its dictum should be followed.' [Citation.]" (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169 (*Hubbard*); see also *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 925 ["Even if the court's conclusions technically constitute dicta, we will not reject dicta of the Supreme Court without a compelling reason"].) *Kinsman's* discussion and analysis of a hirer's liability for open hazards was thorough, and appears to have been "carefully drafted. It was not '. . . inadvertent, ill-considered or a matter lightly to be disregarded.' [Citation]." (*Hubbard, supra,* 66 Cal.App.4th at p. 1169.)

[2] In portions of his brief, Gonzalez appears to argue we should interpret *Kinsman* more broadly to permit hirer liability whenever it is "foreseeable that the [open or known] danger will be encountered by the workmen." *Kinsman* did acknowledge that a landowner can generally be held liable for an open hazard when it is "'foreseeable'" that a person may "'choose to encounter the danger.'" (*Kinsman*, *supra*, 37 Cal.4th at p. 673.) As discussed above, however, the Court further observed that when a landowner hires an independent contractor, the hirer delegates responsibility to the contractor to remedy any open hazard that can be addressed through the adoption of reasonable safety precautions. (*Ibid*.) Thus, under *Kinsman*, a hirer's liability for injuries resulting from an open hazard is not dependent on the foreseeability that a contractor might encounter the hazard, but rather on whether the hazard was one that the contractor could have remedied through the adoption of reasonable safety precautions.

We next address whether Mathis has established as a matter of law that Gonzalez could have remedied the dangerous conditions on the roof through the adoption of reasonable safety precautions. In his deposition, Gonzalez stated that he was required to walk outside the parapet wall, along the exposed ledge, because piping and mechanical equipment prevented him from walking inside the wall. Mathis, however, asserts the video and photographic evidence "conclusively establish that Gonzalez's self-serving [statements] claiming he could not fit through the interior portion of the roof . . . is false." The photographs and video were taken during an inspection of the roof that Gonzalez's experts and lawyers conducted in October of 2015, more than three years after the incident. The images show several individuals maneuvering around the piping and electrical equipment positioned between the skylight and the parapet wall.

In premises liability actions, the reasonableness of a party's actions is generally a question of fact for the jury to decide. (See *Neel v. Mannings, Inc.* (1942) 19 Cal.2d 647, 656 [in premises liability action, "[w]hether plaintiff's action was reasonable and prudent under the circumstances was for the jury to decide as an issue of fact']; *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1207 ["Whether a dangerous condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury"]; *Carson v. Facilities Development* Co. (1984) 36 Cal.3d 830, 843 ["The questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury"].) Such questions "cannot be resolved by summary judgment" (*Onciano v. Golden Palace Restaurant, Inc.* (1990) 219 Cal.App.3d 385, 395) "unless reasonable minds can

come to but one conclusion." (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810.)

The video and the photographs certainly cast doubt on Gonzalez's assertion that the piping and other equipment along the skylight prevented him from walking on the inside of the parapet wall. We disagree, however, that such evidence conclusively establishes Gonzalez could have reasonably utilized that area on the date of the incident.[3] Mathis has presented no

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[3] At oral argument, Mathis's counsel argued that the record also contained evidence establishing Gonzalez could have taken any number of alternative precautions to avoid the ledge. The only other specific precaution that counsel identified, however, consisted of placing a ladder on the east side of the house (the side opposite of where the ledge was located), and then walking across the roof to access the skylight. Mathis did not raise this argument in his appellate briefing, and raised the argument only in the reply brief he filed in the trial court proceedings. The only evidence he cited in support of the argument was Gonzalez's statement at deposition that he did not use a ladder to climb up the east side of the house because "[i]t would have been farther away to walk on the roof and to get to the same edge anyway." This single statement is insufficient to prove as a matter of law that Gonzalez could have reasonably avoided the ledge by placing a ladder on the east side of the house, and then walking across the roof. To the contrary, Gonzalez's statement that he would "get to the same edge anyway" suggests he would have been forced to encounter the ledge even if he had placed a ladder on the east side of the house.

Mathis also argues Gonzalez could have reasonably avoided the ledge by declining to accept the job altogether. Mathis presents no legal authority in support of his assertion that declining to perform a job qualifies as a reasonable safety precaution. If accepted, this argument would effectively preclude hirer liability for any injury resulting from an open or known

evidence that the video, taken in 2015, accurately depicts the condition of the roof as it was at the time of the incident in 2012. Nor has Mathis presented evidence negating other factors that might have affected Gonzalez's ability to traverse the area inside the parapet wall, including, for example, his size in relation to the persons depicted in the video, or whether he was required to carry equipment that rendered the pathway impassable. Standing alone, photographs and videos showing different people maneuvering along the inside of the parapet wall three years after the date of the incident is insufficient to prove as a matter of law that Gonzalez could have reasonably done the same.[4]

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hazard because a contractor always has the option of declining to accept a job. The language of *Kinsman* indicates, however, that a hirer is immune from liability for open hazards only "when . . . the 'dangerous or defective condition' is one that can be remedied by taking reasonable safety precautions." (*Kinsman*, *supra*, 37 Cal.4th at p. 682.)

[4] In a footnote to the introductory section of his respondent's brief, Mathis argues we may affirm the trial court's judgment on an alternative ground, asserting that "Gonzalez is estopped from recovery because he mispresented [sic] himself as having worker's compensation insurance, as required by California state law, and which would have compensated him for his injuries, and improperly seeks to require Mathis to compensate him for an injury that should have been covered by his own claimed insurance." Mathis's brief presents no further argument on this issue. "We . . . need not address . . . contention[s] made only in a footnote." (*Building Maintenance Service Co. v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014, 1028; *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 71 ["We may decline to address arguments made perfunctorily and exclusively in a footnote"]; see also *People v. Lucatero* (2008) 166 Cal.App.4th

DISPOSITION

The judgment in favor of Mathis is reversed. Appellant shall recover his costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

BENSINGER, J.*

1110, 1115 ["A footnote is not a proper place to raise an argument on appeal"].)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

S247677

Case No. S_____

IN THE SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,
v.
JOHN R. MATHIS AND JOHN R. MATHIS AS TRUSTEE OF THE JOHN R. MATHIS TRUST
Defendants and Respondents.

After a Published Decision by the Court of Appeal,
Second Appellate District, Division Seven, Case No. B272344

Superior Court for the County of Los Angeles,
Case No. BC542498, Honorable Gerald Rosenberg, Judge

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John R. Mathis as Trustee of the John R. Mathis Trust

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111.

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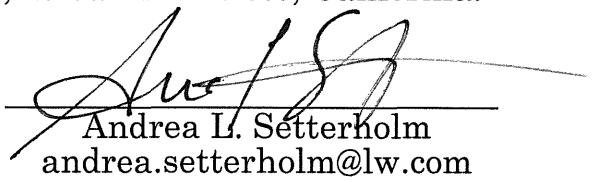
Executed on March 19, 2018, at San Francisco, California.



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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Luis Gonzalez, Plaintiff and Appellant v. John R. Mathis and John R. Mathis as Trustee of the John R. Mathis Trust**
Case Number: **TEMP-5NQV0P09**
Lower Court Case Number:

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