S118561

IN THE SUPREME COURT OF CALIFORNIA

RAY KINSMAN, et al.,

Plaintiffs, Respondents, and Petitioners,

vs.

UNOCAL CORPORATION,

Defendant, Appellant, and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT, DIVISION ONE
CASE NOS. A093424 & A093649

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

INTRODUCTION

A. Nature of the case.

In this personal injury action, plaintiffs seek to abrogate the limitations imposed by this court in *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and cases following it. This court should reject plaintiffs' attempt to circumvent the limits imposed under the *Privette* doctrine and to thereby expand the scope of liability for those who retain contractors to perform

services on their behalf.

Plaintiff Ray Kinsman alleges he was exposed to asbestos at a refinery operated by defendant Unocal Corporation in Wilmington, California in the 1950's. At the time, Kinsman was an employee of Burke & Reynolds, a general contractor retained by Unocal to perform maintenance during shut-downs at the refinery. As an employee of Burke & Reynolds, Kinsman erected and disassembled scaffolding used by other workers, including pipefitters and insulators.

At trial, plaintiffs contended that Unocal, as an oil company, had reason to know that Burke & Reynolds employees such as Kinsman would be exposed to unhealthful levels of asbestos in the course of the removal and installation of insulation at the refinery. Plaintiffs further contend that Unocal therefore should have either warned Burke & Reynolds employees of the risk of asbestos exposure at the refinery or taken steps to abate that risk.

Consistent with plaintiffs' theory, the trial court instructed the jury that a landowner such as Unocal is under a duty to exercise ordinary care in the use and maintenance of its property, in order to avoid exposing persons to an unreasonable risk of harm. The court further instructed the jury Unocal could be liable if it should have foreseen a person such as Kinsman would be exposed to an unreasonable risk of harm. Based on these instructions, plaintiffs argued to the jury that Unocal knew of the dangerous nature of asbestos and had a duty to protect Kinsman from the asbestos. The jury thereupon returned a verdict against Unocal on the premises liability theory and the trial court thereafter entered judgment for plaintiffs.

The Court of Appeal reversed the judgment, holding that the jury should not have been instructed on the general rule of premises liability, but should have instead been instructed that a contractor's employee may recover

from a hirer only where the hirer has "actively or affirmatively contributed to the employee's injury from the dangerous condition."

B. Why Unocal is entitled to judgment as a matter of law.

In *Privette* and the cases following it, this court has held that one who hires a contractor to perform services cannot generally be held liable to a contractor's employee for injuries that occur in the course of the contract work. Instead, the employees are to be compensated through workers' compensation, the same remedy available to all other employees injured in the course of their employment.

This court has carved out narrow exceptions to the foregoing general rule. Thus, for example, a hirer may be liable for injuries caused by a concealed dangerous condition, but only where the injured employee proves all the elements of a cause of action for fraudulent *concealment* or misrepresentation. A hirer may also be liable where it has *affirmatively contributed* to the injuries (e.g., by expressly promising to undertake safety measures, then failing to do so, or alternatively by providing the contractors' employees with defective or unsafe equipment).

Here, Kinsman's work-related injuries fall squarely within the general rule that precludes recovery for work-related injuries because (i) Kinsman has presumptively received workers' compensation benefits for his injuries and (ii) plaintiffs have failed to prove that any of the exceptions to the general rule of non-liability should apply. In particular, plaintiffs have failed to prove that Unocal concealed any dangerous condition on its property. Unocal certainly could not have concealed the dangerous nature of asbestos from Burke & Reynolds. By the 1950's, it was well-documented in medical literature, and

indeed, a matter of public record, that prolonged exposure to high levels of asbestos was hazardous. The level of asbestos exposure deemed permissible by medical authorities as of the 1950's, however, was much greater than it is today. Furthermore, a major epidemiological study of insulators conducted several years prior to the Burke & Reynolds work at the Unocal refinery indicated that insulators (and presumably those working in close proximity to them) were *not* at high risk for asbestos-related disease.

Plaintiffs contend that, notwithstanding the prevailing standards of the 1950's and the epidemiological study suggesting insulators (and therefore carpenters) were not at risk from asbestos-containing insulation, certain reports and studies as of the 1950's should have alerted Unocal to the dangers to carpenters such as Kinsman from asbestos-containing insulation. *To the extent that there were such reports and studies as of the 1950's, however, there is no evidence Unocal concealed such information from Burke & Reynolds or that such reports and studies were not accessible to Burke & Reynolds.* Likewise, there is no evidence Unocal concealed any other material information from Burke & Reynolds or affirmatively contributed in any way to Kinsman's risk of injury from asbestos exposure. Thus, no exceptions to the *Privette* doctrine are applicable here.

Plaintiffs contend their judgment is justified based upon *Rowland v. Christian* (1968) 69 Cal.2d 108, which sets forth the general rule of liability that applies where a landowner maintains a dangerous condition on its property, but fails to warn invitees of this danger. *Rowland*, however, was decided long before *Privette* and did not evaluate the competing public policies that arise in an action by a contractor's employee against the hiring party. Specifically, *Rowland* did not consider the inequity of imposing liability on a hirer where the hirer did not conceal or misrepresent the

dangerous condition; where the hirer's conduct did not affirmatively contribute to the dangerous condition; where the contractor could have taken steps to protect its employees; and where the injured party, as a contractor's employee, can recover workers' compensation benefits for his injuries. Because *Rowland* did not address the facts and policies at issue in a case involving the liability of a hirer of an independent contractor to the contractor's employees, it is not controlling. Rather, the *Privette* doctrine is fully applicable in this case.

C. Why Unocal is, at a minimum, entitled to a retrial.

The premises liability instruction given by the trial court permitted the jury to impose liability on Unocal in contravention of *Privette* and the cases following it. Specifically, the instruction permitted the jury to impose liability based solely on the evidence that Unocal was aware of the general health hazards posed by asbestos and therefore had the ability to take measures to protect Kinsman and other Burke & Reynolds employees. Under the *Privette* doctrine, however, it is not enough that a hirer of an independent contractor is *aware* of a possible health risk to its contractors' employees and that it *could* have taken steps to prevent it. Rather, plaintiffs must demonstrate that the hirer concealed or misrepresented the health risks or otherwise affirmatively contributed to the health risk. The jury was not given instructions to that effect.

Had the jury been properly instructed, it could have easily concluded on this record that Unocal did not conceal or misrepresent any health risks and did not affirmatively contribute to Kinsman's injuries. Accordingly, the judgment must at a minimum be reversed for retrial.

STATEMENT OF THE CASE

A. Kinsman's work as a carpenter, including his years as an employee of Burke & Reynolds, exposed him to asbestos over the course of many years.

Ray Kinsman joined a carpenters' union in 1952, at about the age of 30, and worked in the carpentry trade for many years on both commercial and residential projects. (5 CT 1338-1340, 1388.) [1/] As a carpenter, Kinsman was exposed repeatedly to products containing asbestos, a substance used extensively in construction materials until it became closely regulated beginning in the 1970's. (See 3 RT 851 [testimony by Kinsman's physician, based on his medical history, reciting that as a carpenter, Kinsman was involved in sanding drywall and tearing out walls, acoustic ceilings, stucco, and roofs, all of which contained asbestos], 886-887 [describing dusty conditions caused by demolition of homes]; see also 2 RT 448 [linoleum backing used from 1940's through 1970's was 40-50% asbestos], 473 [ceiling products were part asbestos], 473-474 [drywall tape was part asbestos], 474 [stucco plaster was part asbestos].)

During the 1950's, Kinsman was employed as a carpenter by Burke & Reynolds, a general contractor. (5 CT 1340.) At times during those years, Burke & Reynolds provided maintenance services at Unocal's Wilmington

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1/ Most of the relevant facts are undisputed. Where any facts are in dispute, the conflict is noted. The portions of the Clerk's Transcript cited herein are to (i) deposition testimony that was read to the jury (or played to the jury by way of videotape); and (ii) exhibits admitted into evidence.

refinery. (5 CT 1340, 1489-1490; see 4 CT 1085-1090.) Kinsman worked at the Wilmington refinery at various times from 1954 through 1957, each time as an employee of Burke & Reynolds. (5 CT 1341.)

The labor force provided by Burke & Reynolds to Unocal included not only carpenters, but pipefitters, ironworkers, laborers, and other trades as well. (4 CT 1091-1095.) The detailed contract between Burke & Reynolds and Unocal specifically identified Burke & Reynolds as an independent contractor and further provided its employees were subject to its complete direction and control. (4 CT 1086.)

As part of the services provided by Burke & Reynolds to Unocal, Kinsman constructed and dismantled scaffolding used by other trades, including insulators and pipefitters. (5 CT 1343.) At times, the scaffolding was used by laborers and insulators to remove old insulation at the refinery and to install new insulation in its place. (See 2 RT 484-485.)

Although it is clear from the record that Burke & Reynolds provided a number of different types of workers for the maintenance work at the Unocal refinery, it is not clear whether it employed the insulators or whether they were employed by Unocal or some other contractor. (See Court of Appeal Slip Opn., p. 19 (slip opn.).) It is also unclear which trade removed the old insulation from the facility. The only evidence on this issue came from one of plaintiffs' experts, who testified that the removal of insulation is delegated to "laborers" (who were clearly provided by Burke & Reynolds), not to insulators. (2 RT 469; 4 CT 1085, 1091-1092.)

In any event, Kinsman's work at the facility exposed him to asbestos-containing insulation during the application and removal of the insulation from heated pipes at the refinery. (See 5 CT 1368-1369, 1495-1497.) Specifically, when Kinsman brushed debris from the scaffolding planks in the

course of dismantling the scaffold, he was exposed to respirable asbestos released from remnants of insulation on the planks. (2 RT 444; 5 CT 1344-1345, 1349-1350.) According to plaintiffs' experts, some asbestos was also produced when Kinsman attached his scaffold to insulated pipes or equipment. (2 RT 441-443.)

Kinsman was also presumably exposed to some airborne asbestos. However, he testified he was not present at the refinery "to see whether any existing insulation was *removed*." (5 CT 1509; see 2 RT 468-469 [carpenter would not typically be working directly under insulators].) [2/]

Kinsman received no warnings about asbestos risks from Burke & Reynolds, Unocal or anyone else. (5 CT 1346.) Asbestos risks were not discussed at Burke & Reynolds safety meetings, which were held weekly at the Unocal refinery and conducted by the Burke & Reynolds foreman. (5 CT 1503-1504.)

As of the 1950's, there were numerous respirators and masks available to minimize the risks of industrial dust. (See 4 CT 995-998 [discussing different types of respirators available as of the 1950's]; 2 RT 673 [as of the 1950's, there were rubber and paper masks available to filter asbestos dust].) Kinsman did not wear a mask or respirator while working at the Unocal

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2/ The insulators did not apply *dry* insulation. Rather, the asbestos was one component in a powder that was mixed with water to form a "mud" or "dough" that the insulators then applied to the pipes with rubber paddles. (2 RT 456-457; 5 CT 1512.) Some powder or dust would be released into the air when the mud was prepared. (2 RT 457.) However, it was undisputed that the mud itself posed no threat. Rather, the asbestos was hazardous only when it was in a powder form, i.e., respirable. (See *ibid.*) Likewise, once the insulation was in place, it became hazardous only when it was damaged or disturbed, thereby generating dust containing respirable asbestos fibers. (See *ibid.*)

refinery. (5 CT 1504.) Kinsman testified that masks were not made available, but that if he had wanted a mask or respirator, he would have asked his Burke & Reynolds foreman to provide one. (5 CT 1498-1499, 1504.) Had Kinsman worn even a paper mask, it would have resulted in an 80% reduction in the amount of dust inhaled. (2 RT 674.)

B. Long prior to the 1950's, it was well-documented that prolonged exposure to high levels of asbestos was hazardous.

It was well-documented by the 1950's, the time of Kinsman's work at the Unocal refinery, that dust from damaged or disturbed asbestos-containing materials could cause serious health problems (including asbestosis and possibly lung cancer) for workers employed in certain trades facing prolonged exposure to high levels of asbestos. (See, e.g., RT 1183-1184.) As stated by plaintiffs' expert Dr. Barry Castleman, as early as the 1890's, inspectors in British factories studied respiratory disease among workers in the asbestos plants and urged "dust suppression" in the asbestos plants. (6 CT 1929.) The findings of the inspectors were discussed in the 1902 book *Dangerous Trade*, a text on occupational disease in British asbestos plants by Thomas Oliver. (6 CT 1930.) At about the same time that the book *Dangerous Trade* appeared, the British government began publishing annual reports on the health effects of asbestos dust. (*Ibid*.)

By 1917 or 1918, radiologists in the United States began to publish articles in journals discussing abnormalities in chest x-rays of asbestos workers. (6 CT 1931.) In a report published in 1918 by the U.S. Bureau of Labor Statistics, the author, an actuary for the Prudential Insurance Company, noted it was the general practice of American and Canadian life insurance

companies not to sell coverage to asbestos workers, "on account of the assumed health injurious nature of their occupation." (6 CT 1930-1931.)

In 1924, in a report published in the British Medical Journal, a pathologist [Dr. Cooke] wrote about abnormalities in the lung tissue of a woman who died at the age of 33, after working in asbestos factories off and on for many years. (6 CT 1932.) [3/] At about the same time, the lung-scarring abnormalities seen in asbestos workers were given the name "asbestosis." (*Ibid*.)

In 1928 and 1930, editorials appearing in the Journal of the American Medical Association, (the "most widely published and available medical journal in the United States" according to Dr. Castleman) warned of the dangers of asbestos and called for "action to be taken in this country." (6 CT 1933.)

In the 1930's, landmark studies by an English doctor (Dr. Merewether) and a U.S. doctor (Dr. Dreessen) provided further confirmation of the hazardous nature of asbestos dust to workers in the asbestos industry. In 1930, Dr. Merewether, a government physician in England, conducted a study of workers in asbestos manufacturing plants and plants using asbestos to make textiles and other materials. [4/] (6 CT 1926, 1937, 2029; 4 RT 1182-1183 [asbestos added to fabrics such as curtains, as fire-retardant].) Dr. Merewether

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3/ See *District of Columbia v. Owens-Corning* (D.C. 1989) 572 A.2d 394, 398, fn. 6, citing Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*," (1924) 2 Brit.Med.J. 147; Cooke, *Pulmonary Asbestosis* (1927) 2 Brit.Med.J. 1024.)

4/ See *Borel v. Fibreboard Paper Products Corporation* (5th Cir. 1973) 493 F.2d 1076, 1083, fn. 5, cert. den. (1974), 419 U.S. 869 [95 S.Ct. 127, 42 L.Ed.2d 107], citing Merewether Price, Report on the Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry (1930).

determined that of those employed 20 years or more in the industry, four out of five had asbestosis. (6 CT 1926, 1937.) Dr. Merewether's study affirmed that asbestosis was not "rare or limited," but was "a widespread problem *in the asbestos industry*." (6 CT 1937, emphasis added.) The results of Dr. Merewether's study were published in "widely read articles," including editorials in England in the British Medical Journal and Lancet and in the United States in the Journal of Industrial Hygiene. (6 CT 1926-1927, 1938.)

In 1938, Dr. W.C. Dreessen, who served for a time as an Assistant Surgeon General of the United States Public Health Service, released the results of a seminal study of textile workers. (4 RT 1183-1184; and see *post*, fn. 5.) Like workers in asbestos plants, textile workers in the first half of the 20th century were exposed to significant amounts of asbestos because asbestos was often used in the weaving of certain fabrics. (4 RT 1182.) Dr. Dreessen determined that approximately 25% of the workers had asbestosis. (4 RT 1184.) The results of Dr. Dreessen's survey were published by the United States Public Health Service. [5/]

In addition to the studies by Merewether and Dreessen, numerous other articles were published on asbestos risks throughout the 1930's and 1940's, including articles in JAMA and publications of the National Safety Council. (6 CT 1943-1944, 1976.) By the end of the1930's, there were "well over a hundred articles in print" on asbestos-caused diseases. (6 CT 1951.)

5/ See *Borel v. Fibreboard Paper Products Corporporation*, *supra*, 493 F.2d at p. 1084, fn. 9, citing Dreessen, et al., A Study of Asbestosis in the Asbestos Textile Industry, Pub.Health Bull. No. 241 (U.S.Pub.Health Service 1938) ["The U.S. Public Health Service fully documented the significant risk involved in asbestos textile factories in a report by Dreessen et al., in 1938. The authors urged precautionary measures and urged elimination of hazardous exposures"].)

A report prepared by Standard Oil Company (the Bonsib report), dated July 1937, specifically identified asbestos as one of the components in certain industrial dusts that constituted a known health risk as of 1937. (4 CT 912, 946 [quoting Gardner, J. Industry Hygiene (1937) Vol. 19, No. 3, p. 121.) The report also discussed the risks inherent in the removal of asbestos-containing insulation and noted various techniques to be utilized for dust suppression, including use of proper ventilation; "wet methods" of operation; and use of respirators.[6/] (4 CT 946, 993-999.)

Apart from the many studies confirming the risk of asbestosis, some articles in the 1930's and 1940's also linked asbestos with lung cancer. (6 CT 1945, 1957-1958 [JAMA articles], 1961 [1942 treatise by the first chief of the environmental cancer section of the U.S. National Cancer Institute], 1963, 1979-1982 [study by Dr. Merewether in the 1940's, reporting that up to 13% of asbestos workers died from cancer of the lungs and pleura, ten times the normal rate].) [7/]

C. The level of asbestos exposure permissible in the 1950's was set at 5,000,000 particles per cubic foot (ppcf).

In light of the vast body of medical and scientific literature discussing the risks of asbestos prior to the 1950's, the question faced by a wide range

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6/ According to Dr. Castleman, however, respirators are considered a precaution of "last resort," because workers often "find it very difficult to breathe through a respirator" and therefore "[don't] like to wear [them]." (6 CT 1942.)

7/ It was not until1955, however, that results were published of the first epidemiological study linking asbestos exposure and lung cancer. (4 RT 1193-1195.)

of industries as of the time of Kinsman's work for Burke & Reynolds at the Unocal refinery was not whether industrial dust containing asbestos was harmful to workers, but rather the *permissible level of exposure* to the dust containing such materials. (See 4 CT 927-928.)

The prevailing standard in the 1950's was based on Dr. Dreessen's 1938 study. (4 RT 1184, 1188.) In that study, Dr. Dreessen recommended that asbestos be kept below *5,000,000 particles of asbestos dust per cubic foot*. (*Ibid*.) The standard of 5,000,000 particles per cubic foot (ppcf) represented what came to be known as the "threshold limit value" (TLV) for the prevention of disease. (4 RT 1184, 1185, 1193.) It was believed that asbestos would not cause illness if workers were not exposed to asbestos dust in excess of 5,000,000 ppcf. (See 4 RT 1185-1186 [TLV is "a level of exposure which is intended to prevent disease during a normal working life"].)

Dr. Dreessen's standard of 5,000,000 particles per cubic foot (ppcf) was adopted in 1946 by ACGIH, a group of industrial hygienists composed of physicians and toxicologists, among others, from various state and federal agencies. [8/] (4 RT 1184, 1185, 1199.) ACGIH was not a governmental

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8/ See *AFL-CIO v. OSHA* (11th Cir. 1992) 965 F.2d 962, 968, fn. 5 [ACGIH "is a private organization consisting of professional personnel who work in governmental agencies and educational institutions engaged in occupational safety and health programs]; accord, *Owens-Corning v. Garrett* (1996) 343 Md. 500, 543 [682 A.2d 1143, 1163, fn. 25] [ACGIH described as a "network of governmental health officials from around the country"]; *Borel v. Fibreboard Paper Products Corporation*, *supra*, 493 F.2d at p. 1084 [ACGIH described as "a quasi-official body responsible for making recommendations concerning industrial hygiene"]; *Dunn v. HOVIC* (3d Cir. 1993) 1 F.3d 1362, 1369 [ACGIH standard of 5,000,000 ppcf became "widely accepted"]; cf. 2 RT 701-704 [testimony by plaintiffs' expert, based on "second hand" information, that ACGIH was composed of industry

agency, but was an "organized group" of hygienists that identified environmental agents (including asbestos, benzene, cadmium, nickel, noise, heat, vibration and other items) that posed health risks to workers and quantified dangerous levels of exposure of such agents. (4 RT 1199.) As of the time ACGIH was formed, there was no governmental agency (such as OSHA) that monitored workers' exposure to these chemicals. (*Ibid*.)

Dr. Dreessen's standard of 5,000,000 ppcf also became accepted in many states and by the Federal Government as the TLV for the prevention of disease. (4 RT 1184-1185, 1193.) It remained the standard *from the 1930's until the late 1960's*. (4 RT 1184, 1185, 1193.) [9/] Thus, based on the standards promulgated by Dr. Dreessen (and adopted by ACGIH, the Federal government, and many states *as of the time of the work by Burke & Reynolds at the Unocal refinery in the 1950's*, asbestos was not believed to be hazardous at or below a TLV of *5,000,000 ppcf*. (2 RT 748:2-28, 750:1-22.)

There is no evidence of any standard for asbestos in effect in the 1950's other than the 5,000,000 ppcf standard. Moreover, while the parties' experts all agreed the standard of 5,000,000 pppcf was not a safe standard, there was no testimony from any expert witness or evidence from any other source that any studies or articles existed *in the 1950's* criticizing that standard as unsafe.

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hygienists].

9/ The federal Walsh-Healey Public Contracts Act (41 U.S.C.A. § 35 et seq.) has, over the course of its history, required that public contractors comply with the standards set by the ACGIH. (See, e.g., *Ohio Cast Products v. Occupational Safety & Health* (6th Cir. 2001) 246 F.3d 791, 794.)

D. There was no evidence a carpenter working at the Unocal refinery would have been exposed to asbestos in excess of the 5,000,000 ppcf standard.

There is no evidence that Kinsman, as a carpenter, would have been exposed to asbestos in excess of the 5,000,000 ppcf standard in effect in the 1950's. To the contrary, the evidence indicated the exposure of the carpenters was in all probability well within the 5,000,000 ppcf standard then in effect. Dr. William Nicholson, plaintiffs' risk assessment expert, testified that an *insulator* installing asbestos insulation at a refinery such as the Unocal refinery as it existed in the 1950's would have been exposed to a time-weighted average of *10 to 15 asbestos fibers per cubic centimeter (cc).* (2 RT 759:8-24.) According to Dr. Nicholson, *5,000,000 ppcf* (the ACGIH standard in effect in the 1950's) is equivalent to *30 asbestos fibers per cc.* (2 RT 708:19-28, 709: 1-19; see 4 RT 12070-1208 [defense expert agrees that 15 fpcc equals 2.5 million ppcf].)

Nicholson further testified that a bystander to the insulation work (such as a carpenter like Kinsman) standing ten feet away might be exposed to as many as five or six fibers per cc (1,000,000 ppcf or less), if the wind was blowing toward the bystander. [10/] (2 RT 718:10-28, 719:1-22.) If the wind was not blowing toward the bystander, or if the bystander were further away, the bystander's exposure would be less than five fibers per cc. (See *ibid.*)

Nicholson's testimony is consistent with the conclusions reached in several studies of insulators in the 1940's, including a major epidemiological

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10/ Another of plaintiffs' experts, Charles Ay, who testified in detail to refinery maintenance procedures, testified that the pipes at a refinery are outside. (2 RT 439.)

survey of insulation workers undertaken in 1946, known as the Fleischer-Drinker survey. (See 4 RT 1188-1190, 1191.) In the Fleischer-Drinker survey, researchers evaluated 1,074 insulators at several shipyards, some of whom worked indoors and others who worked outdoors. (*Ibid*.) They found *only three cases of mild asbestosis out of 1,074 people*. (4 RT 1189.) They concluded that "pipecovering using asbestos was a relatively safe occupation." (*Ibid*.) Additionally, they determined the amount of asbestos dust in the air was "usually much below 5,000,000 particles." [11/] (4 RT 1190.)

In one instance, the Fleischer-Drinker survey found that certain workers involved in "bandsaw cutting of insulation" might be exposed to a level of asbestos of 6,100,000 ppcf. (4 RT 1190.) There is no evidence, however, that Kinsman, as a carpenter retained to erect and dismantle scaffolding, was involved with bandsaw cutting of insulation.

Many years later, in the 1960's, after Kinsman's work at the Unocal refinery, the results of the Fleischer-Drinker survey were found to be misleading. (4 RT 1190-1191.) The survey was conducted during World War II, a time when many of the shipyard workers had worked at the shipyards only a short time. (*Ibid*.) Out of the 1,074 people surveyed, it turned out that

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11/ See *Owens-Corning Fiberglas v. Am. Centennial* (1995) 74 Ohio Misc.2d 183, 235, fn. 55 [660 N.E.2d 770, 805, fn. 55], citing Fleischer et al., *A Health Survey of Pipe Covering Operations in Constructing Naval Vessels*, (1946) 28:1 J. Industry Hygiene & Toxicology 9, 13 ["'[i]n general we feel that dust counts below 5 million [PPCF] by Konimeter indicate good dust control'"]. (A Konimeter is an instrument used for measuring the amount of dust in the air. (6 CT 2066.).)

The Fleischer-Drinker survey also noted "exhaust ventilation and respiratory protection" were "of value in maintaining [a] low incidence of asbestosis." (*Borel v. Fibreboard Paper Products Corporation, supra,* 493 F.2d at p. 1084.)

only about 51 had worked in shipyards for more than ten years. (4 RT 1191.) As of the 1940's and 1950's, however, the Fleischer-Drinker survey had not been criticized. (See 4 RT 1190-1191.) Plaintiffs offered evidence of smaller case studies from the 1930's and 1940's indicating that some insulators could contract asbestosis, but nothing on the scale of the Fleischer-Drinker survey. (6 CT 1939-1941, 1952-1954.)

E. The 5,000,000 ppcf standard was substantially reduced beginning *in the late 1960's*.

In the 1960's, there were further studies of insulators and other asbestos workers that led to dramatic revisions in the level of asbestos deemed to be permissible. (See 4 RT 1195, 1196.) In one of these, a definitive study of insulation workers published in 1965, Dr. Irving Selikoff reported a high incidence of asbestosis.[12/] (4 RT 1197.) Dr. Selikoff's research conclusively refuted the results of the 1946 Fleischer-Drinker survey. (4 RT 1190-1191.)

In 1968, the standard of 5,000,000 ppcf standard was called into question when two researchers (Balzer and Cooper) found cases of asbestosis in people who worked for years within the 5,000,000 ppcf standard. (4 RT 1198-1199.) That year, ACGIH announced its intention to lower the standard from 5,000,000 ppcf to 2,000,000 ppcf. (2 RT 748-749; 4 RT 1199.) This standard never became accepted because in 1971 the Occupational Safety and Health Administration (OSHA) came into being and promulgated an even stricter standard. (2 RT 748; 4 RT 1200.) OSHA set a standard (called PEL,

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12/ See also *Borel v. Fibreboard Paper Products Corporation*, *supra*, 493 F.2d at p. 1085 and *In re Joint Eastern & Southern Dist. Asbestos Lit.* (E.&S.D.N.Y. 1991) 762 F.Supp. 519, 522, fn. 10.

for permissible exposure level) of *five fibers per cc.* (2 RT 708, 748; 4 RT 1200.)

As noted, *5,000,000 ppcf* (the ACGIH standard in effect in the 1950's) is equivalent to *30 asbestos fibers per cc.* (2 RT 708:19-28, 709: 1-19; see 4 RT 1207.) Thus, the level of asbestos exposure deemed to be permissible by the medical and scientific community in the 1950's was approximately six times greater than the subsequent OSHA standard.

Throughout the 1970's and 1980's, researchers came to understand that a worker needed only be exposed to a very small level of asbestos to develop mesothelioma, an asbestos-induced malignant cancer of the pleura (the lining of the lungs), and that mesothelioma could develop even where a worker did not develop asbestosis. (4 RT 1204-1205, 1237; see 3 RT 846.) In 95% of mesothelioma cases, the latency period is 30 to 50 years. [13/] (2 RT 578.)

In the 1970's and 1980's, scientists also began to report on asbestos risks to trade groups other than high-risk groups such as insulators and textile workers. (4 RT 1168, 1242.) These studies, including studies of carpenters and other laborers, revealed that workers in these trades were also at risk for asbestos diseases. (*Ibid.*)

As more research emerged reflecting such risks, OSHA continued to lower its PEL for asbestos. Specifically, in *1976*, the OSHA standard was lowered to two fibers per cc; in 1986, it was lowered to .2 fibers per cc; and in 1994, it was lowered to .1 fiber per cc, which remains the current standard. (4 RT 1201.) The reduction from the standard of 30 fibers per centimeter to .1 fiber per cc represents a 300-fold reduction in the permissible level of

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13/ The first medical paper discussing refinery workers and mesothelioma was not published until 1986. (4 RT 1198.)

exposure. (*Ibid*.)

F. Kinsman's action against Unocal and others.

In 1999, Kinsman was diagnosed with mesothelioma. (2 RT 616; 3 RT 846.) Kinsman and his wife thereupon sued numerous product manufacturers and distributors, as well as several owners of facilities at which he performed services while employed by Burke & Reynolds. (1 CT 1-16.)

Ultimately, the case proceeded to a jury trial against Unocal alone. (See 1 CT 181-187.) The parties stipulated Kinsman suffered from mesothelioma; that his mesothelioma was caused by the inhalation of asbestos fibers; and that Kinsman bore no contributory fault. (4 RT 1260-1261.) The trial court also granted a directed verdict for Kinsman on the issue of causation. (4 RT 1299-1306.) Thus, the only disputed issues before the jury were (i) whether, and to what extent, Unocal was negligent; (ii) Mrs. Kinsman's loss of consortium claim; and (iii) damages issues. (See 1 CT 181-187.)

Kinsman asserted two theories of liability at trial: (i) negligence "in the use, maintenance or management of the areas where Ray Kinsman worked;" and (ii) negligence in the exercise of retained control over "the methods of the work or the manner of the work performed" by Kinsman. (see 1 CT 181-187.) The case was submitted to the jury on a special verdict form presenting these two issues. (*Ibid*.)

In instructing the jury, the trial court gave the following instructions on plaintiffs' premises liability theory, based on BAJI 8.00 and 8.01:

"The essential elements of a claim for negligence against the owner of premise are:

"One, Unocal Corporation was the owner of premises;

"Two, Unocal Corporation was negligent in the use, maintenance or management of such premises;

"Three, the negligence of Unocal Corporation was the cause of injury, damage, loss or harm to the plaintiff.

"The owner or occupant of premises is under a duty to exercise ordinary care in the use, maintenance and management of the premises in order to avoid exposing persons to an unreasonable risk of harm. This duty exists whether the risk of harm is caused by the natural condition of the premises or by an artificial condition created on the premises. This duty is owed to persons on the premises and to persons off the premises. A failure to fulfill this duty is negligence.

"Ordinary care is that care which persons or ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

"You shall determine whether a person under the same or similar circumstances as defendant Unocal should have foreseen a person such as plaintiff Ray Kinsman would be exposed to an unreasonable risk of harm. If you so find, you are instructed the defendant Unocal owed plaintiff Ray Kinsman a duty of care, and you should determine if the defendant exercised that care considering all the surrounding circumstances shown by the evidence." (4 RT 1270; see 1 CT 127-128.)

The jury found for plaintiffs on the first (premises liability) theory, but found Unocal was not liable on the retained control theory, because it did not retain control over the methods or manner of Kinsman's work. (1 CT 182-183.) The jury awarded damages of $3,726,157 and allocated fifteen percent of the fault to Unocal and 85% to unnamed "all others." (1 CT 186-187.)

Judgment was then entered on the jury verdict. (1 CT 194-198.)

Unocal filed timely notices of appeal from the judgment on the special verdict and from the denial of Unocal's motion for judgment notwithstanding the verdict. (2 CT 343-344, 358-359; see 1 CT 200-201; 2 CT 341-342.) The appeals were consolidated for briefing and oral argument by order of the Court of Appeal.

G. The briefing in the Court of Appeal and the Court of Appeal opinion.

On appeal, Unocal first contended that the jury instructions on premises liability, particularly BAJI No. 8.01 (9th ed. 2002), conflicted with the *Privette* doctrine. (See AOB, pp. 5, 9-21.) In particular, Unocal argued that the instructions conflicted with *Privette* to the extent the instructions implied that a hirer such as Unocal has a duty to specify the precautions an independent contractor, such as Burke & Reynolds, should take to insure the safety of its employees. (AOB, p. 14.) Unocal further noted that the Court of Appeal has already held the identical instruction given in this case is in conflict with the *Privette* doctrine. (AOB, p. 15, citing *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1401 (*Grahn*), overruled on other grounds in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1243-1244 (*Camargo*) and *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 209-210 (*Hooker*).)

Unocal further argued that, under the *Privette* doctrine, there was insufficient evidence as a matter of law to hold it liable because *either* (i) the risk to Kinsman from asbestos exposure at the Unocal plant was unforeseeable, given the prevailing standards promulgated by the ACGIH as

of the 1950's; *or* (ii) if the risk to workers such as Kinsman was a known risk, the duty to protect him from such risks encountered in the course of his employment was that of Burke & Reynolds, his employer, not Unocal. (AOB, pp. 5-6, 21-26.)

In its opinion, the Court of Appeal concluded, in light of the *Privette* doctrine, that the instructions given by the trial court were defective because they gave rise to the possibility the jury could find Unocal at fault even if it did not in any way affirmatively contribute to Kinsman's injuries. (Slip opn., p. 1.) The Court of Appeal further concluded that the policies underlying *Privette* required reversal of the judgment, given the availability of workers' compensation benefits to compensate Kinsman and the unwarranted windfall in exempting a single class of employees, those who work for independent contractors, from the statutorily-mandated limits of workers' compensation. (See Slip opn., pp. 18, 21.)

H. This Court's grant of review.

Plaintiffs petitioned this court for review. This court granted the petition. A notation on the court's website states, "This case includes the following issue: "Is a landowner's liability under *Rowland v. Christian* (1968) 69 Cal.2d 108 with respect to a concealed hazardous condition on its property limited by the principles of *Privette v. Superior Court* (1993) 5 Cal.4th 689 and its progeny where the concealed condition allegedly causes injury to an employee of an independent contractor hired by the landowner?"

In part I of the argument which follows, Unocal will address the broad legal issue framed by the foregoing question and demonstrate that, as a matter of law, it has no liability under the *Privette* doctrine. In part II, Unocal will

demonstrate that, at a minimum, it is entitled to a new trial based on the erroneous premises liability instructions.

LEGAL ARGUMENT

I.

THE *PRIVETTE* DOCTRINE BARS PLAINTIFFS' RECOVERY AS A MATTER OF LAW.

A. Introduction.

As a general rule, one who hires a contractor is not liable to a contractor's employee for injuries which arise from the manner in which the contractor and its employees perform the contract work. (*Privette, supra,* 5 Cal.4th at pp. 698-702; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 270 (*Toland*); *Camargo, supra,* 25 Cal.4th at p. 1238; *Hooker, supra,* 27 Cal.4th at pp. 210-211.) This Court has determined a hirer is not liable for such injuries for a number of reasons, including the availability of workers' compensation benefits – benefits that are paid for by the hirer when the hirer pays the contractor to perform the contract work. (*Privette, supra,* 5 Cal.4th at p. 701.)

After *Privette*, the recovery of tort damages by a contractor's employee for injuries arising from the manner in which the contractor and its employees perform the contract work is limited to certain exceptions of limited scope, none of which applies in this case:

First, a hirer may be liable for failing to disclose a concealed, preexisting dangerous condition on the property, but only where the plaintiff pleads and proves *all elements of a "fraudulent concealment or misrepresentation"* cause of action. (*Toland, supra,* 18 Cal.4th at pp. 269-270, fn. 4, emphasis added.)

Second, the hirer can be liable where it has *retained control* over the manner in which the contract work was performed and has negligently exercised its retained control *so as to affirmatively contribute* to the employee's injury. (*Hooker, supra,* 27 Cal.4th at pp. 210-211.)

Third, the hirer may be liable for promising "to undertake *a particular safety measure*," but negligently failing to do so. (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3, emphasis added.)

Finally, a hirer may also be liable to a contractor's employee for affirmatively contributing to a contractor's employee's injuries in some manner, such as providing defective equipment to the contractor for use by its employees. (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219 [held, Wal-Mart liable for providing defective forklift for use by contractors' employees].) [14/]

To explain the limited scope of these exceptions, we will first discuss (in this section, I.A.) *Privette* and the three subsequent Supreme Court cases (*Toland*, *Camargo*, and *Hooker*) that have expanded the scope of the general rule set forth in *Privette*. Thereafter (in section II.B.), we demonstrate that the general rule of premises liability set forth in *Rowland v. Christian, supra,* 69 Cal.2d 108 (that premises owners have a duty to warn invitees about

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14/ As plaintiffs do not contend Unocal provided defective equipment for use by Burke & Reynolds employees, the exception discussed in *McKown* is of no relevance to the present action.

dangerous conditions on their property) should not limit the application of the *Privette* doctrine. Next (in section I.C.), we will demonstrate that the *Privette* doctrine applies to bar plaintiffs' recovery in this case because Kinsman's injuries occurred in the course and scope of his employment and he received workers' compensation benefits indirectly paid by Unocal. Finally (in section I.D.), we will establish that plaintiffs' claim does not come within the scope of any of the exceptions this court has created to the *Privette* doctrine. In particular, we will demonstrate that Unocal cannot be liable based on the two exceptions discussed by plaintiffs in their brief: concealment and affirmative contribution.

B. Under the *Privette* doctrine, a contractor's employee cannot recover from a hirer for injuries arising from the manner in which contract work is performed.

Prior to *Privette*, hirers were often held liable to contractors' employees for injuries caused by the manner in which the contract work was performed. (*Privette, supra,* 5 Cal.4th at p. 693.) Although the pre-*Privette* cases acknowledged as a "general" rule that a hirer should not be liable to contractors' employees for their work-related injuries, they frequently found an exception to this general rule pursuant to which the hirer was held liable for the employees' injuries. (*Ibid.*)

Hirers were typically held liable to contractors' employees, pre-*Privette*, pursuant to the "peculiar risk" theory of liability, set forth in sections 413 and 416 of the Restatement Second of Torts. (*Privette*, *supra*, 5 Cal.4th at p. 693.) In essence, the peculiar risk doctrine makes a hirer vicariously liable for injuries caused by the contractor's negligent performance of work

that is "inherently dangerous." (*Toland, supra,* 18 Cal.4th at p. 258.) Under section *413* of the Restatement of Torts, one who hires a contractor to perform work that is inherently dangerous is liable for failing to require the contractor to take "special precautions" to avoid injuries.[15/] (*Id*. at p. 259.) Under section *416* of the Restatement, the hirer may be held liable even where it has required the contractor to take special precautions. (*Id.* at p. 260.)

In *Privette*, this Court held that *a contractor's employee* (as opposed to an innocent third party) may *not* recover from a hirer under the peculiar risk doctrine, as set forth in section *416*. The plaintiff in *Privette*, an employee of a roofing contractor, sought to hold the hirer liable for injuries which occurred when he fell from a ladder during the roofing work. At the time the plaintiff fell, he was carrying a five-gallon bucket of hot tar up the ladder, at his employer's direction. (See *Privette, supra,* 5 Cal.4th at pp. 692-693.)

In rejecting the plaintiff's peculiar risk claim, this Court reasoned it is unfair to impose liability on a hirer based on injuries arising from the manner in which the contractor and its employees have performed the contract work, noting first that it would be improper to allow an injured employee to recover in tort from the hirer when the hirer has in effect paid for workers' compensation insurance by paying the contractor for the services rendered. [16/] (*Privette*, *supra*, 5 Cal.4th at pp. 698-699, 701.)

15/ Unless otherwise noted, all citations to the Restatement are to the Restatement Second of Torts.

16/ This court explained that its decision did not, of course, preclude innocent bystanders from suing the hirer for the negligence of the contractor or its employees, as these third parties could not recover workers' compensation. (See *Privette*, *supra*, 5 Cal.4th at p. 696.)

This Court further concluded it would be contrary to public policy to impose liability on hiring parties who retain contractors to perform dangerous work, since such liability would *discourage* hiring parties from retaining those persons with the special expertise necessary to perform their work in a safe manner. (*Privette*, *supra*, 5 Cal.4th at pp. 698-699, 701.)

In *Toland*, this Court extended *Privette* to claims arising under Restatement section *413*, i.e., cases in which a contractor's injured employee alleges the hirer should be liable for failing to require the contractor to take *special precautions* to protect the contractor's employees. (*Toland, supra,* 18 Cal.4th at pp. 256-257.) The plaintiff in *Toland*, an employee of a framing contractor, was injured when a heavy frame wall collapsed as the plaintiff and other employees of the framing contractor were attempting to raise it. (*Id.* at p. 257.)

Although the alleged injuries in *Toland* occurred as a direct result of the manner in which the contractor and its employees performed the contract work, the plaintiff in *Toland* contended that the rationale of *Privette* applies only to actions under section 416, in which the hirer is essentially being held vicariously liable for the contractor's negligence. The plaintiff argued that under section 413, the hirer should be held liable for its own negligence *in failing to take precautions* to protect the contractors' employee. This Court rejected the latter contention, explaining "it would be unfair to impose liability on the [hirer] when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage." (*Toland, supra,* 18 Cal.4th at p. 267.)

In deciding *Toland,* this court also rejected the argument that the hirer could be held liable on the theory that it had "superior knowledge" to that of the contractor and therefore was in a better position to prevent injury to the

plaintiff. (*Toland*, *supra*, 18th Cal.4th at pp. 268-269.) Instead, this Court determined that a contractor's injured employee might recover based on a "concealed preexisting danger at the site of the hired work that was known to the hiring person," but only where the plaintiff pleads and proves *all elements of a "fraudulent concealment or misrepresentation"* cause of action. (*Id*. at pp. 269-270, fn. 4, emphasis added.)

In *Camargo, supra*, 25 Cal.4th 1235, this Court extended the *Privette* doctrine further by holding that contractors' employees may not sue a hirer under Restatement section 411, which makes the hirer liable for injuries resulting from its failure to select a competent contractor. As in *Toland*, this Court rejected the plaintiffs' claim as an improper attempt to circumvent *Privette*, reasoning that the negligent retention claim is, like a peculiar risk claim, merely another, improper attempt to hold the hirer liable for the negligent performance of the contract work. (*Id*. at p. 1244.)

In *Hooker*, this Court considered the effect of *Privette* on the "retained control" doctrine, set forth in section 414 of the Restatement. Under section 414, a hirer who "retains the control of any part of the [contractor's] work" may be subject to liability for injuries caused by his failure to exercise his control with reasonable care. (*Hooker, supra,* 27 Cal.4th at p. 201.)

Hooker was a wrongful death action against Caltrans brought by the widow of a crane operator (Hooker) who was killed when the crane toppled during construction of an overpass. Caltrans hired Hooker's employer to construct the overpass. Although Caltrans retained control over traffic management on the overpass, it did not close the overpass to construction vehicles while the crane was in operation. (*Hooker*, *supra*, 27 Cal.4th at pp. 202-203.) This meant Hooker had to retract the crane's outriggers to allow the vehicles to pass when the crane was in use on the overpass. With the

outriggers retracted, it was unsafe to swing the crane's boom from side to side. Just prior to the fatal accident, Hooker retracted the outriggers, to allow traffic to pass, then left the crane. Upon returning, Hooker attempted to swing the boom before extending the outriggers. The weight of the swinging boom caused the crane to tip over, throwing Hooker to the pavement and killing him.

Mrs. Hooker filed a complaint alleging Caltrans should be liable on the retained control theory. Mrs. Hooker contended that in light of Caltrans's management of traffic operations, Caltrans's failure to close the overpass to traffic while the crane was in operation constituted negligent exercise of retained control. (See *Hooker*, *supra*, 27 Cal.4th at pp. 202-203.)

This Court rejected Mrs. Hooker's claim, holding that a hirer can be liable on a retained control theory only if it has "*retain[ed] control* over safety conditions at a worksite *and* negligently exercise[d] that control in a manner that *affirmatively contributes* to an employee's injuries. . . ." (*Hooker, supra,* 27 Cal.4th at p. 213, emphasis added.)

This Court further explained in *Hooker* that a hirer might be liable for failing "to undertake a particular safety measure," that was *promised* by the hirer, but is not liable to a contractor's employee merely for "'retain[ing] sufficient control over the work of an independent contractor *to be able to* prevent or eliminate through the exercise of reasonable care the dangerous condition causing injury to the independent contractor's employee.' [Citation.]" (*Hooker*, *supra*, 27 Cal.4th at pp. 209, 212, fn. 3, original emphasis; accord, *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 39 [a contractor's injured employee may not recover for the hirer's "mere failure to intervene in [the] subcontractor's working methods or procedures. . ."].)

Applying the foregoing principles to the case before it, this Court held there was no evidence Caltrans affirmatively contributed to Hooker's injury – even though Caltrans permitted traffic to use the overpass while the crane was being operated. (*Hooker*, *supra*, 27 Cal.4th at p. 215.) "There was, at most, evidence that Caltrans's safety personnel *were aware of an unsafe practice* and failed to exercise the authority they retained to correct it." (*Ibid.,* emphasis added.)

The message of *Hooker*, like that of *Toland* and *Camargo*, is clear. Where a contractor's employee is injured in the course of his work and cannot come within any of the very narrow exceptions discussed above, an injured employee may not avoid the effect of *Privette* by disguising what is in essence a peculiar risk claim as some other legal theory.

C. *Rowland* does not supply an independent basis for imposing liability on a hirer based on a showing the hirer was aware of a dangerous condition and could have intervened to protect the contractor's employees.

Relying on *Rowland v. Christian, supra,* 69 Cal.2d 108, plaintiffs contend a hirer can be liable, based on a premises liability theory, where the plaintiff demonstrates there is a dangerous condition on the premises and that the hirer has failed to take precautions to protect the contractor's employees from the danger. (See, e.g., OBOM, pp. 1, 23-24.)

In *Rowland*, a negligence action, the plaintiff alleged the defendant failed to warn him of a dangerous condition in the defendant's apartment – a cracked porcelain water faucet knob – and that he injured himself when turning the knob. (*Rowland v. Christian*, *supra*, 69 Cal.2d at p. 110.) The

defendant sought summary judgment, but failed to establish whether the dangerous condition was obvious or even nonconcealed. (*Id*. at p. 111.) This court held the defendant raised a triable issue of fact: whether the dangerous condition was obvious or concealed. (*Ibid*.)

In reaching its decision in *Rowland*, this court relied on Civil Code section 1714 for the proposition that "'[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.'" (*Rowland v. Christian*, *supra*, 69 Cal.2d at pp. 111-112.) This court further concluded that, based on section 1714, the "proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." (*Id*. at p. 119.) This court further noted in *Rowland*, however, that "the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances" *is subject to exception where it is "clearly supported by public policy."* (*Id*. at p. 112, emphasis added.)

The holding of *Rowland* is, of necessity, limited by the *Privette* doctrine where a contractor's employee brings an action against a hirer seeking damages for an injury that occurred on the hirer's premises. As is clear from the holding of *Privette* and the cases following it, a hirer/landowner does *not* owe a general duty of care to assure the safety of contractor's employees while on the hirer's property. Instead, the hirer can be held liable only where the plaintiff proves the hirer has concealed a dangerous condition, has negligently exercised retained control, or has otherwise affirmatively contributed to the employee's injury.

As this court explained in *Toland*, a showing of the hirer's "superior knowledge" alone is not a basis for holding the hirer liable based on a preexisting dangerous condition. Rather, where the plaintiff seeks to recover "for personal injury resulting from a failure to disclose a concealed preexisting danger at the site of the hired work," the "[r]ecovery in such a case would be for fraudulent concealment or misrepresentation." (*Toland, supra,* 18 Cal.4th at pp. 269-270, fn. 4.)

The Court of Appeal reached essentially the same conclusion in *Grahn, supra,* 58 Cal.App.4th 1373, a case raising a virtually identical issue to the one presented in this case. In *Grahn*, the plaintiff was a former employee of a contractor (Thorpe) hired to remove and install insulation materials at industrial plants and shipyards. (*Id*. at p. 1380.) Many years later, the plaintiff developed an asbestos-related disease and sued a number of companies, including Tosco Corporation, that had retained his employer to remove asbestos-containing insulation. The plaintiff obtained a jury verdict against Tosco based on a premises liability theory similar to that asserted by plaintiffs in the present case.

The Court of Appeal in *Grahn*, however, concluded that a hirer generally does not have a "duty to exercise ordinary care in the management of [the] premises in order to avoid exposing [the plaintiff] to an unreasonable risk of harm" and that it was error for the trial court to so instruct the jury. (*Grahn*, *supra*, 58 Cal.App.4th at p. 1395, emphasis added.) The court concluded that such an instruction erroneously implied the hirer could be liable to the contractor's employee for a hazard attendant to the very work Thorpe was hired to perform. (*Id*. at pp. 1397-1400.) As the Court of Appeal explained, "not every dangerous condition on the hirer's premises subjects the hirer to liability for physical harm to the independent contractor's employees."

(*Id*. at p. 1398.) It was not the duty of Tosco, the hirer, to protect Thorpe's employees from hazards they could reasonably expect to encounter on the job, but rather the duty of Thorpe. (See *ibid.*)

For these reasons, the court in *Grahn* held that "in the absence of the hirer's retention of control of the methods or operative details of the independent contractor's work, the hirer cannot be held liable to the independent contractor's employee as a result of [a] dangerous condition on the hirer's property if: 1) a preexisting dangerous condition was known or reasonably discoverable by the contractor, and the condition is the subject of at least a part of the work contemplated by the . . . contractor; or 2) the contractor creates the dangerous condition on the hirer's property and the hirer does not increase the risk of harm by its own affirmative conduct." [17/] (*Grahn*, *supra*, 58 Cal.App.4th at p. 1401, emphasis added.)

To the extent the Court of Appeal in *Grahn* held that it is generally improper to instruct a jury on premises liability in an action by a contractor's employee against a hirer, the Court of Appeal opinion properly harmonizes the general rule of liability set forth in *Rowland* and the limitations on liability imposed by the *Privette* doctrine. Under the facts in *Rowland*, the only issue before the court was whether a premises owner could have reasonably taken steps to prevent injury to the plaintiff caused by a dangerous condition on the

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17/ In reaching this conclusion, the court in *Grahn* further noted that if the contractor's employee is injured by "conditions entirely extraneous to the performance of [the contract] work and indisputably within the control of the premises owner/hirer," the hirer could be held liable on a premises liability theory. (*Grahn*, *supra*, 58 Cal.App.4th. at p. 1400.) The examples given by the court in *Grahn* include a slip-and-fall accident caused by a condition on the premises (such as a puddle of water) or a vehicular accident caused by the hirer. (*Ibid*.)

premises. As *Grahn* makes clear, however, when a property owner retains a contractor to perform services, the obligation to assure contractors' employees perform their work in a safe manner is that of *the contractor*, not the hirer. Therefore, where a contractor's employee alleges he was injured by a preexisting dangerous condition on the hirer's premises, the hirer cannot be held liable merely because it *could* have taken steps to protect the contractor's employee from a dangerous condition. Rather, additional proof is required to establish the hirer's fault and a basis for liability under *Privette*.

As noted, the court in *Grahn* suggested the additional proof required to establish the hirer's liability based on a preexisting dangerous condition consists (in relevant part) of proof that the dangerous condition (i) was not "reasonably discoverable" by the contractor; and (ii) was not "the subject of at least a part of the work contemplated" by the contractor. (See *Grahn, supra,* 58 Cal.App.4th at p. 1401.) To the extent *Grahn* suggests a hirer can be held liable if the dangerous condition was not "reasonably discoverable" by the contractor, it does not adequately state the full extent of the proof required of the plaintiff. As this court held in *Toland*, a hirer can be liable for a preexisting dangerous condition *only* where the plaintiff proves the elements of a *concealment or misrepresentation* claim. (*Toland, supra,* 18 Cal.4th at pp. 269-270, fn. 4.) As is implicit in this Court's holding in *Toland*, the proper focus is not *solely* upon the *contractor's* knowledge of the dangerous condition. The *hirer's* knowledge of the "dangerous condition" is *also* relevant to the concealment issue. If the hirer does not have knowledge that a physical condition on its property (such as asbestos) could cause injury to the contractor's employees, the hirer cannot "conceal" the condition and therefore cannot be held liable for failing to disclose it. (See *Toland, supra,* 18 Cal.4th at pp. 269-270, fn. 4.)

The court in *Grahn* failed to discuss the portion of the *Toland* opinion discussing the limited circumstances in which a plaintiff may recover damages based on injuries resulting from a preexisting dangerous condition. Its failure to do so led the court to articulating a standard (whether the preexisting dangerous condition was "known or reasonably discoverable by the contractor") which focuses solely on the contractor's knowledge. As *Toland* makes clear, the proper inquiry is whether the hirer concealed (or misrepresented) the alleged dangerous condition. To recover on a fraud claim based on concealment, the plaintiff must establish the defendant had a *duty to disclose*. (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 131, fn. 9 [one element of concealment claim is "duty to disclose"]; *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1055 [in an action based on fraudulent nondisclosure, plaintiff must prove that duty to disclose existed].)

In the absence of a fiduciary or confidential relationship, a party has no duty to disclose facts unless the defendant has "exclusive knowledge" of the facts. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347-348.) A party with "exclusive knowledge" of the facts has a duty to disclose only where "(1) the material fact is known to (or accessible only to) the defendant; *and* (2) the defendant knows the plaintiff is unaware of the fact and cannot reasonably discover the undisclosed fact." (*San Diego Hospice v. County of San Diego*, *supra*, 31 Cal.App.4th 1048, 1055; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 700, pp. 801-802.)

The foregoing, well-established rules provide the proper standard by which to determine whether a hirer may be held liable based upon a preexisting dangerous condition. Under these rules, if the *hirer* has *no knowledge* of a material fact (i.e., that a condition on its property constitutes

a dangerous condition), it cannot properly be held liable. Likewise, under these rules, the hirer cannot properly be held liable if (i) the hirer does not have *exclusive* knowledge of facts (because they are accessible to the contractor); or (ii) the hirer does not know the contractor is unaware of the dangerous condition and cannot reasonably discover the undisclosed fact.

If an employee asserting a claim based on a dangerous condition on the hirer's property cannot establish the foregoing elements, the hirer should have no liability – even if it could have undertaken steps to protect the contractor's employees. To impose liability without proof of such facts would effectively negate the *Privette* doctrine by permitting employees to recover based merely on the hirer's ability to undertake steps to protect the employee. [18/]

D. The *Privette* doctrine is fully applicable in this case.

The present case is governed by the overarching policy considerations discussed by this Court in *Privette* and its progeny: Kinsman was injured in the course of his work as an employee of a contractor retained to perform services for Unocal. He received workers' compensation benefits. Unocal

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18/ Plaintiffs also rely on several out-of-state cases in support of their contention that a hirer can be liable to a contractor's employee for damages caused by exposure to asbestos-containing materials on the hirer's property. (See, e.g., OBOM, p. 23, citing *Emery v. Owens-Corporation* (La.Ct.App. 2001) 813 So.2d 441 and *Gutteridge v. A.P. Green Services., Inc.* (Pa.Super.Ct. 2002) 804 A.2d 643.) Neither of these cases discussed California's *Privette* doctrine or any comparable doctrine under the laws of those states. To the contrary, the court in *Gutteridge* held that a landowner could be held liable based on the landowner's "superior knowledge," the very basis for liability this court *rejected* in *Toland, supra,* 18 Cal.4th at pp. 268-269.

indirectly paid for these benefits in paying the contract price. The *Privette* doctrine is thus fully applicable here.

In effect, plaintiffs contend Unocal should be liable here because it was aware, or should have been aware, that asbestos was hazardous, and that precautions needed to be taken to "protect" Kinsman from the asbestos hazard. But time and again, this court has made clear that a hirer's mere knowledge of a dangerous condition is not a sufficient basis for imposing liability. As this court explained in *Hooker*, it is not enough for the plaintiff to demonstrate the existence of a dangerous condition and the *ability* of the hirer to "'prevent or eliminate through the exercise of reasonable care the dangerous condition causing injury to the independent contractor's employee.' [Citation.]" (*Hooker*, *supra*, 27 Cal.4th at pp. 209, 212, fn. 3.) If that were the law, the *Privette* doctrine would have little meaning because hirers almost always are aware of the risks inherent in contract work and virtually always retains sufficient control to be *able* to prevent injury to a contractors' employees.

In *Privette*, for example, the hirer could have certainly foreseen the risk to the contractors' employees from carrying buckets of hot tar up a ladder and was "able" to prevent such harm by warning the employees of the danger of doing so or requiring that they use a different method of transporting the buckets of tar to the roof. Similarly, in *Toland* the hirer could have foreseen the danger in raising the wall in the manner that it was raised and arguably was *able* to prevent those injuries by requesting that the work be done in a different manner. Likewise, in *Hooker*, CalTrans could have foreseen the danger to Mr. Hooker posed by allowing traffic to continue using the overpass while he was performing work and CalTrans likewise could have prevented the injury to Mr. Hooker by regulating the flow of traffic during the course of

his work or by taking any one of a number of measures on his behalf.

But this Court held in each of the foregoing cases that the hirers did *not* have the duty to take measures on behalf of any of the contractor's employees. Rather, the hirer "is entitled to assume that the independent contractor will perform its responsibilities in a safe manner, taking proper care and precautions to assure the safety of its employees." (*Grahn, supra,* 58 Cal.App.4th at p. 1398; see also *Hooker, supra,* 27 Cal.4th at p. 210.)

E. Unocal is not liable based on the exceptions to the *Privette* doctrine relied on by plaintiffs.

1. Unocal cannot be liable based on the theory that it concealed a dangerous condition because (a) that was not the theory on which the case was tried and (b) there was no evidence of concealment or failure to disclose.

On appeal and before this court, plaintiffs argue that the presence of the asbestos on the property was a concealed, preexisting danger and that Unocal had a duty to warn Kinsman of the risks of exposure to asbestos. The judgment against Unocal cannot be affirmed based upon a concealment theory, for two reasons:

a. *No Instructions On Concealment Or The Duty To Disclose.* The judgment cannot be affirmed on the concealment or non-disclosure claim because the jury was not instructed on the elements of a concealment or non-disclosure claim, *including the duty to disclose*. It is well-settled that a judgment cannot be affirmed based upon a theory not raised during trial unless "the issue presented involves purely a legal question, on an *uncontroverted*

record and requires no factual determinations . . . ." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847, original emphasis; accord, *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 391, fn. 10; *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920; *Cramer v. Morrison* (1979) 88 Cal.App.3d 873, 887.)

In *Cramer*, the Court of Appeal specifically held a judgment cannot be affirmed on a theory which was not raised at trial. (*Cramer v. Morrison*, *supra*, 88 Cal.App.3d at p. 887.) As the court in *Cramer* explained:

> A party [including a respondent] may not for the first time on appeal present a new theory that " . . . contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial. . . ." [Citations.] A new theory may be advanced for the first time on appeal only where it involves "a legal question determinable from the facts which are not only uncontroverted in the record but could not be altered by the presentation of additional evidence." [Citations.]

(*Ibid.*)

Here, in the absence of instructions on the elements of a concealment claim, the jury made no finding (express *or* implied) that Unocal had a duty to disclose the existence of the asbestos or the hazards of asbestos. Furthermore, the evidence certainly does not support a determination *as a matter of law,* based on "uncontroverted evidence," that Unocal was liable for failing to disclose the existence of asbestos or the dangers it posed.

There is *no* evidence – let alone uncontroverted evidence – that Unocal actively concealed any facts from Burke & Reynolds. Likewise, there is *no* evidence – let alone uncontrovered evidence – that Unocal concealed the hazardous nature of asbestos generally from Burke & Reynolds. Unocal clearly did not have *exclusive knowledge* of the dangerous qualities of asbestos, such that it was inaccessible to Burke & Reynolds. To the contrary,

the adverse health risks of asbestos were well-documented *matters of public record* long before Burke & Reynolds undertook the maintenance work at the Wilmington facility in the 1950's. The 1938 Dreessen report, published by the United States Public Health Service, discussed the risks of asbestos and recommended limiting exposure to it. Likewise, the 1946 ACGIH standard recognized the health risks from exposure to asbestos and provided that workers should not be exposed to asbestos concentrations of more than *5,000,000 ppcf (i.e., thirty fibers per cubic centimeter).* (2 RT 748.) Countless other articles in medical journals also documented the health risks of asbestos as of the 1950's.

Based on the foregoing, it would have been impossible for Unocal to conceal the known risks of asbestos as of the 1950's. By that time, information about asbestos risks generally was too widely known for Unocal to conceal it from Burke & Reynolds or anyone else. (See 6 CT 1935 [testimony of plaintiff's expert discussing "prominence" that the [asbestos] issue received with publication of editorials in JAMA in the 1930's], 1936 [testimony by plaintiffs' expert that in the 1930's, 80% of medical doctors subscribed or had access to JAMA].)

Plaintiffs contend, however, that Burke & Reynolds did not know *specifically* that the removal and installation of the asbestos-containing insulation posed a health risk to its carpenters and other laborers at the Unocal refinery. (See OBOM, pp. 17-18.) But plaintiffs point to no evidence that (i) Unocal itself knew specifically that the work of Burke & Reynolds carpenters at the refinery would expose them to hazardous levels of asbestos; (ii) the information about this hazard, to the extent it existed, was inaccessible to Burke & Reynolds. (See authorities cited *ante*, part I.E.)

The evidence established that as of the 1950's, asbestos was not believed to be harmful where the TLV was less than 5,000,000 ppcf. (See *ante*, Statement of the Case, § C.) There is no evidence, let alone uncontroverted evidence, that Unocal knew or should have known that *carpenters* such as Kinsman (retained to erect scaffolding for insulators and others) would be exposed to a TLV in excess of 5,000,000 ppcf while working at the refinery. (See *ante*, Statement of the Case, § D.) The most definitive study as of the 1950's was the 1946 Fleischer-Drinker study, which indicated that even among *insulators*, a group at much greater risk than carpenters, the removal of asbestos-containing insulation was not hazardous because the levels of exposure were generally well within the 5,000,000 ppcf standard published by the United States Public Health Service and adopted by ACGIH.

Moreover, plaintiffs' own risk assessment expert testified that (i) an *insulator* installing asbestos insulation at a refinery such as the Unocal refinery would have been exposed to a time-weighted average of 10 to 20 asbestos fibers per cubic centimeter (cc), i.e., between 1.7 million ppcf and 3.3 million ppcf (2 RT 759:8-24; see 2 RT 708-709; 4 RT 1207); *and* (ii) that a *bystander* to the insulation work (such as a carpenter like Kinsman) standing ten feet away might be exposed to five or six fibers per cc (1,000,000 ppcf or less), *if* the wind was blowing toward the bystander (2 RT 718:10-28, 719:1-22).

Indeed, plaintiffs also can point to no study, prior to the 1980's demonstrating asbestos risks to *carpenters* as a trade. The first epidemiological study indicating that carpenters were at risk for asbestos diseases was not published until 1983, long after Burke & Reynolds work at the Unocal refinery. (4 RT 1209.) Thus, neither Unocal nor Burke &

Reynolds had any reason to believe that carpenters, as a trade, faced a risk of asbestos-related health diseases that required that precautions be taken on their behalf.[19/]

Unable to point to any studies or reports published as of the 1950's indicating carpenters as a trade group were at risk, plaintiffs rely on the 1937 Bonsib Report, prepared by Standard Oil Company, in an attempt to establish Unocal knew that the removal of the insulation created a risk of asbestos-related diseases for carpenters such as Kinsman. The Bonsib Report indicates that *some* workers involved in the removal of asbestos (presumably those working *indoors* without adequate ventilation) could come into contact with "dust concentrations *as high as* 5,890,560 particles." (4 CT 947, emphasis added.) Nothing in the Bonsib Report indicated, however, that carpenters who erected scaffolding (as opposed to insulators or other laborers who physically removed the old insulation) were at risk of exposure to an unhealthful level of asbestos. Likewise, nothing in the Bonsib Report suggested that workers at a refinery (i.e. working *outdoors*) would be exposed to more than 5,000,000 ppcf. (See *ante*, p. 15, fn. 10.)

The 1937 Bonsib Report, moreover, was followed by the *1946* Fleischer-Drinker survey, which gave every indication that insulators (and

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19/ When specifically asked on cross-examination when a contractor that provided laborers and carpenters for work at a refinery would have become aware of the dangers of asbestos, Unocal's risk assessment expert, Dr. Hughson, responded that "in terms of a concern about those types of activities in refineries, . . . if they were relying on published literature, it would be in the 1980's." (4 RT 1242.) Dr. Hughson similarly testified that in his opinion *no one* (whether a contractor or the hirer of a contractor) would have known that carpenters as a trade group were at a risk from asbestos exposure *until 1983*, when the first epidemiological study was published documenting the risks of asbestos-related diseases among carpenters. (4 RT 1209.)

those working in their proximity) were *not* at high risk for asbestosis. (See *ante*, Statement of Facts § D.) The Fleischer-Drinker survey itself noted (much like the Bonsib Report) that dust concentrations could be *as high as* 6,000,000 ppcf (for those operating bandsaws), but nonetheless concluded that insulation operations were relatively safe. (4 RT 1189.) The Fleischer-Drinker study also determined the amount of asbestos dust in the air was "*usually* much below 5,000,000 particles." (4 RT 1190.) Thus, neither the Bonsib Report nor the Fleischer-Drinker survey establish that Unocal should have known carpenters such as Kinsman were at high risk for asbestos-related disease as of the 1950's.

Like the Bonsib Report, the Fleischer-Drinker survey also recommended that precautions be taken to minimize the risks of asbestos-related illnesses. (See 4 CT 992-1000 [Bonsib Report recommendations]; and see *Borel v. Fibreboard Paper Products Corporation, supra,* 493 F.2d at p. 1084 [noting Fleischer-Drinker survey concluded "'exhaust ventilation and respiratory protection'" were "'of value in maintaining . . . low incidence of asbestosis"].)

To the extent that either the Bonsib Report or the Fleischer-Drinker survey suggested that workers such as Kinsman were at high risk or that precautions were essential to their well-being, however, there is no evidence, and certainly no uncontroverted evidence, that Unocal had *exclusive* knowledge of this information, such that it could have prevented Burke & Reynolds from gaining access to this information. Likewise, there is no evidence such information was not known by *or accessible to* Burke & Reynolds.

Plaintiffs *contend* the information in the Bonsib Report was not known outside the oil industry, but they have no proof to support that contention. To

the contrary, the report leaves little doubt that its contents were not classified. The author, the Chief Safety Inspector of Standard Oil Co., acknowledged the assistance, in the preparation of the report, of the U.S. Public Health Service, the Bureau of Mines, and the Division of Industrial Hygiene of the Department of Labor of the State of New York. (4 CT 1001.) Furthermore, plaintiffs offered no evidence to establish the Fleischer-Drinker survey (which discussed the same risks discussed in the Bonsib Report and called for safety precautions similar to those in the Bonsib Report) would have been for any reason inaccessible to Burke & Reynolds.

Presumably, Burke & Reynolds did not take precautions to protect its carpenters from asbestos in the 1950's because it was widely believed at that time (in light of the Fleischer-Drinker study and other similar studies) that the health risks for insulators and those working in close proximity to them were minimal. But the fact that the Fleischer-Drinker study and others like it may have misled employers like Burke & Reynolds is not a basis for imposing liability on a hirer such as Unocal.

Plaintiffs nonetheless urge there is such a basis for liability because Unocal purportedly had *superior knowledge* (or should have had superior knowledge) to Burke & Reynolds. According to plaintiffs, as of the 1950's, asbestos risks were "not widely known outside the medical community and major industry." (OBOM, p. 17.) As noted, however, in *Toland*, this court rejected the contention that the hirer could be held liable based on a claim that the hirer has superior knowledge of a dangerous condition. (See *Toland, supra,* 18 Cal.4th at pp. 268-269.) Instead, a hirer may be held liable based on a preexisting dangerous condition only when the plaintiff proves the elements of a fraud or concealment cause of action, something which plaintiffs did not do in this case. (*Id*. at pp. 269-270, fn. 4.)

As the record would not support a determination as a matter of law that Unocal actively concealed the existence of the asbestos hazard from Burke & Reynolds or that it had exclusive knowledge about the risks of asbestos, the record would certainly not support a judgment *in favor of plaintiffs as a matter of law*. Accordingly, the judgment cannot be affirmed on a concealment or non-disclosure theory, theories that were not even tried to the jury.

b. *No Evidence Of Concealment Or A Duty To Disclose.* As is clear from the foregoing analysis, there is no evidence supporting a finding in favor of plaintiffs on the concealment/non-disclosure theory. To the contrary, the undisputed evidence supports a finding in favor of Unocal on this issue.

First, as demonstrated, plaintiffs offered no evidence of a *concealed* dangerous condition. Unocal could not possibly have concealed the risks of asbestos-containing insulation because such risks were well-documented by the 1950's. Unocal had no knowledge of any facts that were not known *or reasonably accessible* to Burke & Reynolds.

Second, plaintiffs also offered no evidence that Unocal had exclusive knowledge of any information as of the 1950's that carpenters, as a trade group, were at risk of asbestos-related illnesses. To the extent such information existed, it was equally available to Burke & Reynolds.

Because plaintiffs presented no evidence that Unocal had exclusive knowledge of a material fact about asbestos risks that was not known by (or accessible to) Burke & Reynolds, the judgment cannot be affirmed on a concealment or misrepresentation theory.[20/]

20/ Plaintiffs also cite argument by Unocal's counsel that Unocal was aware as of the 1950's that asbestos was "dangerous." (4 RT 1377.) Plaintiffs fail to note, however, Unocal's attorney thereupon stated, "That's

2. Unocal is not liable for "affirmative contribution" to Kinsman's injuries.

a. Unocal did not affirmatively contribute by requiring that Kinsman's work be performed in an unsafe manner.

Plaintiffs can point to no evidence establishing that Unocal *affirmatively contributed* to plaintiffs injuries. There is no evidence, for example, that Unocal promised to provide Kinsman with a respirator, but failed to do so, or that it provided him with a defective respirator.

Plaintiffs rely on authorities involving situations in which the hirer *prevented* the performance of the contract work in a safe manner. (See, e.g. OBOM, pp. 23-24, 35-37 , citing *McKown v. Wal-Mart Stores, Inc., supra,* 27 Cal.4th 219 [hirer requested that contractors' employees use its equipment, but provided defective forklift]; *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225 [hirer refused to de-energize power lines at the hirer's plant on night that contractor's crane operator was performing work in vicinity of power lines]; *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1134 [during highway construction project, hirer "contractually restrained" contractor from erecting safety barricades].) Plaintiffs have offered no evidence, however, that Unocal required the contract work to be performed

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not really the question here. [¶] The question is, in 1950 what was known about the levels of exposure that were safe?" (*Ibid.*)

in an unsafe manner. Accordingly, these authorities are not controlling. [21/]

At trial, plaintiffs' expert Barry Castleman testified that *"in the 1950s"* oil companies "could have sought mineral oil, fiberglass or other materials which were available for insulation work, which were much less dangerous than asbestos." (6 CT 1992-1993, emphasis added.) Plaintiffs failed to prove, however, the date of the *installation* of the insulation that was being removed at the time Kinsman was working at the plant. For all that appears in the record, the insulation might have been installed before the risks of asbestos were well-known and long before alternatives such as "mineral oil" or fiberglass became available.

21/ Plaintiffs also rely on *Jablonski v. Fulton Corners, Inc.* (N.Y.Civ.Ct. 2002) 748 N.Y.S.2d 634. In that case, the hirer was sued by an employee who was injured when a ceiling beam fell on his head. *Jablonski* thus illustrates a hazardous condition *extraneous* to the contract work that could give rise to liability under general premises liability concepts. But plaintiffs are not seeking recovery in this case based on an extraneous condition. Burke & Reynolds employees such as Kinsman were erecting scaffolding so that insulation could be replaced. Given that the purpose of erecting the scaffolding was to facilitate the removal of the asbestos-containing insulation, the removal of the insulation was in no sense extraneous to the work of the Burke & Reynolds carpenters and other employees.

b. Plaintiffs cannot prevail on the theory that Unocal itself (or a third party contractor retained by Unocal) caused the release of friable asbestos.

(1) Plaintiffs bore the burden of proving the facts supporting such a theory and they did not do so.

Unable to establish Unocal's concealment of a dangerous condition or any other affirmative misconduct by Unocal, plaintiffs contend Unocal is directly liable for the release of the asbestos fibers into the air. Specifically, plaintiffs contend the insulators or other laborers who removed the asbestos *may* have been Unocal employees or employees of some third party contractor, other than Burke & Reynolds. (See, e.g., OBOM, pp. 1-2, 9, 39, 51.)

In order for plaintiffs to prevail on the theory that Unocal employees (or a third-party contractor) were the direct cause of Kinsman's injuries, however, the burden was squarely on plaintiffs to prove that employees of Unocal or a third-party contractor released friable asbestos into the air during the course of Kinsman's work at the Unocal refinery. The allocation of this burden of proof to plaintiffs is required because of the fundamental rule that the plaintiff has the burden of proving all elements necessary to support recovery on the plaintiff's claim. (See Evid. Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . that he is asserting"]; *Smith v. Santa Rosa Police Dept.* (2002) 97 Cal.App.4th 546, 569 ["'ultimate burden of proof . . . rests with the plaintiff to prove each of the relevant facts supporting its cause

of action'"]; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968 [plaintiff bears burden of proving causation].) Thus, the burden of proving who caused the release of friable asbestos was on plaintiffs.

Plaintiffs failed, however, to demonstrate that the workers who caused the release of friable asbestos were employees of Unocal or a third-party contractor rather than Burke & Reynolds employees. In fact, plaintiffs did not prove that anyone *other* than Burke & Reynolds employees removed and installed the insulation. The undisputed evidence demonstrated that Burke & Reynolds was a *general contractor.* (5 CT 1493:22-25, 1494:1-4; 4 CT 1085 [Exh. 31].) Presumably, as the general contractor, Burke & Reynolds retained the company that removed (and installed) the insulation.

Moreover, testimony from plaintiffs' own witnesses confirms that Burke & Reynolds employees *removed* the worn insulation (the activity that would presumably generate most, if not all, of the asbestos dust), even if it did not retain the insulators. Plaintiff's expert, Charles Ay, testified that the removal of the thermal insulation is the job of "laborers" and not that of insulators. (2 RT 437:9-18.) According to Exhibit 31, Burke & Reynolds supplied "laborers" to Unocal's Wilmington refinery, along with carpenters, such as Mr. Kinsman. (4 CT 1085, 1091-1092 [Exh. 31].)

Plaintiffs improperly cite portions of the Court of Appeal *opinion* in an attempt to establish that the Court of Appeal concluded that the insulators were employees of a third-party contractor. (See, e.g., OBOM, p. 51, [erroneously stating opinion "concedes" dangerous condition not created by Burke & Reynolds]; *ibid*., Slip opn., pp. 15-16 [stating plaintiffs' factual *contention* that third-party contractors generated the asbestos dust].) The opinion nowhere indicates, however, that there was *evidence* to establish the identity of the insulators' employer. To the contrary, the court's opinion

correctly recites *"The evidence did not establish, and apparently the parties did not know, what company employed the insulators who worked at the Unocal refinery nearly 50 years ago."* (Slip opn., p. 19, emphasis added.)

In light of the complete lack of evidence to support plaintiffs' claim that Unocal employees (or a third-party contractor's employees) caused the release of friable asbestos during Kinsman's work at the refinery (and the overwhelming evidence that the dust was produced as the result of Burke & Reynolds operations), plaintiffs may not avoid the application of the *Privette* doctrine on the theory that Unocal employees (or third-party contractors' employees) caused Kinsman's injuries.

(2) Unocal cannot in any event be liable based on the release of friable asbestos because it could not reasonably foresee that Kinsman would be injured as a result of asbestos exposure.

In determining whether a tort duty is owed, the most important policy consideration is *foreseeability*. (See, e.g., *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434; *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 778-779; *Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495, 508, fn. 7.) Because foreseeability is of """primary importance""" (*Bryant v. Glastetter, supra,* 32 Cal.App.4th at p. 778) and is a threshold issue, "[i]f the court concludes the injury was not foreseeable," the defendant owes no duty of care. (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306; accord, *Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105). Like all other duty considerations, foreseeability is a question of law for the court. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678.)

Only *reasonable foreseeability* supports a finding of duty. (*Sturgeon v. Curnutt, supra,* 29 Cal.App.4th at p. 307 [noting that "[o]n a clear day, you can foresee forever"]; see also *Bryant v. Glastetter, supra*, 32 Cal.App.4th at p. 778 [to limit the otherwise potentially infinite liability that would follow every negligent act, a defendant can be held liable only for injuries to others which are reasonably foreseeable to defendant].) Harm is not reasonably foreseeable, even if it is logically *possible*, unless a reasonable defendant would """take account of it in guiding practical conduct."""" (*Sturgeon v. Curnutt, supra,* 29 Cal.App.4th at pp. 306-307.)

Here, the undisputed evidence demonstrated that under accepted scientific standards in the 1950's, Unocal had no reason to believe the amount of asbestos that would be encountered by workers at the refinery was hazardous. Under standards published by the United States Public Health Service and adopted by the American Conference of Governmental Industrial Hygienists (ACGIH), the federal government, and many states, asbestos was not believed, *as of the 1950's,* to be hazardous at a concentration of less than 5,000,000 ppcf, i.e., *30 fibers* per cc. (See *ante*, Statement of the Case, § C.)

Indeed, plaintiffs' own expert admitted that an *insulator* working at a refinery would have been exposed to only *10 to 15 fibers* per cubic centimeter in the course of his work. (2 RT 759.) Unocal had no reason to believe a carpenter such as Kinsman, erecting and disassembling scaffolding, would have been exposed to a greater concentration of asbestos than an insulator. Because the level of asbestos exposure faced by its contractors' employees was well within the only standard in effect in the 1950's, Unocal had no reason to believe its contractors' employees work activities would result in a hazardous level of asbestos exposure.

II.

AT A MINIMUM, THE JUDGMENT MUST BE REVERSED BASED ON THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL INSTRUCTIONS ON PREMISES LIABILITY.

A. An unmodified premises liability instruction conflicts with the *Privette* doctrine.

The instructions given by the trial court on the premises liability issue are in *direct* conflict with *Privette*. These instructions, which advised the jury that a hirer has "a duty to exercise ordinary care in the use, maintenance or management of the premises in order to avoid exposing persons to an unreasonable risk of harm" and which required the jury to determine "whether a person under the same or similar circumstances as defendant Unocal should have foreseen a person such as plaintiff Ray Kinsman would be exposed to an unreasonable risk of harm" imposed a duty of care on Unocal to assure the safety of Burke & Reynolds employees while engaged in the contract work. (See *ante*, pp. 19-20.) Because all of the work that was being performed by the Burke & Reynolds employees was conducted on Unocal property, the instruction had the effect of imposing a duty on Unocal to assure that the employees performed their work in a manner that did not give rise to an "unreasonable risk of harm."

As is implicit in the *Privette* doctrine, a jury generally should *not* be given premises liability instructions or any other instructions suggesting a hirer has a general duty of due care to assure the safety of a contractor's employees. Such instructions mislead the jury by suggesting a hirer has a duty

to take precautions to make sure contractors' employees are not injured. In fact, the hirer has no such duty under *Privette*. (See *ante*, part I.B.) Rather, as explained above, the hirer is liable only if the employee establishes one of the narrow exceptions discussed above, such as concealment of a dangerous condition or some form of affirmative contribution resulting in injury. (See *ante,* part I.B)

An instruction on premises liability (or a general negligence instruction) fails to inform the jury that the elements of the foregoing exceptions to the general rule of non-liability must be proven as a prerequisite to liability for injuries resulting from the manner in which the contractor and its employees perform the contract work. Imposition of a duty of due care on a hirer thus flies in the face of *Privette* and the cases following it.

In effect, the premises liability instructions (or instructions on the "general duty of due care") inevitably invite the jury to impose liability in every case in which a hirer has retained "sufficient control over the work of an independent contractor *to be able to* prevent or eliminate through the exercise of reasonable care the dangerous condition causing injury to the independent contractor's employee.' [Citation.]" (*Hooker*, *supra*, 27 Cal.4th at pp. 209, 212, fn. 3, original emphasis.) The hirer of an independent contractor virtually *always* retains sufficient control to be *able* to prevent injury to a contractors' employees. The hirer's ability to do so is not, however, in itself a rationale for imposing a duty on the hirer to do so. (See *ante*, Parts I.B. & I.C.) Thus, allowing a jury to impose liability on Unocal on a premises liability theory would conflict with *Privette*'s teaching that a hirer generally has *no* duty of care to ensure the safety of a contractor's employees in the performance of the contract work.

The Court of Appeal cases that have considered the propriety of premises liability instructions (or instructions on a general duty of due care) are fully in accord with the foregoing analysis. First, the Court of Appeal in the present case concluded that a hirer cannot be liable to a contractors' employee "for a dangerous condition . . . on the property *unless* the dangerous condition was within the property owner's control and the owner exercised this control in a manner that affirmatively contributed to the employee's injury." (Slip opn., p. 1.)

In *Grahn v. Tosco Corp., supra,* 58 Cal.App.4th at p. 1401, the Court of Appeal confronted the very issue raised in this case and specifically held that where a hirer is sued for injuries resulting from the performance of contract work, the hirer cannot be held liable on the theory it failed to "*exercise ordinary care* in the use and maintenance" of the premises where the contract work was conducted, as the effect of imposing liability on this legal theory would be to hold the hirer liable for failing to take precautions to prevent injuries to contractor's employees caused by the negligent manner in which the contract work was performed. (*Grahn, supra,* 58 Cal.App.4th at pp. 1397-1398, emphasis added.)

Likewise, in *Johnson v. Tosco Corp.* (1991) 1 Cal.App.4th 123, the Court of Appeal held a hirer cannot be held liable for injuries arising in the performance of the contract work on the theory that the hirer "owes a duty to the employees of independent contractors to exercise ordinary care. . . ." (*Id.* at p. 138.) To impose liability on this basis "*conflicts with decisions limiting the liability of the employer of an independent contractor*." (*Id.* at p. 139, emphasis added.)

Just as the Court of Appeal has recognized that it would be contrary to the *Privette* doctrine to give general negligence/premises liability instructions

in a contractor's employee's action against the hirer, the drafters of the BAJI instructions likewise came to the same conclusion. In 2002, following this court's opinion in *Hooker* (and long after the trial in this action), the authors of the BAJI form jury instructions amended BAJI No. *8.30*, the BAJI instruction directly addressing the circumstances in which a property owner can be liable "[t]o [w]orkmen." (See BAJI No. 8.30 (8th ed. 1994)). As revised, the instruction incorporated *Hooker*'s requirement of "affirmative contribution." In pertinent part, BAJI No. 8.30, as revised, states:

> An owner of premises who hires a contractor to perform work and retains control over safety conditions at the work site is not liable to employees of the contractor for injuries sustained at the work site, *unless the hirer negligently exercised the retained control, and that negligent exercise affirmatively contributed to the employee's injuries*.

(BAJI No. 8.30 (9th ed. 2002), emphasis added, citing *Hooker, supra,* 27 Cal.4th 198 and *McKown, supra,* 27 Cal.4th 198.) (The superseded version of the BAJI instruction did not incorporate the italicized language. (BAJI No. 8.30 (8th ed. 1994).)

Under the revised version of BAJI No. 8.30, a contractors' employee seeking recovery from a hirer on a retained control theory must, as required by *Hooker* and *McKown*, prove that the hirer negligently exercised retained control *and affirmatively contributed* to the employee's injuries. [22/] The modification of the instruction is a clear recognition that general instructions on premises liability have no place in the trial of an action by a contractor's

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22/ BAJI No. 8.30 does not specifically address other exceptions to the *Privette* doctrine, such as concealment, misrepresentation, or negligent undertaking. Instructions governing those claims come within the scope of other BAJI instructions. (BAJI No. 4.45 [negligent undertaking], 12.31 [misrepresentation], 12.35 [concealment] (9th ed. 2002).)

employee against the hirer of the contractor. [23/]

B. Unocal was prejudiced by the erroneous instruction.

Instructional error is prejudicial if, viewing the record as a whole, it is *reasonably probable* the party seeking the instruction would have obtained a more favorable result without the error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570-571.) "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, original emphasis; see *In re Willon* (1996) 47 Cal.App.4th 1080, 1097-1098 ["The 'reasonable probability' test generally imparts a meaning greater than 'merely possible,' but less than 'more likely than not'"].)

Factors the courts will consider in determining whether error was prejudicial include (1) the degree of conflict in the evidence on key issues, (2) the effect of counsel's argument, (3) any indications by the jury that it was misled, (4) the closeness of the jury's verdict, and (5) whether any instructions may have cured the error. (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at pp. 570-571; *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876.) Prejudice can be found where only two or three of these factors are present. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1366 [finding prejudice where evidence was in conflict and counsel's argument contributed to jury's confusion].)

23/ Of course, in the exceptional case in which a contractor's employee's injuries arise from some negligence by the hirer extraneous or collateral to the contract work, instructions on a general duty of care might be appropriate. (See *ante*, p. 33, fn. 17, citing *Grahn, supra,* 58 Cal.App.4th at p. 1400.)

Here, viewing the record as a whole, it is reasonably probable Unocal would have obtained a more favorable result in the absence of the erroneous instructions. In fact, it is a virtual certainty. Unocal offered overwhelming evidence that it could not be properly held liable on any theory of liability permissible under the *Privette* doctrine. (See *ante*, parts I.D. and I.E.) Thus, the state of the evidence in itself establishes, at the very least, a reasonable probability that reversal of the judgment would result in a more favorable outcome on remand.

The remaining *Soule* factors (i.e., the factors other than the state of the evidence) confirm this conclusion. Plaintiffs' argument was based in large part on the court's instructions on general premises liability. Aided by these instructions, plaintiffs vigorously argued to the jury that Unocal had a duty to protect Kinsman or to assure his safety on the job. (See 2 RT 381 ["Unocal did nothing to warn Mr. Kinsman of the dangers of that asbestos dust coming from those insulators, and they did not provide him with any protection whatsoever such as a respirator"]; 4 RT 1331 [Unocal "did nothing to protect Mr. Kinsman"], 1334 [Unocal as "premises owner has to exercise ordinary care, ordinary care to anyone who comes on their property, not to put that person who is coming on the property in danger"], 1334 [Unocal was negligent because "they had a dangerous condition of property that they knew about, that was foreseeable to that Mr. Kinsman would be harmed by it, and they did nothing"], 1335 ["They didn't protect him"], 1335-1337 [reciting elements of general premises liability claim], 1337 ["Did they do anything to protect Mr. Kinsman? [¶] They didn't offer any respirators or masks to him"].)

Finally, plaintiffs can point to no other jury instructions that mitigated the combined effect of the instruction given and the argument by plaintiffs' counsel. Accordingly, the only conclusion possible on this record is that

Unocal was seriously prejudiced, such that the judgment of the trial court must be reversed and, at a minimum, the case be remanded for retrial.

CONCLUSION

The judgment of the Court of Appeal should be modified to include directions to the Superior Court to enter judgment in favor of Unocal. Alternatively, the judgment of the Court of Appeal should be affirmed.

Dated: August 31, 2005

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1).)

The text of this brief consists of 16,272 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: August 31, 2005

_____
STEPHEN E. NORRIS

PROOF OF SERVICE [C.C.P. § 1013a]

I, **KATHY TURNER**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **March 31, 2004**, I served the within document entitled:

ANSWER BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **March 31, 2004**, at Encino, California.

_____

KATHY TURNER

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