Supreme Court No. S247677

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LUIS A. GONZALEZ,

Plaintiff and Appellant,

v.

JOHN R. MATHIS, et al.

Defendants and Respondents,

From a Decision of the Second District Court of Appeal
Division Seven
Case No. B272344
Honorable Gerald Rosenberg

APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF SUPPORTING DEFENDANTS

PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL SUPPORTING DEFENDANTS

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL SUPPORTING DEFENDANTS

Pursuant to California Rules of Court, rule 8.200(c)(1), the Association of Southern California Defense Counsel (ASCDC) respectfully requests leave to file an amicus brief supporting the position of defendants John R. Mathis et al..

ASCDC is the nation's preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members and has appeared as amicus curiae in numerous appellate cases.

ASCDC members routinely represent clients in defending actions involving homeowner liability, contractor liability, primary assumption of risk and the *Privette* doctrine. (See *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*).) ASCDC has appeared as amicus curiae in courts across California, including numerous recent appearances before this Court. (See, e.g., *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829; *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077; *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536; *J.M. v.*

Huntington Beach Union High School Dist. (2017) 2 Cal.5th 648; *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767.)

Counsel for ASCDC has reviewed the briefing. Defendants have been represented by quality appellate counsel. ASCDC does not intend to repeat detailed legal arguments ably made. It believes, however, that it can provide an important broader perspective going beyond this particular case. No party has funded this amicus brief nor has any party drafted it. It is solely the work of counsel representing ASCDC.

ASCDC respectfully requests that it be granted leave to file the accompanying Amicus Curiae Brief supporting defendants.

Date: December 10, 2018 Respectfully Submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Edward L. Xanders
Eleanor S. Ruth

By /s/ Eleanor S. Ruth
Eleanor S. Ruth

Attorneys for Prospective Amicus Curiae Association of Southern California Defense Counsel

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL SUPPORTING DEFENDANTS

INTRODUCTION

The Court of Appeal's opinion in this case goes out of its way to reverse summary judgment by carving an unprecedented exception to the *Privette* doctrine that is inconsistent with, and in fact undermines, the tapestry of landowner and hirer nonliability vis-à-vis hazardous activities as defined by *Privette* and the closely related primary assumption of risk doctrine.

The Court of Appeal's new exception upsets the fundamental premise of both doctrines—namely, California's long-running public policy of encouraging lay landowners to hire specialists to perform inherently risky jobs and promoting safety by letting those specialist contractors assess and provide for their own safety because their expertise includes familiarity with the distinctive hazards of the job they have voluntarily undertaken. *Privette* was crafted in response to runaway exceptions that rendered the preexisting common law unworkable; the doctrine has maintained its clarity for decades under a manageable, balanced rule with clear exceptions. This case threatens to upend this system—eviscerating the *Privette* doctrine and undermining the primary assumption of risk doctrine.

But even if a new exception might theoretically exist, this case does not present the appropriate circumstance to create it. An absent, noncontrolling landowner is not, and should not be, liable for the injury of a specialist who has tended to these and other rooftop skylights for decades and who was best acquainted with how to safely perform his job. Plaintiff's professional niche was expertise in assessing and navigating dangers inherent to cleaning hard-to-reach places. Moreover, plaintiff was injured in an easily avoidable way—he was simply communicating to his employees that water was leaking inside the house, something that did not even require him to scale the roof, let alone scale it using the particular route he chose. While his injury is undoubtedly regrettable, shifting liability to the unwitting hirer is contrary to California law and public policy.

DISCUSSION

A. The Court of Appeal's new exception to *Privette* undermines the *Privette* and primary assumption of risk doctrines, both of which are rooted in a contractor's assumption of obvious risks inherent to his job.

1. A landowner has no duty to protect a specialized contractor from an open and obvious risk inherent in an activity the contractor has voluntarily undertaken.

Plaintiff argues that the doctrine of primary assumption of risk counsels in favor of his recovery (answer brief pp. 25-27), but his reliance is misplaced. The doctrines, while related, operate uniquely in practice. (See pp. 16-17, *post.*) Regardless, under either doctrine plaintiff's claim fails because a landowner has no duty—aside from a duty to avoid enhancing inherent dangers—to protect a contractor from obvious hazards inherent to the job he has voluntarily undertaken.

Primary assumption of risk applies where a plaintiff's harm resulted from a risk that is an integral and inherent part of plaintiff's activity and thus a risk plaintiff assumes by voluntarily undertaking the activity. (*Gregory v. Cott* (2014) 59

Cal.4th 996, 1001-1002 (*Gregory*); *Knight v. Jewett* (1992) 3 Cal.4th 296, 315 (*Knight*).) The doctrine relieves a hirer/defendant of liability for a plaintiff's injury because "as a matter of law, the defendant owes no duty to guard against a particular risk of harm." (*Gregory*, at p. 1001.)

The rule reflects the policy that where a plaintiff has voluntarily undertaken an inherently hazardous activity, the defendant has no duty to protect him. (*Gregory*, *supra*, 59 Cal.4th at p. 1001; see also *Shin v. Ahn* (2007) 42 Cal.4th 482, 488-489 ["[T]he existence and scope of a defendant's duty is a question for the court's resolution. When a sports participant is injured, the considerations of policy and duty necessarily become intertwined with the question of whether the injured person can be said to have assumed the risk," internal citations omitted].) The test to determine whether primary assumption of risk bars a plaintiff's recovery focuses on (1) the nature of the activity at issue; (2) the parties' relationship; and (3) whether, as a matter of public policy, it is appropriate to impose a duty of care on the defendant. (*Knight, supra*, 3 Cal.4th at pp. 314-315.)

Primary assumption of risk applies in the premises liability context, barring a plaintiff's recovery from a landowner for injuries sustained on the defendant's property as part of an inherently dangerous activity for which the plaintiff has assumed

known and obvious risks. (See, e.g., *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208-1212 [primary assumption of risk by skateboarder in premises liability claim against the road's owner]; *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 115 [same]; *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 12 [primary assumption of risk bars premises liability claim by snow skier against ski resort based on snow and ice conditions].)

Occupational activities are subject to primary assumption of risk the same as recreational activities. (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1119 (*Priebe*) [collecting cases under the umbrella of "occupational assumption of the risk"].) For example, a veterinarian accepts the risk of being bitten by an animal under his care because "[t]he risk of dog bites during treatment is a specific known hazard endemic to the very occupation." (*Nelson v. Hall* (1985) 165 Cal.App.3d 709, 714; accord, *Cohen v. McIntyre* (1993) 16 Cal.App.4th 650, 655 [vet "injured during the course of treating an animal under his control, an activity for which he was employed and compensated and one in which the risk of being attached and bitten is well known"]; *Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1480-1481 [expert shark handler assumes the risk of shark bite]; *Domenghini v. Evans* (1998) 61 Cal.App.4th 118, 120-122 [rancher assumes the risk of injury by

cow].) Similarly, a policeman assumes the risk of being injured by a resistant suspect because it is inherent to his experience and work. (*Hodges v. Yarian* (1997) 53 Cal.App.4th 973, 978.)

Courts have expansively applied primary assumption of risk to a wide variety of occupational hazards, including those bearing striking similarity to the instant case:

- Air conditioning repairman performing a rooftop repair assumes risk of falling from a ladder with a known and obvious defect with which he was personally familiar from past experience climbing it and about which he had complained to the property manager (*King v. Magnolia Homeowners Assn.* (1988) 205 Cal.App.3d 1312, 1317 (*King*));
- Gardener assumes risk of falling while trimming a tree (*Nunez v. R'bibo* (1989) 211 Cal.App.3d 559, 563 (*Nunez*));
- Home care worker assumes risk of injury by patient (*Gregory, supra*, 59 Cal.4th at p. 1027);
- Delivery driver assumes risk of injury when he lifts box for customer who has erroneously understated box's weight (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427.)

2. Fundamental to primary assumption of risk and *Privette* is the policy premise that in undertaking a hazardous task, a hired specialist and *not the lay hirer*, is best suited to decide how the task is performed safely.

The *Privette* doctrine is a particularized application of the primary assumption of risk doctrine, because inherent in the rationale underlying *Privette* is that a contractor is an expert in what he has been hired to do and, as such, is best positioned to assess risks inherent to the job and provide for his own and his employees' safety.

Primary assumption of risk "appl[ies] in favor of those who hire workers to handle a dangerous situation, in both the public and the private sectors" because "'it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.'" (*Gregory, supra*, 59 Cal.4th at p. 1002, quoting *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 542.) This rule is rooted in the policy that, in voluntarily undertaking a hazardous task, the contractor assumes not only the inherent risks but also takes charge of his own safety, relieving the hirer of any duty to ensure

for the specialist contractor's safety. (See, e.g., *Gregory,* at p. 1003 ["the most fundamental [policy rationale for the primary assumption of risk] is rooted in the very nature of the profession. When an owner entrusts a dog to the care of trained professionals, the owner is no longer in charge. The professional determines how best to manage the animal, and is in the best position to take protective measures against" injury]; *Priebe, supra,* 39 Cal.4th at p. 1129 [same].)

Similarly, fundamental to *Privette* and its progeny is the concept that a property owner is not liable to a specialized contractor he hires to do inherently dangerous work precisely because the contractor is an expert and thus best positioned to ensure the task is safely performed. (*Privette, supra,* 5 Cal.4th at p. 693; *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671, 673, 679 (*Kinsman*).) Part of the contractor's expertise is his knowledge of how to do his job safely, dictating his own safety measures and method of performance according to his own particularized understanding of the inherent risks. (E.g., *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600 (*SeaBright*).)

Although, as defendants point out here, the two doctrines operate uniquely—one is a complete absence of a duty to protect against a risk (primary assumption of risk) while the other is the

delegation of a duty to protect against obvious risks inherent in the contractor's work (*Privette*) (defendants' reply brief p. 25)—both doctrines share a fundamental policy preference that laypeople hire experts to perform hazardous work and that those experts, by voluntarily undertaking and holding themselves out as specialists in the field, assume the risk and cannot "be heard to complain of the negligence that is the cause of his or her employment." (*Gregory*, *supra*, 59 Cal.4th at p. 1002.)

This policy premise could not find a more appropriate factual application than that presented here—a case involving a lay defendant, infirm and absent on the date plaintiff was working at his home as plaintiff had innumerable times before, and a plaintiff who knew of the roof's condition and who specifically advertises himself as "a special[ist] in hard to reach windows and skylights," emphasizing that he and his employees take "extra care" "with their own safety when cleaning windows." (3 AA 669.)

The Court of Appeal's new exception sets up an uncertain framework of landowner liability law under which, depending on the particular doctrine invoked, nearly identical factual circumstances meet opposite fates—one plaintiff, injured by a known and obvious risk with which he had previous experience is barred from recovery under the assumption of risk doctrine (e.g.

King, supra, 205 Cal.App.3d 1312 [affirming summary judgment for property manager after plaintiff was injured by falling from a ladder with an obvious defect with which he was familiar]), while another is allowed to pursue a claim under a new *Privette* exception (like plaintiff here, overcoming summary judgment despite full knowledge of the obvious roof condition and having generally assumed risks inherent in cleaning rooftop windows).

3. Both doctrines apply to any risks inherent in specialized and hazardous work, not just defects the plaintiff is hired to cure.

Critical to the applicability of both primary assumption of risk and *Privette* is that they encompass risks inherent to both "the nature or the location of the work" the contractor was hired to perform. (*Privette, supra*, 5 Cal.4th at p. 695; accord, *Knight, supra*, 3 Cal.4th at pp. 309, 313 ["the question of the existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question...," italics omitted].) Thus, settled authority refutes plaintiff's attempt to narrow the reach of the primary assumption of risk (and by analogy, *Privette*) to risks arising only from the very defect a contractor is hired to remedy. (See, e.g., *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 529 [holding that

holes "next to the area" where plaintiff was working were inherent in his task and barred hirer liability].)

Whether a particular risk is inherent to the occupation is an issue resolved as a matter of law, made from the "common knowledge of judges." (*Amezcua v. Los Angeles Harley-Davidson, Inc.* (2011) 200 Cal.App.4th 217, 233, internal quotation marks omitted.)

B. *Privette* bars plaintiff's claim as a matter of law, regardless of whether *Kinsman* implies a third exception.

1. Like primary assumption of risk, *Privette* is based on a strong policy preference that lay homeowners employ a specialist for hazardous jobs and allow that specialist to provide for his own safety.

Central to primary assumption of risk and *Privette* alike is the policy-based premise that encourages a lay hirer to employ a specialist contractor to perform innately dangerous tasks. The hirer, thus, no longer has the right to control the manner and method of the contractor's work, which includes how he provides for his own (and his employees') safety. (See, e.g., *Privette, supra*, 5 Cal.4th at p. 693 ["Central to this rule of nonliabilty was the

recognition that a person who hired an independent contractor had *no right of control* as to the mode of doing the work contracted for," internal quotation marks omitted]; *Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 640 ["Precisely because the hirer has no obligation to specify the precautions an independent hired contractor should take for the safety of the contractor's employees . . . absent an obligation, there can be no liability in tort," internal italics, brackets and quotation marks omitted]; *Priebe, supra*, 39 Cal.4th at pp. 1123-1124 [a veterinarian who has assumed the risk of dog bite during treatment, "determines the method of treatment and handling of the dog. He or she is the person in *possession and control* of the dog and is in the best position to take necessary precautions and protective measures"; by contrast, the dog owner "has *no control* over what happens to the dog while being treated in a strange environment and cannot know how the dog will react to treatment," internal quotation marks omitted, italics added].)

This is why the established exceptions to both doctrines relate to circumstances where the hirer, in some manner, retains control either of the premises or of necessary information about the conditions of the worksite. *Privette* is limited when either (1) a hirer (a) retains control and (b) affirmatively contributes to the plaintiff's injury; or (2) a hirer fails to warn of a concealed

hazard. (E.g., *Kinsman, supra*, 37 Cal.4th at p. 667; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 201-202 (*Hooker*).) Likewise, an exception to primary assumption of risk lies only where the defendant has altered the plaintiff's ability to ensure for their own safety by "unreasonably *increas[ing]* the risks of injury"—that is, where a defendant creates a situation in which the actual risks are beyond plaintiff's awareness and control. (E.g., *Gregory, supra*, 59 Cal.4th at p. 1010, italics in original; *Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 499-500.)

2. The published opinion creates an unauthorized limitation on *Privette* that, broadly construed, eviscerates the doctrine.

None of the above exceptions apply where, as here, a hazard is open and obvious. The Court of Appeal's new exception to *Privette*, as applied in this case, inexplicably shifts liability to a lay homeowner who (1) has responsibly engaged an expert to perform a task that involves an open, obvious and known condition, and (2) in no way retained control of the worksite or increased the risks attendant to the job. That a landowner/hirer might remain liable for protecting against peculiar hazards known and understood best by the specialist contractor flips the

Privette and primary assumption of risk doctrines on their heads, undermining both doctrines. The new exception abrogates the *Privette* doctrine nearly out of existence, without any guidance as to how this newly-crafted exception might operate in practice.

As defendants note (opening brief pp. 41-44; reply brief pp. 17-18), the Court of Appeal's approach virtually precludes summary judgment by landowners, as it effectively turns the rule into a "'preamble to the catalog of exceptions,'" nullifying *Privette's* purposeful effort to limit exceptions to landowner nonliability. (See *SeaBright, supra,* 52 Cal.4th at p. 598 [noting that *Privette* was engineered to limit the expansive list of exceptions to hirer nonliability developing at common law]). The Court of Appeal's approach relegates summary judgment to very specific and rare instances in which a defendant can *conclusively* establish that the contractor could have remedied the condition through reasonable safety precautions (indeed, the Court of Appeal here concluded that not even video evidence that "certainly cast doubt" on plaintiff's claim of unreasonableness satisfied this burden). (Opn. at p. 21.) As the Court of Appeal notes, the issue of "reasonableness" is almost always a jury question. (Opn. at p. 20.)

The Court of Appeal's new exception, thus, drastically impairs judicial efficiency, an approach this Court has rejected.

This Court has recognized the importance of having practical *Privette* exceptions that are amenable to summary judgment. (See *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 268-269 [rejecting an additional exception to *Privette* in part because "practical application presents considerable difficulties" and "will not be amenable to summary judgment"]; accord, *Hooker, supra*, 27 Cal.4th at p. 212.)

3. Even if *Kinsman* implies a third exception to *Privette*, it does not apply here, where an open and obvious hazard did not require remediation for plaintiff's task and was avoidable.

Beyond the policy and abstract practical considerations militating against creating a new *Privette* exception, this case provides no factual support for applying any new exception. Even if a new exception might make sense in some other case, the facts here decry its application. As noted above, plaintiff had more experience, knowledge and control of this particular jobsite than anyone, particularly more than defendant Mathis who was neither present nor able to scale a roof in his infirm condition. The partial rooftop deterioration was open, obvious and known. It was also avoidable because plaintiff was injured simply trying to tell his rooftop employees that they had inadvertently caused

interior water leaks. That communication task did not require plaintiff to encounter the deteriorated section of the roof or to even go on the roof. He could have directed his employees by countless reasonable alternatives, such as yelling up to them from the ground below, calling them on a cell phone, or talking to them from a ladder at any part of the building. There was no need for him to encounter the open and obvious hazard on the roof.

While plaintiff's situation is very sympathetic, "the fact that [he] was injured on [defendant's] property does not mean [defendant] is to blame . . . . The temptation to displace responsibility to another, particularly to a man of means, might be extremely seductive—but not necessarily justified." (*Nunez, supra*, 211 Cal.App.3d. at pp. 564-565.)

CONCLUSION

Courts must apply exceptions to *Privette* in line with the doctrinal and policy underpinnings of both the *Privette* and the primary assumption of risk doctrines. Both doctrines serve the same policy considerations and apply to a unique class of plaintiffs who voluntarily undertake hazardous activities. Together, they set the parameters of liability for millions of California landowners and hirers. This case presents a classic situation where *Privette* precludes a hirer's liability—an

unwitting lay landowner, who neither retains control of, nor conceals, an obvious roof deterioration, employs a trusted, expert skylight cleaner who fully knows the inherent risks of scaling any roof and has 20-years' experience with this particular roof and its open and obvious hazards.

If *Privette* does not foreclose this case, it is hard to imagine any case where the doctrine still applies.

The Court of Appeal's decision should be reversed.

Date: December 10, 2018 Respectfully Submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
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By _____
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Attorneys for Prospective Amicus Curiae Association of Southern California Defense Counsel

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF SUPPORTING DEFENDANTS; PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL SUPPORTING DEFENDANTS** contains **3,611** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 10, 2018

Eleanor S. Ruth

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

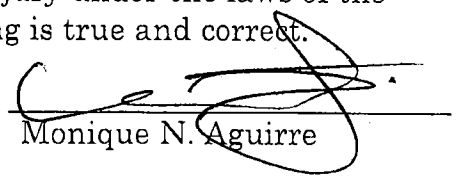
On December 10, 2018, I served the foregoing document described as: **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF SUPPORTING DEFENDANTS; PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL SUPPORTING DEFENDANTS** on the parties in this action by serving:

(X) By Overnight Mail Delivery: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

(X) By Electronic Transmission: I caused the above-named document to be transmitted via electronic transmission to the offices of the addressee(s) at the Email address so indicated above.

Executed on December 10, 2018, at Los Angeles, California.

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



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