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2nd Civil No. B 272344

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LUIS GONZALEZ, Plaintiff and Appellant, vs. JOHN R. MATHIS, et al., Defendants and Respondents.	Supreme Court No. S 247677 2nd Civil No. B 272344 LASC Case No. BC 542498

From a Decision of the Second District Court of Appeal
Division Seven, 2nd Civil No. B 272344
Los Angeles County, Hon. Gerald Rosenberg, Judge presiding
[LASC Case No. BC 542498]

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PARTIES

This certificate is submitted by Appellant Luis Gonzalez

There are no interested persons or entities required to be identified under *C.R.C.* Rule 8.208.

Respectfully Submitted,
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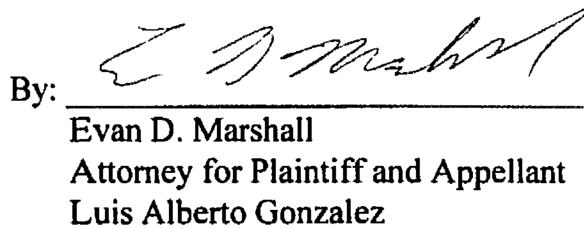
Dated: September 17, 2018 By: 

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1. INTRODUCTION

Privette v. Superior Court (1993) 5 Cal.4th 689 was intended to relieve hirers of vicarious liability for injury to contractors where the hirer has discharged his duty as a landowner by retaining the contractor for the purpose of curing the danger which caused the injury, or where the danger is created by the very project for which the contractor was retained. The premise of *Privette* is that the hirer has performed its non-delegable duty by retaining a contractor specifically tasked and qualified to remedy the danger, and hence charged with avoiding the dangers inherent in that very work. Far from creating a general exemption from the duty of care, *Privette*

> holds that the hirer of an independent contractor is not ***vicariously liable*** to the contractor's employee who sustains on-the-job injuries arising ***from a special or peculiar risk inherent in the work.***
> [*Tverberg v. Filner Construction* (2010) 49 Cal.4th 518, 521, emphasis added]

Privette further assumes that the hirer has not increased risk beyond that inherent in the work by negligently influencing the manner or circumstances of performance. And *Privette* jurisprudence has always recognized that "delegation of duty" places on the contractor only such risks as are reasonably avoidable given the circumstances.

In this case, defendant John Mathis urges that he should be shielded from liability for garden variety neglect – failure to maintain the roof on his home in safe condition – which injured a contractor hired to clean his house, not to fix his roof. This immunity arises, he claims, simply because one item to be cleaned happened to be a skylight, and the poor condition of the roof happened to be

known to the worker. He regards as immaterial his own fault and the fact that his agent ordered Gonzalez to immediately climb the roof, impelling him into the known risk.

Mathis' contention represents "delegation" run amok: Mathis deliberately did not hire a contractor to correct the danger, despite Gonzalez's plea to retain a professional roofer, foreclosing the claim that such responsibility was delegated or assumed by Gonzalez

Mathis' proposed extension of *Privette* is anathema to the policies underlying that decision. It would diminish public safety by encouraging owners *not to cure conditions* by hiring qualified contractors, but instead leave the risk to be assumed by lower-cost and lower-skill workers neither tasked nor qualified to remedy the condition. Under Mathis' theory, *Privette* shifts the cost of such neglect to contractors never retained or paid to address the danger, and to a workers compensation system never designed to bear the costs of hirer/owner negligence not inherent in the contracted work. And it does so by relieving the hirer of the duty to hire contractors qualified to and charged with correcting known existing dangers.

The real issues are unfortunately obscured by the Opening Brief:

- What risks are inherent in contracted work and hence implicitly or explicitly delegated to or assumed by a contractor?
- How can a hirer or owner delegate to contractors having limited specializations and limited time and budgets the duty to control dangers which are not the subject of their work and which are only encountered in transit to the work site?
- By refusing to retain a specialist competent to correct a preexisting danger on the premises, does a hirer retain control of that condition?
- When a hirer explicitly directs a worker to act in manner that

exposes the worker to dangers beyond that incident to their normal trade, or causes the worker to immediately confront a risk not at the locus of the work, how can the hirer deny having exercised control?

> Does *Privette* "delegation of duty" recognize limitations imposed on the contractor by time, resources, skill-sets and customer demands which constrain a worker's options in confronting a dangerous condition?

2. STATEMENT OF THE CASE

Luis Alberto Gonzalez suffered paraplegia after falling from the edge of defendant's roof while returning from a skylight which was being cleaned. The fall was due to (1) lack of maintenance over decades which left the passable portion of the roof - a 20" strip - covered with loose sand and gravel; (2) a configuration of the property that induced Gonzalez to use the narrow and slippery roof edge to reach the skylight, and (3) the influence of defendant's agent, who insisted that Gonzalez mount the roof immediately to deal with leakage also caused by lack of proper maintenance.

A. The Deteriorated Roof and Skylight

During the 50 years he owned the single-story residence, John Mathis had remodeled several times, adding a roof over the pool and replacing the original pool skylight some 40 years ago. (App. 391) In 1972, Mathis installed a "parapet wall" to conceal air conditioning, duct work, pipes and other equipment on the roof. (App. 48, 626, 632; 52-58) The parapet was purely cosmetic (App. 446-447), leaving a 20" catwalk between parapet and roof edge. (App. 54, 436-437, 626, 641) The catwalk itself was cluttered with pipes and wires. (See photos at App.

54, 56, 58, 639-642) The skylight was about 85' x 85' and occupied much of the roof: one end reached the edge of the building and the rest was boxed in by pipes, conduits, etc. (See photos at App. 48, 52, 56, 58, 392) There was thus no direct clear route to the skylight.

Since the 1972 remodel, no major work had been done to the skylight. (App. 391-392) At some point, Mathis had hired a roofer to fix leakage. (App. 432-431) This was "a very long time ago, I would say over 30 years, at the same time the skylight was replaced." (App. 432) The roof and skylight had a long history of problems with leaks; they were "in really bad condition" with leaks around the skylight and elsewhere. (App. 115:2-13; 430-432)

In addition to obstructions due to the roof equipment, the low-rise home presented limited means of roof access. Access at the front was impractical due to a 9' drop and an ornamental façade some 10' to 15' higher than the roof. (App. 412-416) The rear of the house had a low elevation. (App. 644) A metal ladder bolted to the west side with a hand railing reached over onto the roof created an obvious route. (App. 50, 58, 408-410, 626, 637) This was the "only reasonable access point" to the skylight. (App. 626) At the bottom of the ladder was a spigot for water used to clean the skylight (App. 626), and presumably used by gardeners to water plants on the roof. (App. 406-407, 54, 58) The ladder was the usual access point for air-conditioning workers, gardeners and others working on the roof. (App. 438-440) Workers were never told not to use it (App. 440), and Mathis understood that anyone washing the skylight would use the ladder to reach the roof. (App. 451-452)

Mathis and his housekeeper had never tried to walk on the side of the parapet away from the catwalk, and didn't know if it was safe or if someone could fit in it given the profusion of equipment. (App. 495-498) Mathis himself had not

been on the roof in five years, but used the ladder on the west side when he did climb up. (App. 394-396) He never walked in the cluttered area behind the parapet, finding it too constricted. (App. 399-400) There were no safety devices along the catwalk, such as tie-offs, hooks or places for harnesses. (App. 140, 627)

The roof was composed of an asphalt composite, originally with a sand and gravel coating. (App. 627) The catwalk surface was covered with loose sand and gravel as a result of years of neglect, with material sloughing off into the gutters. (App. 627, 632-633) A roofing expert attested that the roof composition (an asphalt cut-back with a granular surface) required maintenance every 3 to 5 years so that the granules do not become loose. (App. 631-633)

Mathis and his agents knew of the dangerous condition. (App. 557-560, 615) Mathis admitted that the catwalk was dangerous, and that this condition had existed since the parapet wall was constructed. (App. 426-428) His housekeeper Marcia Carrasco had known that the catwalk was dangerous for some 44 years and had warned gardeners who accessed the roof on a weekly basis about the danger, but never warned plaintiff. (App. 479, 486-489) Despite knowledge of the danger and that the ladder was used by "everybody" going on the roof (App. 439-440, 452), Mathis never remedied the problem, never installed safety hooks or devices, and never instructed anyone not to use the ladder or catwalk.[1] (App. 425-426, 440 500, 609-612, 614-618)

B. **Gonzalez Advises Mathis to Hire a Roofer**

Several months before the accident, Gonzalez told Carrasco that the roof needed repairs because it was in a dangerous condition. (App. 303-304) Carrasco

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[1] Mathis thought a railing or safety barrier would "ruin the look" of the house. (App. 445)

got Mathis's accountant on the phone so Gonzalez could explain the need for expert repairs. (App. 304)

C. **Gonzalez' Cleaning Job**

Gonzalez had first worked on property as an employee of another cleaning company. In 2005, he started his own business, and Mathis's housekeeper Carrasco hired him for cleaning jobs. (App. 102, 491-492) Gonzalez was not licensed as a house cleaner since there is no such license category. *Business & Professions Code* §§7055 *et seq*. He did not have worker compensation coverage. (App. 257)

Over the years Gonzalez worked on the property, he had only known workers to use the permanent ladder to reach the roof. (App. 136-137) He was occasionally enlisted to do odd jobs besides cleaning: *e.g.*, moving a sofa and fixing a lamp. (App. 418-419) Carrasco would tell Gonzalez what to do and the sequence in which to do it – *e.g.* to do the skylight first. (App. 133-134)

On July 30, 2012, Plaintiff began a 3-day "deep clean" on the house. (App. 74-75) On the third day, Carrasco told Gonzalez that she wanted some people to clean the skylight and others to clean inside. (App. 74, 550-551, 567) On Carrasco's order, Plaintiff sent two workers to the roof. (App. 567)

About an hour later, Carrasco told Gonzalez that the skylight was leaking and instructed him "to go up to tell them not to put a lot of water because the water was falling inside." (App. 76:3-6) "She just told me or sent me up above to tell them not to put a lot of water. That's why I went up." (App. 76:20-22; 114:13-18, 568-570)

Following Carrasco's instructions, Plaintiff climbed up the side ladder. Carrasco followed him onto the roof (App. 570-572), where she continued to instruct Gonzalez, telling him to talk with the accountant about his work. (App.

571-573, 575)

After speaking with his workers, Gonzalez returned along the roof edge towards the ladder, "the only way to get through because you have the AC equipment, and to get to the ladder you have to walk by the edge." (App. 115, 116:1-7, 575-578) As he walked towards the ladder, his foot slipped out from under him on the loose sand and gravel and he fell through the awning to the ground. (App. 115, 575-578)

D. **Motion for Summary Judgment**

Mathis moved for summary judgment on the ground that Gonzalez was an independent contractor and had voluntarily encountered the slippery catwalk. (App. 14-35) His moving papers made no issue of the roof condition, whether the property configuration induced workers to use the catwalk, or whether Gonzalez had authority to remedy the deteriorated surface. He did claim, however, that control of the roof had been "surrendered" to Gonzalez, that Carrasco's role was "passive" (App. 31-32), and that Gonzalez was aware of the width of the catwalk, that it did not have rails or tie-offs, and of the loose sand and gravel. (App. 24)

Plaintiff's opposition asserted Mathis's breach of the duty to maintain his property in a safe condition, and that Gonzalez' knowledge of roof condition did not relieve Mathis of all duties given the foreseeability that workers would access the roof even in the absence of safety devices. Plaintiff further asserted that *Privette* was inapplicable since Mathis' liability was not vicarious but based on his own neglect. (App. 321-345)

In reply, Mathis presented a new declaration claiming the parapet was there to prevent falls (App. 809), contradicting his previous testimony that it was "purely for looks" (App. 446:11-16) and that no structure on the roof protected against

falls. (App. 447) He also contradicted his prior admission that he found it difficult to walk among the roof ducts and equipment, claiming it was easy to do so. (App. 818-819)

The trial court granted summary judgment on the grounds that Gonzales had been on the roof previously and knew the roof edge was slippery, and that as a contractor he was owed no duty by Mathis. (App. 870-871)

3. ***PRIVETTE*** **DOES NOT EXEMPT HIRERS FROM LIABILITY FOR NEGLIGENCE WHICH ENHANCES RISKS OR CREATES DANGERS NOT INHERENT IN THE CONTRACTED WORK**

Mathis contends that there are just two narrow exceptions to a rule of otherwise complete immunity for hirers of independent contractors: (1) concealment of hidden dangers known to the hirer, and (2) negligent exercise of retained control. This is supposedly justified by the contractor's superior skill and knowledge. But Mathis does not explain why a property owner's duty with respect to roof maintenance would be assumed by a house cleaner, nor address the real point of *Privette,* which is the elimination of *vicarious liability* as to risks for which a contractor is actually retained.

Privette held that an employee of an independent contractor could not employ the "peculiar risk" doctrine to subject a non-negligent hirer to greater liability than the contractor actually at fault for the injury, but whose tort liability is limited by workers' compensation: "a non-negligent person's liability for an injury" should not be "greater than that of the person whose negligence actually caused the injury." (5 Cal.4th at 698) As *Toland v. Sunland Housing Group, Inc.* (1998) 18

Cal.4th 253, 265 explains, *Privette* eliminated a form of no-fault liability: "peculiar risk liability is not a traditional theory of direct liability for the risks created by one's own conduct: Liability under both [*Rest.2nd Torts* §§413 and 416] is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work." *Privette* did not eliminate common law duties owed by the hirer, or create immunity for hirer neglect simply because the danger is some premises where work is being done.[2]

This case is a "perfect storm" of hirer neglect, illustrating the array of conduct against which *Privette* does *not* protect hirers and owners.

A. *Privette* Frees a Hirer of Liability Only for Risks Inherent in the Contracted Work and Hence Within the Contractor's Speciality

"Peculiar risk" imposes vicarious liability only for injury resulting from risks inherent in the contracted work. The cases thus consistently formulate *Privette* in terms of risks created by, or which are the subject of, the particular work for which the contractor is retained.

> When, as here, the injuries ***resulting from an independent contractor's performance of inherently dangerous work*** are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis for the

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[2] *Toland* applied the rule of *Privette* to derivative liability under *Rest.2nd Torts* §§413 and 416. *Toland, supra*, 18 Cal.4th at 270. *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244, held that "negligent hiring" is a form of vicarious liability since it is the contractor's acts or omissions that directly caused the injury.

> employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries.
> [*Privette*, 5 Cal.4th at 702, emphasis added]

> . . . the hirer of an independent contractor is not vicariously liable to the contractor's employee who sustains on-the-job injuries ***arising from a special or peculiar risk inherent in the work***.
> [*Tverberg v. Filner Construction* (2010) 49 Cal.4th 518, 521]

> . . . a hired independent contractor who suffers injury resulting ***from risks inherent in the hired work***, after having assumed responsibility for all safety precautions reasonably necessary to prevent precisely ***those sorts of injuries***, is not, in the words of *Privette*, *supra*, at page 694, a "hapless victim" of someone else's misconduct. In that situation, the reason for imposing vicarious liability on a hirer – compensating an innocent third party for ***injury caused by the risks inherent in the hired work*** – is missing.
> [*Tverberg*, 49 Cal.4th at 528, emphasis added]

While Mathis persistently claims that *SeaBright Insurance Co. v. U.S. Airways* (2011) 52 Cal.4th 590, held that *all hirer duties* are delegated to any contractor, *SeaBright* actually endorses the distinction between non-delegable duties imposed by reason of defendant's ownership and "tort law duties that 'only exist because construction or other work is being performed'," which are delegable to the contractor hired to satisfy those very duties. (*Id.* at 602) *SeaBright* found that since the regulation in question imposed a duty to install railings only on

employers towards **employees**, and the injured worker was employed by the contractor rather than the possessor of the premises, the duty to install guardrails lay on the contractor hired to do **the very work that required the railings.** The contract implicitly "included a duty to identify the absence of the safety guards required by CalOSHA regulations and to take reasonable steps to address that hazard," since the duty to install guards "only existed because of the work (maintenance and repair of the conveyor) that [the contractor] was performing for the airline, and therefore it did not fall within the nondelegable duties doctrine." (*Id.* 603)

Seabright's formulation of the issue is informative:

> Here, we consider whether the *Privette* rule applies when the party that hired the contractor (the hirer) failed to comply with workplace safety requirements *concerning the precise subject matter of the contract,* and the injury is alleged to have occurred as a consequence of that failure. We hold that the *Privette* rule does apply in that circumstance.
> [*SeaBright*, 52 Cal.4th at 594, emphasis added]

As *Khosh v. Staples Constr. Co., Inc.* (2016) 4 Cal.App.5th 712, 720, notes, *Seabright* held that *Privette* applies "'when the party that hired the contractor (the hirer) fail[s] to comply with the workplace safety requirements *concerning the precise subject matter of the contract.*' *SeaBright*, 52 Cal.4th 590, 594. Because the alleged duty 'only existed because of the work . . . that [the independent contractor] was performing for the [hirer],' it 'did not fall within the nondelegable duties doctrine.'"

> Similarly, in *Padilla* [*v. Pomona College* (2008) 166 Cal.App.4th 661], the duty to comply with a Cal–OSHA regulation requiring utilities to be shut off, capped, or otherwise controlled during demolition work was a delegable duty. The regulation only applied when specific work was being performed. (*Padilla, supra*, 166 Cal.App.4th at p. 671.) [*Khosh*, 4 Cal.App.5th at 720]

See *Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 651, rejecting the argument that "under *Privette*, *Tverberg*, and *SeaBright*, a hirer can never be liable for injuries to an independent contractor because "the duty to provide a safe working environment is implicitly and presumptively delegated in all independent contractor agreements" unless the hirer is actively negligent, and *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1038, noting that *Privette* does not purport to abolish all forms of vicarious liability "or the doctrine of nondelegable duty in particular, as a basis for suits by employees of contractors against the contractors' employer. Cases are not authority for propositions not discussed."

Privette "should not be viewed as a separate concept, but as an example of the proper application of the doctrine of assumption of risk, that is, an illustration of when it is appropriate to find that the defendant owes no duty of care." *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538–39 (finding firefighter's rule subject to duty analysis of *Knight v. Jewett* (1992) 3 Cal.4th 296.)

B. Inherent Risks Are Those Which Are the Subject of the Contractor's Retention or Created by the Contract Work Itself

"Inherent risk" has been explicated in the context of primary assumption of the risk and the related "firefighters rule." Under these cases, the "inherent risks"

as to which a plaintiff is owed no duty are those necessarily entailed by the particular activity – not every risk that happens to exist concurrently or in the path of the work.

Like *Privette*, the firefighter's rule limits duty with respect to risks inherent in services provided by public safety workers. Those responsible for the emergency confronted by the safety worker have no duty as to the danger posed by the emergency itself (the reason the worker is called), but retain the duty not to enhance risks or create dangers independent of the emergency. The scope of the "inherent risks" assumed by emergency workers is analogous to that assumed by contractors.

> In *Walters* [*v. Sloan* (1970)] 20 Cal.3d 199, 204–205, we expressed the view that it is somehow unfair to permit a firefighter to sue for injuries caused by the negligence that made his or her employment necessary. (See also *Knight*, *supra*, 3 Cal.4th at p. 309, fn. 5) Many courts have agreed with this observation. The illustration of this point given in *Walters*, *supra*, 20 Cal.3d 199, and other cases, is of a contractor who is hired to remedy a dangerous situation; such a private contractor, as a matter of fairness, should not be heard to complain of the negligence that is the cause of his or her employment (*Id.* at p. 205, . . .) *In effect, we have said 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.*
> [*Neighbarger*, 8 Cal.4th at 541-542, emphasis added]

Neighbarger adopted the reasoning of the New Jersey Supreme Court:

> "[I]t is the fireman's business to deal with that very hazard [the fire] and hence, perhaps by analogy to the contractor engaged as an expert to remedy dangerous situations, he cannot complain of negligence ***in the creation of the very occasion for his engagement.*** In terms of duty, it may be said ***there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid.*** Probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences. Hence, for that risk, the fireman should receive appropriate compensation from the public he serves both in pay which reflects the hazard and in workmen's compensation benefits for the consequences of the inherent risks of the calling." (*Walters*, *supra*, 20 Cal.3d at p. 205, quoting *Krauth v. Geller* (1960) 31 N.J. 270, 157 A.2d 129, 130–131.)
> [*Neighbarger*, 8 Cal.4th at 541-542, emphasis added.]

"Occupational" assumption of the risk similarly extends only to the very dangers the worker is hired to confront. *Gregory v. Cott* (2014) 59 Cal.4th 996, 1001 (liability to healthcare worker for dangerous patent where defendants "otherwise increase the level of risk beyond that inherent in providing care, or where the cause of injury is unrelated to the symptoms of the disease.") *Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1119-1120 (dog handlers.)

The "no-duty" rule as to contractors accordingly encompasses only risks

that are the subject of their retention. *Jones v. Chevron* (Wyo. 1986) 718 P.2d 890, 894; *Cassano v. Aschoff* (1988) 226 N.J.Super. 110, 543 A.2d 973, 976 ("landowner liability does not extend to employees of an independent contractor whose injury results from the very risks which are inherent to the work they were hired to perform.") *Cf. Lamborn v. Phillips Pac. Chem. Co.* (1978) 89 Wash.2d 701, 707, 575 P.2d 215, 220 (owner owes servant of independent contractor retained to work on his premises duty to avoid endangering worker by owner's neglect.)

C. A Hirer Retains a Duty Not to Enhance Inherent Dangers or Expose Workers to Risks Unnecessary to Performance of the Work

"Delegation" under *Privette* is essentially a form of primary assumption of the risk. Under *Knight v. Jewett, supra*, 3 Cal.4th 296, and related cases, duty in unavoidably hazardous activities is defined by the risk implicit in the activity, and there is an affirmative duty to not increase the risk above the level inherent in the activity.

> It may be accurate to suggest that an individual who voluntarily engages in a potentially dangerous activity or sport "consents to" or "agrees to assume" the risks inherent in the activity or sport itself, such as the risks posed to a snow skier by moguls on a ski slope or the risks posed to a water skier by wind-whipped waves on a lake. But it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the