Case No. S247677

IN THE
SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,

v.

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

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

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

REPLY BRIEF ON THE MERITS

---

*Michael E. Bern (*pro hac vice*)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
michael.bern@lw.com

Marvin S. Putnam (SBN 212839)
Robert J. Ellison (SBN 274374)
LATHAM & WATKINS LLP
10250 Constellation Boulevard
Suite 1100
Los Angeles, CA 90067
Telephone: (424) 653-5500
Facsimile: (424) 653-5501
marvin.putnam@lw.com
robert.ellison@lw.com

Attorneys for Defendants and Respondents John R. Mathis and John R. Mathis as Trustee of the John R. Mathis Trust

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TREATISES

INTRODUCTION

This Court could not have stated the baseline rule of the *Privette* doctrine any more clearly: "Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*SeaBright Ins. Co. v. U.S. Airways, Inc.* (2011) 52 Cal.4th 590, 594 [citing *Privette v. Superior Court* (1993) 5 Cal.4th 689].) But one would hardly guess from reading Gonzalez's Answering Brief on the Merits (ABM) that this is the general rule. Instead, Gonzalez insists that the *Privette* doctrine is limited to cases in which a "landowner retain[s] a 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"—and only then when the contractor is "specifically tasked and qualified to remedy the danger." (ABM 11.)

Gonzalez's unabashed rewriting of *Privette*'s framework not only is completely irreconcilable with this Court's cases, it also is nowhere to be found in the Court of Appeal's decision in this case—which rested on entirely different grounds. Gonzalez's late pivot to an alternative argument speaks volumes about his inability to defend the actual basis for the Court of Appeal's decision. And it also underscores the stakes of this case, by which Gonzalez seeks to upend a settled framework developed by this Court over 25 years that impacts millions of transactions each year and promotes myriad important policies. Nothing in Gonzalez's Answering Brief provides any justification for that unwarranted and problematic result. This Court should reverse the decision below and reject

Gonzalez's alternative invitation to rewrite the *Privette* doctrine altogether.

First, for the reasons set forth in Mathis's Opening Brief on the Merits (OBM), this Court should hold that the Court of Appeal erred by adopting a new exception to *Privette*'s framework that is sharply at odds with this Court's precedents and *Privette*'s policies. Gonzalez does not even address the Court of Appeal's rationale until almost halfway through his brief. And when he does, he makes little attempt to reconcile it with this Court's holdings in *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198, *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 521, and *Seabright, supra*. Nor does he credibly respond to the charge that the Court of Appeal's new exception would discourage reliance on independent contractors, reduce workplace safety, interfere with the exclusivity of workers' compensation, and arbitrarily favor some claimants with work-related injuries over others—precisely the kinds of results that *Privette*'s framework is intended to avoid.

Second, this Court should reject Gonzalez's convoluted alternative argument, which purports to define the contours of *Privette*'s framework by invoking caselaw addressing assumption of risk, the liability of firefighters, and other areas of law having little to do with the issues at hand. Whatever its source, Gonzalez's alternative argument ultimately reduces to the claim that *Privette*'s framework is applicable only to injuries stemming from risks *inherent* in work done by contractors who specialize in remediating those particular risks. Gonzalez thus argues that he is not an expert in roof repair and the risk of falling from slippery

conditions on an aging roof was not an inherent risk of cleaning skylight at Mathis's house, and that therefore his injuries fall outside *Privette*'s scope.

Gonzalez's dubious characterization of *Privette*'s framework was not even addressed, much less adopted, by the Court of Appeal. And it is wholly unmoored from and incompatible with this Court's precedents, which have never limited *Privette*'s reach (or the concept of inherent risk) in that fashion. In *Tverberg*, for instance, the Court held that the possibility of falling into certain construction holes was an inherent risk of building a metal canopy—even though the contractor was not hired to remediate that risk, had no expertise in doing so, and encountered the risk simply because it was "located next to the area" where he was building the canopy. (49 Cal.4th at p. 518.) This Court should reject Gonzalez's dangerous invitation to fundamentally rewrite *Privette* in a manner that would destabilize millions of transactions and deeply undermine its policy aims.

Because the Court of Appeal's new exception is inconsistent with this Court's precedents and creates all the wrong incentives, the Court should reject it entirely. But for the reasons identified in Mathis's Opening Brief, any exception should, at minimum, be narrowed to incorporate concepts of foreseeability that are essential to the premises liability principles on which the court's exception is purportedly based. Moreover, this Court should confirm that—as other California decisions make clear—it was properly Gonzalez's burden at summary judgment to introduce evidence establishing that an exception to *Privette* could apply,

rather than Mathis's burden to negate that possibility. Gonzalez offers no credible opposition, agreeing that foreseeability is relevant, and failing even to address the authority on which Mathis relies for who bears the burden.

Finally, this Court should reject Gonzalez's contention that Mathis exercised retained control of the work in a manner that affirmatively contributed to Gonzalez's injury. The trial court and Court of Appeal both correctly found this argument meritless. Mathis never controlled how Gonzalez and his workers got to and from the skylight, and—as a matter of settled California law—his *passive* failure to have his roof repaired did not constitute an *affirmative* contribution to Gonzalez's injury. (See *Hooker, supra*, 27 Cal.4th at pp. 210–211.)

ARGUMENT

I. THE COURT SHOULD REJECT GONZALEZ'S ATTEMPT TO REWRITE THE *PRIVETTE* DOCTRINE

As Mathis explained in his Opening Brief, the Court of Appeal's newfound exception is incompatible with this Court's precedents and the policies underlying *Privette*'s framework. It is also unworkable in practice. Gonzalez's Answering Brief fails to seriously address those issues. Instead, Gonzalez devotes most of his brief to advancing an entirely new theory of liability that the Court of Appeal did not adopt and which suffers from the same fatal problems. This Court should reject both efforts—the Court of Appeal's below, and Gonzalez's here—to radically reshape the *Privette* doctrine.

A. Gonzalez's Defense Of The Court Of Appeal's New Exception Is Unpersuasive

The Court of Appeal held there to be a third exception to the *Privette* doctrine under which a hirer "can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." (Op. at pp. 18–19.) Mathis explained at length in his Opening Brief why the Court of Appeal was wrong to conclude that this third exception exists. (OBM 31–51.) Gonzalez fails to show otherwise.

1. This Court's Decisions Provide No Support For The Court of Appeal's New Exception

a. As Mathis's Opening Brief demonstrated, the Court of Appeal's new exception is inconsistent with this Court's decisions in *Hooker*, *Tverberg*, and *SeaBright*. (OBM 33–38.)

Under *Hooker*, a hirer cannot be liable for injuries resulting from known hazards unless the hirer retains control over the jobsite and affirmatively contributes to the injury. (27 Cal.4th at p. 202.) Yet the decision below permits liability for a hirer who *neither* retains control over the jobsite *nor* affirmatively contributes to the injury. (See OBM 33–34.) *Tverberg*, in turn, held that a contractor who was injured as the result of an open hazard that he lacked the ability to remedy could not recover from the hirer unless he showed that *Hooker*'s retained control exception applied. (49 Cal.4th at p. 529.) The Court of Appeal, however, held that Gonzalez's purported inability to remedy the hazard would allow him to recover even though it held that *Hooker*'s retained control exception did *not* apply. (See OBM 35–36.) Finally, the decision below contradicts *SeaBright*'s holding

that the hirer of an independent contractor "implicitly delegates to the contractor *any tort law duty* it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (52 Cal.4th at p. 594, italics added; see also OBM 36–38.)

Gonzalez barely confronts those conflicts. He asserts (ABM 37) that Mathis is wrong to claim that the Court of Appeal's exception permits liability against a hirer "who delegates control of the worksite and does not affirmatively contribute to the injury"—a result squarely at odds with *Hooker*. But the Court of Appeal's decision holds just that—concluding that Mathis may be liable here even though he delegated control to Gonzalez and did not affirmatively contribute to his injuries. (Op. at pp. 14–17.)

Gonzalez next insists that under the Court of Appeal's decision, "[a] hirer is liable only when he has negligently created or maintained a danger *and* has exposed a contractor or worker who is not charged with correcting that condition to the risk." (ABM 37.) But Gonzalez makes these limitations up from whole cloth; he cites nothing in the Court of Appeal's opinion so holding. In any event, such a rule would be irreconcilable with *Hooker*, in which this Court held that a hirer was entitled to summary judgment notwithstanding that (1) the hirer was alleged to have negligently created a risk at the worksite and (2) the contractor's employee was not charged with correcting the risk that gave rise to his injuries. (See 27 Cal.4th at pp. 214–215.)

As to *Tverberg* and *Seabright*, Gonzalez has even less to say. He makes no attempt to reconcile the Court of Appeal's exception

with the actual holdings of those cases. Nor could he. (See OBM 35–38.) Instead, Gonzalez pivots to language from those decisions and others addressing a contractor's responsibility to take "reasonable" or "reasonably necessary" safety precautions. (ABM 32–33.) Gonzalez asserts that these statements evince a "feasibility limitation on *Privette* delegation." (*Id.* at p. 33.) Not so. As Mathis previously has explained (see, e.g., OBM 48, fn. 9; Reply iso Pet'n for Review, filed Apr. 16, 2018 at pp. 7–10), such language does not show that the scope of a hirer's delegation is limited to situations in which feasible safety precautions are available. Rather, it merely reflects that the tort law duty of care *delegated* to the contractor requires him to take all reasonably necessary safety precautions at the worksite to protect his employees.

b. Gonzalez also makes two further attempts to justify the result below that run headlong into this Court's precedents.

First, Gonzalez suggests that the decision below and the notion of a feasibility limitation are bolstered by *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219. (See ABM 37–39.) But it is unclear why Gonzalez thinks *McKown* is helpful. *McKown* held that a hirer who affirmatively provides unsafe equipment to a contractor may be held liable under *Hooker* because it has retained control in a manner that affirmatively contributed to the injury. (27 Cal.4th at pp. 222, 225.) That issue has no relevance to this case. Indeed, the Court of Appeal found *Hooker*'s exception inapplicable here (and never even cited *McKown*).

Second, Gonzalez contends that *Privette* and its progeny protect a hirer only from *vicarious* liability and therefore pose no barrier here, since Gonzalez purportedly seeks to hold Mathis *directly* liable for his own negligence. (See ABM 11, 17, 18.) That too misses the mark. This Court has made clear that "*Privette* extends to cases where the hirer is *directly* negligent in the sense of having failed to take precautions against the peculiar risks involved in the work entrusted to the contractor." (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1243.) Gonzalez's claim here is no different.

Properly understood, moreover, Gonzalez's claim *does* rest on a theory of vicarious liability. Under *Privette*, a homeowner who hires a contractor "delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*Seabright, supra*, 52 Cal.4th at p. 594, italics omitted.) Having delegated that responsibility, "a hirer has *no duty* to act to protect the employee when the contractor fails in that task and therefore no liability; *such liability would essentially be derivative and vicarious.*" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674, italics added [citing *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 268–270].)

As in *Camargo*, the direct cause of Gonzalez's injury here was the contractor's "'fail[ure] to use reasonable care in performing the work.'" (25 Cal.4th at p. 1244, citation omitted.) If, as Gonzalez insists, traversing Mathis's one-story roof exposed his employees to danger for which no reasonable safety precautions

were available, directing his employees to take that risk anyways entailed a failure to use reasonable care. (See *Rasmus v. Southern Pacific Co.* (1956) 144 Cal.App.2d 264, 268 ["[I]f the employer knows . . . that the third party's premises are dangerous, the employer may be liable for the employee's injuries there."]; *Ericksen v. Southern Pacific Co.* (1952) 39 Cal.2d 374, 380 [employer properly liable for exposing his employee to unsafe conditions at a third party's site].)

Notwithstanding Gonzalez's characterization of his claim, he in fact seeks to impose liability on Mathis for an alleged violation of the duty of care Mathis *delegated* to Gonzalez's company. As *Camargo* makes clear, characterizing his claim as one alleging that Mathis was directly negligent does not remove it from *Privette*'s ambit.

2. The New Exception Undermines *Privette*'s Policies

Mathis's Opening Brief noted that the Court of Appeal's new exception would frustrate the policies underlying *Privette*. (OBM 38–41.) Gonzalez does not even respond to, let alone deny, those charges. Instead he makes two policy arguments of his own. Neither withstands scrutiny.

First, Gonzalez argues that public safety will be undermined "[i]f a landowner is free to subject contractors of *any specialty* to *any risk* on the premises" because he "will be incentivized to leave the danger intact." (ABM 42.) That is wrong. To start, *Privette* permits a homeowner to delegate responsibility for safety only with respect to risks *known* to the contractor. In the face of a

known risk, an expert contractor is best positioned to implement appropriate precautions to protect its employees. To the extent that a contractor cannot take necessary precautions without further action by the homeowner, a reasonable contractor will not proceed with the work until those actions are taken. That state of affairs will promote action to *fix* the danger, not leave it intact.

The Court of Appeal's decision, by contrast, incentivizes hirers to assign their own less-skilled employees to complete potentially dangerous tasks rather than hiring expert contractors—exactly the result *Privette* sought to avoid. (See *Privette, supra*, 5 Cal.4th at p. 700; OBM 38.)[1]

Second, Gonzalez claims that the availability of workers' compensation does not justify application of the *Privette* doctrine in this case because, he says, compensation premiums do not reflect "the cost of hirer or third party neglect." (ABM 51.) But a contractor approaching a job that exposes its employees to obvious hazards will *of course* factor the risk of injuries from such hazards, and the resulting cost of workers' compensation insurance, into the price of its contract—irrespective of whether those hazards are the result of the hirer's negligence. Gonzalez's suggestion that contractors would charge less to face open hazards precipitated by the negligence of a hirer or third party has no basis in fact or logic.

---

[1] Under Gonzalez's rule, for instance, Mathis could have immunized himself from tort liability by assigning his longtime housekeeper to clean the skylight, rather than hiring a company (like Gonzalez's) that specialized in performing such work safely. Such results are antithetical to *Privette*'s policy aims.

Gonzalez's view is also flatly contradicted by *SeaBright*. In *SeaBright*, a hirer failed to install safety guards that were affirmatively required by Cal-OSHA regulations. (52 Cal.4th 590.) As a result, the contractor was exposed to additional hazards at the worksite that would have been avoided had the hirer simply complied with its statutory responsibilities. (*Ibid.*) Even so, this Court had little difficulty finding that the "cost of workers' compensation insurance . . . [wa]s presumably included in the contract price" and that the availability of workers' compensation cut firmly against hirer liability. (*Id.* at p. 603.) Likewise, this Court recognized that to permit the contractor's employee to recover in tort when the hirer's own employees would be restricted to workers' compensation would be inequitable. The same considerations apply here.

3. The New Exception Is Unworkable And Would Render Summary Judgment A Practical Impossibility

Mathis explained in his Opening Brief that the Court of Appeal's new exception to *Privette* is unworkable in practice. (OBM 41–44.) Mathis offered a sampling of the numerous and difficult practical questions raised by the decision below. For example:

- What constitutes a "reasonable" safety precaution? Does it turn on the cost of the precaution? Must it eliminate the risk altogether, or simply reduce it?
- Is "reasonableness" judged from the perspective of the hirer or the contractor?

- How does a hirer determine the which hazards must be considered and potentially remedied?
- What if, as here, the hirer is elderly and lacks the ability to inspect a worksite to determine whether reasonable safety precautions are available?

(See OBM 42–44.) Gonzalez makes no effort to respond to these or the many other difficult questions raised by the decision below, underscoring that courts would be left rudderless.

Nor does Gonzalez seriously contest that the Court of Appeal's new exception would render summary judgment a practical impossibility. To the contrary, he himself proposes that summary judgment be reserved for only the few cases where it is undisputed that the injury is caused by a risk that is "the reason for retaining the contractor" and there is "no affirmative neglect by the hirer." (ABM 58.) Because of the ease with which a nonmoving party could and would dispute those issues, among others (see OBM 41–44), the Court of Appeal's new exception will drive every ordinary case towards trial, imposing significant new costs on homeowners and hirers, as well as courts.

4. *Kinsman* Itself Provides No Support For The Court of Appeal's Decision

Although the Court of Appeal purported to follow *Kinsman*, Mathis explained in his Opening Brief that the decision below is inconsistent with *Kinsman*'s ultimate holding. (OBM 44–51.) Gonzalez barely responds to Mathis's detailed discussion of *Kinsman*, spending only one paragraph on Mathis's points. (ABM 36–37.) And that one paragraph is not a defense of the Court of

Appeal's treatment of *Kinsman*. Instead, Gonzalez argues that Mathis's analysis of *Kinsman* is simply irrelevant because delegation under *Privette* "extends only to inherent risks," not "extrinsic or enhanced risks." (*Id.* at p. 37.) But as explained in the next section, Gonzalez is fundamentally mistaken about the concept of inherent risk—as *Kinsman* itself demonstrates.

B. Gonzalez's Invitation To Affirm On Alternative Grounds Should Be Rejected

It is telling that Gonzalez's primary argument in his Answering Brief is not a defense of the Court of Appeal's reasoning, but an invitation to affirm the judgment on an entirely different basis that would fundamentally rewrite and upend *Privette*'s framework. Specifically, Gonzalez argues that falling off Mathis's roof was not an "inherent risk" of the work that his company had been hired to perform, and that therefore the *Privette* doctrine does not apply in the first place. (ABM 18–31; see also *id.* at p. 12 [citing this as the first "real issue[]" presented].) It is not apparent that Gonzalez even raised this argument in his Answer to the Petition. And the Court of Appeal did not even discuss, much less embrace, this idea either. For good reason: Falling off the roof manifestly *was* an "inherent risk" of cleaning Mathis's rooftop skylight. This Court's precedents confirm that commonsense conclusion. And none of Gonzalez's arguments to the contrary is persuasive. The Court should reject this late-breaking bid for affirmance on alternative grounds.

1. Gonzalez's "Inherent Risk" Argument Is Incompatible With This Court's Cases

As summarized in the first sentence of his brief, Gonzalez's alternative argument boils down to the proposition that the *Privette* doctrine applies only where a contractor has been hired "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." (ABM 11; see also, e.g., *id.* at p. 29 [suggesting the contractor must be "specifically retained to cure the dangerous condition"]; *id.* at p. 52 [suggesting "the danger in question [must be] the reason the contractor was hired"].) Only then, in Gonzalez's view, is the danger in question an "inherent risk" of the contracted work for which a hirer may not be held liable. And even then, Gonzalez claims that a hirer may delegate responsibility for addressing those inherent risks only to those "specifically tasked and qualified" to remedy them. (*Id.* at p. 11.) In Gonzalez's view, the risk of slipping on loose sand or gravel on Mathis's roof was neither a risk he was hired or qualified to cure, nor one inherent to cleaning the skylight on Mathis's roof. He therefore claims the *Privette* doctrine is inapplicable.

Gonzalez's remarkable rewriting of *Privette*'s framework is as audacious as it is wrong. Consider *Kinsman*. If Gonzalez were right—if the only risks that come within *Privette*'s scope are those that a contractor has the expertise to remedy or that are entailed by the very nature of the contractor's task—*Kinsman* would have been a trivially easy case. The danger at issue in *Kinsman* was exposure to asbestos. Kinsman's employer neither had expertise in asbestos remediation nor was hired for a task necessarily

entailing asbestos exposure; it was hired simply to build and dismantle scaffolding. (37 Cal.4th at pp. 664–665.) Accordingly, if Gonzalez were correct, this Court would have easily concluded that the risk was not inherent in Kinsman's work and held the hirer liable. But that is not what happened. Instead, the Court concluded that if a jury found that Kinsman's employer knew or should have known of the asbestos hazard, then the hirer would *not* be liable. (*Id.* at p. 683.)

Tverberg likewise squarely rejects Gonzalez's interpretation of inherent risk. There, the Court held that falling into a bollard hole was an inherent risk for an independent contractor (Tverberg) who had been hired to build a metal canopy. (*Tverberg, supra*, 49 Cal.4th at pp. 528–529.) That was so even though "[t]he bollards had no connection to the building of the metal canopy, and Tverberg had never before seen bollard holes at a canopy installation." (*Id.* at p. 523.) Location alone was sufficient: "Because the bollard holes were located next to the area where Tverberg was to erect the metal canopy, the possibility of falling into one of those holes constituted an inherent risk of the canopy work." (*Id.* at p. 529.)[2]

---

[2] Gonzalez suggests in passing that *Tverberg* deemed the risk inherent in part because "the contractor had in fact altered the immediate site to modify the risk." (ABM 49.) That is incorrect. Although the opinion's background mentions that Tverberg removed a few stakes marking some of the bollard holes (*Tverberg, supra*, 49 Cal.4th at p. 523), that fact plays no role in the Court's explanation of why the risk of falling into the holes was inherent in Tverberg's work (see *id.* at pp. 528–529).

Kinsman and *Tverberg* confirm that an "inherent risk" under *Privette* is any risk arising "either from the nature *or the location* of the work." (*Privette, supra*, 5 Cal.4th at p. 695, italics added.) That is, any risk present at the jobsite where the contractor is working qualifies, even if it is *not* a risk "necessarily entailed" (ABM 23), by the nature of the work itself. Scaffolding and canopy construction do not "necessarily entail" the risks of, respectively, asbestos exposure and bollard holes, but because those dangers were present at the worksites in *Kinsman* and *Tverberg*, they qualified as inherent risks. That accords with *Seabright*, where this Court affirmed that independent contractors presumptively have a "duty to provide a safe workplace" (52 Cal.4th at p. 600)—not just safety from the risks they are "retained to cure" (ABM 29).

This Court's cases thus make it abundantly clear that slipping off Mathis's roof was an inherent risk of the job Gonzalez had been hired to perform. Gonzalez was hired to clean a rooftop skylight, which Gonzalez *himself* claims could only be accessed for cleaning from the roof. The rooftop was therefore the jobsite, and so *any* known risks that were present there fall squarely within the *Privette* doctrine. And Gonzalez's argument that the precise spot where he slipped "was a mere path to the work site" (ABM 43), is meritless. *Tverberg* demonstrates (as common sense would suggest) that the "work site" is not limited to the precise spot where the contractor performs his task. (49 Cal.4th at pp. 518–519.) The bollard holes in *Tverberg* were located "next to the area where Tverberg was to erect the metal canopy" (*id.* at p. 529), and he fell into one while "walk[ing] from his truck toward