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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
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Case No. S247677

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 DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIV. SEVEN, CASE No. B272344; LOS ANGELES COUNTY SUPERIOR COURT,
CASE No. BC542498, THE HON. GERALD ROSENBERG, JUDGE.

**AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA IN SUPPORT OF
DEFENDANTS AND RESPONDENTS**

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**INTRODUCTION: INTEREST OF AMICUS
AND IMPORTANCE OF ISSUE**

The Civil Justice Association of California (“CJAC”) welcomes the opportunity as amicus curiae¹ to address the issue this case presents:

Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor’s employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor?

In reversing the trial court’s summary judgment for the homeowner-hirer, the appellate court answered “yes” to this question. In doing so, it also set the evidentiary bar so high for defendant homeowners and others who hire independent contractors that they rarely, if ever, can prevail in a summary judgment motion based on the “peculiar risk” doctrine. The appellate court did this by ruling that

¹ By separate application accompanying the lodging of this brief, CJAC asks the Court to accept it for filing.

“whether[, under a purported “corollary” of the peculiar risk doctrine,] a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for [the contractor to take] preventive measures” are factual issues for the jury, not for the court, to decide. *Gonzalez v. Mathis* (2018) 228 Cal.Rptr.3d 832, 843.

If allowed to stand, this opinion will muddy the waters about when, under the “peculiar risk” and cognate doctrines, summary judgment may be obtained by hirers of independent contractors sued for negligence by the contractors’ employees injured on the job. The result will be an increase in litigation and unnecessary trials over hirer liability of contractors for home construction and other services, including repairs and upkeep, and a concomitant increase in the cost of home construction, maintenance, repair and insurance for home owners and businesses who hire independent contractors for various specialized services.

CJAC is a longstanding non-profit organization whose business, professional association and financial institution members are dedicated to making more fair, economical and certain the laws for determining who pays, how much, and to whom when the conduct of some occasions harm to others. Many of our members hire independent contractors to undertake services that entail peculiar risks for which the contractors have expertise or training that our members’ employees do not. Consequently, we have participated as amicus curiae in cases concerning the scope and application of the peculiar risk doctrine at

issue here. See, e.g., *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235 (“*Camargo*”); *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198 (“*Hooker*”) and *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219 (“*McKown*”).

SUMMARY OF FACTS

The facts animate and inform the legal rules which, as limned and applied by the Court, will decide this case and shape its opinion. Accordingly, the following factual summary is taken from the briefs of the parties and the appellate opinion to provide useful context for legal analysis.

When petitioner Johnny Mathis, “master of the velvet vibrato,”² hired plaintiff Luis Gonzalez in 2012 to clean the skylight on the flat roof of his single-story Los Angeles home, “chances [were] awfully good”³ that things would turn out hunky-dory. After all, Gonzalez had been doing this same job for Mathis for the past 20 years without incident, first as an employee of the independent contractor, Beverly Hills Window Cleaning, and then in the mid-2000s as an employee of his own company, Hollywood Hills Window Cleaning (HHWC). Gonzalez advertised his own company as “specializ[ing] in hard to reach windows

² Karen Heller, *Johnny Mathis, the Voice of the '50s, was Always Ahead of this Time. Now he's Ready to Talk about it*, *THE WASHINGTON POST*, August 2, 2018.

³ “Chances Are,” co-written by Al Stillman and Robert Allen, became Johnny Mathis’s first number one hit in 1957.

and skylights,” through trained employees who took “extra care in his clients’ homes, as well as with their own safety when cleaning windows.”

After Gonzalez opened his new business, he contacted Mathis’s longtime housekeeper, Marcia Carrasco, and urged her to hire his company in place of his former employer for future cleaning of Mathis’s skylight, windows and property. Gonzalez represented that his company was bonded and insured, but failed to clarify that the “insurance” he had did not include workers’ compensation. Carrasco, on behalf of Mathis, agreed to hire Gonzalez’s company and from 2007 until 2012 HHWC was “regularly hired . . . to wash the skylight and perform other services on [Mathis’s] property.”

The skylight was on the northwest corner of the home, overlooking an indoor pool. The section of roof located west of the skylight was divided by a three-foot high parapet wall that ran parallel to the skylight. The area of roof between the skylight and east side of the parapet wall was partially obstructed by a series of ventilation pipes and mechanical equipment. The area of roof on the west side of the parapet wall consisted of an exposed ledge, approximately two feet in width. Mathis had the parapet wall constructed to screen from view the piping and mechanical equipment positioned next to the skylight. A ladder affixed to the west side of the house provided access to the roof. The top of the ladder was located near the beginning of the parapet wall.

On August 1, 2012, two of Gonzalez's employees were on the roof cleaning the skylight when Carrasco informed him water was leaking from the roof into the house. She asked Gonzalez to tell his employees about this, suggesting they use less water. In response, Gonzalez climbed onto the roof using the affixed ladder. He then walked along the ledge on the west side of the parapet wall closest to the edge of the roof instead of the inside of the wall closer to the skylight, and spoke with his employees. While walking back toward the ladder along the outer ledge, Gonzalez lost his footing and fell off the roof, sustaining serious injury. *Gonzalez, supra*, 228 Cal.Rptr.3d at 834.

PROCEEDINGS BELOW

Gonzalez sued Mathis for negligence in 2014. He alleged the worksite – the roof on Mathis's home – was dangerous. Specifically, he charged that the parapet wall, which had been a feature of the home before Gonzalez first cleaned the skylight more than 20 years ago, was dangerous, that the roofing shingles were dilapidated, resulting in slippery and loose conditions, and that the roof lacked "tie-off" points that would enable maintenance workers to secure themselves with ropes or harnesses.

At deposition, Gonzalez admitted he had been on the roof numerous times to clean the skylight, that he always used the west, or outside area from the parapet wall to access the skylight rather than the space between the inside wall of the parapet and the skylight, had known the roofing surface was dilapidated and slippery and that the

ledge lacked any protective features, including tie-off points. He also conceded he could have, but did not, decline to clean the skylight until the roofing surface was repaired and protective features were installed.

Mathis moved for summary judgment, arguing Gonzalez's claims were precluded by *Privette v. Superior Court* (1993) 5 Cal.4th 689 ("*Privette*") and its progeny. These opinions define the liability of hirers to employees of independent contractors injured while taking peculiar risks during their work. The trial court agreed and granted summary judgment for Mathis, but the appellate court reversed in part.

The opinion acknowledged that *Hooker's* "retained control" exception to the non-liability of hirers for injuries to employees of independent contractors did *not* apply under the facts of this case. But, it also held Mathis "failed to establish there is no triable issue of fact" whether he can be held liable under what it called *Kinsman's*⁴ purported "corollary" exception to the non-liability rule for hirers under *Privette* and companion authorities, declaring that a "hirer can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." 228 Cal.Rptr.3d at 842.

⁴ *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 ("*Kinsman*").

SUMMARY OF ARGUMENT

California has long protected the right of homeowners and other hirers to delegate to independent contractors the responsibility for ensuring the safety of their own workers. This court's landmark *Privette* opinion safeguarded this right 25 years ago when it declared and explained why hirers of independent contractors should not be liable to the contractors' employees for on-the-job injuries resulting from special or "peculiar risks" inherent in their work. More recent opinions by the Court have repelled or restricted a variety of legal theories – *e.g.*, "negligent hiring," "retained control," "non-delegable duties" – intended to weaken this right and shift costs onto homeowners and other kinds of hirers and away from contractors.

This case focuses on a new theory designed to demolish the bedrock principle that hirers of independent contractors should not, except in highly limited circumstances not applicable here, be held liable for injuries to contractors or their employees resulting from their own negligence. Concocted by the appellate opinion from nothingness, this new theory would impose liability upon homeowners and other hirers for injuries sustained by an independent contractor's employee whenever the contractor (or its employees) is exposed to a known hazard that cannot be remedied through "reasonable safety precautions."

If accepted by the Court, this new theory would upend current law that hirers who retain control of worksites are not liable for

injuries to the independent contractor's employees unless the contractors *affirmatively contribute* to the injuries; it would do away with the "affirmative contribution" test by supplanting it with the vague "reasonable safety precaution" standard bound to spawn new and open-ended litigation over its meaning. This new theory would also eviscerate the current legal requirement that independent contractors cannot recover from a hirer for injuries sustained by their employees from "open hazards" and known hazards whenever the employees and contractors claimed they lacked the ability to remedy the hazards. The list goes on and on as the briefs of the petitioner and his *amici* point out in describing the ruinous consequences recognition of this new theory will inflict on homeowners, hirers and workplace safety.

It is important that bright-line rules define the liability of hirers to independent contractors for injuries occasioned to the contractors and their employees from their own negligence. That is the lesson imparted by *Privette* and its progeny; it is the surest way to clarity, certainty and stability in the law and important economic relations. The new theory propounded by the appellate opinion in this case rends existing bright-line rules this Court carefully crafted over the past quarter century and invites chaos. It should be repudiated regardless of whether the independent contractor has workers' compensation insurance.

ARGUMENT

I. HOMEOWNERS AND OTHERS WHO HIRE INDEPENDENT CONTRACTORS AND DELEGATE TO THEM RESPONSIBILITY FOR THE SAFETY OF THEIR OWN EMPLOYEES SHOULD NOT BE LIABLE FOR INJURIES TO THOSE EMPLOYEES RESULTING FROM OBVIOUS WORK HAZARDS IRRESPECTIVE OF WHETHER THE CONTRACTORS HAVE WORKERS' COMPENSATION INSURANCE.

A. California's Jurisprudential Evolution of the "Peculiar Risk" Doctrine Shows why the Court should not Impose Liability on Hirers of Independent Contractors for Injuries to the Contractors' Employees Occasioned by Obvious Work Hazards and the Contractor's Negligence.

California has experienced a topsy-turvy jurisprudential ride regarding the liability of hirers for injuries to third-parties by employees of independent contractors and to the employees themselves.⁵ Understanding and learning from this history is important lest we become doomed to return whence the law stood 25 years ago.

1. *The Fluctuation in California Law from 1857 through 1992 on Hirer Liability to Employees of General Contractors and Third Parties Injured by Employee Negligence.*

In the beginning, California adhered to the general common law rule that a hirer of an independent contractor is not liable for the torts of the contractor or the contractor's employees acting within the scope of the contract. *Boswell v. Laird* (1857) 8 Cal. 469, distinguished by the

⁵ "Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as the result of his work only and not as to the means by which such result is accomplished." Lab. Code § 3353.

“peculiar risk” doctrine exception as explained in *Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 250 (“*Van Arsdale*”).

One policy underlying that rule is “since the [hirer] has no right of control over the manner in which the work is to be done, [the work] is to be regarded as the contractor’s own enterprise, and [the contractor], rather than the [hirer], is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it.” W. Page Keeton, et al., *PROSSER AND KEETON ON THE LAW OF TORTS* § 71, at 509 (5th ed. 1984). Another policy supporting the rule is that the amount paid by the hirer to the independent contractor inherently includes the cost of safety precautions and insurance coverage. *Privette, supra*, 5 Cal.4th at 693.

As so often occurs with bright-line rules, however, exceptions driven by what courts view as exigencies and complication creep in to modify them. One of these exceptions was the “peculiar risk” doctrine. “Under that doctrine, a person who hires an independent contractor to do inherently dangerous work can be held liable for tort damages when the contractor causes injury to others by negligently performing the work. The doctrine initially served to ensure that innocent bystanders or neighboring landowners injured by the hired contractor’s negligence will have a source of compensation even if the contractor turned out to be insolvent.” *Camargo, supra*, 25 Cal.4th at 1238-1239.

“Peculiar risk” was recognized early in this country by *Chicago City v. Robbins* (1862) 67 U.S. 418. There, an independent contractor was hired by Chicago City to excavate a sidewalk next to the hirer’s adjoining property. A passerby fell into the excavated area and was injured. The Court held the hirer liable for the tortious conduct of the independent contractor. *Id.* at 429. As *Van Arsdale* explained about the policy reasons underlying the “peculiar risk” exception to the general non-liability rule of the hirer:

Some of the principal [reasons] are that the enterprise, notwithstanding the employment of the independent contractor, remains the [hirer’s] because he is the party primarily to be benefitted by it, that he selects the contractor, is free to insist upon one who is financially responsible, and to demand indemnity from him, that the insurance necessary to distribute the risk is properly a cost of the [hirer’s] business, and that the performance of the duty of care is of great importance to the public.

68 Cal.2d at 245.

The “peculiar risk” doctrine morphed into an expansive exception to the non-liability of hirers of independent contractors for injuries inflicted on others, including the contractors’ employees, from the contractor’s negligence. That doctrine, along with other “apparent exceptions” came to “overshadow in importance and scope” the [non-liability rule] applicable to hirers of general contractors. *Id.* at 250. Eventually the rule, embraced by California and a *minority* of jurisdictions in this country, served to rhythmically shield independent

contractors who caused injury to their own employees from liability for those injuries beyond the exclusive remedy of workers' compensation. In other words, the peculiar risk exception and its related doctrines came to swallow the non-liability rule for hirers of independent contractors.

Yet, at the same time, the *hirer* of the independent contractor could also be held liable in tort for the same injury-causing conduct of the contractor. "As a matter of fact, for nearly three decades, California allowed employees of independent contractors to seek recovery from the *hirers* of the independent contractors regardless of whether *direct* . . . or *vicarious* liability was the basis of the claim." Aaron Love Turner (Comment), *Toland v. Sunland Housing Group, Inc.: the California Supreme Court Erroneously Takes "Liability" out of "Direct Liability"* (1999-2000) 27 *W. ST. U. L. REV.* 425, 435 (emphasis added).

2. Privette's Sea Change Reversal on the Liability of Hirers for Employee Injuries Occasioned by their own Negligence or that of the General Contractor.

In 1993, *Privette, supra*, 5 Cal.4th 689 was decided, a watershed opinion on liability of independent contractors hired for jobs entailing "peculiar risks" that result in injuries to their employees. The defendant, a schoolteacher who owned several rental properties, hired an independent contractor to install a new tar and gravel roof on his duplex. The contractor initially transported hot tar to the roof of the duplex by use of a kettle and pumping device parked in a nearby

driveway. But “[w]hen the gravel truck arrived, the [contractor] moved the kettle and pumping device to make room for the truck.” *Id.* at 692. Once the gravel was deposited on the roof, the contractor’s employees determined they needed 50 more gallons of tar to complete the job. The contractor directed one of his employees to carry 10 five-gallon buckets of hot tar up a ladder to the roof. While carrying the buckets up the ladder, the employee fell, suffering burns from the hot tar. He sought workers’ compensation benefits and tort damages against the defendant property owner, Franklin Privette.

Privette, having lost in the trial and appellate court, petitioned this Court to reconsider its line of previous opinions that allowed hired contractors’ employees to seek recovery from a property owner for injuries occasioned by the contractors’ conduct. See, *e.g.*, *Woolen v. Aerojet General Corp.* (1962) 57 Cal.2d 407, 410-411 and other authorities cited in *Privette, supra*, 5 Cal.4th at 696. The Court obliged petitioner, clarifying in its opinion that “peculiar risk” means neither risk that is abnormal to the type of work done, nor risk that is abnormally great; but simply means special, recognizable danger that arises out of the work itself. *Id.* at 695. More importantly, the Court provided several reasons for reversing the peculiar risk exception to the non-liability rule for hirers of independent contractors.

First, *Privette* explained it was anomalous and a highly criticized policy to continue to shield independent contractors from liability for

their employees' injuries occasioned by the contractors' negligence while permitting employees to also recover in tort against the hirer for its negligence. *Privette* reasoned that "the 'principal' who hires an independent contractor should be subject to no greater liability 'than its independent contractor agent,' whose exposure for injury to an employee is limited to providing workers' compensation insurance." 5 Cal.4th at 728, citing to and quoting from *Olson v. Kilstofte and Vosejka, Inc.* (D. Minn. 1971) 327 F.Supp. 583, 587.

Second, to "impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work . . . penalize[s] those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees." *Privette, supra*, 5 Cal.4th at 729.

Third, "our conclusion in *Woolen v. Aerojet General Corp., supra*, 57 Cal.2d 407 that peculiar risk liability should extend to the employees of the independent contractor does not withstand scrutiny; such a broad extension of . . . peculiar risk is inconsistent with the approach taken by a majority of jurisdictions, and with the view expressed by the drafters of the Restatement Second of Torts." *Privette, supra*, 5 Cal.4th at 702.

3. Toland and Camargo Clarify that Privette's Modification of the "Peculiar Risk" Doctrine Applies whether the Negligence of the Hirer is "Vicarious" or "Direct."

Next came *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253. Plaintiff Timothy Toland was employed as a carpenter by CLP Construction, a framing contractor that was working in a subdivision owned by defendant Sunland Housing. On a day when conditions were muddy and wet, Toland assisted other CLP employees in manually raising a framed wall into place, which fell back, injuring him. Toland filed a workers' compensation claim against CLP and sued Sunland alleging that since raising the rain-soaked wooden wall created a peculiar risk of injury, Sunland was negligent in not providing in the contract, or in some other manner, for CLP to take special precautions to prevent his injury. Toland argued that Sunland's negligence was "direct"⁶ as opposed to "vicarious;"⁷ claiming that *Privette* was limited solely to vicarious liability, he argued that its application of the "peculiar risk" doctrine did not apply to bar plaintiff's lawsuit.

⁶ "Direct liability" is based on some fault of the hirer and is more difficult to prove than indirect or vicarious liability because the employee must prove a cause of action of negligence against the hirers of the independent contractors.

⁷ With indirect or vicarious liability, the employee of the independent contractor only has to prove a duty based on the hirer-independent contractor relationship, the first element of a negligence cause of action. However, *Privette* has made it very difficult to impose such no-fault liability.

Toland held, however, that “contrary to [plaintiff’s] assertion, . . . *Privette* bars employees of a hired contractor who are injured by the contractor’s negligence from seeking recovery against the hiring person, irrespective of whether recovery is sought under the peculiar risk set forth in . . . [Restatement 2d] section 413 [direct liability] or . . . section 416 [indirect liability].” *Id.* at 267.

Camargo buttresses *Privette* and *Toland* by prohibiting farm worker employees of an independent contractor from suing the farm owner for its “negligent hiring,” a form of “direct” liability, of the contractor who had little or no knowledge of California’s Heat Illness Prevention Regulation and consequently did nothing to protect its farm worker employees from unhealthy exposure to blistering hot employment conditions. In refusing to allow recovery under the “negligent hiring” provision of section 411 of the Restatement 2d, *Camargo* again obliterated any viable distinction between vicarious and direct liability. “Liability under both sections [416 and 413 of the Restatement 2d] 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.” *Camargo, supra*, 25 Cal.4th at 1241, quoting *Toland*.

4. ***Hooker and McKown further Limit the Liability of Hirers by Holding that their “Retained Control” of the Contractor’s Work must Affirmatively Contribute to the Employee’s Injury by, for instance, Requiring the Employee Perform the Work in a Negligent Manner or Providing Equipment for the Employee’s use that is Defective.***

Hooker, supra, 27 Cal.4th 198 holds that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer “retains control” over safety conditions at a worksite, but is liable only insofar as the hirer’s exercise of retained control *affirmatively contributes* to the employee’s injuries.

The facts in *Hooker* are instructive for this case. A crane operator employed by a general contractor hired by Caltrans was killed when the crane he was operating tipped over. His widow filed suit against Caltrans, alleging it was liable for her husband’s death because Caltrans “retained control” over the worksite. Specifically, the plaintiff relied upon the existence of a Caltrans safety manual that set forth various guidelines for jobsite safety. Caltrans’s motion for summary judgment under *Privette* and *Toland* was granted by the trial court, but the court of appeal reversed. The Court granted review to consider the issues that arise when the hirer retains control of the worksite.

Hooker found the crane tipped over because the operator withdrew the outriggers on it to let other vehicles pass on the narrow overpass where the crane was operated. When the outriggers were withdrawn and the boom on the crane was swung, it became