S118561

IN THE
CALIFORNIA SUPREME COURT

RAY KINSMAN, et al.,

Plaintiffs, Respondents, and Petitioners

v.

UNOCAL CORPORATION,

Defendant, Appellant, and Respondent.

ON REVIEW FROM THE FIRST APPELLATE DISTRICT, DIVISION THREE,
AFTER REVERSING THE JUDGMENT OF THE
SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO
HONORABLE PAUL H. ALVARADO, JUDGE

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Unocal's Answer Brief on the Merits is well written but not well reasoned.

Unocal offers no reasoned explanation why this Court should expand the *Privette* doctrine from providing immunity from "liability without fault" (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 691) to providing *immunity despite fault*.

Unocal offers no reasoned explanation why this Court can and should abrogate landowner liability for negligence provided in Civil Code section 1714, Restatement of Torts (Second) section 343, and three decisions of this Court: *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 229-230; *Markley v. Beagle* (1967) 66 Cal.2d 951, 955; and *Rowland v. Christian* (1968) 69 Cal.2d 108. See Part I.C, below.

Other aspects of Unocal's position also lack a reasoned basis.

- Though Unocal seeks judgment as a matter of law, Unocal waived this remedy by failing to file a Petition for Rehearing below and failing in this Court to state this claim as an "Issue Presented." See Part I.B, below.
- Though Unocal relies on *Privette*, *Toland*, *Camargo*, and *Hooker*, Unocal misdescribes their immunity as resting solely on workers' compensation, ignoring that in each case the hirer (unlike Unocal) was without fault. See Part I.D.1, below.
- Though Unocal acknowledges that "affirmatively contributing" to an injury supports liability, Unocal ignores that its "affirmative contribution" to Kinsman's mesothelioma was undisputed, even *admitted by Unocal*. Hence, the trial court instructed that Unocal's asbestos was a substantial factor in causing Kinsman's mesothelioma. See Part I.D.2.a, below.
- Though Unocal claims landowners are liable only for "fraudulent concealment," the *Toland* footnote Unocal cites was not a holding on an issue presented and did not purport to define the sole basis of landowner liability. See Part I.D.2.b, below.

In sum, Unocal has failed to provide any law or policy supporting the Court of Appeal's reliance on the *Privette* doctrine to limit a landowner's statutory and common-law liability for negligently creating a hazardous condition of the property.

Unocal's rationale leads to bad public policy. The risks to the public

are increased by a policy that exonerates the only entity that controlled the presence of asbestos on the property and had sufficient knowledge of hazard to protect against it. Consider a landowner who buried a land mine in his lawn and then hired an arborist to trim his trees and a gardener to mow the lawn. When the lawn mower triggered an explosion killing the arborist, the landowner would be liable under Civil Code section 1714 for not exercising "ordinary care or skill in the management of his or her property . . . ." But under Unocal's rationale, the landowner would not be liable, supposedly because he had not "fraudulently concealed" the hazard (ABOM at 38-45) and had not "requir[ed] the work to be performed in an unsafe manner." ABOM at 46-47. In short, under Unocal's rationale every hirer who knows of a hazardous condition on the property can avoid liability simply by hiring an independent contractor and remaining silent about the hazard. Such a policy–rewarding the silence of a culpable actor–wrongly increases the risk to the public.

In addition, the instant case lacks an essential ingredient supporting immunity in decisions from *Privette* to *Hooker*: here no evidence shows negligence by any contractor or any contractor's employee. The only entity with sufficient knowledge of the asbestos hazard to be negligent in failing to protect against it was Unocal. *Kinsman*, 110 Cal.App.4th at 831; Slip Opinion at 2-3. Unocal at trial showed it did not believe any contractor (including Kinsman's employer) was negligent:

(1) Unocal presented no evidence to carry its burden of proof that other contractors knew of the asbestos hazard and thus were negligent for failing to protect against it. *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 478 (asbestos defendant has burden to prove all the elements of the fault of others).

(2) Unocal did not argue that contractors were at fault (RT 1373-1423);

(3) Unocal did not obtain instructions on determining the fault of any contractors (CT 92-153); and

(4) Unocal did not obtain a jury verdict form requiring the jury to find and apportion fault to Kinsman's employer or to other contractors. CT 101-107.

The only other entities Unocal claimed to be at fault were the

insulation's manufacturers and suppliers. RT 1418-1420 (Unocal argues for 90% apportionment to manufacturers and suppliers for defective design); CT 133 (instruction on design defect).

For all these reasons, the instant case resembles *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, rather than any decision from *Privette* to *Hooker*. Hence, the decision below, wrongly allowing Unocal to invoke the immunity provided the *Privette* doctrine, should be reversed with directions to reinstate the judgment for Kinsman.

I.

Unocal fails to show that the *Privette* doctrine limits the liability stated in Civil Code § 1714, the Restatement, and *Austin*, *Markley*, and *Rowland*.

A. Summary of argument.

Unocal's claim that *Privette* limits Unocal's premises liability for negligence is illogical, contrary to Civil Code section 1714 and three decisions of this Court (*Austin*, *Markley*, and *Rowland*), and unsupported by any decision of this Court from *Privette* to *McKown*.

Unocal fails to recognize that decisions from *Privette* to *Hooker* granted immunity only to bar vicarious liability where the hirer (unlike Unocal) was *without* fault. Hence, this Court's decisions from *Privette* to *Hooker* do not aid Unocal because the jury found Unocal at fault for knowingly exposing Kinsman to an asbestos hazard that Unocal created but failed to warn of or protect against.

Though Unocal acknowledges it can be liable if it "affirmatively contributed" to Kinsman's injuries, Unocal claims that its installation of asbestos on its premises and its failure to warn or protect Kinsman did not constitute an "affirmative contribution." Answer Brief on Merits (ABOM) at 31. But Unocal's appellate denial of making an "affirmative contribution" is belied by three factors: (1) at trial Unocal admitted causation; (2) the trial court instructed the jury to find causation (an instruction Unocal does not here challenge); and (3) this Court ruled in *Hooker* that an affirmative contribution "need not always be in the form of actively directing a contractor or contractor's employees." *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 212, fn 3.

For these reasons, the *Privette* doctrine does not limit Unocal's liability for negligence. Hence, the decision below should be reversed with instructions to reinstate the judgment for Kinsman.

B. Unocal waived its claim for judgment.

Unocal's Answer first seeks judgment as a matter of law. ABOM at 23-51.

But Unocal *waived this claim*. After the Court of Appeal failed to rule on Unocal's claim for judgment, Unocal failed to assert the claim (1) in a Petition for Rehearing below or (2) in its Answer in this Court as an "Issue Presented."

1. The Court below ignored Unocal's claim for judgment.

On appeal from the denial of its motion for judgment NOV, Unocal asked the Court of Appeal to "grant judgment in Unocal's favor." AOB at 36; Reply Brief at 22; *Kinsman, supra*, 110 Cal.App.4th at 831 (citing Unocal's appeal from the denial of its motion for judgment NOV); Slip Opinion at 3.

But the Court of Appeal neither discussed nor ruled on Unocal's claim for judgment. The "Disposition" below expressly resolved *only* Unocal's appeal from the judgment: "The judgment is reversed and the matter remanded for a new trial in accord with this opinion." *Kinsman*, 110 Cal.App.4th at 847; Slip Opinion at 24. Unocal's quest for judgment was impliedly denied.

2. Unocal filed no petition for rehearing.

After the Court of Appeal impliedly denied Unocal's claim for judgment as a matter of law, Unocal failed to file a Petition for Rehearing.

Where a party fails to file a Petition for Rehearing, it was formerly this Court's policy not to consider "any issue or many material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing." Former Cal. Rules of Court, rule 29(b)(2).

Though Rule 29 no longer contains this strict prohibition, Unocal has failed to explain why this Court should consider the issue even though Unocal did not consider it important enough to file a Petition for Rehearing.

3. Unocal failed to state its claim for judgment as an "Issue Presented."

Moreover, Unocal waived its claim for judgment in this Court by failing to state in a Petition for Review or in its Answer to Kinsman's Petition that its claim for judgment was an "Issue Presented."

This omission violates this Court's rules, which require either (1) Unocal's own Petition for Review, challenging the Court of Appeal's failure to rule on the denial of judgment NOV (Cal. Rules of Court, Rule 28, subd. (a)(1)), or (2) Unocal's statement of a new "Issue Presented" in Unocal's Answer to Kinsman's Petition for Review. Cal. Rules of Court, Rule 28, subd. (a)(2); Rule 28.1, subd. (c).

For these reasons, Unocal's claim for judgment as a matter of law was waived.

4. The issue is not worthy of review.

In addition, this Court should ignore Unocal's claim for judgment as a matter of law because that claim is not worthy of this Court's review for two reasons:

(1) This Court reviews decisions of the Court of Appeal. Cal. Const., art VI, § 12, subd.(b). But the Court of Appeal did not rule on Unocal's appeal from the denial of its motion for judgment de novo. Hence, there is no Court of Appeal decision on the point for this Court to review.

(2) In claiming judgment as a matter of law, Unocal raises largely factual questions that the jury, on substantial evidence, resolved against Unocal. This Court's resolution of these fact issues will neither "secure uniformity of decision [n]or . . . settle an important question of law." Cal. Rules of Court, Rule 28, subd. (b)(1).

Unocal's Answer shows that the issues raised by the trial court's denial of judgment NOV are largely factual:

- Did Kinsman's injuries arise solely from "the manner in which the work is performed"? ABOM, Part I.B (p. 25 ff).
- Was there "evidence of concealment or failure to disclose"? ABOM, Part I.E.1 (p. 38 ff).
- Did Unocal "affirmatively contribute" to Kinsman's injury? ABOM, Part I.E.2.a (p. 46 ff).
- Could Unocal "reasonably foresee that Kinsman would be injured as a result of asbestos exposure"? ABOM, Part I.E.2.b(2) (p. 50 ff).

These factual issues do not warrant this Court's review because their resolution will neither "secure uniformity of decision [n]or . . . settle an

important question of law." Cal. Rules of Court, Rule 28, subd. (b)(1).

For all the foregoing reasons, Unocal's claim for judgment as a matter of law (ABOM at 23-51) should be disregarded.

C. Unocal's quest for immunity despite fault abrogates Civil Code § 1714 and three decisions of this Court.

In Parts I and II of its Answer, Unocal asks this Court to expand the *Privette* doctrine, from barring liability without fault to barring liability *despite* fault.

Such an expansion of the *Privette* doctrine would abrogate Civil Code section 1714 and overrule this Court's decisions in *Austin*, *Markley* and *Rowland*.

But Unocal offers no reasoned explanation why a landowner's liability for negligence under Civil Code section 1714, *Austin*, *Markley*, and *Rowland* should be rejected to confer immunity *despite the landowner's negligence*.

1. Unocal was negligent: Exposing Kinsman to an asbestos hazard without warning or protection.

Kinsman presented substantial evidence of Unocal's negligence, summarized by the Court of Appeal as follows:

> Kinsman claimed Unocal was negligent because, in the 1940's, the company knew or should have known that asbestos was hazardous, but it failed to warn Kinsman or protect him from the hazard. To show Unocal's knowledge, Kinsman relied on several published articles in the 1930's and 1940's linking asbestos with asbestosis, lung cancer and mesothelioma, and reports distributed by other oil companies and oil industry associations in the 1940's and 1950's that described the risks associated with asbestos exposure. Given Unocal's access to these published articles and reports and its members ship in oil industry associations, Kinsman's expert testified that, in the 1950's, oil companies such as Unocal knew or should have known asbestos posed a risk of harm to refinery workers. Despite this knowledge, Unocal never warned Kinsman about the danger of asbestos exposure and did not provide him with a mask to wear for protection.

Kinsman, 110 Cal.App.4th at 831; Slip Opinion at 2-3.

This assessment of the evidence of Unocal's negligence has never been challenged by Unocal. Unocal failed to file a Petition for Rehearing in the Court of Appeal and failed to state in its Answer to Kinsman's Petition for Review that the Court of Appeal's summary of Unocal's

negligence created an "Issue Presented."

Hence, Unocal's attempt to portray itself as without negligence must be rejected as barred by Unocal's waiver and as refuted by the substantial evidence that the Court of Appeal summarized. See also Kinsman's OBOM at 8-10; Kinsman's Respondent's Brief in the Court of Appeal at 16-24.

2. Under Civil Code § 1714 and the Restatement, a negligent landowner is liable for a hazardous condition.

The instructions on premises liability (CT 127-129) embody Civil Code section 1714 and this Court's decisions imposing liability *based on fault*—where the landlord negligently creates a hazard but fails to warn or protect against it. OBOM 21-27.

a. Liability for negligence under section 1714.

Civil Code section 1714 *expressly states* the liability of a negligent landowner:

> Every one is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the *management of his or her property* or person . . . . (Emphasis added.)

This statute embodies a bedrock principle: "one whose negligence has caused damage to another should be liable therefor." *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 822.

Unocal offers no valid reason why it should be exempt from this principle. Though Unocal touts Kinsman's receipt of worker's compensation benefits (ABOM at 23, 36), the plaintiff's receipt of worker's compensation benefits is not a ground for granting immunity to every tortfeasor. Specifically, this Court allows employees to sue "anyone" (other than the employer), despite the employee's receipt of worker's compensation benefits: "[T]he exclusivity clause does not preclude the employee from suing *anyone else* whose conduct was a proximate cause of the injury." *Privette*, 5 Cal.4th at 697 (citing Labor Code § 3852)(emphasis added).

b. Liability for negligence under the Restatement.

The principle in *Li*–that negligence requires liability–is embodied in Restatement section 343, providing "liability" for negligently exposing others to dangerous "condition[s]" on the landowner's premises:

> A possessor of land is subject to liability for physical harm caused to his invitees by a *condition of the land* if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Rest.2d Torts, § 343 (emphasis added).

3. This Court imposes liability on a negligent landowner.

Unocal fails to distinguish three decisions of this Court that impose liability for negligently creating and exposing anyone to a hazard on the land.

1. In *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 229-30, a contractor's employees doing repair work for the landowner were injured when a construction boom contacted an exposed power line on defendant's property. This Court (in line with Civil Code § 1714 and Restatement (Second) Torts § 343) imposed liability on the defendant landowner for exposing workers to "a natural or artificial condition upon his premises" that posed "an unreasonable risk":

> "A possessor of land who known, or reasonably should know, of a natural or artificial condition upon his premises which, he should foresee, exposes his business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved therein, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm." [Citation.]

Austin, 44 Cal.2d at 233.

Unocal mistakenly claims that *Austin* imposed liability only because

the hirer/landowner "refused to de-energize power lines at the hirer's plant on [the] night that contractor's crane operator was performing work in vicinity of power lines." ABOM at 46. But the defendant's refusal to have the power shut down was relevant only because the power lines on the defendant's property created a hazard. Unocal focuses solely on the refusal to cut off the power in an attempt to turn *Austin* into a case of "affirmative contribution" to the worker's injury, supposedly to distinguish *Austin* from the instant case. But *Austin* and the instant case are parallel in all important respects—in each case (1) a condition on the property created a hazard known to the landowner, (2) the landowner failed to take reasonable steps to protect against the known hazard, and (3) on this evidence the trial court properly entered judgment against the landowner.

2. In *Markley v. Beagle* (1967) 66 Cal.2d 951, 955, this Court ruled that the landowner owed a contractor's employee "a duty of reasonable care" to protect him from the "dangerous condition" (defective railing) on the property. This holding supports the trial court's judgment precisely. But Unocal fails to mention *Markley*, let alone distinguish it.

3. In *Rowland v. Christian* (1968) 69 Cal.2d 108, this Court expanded the application of the premises-liability principles in *Austin* and *Markley* to protect all persons. This Court abolished the distinctions that had conferred immunity on the landowner, depending on the injured plaintiff's status (trespasser, invitee, or licensee). To "avoid injustice," *Rowland* stated that the landowner's duty in section 1714 applied to "everyone," rejecting:

> the wholesale immunities resulting from the common law classifications, and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion. *We decline to follow and perpetuate such rigid classifications.*

Rowland, 69 Cal.2d at 119 (emphasis added).

But Unocal asks this Court to abrogate *Rowland* by adopting another "classification"—"contractor's employee"—to create an immunity from negligence liability based solely on the status of the plaintiff. This Court should not repudiate *Rowland* in the manner Unocal seeks.

In sum, if this Court grants Unocal judgment as a matter of law or affirms the decision below, this Court will have to invalidate Civil Code

section 1714, overrule *Rowland, Austin,* and *Markley,* and abrogate the principle "that one whose negligence has caused damage to another should be liable therefor." *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 822.

Unocal has failed to justify such a radical revision of California tort law to benefit a defendant whose negligence was a substantial factor in causing a worker's injury.

Hence, the Opinion below should be reversed with directions to reinstate the judgment for Kinsman.

4. Unocal fails to refute its liability for negligence.

Unocal offers no reasoned explanation why section 1714 and the Restatement do not validate the premises liability instructions and judgment below.

Unocal merely asserts its *ipse dixit*–that "the holding of *Rowland* is, *of necessity*, limited by the *Privette* doctrine where a contractor's employee brings an action against a hirer seeking damages for an injury that occurred on the hirer's premises." ABOM at 31 (emphasis added). But it is one thing for Unocal to claim that *Privette* prevails "of necessity"; it is another thing to demonstrate that *Privette* prevails, which Unocal has failed to do.

Unocal says a landowner has "no general duty of care" for a contractor's employees. ABOM at 31. True enough; but this is beside the point–Kinsman's judgment does not rest on a "general duty of care." Rather, the judgment rests on a landowner's specific duty to protect anyone on the property from a hazardous condition on the land.

Though Unocal attempts to delimit a landowner's duty to "fraudulent concealment" of a hazardous condition (ABOM at 31-32, 35-36), *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, which Unocal cites, did not present an exclusive list of the grounds of landowner liability. See Part I.D.2.b, below.

Finally, Unocal cites *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373 (disapproved in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1243-1245 on negligent hiring and in *Hooker*, 27 Cal.4th at 209-210, 214, on negligent exercise of retained control). But *Grahn* ought not be followed because (1) it is internally contradictory and (2) its rationale for limiting landowner liability violates this Court's rules on causation.

1. *Grahn* was contradictory. On the one hand, *Grahn* acknowledged that "*Privette* did not abrogate the law in California that a hirer of an independent contractor may be liable to the independent contractor's employee for the hirer's *own independent fault*." *Id.* at 1379 (emphasis added). *Grahn* noted that where (as here) liability is based on the "hirer's own negligent conduct," "*Privette*'s concern about the fundamental unfairness of imposing vicarious liability on a nonnegligent hirer is *entirely inapplicable*." *Id.* at 1384-85.

Yet *Grahn* contradicted this view by ruling that "the hirer cannot be held liable to the independent contractor's employee as a result of the dangerous condition on the hirer's property if: 1) a preexisting dangerous condition was known or reasonably discoverable by the contractor, and the condition is the subject of at least a part of the work contemplated by the independent contractor." *Id.* at 1401.

Grahn fails to reconcile the duty it acknowledges with the immunity it imposes.

2. *Grahn*'s grant of immunity violated basic tort principles.

First, *Grahn* granted immunity because the dangerous condition was "known or reasonably discoverable by the contractor"(*ibid.*)–in other words, because someone else (the contractor) was also negligent. But to grant "A" immunity simply because "B" was negligent violates the concurrent cause rule: a negligent party "cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [name of plaintiff]'s harm." Judicial Council Civil Jury Instructions, CACI 431; *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 586. The jury was instructed on the concurrent cause rule (CT 125), and Unocal does not challenge that instruction.

Moreover, after the abolition of contributory negligence in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, California law no longer permits a negligent party to be exonerated simply because someone else was also at fault.

Second, it is illogical for *Grahn* to grant immunity simply because the hazard was "the subject of at least a part of the work contemplated by the independent contractor." This rationale oddly eliminates liability where the defendant's culpability is *greater*. Under *Grahn*'s rationale, if the

landowner knows the contractor's employee will be required by the work to encounter the hazard, then the landowner is immune. But if the employee's contact with the hazard is only incidental, then the landowner is liable. No rule of logic or tort law suggests that where nexus between the hazard and the employee's work is close, there is immunity, but where the nexus between the hazard and the work is remote, only then is there liability.

A third reason not to follow *Grahn* is that a central ground for the immunity in *Grahn* is absent here: the independent contractors who worked with the asbestos insulation knew of the risk. In *Grahn*, the contractor's insulation work occurred from 1976 to 1989, when asbestos hazards were well known and asbestos insulation had been banned.[1] For this reason, *Grahn* said "the hirer" was "entitled to assume that the independent contractor" would "perform its responsibilities in a safe manner, taking proper care and precautions to assure the safety of its employees." *Grahn*, 58 Cal.App.4th at 1398. On this basis, *Grahn* could rule that the "duty to protect" the contractor's employees resided with the contractor. *Id.*

By contrast, in the instant case no evidence showed that any contractor in the 1950s knew that the insulation on Unocal's property was hazardous. Indeed, no evidence showed (1) that the insulators were "contractors" (rather than Unocal's employees), (2) that those "contractors" knew that they were working with asbestos, (3) that they knew that asbestos was dangerous, and (4) that they knew how to avoid asbestos injuries. Thus, Unocal (unlike the contractor in *Grahn*) was not "entitled to assume" that the contractors working at the refinery would "tak[e] proper care and precautions to assure the safety" of workers like Kinsman. *Grahn*, 58 Cal.App.4th at 1398.

For all these reasons, Unocal has failed to refute its liability for negligence under Civil Code section 1714 and this Court's decisions in *Austin*, *Markley*, and *Rowland*.

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[1] See *Buckley v. Metro-North Commuter RR* (2d Cir. 1996) 79 F.3d 1337, 1340 ("asbestos" has been "widely recognized as a carcinogen *since the mid-1970s*"); *Affiliated FM Ins. Co. v. Board of Educ. of City of Chicago* (N.D.Ill 1992) 1992 WL 409442 at *10 (after asbestos insulation "banned" in about "1973," school board "*knew* that the presence and release of asbestos was a potential health hazard").

D. Unocal expands the *Privette* doctrine beyond its rationale.

Unocal asks this Court to expand the *Privette* doctrine beyond its rationale to relieve Unocal of a judgment resting on substantial evidence of Unocal's negligence. All of Unocal's arguments are without merit.

1. Unocal ignores *Privette*'s requirement for immunity: that the hirer not be at fault.

To obtain immunity from liability for negligence, Unocal asks this Court to ignore an essential element of the *Privette* doctrine: that the hirer not be at fault.

For example, Unocal describes the *Privette* doctrine as follows:

- A hirer "cannot generally be held liable to a contractor's employee for injuries that occur in the course of the contract work." ABOM at 3.
- "[I]t is unfair to impose liability on a hirer based on injuries arising from the manner in which the contractor and its employees have performed the contract work." ABOM at 26.
- The *Privette* immunity applies even though the hirer has "knowledge of a dangerous condition" and could have "foreseen the risk to the contractors' employees . . . ." ABOM at 37.

What these summaries omit is the requirement that the conditions that harmed the employee were not caused by the hirer's negligence.

In *Privette*, this Court described the hirer who is entitled to immunity as "innocent of any personal wrongdoing," as "fault-free" and as one who ought not be subject to "vicarious liability" for a contractor's negligence. *Privette*, 5 Cal.4th at 694, 701, 695 and fn. 2.

Toland said the *Privette* doctrine barred "*`vicarious' or `derivative'* [liability] 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." *Toland*, 18 Cal.4th at 265 (emphasis added).

Camargo cited *Toland*'s foregoing quotation to justify immunity for negligent hiring: "the liability of the hirer 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 caused the injury by failing to use reasonable care in performing the work." *Camargo,* 25 Cal.4th at 1244.

Hooker similarly explained that where harm is caused by "the hired contractor's negligence," the *Privette* doctrine bars imputing liability to "the hiring person, who did nothing to create the risk that caused the injury . . . ." *Hooker,* 27 Cal.4th at 204 (quoting *Toland,* 18 Cal.4th at 256).

In sum, in this Court's decisions granting immunity, a central justification was that the hirer was without fault in creating the hazard that harmed the plaintiff.

McKown presented the first case in which the hirer was negligent, and this Court did not apply the *Privette* doctrine's immunity: "when a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence." *McKown,* 27 Cal.4th at 225.

The instant case resembles *McKown* and differs from all the prior cases in two significant respects:

First, substantial evidence (accepted by the Court of Appeal) showed that Unocal was negligent– Unocal knew of the asbestos hazard but failed to warn or protect Kinsman from it.

Second, no evidence showed that anyone other than Unocal (certainly not Kinsman's employer) knew of the asbestos hazard and therefore could have been negligent in failing to perform the work more safely. Unocal conceded it had no evidence of any other entity's negligence by (1) failing to argue that anyone other than the manufacturers and suppliers of the asbestos insulation were at fault (RT 1373-1423), (2) by failing to obtain instructions allowing the jury to determine the fault of anyone other than the manufacturers and suppliers (CT 92-153), and (3) by failing to obtain a jury verdict form requiring the jury to find and apportion fault to Kinsman's employer or to another contractor. CT 101-107.

For these reasons, Unocal is not entitled to an immunity that this Court confers only on hirers without fault.

2. Unocal's claimed "exceptions" fail to support the judgment below.

Unocal claims that the *Privette* doctrine permits only four grounds of hirer liability: (1) fraudulent concealment; (2) negligent exercise of retained control; (3) negligently failing to undertake a promised safety measure, and (4) affirmatively contributing to the worker's injury. ABOM at 24. Unocal claims that any negligence falling outside the "limited scope of these exceptions" (ABOM at 24) is immune from liability. Because the premises liability instructions given at trial did not conform to Unocal's four exceptions, Unocal claims the Opinion below properly reversed the judgment. ABOM, Part II.A at 52-58.

But, for three reasons, Unocal's analysis is mistaken and fails to support the Court of Appeal's reversal of Kinsman's judgment.

First, Unocal's argument ignores this Court's bright line between immunity and liability–negligence. The unifying thread of this Court's decisions is this: where (as here) the hirer negligently created the hazard that inflicted harm, then the hirer may be liable (*McKown)*; but if the hirer was not negligent in creating the hazard that inflicted harm (so that any liability could only be vicarious, based on the contractor's negligence) then the hirer may not be liable (*Privette*, *Toland, Camargo*, *Hooker*). See Part I.D.1, above.

Second, though Unocal acknowledges that it can be held liable for "affirmatively contributing" to Kinsman's disease, Unocal offers no plausible explanation why its creation of an asbestos hazard on its property, while failing to warn or protect Kinsman from that hazard, does not constitute an "affirmative contribution" to Kinsman's disease. See Part I.D.2.a, below.

Third, Unocal's discussion of "fraudulent concealment" (ABOM at 38-45) is irrelevant because the judgment properly rests on a finding of Unocal's negligence, liability supported by Civil Code section 1714 and by this Court's decisions in *Austin*, *Markley*, and *Rowland.* Hence, this Court need not consider Unocal's argument that the trial court judgment cannot be affirmed on the ground of "fraudulent concealment." See Part I.D.2.b, below.

a. Unocal "affirmatively contributed" to Kinsman's mesothelioma.

This Court requires hirer liability where (as here) the hirer "affirmatively contributed to the employee's injuries . . . ." *Hooker*, 27 Cal.4th at 214; *McKown*, 27 Cal.4th at 222 (liability where "the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury.").

Kinsman's Opening Brief cited the "affirmative contribution" test as a ground for reversing the Court of Appeal decision and reinstating the judgment for Kinsman. OBOM at 54-55.

Unocal now claims: "Plaintiff can point to no evidence establishing that Unocal *affirmatively contributed* to plaintiffs' injuries." ABOM at 46. Unocal also attempts to limit a hirer's "affirmative contribution" to a hirer's "require[ment] that the contract work [] be performed in an unsafe manner." ABOM at 46-47. But this claim contradicts Unocal's position at trial, where Unocal admitted–and the trial court agreed–that if Unocal was negligent, its negligence was a substantial factor in causing Kinsman's injury. Unocal's attorney said:

> "If [Unocal was] negligent, I don't think I have any evidence that that negligence was not a substantial factor." RT 893:8-10.

Hence, the trial judge instructed the jury that Kinsman's exposure to asbestos at Unocal "was a substantial factor in causing or contributing to" Kinsman's "risk of developing mesothelioma." CT 122.

Under this ruling, the verdict form did not ask the jury to determine causation, but provided that if the jury found Unocal negligent, the jury should proceed to damages. CT 181-187.

In light of Unocal's admission of causation and the trial court's instruction to the jury that causation was established, Unocal's denial in this Court of making any affirmative contribution to Kinsman's mesothelioma is a change in a fact-based theory of the case, which is improper: "A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." *Ernst v. Searle* (1933) 218 Cal. 233, 240-241. "[I]f the new theory contemplates a factual situation the consequences of which are open to controversy and were not

put in issue or presented at the trial the opposing party should not be required to defend against it on appeal." *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.

Moreover, Unocal's claim of no affirmative contribution rests on Unocal's misinterpretation of *McKown, Austin* and *Ray* as supposedly imposing liability only because the hirer "*prevented* the performance of the contract work in a safe manner." ABOM at 46. In this vein, Unocal argues "[t]here is no evidence, for example, that Unocal promised to provide Kinsman with a respirator, but failed to do so, or that it provided him with a defective respirator." ABOM at 46.

But Unocal's interpretation of *McKown, Austin* and *Ray* constitutes a misinterpretation–nothing in the statements or holdings of those cases suggests that exposing a contractor's employee to a dangerous condition on the property (as occurred in *Austin* and *Ray*) would not be sufficient to impose liability.

In addition, no statement or holding in *McKown* limited the hirer's liability for an "affirmative contribution" to altering the details of the work.

That the trial court judgment below should be affirmed is apparent from an analogy to *McKown*. For example, suppose that, instead of the hirer providing an unsafe forklift platform, the hirer's store ceiling had contained an exposed electrical wire that the hirer knew of but failed to warn or protect against. This electrical wire would not be part of the details of the work, and so would fall outside Unocal's narrow definition of circumstances qualifying as an "affirmative contribution" to the employee's injury. Yet it would be unreasonable to conclude that the hirer, by exposing the employee to the exposed electrical wire, had not "affirmatively contributed" to the employee's electrical burns.

b. Unocal miscites *Toland* as supposedly limiting liability to "fraudulent concealment or misrepresentation."

Unocal's discussion of "fraudulent concealment" in *Toland* is wrong for several reasons.

First, Unocal is wrong to claim that *Toland* limited a landowner's

liability to "fraudulent concealment." ABOM at 38-45. In *Toland* this Court stated in that its holding in *Toland* "in no way precludes" liability to a contractor's employees for "fraudulent concealment or misrepresentation." *Toland*, 18 Cal.4th at 269-270, fn. 4.

But *Toland*'s footnote did not state (let alone imply) that a hirer could not be liable for negligently creating and exposing a contractor's employee to a hazardous condition of property. Rather, *Toland*'s footnote addressed a dispute between the majority and the concurring and dissenting members over the hirer's "superior knowledge . . . of a special risk or the precautions . . . to avoid it . . . ." *Id.* at 268, citing *id*. at 277, and 269-270, fn. 4.

The position of the concurring and dissenting justices was that a hirer should be held liable where the hirer "is in a better position than the contractor either to anticipate dangers to workmen, to foresee and evaluate the best methods of protection, or to implement and enforce compliance with appropriate on-site safety precautions." *Id.* at 274 (citation omitted). This position supports reversal of the Opinion below, but is not essential to reversal, which is compelled for the reasons stated in Parts I.C and I.D.1 of this Reply Brief.

Because the dispute in *Toland* that triggered footnote four did not involve a hazardous condition of property, *Toland* had no occasion to consider in footnote four whether the *Privette* doctrine applies to a hirer's premises liability. Hence, no basis exists for Unocal's suggestion that the liability for fraudulent concealment mentioned in footnote four precludes a hirer's premises liability.

Second, Unocal is wrong to suggest that its concealment of the asbestos hazard cannot be a basis of Unocal's liability. ABOM at 38ff. Though Unocal claims that the trial court gave no instructions on concealment or a duty to disclose, the instructions did allow liability based on Unocal's negligent failure "to exercise ordinary care in the use, maintenance and management of the premises in order to avoid exposing persons to an unreasonable risk of harm." CT 128. In *Austin*, such negligence included the hirer's failure to warn: "[t]here also was no obstacle to the *posting of warnings by defendant*." *Austin*, 44 Cal.2d at 230 (emphasis added). Also, the hirer "could provide adequate lighting [to disclose electrical lines] for night work and [give] *proper warnings*." *Ibid.*

(emphasis added).

E. Unocal's other arguments have no merit.

Unocal offers a variety of other arguments that have no merit.

1. Unocal's discussion of 5 million particles/cf is inaccurate and irrelevant.

Unocal engages in a one-sided discussion of various measures of asbestos exposure from the 1930s (starting with 5 million particles/cf) to the present. ABOM at 40-45. But this discussion has no bearing on the issue before the Court–whether Unocal is entitled to the *Privette* immunity.

For one thing, Unocal links this discussion of asbestos exposure to the issue of "fraudulent concealment." But the issue on which this Court granted review is whether Unocal should be immunized from liability for its negligence in creating and exposing Kinsman to an asbestos hazard that Unocal knew or should have known could cause cancer.

For another thing, what Unocal knew or should have known was a disputed fact question the jury resolved against Unocal for several reasons: (1) Unocal presented *no evidence* that in the 1950s it relied on the 1946 ACGIH standard of 5 million particles/cubic foot (30 fibers/cc) in determining to expose Kinsman to the hazard; and (2) the ACGIH TLV standard "was never an official regulatory standard" but rather "guidelines" by a "private organization." RT 749:11-12 (Dr. Nicholson). As Dr. Castleman explained, "before there were really serious regulations of any kind in this country to protect workers from health hazards in the 1970s and thereafter, . . . the whole field of industrial hygiene and industrial medicine [was] completely dominated by big business." CD 17-18.

The trial court and Unocal understood this point when the trial court rejected the then-existing TLV number of 5 million particles/cf as a standard of Unocal's negligence. The trial court said the "TLV's would seem to me to be a political measure, one that is arrived at through agreement among industry, unions, maybe even medical doctors, *just out of an expediency* . . . ." RT 1284:3-8. Unocal's attorney *agreed*: "To some extent that may be true, your Honor." RT 1284:9. When the trial court said

that the TLV is "not necessarily a standard to which anyone that complies with can say, `I am negligence-free . . . because I complied with the requirements,'" Unocal's attorney again *agreed*: "[T]hat's a reasonable conclusion that could be drawn from the evidence." RT 1294:12-22.

Also, the limit of 5 million particles/cf was irrelevant for mesothelioma, for which there is no safe level of exposure. RT 657:6-8; 663:8-12.

Finally, Unocal waived in this Court any claim that the evidence was insufficient to show its negligence by failing to state this issue as an "Issue Presented" in its Answer to Kinsman's Petition for Review. Finally, Unocal's discussion omits significant evidence supporting the judgment.

2. Who released the asbestos is irrelevant.

Unocal argues that Kinsman failed to prove who released the asbestos fibers. ABOM at 48-50. But this point is irrelevant. Under the instructions on premises liability (CT 128), Kinsman had to prove only that Unocal was one of several "concurring" causes that exposed Kinsman to an "unreasonable risk of harm" from an "artificial condition created on the premises." CT 125, 128. Hence, Kinsman was not required to prove precisely whose activity released the asbestos fibers.

3. Unocal is wrong to claim a lack of foreseeability.

Unocal claims a lack of foreseeability. ABOM at 50-51.

But this issue was waived by (1) Unocal's failure to obtain an instruction on foreseeability (CT 92-152), (2) by Unocal's failure to seek rehearing on foreseeability, and (3) by Unocal's failure in this Court to state foreseeability as an "Issue Presented."

Moreover, Unocal's claimed lack of foreseeability has no merit because Unocal's claim is refuted by California's existing rule on foreseeability: "what is required to be foreseeable is the general character of the event or harm . . . not its precise nature of manner of occurrence." *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58; *accord*, *Robison v. Six Flags Theme Parks Inc.* (1998) 64 Cal.App.4th 1294, 1298-1299, *approved as to negligence in Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1149-1150. Hence, Unocal was

properly held liable even if it could not foresee that Kinsman's exposures would cause mesothelioma.

Hence, the jury could find that Kinsman's disease was foreseeable in light of the admissions by Unocal's attorney that Unocal knew asbestos was hazardous:

- "[O]f course, they [Unocal] knew it was a hazard, it is obvious it was a hazard in the 1950's. If you are a big company and you have doctors and industrial hygienists, you know asbestos is dangerous." RT 1377:3-6.
- [C]ertainly in the '30s and '40s, there were more and more case reports of people who got sick who worked in asbestos factories. . . . [] And after a while it started to become obvious asbestos, at least at certain exposure levels, could be hazardous." RT 1377:13-20.
- "So the question is not, as Mr. Kelly has posed it, should Unocal have known asbestos was hazardous in the 1950's. [] Of course they should have, and they probably did." RT 1394:15-17.

CONCLUSION

For the foregoing reasons, this Court should reverse the Opinion with directions to reinstate the judgment for the Kinsmans.

Dated: June 28, 2004.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief, excluding tables, consists of no more than 6,902 words, as counted by my word processor.

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PROOF OF SERVICE BY MAIL
(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows: I am a citizen of the United States, and over the age of eighteen years, and not a party to the within action; my business address is Post Office Box 278, Kentfield, California 94914. On this date I served the interested parties in this action the within document: **RESPONDENTS' REPLY BRIEF ON THE MERITS**, enclosed in a sealed envelope, postage prepaid, in the United States Mail at Kentfield, California, addressed as follows:

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