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' OPENING BRIEF ON THE MERITS

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INTRODUCTION AND REASONS TO REVERSE

The Opinion below should be reversed because it erroneously applies the doctrine of *Privette v. Superior Court* (1993) 5 Cal.4th 689 and its progeny, a doctrine that limits a landowner's *vicarious liability* for a hired contractor's primary negligence, to the judgment below that rests on defendant Unocal Corporation's *direct* premises liability for knowingly creating a hazard (asbestos) on its property and exposing plaintiff Ray Kinsman to that hazard without any protection or warning.

A. The judgment rested validly on premises liability: Unocal knowingly created an asbestos hazard and exposed Kinsman to it without warning or protection.

The judgment for Kinsman rested on premises liability.

Kinsman in the early 1950s was exposed to asbestos at Unocal's Wilmington oil refinery. At that time few people outside the medical community and major industry knew about asbestos's hazards. *See* Statement of Facts (SF) Part D.2 below.

But Unocal, as an oil-industry member, *admittedly* knew about those hazards–as Unocal told the jury:

> Well, of course, [we] *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 (emphasis added).

Despite this admitted knowledge, Unocal used asbestos throughout its refinery, coating miles of pipe and machinery with asbestos-containing insulation. Opinion at 2; RT 404:19-21, 430:9-18. Because "deteriorat[ion]" of "refinery" insulation is "commonplace" (RT 446:7-27), Unocal commonly replaced the old asbestos insulation with new asbestos insulation in refinery "shutdowns." RT 435:11-436:18; CT 1341:20-23.

During these shutdowns, Unocal invited Kinsman and his employer, independent contractor Burke & Reynolds, onto the refinery premises. Kinsman was not an insulator. He and Burke & Reynolds were carpenters who built scaffolding so that insulators and other trades could access the pipes and machinery. RT 436:21-28; CT 1343:16-18; Opinion at 2.

The asbestos-insulation work during shutdowns dumped asbestos onto

Kinsman's scaffolding and into the surrounding air. RT 407-11; Opinion at 2.

Thus, when Kinsman built and dismantled scaffolding at Unocal, he was continually exposed to Unocal's asbestos.

But Unocal "never warned" Kinsman that he was working near asbestos, let alone "about the danger of asbestos exposure," and never gave him any "protection." Opinion at 3; CT 1346:8-15; RT 672:19-21.

Years later, Kinsman contracted terminal mesothelioma. Opinion at 2; CT 1339-41. It is undisputed that Kinsman's asbestos exposure at Unocal was a substantial factor in causing his disease. Opinion at 2 (citing "uncontroverted expert testimony"); RT 1305:24, 1306:22-25, 1308:11-13, 1530:4-8 (directed verdict for Kinsman on causation).

Based on the foregoing evidence, the jury held Unocal liable for premises liability: "negligen[t] `in the use, maintenance or management of the areas where Ray Kinsman worked.'" Opinion at 3.

B. The Opinion wrongly extends this Court's *Privette* doctrine to absolve Unocal of its premises liability.

The Opinion below reverses the judgment by wrongly extending the *Privette* doctrine, which limits a landowner's *vicarious* liability for the negligence of a hired contractor, to premises liability, a theory of *direct* liability resting on the landowner's negligence in *creating or failing to remedy* a known hazard on its premises.

1. The *Privette* doctrine limits a landowner's *vicarious* liability when a contractor injures its employee.

The *Privette* doctrine limits a landowner's vicarious liability when an independent contractor's negligence on the landowner's property injures the contractor's employee. *Privette*, 5 Cal.4th at 698-700. Because the liability of the contractor, whose negligence caused the injury, is limited to workers' compensation benefits, the *Privette* doctrine holds that it would be unfair to impose greater tort liability on the landowner, whose "negligence" derives from the contractor's "primary" negligence. *Id.*

Thus, this Court has applied the *Privette* doctrine to limit liability under theories of vicarious liability like peculiar risk (*Privette* and *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253), negligent hiring (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235), and some cases of negligent exercise of retained control (*Hooker v. Department of Transp.* (2002) 27 Cal.4th 198 (no liability when landowner did not "affirmatively contribute" to the risk by "exercising" the retained control)).

By contrast, this Court has held that the *Privette* doctrine *does not limit* a landowner's liability when the landowner's direct negligence caused, or "affirmatively contributed" to causing, the plaintiff's injuries: e.g., by "exercising" retained control over the contractor's work in a way that "affirmatively contributed to the employee's injuries" (*Hooker*, 27 Cal.4th at 202), or by "negligently furnishing unsafe equipment" (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225). Similarly, a Court of Appeal recently held that the *Privette* doctrine does not limit liability when the landowner violated an "independent duty" that is "distinct" from any contractor negligence. *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1128-29.

2. The *Privette* doctrine does not apply because the premises-liability judgment rests on Unocal's *direct* liability, unrelated to any contractor negligence.

The *Privette* doctrine does not affect the premises-liability judgment below because the judgment rests not on vicarious liability but on Unocal's *direct* liability for exposing Kinsman to the known asbestos hazard that Unocal created on its premises.

Premises liability, as defined by this Court in *Rowland v. Christian*, rests on a landowner's *direct* liability for exposing a visitor to a known hazard on its premises:

> Where the occupier of land is *aware of a concealed condition* involving in the absence of precautions an *unreasonable risk of harm* to those coming in contact with it and is *aware* that a person on the premises is *about to come in contact with it*, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence.

Rowland v. Christian (1968) 69 Cal.2d 108, 119 (emphasis added).

Thus, unlike the vicarious-liability theories that the *Privette* doctrine limits, premises liability is direct liability that has nothing to do with any contractor negligence.

Moreover, it is not even arguable that Unocal's liability was "vicarious," deriving from a contractor's negligence, because no evidence showed that any contractor was negligent. No evidence showed that Kinsman, his employer, or any insulator knew that they were working with asbestos, let alone that asbestos was hazardous–indeed, Unocal did not tell them. *See* Opinion at 3 ("Unocal never warned Kinsman about the danger of asbestos exposure"). And the jury could not infer knowledge of asbestos's hazards because, in the early 1950s (when Kinsman was exposed), few outside medicine and major industry knew about asbestos's hazards.

Further, the jury could not infer that the insulators were some sort of insulation "experts" who should have known about asbestos–allowing Unocal to rely on them for safety measures–because no evidence showed that the insulators were even independent contractors as opposed to Unocal employees. *See* Opinion at 19 ("The evidence did not establish . . . what company employed the insulators.").

In short, the *only* person or entity in this case whom the jury could have found acted negligently at Unocal's refinery was *Unocal*.

Thus, this case–like premises-liability cases generally–has nothing to do with any contractor negligence, resting instead on the landowner Unocal's direct negligence for creating a hazard on its premises and exposing Kinsman to it without warning or protection.

Hence, the Opinion was wrong to extend the *Privette* doctrine to this premises-liability case. *See* Argument Part I below.

C. The *Privette* doctrine does not apply also because any conceivably "negligent" contractor was not Kinsman's employer.

The Opinion erred in applying the *Privette* doctrine to limit Unocal's liability for another reason: even if this Court somehow believes that the (unknown) insulators were independent contractors who were negligent–despite the lack of evidence to show any of this–and that

Unocal's negligence somehow derived from that contractor negligence, the *Privette* doctrine *still* should not apply because the negligent contractor was *not Kinsman's employer*.

No evidence showed even suggests that Kinsman's employer, carpenters Burke & Reynolds, were negligent. No evidence showed that Burke & Reynolds knew that its workers were working near asbestos, let alone that asbestos was hazardous.

Thus, if any contractor was negligent, it was the (unknown) insulation contractors.

The *Privette* doctrine rests (in part) on the unfairness in imposing on a landowner vicarious liability that is *greater* than the liability imposed on the primarily negligent contractor, whose liability is limited to workers' compensation benefits. *Privette,* 5 Cal.4th at 698.

But when, as here, the negligent contractor is not the plaintiff's employer, that contractor's liability is *not* limited to workers' compensation. Labor Code § 3852; *Hooker,* 27 Cal.4th at 214.

Thus, unlike in *Privette,* there is nothing unfair about holding the vicariously liable landowner liable to the same extent. *See* Argument Part II below.

D. Even under the Opinion, Unocal "affirmatively contributed" to causing Kinsman's injuries by *creating* the asbestos hazard.

Finally, even if the Opinion's announced "rule"—requiring a showing that Unocal "affirmatively contributed" to causing Kinsman's "injury" (Opinion at 1)—is correct, the judgment should be affirmed because Unocal's negligence in knowingly exposing Kinsman to an asbestos hazard without any protection or warning *was an affirmative contribution to his injuries*. *See* Argument Part III below.

STATEMENT OF FACTS

Because Unocal did not petition for rehearing below, the following facts, stated in the Opinion, are undisputed here:[1]

1. **Unocal's negligence:** On Kinsman's cause of action for premises liability (in the "use, maintenance, or management" of its premises), the jury found Unocal "negligent" because (1) Unocal placed "asbestos-containing insulation" throughout its refinery on "pipes and machinery" (Opinion at 2), (2) Unocal "knew or should have known" that "asbestos posed a risk of harm to refinery workers" like Kinsman (Opinion at 3), but (3) "[d]espite this knowledge, Unocal never warned Kinsman about the dangers of asbestos exposure" or "provide[d] him" with any "protection" such as a "mask" (Opinion at 3).

2. **Exposure:** When Kinsman in the early 1950s worked at Unocal's oil refinery (as a carpenter building scaffolding), he was "exposed" to "airborne asbestos" that was "produced" during the "application and removal" of Unocal's "asbestos-containing insulation." Opinion at 2.

3. **Causation:** Kinsman's "exposure" to asbestos at Unocal's refinery was a "`substantial factor' contributing to [his] development of mesothelioma" (as shown by "[u]ncontroverted expert testimony"). Opinion at 2.

These statements in the Opinion are supported by ample evidence, as shown below.

A. Unocal's negligence: Unocal knowingly placed hazardous asbestos insulation throughout its refinery and exposed Kinsman without warning or protection.

Ample evidence showed that Unocal was negligent because (1) Unocal admittedly knew in the 1950s that asbestos was hazardous, (2) Unocal placed asbestos throughout its refinery, and (3) Unocal exposed Kinsman to its asbestos without warning or protection.

[1] CITE?? Rules of Court.

1. Before Kinsman arrived, Unocal *admittedly knew* that asbestos, as used in refinery insulation, was hazardous.

Ample evidence showed that Unocal, "in the 1950s" (when Kinsman was exposed), "knew or should have known" that "asbestos posed a risk of harm to refinery workers" like Kinsman. Opinion at 3.

This knowledge was shown by "published articles in the 1930's and 1940's" that "link[ed] asbestos" with diseases like mesothelioma and by "reports distributed by other oil companies and oil industry associations in the 1940s and 1950s that described the risks associated with asbestos exposure." Opinion at 3; *see* CT 1969-73, 2053:13-20; RT 1222:23-1223:1 (oil-industry's "Bonsib Report" told the "industry" that anyone "working around asbestos dust within an oil refinery *should be protected* from exposure to that dust"); CT 1975-87 (discussing other oil-industry publications on asbestos's hazards).

Thus, Kinsman's expert Dr. Castleman "testified that, in the 1950s, oil companies such as Unocal knew or should have known asbestos posed a risk or harm to refinery workers" like Kinsman. Opinion at 3; *see* CT 1992:17-1993:14, 1993-94.

In light of this overwhelming evidence, Unocal admitted in closing argument that it "knew" in the "1950's" that asbestos "was a hazard":

> Well, of course, [we] *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 (emphasis added).

And on appeal, Unocal *did not dispute* that it had actual knowledge of asbestos's hazards. *See* Appellant's Opening Brief ("AOB") and Appellant's Reply Brief ("Reply") below.

2. Despite this knowledge, Unocal used asbestos-containing insulation throughout its refinery.

Unocal, despite admittedly knowing that asbestos was dangerous, used throughout its refinery massive amounts of asbestos insulation that Unocal knew would deteriorate and release asbestos in its normal use.

Unocal used "asbestos-containing insulation" on all of its "pipes and machinery," including "hundreds of thousands of lineal feet" of pipe that

"require[d] insulation." Opinion at 2; RT 404:19-21, 430:9-18.

Unocal knew that this asbestos-containing insulation, used under normal refinery conditions, would deteriorate and need to be replaced regularly. At a "refinery," insulation "deteriorat[ed]" due to "[v]ibration," "[p]hysical abuse," and "[e]xpansion and contraction"—all processes "*commonplace* in a refinery." RT 446:7-27 (emphasis added).

Thus, Unocal had to remove and replace its asbestos insulation regularly.

And Unocal's routine "application and removal" of its asbestos insulation created "airborne asbestos." Opinion at 2. So much "dust" would "fall[]" during insulation work that people "working below an insulator" were called "snowbirds." RT 445:25-446:6. And "cutting" new and old asbestos insulation "create[d] visible dust," with "[e]ach stroke of the saw" like hitting "a chalk eraser." RT 407:3-14, 444:14-16.

3. Unocal failed to warn or protect Kinsman.

It is undisputed that Unocal, despite its admitted knowledge of asbestos's hazards, failed to warn Kinsman of the asbestos hazard at Unocal's refinery or to protect him from it:

> Unocal never warned Kinsman about the danger of asbestos exposure and did not provide him with a mask to wear for his protection.

Opinion at 3.

But such protection existed. Indeed, *other* oil companies before the 1950s were protecting their workers by using measures recommended in oil-industry reports: "ventilation," plant "design," "storing materials" in "dust-tight bins," "isolat[ing] dusty processes," "design[ing] equipment to control dust," and providing "wet methods of operation, an "exhaust system," and "respirators." RT 1223:10-1224:10; CT 2064:13-25, 2080:25-2081:14; *see* CT 1939:6-16, 1961:8-18.

But Unocal neither warned Kinsman nor offered him any protection from Unocal's asbestos. Opinion at 3; CT 1346:8-15; RT 672:19-21.

B. Exposure: Kinsman undisputedly was exposed to Unocal's asbestos.

Kinsman in the 1950s worked as a carpenter at Unocal's Wilmington

refinery, erecting and dismantling scaffolding that was used by other workers, including insulation workers who generated asbestos dust. This scaffolding work undisputedly "exposed [Kinsman] to airborne asbestos." Opinion at 2.

1. Kinsman built and dismantled scaffolding.

Kinsman worked from about 1954 to 1957 at Unocal's Wilmington refinery as a "carpenter." CT 1339:1-10, 1340:10-16, 1341:10-12. Kinsman's "employer" was Burke & Reynolds, a contractor hired by Unocal to build and "take down" "scaffolding" that ranged from five to 120 feet high (about 10 stories). CT 1340:17-23, 1344:1-16. Kinsman did not do insulation work, and no evidence showed or suggested that Burke & Reynolds did any insulation work.

2. The parties stipulated that Kinsman's work exposed him to asbestos.

Because ample evidence showed that Kinsman's work at Unocal exposed him to asbestos, the parties *stipulated* that he was exposed at Unocal, and the jury was so instructed.

a. Ample evidence showed Kinsman's exposure at Unocal.

Ample evidence showed that Kinsman's scaffolding work at Unocal exposed him to asbestos.

(1) Unocal's refinery used lots of dusty asbestos insulation.

Oil "refineries" have "hundreds of thousands of lineal feet" of "crude oil pipe," which "require[s] insulation." RT 404:19-21, 430:9-18.

This insulation regularly deteriorated in its "commonplace" use due to "[v]ibration," "[p]hysical abuse," and "[e]xpansion and contraction." RT 446:7-27.

Applying and removing this asbestos insulation created lots of asbestos dust. Because the asbestos "products" were "extremely dusty," "cutting" them "create[d] visible dust," with "[e]ach stroke of the saw" like

hitting "a chalk eraser." RT 407:3-14, 444:14-16. In fact, insulation work created so much "dust" that people "working below an insulator" were called "snowbirds." RT 445:25-446:6.

(2) Kinsman worked at Unocal during lengthy refinery "shutdowns," which involved lots of dusty insulation work.

Kinsman worked at Unocal's Wilmington refinery periodically from 1954 to 1957, "whenever" Unocal had a "shutdown" of its "Unit 33." CT 1341:17-19, 1342:3-5, 1343:12-15.

A "shutdown" involved "fix[ing] everything" in the unit, with "all of" the building trades including "insulators" "working around the clock." RT 435:11-436:18; CT 1341:20-23. During a "shutdown," it was "typical" to have "15 to 20" insulators installing "insulation" and "remov[ing]" it. RT 437:19-20, 453:9-20.

"[C]arpenters" like Kinsman built "scaffolding" (or "staging") to give all of the other shutdown workers including insulators "[a]ccess" to the machinery that they were repairing. RT 436:21-437:2; 1343:16-25.

The insulation work during a shutdown created asbestos dust. Some of the dusty, "chalk eraser"-like cutting of new insulation took place "on site" (where it was being applied), and some in nearby "saw rooms." RT 407:5-14, 409:20-25. And insulators mixed asbestos "mud" (powder mixed with water) to "fill[] all the cracks and voids" in the insulation, making more "visible dust." RT 411:5-412:20.

(3) Kinsman's normal scaffolding work exposed him to asbestos dust.

Kinsman's normal scaffolding work during Unocal shutdowns "exposed him to airborne asbestos" (Opinion at 2), as shown below.

(a) Dismantling scaffolding.

Kinsman was exposed to asbestos when he "dismantl[ed] used scaffolding." Opinion at 2.

During insulation work, the scaffolding became coated with asbestos dust. So much "dust" would "fall[]" during insulation work that people

"working below an insulator" were called "snowbirds." RT 445:25-446:6. Thus, when insulators worked on the scaffolding, asbestos "dust or debris" would "accumulate on [the] scaffolding." RT 444:11-13; CT 1344:23-1345:5, 1514:15-17. Because the scaffolding "planks" were "rough" (to prevent "slid[ing] and slip[ping]"), insulation "material" got "imbedded" on the planks. RT 444:17-21.

The "normal" way to dismantle this asbestos-coated scaffolding was to "stand" one level "below" the scaffolding you were dismantling, "turn [the] plank" above you "on end," and "bounce it" to "knock off" the imbedded dust and debris. RT 444:25-28, 470:18-19, 735:3-16. This material would "fall[] to the next level below," then "to the next one," resulting in a "voluminous amount" of asbestos material on the lower planks. RT 445:11-17, 714:18-28 (a "majority of the material containing [asbestos] fibers would fall on to the planks").

This voluminous asbestos material created repeated exposures. The material that "f[ell] on to the planks" was "clumps of [asbestos] fibers." RT 714:26-715:2. These fibers were "reentrained into the air" when the "planks [we]re lifted up," they were "abraded" when people "walk[ed] on the planks," and they "f[e]ll to the ground" for people to "walk on them," creating more "[r]eentrainment." RT 715:9-13. These processes created "ongoing release" of the "smaller fibers as they [were] broken apart from what was visible." RT 715:13-17.

Hence, Kinsman's dismantling create[d] "continuous exposure all down [the] scaffolding tower." RT 670:25-671:20.

(b) Building scaffolding.

Asbestos dust was created also when carpenters like Kinsman built the scaffolding, which they attached to insulated surfaces. The "process of tying in" the scaffolding to machinery with deteriorated insulation could also "produce" some "dust." RT 442:14-16, 446:7-447:10; *see* Opinion at 2.

(c) Working in the presence of insulation work.

Because asbestos "float[ed] in the air" at Unocal (Opinion at 2),

Kinsman was exposed to asbestos continuously.

Asbestos "fibers" are "so thin and so light" that in "still air" it takes "an hour" for a fiber to fall "one meter." RT 639:13-15. These fibers "easily float in the air and disburse very rapidly," going "wherever the air will take it." RT 639:16-19, 710:15-19 (Dr. Nicholson), 842:22-24 (Dr. Horn). This "fiber drift" can expose workers who are "100 feet or further away" from the "insulation" work. RT 670:6-19.

Because of this "fiber drift," asbestos diseases traditionally have affected not just "insulators" but also "construction workers" like Kinsman who were "working nearby." RT 639:21-640:4.

At Unocal, Kinsman was exposed to floating asbestos fibers continuously because he stayed around Unit 33 all day. Kinsman's crew was around Unit 33 "continuously," always "building another scaffold"—they did not "erect a scaffolding, leave the facility, and come back and remove it." RT 753:10-17; *see* RT 484:23-485:3 (Ay), 754:4-9 (Dr. Nicholson); CT 1344:6-12 (Kinsman).

Moreover, Kinsman's exposure continued after work. Insulation work at refineries generated so much airborne asbestos dust that, at the end of the day, "dust from the insulation would be all over your car," even "500 yards away." It was "like" a "snow storm." RT 448:15-28 (Ay). Moreover, Kinsman faced "further exposure" from asbestos that got "on his clothes," in his "hair," and in his "car." RT 672:4-18, 697:15-25 (Ay). When asbestos got into Kinsman's car, he faced further exposures for "[s]everal days." RT 697:1-14 (Ay).

(4) Expert testimony showed Kinsman's asbestos exposure.

Dr. Nicholson opined that Kinsman "was exposed" at Unocal to "asbestos released from thermal insulation." RT 666:22-667:16. When Kinsman "confront[ed] the insulation material on the scaffolding," it was "a very significant exposure." RT 670:21-23. And because Kinsman worked "within 20, 30 feet of" the insulators, the "air currents" made further exposure "likely." RT 667:5-13.

b. The parties stipulated that Kinsman was exposed to asbestos at Unocal.

In light of the foregoing undisputed evidence, the parties "stipulated that Kinsman was exposed to asbestos during his work at Unocal." Opinion at 2; RT 1529:28-1530:3.

3. Unocal failed to warn or protect Kinsman.

As discussed in Part A.3 above, Kinsman was exposed to Unocal's asbestos unwittingly–Unocal failed to warn him of asbestos's hazards or to give him any kind of protection from asbestos dust. Opinion at 3 ("Unocal never warned Kinsman about the danger of asbestos exposure and did not provide him with a mask to wear for his protection.").

C. Causation: Without dispute, Kinsman's exposure at Unocal was a substantial factor in causing his mesothelioma.

Kinsman contracted mesothelioma. It is undisputed that (1) Kinsman's mesothelioma was caused by asbestos exposure, and (2) Kinsman's asbestos exposure at Unocal was a "substantial factor" in causing his mesothelioma.

1. Stipulated: Kinsman contracted asbestos-caused mesothelioma.

Kinsman in 1999, over 40 years after his asbestos exposure at Wilmington, "developed mesothelioma" (Opinion at 2), a "cancer" of the "lining of the lung" that is "virtually impossible to cure" and has an "average survival" after diagnosis of only "nine to 12 months." RT 613:26-27, 616:11-13, 751:6-7, 846:14-16, 855:2-4.

The parties "stipulate[d]" that Kinsman's "mesothelioma" was "caused by the inhalation of asbestos fibers." RT 1260:24-28.

2. Uncontroverted: The Unocal exposures were a substantial factor.

Kinsman presented "uncontroverted expert testimony" that his "exposure" to asbestos at Unocal was a "substantial factor" in "contributing to" his "development of mesothelioma." Opinion at 2. RT 611:2-9 (Dr.

Hammar), 872:2-20 (Dr. Horn), 670:21-23, 743:19-25, 756:6-12, 757:15-17 (Dr. Nicholson).

Unocal failed to offer *any* contrary evidence or to cross-examine Kinsman's experts on their causation opinions.

Thus, the trial court "granted a directed verdict for Kinsman on the issue of causation." Opinion at 2; *see* RT 1305:24, 1306:22-25, 1308:11-13, 1530:4-8.

D. Besides Unocal, no one else was shown to be negligent.

1. Stipulated: Kinsman bore no contributory fault.

The parties stipulated that Kinsman "bore no contributory fault." Opinion at 2; RT 387:20-22, 1026:3-5, 1261:1-3, 1373:26-27 (Kinsman "was not negligent and bears no fault in this matter").

2. No evidence showed that *any* contractor who worked at Unocal knew that there was an asbestos hazard.

In contrast with the ample evidence showing that Unocal knew its refinery asbestos was hazardous (causing Unocal to *admit* in closing argument that it *knew* the hazards (RT 1377:3-6)), no evidence showed that anyone else–not Kinsman or any other workers–knew they were working with asbestos or that asbestos was hazardous.

Moreover, the jury could not *infer* that any contractor working at Unocal knew or should have known that they were working in or around an asbestos hazard. First, in the mid-1950s (during Kinsman's exposure), asbestos hazards were not widely known outside the medical community and major industry. Not until 1964 was Dr. Irving Selikoff's landmark study on "the dangers of asbestos exposure to insulation workers reported to . . . the general public." *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 168-69; *see Buckley v. Metro-North Commuter RR* (2d Cir. 1996) 79 F.3d 1337, 1340 (rev'd on other grounds *sub nom. Metro-North Commuter RR v. Buckley* (1997) 521 U.S. 424, 117 S.Ct. 2113) ("asbestos" has been "widely recognized as a carcinogen *since the mid-1970s*"). And not until the early 1970s were most uses of asbestos banned. *See Tisco Intermountain v. Industrial Comm'n of Utah* (Utah 1987) 744 P.2d 1340, 1341 (The "federal government banned the use of asbestos in

insulation" in "1971."); *Affliated FM Ins. Co. v. Board of Educ. of City of Chicago* (N.D. Ill. 1992) 1992 WL 409442 at *10 (government "banned the spraying of asbestos for fireproofing and insulation" in about "1973").

Second, no evidence allowed the jury to infer that the workers who removed and replaced insulation were insulation "experts" who should have known about the asbestos hazard. Indeed, no evidence showed even *who* the insulators were–independent contractors or Unocal employees. Opinion at 19 ("The evidence did not establish . . . what company employed the insulators.").

In sum, on this record, the only person or entity at Unocal that knew that there was an asbestos hazard was Unocal.

PROCEDURAL HISTORY

Kinsman asserted against Unocal two theories of liability: (1) premises liability; and (2) negligent exercise of retained control.

A. Premises liability: The jury found Unocal liable for creating the asbestos hazard on its premises.

Kinsman's premises-liability claim asserted that Unocal was negligent "in the use, maintenance or management of the areas where Ray Kinsman worked." Opinion at 3.

The jury was instructed on this theory with BAJI 8.00, asking whether Unocal was "negligent in the use, maintenance, or management of [its] premises." CT 127.

The court also instructed under BAJI 8.01 that premises liability could arise from a dangerous "artificial condition":

> The owner of occupant of premises is under a duty 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*. This duty exists whether the risk of harm is caused by the natural condition of the premises or by an *artificial condition created on the premises*.

CT 128 (emphasis added).

On this theory, "the jury concluded Unocal was negligent in the `use, maintenance or management' of the refinery." Opinion at 3; CT 182.

B. Negligent exercise of retained control: The jury found for Unocal because Unocal did not retain control over "Kinsman's work."

On Kinsman's other theory of liability, negligent exercise of retained control, the jury found for Unocal. "The jury found [that] Unocal did not retain control over the methods or manner of Kinsman's work, and thus did not reach the question of negligence under the retained control theory." Opinion at 3.

C. Damages and apportionment of fault.

The jury awarded Kinsman and his wife "over $3 million in compensatory damages." Opinion at 3.

The jury "assigned Unocal 15 percent of the fault in causing Kinsman's mesothelioma" and assigned the "remaining 85 percent of fault" to unnamed "all others." Opinion at 3.

D. The Court of Appeal reversed for a new trial, extending the *Privette* doctrine to Kinsman's premises-liability claim.

The Opinion below reversed and remanded for a new trial. Opinion at 1.

Although the judgment rests on undisputed evidence that *Unocal created* the asbestos hazard that harmed Kinsman, the Opinion invoked the *Privette/Hooker* requirement of the landowner's "affirmative contribution" by characterizing the case as involving injury from "a dangerous condition *a contractor has created* on the property":

> [W]e conclude a premises owner has no liability to an independent contractor's employee for a dangerous condition a *contractor has created* on the property *unless* [1] the dangerous condition was within the property owner's control and [2] the owner exercised this control in a manner that *affirmatively contributed* to the employee's injury.

Opinion at 1 (second emphasis in original).

We show below that this analysis, and the Opinion's holding, are erroneous and should be reversed.

ARGUMENT

I.

The judgment was valid because premises liability does not create the concerns that *Privette* addresses.

The judgment below validly rests on Unocal's direct premises liability for knowingly creating an asbestos hazard on its premises and exposing Kinsman without warning or protection.

The Opinion was wrong to reverse the judgment on the ground that the *Privette* doctrine, which limits a landowner's *vicarious* liability (derived from a contractor's primary negligence), limits Unocal's direct premises liability, as shown below.

A. The judgment against Unocal properly rests on the well-established doctrine of premises liability.

1. Premises liability: Landowners are liable for hazards they *create* but fail to warn of or protect against, including "artificial conditions" like asbestos hazards.

a. The origins of premises liability.

California's doctrine of premises liability arises from Civil Code section 1714 and the Restatement (Second) of Torts, section 343.

Civil Code section 1714 holds people "responsible" for "injur[ies]" caused by negligent "management" of their "property":

> 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 . . . .

Restatement section 343 provides "liability" for 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).

b. *Rowland v. Christian*: California's premises-liability doctrine.

This Court in *Rowland v. Christian* articulated a premises-liability doctrine that tracks Restatement section 343:

> Where the occupier of land is *aware of a concealed condition* involving in the absence of precautions an *unreasonable risk of harm* to those coming in contact with it and is *aware* that a person on the premises is *about to come in contact with it*, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence.

Rowland v. Christian (1968) 69 Cal.2d 108, 119 (emphasis added).

c. Premises liability applies when the hazard is asbestos.

Rowland's premises-liability principles apply when the hazard on the premises is asbestos. As this Court has held, *Rowland*'s "ordinary principles of negligence" apply to a landowner's liability for "harm caused by artificial conditions" on the property:

> [T]he possessor's liability for harm caused by *artificial conditions* [is] determined in accord with *ordinary principles of negligence*.

Sprecher v. Adamson Companies (1981) 30 Cal.3d 358, 362.

Thus, it has been undisputed in this case that premises liability under section 343 applies when the hazard is asbestos. Indeed, the Opinion acknowledges that premises liability under section 343 can apply in this asbestos case. Opinion at 10 (discussing "premises owner's liability under section 343"). And courts in other jurisdictions have recognized that a landowner can be subject to premises liability for creating an asbestos hazard on its property. *Emery v. Owens-Corporation* (La.App. 2001) 813 So.2d 441, 446 (Louisiana: affirming judgment for asbestos victims against "premises owner" Exxon); *Gutteridge*, 804 A.2d at 657-60 (Pennsylvania: reversing summary judgment and approving premises-liability claim against landowner).

d. Premises liability extends to employees of hired independent contractors.

This Court has long acknowledged that a landowner's duty to maintain safe premises extends generally to employees of an independent contractor. In 1955, this Court in *Austin* affirmed a premises-liability judgment for the plaintiffs, employees of an independent contractor (Haddock) hired by the defendant landowner (Riverside). *Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 229-30. Plaintiffs were injured when their crane hit an exposed electrical conduit on Riverside's property. *Id.* This Court held that Riverside could be subject to premises liability to the injured contractor's employees ("business visitors"), citing a rule identical to *Rowland*:

> A possessor of land who knows, 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.

Austin, 44 Cal.2d at 233.

Similarly, this Court held in *Markley v. Beagle* that because the "[p]laintiff was an employee of an independent contractor" working on the premises, he "therefore [was] a business invitee of the owners to whom they owed a duty of reasonable care" to protect him from the "dangerous condition" of a defective "railing." *Markley v. Beagle* (1967) 66 Cal.2d 951, 955.

Other jurisdictions also subject landowners to premises liability when the plaintiff is an employee of a hired contractor. *E.g., Gutteridge v. A.P. Green Servs., Inc.* (Pa.Super. 2002) 804 A.2d 643, 657 ("a landowner . . . owes a duty to warn an unknowing independent contractor of [known or discoverable] existing dangerous conditions on the landowner's premises"); *Jablonski v. Fulton Corners Inc.* (N.Y.Civ. 2002) 748 N.Y.S.2d 634, 638 (landowner subject to premises liability when "injuries" to a contractor's employee were caused by a "defective condition at the worksite" that "inhere[d] in the premises").

e. A landowner can avoid premises liability by repairing hazards or warning of them.

A landowner can avoid premises liability by repairing hazards or warning of them.

As this Court held in *Rowland*, a landowner that knows or should know that someone is going to "come in contact" with a hazard on its premises must either "repair" the hazard or "warn" the person of the hazard. *Rowland*, 69 Cal.2d at 119.

The duty to warn of known hazards rests on the notion that "[w]hether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a *warning* of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it." *Rowland*, 69 Cal.2d at 119.

2. Ample evidence and proper instructions supported the jury's finding of premises liability.

Under the foregoing standards, the jury's finding of premises liability against Unocal was supported by ample evidence.

The "jury concluded Unocal was negligent in the `use, maintenance or management' of the refinery." Opinion at 3; CT 182. This finding rested on instructions under BAJI 8.01, which is derived from *Rowland*:

> The owner of occupant of premises is under a duty 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 (emphasis added).

The jury could reasonably find that Unocal did not take *any* care to "avoid exposing" Kinsman to the "unreasonable risk of harm" at Unocal's refinery. Unocal admittedly *knew* that the asbestos insulation it had placed throughout its refinery was extremely dangerous. But Unocal neither warned Kinsman about the asbestos hazard nor protected him from it, as the Opinion notes: ""Unocal never warned Kinsman about the danger of asbestos exposure and did not provide him with a mask to wear for

protection." Opinion at 3. Indeed, the record contains *no evidence* that Unocal told Kinsman, Kinsman's employer, or anyone else even that they were working with asbestos–let alone that the asbestos was hazardous. Thus, Unocal failed to alllow Kinsman to "take special precautions" beefore "com[ing] in contact" with Unocal's asbestos, as *Rowland* requires. *Rowland*, 69 Cal.2d at 119.

Moreover, ample evidence showed that Unocal was negligent under the *Rowland* elements:

1. Unocal was "aware of a concealed condition." *Rowland*, 69 Cal.2d at 119. Unocal admitted that it knew its asbestos was hazardous. RT 1377:3-6; *see* Opinion at 3 (discussing Unocal's "knowledge" based on uncontroverted "expert" testimony); *see also* SF Part A.1 to A.2 above.

2. Unocal knew that, "in the absence of precautions," the asbestos hazard posed "an unreasonable risk of harm to those coming in contact with it." *Rowland*, 69 Cal.2d at 119. As the Opinion notes, expert testimony showed that "Unocal knew or should have known asbestos *posed a risk of harm to refinery workers*." Opinion at 3 (emphasis added); *see* SF Part A.1 to A.2 above.

3. Unocal was "aware that a person on the premises is about to come in contact with" the asbestos hazard. *Rowland*, 69 Cal.2d at 119. Unocal *invited* Kinsman and his carpentry company to build scaffolding to hold workers who were tearing out old asbestos and installing new asbestos.

Because ample evidence showed each of these *Rowland* elements for premises liability, the jury could "reasonably conclude that a failure to warn or to repair the [asbestos] condition constitute[d] negligence." *Rowland*, 69 Cal.2d at 119.

Thus, under *Rowland*, because Unocal failed to "repair" the asbestos hazard or to "warn" Kinsman (or anyone) of its existence, the jury "reasonably conclude[d]" that Unocal was liable for "negligence." *Rowland*, 69 Cal.2d at 119.

In sum, the judgment validly rests on the jury's finding of premises liability.

B. The valid premises-liability judgment is unaffected by the *Privette* doctrine, which does not–and should not–affect premises liability.

The Opinion was wrong to reverse the premises-liability judgment on the ground that it was supposedly affected by the *Privette* doctrine.

As this Court's decisions from *Privette* to *McKown* show, when a hired contractor's employee is injured by a hazard on the landowner's premises, the *Privette* doctrine:

1. Limits the landowner's liability when *only the contractor* created the hazard; but

2. Does not limit the landowner's liability when *the landowner created*, or was *sufficiently involved in creating*, the hazard.

Here, the premises-liability judgment fits the second category: Unocal *created* the hazard by using asbestos insulation that Unocal *admittedly knew* was hazardous but failing to warn or protect Kinsman.

Thus, contrary to the Opinion, the *Privette* doctrine does not limit Unocal's liability, as shown below.

1. The *Privette* doctrine limits landowner liability when *only the contractor* created the hazard, but not when the landowner created or contributed to creating the hazard.

When a hired contractor's employee is injured by a hazard on the landowner's premises, the *Privette* doctrine (1) bars landowner liability when the hazard was created entirely by the contractor but (2) does not limit landowner liability when the landowner created, or was sufficiently involved in creating, the hazard.

a. Landowner liability is barred when an independent contractor created the hazard.

Landowner liability is barred when the hazard on the landowner's premises was *created by* the negligence of the hired contractor who employed the injured plaintiff.

In such a case, the primarily negligent party is the independent contractor. Any landowner negligence–e.g., for negligently hiring the contractor–is merely "vicarious," or "derivative" of the contractor's

liability.

But because the contractor's liability is limited to workers' compensation benefits, it is unfair for the landowner, whose negligence is merely vicarious, to be held liable in tort, *i.e.*, *more* liable than the primarily negligent contractor.

This limitation of liability–the "*Privette* doctrine"–is set forth in this Court's decisions in *Privette*, *Toland*, and *Camargo*.

(1) *Privette:* A landowner who does nothing to create the risk except hire a contractor who negligently performs a dangerous activity cannot fairly be held more liable than the contractor.

In *Privette*, this Court held that "peculiar risk" liability cannot fairly be imposed on a nonnegligent landowner when the plaintiff was injured by the negligence of his employer, an independent contractor hired by the landowner, so that the plaintiff's injuries were covered by workers' compensation benefits.

Privette, a teacher, hired independent contractor Krause Roofing to do "dangerous" work–putting a "new tar and gravel roof" on Privette's rental "duplex." *Privette*, 5 Cal.4th at 692. Due to Krause's negligence, Krause's employee Contreras "fell" and was "burned by hot tar." *Id.*

Contreras "sought workers' compensation benefits" and "also sued Privette" under the "peculiar risk" doctrine. *Id.*

The peculiar-risk doctrine imposes liability on a nonnegligent landowner for the injuries of an innocent third party who is injured on the landowner's premises due to the negligence of an "independent contractor" hired by the landowner to do "inherently dangerous work." *Camargo*, 25 Cal.4th at 1238 (*quoting Toland*, 18 Cal.4th at 256). The peculiar-risk doctrine is policy based, "ensur[ing] that innocent bystanders or neighboring landowners injured by the *hired contractor's negligence* will have a source of compensation even if the contractor turns out to be insolvent." *Camargo*, 25 Cal.4th at 1238-39. The peculiar-risk doctrine is described in Restatement sections 413 and 416.

In *Privette*, this Court affirmed summary judgment for the landowner Privette, holding that the peculiar-risk doctrine cannot "fairly" impose tort

liability on a *nonnegligent* employer like Privette, "who did nothing to create the risk," when the negligent contractor's liability is limited to workers' compensation benefits:

> Because the Workers' Compensation Act . . . shields an independent contractor from tort liability to its employees, applying the peculiar risk doctrine to the independent contractor's employees would *illogically* and *unfairly* subject the hiring person, *who did nothing to create the risk* that caused the injury, to greater liability than that faced by the independent contractor whose negligence caused the employee's injury.

Camargo, 25 Cal.4th at 1235; *see Privette*, 5 Cal.4th at 698-700.

Moreover, when the injured plaintiff is guaranteed workers' compensation benefits, the rationale of the peculiar-risk doctrine–"ensur[ing]" compensation–is absent:

> The property owner should not have to pay . . . when workers' compensation statutes *already cover* [the] injuries.

Privette, 5 Cal.4th at 699.

Further, allowing a plaintiff who has already received workers' compensation benefits to "seek damages" from the faultless hirer "would give" the plaintiff "an unwarranted windfall" that is "denied to other workers": the "right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment." *Id.* at 699-700.

Finally, this Court cited one more policy reason for abolishing peculiar-risk liability to injured employees of independent contractors hired to do dangerous work: "impos[ing] vicarious liability for *tort damages*" would "penalize" landowners "who hire experts to perform dangerous work" instead of limiting their liability to workers' compensation benefits by "assigning" the work "to their own inexperienced employees." *Id.* at 700.

(2) *Toland*: A landowner who merely hires a contractor to perform dangerous work is not sufficiently involved in creating the risk.

In *Toland*, this Court held that the *Privette* doctrine bars imposing peculiar-risk liability on the hiring landowner whenever that liability is "vicarious" or "derivative" of the independent contractor's *primary* negligence.

Toland worked for a "framing subcontractor" (CLP) that was hired at a "housing development under construction" by the project owner (Sunland). *Toland*, 18 Cal.4th at 257. A "heavy framed wall," being lifted by Toland and other "CLP employees," fell on Toland, injuring him. *Id.* Toland sought workers' compensation benefits from CLP and tort damages from Sunland under the peculiar-risk doctrine. *Id.*

Toland, in opposing Sunland's *Privette*-based summary-judgment motion, argued that his claim was not barred because he asserted "direct" negligence under Restatement section 413, not "vicarious" negligence under section 416.

Section 413 imposes on the hiring landowner "direct" liability for "fail[ing] to provide" that the contractor take "*special precautions*" to "avert" the work's "peculiar risks," while section 416 imposes "vicarious" liability for, although providing for special precautions, failing to assure that the contractor actually takes the precautions. *Camargo*, 25 Cal.4th at 1240.

But *Toland* rejected the proposed distinction between claims under sections 413 and 416. This Court reasoned that when the "hired contractor . . . *caused the injury* by failing to use reasonable care in performing the work," peculiar-risk liability cannot fairly be imposed on the hirer under either section 413 or section 416 because in each case liability is "in essence `vicarious' or `derivative'" of the negligent "`act or omission' of the hired contractor." *Toland*, 18 Cal.4th at 265 (emphasis added); *see Camargo*, 25 Cal.4th at 1240-41. Thus, the *Privette* doctrine applies "*irrespective* of whether recovery is sought under . . . section 413 or section 416." *Toland*, 18 Cal.4th at 267 (emphasis in original).

Toland, like *Privette*, rested its holding on the "unfair[ness]" of holding the "hiring person" more liable than the "contractor," who is

"primarily responsible" but whose liability is "limited to workers' compensation coverage." *Id.*

(3) *Camargo*: A landowner who negligently hires a negligent contractor is not sufficiently involved in creating the risk.

In *Camargo*, this Court held that "the *Privette/Toland* rationale" also bars landowner liability under Restatement section 411 for negligently *hiring* a contractor whose primary negligence injures the plaintiff. *Camargo*, 25 Cal.4th at 1235; *see* Rest.2d Torts § 411 ("An employer is subject to liability" for injuries caused by "fail[ing] to exercise reasonable care to employ a competent and careful contractor . . . .").

Camargo worked for a trucking contractor (Golden Cal) that Tjaarda Dairy "hired to scrape the manure out of its corrals and to haul it away." *Id.* at 1238. When Camargo drove his tractor over a manure pile in a Tjaarda corral, the tractor "rolled over," killing Camargo. *Id.*

The plaintiffs, Camargo's family, argued that the *Privette* doctrine does not bar a negligent-hiring claim, which rests on the hirer's "direct" negligence in "failing to exercise reasonable care." *Id.*

But this Court held that the *Privette* doctrine applies in negligent-hiring cases because, like in peculiar-risk cases, it "would be *unfair* to impose liability on the hiring person" when the liability of the "*primarily responsible*" hired party is "*limited* to providing *workers' compensation* coverage." *Id.* at 1244.

In sum, the *Privette* doctrine bars landowner liability when the employee's injuries were *caused by* the negligence of the hired contractor–i.e., if the injuries were caused by a hazard on the property, when that hazard was *created by* the contractor.

b. Landowner liability is not barred when the landowner created the hazard on its premises, or was sufficiently involved in creating the hazard.

By contrast, landowner liability is *not* barred when the hazard that injured the plaintiff was created by the landowner, or when the landowner at least was sufficiently involved in creating the hazard.

This distinction from *Privette*, *Toland*, and *Camargo* is shown in this

Court's decisions in *Hooker* and *McKown* and in the appellate decision in *Ray*, as discussed below.

(1) *Hooker*: A landowner who retains control of the contractor's work and affirmatively contributes to the injury is liable because it is sufficiently involved in creating the risk.

In *Hooker*, this Court ruled that the *Privette* doctrine does *not* bar landowner liability when the landowner's own negligent conduct "affirmatively contributed" to creating the hazard that injured the plaintiff.

Hooker considered whether the *Privette* doctrine limits landowner liability on claims for "negligent exercise of retained control" under Restatement section 414. *Hooker*, 27 Cal.4th at 201. Under section 414:

> One who entrusts work to an independent contractor, but who *retains control* o any part of the work, is subject to liability for physical harm to others . . . caused by his failure to exercise his control with reasonable care.

Rest.2d Torts §414; *see Hooker*, 27 Cal.4th at 201.

Hooker was a crane operator whose employer was an independent contractor hired by the defendant, landowner Caltrans, to "construct an overpass." *Hooker*, 27 Cal.4th at 202. Hooker's crane was stabilized by large "outriggers" that extended almost as wide as the overpass on which the crane sat. *Id.* Thus, when "other construction vehicles" needed to pass the crane, Hooker had to "retract the outriggers." *Id.* Hooker was injured when he tried to "swing" the crane "without first reextending the outriggers," which "caused the crane to tip over," killing Hooker. *Id.*

Hooker's widow "received workers' compensation benefits." *Id.* at 203. She also sued Caltrans, alleging that Caltrans "had negligently exercised control it had retained over safety conditions at the jobsite." *Id.*

This Court held that the *Privette* doctrine does *not* limit landowner liability for "negligent exercise of retained control" when the landowner's negligence "affirmatively contributed" to causing the "employee's injuries." *Id.* at 202.

By contrast, a hirer is not liable "merely because the hirer retained control over safety conditions at a worksite." *Id.* Instead, the hirer must "actually exercis[e] the retained control" in a way that "affirmatively

contribute[s]" to causing the plaintiff's injuries. *Id.* at 215. Because Hooker's wife failed to present evidence that Caltrans affirmatively contributed to Hooker's death, this Court affirmed summary judgment for Caltrans. *Id.* at 202, 215.

Finally, this Court explained why, when the landowner's own negligence affirmatively contributes to causing the injuries, the reasons for barring liability (articulated in *Privette*) are absent:

- **No "vicarious" liability:** "[W]hen the hirer's conduct has affirmatively contributed to the injuries," the hirer's liability is *not* (as in *Privette* et al.) "in essence vicarious" and does *not* "deriv[e] from the act or omission of the hired contractor." *Id.* at 211-212 (internal quotation marks omitted).
- **No unfairness regarding workers' compensation:** Because the hirer "affirmatively contribute[d]" to causing the injuries, there is nothing unfair about imposing tort liability in addition to workers' compensation benefits. *Id.* at 212-13.
- **No "unwarranted windfall":** The landowner's "tort liability" is "warranted by the hirer's affirmative conduct," so that "permitting the employee to sue" does not "give the employee an unwarranted windfall." *Id.* at 214; *cf. Privette*, 5 Cal.4th at 699-700.

(2) *McKown*: A landowner who supplies defective equipment that injures the contractor's employee is sufficiently involved in creating the risk.

In *McKown*, this Court echoed *Hooker* to hold that the *Privette* doctrine does not bar liability when the landowner affirmatively contributes to creating the hazard by negligently supplying unsafe equipment that injures the plaintiff. *McKown*, 27 Cal.4th at 219.

Plaintiff McKown was an employee of an independent contractor that defendant Wal-Mart hired to "install sound systems in its stores." *Id.* at 223. Wal-Mart gave McKown a forklift that was defective, lacking a safety chain. *Id.* When the forklift platform hit a ceiling pipe, it "disengaged" and fell 12 to 15 feet to the floor "with McKown on it." *Id.*

This Court affirmed the judgment for McKown, holding that the *Privette* doctrine did not bar liability because Wal-Mart, in supplying an

unsafe forklift, "affirmatively contribute[d]" to causing his injuries by its "own negligence":

> [W]hen 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.*

Id. at 225 (emphasis added).

(3) *Ray v. Silverado Constructors* (Court of Appeal): A landowner who violates an independent duty of care (unrelated to any contractor negligence) is sufficiently involved in creating the risk.

In *Ray*, the Court of Appeal followed the *Hooker/McKown* rationale, holding that the *Privette* rationale does not bar a hiring landowner's liability for violating an "independent duty" to the plaintiff. *Ray*, 98 Cal.App.4th at 1128.

Ray, an employee of a highway subcontractor, was killed while clearing construction materials that blew in high winds off a freeway bridge owned by defendant Foothill/Eastern Transportation Corridor Agency (the Agency) and controlled by general contractor Silverado. Ray's employer, subcontractor Rados, was working on the bridge. Ray, working at a nearby site, was driving under the bridge when he saw the fallen construction materials. Ray blocked traffic below the bridge and helped two co-employees secure the materials. He was hit in the head with a massive piece of equipment and killed. *Ray*, 98 Cal.App.4th at 1123-24.

Ray reversed summary judgment for Silverado, holding that *Privette* did not bar liability because Silverado violated an "independent duty" and a "distinct obligation" to Ray: the duty to "close the roadway" below the bridge "when a risk of harm arose due to falling construction materials." *Id.* at 1124-25.

According to *Ray*, *Hooker* and *McKown* "eliminated any doubt that a direct negligence cause of action may be maintained against the hirer of an independent contractor *without running afoul of Privette and Toland*." *Id.* at 1128 (emphasis added). Thus, Ray could prevail against Silverado on "a

cause of action based on direct liability, not [on] vicarious liability" resting solely on "the `act or omission' of the hired contractor . . . ." *Id.* at 1126, 1129.

The duty of an owner or occupier of land to protect others from hazards on the property creates "direct liability" that is not limited by the *Privette* doctrine. "Silverado, the general contractor" on a large "25-mile project," "owed a duty to the traveling public to protect it from injury on the roadways comprising" that project. *Id.* at 1134-35. And this "duty" exists whether or not a hired contractor was also negligent: "The fact the construction activities of [subcontractor] Rados may have affected safety conditions on Marine Way did not necessarily mean all of Silverado's obligations to make the roadway safe evaporated." *Id.* at 1135.

In sum, under *Hooker*, *McKown*, and *Ray*, the *Privette* doctrine does not limit the landowner's liability when the landowner created the hazard, or contributed to creating the hazard, through its *own independent negligence* that exists regardless of whether any hired contractor was negligent.

2. The *Privette* doctrine does not affect premises liability, which rests on the landowner's *creation* of the hazard and does not create *Privette*'s concerns.

Under the foregoing authorities, the *Privette* doctrine does not limit a landowner's *premises* liability because premises liability rests on the landowner's independent negligence in creating the hazard, not on any contractor's subsequent negligence.

Moreover, the *Privette* doctrine *should not* limit premises liability because premises liability does not raise the policy concerns articulated in *Privette*.

Finally, the Opinion's various reasons for applying *Privette* are erroneous.

a. The *Privette* doctrine does not limit premises liability: the landowner's creation of a hazard on its property is independent negligence.

The *Privette* doctrine does not limit a landowner's premises liability–for creating a hazard on its premises–because that liability rests on

the landowner's independent duty to maintain a safe premises, a duty unrelated to any contractor negligence.

(1) Premises liability involves an independent duty unrelated to contractor negligence.

Premises liability is like *McKown* and *Ray*, and unlike *Privette*, *Toland*, and *Camargo*, because it involves the landowner's independent duty to maintain safe premises–a duty unrelated to any contractor negligence.

As shown above, premises liability rests on the landowner's failure to protect or warn visitors about a hazardous condition on its premises. This duty to protect or warn rests on Restatement section 343 and this Court's decision in *Rowland v. Christian*.

Under those authorities, the jury held Unocal liable for negligently creating and maintaining on its property the hazardous condition of asbestos. Unocal, which admittedly knew that this hazardous condition existed, had a duty to protect Kinsman from the asbestos or at least to warn him so he could protect himself. Unocal failed to do this. Opinion at 3.

As in *McKown* and *Ray*, Unocal was directly negligent. As in *McKown*, Unocal's failure to protect Kinsman from the asbestos hazard that Unocal knowingly created at its refinery "affirmatively contributed" to causing his asbestos disease through Unocal's "*own negligence*." *Id.* at 225 (emphasis added). And as in *Ray*, Unocal violated an "independent duty" to Kinsman that existed regardless of any contractor negligence. *Ray*, 98 Cal.App.4th at 1124-25. Indeed, as in both *McKown* and *Ray*, Unocal was negligent *whether or not* any contractor was negligent.

By contrast, this premises-liability case is unlike *Privette, Toland*, and *Camargo*, where the landowner's negligence was "vicarious" or "derivative" of a contractor's negligence–*i.e.*, the landowner's negligence *would not exist* if the contractor had not been negligent.

Moreover, it is no answer here for Unocal to argue that the insulators on its premises were "negligent" in removing and replacing the asbestos on Unocal's equipment, so that Unocal's negligence was somehow "derivative" of that contractor negligence. First, the record contains *no* evidence that the insulators' work was negligent because there is *no* evidence that the

insulators, whoever they were, knew that asbestos was dangerous or even that they were working with asbestos. Second, even if any insulator had been shown to be negligent in the way that it worked with the asbestos, Unocal was still *independently* negligent for knowingly *creating* the asbestos hazard and failing to warn or protect Kinsman.

(2) Nothing in this Court's *Privette* decisions suggests that the *Privette* doctrine limits premises liability.

Next, nothing in *Privette*, *Toland*, *Camargo*, *Hooker*, or *McKown* suggests that the *Privette* doctrine limits a landowner's premises liability.

On the contrary, as *Ray* noted, *Hooker* and *McKown* "eliminated any doubt that a direct negligence cause of action may be maintained against the hirer of an independent contractor without running afoul of *Privette*." *Ray*, 98 Cal.App.4th at 1127-28.

And a premises liability cause of action is indisputably a "direct negligence cause of action," unrelated to any contractor negligence. Premises liability rests on the landowner *creating* a hazard, by act or omission, *before* anyone comes onto the property. Thus, premises liability exists whether or not any contractor is also negligent.

(3) Even the Opinion recognizes that *Privette* does not limit a landowner's liability for *creating* a hazard on its premises.

The Opinion recognizes that the *Privette* doctrine does not apply to claims asserting, under Restatement section 343, that the landowner *created* the hazard to which the plaintiff was exposed. Opinion at 10. The Opinion notes that "a premises owner's liability under section 343 . . . may arise" in two "contexts":

(1) When "the plaintiff is injured by a dangerous condition the *landowner created*, or knowingly failed to remedy"; and

(2) When "the plaintiff is injured by a dangerous condition *created entirely by third parties*, or the plaintiff himself . . . and beyond the landowner's power to control."

Opinion at 10.

And the Opinion acknowledged that "the *Privette* doctrine" applies to

limit the landowner's liability *only* in the "*second* context":

> *In this second context*, the *Privette* doctrine permits recovery by a contractor's employee only when the landowner has actively or affirmatively contributed to the employee's injury from the dangerous condition.

Opinion at 10.

Thus, the Opinion conceded that the *Privette* doctrine does not limit landowner liability in the first "context," *i.e.*, when the landowner created, or knowingly failed to remedy, the hazard on its premises. *See Zamudio v. City and County of San Francisco* (1999) 70 Cal.App.4th 445, 454-55 (*Privette* applied only because the "dangerous condition" was "*not* created by" the landowner but rather by the plaintiff's employer).

The Opinion, however, misapplied these standards, ruling erroneously that Kinsman's case against Unocal somehow arose in the "second context," *i.e.* that the asbestos hazard at Unocal's refinery was "created entirely by third parties." Opinion at 10.

(4) Other jurisdictions hold that *Privette*-style limitations do not apply when the landowner *created* a hazard on the premises.

Other jurisdictions have also recognized that the *Privette* limitations on liability to an independent contractor's employees do not apply when the landowner *creates* the hazard on the premises.

For example, when Arizona in 1965 adopted the *Privette*-style limitations on landowner liability to an independent contractor's employee, the court was careful to note that the limitations did not apply when the landowner had created on its land a hazardous "defect":

> It must be clearly understood that the [*Privette*-style] rule of nonliability adopted by this court is limited to the situation where the contractee has turned over *safe premises* to the independent contractor without *hidden and/or concealed defects*.

Welker v. Kennecot Copper Co. (Ariz.App. 1965) 403 P.2d 330, 339-40.

Even when the *Privette*-style limitations exist, the landowner still has a "duty owed to an independent contractor and to his employees to *turn over a reasonably safe place to work, or to give warning of any dangers*." *Id.* at 340 (emphasis added).

Moreover, other courts have concluded that the *Privette*-style limitations are justified in part *because* the plaintiff can still sue the landowner under Restatement section 343 based on premises liability.

For example, the Third Circuit in *Monk* adopted the *Privette* doctrine under Virgin Islands law, holding that "employees of an independent contractor" cannot assert vicarious "peculiar risk" liability against the hiring landowner. *Monk v. Virgin Islands Water & Power Authority* (3d Cir. 1995) 53 F.3d 1381, 1393 (expressly following *Privette*). Although a "minority of jurisdictions" have not followed the *Privette* reasoning, the Third Circuit held that the *Privette* limitations on a landowner's vicarious liability are appropriate for several reasons, including that the plaintiff can still sue the landowner under section 343 for premises liability:

> [C]ourts point out that employers need not be held liable to employees of an independent contractor under the peculiar risk provisions of Chapter 15 of the Restatement *because* other remedies exist besides workers' compensation. A contractor's employees . . . *still have the right* to sue for certain latent defects on the land, *see* Restatement § 343 . . . .

Monk, 53 F.3d at 1393 (emphasis added).

Similarly, the Washington Supreme Court barred vicarious peculiar-risk liability to employees of independent contractors based on "strong policy considerations," including that the "owner who employs an independent contractor is *already liable* to all third persons, *including* employees of the independent contractor, for . . . injuries resulting from *any latent defects on the land*" under "Restatement" section "343." *Tauscher v. Puget Sound Power & Light Co.* (Wash. 1981) 635 P.2d 426, 431 (emphasis added).

In sum, when a landowner creates or knowingly fails to remedy a hazard on its premises, the *Privette* doctrine does not limit the landowner's premises liability.

b. The *Privette* doctrine should not limit premises liability, which creates none of *Privette*'s policy concerns.

This Court should not extend the *Privette* doctrine to premises liability because premises-liability cases create none of the policy concerns

cited in *Privette*.

First, *Privette* found it "unfair" and "illogical" to subject a landowner who "who *did nothing* to create the risk" to more liability than the contractor "whose negligence caused the employee's injury" but whose liability is limited to workers' compensation benefits. *Camargo*, 25 Cal.4th at 1235; *see Privette*, 5 Cal.4th at 698-700. But premises liability does not involve a landowner who "did nothing to create the risk"—by definition the landowner created or knowingly failed to remedy the hazard on its premises that injured the plaintiff. As *Hooker* noted regarding a landowner who "affirmatively contributes" to creating the risk, in a premises-liability case the hirer's liability is *not* "in essence vicarious" and does *not* "deriv[e] from the act or omission of the hired contractor." *Hooker*, 27 Cal.4th at 211-12.

Second, *Privette* limited the liability of a faultless landowner because it would give the plaintiff "an unwarranted windfall." *Privette*, 5 Cal.4th at 699-700. But compensating a plaintiff like Kinsman for being injured by a hazard that Unocal *knowingly* created, failed to remedy, and failed to warn about, would not be "unwarranted." As this Court held in *Hooker* and *McKown*, when "tort liability" is "warranted by the hirer's affirmative conduct," "permitting the employee to sue" does not "give the employee an unwarranted windfall." *Hooker*, 27 Cal.4th at 214; *see McKown*, 27 Cal.4th at 226 (finding no "unwarranted windfall" for the "reasons stated in *Hooker*").

Third, *Privette* limited peculiar-risk liability to employees of independent contractors because it would discourage worker safety, "penaliz[ing]" landowners "who hire experts to perform dangerous work" instead of limiting their liability to workers' compensation benefits by "assigning" the work "to their own inexperienced employees." *Privette*, 5 Cal.4th at 700. But this concern does not arise with premises liability, which rests on the landowner's creation of or failure to remedy a hazard and has nothing to do with hiring workers.

In fact, applying the *Privette* doctrine to premises liability would itself *discourage* worker safety, rewarding landowners who do nothing to improve worker safety by providing an immunity from liability for hazards that the owner created. For example, the Opinion holds that landowners who create hazardous conditions are not subject to premises liability "under

section 343" unless they "affirmatively contributed" to the hazard that caused the plaintiff's injury. Opinion at 16. Under this holding, landowners would intentionally avoid any involvement in worker safety so they could deny making an "affirmative contribution" to the risk, thereby leaving an unreasonable risk of harm that the owner created and knew existed but failed to warn anyone about.

In sum, because none of the policy concerns that drove this Court in *Privette* to limit a landowner's vicarious liability exist in a premises liability case, this Court should not extend the *Privette* doctrine to premises liability.

c. The Opinion's reasons for applying the *Privette* doctrine to this case are wrong.

Next, the Opinion's various reasons for applying the *Privette* doctrine to this case are wrong.

(1) The Opinion mischaracterizes this case as involving a hazard created "entirely" by persons other than Unocal–i.e., not created by Unocal *at all*.

The Opinion's analysis hinges on a mischaracterization of this case as involving a hazard that was created *entirely* by a contractor–*i.e.*, a hazard that Unocal did not contribute to creating *at all*.

This mischaracterization is the linchpin of the Opinion's holding:

- "[W]e conclude a premises owner has no liability to an independent contractor's employee for a dangerous condition *a contractor has created* on the property . . . ." Opinion at 1 (emphasis added).
- "[W]e conclude a premises owner's liability for injuries suffered by an independent contractor's employee due to a dangerous condition on the land *created by the contractor* is limited by the *Privette* doctrine." Opinion at 10 (emphasis added).
- "We announce [the] simpler rule . . . [that a] property owner cannot be liable to a contractor's employee for a dangerous condition a *contractor has created* on the land . . . ." Opinion at 13-14 (emphasis added).

And the Opinion even asserts that the asbestos hazard that injured Kinsman was not just "created" by a contractor it was "created *entirely*" by

a contractor. Opinion at 10.

This characterization of this case is belied by the evidence, which shows that *Unocal* created the asbestos hazard by using hazardous asbestos in its refinery, knowing that the asbestos was hazardous and would degrade. Unocal then invited Kinsman and other contractors onto the property to encounter the hazard, failing to tell them that they were working with asbestos or to offer them any protection from the hazard.

Thus, the Opinion is wrong to assert that the hazard was "created entirely by third parties." If anything, the hazard was created *entirely* by Unocal's negligence—no evidence showed that any contractor was negligent. But at a minimum, Unocal contributed to creating the hazard, so that the hazard was not created "entirely" by someone else.

(2) The Opinion, confusing two tort theories, erroneously allowing premises liability only when the owner "retained control" over the worksite.

The Opinion, although concededly analyzing a cause of action for "premises liability" under Restatement "section 343" (Opinion at 10), creates a requirement for liability that the owner must have retained "control" over the hazard that the owner created. Opinion at 1, 10, 13-14.

This requirement confuses two tort theories, erroneously allowing premises liability under Restatement section 343 when the owner "retained control," a component of a claim for negligent exercise of retained control under section 414.

And this requirement makes no sense. A "retained control" requirement makes sense when the contractor creates a hazard that injures the plaintiff, so that the landowner who had no control over what the contractor was doing avoids liability because it had nothing to do with creating the hazard.

But a "retained control" requirement makes no sense when the landowner created the hazard *before any contractor arrived* on the premises. Indeed, section 343 imposes premises liability for exposing visitors to a known hazard on the property without warning them.

(3) The Opinion erroneously holds that the jury could find Burke & Reynolds and the "insulators" negligent, ignoring that no evidence showed that they knew they were working with dangerous asbestos.

The Opinion was wrong to reject Kinsman's showing that the *Privette* doctrine, which rests on *contractor* negligence, is inapplicable because no evidence showed that any contractor was negligent. Opinion at 18-21.

The Opinion held to the contrary that the jury could have:

1. Found the (unknown) "insulators" negligent based on "evidence suggesting the insulators acted carelessly in releasing asbestos dust." Opinion at 19.

2. Found Burke & Reynolds negligent because Burke & Reynolds "failed to discuss the dangers of asbestos in safety meetings and failed to require its employees to wear masks." Opinion at 19.

The Opinion is wrong. The jury could not have reasonably found either the "insulators" or Burke & Reynolds negligent because no evidence showed that either of them *had any idea that they were working with or near asbestos or that asbestos is dangerous*–because Unocal failed to tell them.

(4) The Opinion does not draw support from *Zamudio* or *Grahn*.

Finally, the Opinion's expansion of *Privette* to premises-liability claims like Kinsman's does not draw support from the two appellate cases cited by the Opinion as supposedly "consider[ing] the application of *Privette* to a landowner's liability for a dangerous condition on the property" (Opinion at 11):

1. *Zamudio v. City and County of San Francisco* did not involve a "dangerous condition" that was created by the landowner. *Zamudio*, 70 Cal.App.4th 445. As the Opinion notes, in *Zamudio* "the only `dangerous condition' was a plank that was owned, and placed in a potentially dangerous position, *by the plaintiff's employer*." Opinion at 11 (*citing Zamudio*, 70 Cal.App.4th at 454-55)). Thus, as the Opinion concedes, the "danger" from the plank "was created entirely by the contractor's work and *did not arise from the property itself*." Opinion at 11 (emphasis added).

Here, by contrast, the asbestos danger arose from the property itself–put there by Unocal's negligent decision to knowingly use hazardous asbestos that would have to be disturbed and replaced.

2. *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, although applying *Privette* to a premises-liability case involving an asbestos hazard, is factually inapposite because the independent contractor, an insulation expert, *undisputedly knew* that it was working with hazardous asbestos– so that the landowner could reasonably rely on the contractor to take safety precautions. The contractor, Thorpe, was "an independent contractor *specializing* in installation and repair of refractory and insulation materials in high-temperature units . . . , including all of the Bay Area's major refineries." *Grahn*, 58 Cal.App.4th at 1373. And because Thorpe's insulation work at defendant/landowner Tosco's refinery occurred from 1976 to 1989, when asbestos insulation had been banned and thus its hazards were well known,[2] it is not disputable that insulation-expert Thorpe knew about asbestos's hazards. (The *Grahn* opinion does not suggest that Thorpe argued otherwise.)

Grahn's holding rests on Thorpe's knowledge. Because Thorpe was an asbestos-insulation expert with indisputable knowledge of the hazards, "the hirer" (Tosco) was "entitled to assume that the independent contractor" (Thorpe) 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 (cited in Opinion at 13). Thus, the "duty to protect [Thorpe's] employees from hazards reside[d] with [Thorpe]." *Id.*

But Tosco could "assume" that Thorpe would "assure" people's "safety" only because Thorpe *knew that a hazard existed*.

Here, by contrast, no evidence showed that any contractor knew that the insulation on Unocal's property was hazardous. Indeed, no evidence showed (1) that the insulators were "contractors," (2) that those "contractors" knew that they were working with asbestos, or (3) that they

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[2] *See Buckley*, 79 F.3d at 1340 ("asbestos" has been "widely recognized as a carcinogen *since the mid-1970s*"); *Affliated FM*, 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").

knew that asbestos was dangerous, let alone that they knew how to "tak[e] proper care and precautions" to avoid asbestos injuries. *Id.* Thus, Unocal has failed to show that it was "entitled to assume" that the insulators (whoever they were) would "tak[e] proper care and precautions to assure the safety" of workers like Kinsman.

Finally, if this Court finds that *Grahn* is parallel to the instant case, then this Court should disapprove *Grahn*—just as it has expressly disapproved *Grahn*'s holdings on negligent hiring (*Camargo*, 25 Cal.4th at 1243-45) and negligent exercise of retained control (*Hooker*, 27 Cal.4th at 209-10, 214).

(5) The Opinion does not draw support from the cited out-of-state cases.

The Opinion erroneously claims to be "consistent with limitations other states have imposed on premises owners' liability to employees of independent contractors." Opinion at 11.

But the three out-of-state cases cited in the Opinion are inapposite because none involves a premises hazard that the *landowner* created. Instead, each involves a hazard that the *independent contractor created* after it came onto the property:

- *Lee v. E.I. Dupont de Nemours & Co.* (3d Cir. 2001) 249 F.3d 362, 364: Plaintiff was injured on a "scaffold" because a "piece of grating" was "not adequately secured to a support structure" by the *contractor*.
- *West v. Briggs & Stratton Corp.* (Ga.App. 2000) 536 S.E.2d 828, 841: Plaintiff "fell into a pit" that was "constructed and maintained by the flooring *contractor*" (emphasis added).
- *Dow Chem. Co. v. Bright* (Tex. 2002) 89 S.W.3d 602, 605: Plaintiff was crushed by a an "unstable" pipe that was "put into place and improperly secured" by an "employee" of "an *independent contractor* (emphasis added)."

Hence, in these cases the courts considered whether the landowner had retained sufficient control over the contractor's work to warrant imposing vicarious liability on the landowner.

Thus, these cases are inapposite here, where Unocal itself *created* the asbestos hazard *before* any contractor arrived on the premises.

In sum, the Opinion's various reasons for applying the *Privette*

doctrine to this premises-liability case all lack merit.

Because the valid premises-liability judgment is unaffected by the *Privette* doctrine, the Opinion should be reversed and the judgment should be affirmed.

II.

The *Privette* doctrine does not apply also because Kinsman's employer was not negligent, so that the availability of workers' compensation benefits creates no unfairness to Unocal.

Next, even if the insulators at Unocal were a "contractor" who "created" the asbestos hazard (Opinion at 1, 10), the Opinion unduly expands the *Privette* doctrine in a second way: to apply when the culpable contractor is *not* the plaintiff's employer, so that the contractor's liability is *not* limited by workers' compensation.

A. The Opinion holds that the asbestos hazard was created by insulation contractors, not by Kinsman or his employer.

The Opinion rests on its conclusion that the "dangerous condition" of "airborne asbestos" "primarily resulted from the activities of other contractors on-site," *i.e.*, the dangerous condition was "created" by the insulators. Opinion at 1, 15-16.

By contrast, the Opinion concedes that "the dangerous condition" was "*not* created by Kinsman or his employer." Opinion at 15. Indeed, Kinsman and his employer were not insulators–they were carpenters who built and dismantled scaffolding. CT 1339-44. Although "Kinsman was exposed to some asbestos when he `tied in' scaffolding to insulated pipes and equipment," no evidence suggested that Kinsman or Burke & Reynolds had any idea that they were working with asbestos. Moreover, this contribution was de minimus, as the Opinion concedes: "most of his exposure resulted from the work of neighboring insulators," so that the "dangerous condition (i.e., airborne asbestos) was not created by Kinsman or his employer." Opinion at 15.

B. The *Privette* doctrine does not apply because it rests on the unfairness of subjecting the landowner to more liability than the negligent contractor whose liability is limited to workers' compensation benefits.

The *Privette* doctrine rests on the "unfairness" of "impos[ing liability on the hiring person" when the liability of the "primarily responsible" hired party is "limited to providing workers' compensation coverage." *Camargo*, 25 Cal.4th at 1244; *Toland*, 18 Cal.4th at 267; *see Privette*, 5 Cal.4th at 698 (barring the "*anomalous result* that a nonnegligent person's liability for an injury is greater than that of the person whose negligence actually caused the injury" (emphasis added)).

But when a contractor's employee is injured by the negligence of a *different* contractor, the employee can recover workers' compensation benefits from his employer *and* civil damages from the other negligent contractor. *See* Labor Code § 3852 ("The claim of an employee . . . for compensation *does not affect* his or her claim or right of action for all damages . . . against any person other than the employer."). As this Court noted in *Hooker*, the "rule of workers' compensation exclusivity `does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury.'" *Hooker*, 27 Cal.4th at 214.

Thus here, because the liability of the (supposedly) "primarily responsible" insulation contractor was not "limited" to workers' compensation, there is nothing "unfair" about holding the landowner (Unocal) liable to the same extent. Indeed, unlike in *Privette*, Unocal is entitled to seek "equitable indemnity from the primarily responsible insulation contractor." *See Privette*, 5 Cal.4th at 701 (barring landowner liability as unfair in part because "the exclusivity provisions of the workers' compensation scheme shield the negligent contractor [the plaintiff's employer] from an action seeking equitable indemnity").

The Opinion wrongly rejects this distinction, ruling that it still would be "unfair" to allow Kinsman to recover in tort from Unocal because "workers' compensation benefits are [still] available" to Kinsman. Opinion at 18. That ruling violates *Hooker*, where this Court noted that the workers' compensation scheme clearly contemplates that injured employees who receive benefits can still recover additional damages from "anyone else whose conduct was a proximate cause of the injury.'" *Hooker*, 27 Cal.4th at

214.

In sum, even if this Court believes (despite the lack of evidence) that, as the Opinion asserts, the asbestos hazard was "created entirely" by an insulation "contractor" (Opinion at 10, 13-14), this Court should still hold that the *Privette* doctrine does not apply because that primarily negligent contractor's liability is not limited to workers' compensation benefits, so that (unlike in *Privette*) there is nothing "unfair" about holding Unocal liable to the same extent.

III.

Even under the Opinion's announced "rule," the judgment should be affirmed because Unocal's negligence "affirmatively contributed" to Prior's disease.

Finally, even if the Opinion's announced "rule"—requiring a showing that Unocal "affirmatively contributed" to causing Kinsman's "injury" (Opinion at 1)—is correct, the judgment should be affirmed because Unocal's negligence in knowingly exposing Kinsman to an asbestos hazard without any protection or warning *was an affirmative contribution to his injuries*.

The Opinion announced for premises-liability cases the following "rule":

> A property owner cannot be liable to a contractor's employee for a dangerous condition a contractor has created on the land unless the owner exercised control over the condition and, in doing so, *affirmatively contributed to the employee's injury*.

Opinion at 14; *see* Opinion at 10 (same).

The Opinion expressly derived this "rule" from this Court's "reasoning in *Hooker* and *McKown*." Opinion at 10.

But *McKown* shows that Unocal, like Wal-Mart in *McKown*, "affirmatively contributed" to causing the plaintiff's injuries.

In *McKown*, Wal-Mart "affirmatively contribute[d]" to injuring McKown by providing McKown and his employer with "unsafe equipment"—a forklift lacking a required safety chain. *McKown*, 27 Cal.4th at 223, 225. Although the jury found that McKown's independent-contractor employer also negligently caused his injuries (*id.* at 223),

because Wal-Mart *provided* McKown with the unsafe equipment, Wal-Mart "affirmatively contributed" to causing the injuries. *Id.* at 225.

Likewise here, Unocal affirmatively contributed to Kinsman's injuries by knowingly furnishing an "unsafe" condition of land without any warning. Just as McKown was injured by unwittingly working with the unsafe forklift, Kinsman was injured by unwittingly working with and around the unsafe asbestos materials.

No meaningful distinction exists between Wal-Mart's negligence in *McKown* and Unocal's negligence. Both "affirmatively contributed" to causing the plaintiff's injuries.

Hence, even under the Opinion's "rule" requiring an affirmative contribution to Kinsman's injuries, the judgment should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Opinion and affirm the judgment.

Dated: December 23, 2003. Respectfully submitted,

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