

## CASE SUMMARY

*Ray Kinsman v. Unocal Corporation*  
No. S118561

In the 1950's, carpenter Ray Kinsman was employed by an independent contractor retained by Unocal Corporation (hereafter Unocal) to build and dismantle scaffolding at a refinery in Wilmington, California. In the course of his employment, Kinsman was exposed to airborne asbestos. He did not wear a mask or respirator. The airborne asbestos was caused by other trade workers while they applied insulation containing asbestos to pipes and machinery, and removed such insulation. Some 40 years later, Kinsman developed mesothelioma, an asbestos-induced cancer of the lungs.

Kinsman filed a lawsuit against Unocal in the San Francisco County Superior Court, claiming among other things that his mesothelioma was caused by a dangerous condition at Unocal's premises. A jury found that Unocal was negligent in the use, maintenance, or management of its refinery. The jury assigned to Unocal fifteen percent of the fault for Kinsman's mesothelioma and awarded Kinsman over \$3 million in damages.

Unocal sought appellate review by the California Court of Appeal. After the parties filed written papers setting forth their legal positions (called "briefs") and made oral presentations to the court (called "oral argument"), the First Appellate District of the Court of Appeal reversed the judgment and remanded the matter for new trial.

In deciding the case, the Court of Appeal applied principles of law expressed by the California Supreme Court in a case entitled *Privette v. Superior Court* (hereafter *Privette*). Under common law, the hirer of an independent contractor was not liable to bystanders for injuries caused by the contractor's negligence. Over time, exceptions were made to this common law rule, and bystanders were permitted to pursue certain claims against the hirer of an independent contractor for injuries that were caused by the independent contractor. One such exception is where the work performed by the independent contractor is inherently dangerous and poses a "peculiar risk" of injury to bystanders or neighboring landowners. In *Privette*, the California Supreme Court held that liability under the peculiar risk exception does not extend to an employee of the independent contractor, who instead can recover workers' compensation benefits. However, the hirer of an independent contractor can be held liable to employees of the independent contractor for injuries caused by the hirer's own negligence. Subsequent decisions have applied to other situations the principles of law expressed in *Privette*.

In this case, the Court of Appeal concluded the trial judge erred by failing to instruct the jury that the employee of an independent contractor cannot recover from the landowner and hirer of the independent contractor for a dangerous condition on the property, absent proof the landowner and hirer had control over the allegedly dangerous condition of the property and affirmatively contributed to the injury.

Kinsman then petitioned for review by the California Supreme Court, which agreed to decide the following issue:

1. Is a landowner's liability with respect to a concealed hazardous condition on its property limited by the principles of law articulated in *Privette* and its progeny where the concealed condition allegedly causes injury to an employee of an independent contractor hired by the landowner?

Kinsman contends the Court of Appeal wrongfully extended the principles expressed in *Privette* to bar recovery based on a theory of Unocal's direct liability as a landowner for creating, or failing to cure, a known hazard on its premises. In Kinsman's view, the jury's verdict and award of damages are valid based upon his theory of premises liability, that Unocal knowingly created an asbestos hazard to which he was exposed without warning or protection.

Claiming that Kinsman failed to prove Unocal concealed a dangerous condition on its property, Unocal argues it is not equitable to impose liability on the hirer of an independent contractor for work-related injury to the employee of the independent contractor where the hirer did not fraudulently conceal or misrepresent the dangerous condition that caused the employee's injury, the hirer's conduct did not affirmatively contribute to the dangerous condition, the independent contractor could have taken steps to protect its employee, and the injured employee can recover workers' compensation benefits for the injury.