S169753

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

Jeffrey Tverberg and Catherine Tverberg,
Plaintiffs and Appellants,

vs.

Fillner Construction, Inc.,
Defendant and Respondent.

After a Decision by the Court of Appeal, First Appellate District, Division Four
Case No. A120050

ANSWERING BRIEF ON THE MERITS

Kirk J. Wolden
(State Bar #138902)
CLAYEO C. ARNOLD
A Professional Law Corporation
865 Howe Avenue, Suite 300
Sacramento, CA 95825
(916) 924-3100 (Tel)
(916) 924-1829 (Fax)

Leslie M. Mitchell
Attorney at Law
(State Bar # 115105)
1710 Broadway #96
Sacramento, CA 95818
(916) 447-3426 (Tel)
(916) 447-4383 (Fax)

Attorneys for Plaintiffs and Appellants
Jeffery Tverberg and Catherine Tverberg

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INTRODUCTION

In *Privette v. Superior Court* (1993) 5 Cal.4th 689, this Court held that the hirer of an independent contractor ordinarily cannot be held liable under the peculiar risk doctrine for injuries to the contractor's employees. *Privette* was based on policy considerations arising out of the existence of workers' compensation coverage for such employees and the effect workers' compensation has on the rights of hirers, contractors, and employees.

Since *Privette*, this Court has rendered five further decisions addressing the liability of hirers for injuries to employees of their contractors. In each of those decisions, this Court has emphasized that it is the existence of workers' compensation coverage, and the ramifications of that coverage, which is the legal and intellectual foundation of the *Privette* doctrine.

The issue in the present case is whether the *Privette* doctrine can be extended to self-employed workers who are without workers' compensation coverage. The Court of Appeal in this case determined that such an extension of the *Privette* doctrine is unsupported by this Court's reasoning in the *Privette* cases and would, in fact, be in direct conflict with those cases. The Court of Appeal was correct: the *Privette* doctrine cannot be extended to self-employed workers without eviscerating the very reasoning upon which *Privette* is based. Therefore, the decision of the Court of Appeal should be affirmed.

STATEMENT OF THE CASE

A. Background.

Plaintiff and Appellant Jeffrey Tverberg ("Tverberg") is an individual who, until May 2006, did business as an independent contractor, called "J.T. Construction." J.T. Construction was a sole proprietorship, with no employees. Tverberg worked on the erection of gas station canopies. His services were frequently used by a company called Perry Construction, a supplier and installer of gas station canopies. (AA 38 [Fact 6];102-103 [Facts 1-2]; 139-140.) Tverberg was not an employee of Perry Construction, or of anyone else. (AA 38 [Fact 8]; 52.)

B. The Ramos Oil Project.

In early 2006, Perry Construction told Tverberg that it needed his services to help with the construction of a canopy at the Ramos Oil site in Dixon, California. (AA 103 [Fact 2]; 167.) Defendant and Respondent Fillner Construction, Inc. ("Fillner") was the general contractor on the project, which involved the expansion of Ramos Oil's commercial fuel depot in Dixon. (AA 38 [Fact 2].) Fillner contracted with Lane Supply to supply and install the canopy. (AA 38 [Fact 4].) Lane Supply, in turn, hired Perry Construction to install the canopy. (AA 38 [Fact 5].) Perry Construction asked Tverberg to take charge of the canopy project, and to act as a "work-along foreman" for the

two Perry Construction employees who were also working on the canopy installation. (AA 38[Fact 8]; 103 [Fact 2]; 140.)

As part of the Ramos Oil remodel project, Fillner directed another of its contractors, Alexander Concrete, to dig eight "bollard holes" in the same area where the canopy was going to be installed. (AA 39 [Fact 10]; 52; 104 [Fact 13].) These holes were for the installation of "bollards," which are the posts near fuel pumps designed to prevent vehicles from crashing into them. The bollard holes at the Ramos Oil jobsite were four feet wide and four feet deep. (AA 39 [Facts 9-10].) The bollard holes were not related in any way to the canopy installation work Tverberg was going to perform. (AA 104 [Facts 12, 15-17]; 116; 142; 168; 180.)

Alexander Concrete did not place any covering over the bollard holes, or place any guardrails or other barricades around them. There were two pre-existing wooden stakes near each hole which had been placed there in connection with pouring concrete. Alexander Concrete put some "safety ribbon" on some of those stakes. Other holes had no ribbon or other markings, except for the two pre-existing wooden stakes. (AA 104 [Fact 14]; 154; 156.)

As the general contractor, Fillner had overall responsibility for safety at the jobsite, including the area around the bollard holes and canopy installation. This included ensuring compliance with Cal-OSHA regulations.

(AA 103-104 [Facts 5-9, 18]; 132-133; 151-154; 157; 168-169.) After Alexander Concrete finished digging the bollard holes, they were inspected by Steve Richardson, the Fillner employee in charge at the Ramos Oil jobsite. (AA 104 [Fact 19]; 157.) The Cal-OSHA General Industry Safety Order governing excavations at construction sites requires that all holes, pits and other excavations be covered or barricaded to prevent workers from falling into them. (8 Cal.Code Regs. §1542(a)(3).) Nevertheless, Richardson made the determination that the two wooden stakes and the ribbon around some of the holes, were "sufficient protection" for persons who had to work around them, and no covering or barricade was needed. (AA 104 [Facts 19, 20]; 157-158.)

C. Tverberg's Injury.

May 1, 2006 was Tverberg's first day at the Ramos Oil jobsite. (AA 39 [Fact 11].) When he arrived at the jobsite the bollard holes had already been dug. (AA 39 [Facts 10-11].) Before he began work, Tverberg asked Fillner's foreman, Richardson, to cover the bollard holes. (AA 105 [Fact 25]; 143-144.) There were metal plates present at the jobsite which could have been used to cover the holes within just a few minutes. (AA 106 [Facts 33, 34]; 144; 160-162.) However, Richardson told Tverberg that he needed an "HIJ bolt" to access those metal plates, and that he did not have the necessary bolt in his work truck. Richardson did not indicate that he would not cover the bollard

holes, or that it was Tverberg's responsibility to cover them, only that he needed a bolt that he did not have in his truck. (AA 105 [Fact 25]; 143-144.) The danger of the open bollard holes became even more obvious when, that same afternoon, Brandon Hickman, one of the Perry employees with whom Tverberg was working, fell into one of them. Fortunately he was not injured. (AA 105 [Fact 23]; 174.)

When Tverberg arrived at the jobsite the following day, May 2, he found that the bollard holes had not yet been covered. He again asked Fillner's representative about covering the holes, asking "if they were going to put the plates over the holes." This time Tverberg got no clear response. (AA 105 [Facts 27-29]; 145-146; 175.) Approximately an hour and a half later, Tverberg fell into one of the open holes while working, and was injured. (AA 105 [Fact 31]; 145.)

D. The Tverbergs' Lawsuit.

On July 26, 2006, Jeffrey Tverberg and his wife, Catherine Tverberg, filed the present action in the Solano Superior Court, against Fillner and other defendants. The Complaint contained three causes of action, for negligence, for premises liability, and for loss of consortium. (AA 1-14.)

On July 19, 2007, Fillner filed a motion for summary judgment on the sole ground that the Tverbergs' Complaint was barred by the doctrine of

Privette v. Superior Court (1993) 5 Cal.4th 689, under which the hirer of an independent contractor cannot be held vicariously liable for injuries to employees of that contractor under the peculiar risk doctrine and related provisions of the Restatement (Second) of Torts. (AA 16-33.) On November 1, 2007, the Solano Superior Court issued an order granting Fillner's summary judgment motion. (AA 195-199.) Judgment was entered on November 14, 2007. (AA 201.) The Tverbergs filed a timely Notice of Appeal with the California Court of Appeal for the First Appellate District on November 30, 2007. (AA 206-207.)

E. The Decision of the Court of Appeal.

On December 5, 2008, the Court of Appeal issued a decision reversing the decision of the trial court. The Court of Appeal noted that *Privette* created "a public policy exception to the peculiar risk doctrine." Therefore, the policy considerations underlying *Privette* are critical to determining the scope of its application. (*Tverberg v. Fillner Construction, Inc.* (2008) A120050, *slip op.* at 10.) The Court of Appeal found that the policy considerations upon which the *Privette* doctrine is based are all "interwoven with the fact of workers' compensation coverage" for injured employees of independent contractors. (*Id.*) The Court of Appeal concluded that where a worker such as Tverberg is not an employee, and has no workers' compensation coverage, the policy bases

for the *Privette* doctrine are not present, and the doctrine cannot apply. (*Id.* at 9-11.)

On January 15, 2009, Fillner Construction filed a Petition for Review with this Court. On February 25, 2009, this Court granted review on the issue of whether the limitations on a hirer's liability for injuries to employees of contractors that were established in *Privette* and subsequent cases extend to claims brought by self-employed workers.

ARGUMENT

I. BY ITS OWN TERMS, THE *PRIVETTE* DOCTRINE CAN ONLY APPLY TO PERSONS WHO ARE COVERED BY THE WORKERS' COMPENSATION SYSTEM.

In *Privette v. Superior Court* (1993) 5 Cal.4th 689, this Court held that a person or entity which hires an independent contractor cannot be vicariously liable under the "peculiar risk" doctrine (Restatement (Second) Torts §416) for injuries to employees of that contractor. In five subsequent cases, this Court has examined the application of the *Privette* doctrine to related theories of liability set forth the in Restatement under which hirers can be held liable for the negligence of their contractors: the hirer's failure to require special precautions by contract (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253); negligent hiring of the contractor (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235); retained control by the hirer (*Hooker v. Dept. of*

Transportation (2002) 27 Cal.4th 198); the hirer's provision of unsafe equipment (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219); and premises liability (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659).

In *Privette*, this Court established a public policy exception to the general rule of the peculiar risk doctrine, based on the existence of workers' compensation coverage for the injured employees of contractors. (*Privette*, *supra*, 5 Cal.4th at 691-692.) In each of its five subsequent decisions, this Court has reiterated that the *Privette* doctrine is based on the existence of workers' compensation coverage for injured employees of independent contractors, and upon the policy considerations arising out of the interaction between the workers' compensation system and the legal theories under which liability can be imposed on hirers. This Court has repeatedly emphasized that both the logic and the fairness of the *Privette* doctrine are entirely dependent on the fact that injured employees are covered by workers' compensation. Accordingly, this Court cannot extend the *Privette* doctrine to persons who are not covered by the workers' compensation system without eviscerating the intellectual and policy justifications for that doctrine.

A. The *Privette* Doctrine Is Grounded on the Existence of Workers' Compensation Coverage, and Cannot Be Applied in the Absence of Such Coverage.

Prior to this Court's *Privette* decision, California was one of a minority

of jurisdictions which permitted employees of contractors to sue hirers for work-related injuries under the "peculiar risk" doctrine. (*Woolen v. Aerojet Gen. Corp.* (1962) 57 Cal.2d 407, 410-411.) In *Privette*, this Court announced that it had chosen to revisit the issue for the specific purpose of reconciling the peculiar risk doctrine with the workers' compensation system:

> [T]he decisions of this court by which the minority rule has become established in California have never addressed the potential conflict between the peculiar risk doctrine, as applied in favor of the contractor's employees, and the system of workers' compensation. Today, this court for the first time directly confronts this issue.

(*Privette*, *supra*, 5 Cal.4th at 691.)

The Court concluded that a contractor's employees cannot recover under the peculiar risk doctrine *because they are covered by the workers' compensation system*. The Court held:

> When an employee of the independent contractor hired to do dangerous work suffers a work-related injury, the employee is entitled to recovery under the state's workers' compensation system. That statutory scheme, which affords compensation regardless of fault, advances the same policies that underlie the doctrine of peculiar risk. Thus, when the contractor's failure to provide safe working conditions results in injury to the contractor's employee, additional recovery from the person who hired the contractor – a non-negligent party – advances no societal interest that is not already served by the workers' compensation system. Accordingly, we join the majority of jurisdictions in precluding such recovery under the doctrine of peculiar risk.

(*Id.* at 692.)

The Court identified a number of specific policy considerations as the basis for the decision arising from the fact that a contractor's employees are necessarily covered by the workers' compensation system. The first consideration was the so-called "compensation bargain" upon which the workers' compensation system rests. Under this "bargain," workers' compensation is the sole and exclusive remedy for injured employees against their employers, even where the employer was negligent or otherwise at fault:

> The employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations in the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault, but, in exchange, gives up the wider range of damages potentially available in tort.

(*Id.* at 697, quoting *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.)

Despite the existence of workers' compensation coverage, injured employees *can* sue third parties in tort. However, those third parties cannot obtain equitable indemnity against the employee's negligent employer, since that would circumvent the rule that the employer's liability is limited to workers' compensation benefits. The *Privette* Court noted that the exclusive remedy rule creates an "anomalous result" when the hirer is held liable under the peculiar risk doctrine for injuries caused by the contractor's own

negligence. In such circumstances, the hirer, who was not itself negligent, can be held liable in tort for the employee's injuries, but cannot obtain indemnity from the negligent contractor who actually caused the injuries. The unfair result is that the non-negligent hirer has greater liability than the negligent employer. (*Privette*, *supra*, 5 Cal.4th at 698.) The Court noted that "a significant policy justification" for the peculiar risk doctrine is the ability of the non-negligent hirer to "be made whole by the party responsible for the injury" through equitable indemnity. But the interplay between the peculiar risk doctrine and the exclusive remedy rule of workers' compensation results in, "affixing liability without indemnification" and "places an onerous burden on someone who is 'fault-free'." (*Id.* at 701.)[1]

These policy considerations do not exist when the injured worker is self-employed. Because self-employed workers have no employer, and are not

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1/ Fillner argues at several points in its brief that this Court, after its decision in *Privette*, effectively abandoned the issue of equitable indemnity as a basis for the *Privette* doctrine. This is incorrect. In *Toland* this Court specifically reiterated the importance of the equitable indemnity issue to the *Privette* doctrine. (*Toland*, *supra*, 18 Cal.4th at 261.) And this Court's other decisions emphasize the point that when an employee is covered by workers' compensation, the employee's own negligent employer can only liable for workers' compensation benefits, leaving the non-negligent hirer alone to be held liable in tort. (See, e.g., *Hooker*, *supra*, 27 Cal.4th at 204.) As *Privette* and *Toland* explain, that state of affairs only exists because equitable indemnity is not available against the employer. Thus, the unavailability of equitable indemnity remains one of the key elements to the application of the *Privette* doctrine.

covered by the workers' compensation system, they are not parties to the "compensation bargain," and the exclusive remedy rule does not apply to them. Accordingly, a non-negligent hirer is not precluded from seeking indemnity from a negligent contractor who actually caused the self-employed worker's injury. This Court's concerns about the absence of equitable indemnity are not present with self-employed workers.

The second policy consideration the Court identified was that the cost of workers' compensation coverage is part of the price a contractor charges the hirer for its services. The hirer effectively pays for the workers' compensation insurance which covers the contractor's employees, and should be able to obtain the benefit of that coverage. The Court explained:

> [T]he rule of workers' compensation exclusivity, which shields an independent contractor who pays workers' compensation insurance premiums from further liability to its employees for on-the-job injuries, should equally protect the property owner who, in hiring the contractor, is indirectly paying for the cost of such coverage, which the contractor presumably calculated into the contract price. Therefore, [other] courts have concluded, the property owner should not have to pay for injuries caused by the contractor's negligent performance of the work when workers' compensation statutes already cover those injuries.

(*Id.* at 699.)

This second policy consideration also does not apply to self-employed workers. Since the contractor does not pay any workers' compensation premiums for such workers, such premiums are not part of the cost charged to

the hirer. There is no justification for giving the hirer the benefit of workers' compensation coverage for which it did not pay and which, in fact, does not even exist.

The third policy concern identified by the Court was that employees who are able both to obtain workers' compensation benefits from their employer and to sue the hirer in tort, would obtain an unwarranted windfall:

> [T]o permit such recovery would give these employees something 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. This, in effect, would exempt a single class of employees, those who work for independent contractors, from the statutorily mandated limits of workers' compensation.

(*Id.* at 700.)

Again, this policy consideration is inapplicable to self-employed workers. Since such workers are not entitled to employer-provided workers' compensation benefits, there is no risk of double recovery. Nor are non-employees unfairly *exempted* from the "statutorily mandated limits of workers' compensation coverage," since they have no employer, and are not covered by that statutory mandate. (See *State Comp. Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 204 [*Brown*].)

Privette further explained that the purposes of the peculiar risk doctrine are fully satisified by the recovery employees are guaranteed through the

workers' compensation system. The purpose of the peculiar risk doctrine is "to ensure that injuries caused by contracted work will not go uncompensated." (*Privette*, *supra*, 5 Cal.4th at 701.) The Court noted that "[u]nder the Workers' Compensation Act . . . all employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of employment.'" (*Id.* at 696-697.) Because of this automatic workers' compensation coverage, employees of a contractor are not at risk of uncompensated injuries:

> [I]n the case of on-the-job injury to an employee of an independent contractor, the workers' compensation system of recovery regardless of fault achieves the identical purposes that underlie the doctrine of peculiar risk: it ensures compensation for injury by providing swift and sure compensation to employees for any workplace injury; it spreads the risk created by the performance of dangerous work to those who contract for and thus benefit from such work, by including the cost of workers' compensation insurance in the price for the contracted work; and it encourages industrial safety.

(*Id.* at 701.)

Once again, this policy consideration does not apply to self-employed workers, who are not entitled to automatic for workers' compensation benefits. Indeed, self-employed workers may face precisely the dilemma the peculiar risk doctrine was designed to remedy: they may be left without compensation if *Privette* is applied to them.

The final policy consideration identified in *Privette* was the concern that making hirers liable for the negligence of contractors could discourage

persons from hiring experts to perform dangerous work and to rely instead on their own inexperienced employees. (*Id.* at 700.) This concern is considerably mitigated in the case of self-employed workers. As discussed above, while a hirer is barred from seeking equitable indemnity from the contractor for injuries to the contractor's employees, that hirer has every right to seek equitable indemnity where the contractor's negligence causes injury to a self-employed worker. Thus, where the injured worker is self-employed, the hirer need not fear being "left holding the bag" for the contractor's negligence. In addition, as this Court has recognized, the hirer of an independent contractor has the power to protect itself from liability by selecting a contractor who is both "competent and financially responsible," by demanding contractual indemnification provisions from the contractor, and by requiring that the contractor name the hirer as an additional insured on its liability insurance policies. (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 508; *Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 253.)

This Court's *Privette* decision was based *entirely* on the existence and effects of workers' compensation insurance. This Court expressly stated that the sole reason for its decision in *Privette* was to reconcile the "potential conflict between the peculiar risk doctrine, as applied in favor of the contractor's *employees*, and the system of *workers' compensation*." (*Id.* at

691.) (Emphasis added.) The policy considerations and legal justifications the Court identified in *Privette* apply solely to *employees* of a contractor who are covered by workers' compensation insurance, and to the various legal issues arising out of that workers' compensation coverage. *None* of those policy considerations apply to self-employed workers who are not covered by workers' compensation.

In the years since *Privette* was decided, this Court has reiterated the centrality of workers' compensation coverage to the application of the *Privette* doctrine many times. In *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, the Court summarized its holding in *Privette* this way: "the property owner should not have to pay for injuries caused by the contractor's negligent performance of the work *when worker's compensation statutes already cover those injuries*." (*Id.* at 256.) (Emphasis added.) The Court also repeated the other policy concerns identified in *Privette*: the unfairness of holding a non-negligent hirer liable in tort when the negligent contractor's liability is limited to workers' compensation (*id.* at 267); the unfairness of the non-negligent hirer being barred from obtaining equitable indemnity due to the workers' compensation exclusive remedy rule (*id.* at 261); the fact that the hirer effectively pays the workers' compensation premiums as part of the cost of the project, and therefore should get the benefit of the workers'

compensation insurance (*id.* at 266); and the fact that the workers' compensation system provides guaranteed recovery to employees, thus satisfying the same policy concerns addressed by the peculiar risk doctrine. (*Id.* at 261.)

In *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235,1239-1240, this Court repeated that it is the interplay between the peculiar risk doctrine and workers' compensation, which underpin the *Privette* doctrine. And in *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198, 204, the Court yet again recognized that the *Privette* doctrine is based on the effect of workers' compensation coverage on the rights and obligations of the parties:

> In *Privette* we unanimously held that under the peculiar risk doctrine the hiring person's liability does not extend to the hired contractor's employees. *Because the Workers' Compensation Act (Lab.Code §3200 et seq.) 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.

The centrality of workers' compensation coverage to the *Privette* doctrine was discussed yet again in this Court's most recent decision addressing *Privette*, *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 668. There, the Court explained *Privette* in these terms: "We concluded that the justifications for the peculiar risk doctrine did not apply to situations in which

a contractor's employee is injured *and workers' compensation is available*." (Emphasis added.) The Court further stated:

> [I]n *Privette* and its progeny, we have concluded that, *principally because of the availability of workers' compensation coverage* . . . policy considerations for limiting delegation do not apply to the hirer's ability to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment.

(*Id.* at 671.)

This Court could scarcely have made it more clear that the logic of the *Privette* doctrine is based entirely on the fact that employees of independent contractors are covered by the workers' compensation system. *Privette* shields hirers from liability for injuries to *employees* of a contractor, because the rights and restrictions created by the existence of workers compensation insurance makes it unjust to hold hirers liable to such employees. The *Privette* doctrine does *not* apply to anyone other than employees of the contractor, because none of the policy considerations upon which *Privette* is based apply to non-employees, including self-employed workers such as Tverberg. This Court cannot extend *Privette* to self-employed workers who are without workers' compensation coverage without completely abandoning the reasoning upon which *Privette* is based, thereby rendering the *Privette* doctrine devoid of any legal or logical justification.

B. The *Michael* Decision Disregarded this Court's Reasoning in *Privette* and Was Wrongly Decided.

Until the Court of Appeal rendered its decision in the present case, the only case which had considered the issue of whether *Privette* applies to self-employed workers was *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082.[2] The *Michael* court, without any discussion of the policy considerations upon which *Privette* is based, simply stated, "notwithstanding the exclusion of independent contractors from the mandatory workers' compensation system, any lack of insurance coverage for Michael's injuries is not dispositive in determining the application of the *Privette* doctrine." (*Id.* at 1094.)

The Court of Appeal in the present case concluded that *Michael* was wrongly decided because it failed to consider the policy considerations underlying the *Privette* doctrine:

> The *Michael* decision rings hollow, as it fails to explain how the public policies furthered by the *Privette* cases – all of which are interwoven with the fact of workers' compensation coverage – apply in the context of a case in which there is no such coverage. In our view, *Michael* fails to make any reasoned analysis of the public policy reasons set out in *Privette* at all. As *Privette* is a public policy exception to the peculiar risk doctrine, it is particularly troubling that *Michael* does not distinguish the policy reasoning underlying the *Privette* line of cases.

2/ This issue does not appear to have been addressed by the courts of any other state.

(*Tverberg, supra, slip op.* at 10.) (Citation omitted.)

The Court of Appeal's criticism of *Michael* was entirely justified. In reaching the conclusion that the existence of workers' compensation coverage is not significant to the *Privette* doctrine, the *Michael* court did not discuss or consider the reasoning of any of this Court's *Privette* line of cases. Instead, it relied on a single appellate court case, *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, which actually addressed a different issue.

In *Lopez* the plaintiff, Lopez, was an employee of a contractor, L&E. After Lopez was injured on the job, he discovered that his employer had illegally failed to obtain workers' compensation insurance for its employees. Therefore, pursuant to Labor Code §3706, Lopez was entitled to sue his employer in tort. (*Id.* at 444.) Lopez also sought to sue the hirer, CGM, arguing that in the absence of workers' compensation coverage, CGM should be liable to the same extent as his employer. The court disagreed.

The court noted that Lopez's employer was required by law to have workers' compensation insurance, and had committed a crime by failing to secure such insurance. It concluded that, "[e]quity and public policy would not be served by penalizing CGM for L&E's wrongdoing. L&E's failure to obtain workers' compensation insurance – a misdemeanor – should not expose CGM to liability." (*Id.* at 444-445.)

The *Lopez* court also noted that because workers' compensation insurance is *required by law for all employees*, it is reasonable for hirers to assume that their contractors will obtain insurance for their employees, and that the cost of such insurance will be part of the contract price. (*Id.* at 445.)

Finally, the *Lopez* court emphasized that, despite his employer's failure to obtain workers' compensation insurance, Lopez was covered by the workers' compensation system through the Uninsured Employers Fund. (Labor Code §3716.) Thus, Lopez had available to him the same workers' compensation remedy that all other injured employees have. (*Id.* at 445.)

The *Michael* court's analysis rested on a single point from the *Lopez* opinion – the statement that in light of the policy considerations underlying the workers' compensation system, a hirer should be able to reasonably rely on the contractor to obtain appropriate insurance. *Michael* ignored the *Lopez* court's emphasis on the criminal nature of the contractor's failure to secure workers' compensation insurance, and the inequity of penalizing the hirer for the criminal act of the contractor. *Michael* also ignored the emphasis *Lopez* placed on the fact that the plaintiff there actually was covered by workers' compensation through the Uninsured Employers Fund. Those factors are present not with a self-employed worker.

The *Michael* court concluded its discussion by stating that the plaintiff

there did not "identify any public policy reason why [the hirer's] responsibilities to him (as an independent contractor) should be greater than their responsibilities to other workers who are . . . employees." The court added that, in the absence of *Privette*, a self-employed worker, "would have greater rights than [an] employee." (*Id.* at 1096.)

What the *Michael* court missed is that *Privette* carves out an *exception* to the peculiar risk doctrine. That doctrine applies generally, to anyone and everyone who may be injured by the negligence of a contractor. *Privette* identifies a single, narrow class of persons – *employees* of the contractor – and creates an exception to the peculiar risk doctrine which applies to them, and them alone, "*because of the availability of workers' compensation coverage.*" (See *Hooker*, *supra*, 27 Cal.4th at 204.) Thus, the question is not whether a self-employed worker should have greater rights than employees. The question, which this Court answered in the affirmative in *Privette*, is whether employees, because of considerations related to workers' compensation coverage, should be restricted from exercising the rights which *all non-employees* have under the peculiar risk doctrine.

And, while the plaintiff in *Michael* may not have identified any public policy reasons why the *Privette* doctrine should not apply to him, this Court has certainly done so, repeatedly and in detail. First, and most critically,

injured self-employed workers face the risk of being left without any compensation or remedy for their injuries. While injured employees are guaranteed compensation through the no-fault workers' compensation system, self-employed workers are not. (*Privette*, *supra*, 5 Cal.4th at 696-697; *Brown*, *supra*, 32 Cal.App.4th at 204; Labor Code §3600(a).) Concern over the risk of uncompensated injuries is the reason the peculiar risk doctrine was created in the first place. Instead of being concerned that a non-employee worker might have greater rights than employees, the *Michael* court should have recognized that the principal underlying the peculiar risk doctrine is the concern that non-employees may end up with *no* rights and *no* recovery.

Moreover, while the *Michael* court framed the issue as one of giving the non-employee "greater" rights than employees, that point is highly debatable. The workers' compensation system is no-fault. Employees are guaranteed compensation without the need to prove any negligence or fault by anyone, and benefits are guaranteed, even if the employer is insolvent and/or uninsured. (Labor Code §3716.) Self-employed workers have no guaranteed recovery. They must prove fault by the contractor, and can only recover if at least one of the defendants has sufficient funds to pay the judgment. Although a non-employee's potential recovery may be greater than that of an employee, it is also far less certain.

Nor are these the only policy considerations weighing against application of *Privette* to self-employed workers. As this Court explained in *Privette*, when the plaintiff is self-employed, the availability of equitable indemnity to the hirer will permit it to recover from the negligent contractor. Thus, the unfairness of a non-negligent hirer being held liable while a negligent contractor escapes tort liability is eliminated.

In addition, when the injured worker is self-employed, neither the hirer nor the contractor has provided him with workers' compensation coverage, and thus payment for workers' compensation insurance is not "part of the contract price."

Finally, the hirer can protect itself against the contractor's negligence by contract. Hirers can require that the contractor name them as additional insureds on the hirer's liability insurance policy and can insist on contractual indemnification provisions. As between a hirer, who has the power to choose which contractor to use and under what terms (and who may save a substantial sum if its contractor uses self-employed workers), and the self-employed worker, who is without workers' compensation coverage and the other benefits conferred on employees by law, fairness requires that the hirer bear the risk of injury to the worker, who might otherwise be left without remedy or compensation. (See, e.g., *Aceves*, *supra*, 24 Cal.3d at 508; *Van Arsdale*, *supra*,

68 Cal.2d at 253.)

The *Michael* court's statement that there are no public policy considerations in favor of permitting self-employed workers to exercise the same rights under the peculiar risk doctrine as other non-employees is incorrect. But, as important as these policy considerations are, they are, to some extent, beside the point. This Court in *Privette*, in *Toland*, in *Carmargo*, in *Hooker*, and in *Kinsman*, made it clear that the *Privette* doctrine is founded on the policy considerations created by the interplay between the workers' compensation system and the legal theories under which liability can be imposed on hirers. This Court has made it clear that *Privette* only applies where "a contractor's employee is injured *and workers' compensation is available*." (*Kinsman*, *supra*, 37 Cal.4th at 668.) (Emphasis added.) Therefore, *Privette* cannot apply to self-employed workers who are without workers' compensation coverage.

II. EVEN ASSUMING *PRIVETTE* APPLIED TO SELF-EMPLOYED WORKERS UNDER SOME THEORIES OF LIABILITY, THE LIMITS ON THE HIRER'S LIABILITY FOR "RETAINED CONTROL" SET FORTH IN *HOOKER* CANNOT APPLY IN THE ABSENCE OF WORKERS' COMPENSATION COVERAGE.

Even if *Privette* could be extended to self-employed workers under some legal theories, its limits would not apply to the theory of "retained control." In *Hooker*, this Court held that, with certain limits, hirers can be

liable even to employees of contractors under the "retained control" theory. *Hooker* also established that the limits on liability for "retained control" apply only where the plaintiff's injury is actually covered by the workers' compensation system.

The general rule regarding the hirer's liability when it retains control is found in Restatement (Second) of Torts §414 ("Negligence in Exercising Control Retained by Employer"), which states:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The comments to the Restatement make it clear that the hirer can be held liable not merely when it exercises that control negligently, but also where it *fails to exercise* that control to prevent unsafe practices by its contractors. *Comment a* states:

> If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. *He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he*

> *exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.*

(Emphasis added.)

Comment b states:

> The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability *if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others*, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So, too, he is subject to liability *if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.*

Thus, under Section 414 a hirer who retains general supervisory control over a project is responsible for exercising control over its contractors to prevent them from engaging in unsafe practices, particularly where the hirer's representatives are present on the jobsite. In *Holman v. State* (1975) 53 Cal.App.3d 317, this rule was applied to a hirer who did not exercise power over the details of its contractor's work, but did have authority "to decide all questions as to the acceptability of the work and the acceptability of the manner of the performance of the work." Because the hirer had that authority,

and had actual knowledge that a contractor was using unsafe equipment, the hirer was held liable under Section 414 for injuries resulting from the contractor's use of that unsafe equipment. (*Id.* at 332-335; see also *Yanez v. United States* (9th Cir. 1995) 63 F.3d 870, 875 (under *Holman*, "section 414 liability applies where a principal has actual knowledge of a dangerous condition and the authority to correct the dangerous condition").)

In *Hooker*, this Court held that hirers can be held liable under Section 414 for injuries to employees of their contractors, but with limitations. The Court held that the hirer could only be held liable if it "*exercised* the control that was retained in a manner that *affirmatively* contributed to the injury to the contractor's employee." (*Hooker*, *supra*, 27 Cal.4th at 210.) However, *Hooker* makes clear that the those limitations on liability under section 414 exist only where the injured person is an employee of the contractor, covered by workers' compensation. The Court stated:

> *[B]ecause the liability of the contractor, the person primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage*, it would be unfair to impose tort liability on the hirer of the contractor merely because the hirer retained the ability to exercise control over safety at the worksite.

(Emphasis added.)

Hooker specifically conditioned its limits on hirers' liability in retained control cases on the existence of workers' compensation coverage, because

of the rule of workers' compensative exclusivity under which a negligent contractor cannot be liable in tort for injuries to its own employees. The *Hooker* limits on Section 414 liability are not applicable where, as in the present case, the injured worker is self-employed.

Indeed, even if an injured self-employed worker were one of that tiny group of self-employed persons who purchased a workers' compensation policy for himself, the *Hooker* limits on retained control would not apply. As noted, those limits are based on the fact that the negligent contractor would be protected from tort liability to its employee by the exclusive remedy rule of workers' compensation. Where a self-employed worker purchases his own insurance, there is no employer to be insulated from liability by the exclusive remedy rule. Accordingly, the premise upon which *Hooker* based its limits on retained control liability would not exist even where the worker purchased his own workers' compensation policy.

In the present case, Fillner was the general contractor for the Ramos Oil project and retained overall control over safety at the jobsite, including the areas in which Tverberg was working. (AA 38 [Facts 1-2];103-104 [Facts 4-9, 18]; 132-133; 151-154; 157; 168-169.) It was Fillner that directed another of its contractors, Alexander Concrete, to dig four-foot-deep holes in area where Tverberg was going to be working. (AA 39 [Fact 10]; 52; 104 [Fact 13].)

Fillner's foreman, Steve Richardson, was present at the jobsite, and had actual knowledge of the existence of the open holes. (AA 38 [Fact 3]; 104 [Fact 19]; 157.) In fact, Tverberg twice asked Richardson to cover the holes for safety reasons, but Richardson decided that the presence of two wooden stakes at each of the four-foot wide holes and some safety ribbon at some of them was sufficient protection for workers in the area. (AA 104 [Fact 19]; 105 [Facts 25, 27-29]; 106 [Facts 33, 34]; 143-146; 157-158; 160-162; 175.)

This evidence establishes all the facts necessary for Fillner to be held liable under Section 414 of the Restatement: Fillner had authority over safety at the jobsite; Fillner had the power to cover the holes or provide other safety measures; Fillner was on actual notice of the danger; and Fillner chose to take no action. Since it is undisputed that Tverberg was self-employed, the *Hooker* limitations on liability under Section 414 do not apply, and Fillner can be held liable for having failed to reasonably exercise its retained control to prevent unsafe practices of which it had actual knowledge.

III. THE JUSTIFICATIONS PROFFERED BY FILLNER FOR EXTENDING *PRIVETTE* TO PERSONS WITHOUT WORKERS' COMPENSATION COVERAGE CONFLICT WITH THE REASONING OF THE *PRIVETTE* DOCTRINE.

Fillner's brief puts forth a number of policy justifications for extending the *Privette* doctrine to self-employed workers such as Tverberg. All of these justifications conflict with this Court's reasoning in its *Privette* line of cases.

A. *Privette* Cannot Be Extended to Self-Employed Workers Who Have No Workers' Compensation Coverage Merely Because They Might Have Been Able to Purchase Workers Compensation Coverage for Themselves.

Fillner's primary argument appears to be that the *Privette* doctrine should be applied to all self-employed workers because such workers could have voluntarily chosen to purchase workers' compensation policies for themselves. Fillner argues that because self-employed workers such as Tverberg can choose to buy their own workers' compensation policies before they are injured, that means that workers' compensation is "available" to them, and the Court of Appeal erred in concluding that Tverberg and other self-employed workers are "ineligible" for workers' compensation coverage.[3]

Fillner's argument on this point is little more than an exercise in semantics. In a sense Fillner is correct. Pursuant to Insurance Code §11846,

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3/ It is undisputed that Tverberg was a self-employed independent contractor and was not entitled to automatic coverage by the Workers' Compensation system. (Opening Brief on the Merits, p. 8.) Whether or not Tverberg was one of the tiny fraction of self-employed workers who elect to purchase workers' compensation coverage does not appear in the record, although the Tverbergs can represent to the Court that he did not purchase such a policy. Because this case was decided on a summary judgment motion brought by Fillner on its affirmative defense of the *Privette* doctrine, Fillner had the burden of proof on that issue. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In the event this Court were to determine that the question of whether or not Tverberg had purchased workers' compensation coverage for himself is relevant to the application of the *Privette* doctrine in this case, then that would be an issue of fact for determination at trial.

workers' compensation insurance is "available" to self-employed workers who decide – before they suffer an injury – to purchase a policy for themselves from the State Compensation Insurance Fund ("SCIF"). But such workers must affirmatively opt into the system and pay for the policy. "[S]elf-employed workers . . . are not subject to the workers' compensation system unless they *opt* to obtain a policy from SCIF providing themselves with coverage." (*Brown*, *supra*, 32 Cal.App.4th at 204.)

However, the *Privette* doctrine is not based on a hypothetical or theoretical possibility that an injured worker might have had an opportunity to have workers' compensation insurance "available" if he had chosen at some earlier point to buy a policy. The *Privette* cases are based on the policy issues which arise when a worker is *actually covered* by workers' compensation insurance for the injuries at issue in the case. This Court has made that clear repeatedly, stating that the rationale for the *Privette* doctrine is "that the hirer should not have to pay for injuries caused by the contractor's negligent performance *because the workers' compensation system already covers those injuries*." (*Camargo*, *supra*, 25 Cal.4th at 1239; see also, *Privette*, *supra*, 5 Cal.4th at 699; *Toland*, *supra*, 18 Cal.4th at 256; *Hooker*, *supra*, 27 Cal.4th at 204.) Unless the plaintiff in a particular case is one of that tiny minority of self-employed workers who has actually purchased a workers' compensation

policy for himself, his injuries will not be "already covered by the workers' compensation system," and the rationale for *Privette* cannot apply to him.

Moreover, the other policy considerations identified in the *Privette* line of cases can only apply where the worker is *actually* covered by workers' compensation, and not where he merely had an unexercised theoretical right to buy such coverage.

First, this Court has emphasized that *Privette* is based on the "compensation bargain" whereby the employer is liable for injures to its workers without regard to fault, in exchange for limits on that liability, and the worker "is afforded relatively swift and certain payment of benefits," but gives up the right to sue in tort. (*Privette*, *supra*, 5 Cal.4th at 697.) As a result of this "bargain," even if the employer's negligence was responsible for the employee's injuries, the employer cannot be sued for equitable indemnity by a non-negligent hirer who is held liable for injury to the employee under the peculiar risk or related doctrines. (*Id.* at 698.)

But if the injured worker is not covered by workers' compensation, there is no "compensation bargain" and no bar to equitable indemnity. Indeed, even if a self-employed worker had purchased his own workers' compensation policy, this justification for *Privette* would not exist, because there would still be no "compensation bargain," inasmuch as the self-employed worker, who is

both "employer" and "employee," could hardly be held to have made such a "bargain" with himself.

The second policy consideration identified in *Privette* is that the hirer is deemed to have paid for the workers' compensation insurance as part of the contract price for the work. (*Id.* at 699.) But where the self-employed worker has not purchased workers' compensation insurance, the hirer obviously cannot be deemed to have paid for non-existent insurance.

The third policy consideration identified in *Privette* is that the worker should not be permitted to obtain double recovery by both receiving workers' compensation benefits from his employer and recovering from the hirer in tort. (*Id.* at 700.) There is no possibility that a self-employed worker who is not actually covered by workers' compensation insurance can obtain a double recovery, since he will receive no workers' compensation benefits. And even where a self-employed worker is one of those few who did purchase such a policy, he cannot be regarded as having received a "double recovery" merely by recovering insurance benefits for which he paid himself. The existence of insurance proceeds paid for by the injured person for his own benefit should be completely irrelevant to the analysis. (See *Helfand v. So. Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10.)

The fourth policy consideration identified by this Court is that workers'

compensation insurance is "automatic" for all employees, and therefore, there is no risk that any employee will be left without compensation for his injuries if he is barred from suing the hirer. "Under the Workers' Compensation Act . . . all employees are *automatically entitled to recover benefits* for injuries 'arising out of and in the course of employment.'" (*Privette*, *supra*, 5 Cal.4th at 696-697.) (Emphasis added.) Therefore, workers' compensation "achieves the identical purposes that underlie the peculiar risk doctrine" of ensuring "that injuries caused by the contracted work will not go uncompensated." (*Id.* at 701.) Self-employed workers are *not* automatically covered by workers' compensation. They can be covered only if they opt into the system and pay for their own policy. (*Brown*, *supra*, 32 Cal.App.4th at 204.) This consideration clearly cannot be satisfied unless the worker is *actually covered* by workers' compensation insurance.

Absent the actual existence of workers' compensation coverage, the conflicts and concerns discussed by this Court in *Privette* and its progeny, simply do not exist. Significantly, every other court which has considered the issue has determined that the key to the application of the *Privette* doctrine is the *actual existence* of workers' compensation coverage. For example, in both *Bell v. Greg Agee Construction, Inc.* (2005) 125 Cal.App.4th 453, 466, and *Lopez*, *supra*, 101 Cal.App.4th at 445, the court concluded that the injured

employee's claim was barred by *Privette* even though his employer was illegally uninsured, because the employee *actually did* have workers' compensation coverage under the Uninsured Employers Fund.[4]

Similarly, the courts of other states which have addressed this issue have all concluded that employees of contractors are only barred from suing the hirer where they are *actually covered* by workers compensation. For example, in *Dillard v. Strecker* (1994) 255 Kan. 704, 877 P.2d 371, the Kansas Supreme Court held that a hirer is not liable for injuries to an employee of a contractor "when the employee was covered by workers compensation." (See also, *Herrell v. Nat. Beef Packing Co.* (2009) 41 Kan.App.2d 302, 303.) The Missouri Supreme Court reached the same conclusion in *Matteuzzi v. Columbus Partnership, L.P.* (1993) 866 S.W.2d 128, 130. (See also *Mouser v. Caterpillar, Inc.* (8th Cir. 2003) 336 F.3d 656, 661 (applying Missouri law).)

There is no reasonable basis for Fillner's claim that *Privette* should

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4/ Several of the policy grounds upon which *Privette* is based do not apply where the employer is illegally uninsured and the employee obtains coverage through the Uninsured Employers Fund. For example, there is no "compensation bargain" preventing the employer from being sued in tort by the employee or for equitable indemnity by the hirer. Nor can the hirer be deemed to have paid for non-existent workers' compensation coverage as part of the contract price. Accordingly, *Bell* and *Lopez* may be incorrect in concluding that such employees are barred from suing the hirer under *Privette*. However, because Tverberg was self-employed, rather than an employee of an illegally uninsured employer, that issue is not before the Court in the present case.

apply to persons who have a theoretical right to obtain workers' compensation coverage, but do not *actually* have such coverage. None of the policy considerations underlying *Privette* would apply in such circumstances, and no other court in this country has reached such a conclusion. Fillner's argument must be rejected.

B. *Privette* Cannot Be Extended to Self-Employed Workers Who Have No Workers' Compensation Coverage Merely Because Some of Them May Have Purchased Medical or Disability Insurance for Themselves.

Fillner also argues that *Privette* should bar self-employed workers who have no workers' compensation coverage from suing hirers, because some of those self-employed workers may buy medical and/or disability insurance for themselves. In an effort to fit this argument into the *Privette* analysis, Fillner claims that, like workers' compensation insurance, the hirer in effect pays for ordinary medical and disability insurance policies for self-employed workers through the contract price. In light of the fundamental differences between workers' compensation insurance and private medical and disability policies, this argument is untenable.

First, the policy considerations identified by this Court as the basis for the *Privette* doctrine are not present when a worker is covered only by private medical and/or disability insurance. Private insurance is not part of a "workers' compensation bargain." Its existence does not prevent the

contractor from being sued in tort or preclude the hirer from suing the contractor for equitable indemnity.

Furthermore, in *Privette* this Court explained that the key fact about workers' compensation insurance is that it is "automatic." Every employee who is employed in the State of California is required by law to be covered by workers' compensation insurance. (*Privette*, *supra*, 5 Cal.4th at 696-697.) Workers' compensation provides a guaranteed no-fault remedy to every injured employee, and provides relatively "swift and sure compensation" to every injured employee. (*Id.* at 701.) It is a criminal offense for an employer to fail to maintain workers' compensation coverage for all its employees, and even where an employer unlawfully fails to obtain workers' compensation insurance, its employees are still entitled by law to compensation through the Uninsured Employers Fund. (*Bell*, *supra*, 125 Cal.App.4th at 466; *Lopez*, *supra*, 101 Cal.App.4th at 445.)

By contrast, there is no law requiring that self-employed persons have insurance of any kind. Nor is there any law requiring that insurance companies make medical and/or disability insurance policies available to all self-employed persons. Thus, self-employed persons who are deemed too high a risk by insurance companies may be unable to obtain private insurance at any price. Indeed, self-employed persons, like other "contingent workers," are

statistically *less* likely to have health insurance than workers who are employees, and are *more* likely to receive lower pay – and thus be even less able to afford costly individual medical and disability insurance policies than employees would be. (See Mary E. O'Connell, *Contingent Lives: The Economic Insecurity of Contingent Workers* (1995) 52 Wash. & Lee L. Rev. 889, 890; Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce* (2006) 116 Yale L.J. 170, 177-178.)[5]

Self-employed workers may have no medical or disability insurance of any kind, in which case the hirer has certainly not paid for such insurance as part of its contract price.[6] If such a worker is seriously injured he may well become a public burden, using the services of hospital emergency rooms for

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5/ Even those self-employed workers who do pay for private individual insurance, are unlikely to obtain the full array of coverage provided by workers' compensation: temporary disability for wage replacement; permanent disability for lost earning capacity; "medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services." (*Dept. of Rehabilitation v. W.C.A.B.* (2003) 30 Cal.4th 1281, 1292-1293; Labor Code §4600(a).)

6/ Fillner claims that unless the Court of Appeal's decision is reversed, self-employed workers may be discouraged from obtaining medical insurance. It is highly improbable that workers who could afford medical insurance would voluntarily forgo obtaining coverage for all the many illnesses and injuries which are unrelated to the workplace because they might be able to sue if injured in the workplace.

which he cannot pay, and, if seriously disabled, becoming a charge on the Medi-Cal and social security disability systems. And if a self-employed worker does have private insurance, it may come from a source entirely independent of his income from the work performed for the hirer, such as coverage through an employed spouse. In such circumstances, the worker's medical expenses are shifted to the spouse's employer, an entirely innocent and unrelated business. In either case, the hirer, who obtained the benefit of the work performed and had the ability to exercise some control over the worker's safety, escapes liability, while the general public or the innocent employer of the worker's spouse bears the cost of the workers' medical and disability claims. This is precisely the evil that the peculiar risk doctrine was intended to prevent. (See *Privette*, *supra*, 5 Cal.4th at 701.)

In fact, as the Court of Appeal noted, some hirers may intentionally choose to contract with companies which use self-employed workers instead of employees, precisely because they can thereby avoid the cost of workers' compensation insurance. (*Tverberg*, *supra*, *slip op.* at 10 n. 8.) Fillner claims that this analysis is "flawed," because contract prices are always subject to negotiation, and contractors *can* negotiate a price sufficient to cover insurance costs for self-employed workers. As the Court of Appeal recognized, that argument ignores reality. When a contractor uses self-employed workers, it

avoids workers' compensation costs, which would otherwise be required by law. As a result, the contractor can charge the hirer less, and be more likely to be awarded the job. Both the hirer and the contractor profit from the lack of workers' compensation coverage, while the self-employed worker is left unprotected.

Moreover, contractors who use self-employed workers also avoid a myriad of other expenses, including: payroll taxes, such as unemployment insurance and the employer's share of social security and medicare taxes (Unemployment Insurance Code §656; I.R.C. §3121(d)); employer-paid private medical, dental, disability and other insurance; pension and 401(k) contributions; vacation, holidays, and sick leave; state and federally mandated family, medical and pregnancy leaves (Government Code §§12945, 12945.2; 29 U.S.C. §2612); overtime and even minimum wage under state and federal law. (8 Cal.Code Regs. §§11010 *et seq.*; *Real v. Driscoll Strawberry Assocs., Inc.* (9th Cir. 1979) 603 F.2d 748, 754.) Self-employed workers also save contractors risk and expense because they are not covered by state and federal anti-discrimination laws (Government Code §12940(a); *Mitchell v. Frank R. Howard Mem. Hosp.* (9th Cir. 1988) 854 F.2d 762 766), and have no right to unionize under the National Labor Relations Act. (29 U.S.C. §152(3).) (See, generally, Note, *From Employment to Contract: Section 1981 and*

Antidiscrimination Law for the Independent Contractor Workforce (2006) 116 Yale L.J. 170, 179, and the footnotes included therein.)

Hirers have strong financial incentives to hire contractors who use self-employed workers because such workers are low-paid, have no entitlement to benefits, and have few legal protections. Even if such workers could afford to pay for individual medical and disability insurance for themselves, giving hirers the "benefit" of whatever insurance such workers are able to obtain for themselves would be unjust in the extreme. And, since many self-employed workers have no insurance at all, the rule proposed by Fillner would leave many injured workers with no choice but to become charges on the public treasury. Such an approach is certainly nowhere contemplated in *Privette* or any of this Court's subsequent cases, which emphasize that workers' compensation is an adequate substitute for the peculiar risk doctrine precisely because it *guarantees* that all injured employees will have compensation, and will not became destitute or dependent upon public resources.

C. *Privette* Does Not Provide Hirers with a Right to Delegate *All* Responsibility for Safety.

Fillner argues that the *Privette* doctrine confers on hirers of contractors a right to delegate all responsibility for safety on the project to the contractor. In fact, as discussed in Section I.A above, the *Privette* cases only establish the hirer's right delegate safety responsibilities regarding the safety of contractors'

employees. Fillner argues that if *Privette* is not extended to self-employed workers, millions of California homeowners and other unqualified hirers would be required to actively supervise the work of their contractors, imposing a "daunting, if not impossible task" on these hirers. According to Fillner, such hirers would be discouraged from using experienced contractors, and would instead attempt to perform dangerous work themselves, which they could not do safely. The concerns expressed by Fillner are highly exaggerated and lacking in substance.

1. Homeowners and Other Unsophisticated Hirers Are Not Subject to Liability Under the Peculiar Risk and Related Doctrines.

Throughout its brief, Fillner repeatedly expresses concern over the fate of innocent homeowners who will be subjected to the potential for unlimited liability unless *Privette* is extended to cover self-employed workers. These arguments are completely without substance. Ordinary homeowners and other unsophisticated hirers can rarely, if ever, be held liable under the peculiar risk doctrine and the related theories of liability discussed in the *Privette* cases.

This Court's *Privette* cases arise out of various theories of liability set forth in Restatement (Second) Torts, §§409 *et seq*., entitled "Chapter 15 - Liability of an Employer of an Independent Contractor." *Privette* itself arose from Section 416, which imposes liability on hirers who use "an independent

contractor to do work *which the employer should recognize* as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken," and the contractor negligently fails to take such precautions. (Emphasis added.) (See *Privette*, *supra*, 5 Cal.4th at 695.) *Toland* addressed Section 413, which imposes liability on hirers who use "an independent contractor to do work *which the employer should recognize* as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken," and the hirer fails to provide by contract or otherwise that the contractor must take such precautions. (Emphasis added.) (See *Toland*, *supra*, 18 Cal.4th at 256-257.) And *Camargo* concerned Section 411, which imposes liability on hirers who fail to "exercise reasonable care to employ a competent and careful contractor." (See *Camargo*, *supra*, 25 Cal.4th at 1241.)[7]

In each of those situations, the rule of the Restatement specifically limits the hirer's duty of care to that which a person with the hirer's level of knowledge and expertise could reasonably be expected to exercise. For

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7/ *Hooker* and *McKown* both addressed Section 414, which governs the hirer's negligent exercise of retained control. (*Hooker*, *supra*, 27 Cal.4th at 201; *McKown*, *supra*, 27 Cal.4th at 221.) Since those cases involved control actually exercised by the hirer over the contractor's work, they would not apply to the unqualified, passive homeowner for whom Fillner expresses concern.

example, Restatement (Second) Torts §411 ("Negligence in the Selection of Contractor"), *comment c,* explains:

> The amount of care which should be exercised in selecting an independent contractor is that which a reasonable man would exercise under the circumstances, and therefore varies as the circumstances vary. . . .
>
> [¶] The extent of the employer's knowledge and experience in the field of the work to be done is to be taken into account; and an inexperienced widow employing a contractor to build a house is not to be expected to have the same information concerning the competence and carefulness of building contractors in the community, or to exercise the same judgment, as would a bank seeking to build the same house.

The same rule is set forth in Restatement (Second) Torts §413 ("Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor"), *comment f,* which provides:

> Again, as in the case of the rule stated in §411, the extent of the employer's knowledge and experience in the field of work to be done is to be taken into account; and an inexperienced widow employing a contractor to build a home is not to be expected to have the same information, or make the same inquires, as to whether the work to be done is likely to create a peculiar risk of physical harm to others, or to require special precautions, as is a real estate development company employing a contractor to build the same house.

In *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 509-510, this Court expressly adopted these comments from the Restatement as limiting the liability of unsophisticated hirers under both Section 413 and Section 416. This Court noted that the two sections are very similar, and that under both of

them hirer can be liable only for a risk "against which a reasonable person would recognize the necessity of taking special precautions." The Court explained that whether *the hirer* should have recognized the need for precautions depends on the particular hirer's level of sophistication:

> The determination of whether a danger is recognizable requires consideration of the employer's knowledge and experience in the field of work to be done. [Citations.] "An inexperienced widow employing a contractor to build a home is not to be expected to have the same information, or make the same inquires, as to whether the work to be done is likely to create a peculiar risk of physical harm to others, or to require special precautions, as is a real estate development company employing a contractor to build the same house." (Rest.2d Torts, §413, com. f.)

Contrary to the concerns expressed by Fillner, ordinary homeowners, small business persons, and other unsophisticated hirers are not exposed to unlimited liability under the peculiar risk doctrine and the related provisions of the Restatement. Only persons who have knowledge and experience in the field, and businesses which have the sophistication and resources to make inquires into the work to be performed, can be held liable under these Restatement sections. Extending *Privette* as Fillner advocates would deprive self-employed workers of compensation from knowledgeable and experienced hirers who should have been aware of the dangers, without providing new protections for ordinary homeowners.

2. Even If *Privette* Were Expanded to Self-Employed Workers, Sophisticated Hirers Would Still Have a Duty to Oversee the Work of Their Contractors.

Fillner's claim that if *Privette* is not expanded to cover self-employed workers hirers will be unfairly required to supervise the work of their contractors is equally unavailing as to sophisticated hirers for one simple reason – even if this Court were to expand *Privette* to self-employed workers, *hirers would still have a duty to oversee the work of their contractors to protect other third persons.* In other words, the duty of a hirer under the peculiar risk and related doctrines to oversee the work of its contractors will remain, regardless of whether this Court expands *Privette* to self-employed workers or not.

The sections of Restatement discussed above, set forth a variety of circumstances under which a hirer can be held liable for the negligence of its contractors which results in injury to "others." This Court explained in *Privette*:

> Under the peculiar risk doctrine, a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others. By imposing such liability without fault on the person who hires the independent contractor, the doctrine seeks to ensure that injuries caused by inherently dangerous work will be compensated, that the person for whose benefit the contracted work is done bears responsibility for any risks of injury to others, and that adequate safeguards are taken to prevent such

injuries.

(*Privette*, *supra*, 5 Cal.4th at 691.)

In *Privette* and subsequent cases, this Court limited the hirer's liability to *employees* of the contractor. But the doctrine remains intact with respect to all other third persons. Even if this Court were to expand *Privette* to cover self-employed workers, the hirer would still remain liable to other third persons. A sophisticated hirer would continue to have a duty to oversee the contractor's work for the protection of those third persons. Expanding *Privette* to self-employed workers would thus deprive those workers of compensation without eliminating the duty of sophisticated hirers to oversee their contractors.

3. Hirers Are Not Liable For the Self-Employed Worker's Own Negligence.

Fillner also suggests that unless *Privette* is expanded, hirers will find themselves responsible for ensuring that the self-employed worker himself does not perform his work negligently, or risk being held liable to the self-employed worker for his own negligence. That is clearly incorrect.

The peculiar risk doctrine and the related provisions of the Restatement provide for a form of vicarious liability. Under these rules, the hirer is held liable for the negligence of its contractor. (*Camargo*, *supra*, 25 Cal.4th at 1240-1241.) Comparative negligence principals also apply to peculiar risk cases, and any recovery by the injured plaintiff must be reduced by the extent

to which that plaintiff's negligence contributed to his injuries. (See *Aceves*, *supra*, 24 Cal.3d at 512; *McKown*, *supra*, 27 Cal.4th at 223.) By definition, the hirer's liability is limited to the negligence of its contractor, and the hirer has no liability for the negligence of the injured plaintiff – whether that plaintiff is a self-employed worker or another third party. Fillner's concern that hirers will be liable for self-employed workers' own negligence is thus unfounded.

4. Sophisticated Hirers Who Are Covered by *Privette* and Wish to Avoid Paying for Their Contractor's Negligence, Can Protect Themselves By Contract.

Fillner also claims that hirers will be discouraged from hiring expert contractors if they can be held liable for injuries to self-employed workers. In fact, the sophisticated hirers who are subject to liability under the peculiar risk doctrine and related sections of the Restatement are entirely capable of protecting themselves from the financial risks involved in the use of contractors.

This Court has expressly recognized that hirers can protect themselves against their contractors' negligence by carefully selecting the contractor and by contractual terms. For example, in *Aceves*, *supra*, 24 Cal.3d 502, this Court explained that the hirer, "selects the contractor and is free to insist on a competent and financially responsible one, the employer is in a position to

demand indemnity from the contractor, the insurance necessary to distribute the risk is properly a cost of the employer's business . . . ." (See also, *Van Arsdale*, *supra*, 68 Cal.2d at 253.)

Sophisticated hirers can be expected to take all of these steps and more. Indeed, construction law publications expressly warn contractors of the steps to take to avoid financial responsibility for the negligence of their contractors. For example, one such publication has advised contractors:

> Principals should ensure that any contractor involved in an accident maintains adequate liability insurance and that such insurance covers the principal as well. Owners should be named as an additional insured on every policy at every contract tier, on a primary and noncontributory basis, with a separation of insureds. General contractors too should be named on all subcontractors' policies.

(Marc M. Schneier, *The Independent Contractor Rule: Shifting Bedrock of Construction Accident Law*, Construction Briefings No. 2002-8, pp. 14-15 (August 2002).)

A hirer who takes these steps can almost completely insulate itself from financial costs associated with injuries to self-employed workers or other third parties caused by the negligence of its contractors. And the sophisticated hirers to whom the peculiar risk and related doctrines apply are well aware of their right to take these steps. The unfair and wholesale imposition of liability on helpless hirers envisioned by Fillner does not reflect the reality of these

sophisticated businesses.

5. Fillner's Argument that Safety Can Properly Be Delegated to Self-Employed Workers Ignores the Realities Faced by Such Workers.

Fillner also argues that self-employed workers themselves should be held responsible for their own safety, and thus barred from seeking compensation from the hirer for the negligence of the contractor. This argument disregards the economic realities faced by self-employed workers.

As a group, self-employed workers are lower-paid than employees, are less likely to have insurance coverage than employees, and are not protected by most laws which cover employees. (See Section III.B, above.) In addition, employees have a legally protected right to complain about safety violations and to refuse to work in conditions which they reasonably believe to be unsafe. It is unlawful for an employer to fire or otherwise retaliate against an employee for taking either of those steps. (Labor Code §§6310, 6311.) But those protections do not extend to self-employed workers. (*Lujan v. Minagar* (2005) 124 Cal.App.4th 1040, 1048-1049.) If a self-employed worker complains about safety issues or refuses to work in unsafe conditions, the hirer or contractor can terminate his contract and replace him with another self-employed worker who is sufficiently in need of the work that he is willing to perform it in unsafe conditions.

In *McKown* this Court recognized the dilemma faced by small independent contractors when dealing with larger businesses with far greater bargaining power. In *McKown* the plaintiff was an employee of a contractor that installed sound systems in Wal-Mart stores. The employee was injured while using a defective forklift provided by Wal-Mart. Wal-Mart argued that it had only requested that the contractor use the forklift, and had not insisted that it do so. This Court concluded that in light of the unequal power between Wal-Mart and the contractor, Wal-Mart's "request" was in effect a requirement which the contractor would have found very difficult to refuse:

> Wal-Mart contends it should not be held liable for provision of the unsafe equipment because it merely requested, and did not insist, the contractor use its forklift. To the contrary: The contractor had several contracts with Wal-Mart for the installation of sound systems in Wal-Mart's stores, and Wal-Mart, the world's largest retailer, was a customer the contractor was presumably loath to displease. . . . Wal-Mart presumably believed that the forklift it provided was safe, and plaintiff may well have believed that refusal to use it would have generated ill will. The extra expense of renting a forklift would have been chargeable to Wal-Mart. Moreover, renting a forklift would have entailed delaying the installation project for at least 24 hours . . . .

(*McKown*, *supra*, 27 Cal.4th at 225-226.)

If a business which is large and successful enough to have entered into numerous contracts with Wal-Mart can be intimidated into engaging in unsafe practices, the same can certainly be said of a self-employed individual who is

unprotected by employment and safety laws. It is completely unrealistic to expect such individuals to undertake responsibility for their own safety, particularly on a multi-employer jobsite, where they have no control over the practices of other contractors.

Indeed, the present case is a good example of the difficulties faced by self-employed workers in this respect. In this case Fillner directed one of its subcontractors to dig bollard holes in the area where it knew Tverberg was going to have to work. (AA 39 [Fact 10]; 52; 104 [Fact 13].) The holes were completely unrelated to Tverberg's work. (AA 104 [Facts 12, 15-17]; 116; 142; 168; 180.) The contractor who dug the holes left them uncovered and un-barricaded. (AA 104 [Fact 14]; 154; 156.) Fillner ignored Tverberg's requests to cover them, even though there were metal plates available at the jobsite, which only Fillner had the ability to place over the holes. (AA 105 [Facts 25, 27-29]; 106 [Facts 33, 34]; 143-146; 160-162; 175.) In this action, Fillner takes the position that it was Tverberg's responsibility to cover the holes. But to do this, Tverberg would have had to delay his work, either by waiting for Fillner to cover the holes with the metal plates, or by leaving the jobsite to find suitable coverings himself. He would and thereby have risked angering the contractors from whom he needed to obtain future work.

In such circumstances, where the hirer and its contractors are all

"passing the buck" of responsibility for worksite safety, an individual self-employed worker is left in an untenable situation, forced to choose between his safety and his livelihood. Fillner's argument that self-employed workers should be left to provide for their own safety in such circumstances would place an unfair and intolerable burden on such workers.

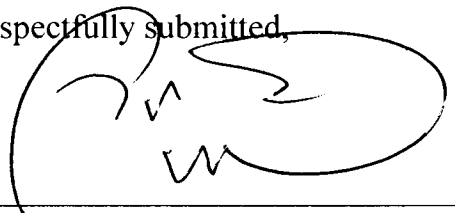
CONCLUSION

The decision of the Court of Appeal in this case was correct in all respects. That court properly recognized that justification for this Court's *Privette* line of cases rests entirely on the interplay between workers' compensation and the peculiar risk doctrine and other theories upon which liability can be imposed on the hirer of an independent contractor. Where workers' compensation coverage is not present, the reasoning upon which the *Privette* cases are based disappears. The *Privette* doctrine cannot be applied to persons who are not covered by workers' compensation without completely destroying the legal and intellectual basis for that doctrine. The policy considerations advanced by Defendant and Respondent Fillner Construction, Inc., for expanding *Privette* to cover self-employed workers do not take into account this fundamental premise of *Privette*. And Fillner's predictions of catastrophic consequences unless *Privette* is expanded are highly exaggerated, to say the very least.

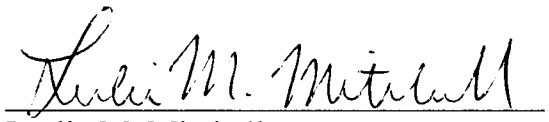
For these reasons, and the reasons set forth above, Plaintiffs and Appellants Jeffery Tverberg and Catherine Tverberg respectfully request that the decision of the Court of Appeal be affirmed. But in the event this Court were to reverse the Court of Appeal's decision, the Tverbergs respectfully request that this case be remanded to the Court of Appeal for decision of the alternate theories raised in the Tverberg's appeal which have not yet been addressed by the Court of Appeal.

Date: July 2, 2009

Respectfully submitted,



Kirk J. Wolden
Clayeo C. Arnold, A Professional
Law Corporation
Attorney for Plaintiffs and Appellants
Jeffrey Tverberg and Catherine Tverberg



Leslie M. Mitchell
Attorney for Plaintiffs and Appellants
Jeffrey Tverberg and Catherine Tverberg

CERTIFICATE OF COUNSEL

Pursuant to California Rules of Court, Rule 8.204(c)(1), I hereby certify that this Answering Brief on the Merits contains 12,784 words, including footnotes, as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

Date: July 2, 2009

Leslie M. Mitchell

PROOF OF SERVICE

I, Connie McComb, declare and state:

I am a citizen of the United States, over 18 years of age, employed in the County of Sacramento, and not a party to the within action. My business address is 865 Howe Avenue, Suite 300, Sacramento, CA 95825.

On July 2, 2009, I served the within **ANSWERING BRIEF ON THE MERITS** on the following parties in said action by placing a true copy thereof enclosed in a sealed envelope:

[X] (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Sacramento, California. I am familiar with my firm's practice whereby the mail is given the appropriate postage and is placed in the designated area to be deposited in a U.S. mail box in Sacramento, California, in the ordinary course of business;

[] (BY EXPRESS MAIL) I caused such envelope to be placed in the U.S. Mail/UPS depository at Sacramento, California; overnight service;

[] (BY PERSONAL SERVICE) delivered by hand to addressee at the address listed below;

[] (BY FACSIMILE/TELECOPIER) I personally sent to the addressee's telecopier number (stated above) a true copy of the above-described documents.

to the following parties:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 2, 2009, at Sacramento, California.

Connie McComb

Connie McComb

SERVICE LIST
Tverberg v. Fillner Construction, et al.
California Supreme Court Case No.: S169753
First District Court of Appeal Case No. A120050

David M. Axelrad Stephen E. Norris Horvitz & Levy LLP 15760 Ventura Blvd., 18th Floor Encino, CA 91436-3000	Attorneys for Defendant and Respondent, Fillner Construction, Inc. Tel: (818) 995-0800 Fax: (818) 995-3157
Andrew K. Ulich Ulich & Terry LLP 4041 MacArthur Blvd., Suite 500 Newport Beach, CA 92660	Attorneys for Amicus in support of Fillner Construction, Inc. Tel: (949) 250-9797
Robert L. Bragg Vitale & Lowe 3249 Quality Drive, Suite 200 Rancho Cordova, CA 95670-6098	Co-Counsel for Defendant and Respondent, Fillner Construction, Inc. Tel: (916) 851-3750 Fax: (916) 851-3770
Court of Appeal First Appellate District 350 McAllister Street San Francisco, CA 94102	Court of Appeal Case No. A120050
Judge Paul L. Beeman Solano County Superior Court 321 Tuolumne Street Vallejo, CA 94590	Trial Court Case No. FCS02810
Priscilla Slocum Law Office of Priscilla Slocum 1800 Century Park East, Suite 600 Los Angeles, CA 90067	Counsel for Amicus Farmers Insurance Exchange in support of Fillner Construction, Inc. Tel: (310) 508-9466

Jeffrey J. Fuller
Vice President and General Counsel ACIC
1415 L Street, Suite 670
Sacramento, CA 95814

Counsel for Amicus ACIC in support of Fillner Construction, Inc.

Tel: (916) 449-1370