S169753

IN THE SUPREME COURT OF CALIFORNIA

JEFFREY TVERBERG and CATHERINE TVERBERG,
Plaintiffs and Appellants,

v.

FILLNER CONSTRUCTION, INC.,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NO. A120050

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

In a series of cases beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*), this Court has limited the extent to which those who retain independent contractors can be held liable to contractors' employees for work-related injuries. This case raises the important issue whether the limitations on liability imposed by this Court in the *Privette* line of cases apply in an action by a self-employed contractor against a hirer for injuries sustained by the contractor during the performance of the contract work.

INTRODUCTION

Nature of the action.

This is a negligence action brought by a self-employed subcontractor against a general contractor for personal injuries sustained in a work-related accident. In bringing this action, the subcontractor seeks to avoid the reasonable limitations on hirer liability imposed by this court in the *Privette* line of cases.

The accident at issue in this case occurred during the construction of a gas station. Defendant Fillner Construction, Inc. (Fillner) was the general contractor for the construction of the gas station. Plaintiff Jeffrey Tverberg, a self-employed contractor, was retained by one of the project's subcontractors to erect a canopy at the gas station. Tverberg sustained injuries during the course of the project when he fell into a hole at the worksite excavated in preparation for installation of bollards (posts) around the station's gas pumps.

After the accident, Tverberg and his wife sued Fillner, asserting claims for premises liability and negligence. Fillner sought summary judgment, arguing that plaintiffs' action was without merit as a matter of law based on the *Privette* doctrine. The Superior Court entered summary judgment in Fillner's favor.

Plaintiffs appealed from the summary judgment and the Court of Appeal reversed, refusing to apply the *Privette* doctrine to self-employed contractors. The Court of Appeal held the limitations

on liability established in the *Privette* line of cases apply only where the plaintiff is a contractor's employee. According to the Court of Appeal, the *Privette* doctrine in no way limits claims by self-employed contractors against hirers, primarily because self-employed contractors "[are] not eligible for workers' compensation benefits." (Typed opn., 9, emphasis omitted.)

Why the Court of Appeal's judgment should be reversed.

Under the *Privette* doctrine, as developed by this Court to date, one who hires a contractor to perform services is generally not liable to contractors' employees for injuries that occur in the performance of the contractor's work. Instead, the hirer is liable to contractors' employees only in exceptional circumstances, such as where the hirer has concealed a dangerous condition or otherwise affirmatively contributed to the plaintiff's injury. Absent some form of affirmative misconduct by the hirer, contractors' employees injured in the course of their work as a result of the hirer's alleged negligence have been limited to workers' compensation, the same remedy available to all other employees injured in the course of their employment.

The *Privette* doctrine is supported by numerous salutary policies, many of which are based on California's workers' compensation system. Under the workers' compensation system, all employees who are injured in work-related accidents obtain swift and certain payment of benefits, without proving fault. Those who

retain contractors have, in paying for the contractor's services, effectively paid for workers' compensation benefits available to contractors' employees. The hirers therefore have the right to assume that a portion of the contract price will be used to procure such coverage. To permit contractors' employees to sue hirers would, moreover, provide an unwarranted windfall to contractors' employees that is not available to other employees injured in work-related accidents, for whom workers' compensation is their sole remedy.

Permitting contractors' employees to obtain tort recovery from hirers, without proof of some affirmative misconduct by the hirer, would also be contrary to public policy because such broad-based liability would discourage many property owners (such as large commercial property owners or general contractors) from retaining contractors. Rather than run the risk of civil actions by contractors' employees, such hirers might instead choose to delegate hazardous work to their own employees, whose recovery is limited to workers' compensation. Imposing a broad duty of care on hirers to protect contractors' employees would thus discourage property owners and other hirers from delegating hazardous work to contractors who specialize in such work. This result is contrary to public policy because contractors, who typically have specialized skills and training, are best able to perform hazardous work with the least risk of injury to either those directly involved in the performance of the work *or* third parties who might be affected by the performance of the work.

The Court of Appeal's holding in this case, which would impose a duty of care on hirers to supervise the work of self-employed contractors—and subject hirers to liability for breach of that duty of care—conflicts with the many policies underlying the *Privette* doctrine. Just as workers' compensation benefits are available to contractors' employees, they are likewise available to self-employed contractors, either from private insurers or the State Compensation Insurance Fund (SCIF). In fact, the California legislature has expressly authorized SCIF to issue workers' compensation policies to self-employed contractors who request such a policy. Thus, contrary to the Court of Appeal opinion, self-employed contractors are eligible for workers' compensation benefits.

Of course, self-employed contractors may elect not to procure workers' compensation for their own benefit and instead purchase some other form of private insurance providing medical and disability benefits equivalent or superior to those of a workers' compensation policy. In either event, hirers have the right to assume that contractors who choose to perform contract work themselves, rather than delegate it to employees, will use a portion of the contract price to procure some form of insurance to cover their work-related injuries.

Applying the *Privette* doctrine to self-employed contractors also serves the other salutary policies underlying *Privette*. Limiting the scope of hirer liability to self-employed contractors would, for example, preclude unwarranted windfalls by barring many tort claims of contractors who already have medical and disability

benefits, the cost of which is effectively underwritten by the hirer. It would also promote public safety generally: insulating those who have the need for contractors' services from expansive tort liability will encourage hirers, particularly commercial entities, to delegate hazardous work to specialty contractors rather than to rely on their own employees to perform work that may not be directly within their employees' field of expertise.

For all these policy reasons, the Court of Appeal opinion should be reversed and the case remanded to the Court of Appeal for further proceedings.

STATEMENT OF THE CASE

A. Jeffrey Tverberg's injury.

In 2006, defendant Fillner was the general contractor on a gas station construction project in Dixon. (Typed opn., 2; AA 38 [Fact 1].)

Fillner contracted with Lane Supply to assist in the construction project. (Typed opn., 2; AA 38 [Fact 4].) Lane Supply then retained Perry Construction, Inc. (Perry) to install a canopy at the site. (Typed opn., 2; AA 38 [Fact 5].) Perry hired appellant Jeffrey Tverberg to erect the canopy. (Typed opn., 2; AA 38 [Fact 8].)

During the course of the construction, holes were dug near where the canopy was to be installed. (Typed opn., 2; AA 39 [Fact 10].) The holes, which were four feet wide and four feet deep, were

excavated in preparation for the installation of bollards around the station's gas pumps. (AA 39 [Facts 9-10].)

It is undisputed that Tverberg was aware of the bollard holes and that he discussed them with a Fillner supervisor prior to beginning his work. (AA 39 [Facts 14-15], 62-64 [Tverberg's deposition testimony admitting that he discussed the bollard holes with Fillner supervisor prior to accident], 110-111 [plaintiffs' response to Fillner's statement of undisputed facts].) It is also undisputed that during the course of his work at the gas station, Jeffrey Tverberg fell into one of these holes, which were not covered at the time of Tverberg's accident. (Typed opn., 2; AA 40 [Facts 23, 25].)

B. The Tverbergs' complaint and the summary judgment in favor of Fillner.

Following the accident, Tverberg and his wife, Catherine, filed a personal injury action against Fillner and Perry. (Typed opn., 2; AA 1-8 [Complaint].) Jeffrey alleged causes of action for negligence and premises liability; Catherine pled a cause of action for loss of consortium. (Typed opn., 2; AA 3-7.) Fillner answered the complaint with a general denial. (Typed opn., 2; AA 9-14 [Answer].)

Fillner moved for summary judgment, asserting it owed no duty of care to the Tverbergs. (Typed opn., 2; AA 16-33 [notice of motion and supporting memorandum].) The Tverbergs opposed the motion. (Typed opn., 2; AA 89-100.)

Plaintiffs and Fillner agreed in the trial court that Jeffrey Tverberg had been hired as an independent contractor. (Typed opn., 2.)

The trial court granted Fillner's motion for summary judgment, finding that Fillner owed the Tverbergs no duty of care because it did not affirmatively contribute to Jeffrey Tverberg's injuries. (Typed opn., 2; AA 195-199 [order granting summary judgment], 201 [final judgment].) The Tverbergs appealed and the Court of Appeal reversed, holding that self-employed contractors are ineligible for workers' compensation and that their personal injury claims against hirers are therefore not barred by the *Privette* doctrine. (See typed opn., 8-12.)

LEGAL DISCUSSION

I. BASED ON SOUND PUBLIC POLICY, THE *PRIVETTE* DOCTRINE IMPOSES REASONABLE LIMITS ON HIRER LIABILITY.

A. The *Privette* doctrine generally bars hirer liability to contractors' employees absent evidence of some exceptional misconduct by the hirer.

Under the *Privette* line of cases, hirers are generally not liable in a negligence action brought by contractors' employees for personal injuries arising from the manner in which the contract work is performed. (See generally *Privette, supra*, 5 Cal.4th at pp. 698-702; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 270 (*Toland*); *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*).) Instead, the hirer may be held liable for such injuries only in very limited circumstances, such as where the hirer has failed to warn the contractor of a concealed dangerous condition or has affirmatively contributed in some other manner to the plaintiff's injury. (See, e.g. *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664 (*Kinsman*) [hirer may be liable for failing to disclose a known dangerous condition not known to or discoverable by contractor]; *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225-226 (*McKown*) [in providing defective equipment for use by

contractors' employees, hirer affirmatively contributed to worksite accident and could properly be held liable to injured employees].)

The immunity provided to hirers by the *Privette* doctrine has broad application to both vicarious and direct liability claims. Initially, in *Privette* and *Toland*, this Court applied the doctrine to preclude claims in which contractors' employees seek to hold hirers *vicariously* liable, under the peculiar risk theory of liability, for injuries arising from the contractor's negligent performance of inherently dangerous work on behalf of the hirer. (*Privette, supra*, 5 Cal.4th at p. 693; see *Toland, supra*, 18 Cal.4th at p. 270.)

In numerous cases decided after *Privette* and *Toland*, the *Privette* doctrine has repeatedly been invoked to limit hirer liability in cases where contractors' employees seek to hold hirers *directly* liable for work-related injuries.[1] (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235 (*Camargo*) [applying doctrine in context of negligent retention action]; *Hooker, supra,* 27 Cal.4th 198 [applying doctrine to retained control theory of liability]; *Kinsman, supra,* 37 Cal.4th at p. 664 [applying doctrine in premises liability action]; *McKown, supra*, 27 Cal.4th at p. 225 [hirer not liable for injuries to contractors' employees caused by defective equipment unless hirer supplied equipment or supervised its use]; *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595 [*Privette* doctrine limits scope of hirer's liability on alleged non-delegable duty theory of liability]; *Padilla v. Pomona College* (2008) 166

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[1] In section I.C. below, we will discuss in detail the scope of the limitations on hirer liability under both vicarious and direct theories of liability considered by this Court.

Cal.App.4th 661 [same].) These limitations on direct-liability claims have been imposed to preclude an injured party from "circumvent[ing]" the *Privette* doctrine in any way that would result in a hirer being held liable for a contractor's failure to undertake measures to protect contractors' employees from hazards arising from the contract work. (*Kinsman,* at p. 671.)

In limiting the scope of hirer liability under the *Privette* doctrine, this Court has also applied the doctrine broadly in favor of a wide range of defendants, whether homeowners, developers, general contractors, public entities, or large commercial entities. (*Privette, supra,* 5 Cal.4th at p. 692 [doctrine applied in favor of homeowner]; *Toland, supra,* 18 Cal.4th at pp. 257, 269 [doctrine applied in favor of developer and general contractor]; *Camargo, supra,* 25 Cal.4th 1235 [doctrine applied in favor of commercial dairy]; *Hooker, supra,* 27 Cal.4th 198 [doctrine applied in favor of state agency]; *Kinsman, supra,* 37 Cal.4th at p. 664 [doctrine applied in favor of large oil company].) As explained by this Court, all hirers, whatever the nature of their business, should have "the right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Toland,* at p. 269.)

B. The *Privette* doctrine is supported by numerous salutary policies.

The rationale underlying *Privette*'s limitations on hirer liability is multi-faceted and has evolved as this Court has expanded the doctrine beyond the context of claims based solely on

the hirer's vicarious liability. Some of the most significant factors relied upon by this Court include the following:

(i) *Availability of Workers' Compensation.* The *Privette* doctrine is based "principally [on] the availability of workers' compensation" to injured employees under California's Workers' Compensation Act. (*Kinsman, supra*, 37 Cal.4th at p. 671.) Under the Act, "all employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.'" (*Privette, supra*, 5 Cal.4th at pp. 696-697, citing Lab. Code, § 3600, subd. (a).)

In relying on the availability of workers' compensation to limit hirer liability, this Court has determined that the Workers' Compensation Act achieves many of the purposes underlying tort recovery by contractors' employees against hirers: "[i]t 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 . . . ; and it encourages industrial safety." (*Privette, supra*, 5 Cal.4th at p. 701.) Under the Workers' Compensation Act, moreover, an employee injured in a work-related accident is also assured of obtaining benefits "regardless of fault," thus assuring that injured employees will be compensated for their injury. (*Ibid.*)

(ii) *Hirer's indirect payment of premiums for workers' compensation coverage.* This Court has determined that hirers who retain contractors are entitled to the same immunity from tort claims that applies to employers under the "exclusive remedy" of the

Workers' Compensation Act because the hirer, in paying for a contractor's services, has in effect paid for the workers' compensation benefits available to injured contractors' employees. (*Privette, supra*, 5 Cal.4th at pp. 699, 701; *Camargo, supra*, 25 Cal.4th at pp. 1244-1245; and see Lab. Code, § 3602 [exclusive remedy provision].)

As explained in *Camargo*, the rule of workers' compensation exclusivity "should equally apply to the person hiring the contractor because the hirer has indirectly paid the cost of such coverage inasmuch as it was presumably calculated into the contract price." (*Camargo, supra*, 25 Cal.4th at pp. 1244-1245; accord, *Kinsman, supra,* 37 Cal.4th at p. 668; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 13 (*State Compensation*) [hirer may reasonably "anticipate that the independent contractor will insure against the risk" of injury "and that the cost of the insurance will be passed on as part of the price of the contract"].)

(iii) *Avoiding anomaly of hirer bearing liability for contractors' negligence.* Because employers are shielded from negligence liability for work-related injuries to employees, permitting a contractor's employee to recover from a hirer for work-related injuries attributable to the contractor's conduct would lead to "the anomalous result that a nonnegligent person's liability," i.e., that of the hirer, could be "greater than that" of the contractor, whose negligence caused the employee's injuries. (*Privette, supra*, 5 Cal.4th at p. 698.)

As this Court explained in *Toland*, "it would be unfair to impose liability on the hiring person when the liability of the contractor, *the one primarily responsible for the worker's on-the-job injuries*, is limited to providing workers' compensation." (*Toland, supra*, 18 Cal.4th at p. 267, emphasis added; accord, *Hooker, supra*, 27 Cal.4th at p. 210 ["because 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 . . . merely because the hirer retained the ability to exercise control over safety at the worksite"].)

(iv) *Avoiding unwarranted windfall.* To allow contractors' employees to sue a hirer for negligence for work-related injuries also gives rise to an "unwarranted windfall" because other employees who are injured in work-related accidents are not permitted to bring negligence actions against their employers as a result of their work-related injuries. (*Privette, supra*, 5 Cal.4th at pp. 699-700; *Camargo, supra*, 25 Cal.4th at p. 1245 [permitting recovery against the hirer "would give employees of independent contractors an unwarranted windfall, something that is denied other workers—the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment"].)

(v) *Avoiding creation of disincentives to hirers' retention of contractors.* The limitations on hirer liability under *Privette* encourage hirers to retain contractors to perform work that is often hazardous and requires special precautions. Conversely, imposing broad-based liability on hirers for injuries arising from the

performance of the contract work discourages hirers from retaining contractors. To discourage hirers from retaining contractors is contrary to public policy because it is contractors who typically have the technical skills and specialized training necessary to perform what is often hazardous work in a safe manner. (See *Privette*, *supra*, 5 Cal.4th at p. 700.)

(vi) *Protecting hirer's right to delegate work.* Finally, this Court has cited the hirer's right to delegate work to contractors, including the right to delegate responsibility for assuring the safety of the contractors' own employees, as a basis for limiting hirer liability to contractors. (*Kinsman, supra*, 37 Cal.4th at p. 671.) Prior to *Privette*, courts "severely limited the hirer's ability to delegate responsibility and escape liability." (*Ibid.*) "But in *Privette* and its progeny," this Court has concluded that, "these policy reasons 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." (*Ibid.*; accord, *Hooker, supra*, 27 Cal.4th at p. 211 [*Privette* doctrine precludes hirer liability "for mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice"].)

C. The policies underlying *Privette* have been applied to a wide variety of liability claims.

1. *Privette v. Superior Court*: No vicarious liability under the peculiar risk doctrine.

In *Privette*, this Court granted review to reconsider prior decisions permitting contractors' employees to recover from hirers under the peculiar risk doctrine.

Preliminarily, *Privette* explained that a "general rule" of common law provides that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." (*Privette, supra*, 5 Cal.4th at p. 693; Rest.2d Torts, § 409.) This general rule is based on "the recognition that a person who hired an independent contractor" has no right to control the manner in which the contractor performed its work. (*Ibid.*)

Over time, courts have created multiple exceptions to this general rule of non-liability, including the peculiar risk doctrine, which applies where the contractor's work "poses some inherent risk of injury to others." (*Privette, supra*, 5 Cal.4th at p. 693.) Initially, the peculiar risk doctrine and other exceptions to the general rule of non-liability applied only to innocent bystanders and neighboring property owners, but a minority of states, including California, expanded the scope of the exceptions to permit contractors' employees, as well as third parties, to seek recovery from the hirer

based upon a contractor's negligence. (See *id.*, citing *Woolen v. Aerojet General Corp.* (1962) 57 Cal.2d 407 (*Woolen*).)

In *Privette*, this Court reconsidered *Woolen* and other decisions permitting contractors' employees to recover under the peculiar risk doctrine. The plaintiff in *Privette* was a roofing contractor's employee who was injured when he fell from a ladder while attempting to carry a bucket of hot tar to the roof of the defendant homeowner's house. (*Privette, supra*, 5 Cal.4th at p. 692.) In his action against the homeowner, the plaintiff argued his injury arose from a peculiar risk of the contract work and that he was therefore entitled to recover from the homeowner.

This Court held the peculiar risk claim asserted by the plaintiff failed as a matter of law. Citing the availability of workers' compensation and other policy reasons discussed above, this Court concluded that "the 'principal' who hires an independent contractor should be subject to no greater liability 'than its [independent contractor] agent,' whose exposure for injury to an employee is limited to providing workers' compensation insurance."[2] (*Privette, supra*, 5 Cal.4th at p. 692, 698-700; see *ante*, part I.B.)

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[2] The *Privette* decision also referred to the hirer's inability to obtain equitable indemnity from a negligent contractor as an additional reason for limiting hirer liability to contractors' employees. None of this Court's post-*Privette* decisions, however, has referred to a hirers' inability to obtain equitable indemnity from the contractor as the basis for *Privette*'s limitations on hirer liability for injuries to contractors' employees.

2. *Toland v. Sunland Housing*: No peculiar risk liability even where hirer with "superior knowledge" fails to take special precautions.

The plaintiff in *Toland* was injured when a heavy frame wall collapsed as the plaintiff and other employees of the framing subcontractor were attempting to raise it. (*Toland, supra*, 18 Cal.4th at p. 257.) The plaintiff sued a general contractor and real estate developer who retained the framing contractor. Although the alleged injuries in *Toland* occurred as a direct result of the manner in which the subcontractor and its employees chose to perform the framing work, the plaintiff in *Toland* contended that the rationale of *Privette* applies only to actions where the hirer has been sued on a vicarious liability theory, based on the contractor's failure to undertake precautions on behalf of the contractors' employees. (*Id.* at pp. 256-257, citing Rest.2d Torts, § 416.) Plaintiff contended *Privette* does not apply where the plaintiff alleges that the hirer failed to require the contractor to take special precautions to prevent injury. (*Ibid.*, citing Rest.2d Torts, § 413.)

This Court rejected plaintiff's contention, explaining that even where a plaintiff alleges that the hirer is liable for failing to require the contractor to take precautions, the basis for liability is "the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work." (*Toland, supra*, 18 Cal.4th at p. 265.) "[I]t would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the

worker's on-the-job injuries, is limited to providing workers' compensation coverage." (*Id.* at p. 267.)

In deciding *Toland*, this Court also refused to permit imposition of liability on hirers merely because they might be deemed to have *superior knowledge* to that of the contractor. (*Toland, supra*, 18 Cal.4th at pp. 268-269.) This Court noted that whenever a subcontractor's employee sues a general contractor, there will almost always be a triable issue of material fact whether the general contractor's knowledge of the subcontractor's work and its hazards was "superior" to that of the subcontractor. (*Ibid.*) To permit imposition of liability based on the hirer's superior knowledge would "effectively deprive general contractors" and others with superior knowledge "of a right available to any other hiring person: the right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Id.* at p. 269.)

3. *Camargo v. Tjaarda Dairy*: No hirer liability for negligently retaining contractor.

In *Camargo, supra*, 25 Cal.4th 1235, this Court extended the *Privette* doctrine further by holding that contractors' employees may not sue a hirer for injuries resulting from the hirer's failure to retain a competent contractor. As in *Toland*, this court rejected the plaintiffs' claim as an improper attempt to circumvent *Privette*'s limitations on liability, reasoning that a negligent retention claim, like a peculiar risk claim, is an improper attempt to hold the hirer

liable for the contractor's negligent performance of the contract work. Relying on the policy rationale discussed above (see *ante*, part I.B.), this Court held that negligent retention claims against hirers are barred by the *Privette* doctrine. (*Camargo*, at pp. 1244-1245.)

4. *Hooker v. Department of Transportation*: No retained control liability absent proof of the hirer's affirmative contribution.

Hooker is the first of this Court's opinions applying the *Privette* doctrine in the context of a claim by a plaintiff asserting a purely direct theory of liability, specifically, the retained control theory of liability. Under this legal theory, a hirer who retains control of any part of the contractor's work may generally be held liable for the failure to exercise the retained control with reasonable care. (*Hooker, supra*, 27 Cal.4th at p. 201; Rest.2d Torts, § 414.)

The plaintiff in *Hooker* argued that Caltrans was liable under the retained control theory for negligent exercise of control over traffic during construction of an overpass. Specifically, the plaintiff argued Caltrans should have closed an overpass to traffic during the construction to reduce the risk of injury. Plaintiff's decedent, a crane operator employed by one of Caltrans' contractors, was killed during the construction when his crane toppled at the worksite as a result of his failure to extend the crane's outriggers after he retracted them to permit traffic to pass.

This Court rejected the plaintiff's theory that Caltrans could be liable for failing to close the overpass to traffic, holding that a hirer can be liable on a retained control theory only if it has "retain[ed] control over safety conditions at a worksite and negligently exercise[d] that control in a manner that *affirmatively contributes* to an employee's injuries . . . ." (*Hooker, supra,* 27 Cal.4th at p. 213, emphasis added; accord, *McKown, supra,* 27 Cal.4th at p. 225.)

5. *Kinsman v. Unocal*: No premises liability absent the hirer's concealment of a dangerous condition.

Most recently, in *Kinsman*, this Court applied the *Privette* doctrine in an action in which the plaintiff sought recovery on a premises liability claim. Prior to *Kinsman*, a hirer faced potential liability under ordinary rules of premises liability, pursuant to which a property owner who is aware of a concealed dangerous condition, but fails to correct it or provide adequate warnings, may be liable to those who are foreseeably injured as a result of the dangerous condition. (*Kinsman, supra,* 37 Cal.4th at pp. 672-673, citing *Rowland v. Christian* (1968) 69 Cal.2d 108, 118-119 (*Rowland*); Rest.2d Torts, § 343.) Hirers thus faced liability based upon the exposure of a contractor's employee to an injury-causing dangerous condition on the hirer's property, without regard to whether *the contractor* knew or should have known of the dangerous condition. (See *Kinsman,* at pp. 672-673.)

In *Kinsman*, this Court concluded that in light of the hirer's general right to delegate responsibility for workplace safety to contractors, the ordinary rule of landowner liability set forth in cases such as *Rowland* has no application in an action by a contractor's employee against a landowner who retains the contractor. (*Kinsman, supra*, 37 Cal.4th at p. 674.) Noting that under *Privette* and its progeny, "the hirer generally delegates . . . the responsibility to take . . . precautions" against safety hazards that are known to the contractor, this Court held a hirer is liable to a contractor's employee for injuries arising from a pre-existing dangerous condition on the hirer's property only if the hirer knew (or should have known) of the dangerous condition *and* the contractor did not know and could not reasonably have ascertained the existence of the dangerous condition. (*Id.* at pp. 664, 674-675.)

II. FOR THE SAME POLICY REASONS THAT THE *PRIVETTE* DOCTRINE IMPOSES REASONABLE LIMITATIONS ON CLAIMS BY CONTRACTORS' EMPLOYEES, IT IMPOSES REASONABLE LIMITS ON CLAIMS BY SELF-EMPLOYED CONTRACTORS.

A. A hirer should owe no greater duty of care to a self-employed contractor than to a contractor's employee.

Although this Court has not yet discussed the circumstances in which a hirer may be liable to a self-employed contractor, the Court of Appeal held in *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082 (*Michael*) that, for many of the same policy reasons discussed in the *Privette* line of cases, the *Privette* doctrine should apply to claims asserted against hirers by self-employed contractors. (*Id.* at pp. 1094-1096.) "If the limitations of the *Privette* line of cases did not apply" to a self-employed contractor, the contractor "would have greater rights" than a contractor's employees. (*Id.* at p. 1096.) Granting the self-employed contractor such rights "would be in derogation of the common law principle that hirers . . . delegating a task to an independent contractor . . . reasonably expect that in delegating such responsibility, the hirers have also assigned liability for the safety of workers engaged by that independent contractor." (*Ibid.*, citing *Kinsman, supra*, 37 Cal.4th at p. 671; see *Torres v. Reardon* (1992) 3 Cal.App.4th 831, 840 (*Torres*) [pre-*Privette* decision holding that

self-employed contractor may not recover from a hirer under the peculiar risk doctrine because the hirer may reasonably anticipate that the contractor will insure against the risk of injuries that are inherent in the contractor's work].)

Under the contrary reasoning of the Court of Appeal in this case, a self-employed contractor who is injured in the performance of contract work may sue the hirer on both vicarious and direct theories of liability that would clearly contravene *Privette* if a contractor's employee sustained the same injuries while performing the same work on behalf of the hirer. The Court of Appeal opinion would, for example, allow self-employed contractors to sue hirers under the peculiar risk theory of liability (rejected in *Privette* and *Toland*) and on a negligent hiring theory (rejected in *Camargo*). The opinion would also permit self-employed contractors to sue hirers on a retained control theory of liability without proving the hirer has affirmatively contributed to the creation or persistence of the hazard causing the plaintiff's injuries (contrary to *Hooker*) and to recover on a general premises liability theory even where the contractor knew or should have known of the dangerous condition (contrary to *Kinsman*).

In effect, the Court of Appeal opinion would impose a duty on hirers to assure that self-employed contractors adhere to safe work practices. This result is antithetical to the *Privette* doctrine. If, as this Court has determined in *Privette* and each post-*Privette* decision, hirers generally owe no duty to contractors' employees to supervise contractors' activities to assure the safety of contractors' employees, hirers likewise should have no duty to supervise

contractors' activities to assure the safety of contractors themselves. After all, it is the contractor who, under the *Privette* doctrine, is charged with the duty of assuring a worksite is safe and that adequate precautions have been taken to assure employee safety. (See *ante*, part I.C.) It makes no sense that a contractor is charged with less responsibility to assure workplace safety where the contractor chooses to perform the contract work (or part of it) himself, rather than delegate that work to employees.

Under the Court of Appeal's holding in the present case, however, if a homeowner (or other hirer) retains a general contractor, who then delegates a portion of the work to a self-employed subcontractor, the homeowner would immediately owe a duty of care to the subcontractor. This duty would require the homeowner to supervise the contractors' activities to assure that neither the general contractor, the subcontractor, nor any other contractor retained by the general contractor, performs the contract work in a manner that jeopardizes the safety of the subcontractor. Otherwise, if the subcontractor were injured, the homeowner could face vicarious liability to the subcontractor for the general contractor's negligence and face direct liability to the subcontractor, even where the hirer did nothing to affirmatively contribute to the self-employed subcontractor's injuries. The net effect of the Court of Appeal opinion is thus to impose greater liability on the hirer for injuries to a self-employed contractor than to the contractor's employees, even though a self-employed contractor (unlike contractors' employees), has ultimate authority to decide whether a

worksite is safe enough for work to proceed and, if so, the manner in which it is to proceed.

By imposing no limitations on hirer liability to self-employed contractors, the Court of Appeal opinion confers on self-employed contractors the same right to sue the hirer in tort that is available *to an innocent third party* (e.g., an innocent passerby or a neighboring property owner) who happens to be injured during the performance of the contract work. Once again, this result makes no sense. Unlike an innocent third party, the contractor is, or should be, aware of the hazardous nature of contract work and be able to determine whether or not conditions at a work-site are safe enough for work to proceed. The contractor's control over the contract work distinguishes the contractor from innocent third parties. Consequently, hirers should not owe the same duty of care to a contractor that they owe to innocent third parties. (*Michael, supra,* 137 Cal.App.4th at pp. 1094-1096 & fn. 6.)

B. The Court of Appeal opinion is contrary to each of the salutary policies underlying *Privette.*

1. Workers' compensation or equivalent benefits are available to self-employed contractors.

The public policies underlying the *Privette* doctrine are as applicable to claims by self-employed contractors as they are to claims by contractors' employees. Most importantly, the principal rationale underlying *Privette*—the availability of workers'

compensation insurance for work-related injuries (*Kinsman, supra*, 37 Cal.4th at p. 671)—applies equally whether the injured party is a self-employed contractor or one of the contractor's employees. There is no reason that self-employed contractors cannot obtain workers' compensation coverage. No California law precludes a self-employed contractor from purchasing workers' compensation coverage for work-related injuries. (See generally 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed. 2008) § 2.10[3], p. 2-23 [employer may obtain workers' compensation coverage from private company, corporation, mutual association, or reciprocal or interinsurance exchange].) Nor is there any reason that a private insurer engaged in the business of selling workers' compensation policies would not issue a policy to a self-employed contractor willing to pay the applicable premium.

Even if a self-employed contractor for some reason cannot obtain a workers' compensation policy from a private insurer, self-employed contractors may "*opt* to obtain" a workers' compensation policy from the SCIF.[3] (*State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 204 (*Brown*); Ins. Code, §§ 11843, 11846.) Insurance Code section 11846 authorizes SCIF to issue workers' compensation coverage to all self-employed workers, whether or not they have employees: section 11846 states that workers' compensation policies "*may likewise be sold to self-*

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[3] SCIF is a non-profit state agency established by law "to ensure that affordable workers' compensation insurance [is] available to employers." (1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation, *supra*, § 1.20[1], p. 1-81; Ins. Code, § 11775.)

employing persons." (Emphasis added; see generally 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation, *supra*, § 1.20[2], p. 1-82.) Such persons "shall be deemed to be *employees* within the meaning of the workers' compensation law." (Ins. Code, § 11846, emphasis added.) Thus, just as workers' compensation benefits are available to an injured contractor's employee, they are also available to a self-employed contractor where the contractor has opted to procure such coverage.[4]

The Court of Appeal based its holding that *Privette* does not apply to claims by self-employed contractors in part on the assumption that self-employed contractors are "not eligible" for workers' compensation benefits. (Typed opn., 9 & fn. 7, emphasis omitted, citing Lab. Code, §§ 3351, 3357, 3600, subd. (a), 3700; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 (*Borello*).) As set forth in Insurance Code sections 11843 and 11846, however, a contractor *may* elect to obtain workers' compensation coverage from SCIF. (See *Brown, supra,* 32 Cal.App.4th at p. 204.) The legislature's express authorization of the issuance of workers' compensation policies to self-employed persons conclusively refutes the Court of Appeal's conclusion that self-employed contractors are *ineligible* for workers' compensation coverage.

None of the authorities cited by the Court of Appeal indicates, moreover, that a self-employed contractor is ineligible for workers'

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[4] Insurance Code section 11843 similarly authorizes SCIF to issue workers' compensation policies that cover "employers who perform labor incidental to their occupations."

compensation benefits. The Labor Code sections cited in the Court of Appeal opinion merely provide that an employer must provide workers' compensation benefits for employees; they nowhere indicate that a self-employed person may not be insured under a workers' compensation policy procured by the self-employed person. (See Lab. Code, §§ 3351, 3357, 3600, subd. (a), 3700.)

In attempting to find authority in support of its decision, the Court of Appeal cited *dicta* from *Borello* that the "Workers' Compensation Act (Act) extends only to injuries suffered by an 'employee.'" (*Borello, supra*, 48 Cal.3d at p. 349; typed opn., 9, fn. 7.) This broadly-worded *dicta* merely stands for the proposition that an employer is obligated to procure workers' compensation coverage on behalf of employees, but has no obligation to procure such coverage on behalf of independent contractors. (*Borello,* at pp. 349-350.) The actual holding of *Borello* was that migrant farm workers retained by produce growers were employees rather than contractors and that the growers were therefore subject to administrative penalties for failing to procure workers' compensation coverage for the farm workers. (See *id.* at pp. 345-346.) *Borello* thus does nothing more than apply the general rule that an employer is obligated to provide workers' compensation coverage for employees, but not contractors.

Read in its entirety, *Borello* nowhere suggests that a self-employed contractor is *ineligible* to procure workers' compensation coverage or that a self-employed contractor cannot be deemed to be an "employee" for purposes of workers' compensation coverage. Nor could *Borello* or any other decision properly so hold. Insurance Code section 11846, as noted, expressly provides that self-employed

persons may procure workers' compensation policies *and* further provides specifically that such persons "shall be deemed to be *employees* within the meaning of the workers' compensation law."

Of course, many self-employed contractors might elect *not* to purchase a policy issued pursuant Insurance Code section 11846, but instead choose to procure an individual medical or disability policy. A contractors' election to choose such first-party policy coverage is not a basis to deny a hirer the protections of the *Privette* doctrine because such policies provide equivalent, if not superior, coverage to a workers' compensation policy. Such a policy provides the same "swift and sure" compensation that is available to the insured under a workers' compensation policy because the insured is entitled to compensation *regardless of fault*. (Cf. *Privette, supra*, 5 Cal.4th at p. 701.) Under such policies, self-employed contractors may obtain medical and disability benefits without establishing any third-party's liability for the injury sustained by the contractor.

2. Hirers may reasonably assume that the price paid to self-employed contractors includes the cost of casualty insurance.

As discussed, another reason for *Privette*'s limitations on hirer liability is that the hirer, in paying the contractor to provide services, has in effect paid for medical, disability, and other benefits provided under the workers' compensation system when a contractor's employee is injured. (*Privette, supra*, 5 Cal.4th at p. 699.) This same policy rationale applies to limit liability where a

self-employed contractor seeks to recover from the hirer. Just as a hirer effectively pays for medical, disability, and other workers' compensation benefits available to contractors' employees, the hirer has likewise effectively paid for medical and disability benefits available to contractors through private insurance or SCIF.

To impose liability on the hirer where a self-employed contractor has failed to allocate a portion of the contract price to pay for appropriate medical and/or disability insurance is to penalize the hirer for the failure of a contractor to act responsibly in the protection of his or her own personal interests. The effect of the Court of Appeal's decision is thus to reward those contractors who fail to procure medical and/or disability insurance for work-related injuries—and even to discourage contractors from procuring their own workers' compensation or other medical and disability coverage applicable to work-related accidents.

As explained by the Court of Appeal in *Michael*, hirers have the right to anticipate that a contractor who chooses to undertake part (or all) of the contract work will use part of the payment from the hirer to insure against the risk of personal injury to the contractor. (*Michael, supra*, 137 Cal.App.4th at p. 1095.) For hirers to expect that self-employed contractors will use a portion of the contract price to procure casualty insurance to cover the contractor's work-related injuries is not an unreasonable expectation. (*State Compensation, supra*, 40 Cal.3d at p. 13 [hirer may reasonably "anticipate that the independent contractor will insure against the risk and that the cost of the insurance will be passed on as part of the price of the contract"].) Under *Privette*, the duty to insure

against the risk of injury to a self-employed contractor is properly on the contractor because contractors are in the best position to evaluate the risk of their enterprise, procure appropriate levels of casualty insurance, and pass the cost for such insurance on to those who retain the contractor.

To hold that hirers are *not* entitled to assume that contractors will procure some form of casualty insurance is to impose essentially all risk of injury to self-employed contractors on hirers. Yet many hirers are uniquely ill-prepared to calculate the risk of loss or the adequacy of insurance for hazards inherent in the contractor's business. The average homeowner or small business owner, for example, is not in the business of evaluating and insuring against the risk of injury to contractors and their employees. The average contractor, in contrast, is (or should be) fully aware of the risks inherent in his occupation and the need for appropriate levels of medical, disability, and other casualty insurance. (*Torres, supra,* 3 Cal.App.4th at p. 840 [contractor, rather than hirer, "better understands the nature of the work and is better able to recognize risks peculiar to it" and to insure against those risks].) Thus, the contractor should be expected to procure adequate insurance coverage for himself as well as his employees.

The Court of Appeal in this case acknowledged that some hirers might reasonably anticipate that a contractor will use a portion of the contract price to procure "workers' compensation or its equivalent." (Typed opn., 10, fn. 8.) The Court of Appeal further suggested, however, that some hirers might attempt (apparently through the process of negotiating the contract price) to "avoid

having to pay for the contractor's employees' workers' compensation expenses." (*Ibid.*, emphasis omitted.)

The latter portion of the Court of Appeal opinion directly contravenes not only the *Michael* holding, but this Court's decision in *Privette*, which specifically held that in paying a contractor, the hirer "*is indirectly paying for the cost*" of workers' compensation insurance premiums.[5] (*Privette, supra*, 5 Cal.4th at p. 699, emphasis added; see *Borello, supra*, 48 Cal.3d at p. 354 [independent contractor "is best situated to distribute the risk and cost of injury as an expense of his own business"]; *Torres, supra*, 3 Cal.App.4th at p. 840 [independent contractor is "able to insure against the risk and cost of injury as an expense of his own business"].)

If the Court of Appeal is suggesting that some hirers can avoid the cost of paying for contractors' workers' compensation coverage by negotiating a discounted price, the court's analysis is flawed. The price the hirer pays to the contractor is a term that is always subject to negotiation. Accordingly, the contractor may require, as a condition to accepting a hirer's offer of employment, that the contract price include an amount sufficient to cover the contractors' cost of insurance coverage. (See *Torres, supra*, 3 Cal.App.4th at p. 840, citing *Borello, supra*, 48 Cal.3d at p. 354 [independent contractor "who bargains for a contract to complete a

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[5] As noted in *Privette*, numerous courts in other jurisdictions have likewise concluded that the hirer indirectly pays the cost of workers' compensation. (*Privette, supra*, 5 Cal.4th at p. 699; see Annot. (1984) 34 A.L.R.4th 904, 912.)

project . . . is in a position to negotiate the price of his services, taking into consideration the expense of insurance"].) Likewise, the contractor may refuse to undertake a project that fails to provide adequate compensation to cover the cost of the contractor's insurance.

Even if *some* hirers might bargain for a discount with the contractor to avoid paying for workers' compensation or equivalent coverage, and *some* contractors might agree to such a discount, such an unlikely eventuality is no basis for holding that *all* hirers must bear the cost of self-employed contractors' work-related injuries to a greater degree than permitted by the *Privette* doctrine. To do so unfairly punishes all hirers for the over-reaching of the relatively few hirers who would demand such a concession—and for the poor judgment of those contractors who agree to a concession so clearly contrary to their self-interest. Thus, even if some contractors might elect to engage in hazardous work activities without procuring adequate insurance coverage for work-related injuries, hirers should owe no greater duties to self-employed contractors than they do to contractors' employees under the *Privette* doctrine.

3. Imposing a general duty of care on hirers in favor of self-employed contractors would lead to the anomaly of some hirers incurring a disproportionate share of liability.

As discussed in *Privette*, to permit contractors' employees to recover under the peculiar risk doctrine would lead to "the

anomalous result that a nonnegligent person's liability for an injury is greater than that of the person whose negligence actually caused the injury." (See *Privette, supra*, 5 Cal.4th at p. 698.)

Imposing liability on a hirer for a self-imposed contractor's injuries could give rise to essentially the same anomaly identified in *Privette*: nonnegligent hirers could potentially face liability under the peculiar risk doctrine for the negligent conduct of an independent contractor who retained the injured, self-employed contractor. Here, for example, if the *Privette* doctrine did not apply to this case, Fillner, as the general contractor, could be held vicariously liable under the peculiar risk doctrine for the negligent conduct of either Lane (the subcontractor retained by Fillner) or Perry (the subcontractor retained by Lane).

In theory, a hirer might seek equitable indemnity from a contractor (or contractors) who were ultimately responsible for the injury. In many construction accidents, however, the injuries are severe and the amount of the plaintiffs' damage claims are extremely large. In such cases, the parties who are directly liable for the injuries will not always be able to indemnify the hirer. Consequently, if the *Privette* doctrine does not apply to claims by self-employed contractors, many non-negligent hirers could be held vicariously liable to injured self-employed contractors caused by the negligence of other contractors, yet not be able to obtain indemnity from the parties directly liable. This result is contrary to *Privette*, which properly recognized that a non-negligent hirer should not be required to shoulder greater liability than that of the person whose negligence actually caused the injury.

4. Imposing a general duty of care on hirers in favor of self-employed contractors would confer an unwarranted windfall on contractors.

As noted, another compelling policy underlying *Privette* is that to permit a contractor's employee to recover tort damages from a hirer confers an unwarranted windfall on contractor's employees, who have already received workers' compensation benefits paid for by the hirer. (*Privette, supra*, 5 Cal.4th at pp. 699-700.)

By categorically rejecting any *Privette* limitations in an action by a self-employed contractor against a hirer, the Court of Appeal opinion permits self-employed contractors to obtain an "unwarranted windfall" similar to that discussed in *Privette*. Specifically, the Court of Appeal opinion enables contractors who choose to do their own work to use a portion of the price paid by the hirer to obtain medical and disability benefits; to retain such benefits in the event of an accident; *and* to then sue the hirer who has paid for those benefits, even without proving that the hirer has affirmatively contributed to their injuries. This result would improperly grant an unwarranted windfall to self-employed contractors, one that is available to no other class of workers, including the contractors' own employees.

5. Imposing a general duty of care on hirers in favor of self-employed contractors would discourage retention of contractors, making worksites more hazardous.

As noted in *Privette*, to the extent hirers incur liability to contractors' employees, without proof that the hirer has concealed a dangerous condition or otherwise affirmatively contributed to the employees' injury, such liability might discourage certain hirers from retaining contractors for fear of large claims for damages in the event of a catastrophic injury. (See *Privette, supra*, 5 Cal.4th at p. 700.) To provide a disincentive to retention of contractors is contrary to sound public policy because, among other reasons, it encourages certain hirers (specifically, commercial property owners, general contractors, and others who retain employees), to delegate hazardous work to their employees even where that work requires specialized skills and therefore might be more appropriately delegated to specialty contractors.

Precisely the same disincentive to hiring specialty contractors arises to the extent liability is imposed on the hirer for a self-employed contractor's injuries, even where the hirer has in no way affirmatively contributed to those injuries. Limiting liability to self-employed contractors to exceptional cases where such liability is truly warranted (i.e., cases in which the hirer has concealed a dangerous condition or affirmatively contributed to the contractor's injury) thus promotes workplace safety by encouraging hirers to

retain contractors to perform hazardous work that the contractors are uniquely qualified to perform.

6. Imposing a general duty of care on hirers in favor of self-employed contractors would unduly limit the hirer's ability to delegate control over the contract work to the contractor.

By limiting the scope of hirer liability to contractor's employees (e.g., by requiring proof of affirmative contribution or concealment of a dangerous condition as a predicate to recovery), this Court has taken reasonable efforts to encourage those who hire contractors to exercise their right to delegate to contractors the responsibility to assure work-site safety. (*Kinsman, supra,* 37 Cal.4th at pp. 673-674 ["a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to take . . . precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so"].)

To the same extent the *Privette* doctrine confers on hirers the right to delegate to contractors the duty to assure work-site safety for the contractors' employees, the doctrine likewise should provide hirers the right to delegate to contractors the duty to assure the contractors' own safety. Imposing liability on hirers for injuries to self-employed contractors to an extent greater than is permitted under *Privette* would require that all hirers, including homeowners and others who lack the expertise to supervise contractors' activities, to attempt to supervise the contractors' work to assure

that they do not engage in unsafe activities (such as carrying a hot bucket of tar up a ladder, as in *Privette*, or attempting to elevate a wood frame in an unsafe manner, as in *Toland*).

The inequity underlying the Court of Appeal's decision is greatly compounded on multi-employer worksites, where numerous subcontractors are retained. Under the Court of Appeal's opinion, hirers will no longer be free to delegate work to contractors on the assumption that they will be protected by *Privette* immunity. Instead, the hirer will be required to supervise the operations of all contractors (and those retained by the contractors) to avoid potential liability under the peculiar risk doctrine. On many large worksites, such supervisory activity by the hirer would be a daunting, if not impossible task, yet all hirers will neglect it at their peril under the Court of Appeal's opinion.

III. THE REASONS GIVEN BY THE COURT OF APPEAL FOR DISTINGUISHING *PRIVETTE* ARE UNSOUND.

The Court of Appeal provided a number of reasons for diverging from *Privette*, most of which have been addressed in the preceding argument and shown to be without merit. The other reasons given by the Court of Appeal are likewise without merit:

1. The first reason given by the Court of Appeal for limiting the *Privette* doctrine to claims by contractors' employees is that all the plaintiffs in the *Privette* cases decided by this Court have to date been contractors' employees rather than self-employed contractors. (See typed opn., 9.)

That this Court has not yet addressed the specific issue whether the *Privette* doctrine applies to claims by self-employed contractors is not a principled basis for limiting application of the doctrine to contractors' employees. (See generally *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 [cases are not authority for issues not discussed].) The issue here is whether the *rationale* underlying *Privette* also limits claims by self-employed contractors. For the many reasons discussed above, the rationale underlying each of the *Privette* decisions applies to claims by self-employed contractors as well as contractors' employees.

2. The Court of Appeal stated that "the California Supreme Court decisions all acknowledge that the *Privette* rule is grounded in the interplay of the workers' compensation system and the peculiar risk doctrine." (Typed opn., 9; see typed opn., 10 [public

policy reasons discussed in *Privette* "are inextricably connected to the interplay of the peculiar risk doctrine and the workers' compensation system"].)

The Court of Appeal's observation greatly understates the scope of the *Privette* doctrine. As discussed in detail above, *four* of this Court's five post-*Privette* decisions applied the *Privette* doctrine to claims other than peculiar risk claims. (*Camargo, supra,* 25 Cal.4th 1235 [extending *Privette* doctrine to negligent hiring claims]; *Hooker, supra,* 27 Cal.4th 198 [extending doctrine to retained control claims]; *McKown, supra,* 27 Cal.4th at p. 226 [applying doctrine to plaintiffs' claim that hirer's provision of defective equipment constituted "affirmative contribution" to plaintiff's injuries]; *Kinsman, supra,* 37 Cal.4th at p. 664 [extending doctrine to premises liability claims].)

Thus, while the *Privette* doctrine may have originally been "grounded in the interplay between workers' compensation and the peculiar risk doctrine," it has since been expanded far beyond that limited realm. Most notably, the doctrine has been expanded to the very type of claim asserted in the present case: a premises liability claim in which the plaintiff seeks to recover based upon an alleged dangerous condition on the hirer's property. (*Kinsman, supra,* 37 Cal.4th 659.)

3. The Court of Appeal held the *Privette* doctrine should be limited to contractors' employees because uninsured contractors, unlike uninsured employees, have no right to obtain benefits from the Uninsured Employers Fund (UEF). (See typed opn., 11.)

The UEF exists because certain employers fail to comply with their statutory duty to procure workers' compensation on behalf of their employees. (See generally Lab. Code, § 3716, subd. (b).) Pursuant to the legislation creating the UEF, only those "workers who happen to be employed by *illegally uninsured employers*" are entitled to recover from the UEF. (*Ibid.*, emphasis added.) A self-employed contractor who fails to procure workers' compensation is not employed by an "illegally uninsured" employer and is therefore, as the Court of Appeal noted, not entitled to compensation from the UEF.

That a self-employed contractor is ineligible for UEF benefits is not, however, a proper basis for permitting injured contractors to recover from hirers beyond the extent permitted under the *Privette* doctrine. If the self-employed contractor has no workers' compensation benefits, or comparable medical or disability coverage from a private insurer, it is solely because the contractor himself has elected to perform contract work without obtaining such coverage. The contractor's decision to perform hazardous work without obtaining insurance coverage is not a principled basis for imposing liability on hirers, whether homeowners, business owners, or general contractors.

This result does not unfairly discriminate in any way against an injured, but uninsured, self-employed contractor. Unlike an employee, who does not have the right to procure workers' compensation with a hirer's payment to a contractor, a self-employed contractor has the right to allocate some portion of the hirer's payment to the acquisition of workers' compensation

insurance coverage or some other form of first-party insurance coverage. The contractor's control over the decision whether to allocate some portion of payments from hirers to insurance coverage distinguishes the self-employed contractor from contractors' employees, who must rely on entirely on their employers to assure that workers' compensation coverage has been obtained.

4. The Court of Appeal also concluded the *Privette* doctrine applies only where the workers' compensation exclusivity rules would preclude a hirer from seeking equitable indemnity from the contractor who employed the injured plaintiff. (Typed opn., 10.) The Court of Appeal then reasoned that since the workers' compensation exclusivity rules do not preclude a hirer from seeking equitable indemnity from those responsible for injuries to a self-employed contractor (who is not an "employee" within the meaning of the Workers' Compensation Act), a self-employed contractor may recover from a hirer on theories that would not be permissible under *Privette* were the injured party a contractor's employee.

As noted, the availability of equitable indemnity does not in itself assure that the amount of damages recoverable from a hirer will be limited to an amount that is commensurate with the hirer's fault. As a result of insolvency or limited financial resources, the party or parties that bear the greatest amount of fault for the self-employed contractor's injury may not be able to provide the hirer with indemnity under principles of joint and several liability. The extent of a hirer's liability to a self-employed contractor should not be based on the false assumption that the parties who bear the

greatest responsibility for the plaintiff's injuries will always be able to fully indemnify the hirer.

Furthermore, the weight given by the Court of Appeal to the availability of equitable indemnity is far greater than the weight given to that factor by this Court's *Privette* decisions. The general availability of equitable indemnity was "but one of several policy reasons" underlying the peculiar risk doctrine. (*Privette, supra*, 5 Cal.4th at p. 701.) Similarly, the inability of the hirer to recover equitable indemnity is "but one of several policy reasons" for limiting the scope of the peculiar risk doctrine in an action by a contractor's employee against a hirer. As discussed, there are numerous other policies underlying *Privette*, all of which support limitations on hirer liability to contractors' employees—and likewise support limitations on hirer liability to self-employed contractors.

Indeed, in subsequent opinions of this Court addressing theories of liability other than the peculiar risk doctrine, this Court has not *once* referred to the inability of the hirer to obtain equitable indemnity as a rationale for extending the scope of the *Privette* doctrine. Specifically, in extending *Privette* to theories of liability such as negligent retention, retained control, or premises liability claims, this Court has not once cited the hirer's inability to obtain equitable indemnity as a basis for any of its decisions. (See *Camargo, supra,* 25 Cal.4th 1235; *Hooker, supra,* 27 Cal.4th 198; *Kinsman, supra,* 37 Cal.4th 659.)

The express basis for limiting hirer liability in each of the latter three decisions has instead been a wide range of factors having nothing to do with the hirer's inability to recover equitable

indemnity from the contractor. The significance of the hirer's inability to obtain equitable indemnity has thus been eclipsed by many other factors supporting reasonable limitations on hirer liability. Consequently, in relying on the hirer's ability to obtain equitable indemnity, the Court of Appeal erroneously construes as dispositive a factor that this Court has deemed to be irrelevant in determining the scope of *Privette's* application beyond the context of peculiar risk claims.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

May 7, 2009

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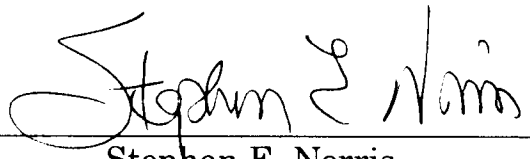
By: 
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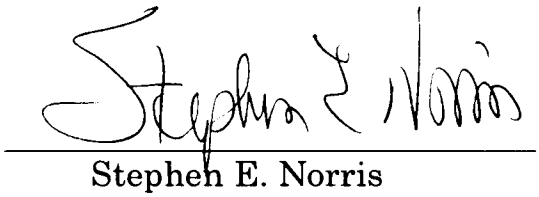
The text of this brief consists of 10,082 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

May 7, 2009



Stephen E. Norris

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On **May 7, 2009**, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on **May 7, 2009**, at Encino, California.

Pamela Donato

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Paul L. Beeman Supervising Judge Superior Court of California County of Solano Vallejo Branch Court 321 Tuolumne Street Vallejo, California 94590 (707) 561-7801	Trial Judge **Case No. FCS02810**
Clerk, Court of Appeal First Appellate District Division Four 350 McAllister Street San Francisco, California 94102 (415) 865-7297	**Case No. A120050**