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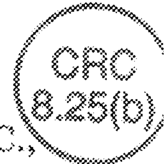
IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT COPY

JEFFREY TVERBERG et al.,
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

SUPREME COURT FILED

JAN 15 2009

Deputy

PETITION FOR REVIEW

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JEFFREY TVERBERG et al.,
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PETITION FOR REVIEW

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

WHY REVIEW SHOULD BE GRANTED

The Court of Appeal has held in this case that a self-employed contractor may recover in a negligence action from a general contractor (or other hirer) for injuries sustained in the performance of contract work. (Typed opn., 1.) In so holding, the Court of Appeal has concluded the limitations on liability established in *Privette* and subsequent cases apply solely to claims by contractors' employees against the hirer. According to the Court of Appeal, the *Privette* doctrine in no way limits claims by self-employed contractors against hirers because self-employed contractors "[are] not eligible for workers' compensation benefits." (Typed opn., 9, emphasis omitted.)

None of the authorities cited by the Court of Appeal hold that a self-employed contractor cannot procure workers' compensation or, alternatively, coverage that would provide benefits equal or superior to those provided in a workers' compensation policy. In reaching its decision, moreover, the Court of Appeal failed to address the important issue whether a hirer, in retaining a self-employed contractor, has in effect paid the contractor to procure medical and disability insurance coverage that would provide the contractor with coverage equal or superior to workers' compensation. The Court of Appeal also refused to follow the Court of Appeal opinion in *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 1095-1096 (*Michael*) [Second Dist., Div. One],

which held that the limitations of the *Privette* doctrine *are* fully applicable in an action by a self-employed contractor precisely because a hirer, in retaining a contractor, has paid the contractor to insure against the risks inherent in the contract work. The Court of Appeal opinion in this case thus gives rise to an irreconcilable conflict on an important issue of law that can be properly resolved only by this Court.

This action was brought by plaintiff Jeffrey Tverberg, a self-employed contractor who was retained by a subcontractor hired to construct a canopy at a gas station. It is undisputed that Tverberg was injured during the performance of his work when he fell into a hole at the construction site that was excavated in the course of the construction project. Plaintiff sued defendant Fillner Construction, Inc. (Fillner), the general contractor for the construction project, alleging causes of action for negligence and premises liability. The Superior Court entered summary judgment in Fillner's favor. Plaintiff appealed and the Court of Appeal reversed the judgment, refusing to apply the *Privette* doctrine to self-employed contractors.

For multiple compelling reasons, review should be granted:

1. By rejecting the Court of Appeal opinion in *Michael*, the Court of Appeal opinion in the present case has created a conflict in the law on an issue of overwhelming importance to virtually every property owner, general contractor, or other person who considers retaining the services of an independent contractor. Without guidance from this Court, parties and trial courts throughout the state will not know for certain whether, as held by the Court of Appeal in *Michael*, the *Privette* doctrine is fully applicable to

personal injury claims by self-employed contractors, or whether, as held by the Court of Appeal in the present case, the *Privette* doctrine has no application whatsoever to such claims.

2. A single worksite accident can give rise to a catastrophic claim for damages that can be ruinous for many defendants, particularly homeowners and small businesses who retain the services of independent contractors. One slip and fall from a ladder or scaffold, for example, can lead to death or spinal injuries and result in damages claims of millions of dollars (and in the most serious cases, claims of tens of millions of dollars). Even with a relatively large umbrella policy in place, few homeowners or small business owners have the wherewithal to compensate injured contractors and their employees for a large catastrophic work-related personal injury claim.

The issue presented by this case, as *Privette* reflects, is who is better situated to insure against catastrophic personal injury claims arising from work-related injuries to contractors: (i) the average homeowner or small business owner, who is not in the business of evaluating and insuring against the risk of injury to contractors and their employees; or (ii) the average contractor, who is in the business of performing hazardous work and 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. Under *Privette,* the duty to insure against such risks is squarely on the contractor because it is the contractor who is in the best position to procure appropriate levels of casualty insurance and

pass the cost for such insurance on to those who retain the contractor.

3. The primary rationale underlying the immunity created by the *Privette* doctrine is that in paying for a contractor's services, a hirer has in effect paid for medical and disability benefits (available through the workers' compensation system) that are available to a contractor's employee who is injured in the performance of his work. The same rationale should apply to preclude tort claims against hirers by contractors who choose to perform contract work themselves rather than delegate the work to employees. In paying the contract price, the hirer has necessarily paid for the contractor to procure casualty insurance, whether the contractor chooses to insure himself through his personal medical or disability policy or through a workers' compensation policy under which he insures his employees. Whatever the form of the coverage, medical and disability benefits are readily available to any self-employed contractor who procures coverage for work-related accidents.

4. If casualty insurance benefits are in fact *not* available to a particular self-employed contractor, it is solely because the contractor has failed to procure such insurance on his own behalf. No hirer, whether a homeowner, a business owner, a general contractor, or a subcontractor, should be penalized for a self-employed contractor's failure to procure casualty coverage. (See generally *Michael, supra,* 137 Cal.App.4th at pp. 1094-1095.)

5. The Court of Appeal has assumed, with no basis in the record, that self-employed contractors are ineligible for workers'

compensation or some equivalent form of coverage that would have provided medical or disability benefits in the event of a work-related accident.

In fact, California law does not preclude a self-employed contractor from obtaining workers' compensation or some form of insurance coverage providing benefits equal or superior to those provided under a workers' compensation policy. Review should be granted to affirm this proposition as well. At a minimum, review should be granted and the case remanded to the Court of Appeal with directions to modify its opinion to hold that a triable issue remains on the question whether a self-employed contractor is in fact eligible to obtain workers' compensation or some form of coverage providing benefits equal or superior to those provided under a workers' compensation policy.

STATEMENT OF THE CASE[1]

A. Plaintiff Jeffrey Tverberg's injury.

In 2006, defendant Fillner was the general contractor on a gas station construction project in Dixon. (Typed opn., 2.)

Fillner contracted with Lane Supply to assist in the construction project. (Typed opn., 2.) Lane Supply then retained Perry Construction, Inc. (Perry) to install a canopy at the site. (*Ibid.*) Perry hired appellant Jeffrey Tverberg to erect the canopy. (*Ibid.*)

During the course of the construction, holes were dug near where the canopy was to be installed. (Typed opn., 2.) Jeffrey Tverberg fell into one of these holes, which were not covered at the time of Tverberg's accident. (*Ibid.*)

B. The Tverbergs' complaint against Fillner 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.)

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[1] For purposes of this petition, the facts pertaining to the accident can be taken directly from the Court of Appeal opinion.

Jeffrey alleged causes of action for negligence and premises liability; Catherine pled a cause of action for loss of consortium. (*Ibid.*) Fillner answered the complaint with a general denial. (*Ibid.*)

Fillner moved for summary judgment, asserting it owed no duty of care to the Tverbergs. (Typed opn., 2.) The Tverbergs opposed the motion. (*Ibid.*)

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.) The trial court cited *Michael, supra*, 137 Cal.App.4th 1082, in support of its ruling. (*Ibid.*)

Finding that Fillner had established a complete defense to the Tverbergs' action, the trial court entered judgment for Fillner. (Typed opn., 2.) The Tverbergs appealed. (See *ibid.*)

C. The Court of Appeal opinion.

Plaintiffs argued in the Court of Appeal that the *Privette* doctrine does not apply to this case because at the time of the accident, plaintiff Jeffrey Tverberg was a self-employed contractor. (See typed opn., 1, 4.) The Court of Appeal accepted plaintiffs' argument, holding the *Privette* doctrine in no way limits claims by self-employed contractors against hirers because self-employed

contractors "[are] not eligible for workers' compensation benefits." (Typed opn., 9, emphasis omitted.)

The Court of Appeal enumerated five reasons for its decision:

1. All of the *Privette* cases decided by the Supreme Court to date have involved plaintiffs who were employees "or who were said to have been covered by workers' compensation." None of the plaintiffs in these cases were independent contractors. (Typed opn., 9.)

2. All of the Supreme Court's decisions to date are based on the exclusivity of the workers' compensation remedy. (See typed opn., 9 ["[a] plaintiff entitled to workers' compensation benefits is limited to that remedy and may not also seek recovery from the hirer of his or her employer, for reasons of public policy"].)

3. The Court of Appeal in *Michael* "fail[ed] to make any reasoned analysis of the public policy reasons set out in *Privette* at all." (Typed opn., 9-10.)

4. The *Privette* opinion was based on several public policy considerations which, according to the Court of Appeal, do not apply when the injured party is a contractor. (Typed opn., 10-11.) Specifically, the Court of Appeal held:

(i) while workers' compensation benefits are available to contractors' employees, they are, according to the Court of Appeal, not available to a self-employed contractor;

(ii) while the exclusivity provisions of the workers' compensation act preclude a hirer from obtaining equitable indemnity from a contractor to compensate for damages paid to a contractor's employee for work-related injuries, a hirer (e.g., a

general contractor) can obtain equitable indemnity from the injured party's hirer (e.g., a first-level subcontractor) when the injured party is not covered by workers' compensation;

(iii) while the hirer has, in paying a contractor, paid for workers' compensation benefits provided to an injured contractor's employee, those benefits are not, according to the Court of Appeal, available to contractors; and

(iv) while permitting contractors' employees to obtain both workers' compensation and tort recovery from the hirer would give such employees a windfall not available to any other employees, a contractor would obtain no windfall in recovering tort damages from a hirer. (See typed opn., 10-11.)

5. Even where a contractor fails to procure workers' compensation insurance, an employee injured in the course of his employment may still obtain compensation through the state uninsured employers' fund. In contrast, no compensation through the uninsured employers' fund is available to an injured contractor. (Typed opn., 11 [distinguishing *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430].)

Fillner filed a petition for rehearing, which the Court of Appeal denied. (See exhibit B attached hereto.)

LEGAL DISCUSSION

I. REVIEW SHOULD BE GRANTED TO ESTABLISH THAT THE *PRIVETTE* DOCTRINE APPLIES TO SELF-EMPLOYED CONTRACTORS.

A. Under the *Privette* doctrine, this Court has limited liability of hirers to contractors' employees for numerous compelling policy reasons.

Under the *Privette* line of cases, this Court has held that a hirer is generally *not* liable in tort to a contractor's employee for injuries arising from the manner in which the contractor and its employees perform their work. (See generally *Privette, supra,* 5 Cal.4th at pp. 698-702; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 270 (*Toland*).) Instead, the hirer may be held liable in tort for such injuries only if exceptional circumstances are present, such as the hirer's failure to disclose a concealed dangerous condition or some other affirmative misconduct. (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]; *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225-226 (*McKown*) [hirer liable where it affirmatively contributed to worksite accident by providing defective forklift for use by contractors' employees].)

The rationale underlying *Privette* is multi-faceted:

First, when a contractor's employee is injured in an accident, the contractor himself may generally not be held liable to the employee because of the exclusivity provisions of the Worker's Compensation Act. (*Privette*, *supra*, 5 Cal.4th at p. 698.) Consequently, where, as is frequently the case, a work-related injury results primarily from the contractor's own negligence in performing the contract work, to permit a contractor's employee to recover from a hirer for such work-related injuries 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. (*Ibid.*; see also *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210 (*Hooker*) ["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"].)

Second, contractors' employees are generally not permitted to recover from a hirer in tort (absent some affirmative misconduct by the hirer) because the hirer, in paying for the contractor's services, has in effect paid medical and disability benefits payable through the workers' compensation system to injured workers in the event of a work-related accident. (*Privette, supra*, 5 Cal.4th at pp. 699, 701.)

Third, allowing a contractor's employee to sue in tort gives rise to an "unwarranted windfall," because other employees are not permitted to bring tort actions for work-related injuries. (*Privette*, *supra*, 5 Cal.4th at pp. 699-700.)

Additionally, imposing liability on hirers for injuries arising from the performance of the contract work would discourage hirers

from retaining contractors, even though contractors have the technical skills and training necessary to perform what is often hazardous work in a safe manner. (See *Privette, supra,* 5 Cal.4th at p. 700.)

Based on the foregoing policy considerations, this Court has in each of the *Privette* line of cases imposed reasonable limitations on the scope of hirer liability resulting from work-site accidents, thereby affirming the right of hirers "'to delegate to independent contractors the responsibility of ensuring the safety of their own workers.'" (*Kinsman, supra,* 37 Cal.4th at p. 679.)

In *Privette,* for example, this Court held that homeowners and other hirers may not be held liable to contractors' employees under the "peculiar risk" theory of liability, an exception to the general rule that hirers are not liable for injuries arising from their contractors' work-related activities. Pursuant to the peculiar risk theory of liability, a hirer can be held vicariously liable for injuries to third parties arising from a contractor's negligent performance of contract work that is inherently dangerous.[2] (*Privette, supra,* 5 Cal.4th at p. 692.)

Specifically, *Privette* held that the defendant homeowner in that case was not liable for injuries to a roofing contractor's employee who fell while attempting to carry a bucket of hot tar up a ladder. (*Privette, supra,* 5 Cal.4th at p. 692.) A safer method of

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[2] Prior to *Privette,* contractors' employees frequently relied on the peculiar risk doctrine to avoid the general rule of hirer non-liability for contractor negligence. (See *Privette, supra,* 5 Cal.4th at pp. 691-692.)

getting the tar to the roof—a method that had been used at the job site prior to plaintiff's accident—was to pump it from a kettle. (See *ibid.*) The contractors' employees deviated from this method at the time of the accident, however, because they discovered that additional tar was needed on the roof after the kettle and pump had been removed from the work site. (*Ibid.*) This Court held the peculiar risk claim asserted by the contractor's employee failed as a matter of law, based on the various factors discussed above, including the availability of workers' compensation (i.e., medical and disability benefits) that was in effect paid by the hirer; the unwarranted windfall of a tort remedy that is generally unavailable to employees for work-related accidents; and the public policy of encouraging retention of independent contractors to perform inherently dangerous work that requires specialized skills. (*Id.* at pp. 692, 698-700.)

B. The Court of Appeal in *Michael* properly extended the *Privette* doctrine to self-employed contractors.

The Court of Appeal in *Michael* extended the Supreme Court's opinion in *Privette* to self-employed contractors, as well as their employees. (*Michael, supra,* 137 Cal.App.4th at pp. 1094-1096.) The Court of Appeal in *Michael* based its decision in part on the policy that when a hirer retains a self-employed contractor, the hirer in effect pays the contractor for "'the cost of safety precautions and insurance coverage'" that arises from the performance of the

contract work. (*Id.* at p. 1094.) Thus, it is reasonable for the hirer "'"to 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."'" (*Id.* at p. 1095, emphasis omitted.) Consequently, the hirer of the independent contractor should generally not be liable for work-related injuries to a contractor and his employees. (See *ibid.*)

The Court of Appeal in *Michael* further noted that if a hirer "ha[s] no duty to ascertain whether [an independent contractor] ha[s] complied with its obligation to obtain workers' compensation insurance for its employees [citation]," the hirer "likewise should have no duty to inquire" whether those who will actually perform the contract work are contractors or their employees. (*Michael, supra*, 137 Cal.App.4th at p. 1095.) Instead, hirers have "'a right to anticipate that [their] liability [will] not depend upon whether" those who perform contract work are contractors or their employees. (*Ibid.*)

The Court of Appeal in *Michael* also noted that "[i]f 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. (*Michael, supra*, 137 Cal.App.4th 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.)

Based on the foregoing policy analysis, the Court of Appeal in *Michael* concluded that the *Privette* doctrine shields a hirer from tort claims by a self-employed contractor to the same extent that it shields a hirer from tort claims by a contractor's employee. (*Michael, supra,* 137 Cal.App.4th at pp. 1095-1096.)

C. The Court of Appeal holding in this case conflicts with the *Privette* doctrine and the policies discussed by the Court of Appeal in *Michael.*

The Court of Appeal's decision in this case is in direct conflict with the *Privette* doctrine. Under the Court of Appeal's holding, whenever a self-employed contractor sustains an injury, a hirer will be subject to liability for the injury sustained by the contractor—even though the hirer would *not* be liable under *Privette* if a contractor's *employee* had been injured while performing the identical task. If the Court of Appeal were correct in this case, a hirer's liability to a self-employed contractor would *not* be limited to exceptional circumstances where the hirer has affirmatively contributed to the employee's injury. (See, e.g., *Kinsman, supra,* 37 Cal.4th at p. 664 [liability based on the hirer's failure to disclose a concealed dangerous condition]; *McKown, supra,* 27 Cal.4th at pp. 225-226 [liability based on the hirer's provision of defective equipment].) Instead, a hirer's potential liability would arise whenever a contractor asserts merely that his injury arose out of a

peculiar risk, i.e., an inherent danger in the services performed by the contractor.

A comparison of the facts in *Privette* with those in the present case is illustrative. Under the Court of Appeal's holding in the present case, if a homeowner retains a roofing contractor to re-roof a house and the contractor himself chooses to perform the work (or some portion of it) and is injured in the performance of the work, the hirer could be liable *to the contractor* under the peculiar risk doctrine—even though this Court in *Privette* unequivocally held that a hirer would *not* be liable *to a contractor's employee* under the peculiar risk doctrine if the employee were injured doing the very same work as the contractor. Likewise, under the Court of Appeal opinion in this case, if *both* the contractor and one of his employees were injured in the same accident, the contractor's employee would have no right to recover under the peculiar risk doctrine, but the injured contractor would be free to assert a peculiar risk claim against the hirer.

Under the rationale of the Court of Appeal's opinion, even if an injury to a contractor and his employee(s) resulted from the negligent manner in which the contractor performed the work, and did not result from the fault of the injured employee(s), the contractor would be able to sue the hirer under the peculiar risk doctrine even though *Privette* would bar the employee(s) peculiar risk claim.

Indeed, by imposing no limitations on hirer liability to self-employed contractors, the Court of Appeal opinion provides the self-employed contractor the same right to sue the hirer in tort that is

available *to an innocent third party* who happens to be injured during the performance of the contract work—even though the hirer has received a payment that could be applied toward medical and/or disability benefits.

The inequity underlying the Court of Appeal's decision is greatly compounded on multi-employer worksites, where numerous subcontractors are retained. Under this Court'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.

The Court of Appeal opinion, moreover, undercuts many of the salutary policies specifically enumerated in *Privette* and the decisions of this Court following *Privette*:

1. *Imposing liability based on hirer's failure to supervise the contractor.* As noted, one very sound rationale underlying *Privette* is that a hirer should not be subject to liability for injuries caused by a contractor's negligence merely because the hirer retained the ability to exercise control over the contractor's activities at the worksite. (See *Hooker, supra*, 27 Cal.4th at p. 210.) Instead, the hirer may be liable under the *Privette* doctrine only where it has affirmatively contributed to injuries. (*Ibid.*)

The Court of Appeal opinion is in direct contravention of this salutary policy. Indeed, the Court of Appeal opinion has the anomalous effect of precluding contractors' employees from suing hirers based on the hirer's failure to supervise contractors, yet permitting the contractors who choose to do the work themselves (and who may themselves have been actively negligent in performing the work) to sue the hirer on the theory that the hirer should have done a better job of supervising the contractor's activities. Given that a hirer has the right to delegate to a contractor the duty to assure the safety of the contractors' employees (see *Kinsman, supra*, 37 Cal.4th at p. 679), the hirer should likewise have the right to delegate to the contractor the duty to assure the contractor's own safety.

2. *Hirer payment of insurance to cover risk of injury to contractor.* As noted, one of the primary reasons for *Privette*'s limitations is that the hirer, in paying the contractor to provide its 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. 698.)

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, disability, and other insurance that a contractor should purchase for his or her own benefit, in the event the contractor chooses to perform contract work himself rather than delegate the work to an employee. As correctly noted by the Court of Appeal in *Michael*,

just as a hirer has the right to anticipate that a contractor will use part of the contract price to procure adequate workers' compensation to cover his employees, the hirer likewise has the right to assume that a contractor who chooses to do part of the contract work himself (rather than delegate it to employees) will use part of the contract price to insure against risk of injury to himself. (*Michael, supra,* 137 Cal.App.4th 1095.) After all, any contractor can insure against such risk, either by designating himself as a beneficiary under a workers' compensation policy *or* by purchasing insurance coverage that would provide medical and disability benefits equivalent to those provided under a workers' compensation policy.

To impose liability on the hirer where a self-employed contractor has failed (or refused) to use 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 encourage them to not procure their own medical and disability coverage applicable to work-related accidents.[3]

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[3] To consider the availability of medical and/or disability insurance to the contractor, moreover, does *not* conflict with the collateral source rule, which precludes the introduction of evidence of collateral sources of compensation that are "'*wholly independent* of the tortfeasor.'" (*Miller v. Ellis* (2002) 103 Cal.App.4th 373, 378, emphasis added.) A contractor's recovery of medical and/or

(continued...)

3. *Unwarranted windfall.* 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 leads to the anomalous result that, while contractors' employees may not obtain an "unwarranted windfall," the contractors themselves may obtain precisely such a windfall. 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.

(...continued)
disability benefits is not "wholly independent" of a hirer because the hirer, in paying the contract price, has effectively paid the portion of the premium covering the contractor's work for the hirer, just as the hirer, in paying a contractor has effectively paid the portion of the workers' compensation premium covering the work performed for the hirer by the contractor's employees. (See *Privette, supra,* 5 Cal.4th at p. 699 [cost of insurance premium for work-related activity is "'borne by the defendant who hires [the contractor]'"].) In the typical tort action, in contrast, the defendant has no pre-existing contractual relationship pursuant to which the defendant has *paid* the plaintiff for his or her services in the same manner that a hirer pays for the services of its contractors.

4. *Effect of tort liability as disincentive to hirers' retention of contractors*. As noted by this Court, to the extent unwarranted liability to contractors' employees is imposed on hirers, it tends to discourage hirers from retaining contractors. (See *Privette, supra*, 5 Cal.4th at p. 700.) To provide such a disincentive to hirers is contrary to sound public policy because it encourages many hirers (e.g., commercial property owners and general contractors) to delegate to their own employees work better suited to specialty contractors. The same disincentive to hiring qualified contractors arises to the extent liability is imposed on the hirer for a self-employed contractor's injuries to which the hirer has in no way affirmatively contributed.

Review should be granted to preclude the many anomalous results that will inevitably arise from the Court of Appeal opinion in this case.

D. 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*, but none is persuasive:

1. The Court of Appeal relied on the fact that all of the plaintiffs in this Court's *Privette* cases were employees of contractors and none were self-employed contractors. (See typed opn., 9.) The fortuity 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 claims by contractors' employees. As discussed, the issue is whether the policies underlying the *Privette* doctrine also apply to claims by self-employed contractors. As reflected by the foregoing analysis, it is clear that this is an issue that warrants resolution by this Court.

2. The Court of Appeal also noted that all of this Court's *Privette* decisions to date are based on the exclusivity of the workers' compensation remedy. (See typed opn., 9.) As discussed above, however, the exclusivity of the workers' compensation remedy is merely one aspect of the *Privette* decisions. This Court has relied on numerous other policies that are equally applicable to claims by self-employed contractors.

3. The Court of Appeal surprisingly concluded that the opinion in *Michael* "fail[ed] to make any reasoned analysis of the public policy reasons set out in *Privette* at all." (Typed opn., 10.) As explained, however, the court in *Michael* analyzed the policies underlying *Privette* in detail. (See *Michael, supra*, 137 Cal.App.4th at pp. 1095-1096.) For reasons known only to the Court of Appeal in this case, however, it failed to address the policy discussion set forth in *Michael*.

4. The *Privette* opinion was based on several public policy considerations which, according to the Court of Appeal, do not apply when the injured party is a self-employed contractor. (Typed opn., 10-11.) As explained, however, the policies underlying *Privette* actually support application of *Privette* immunity to claims against hirers by self-employed contractors.

5. The Court of Appeal relied on the fact that when a contractor fails to procure workers' compensation insurance, an employee injured in the course of his employment may still obtain compensation through the state uninsured employers' fund. In contrast, no compensation through the uninsured employers' fund is available to an injured contractor. (Typed opn., 11.)

The existence of the uninsured employee's fund is irrelevant to whether a hirer should be liable to a self-employed contractor for work-related claims. The uninsured employee's fund exists because certain employers fail to fulfill their statutory duty to procure workers' compensation on behalf of their employees. Unlike an employee, who typically will not know whether his employer has insured the employee under a workers' compensation policy, a self-employed contractor will always know whether he has insured against the risk of injury inherent in his profession.

E. California law does not preclude a self-employed contractor from obtaining workers' compensation coverage.

The Court of Appeal cited several California statutes and a Supreme Court decision for the proposition that a self-employed contractor is "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*).)

In fact, *none* of these authorities actually holds that a self-employed contractor is ineligible for workers' compensation benefits. The Labor Code sections cited in the Court of Appeal opinion provide that a hirer must provide workers' compensation benefits for employees, but they nowhere state that a self-employed contractor may not himself be insured under a workers' compensation policy procured by the contractor. (See Lab. Code, §§ 3351, 3357, 3600, subd. (a), 3700.) Nor is respondent aware of any statute so providing.

In *Borello*, the Supreme Court stated that the "Workers' Compensation Act (Act) extends only to injuries suffered by an 'employee'" (*Borello, supra,* 48 Cal.3d at p. 349), but nowhere held that a self-employed contractor could not use money received in payment from a hirer for services rendered to procure workers' compensation coverage *or* some equivalent form of coverage that would provide the contractor the identical medical and disability benefits that would be provided under a workers' compensation insurance policy.

The Court of Appeal nonetheless construed the cited authorities for the proposition that a self-employed contractor is in fact ineligible for workers' compensation benefits. Review should thus be granted to resolve the issue whether a self-employed contractor is ineligible to obtain the same workers compensation coverage (or some equivalent form of coverage) that would be available to employees retained by the contractor.

II. AT A MINIMUM, THE CASE SHOULD BE TRANSFERRED TO THE COURT OF APPEAL WITH DIRECTIONS TO MODIFY ITS OPINION.

The Court of Appeal nowhere cites any evidence from the record indicating that a self-employed contractor cannot procure workers' compensation coverage or some equivalent form of insurance coverage. Instead, the Court of Appeal merely *assumes* that self-employed contractors are ineligible for workers' compensation or some equivalent form of coverage that would have provided medical or disability benefits in the event of a work-related accident. But if such coverage is in fact available, the fundamental premise underlying the court's opinion fails.

Accordingly, if this Court does not grant review and request briefing on the merits, this Court should, at a minimum, grant review and transfer this case to the Court of Appeal with directions to modify its opinion to hold that this case raises a triable issue whether workers' compensation coverage, or some form of coverage providing benefits equivalent or superior to workers' compensation, was available to self-employed contractors at the time Jeffrey Tverberg agreed to perform the services for Perry Construction, Inc. that led to his injuries. (See generally, *Michael, supra,* 137 Cal.App.4th at p. 1095 [it is "reasonable" for hirer to anticipate that contractors will insure against casualty risks and pass on the cost of insurance as part of the price of the contract].)

The Court of Appeal should further be directed to modify its opinion to hold that in the event the trier of fact determines that

workers' compensation or coverage providing equivalent or superior benefits was available for purchase as of the time Tverberg contracted to perform services for Perry, the *Privette* doctrine bars plaintiffs' claims against Fillner.

CONCLUSION

For the reasons set forth above, the petition for review should be granted and the case decided by this Court on the merits. At a minimum, review should be granted and the case transferred to the Court of Appeal with directions to modify its opinion to hold that a triable issue of fact remains as to whether a self-employed contractor may obtain workers' compensation coverage or some form of coverage providing benefits equivalent or superior to workers' compensation benefits.

January 14, 2009

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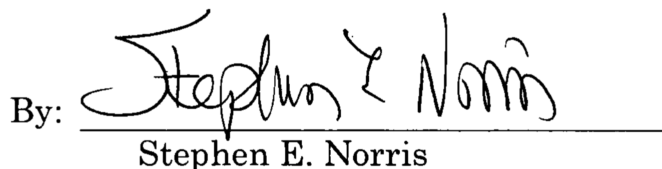
By: 
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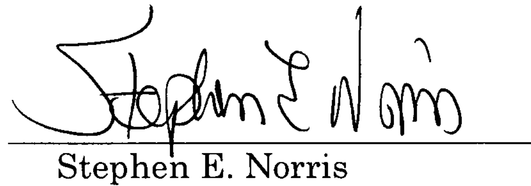
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this petition consists of 6,523 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: January 14, 2009



Stephen E. Norris

EXHIBIT A

Filed 12/5/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JEFFREY TVERBERG et al., Plaintiffs and Appellants, v. FILLNER CONSTRUCTION, INC., Defendant and Respondent.	A120050 (Solano County Super. Ct. No. FCS028210)

A hirer of a contractor owes no duty of care to the contractor's injured employee because the employee has an alternative remedy through the workers' compensation system. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 696-702 (*Privette*).) In the case before us, appellants Jeffrey and Catherine Tverberg (the Tverbergs) contend that the *Privette* doctrine does not apply to their case because Jeffrey Tverberg was injured while working as an independent contractor, not as an employee. Workers' compensation coverage applies only to an employee; it does not extend to an independent contractor. (See Cal. Const., art. XIV, § 4; Lab. Code, §§ 3351, 3357, 3600, subd. (a), 3700; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349; see also 2 Witkin, Summary of Cal. Law (10th ed. 2005) Workers' Compensation, § 189, pp. 770-773.) As we find the Tverbergs' reasoning compelling, we conclude that the trial court erred in granting summary judgment to respondent Fillner Construction, Inc. (Fillner) We reverse the subsequent judgment for Fillner and explain our disagreement with a contrary decision of another appellate court. (See *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 1093-1096 (*Michael*).)

I. FACTS

In 2006, respondent Fillner was the general contractor on a gas station project in Dixon. Fillner contracted with Lane Supply, which in turn hired Perry Construction, Inc. (Perry), to install a canopy at the project site. Perry hired appellant Jeffrey Tverberg to erect the canopy. Uncovered holes had been dug near where the canopy was to be installed. On May 2, 2006, Jeffrey Tverberg fell into a hole at the project site, resulting in both physical and emotional injuries. His injuries also affected his relationship with his wife, appellant Catherine Tverberg.

In July 2006, the Tverbergs filed a personal injury action against Fillner and Perry.[1] Jeffrey Tverberg alleged causes of action for negligence and premises liability; Catherine Tverberg pled a cause of action for loss of consortium. In September 2006, Fillner answered the complaint with a general denial.

In July 2007, Fillner moved for summary judgment, alleging that it owed no duty of care to the Tverbergs. The Tverbergs opposed the motion. In their respective statements of undisputed facts submitted to assist the trial court in resolving the motion for summary judgment, both sides agreed that Jeffrey Tverberg had been hired as an independent contractor. After a hearing on the motion, the trial court granted the 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. The trial court cited *Michael, supra,* 137 Cal.App.4th 1082 in support of its ruling. Finding that Fillner had established a complete defense to the Tverbergs' action, the trial court entered judgment for Fillner in November 2007.

II. THE *PRIVETTE* DOCTRINE

In order to consider the issues raised in this appeal, we offer an overview of the relevant case law. At common law, a person who hired an independent contractor was not liable to third parties for injuries caused by the contractor's

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[1] Perry is a party to the underlying action, but did not obtain summary judgment and thus, is not a party to this appeal.

negligence in performing the work. This rule of nonliability was premised on the hirer's lack of control over the work that was the subject of the contract. The work performed was the enterprise of the contractor, who was thought to be better able than the hirer to absorb accident losses incurred in the course of the contracted work. (*Privette, supra,* 5 Cal.4th at p. 693; see Rest. 2d Torts, § 409.)

For policy reasons, courts created many exceptions to this general rule of nonliability. (*Privette, supra,* 5 Cal.4th at p. 693; see Rest. 2d Torts, §§ 410-429.) One such exception—commonly referred to as the doctrine of peculiar risk—pertains to contracted work posing an inherent risk of injury to others. (*Privette, supra,* 5 Cal.4th at p. 693; see Rest. 2d Torts, § 416.) Courts adopted the peculiar risk exception to the general rule of nonliability to ensure that innocent third parties injured because of the negligence of an independent contractor hired to do inherently dangerous work do not have to depend on that contractor's solvency in order to be compensated for those injuries, but can also look to the contractor's hirer for compensation. (*Privette, supra,* 5 Cal.4th at p. 694.) If held liable under the doctrine of peculiar risk, the hirer is entitled to equitable indemnity from the contractor at fault for the injury. (*Id.* at p. 695.)

The doctrine of peculiar risk developed in cases in which the plaintiff was an innocent bystander or neighboring property owner who sought recovery from a landowner who had hired a contractor to perform dangerous work on the land. Over time, the doctrine was extended to allow a plaintiff who is a contractor's employee to obtain recovery from the landowner for injuries caused by the negligent contractor. (*Privette, supra,* 5 Cal.4th at p. 696.) However, in *Privette,* the California Supreme Court held that if the injured person is an employee of a negligent contractor, the employee is barred from obtaining recovery from the hirer of the contractor, because the employee's injury is already compensable under our state's workers' compensation scheme. (*Id.* at pp. 696-702.)

Since *Privette* was decided, our Supreme Court has repeatedly considered its implications, always in an action involving an injured employee. (See *Kinsman v.*

Unocal Corp. (2005) 37 Cal.4th 659, 664, 672-678 [undisclosed hazardous conditions]; *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222-226 [providing unsafe equipment affirmatively contributing to injury]; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 200-202, 206-215 [negligent exercise of retained control affirmatively contributing to injury]; *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1238, 1241-1245 [negligent hiring]; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 256-257, 264-270 [negligent failure to take special precautions].) In 2006, the *Michael* court held that the *Privette* doctrine applied regardless of whether the plaintiff was an employee or an independent contractor of the hirer's contractor. (See *Michael, supra,* 137 Cal.App.4th at pp. 1093-1096.)

III. PRESERVATION OF ISSUE

A. *Review of Correctness of Ruling*

The Tverbergs reason that the *Privette* line of cases does not apply to their case because Jeffrey Tverberg was an independent contractor who was not covered by workers' compensation. Fillner counters that this issue is not properly before us on appeal, because the Tverbergs did not raise it in the trial court. We disagree with Fillner's contention, for several reasons, the first of which relates to our standard of review in this matter.

As a general rule, an appellate court reviews only issues that were raised in the trial court. We do not generally consider issues raised for the first time on appeal. (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) However, on appeal from a summary judgment, we must make an independent assessment of the correctness of the trial court's ruling. (*Ibid.*; see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563; *Kelly v. First Astri Corp.* (1999) 72 Cal.App.4th 462, 470.) We review that court's ruling, not its rationale. (*Michael, supra,* 137 Cal.App.4th at p. 1091; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 373.) In so doing, we apply the same legal standard as the trial court did to

determine whether there are any genuine issues of material fact and thus, whether the moving party is entitled to a judgment as a matter of law. (*Iverson v. Muroc Unified School Dist., supra,* 32 Cal.App.4th at p. 222; see *Kelly v. First Astri Corp., supra,* 72 Cal.App.4th at p. 470.) To fulfill our appellate responsibility to determine whether Fillner is entitled to judgment as a matter of law, we may consider issues that were not raised in the trial court. (See, e.g., *Iverson v. Muroc Unified School Dist., supra,* 32 Cal.App.4th at pp. 222-228 [summary judgment reversed based on newly raised question of law].)

B. *Issue of Law*

An appellate court may also address an issue that was not raised in the trial court if it is an issue of law that turns on undisputed facts and involves important issues of public policy. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654-655 fn. 3; *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 51; *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15-16; see *Johanson Transportation Service v. Rich Pik'd Rite Inc.* (1985) 164 Cal.App.3d 583, 588; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 415, pp. 473-474.) We have discretion to consider an important public policy issue in an appropriate case. (*Shaw v. Regents of University of California, supra,* 58 Cal.App.4th at p. 51.)

Fillner argues against our exercise of this discretion, asserting that the record on appeal does not contain sufficient evidence from which we could find the key predicate fact—that Tverberg was an independent contractor. We accept as true those facts alleged in the Tverbergs' affidavits and exercise our independent judgment about the legal effect of the undisputed facts disclosed by the parties' papers. (See *Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 345.) We consider all evidence set forth in the motion for summary judgment and the opposition to it, except any evidence to which objections have been made and sustained. (See *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 334; *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612; see also Code Civ. Proc., § 437c,

subd. (c).)[2] We strictly construe Fillner's evidence and liberally construe the evidence offered by the Tverbergs. Any doubts about the propriety of summary judgment are usually resolved against granting the motion. (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.)

The Tverbergs' complaint alleges that at the time of the accident, Jeffrey Tverberg had been hired as an independent contractor. Fillner's answer constituted a general denial of all of the complaint's allegations. However, the facts section of its memorandum in support of the motion for summary judgment and its separate statement of undisputed facts both stated that Jeffrey Tverberg was an independent contractor. Both of these statements were made under the direction and supervision of counsel with the full professional realization of their significance.[3] They constitute a conclusive judicial admission of fact that binds Fillner. (See *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1525 fn. 4 [reply to motion]; *City of San Diego v. DeLeeuw* (1993) 12 Cal.App.4th 10, 14-15 [statement of undisputed facts]; see also *Scalf v. D. B. Log Homes, Inc., supra,* 128 Cal.App.4th at p. 1522 [written discovery admission as more binding than deposition testimony].)

The Tverbergs' response to Fillner's statement of facts agrees that this is an undisputed fact. Furthermore, those assertions are supported by a declaration from a Fillner employee made under penalty of perjury, by a declaration from Jeffrey Tverberg made under penalty of perjury and by the deposition testimony of Jeffrey Tverberg himself.[4] (See Code Civ. Proc., § 437c.) In its statement of decision on the

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[2] The form of the Tverbergs' objections was improper and the trial court may not have ruled on those objections. (See Cal. Rules of Court, rule 3.1354(b).)

[3] In fact, after Fillner's memorandum in support of its motion for summary judgment stated that Jeffrey Tverberg was an independent contractor, it anticipated a Tverberg argument based on this status. Clearly, Fillner's counsel understood the significance of its admission of his status.

[4] In their opening brief, the Tverbergs also state that Jeffrey Tverberg was not covered by the workers' compensation system—that he has not and cannot receive any workers' compensation benefits.

motion for summary judgment, the trial court found that Jeffrey Tverberg had been hired as an independent contractor. Based on all this undisputed evidence, we also find the fact that Jeffrey Tverberg was hired by Perry as an independent contractor and not as an employee, as a matter of law.

The extension of a line of cases precluding an action by an employee who has an alternative remedy through the workers' compensation system to an injured independent contractor who has no access to that system raises a significant issue of public policy. As we have found that the key fact of Jeffrey Tverberg's employment status is undisputed, we conclude that this is an appropriate case to exercise our discretion to consider the legal questions posed. (See, e.g., *Shaw v. Regents of University of California, supra,* 58 Cal.App.4th at p. 51.)

C. *Futility Exception*

In this case, there is a third reason why we address issues that were not presented to the trial court for resolution. We may address a new issue on appeal if the trial court would have been bound to rule in a manner that would have made it futile to have raised that issue in that court. (*Cedars-Sinai Medical Center v. Superior Court, supra,* 18 Cal.4th at pp. 6-7.) On the question of whether the *Privette* doctrine applied to Jeffrey Tverberg as an independent contractor, the trial court was bound to apply the Second Appellate District's decision in *Michael, supra,* 137 Cal.App.4th at pages 1093-1096, when determining the motion for summary judgment[5] (see *Cedars-Sinai Medical Center v. Superior Court, supra,* 18 Cal.4th at p. 6; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). *Michael* held that *Privette* applied to independent contractors and employees. (*Michael, supra,* 137 Cal.App.4th at pp. 1093-1096.) As the trial court would have been compelled to rule against the Tverbergs on this issue if the question had been offered to it, it would have been futile for them to raise that issue in the trial court. For these

[5] In fact, the trial court cited *Michael* in its statement of decision.

several reasons, we address the independent contractor issue that the Tverbergs raise in their appeal, even though it was not raised in the trial court.

IV. APPLICATION TO INDEPENDENT CONTRACTOR

A. *Standard of Review*

On appeal, our review is limited to those facts contained in the documents presented in the trial court. (See *Federal Deposit Ins. Corp. v. Superior Court, supra,* 54 Cal.App.4th at p. 345.) On each cause of action, we determine whether Fillner—as the party seeking summary judgment—has conclusively negated a necessary element of the Tverbergs' case or has demonstrated that under no hypothesis is there a material issue of fact that warrants a trial, such that Fillner is entitled to summary judgment as a matter of law. (See *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 334; *Artiglio v. Corning Inc., supra,* 18 Cal.4th at p. 612; see also Code Civ. Proc., § 437c, subd. (c).) With this standard of review in mind, we address the merits of the Tverbergs' claim of error.

B. *Independent Contractor*

The Tverbergs reason that *Privette* does not apply to them because Jeffrey Tverberg was not an employee who was covered by the workers' compensation system but an independent contractor who was ineligible for workers' compensation. In *Michael,* an appellate court first[6] considered the question of whether the *Privette* line of cases applied to bar an action by an independent contractor, as well as one brought by an employee. That court held that *Privette* and its progeny applied to bar a hirer's liability for injuries to the plaintiff, regardless of whether he or she was the hirer's contractor's employee or an independent contractor of the contractor. (*Michael, supra,* 137 Cal.App.4th at pp. 1093-1096.) The Tverbergs urge us to find that this decision was wrongly decided.

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[6] To our knowledge, no other appellate decision has applied the central holding in *Michael.* It stands alone in its application of *Privette* and its progeny to an independent contractor.

After careful consideration, we find the Tverbergs' reasoning to be persuasive, for several reasons. First, as we have noted, all of the *Privette* cases decided by the California Supreme Court involved plaintiffs who were identified as employees or who were said to have been covered by workers' compensation. None of the plaintiffs in these cases were independent contractors. (See *Kinsman v. Unocal Corp., supra,* 37 Cal.4th at p. 664; *McKown v. Wal-Mart Stores, Inc., supra,* 27 Cal.4th at p. 223; *Hooker v. Department of Transportation, supra,* 27 Cal.4th at pp. 202-203; *Camargo v. Tjaarda Dairy, supra,* 25 Cal.4th at p. 1238; *Toland v. Sunland Housing Group, Inc., supra,* 18 Cal.4th at p. 257; *Privette, supra,* 5 Cal.4th at p. 692.) This fact distinguishes the Tverbergs' action from one in which the injured plaintiff was an employee of a hirer's contractor.

Second, 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. A plaintiff entitled to workers' compensation benefits is limited to that remedy and may not also seek recovery from the hirer of his or her employer, for reasons of public policy. (*Privette, supra,* 5 Cal.4th at pp. 691-692, 696-702; see *Kinsman v. Unocal Corp., supra,* 37 Cal.4th at pp. 668-669, 681; *McKown v. Wal-Mart Stores, Inc., supra,* 27 Cal.4th at pp. 222, 224; *Hooker v. Department of Transportation, supra,* 27 Cal.4th at pp. 204-206, 210, 214; *Camargo v. Tjaarda Dairy, supra,* 25 Cal.4th at pp. 1239, 1241, 1244-1245; *Toland v. Sunland Housing Group, Inc., supra,* 18 Cal.4th at pp. 256, 261, 263, 267, 270.)

Third, *Michael* applied the *Privette* line of cases to an independent contractor—someone who is *not* eligible for workers' compensation benefits[7]—without any attempt to distinguish the underlying workers' compensation public

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[7] The Workers' Compensation Act covers only employees, not independent contractors. (See Cal. Const., art. XIV, § 4; Lab. Code, §§ 3351, 3357, 3600, subd. (a), 3700; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 349; see also 2 Witkin, Summary of Cal. Law, *supra*, Workers' Compensation, § 189, pp. 770-773.)

policy reasons for those cases. (*Michael, supra,* 137 Cal.App.4th at pp. 1086, 1091-1097.) 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. (See *Michael, supra,* 137 Cal.App.4th at pp. 1086, 1093-1096.) 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.

Fourth, when we make our own examination of the public policy reasons cited by *Privette* and its progeny in support of those decisions, we find that those reasons are inextricably connected to the interplay of the peculiar risk doctrine and the workers' compensation system. These policy considerations include (1) that workers' compensation alleviates the concern that an injured employee may be uncompensated; (2) that when an employee is covered by workers' compensation, an innocent hirer cannot obtain equitable indemnity from the injured employee's negligent employer; (3) that a hirer pays for workers' compensation for the contractor's employee as part of the subcontract price and is entitled to receive the benefit of that coverage;[8] and (4) that an employee would receive a windfall if able to obtain both workers' compensation benefits from the employer and tort damages from the hirer. (See *Privette, supra,* 5 Cal.4th at pp. 699-701.) These public policy

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[8] This factor may apply in the context of a contractor who hires an independent contractor if the contractor's hirer paid a contract price that anticipated that the contractor would provide workers' compensation or its equivalent to those hired by the contractor. *Michael* is based, in part, on the assumption that a hirer may delegate these responsibilities to a contractor and not be liable for them. (See *Michael, supra,* 137 Cal.App.4th at p. 1094.) However, a hirer may also hire a contractor expecting that he or she will seek the assistance of an independent contractor, in part, to *avoid* having to pay for the contractor's employees' workers' compensation expenses.

reasons—applicable when the plaintiff is an injured employee—have no force when the injuries are suffered by an independent contractor.

Fifth, *Michael* misconstrues the only case it cites in support of its conclusion that a lack of workers' compensation insurance coverage was not dispositive in determining whether *Privette* applied. The *Michael* decision cites a case in which a hirer of a contractor was not held liable to the contractor's injured employee despite the contractor's failure to obtain workers' compensation insurance for its employees. (*Michael, supra,* 137 Cal.App.4th at p. 1094; see *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, 444-445.) *Michael* implies that the plaintiff in *Lopez* was not entitled to a workers' compensation remedy. (*Michael, supra,* 137 Cal.App.4th at pp. 1093-1094.) However, *Lopez* makes it clear that its plaintiff *was* covered by workers' compensation. Even though his employer illegally failed to obtain workers' compensation insurance, the court noted that Lopez was eligible to recover comparable benefits through the state's uninsured employers fund. (*Lopez v. C.G.M. Development, Inc., supra,* 101 Cal.App.4th at pp. 435, 445; see Lab. Code, § 3716, subd. (b).) This mistaken assumption undermines the reasoning of *Michael.* Our reading of *Lopez* is one that is consistent with the result for which the Tverbergs argue in their appeal—that only a plaintiff who is entitled to apply for workers' compensation benefits is barred from bringing a successful action for damages against the hirer of the contractor who in turn hired the plaintiff.

For all these reasons, we conclude that the reasoning of *Michael* is inconsistent with controlling California Supreme Court authority, and that, as an independent contractor, Jeffrey Tverberg does not fall within the employee class of plaintiffs included within the scope of the *Privette* line of cases.

Because Jeffrey Tverberg was not an employee of Perry, *Privette* and its progeny do not apply to bar him from being able to seek recovery from Fillner. For the same reasons that *Privette* does not bar Jeffrey Tverberg's negligence and premises liability claims, Catherine Tverberg's loss of consortium claim also

withstands Fillner's motion for summary judgment.[9] (See, e.g., *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 746; *Brittell v. Young* (1979) 90 Cal.App.3d 400, 407 fn. 5.) As Fillner has not established its right to summary judgment as a matter of law, the trial court's judgment must be reversed. (See Code Civ. Proc., § 437c, subd. (c).)

The judgment is reversed and the matter remanded to the trial court for further action.

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[9] The Tverbergs also contend that *Privette* does not apply in the circumstances of this case because Fillner breached a nondelegable regulatory duty and because Fillner affirmatively contributed to Jeffrey Tverberg's injuries. In light of our conclusion that the *Privette* lines of cases do not apply to this matter for other reasons, we need not address these issues.

____
Reardon, Acting P.J.

We concur:

____
Sepulveda, J.

____
Rivera, J.

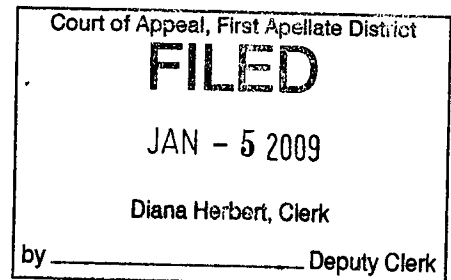
Trial Court:	Solano County Superior Court
Trial Judge:	Hon. Paul Lloyd Beeman
Counsel for Appellants:	Kirk J. Wolden Clayeo C. Arnold Leslie M. Mitchell
Counsel for Respondent:	Vitale & Lowe Johanna M. Berta

EXHIBIT B

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 4

COPY

JEFFREY TVERBERG et al.,
Plaintiffs and Appellants,
v.
FILLNER CONSTRUCTION, INC.,
Defendant and Respondent.



A120050
Solano County No. FCS028210

BY THE COURT:

The petition for rehearing is denied.

Date: JAN - 5 2009

REARDON, ACTING P.J.
P.J.

orun

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 January 14, 2009, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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 January 14, 2009, at Encino, California.

Pamela Donato

SERVICE LIST
Tverberg v. Fillner Construction, Inc.
A120050

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Paul L. Beeman, Sup. 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**