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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

[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.

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Reardon, Acting P.J.

We concur:

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Sepulveda, J.

_____
Rivera, J.

Trial Court:	Solano County Superior Court
Trial Judge:	Hon. Paul Lloyd Beeman
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