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S252796

IN THE SUPREME COURT OF CALIFORNIA

JOSE M. SANDOVAL,
Plaintiff and Appellant,

v.

QUALCOMM INCORPORATED,
Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D070431

SUPPLEMENTAL BRIEF OF APPELLANT QUALCOMM INCORPORATED

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SUPPLEMENTAL BRIEF

Qualcomm Incorporated submits this brief to alert the Court to two relevant Court of Appeal decisions issued after briefing concluded. (See Cal. Rules of Court, rule 8.520(d).)

1. *Horne v. Ahern Rentals, Inc.* (2020) 50 Cal.App.5th 192 (*Horne*), review granted Sept. 16, 2020, S263309, is relevant to Qualcomm's argument on the first issue presented—that the trial court should have granted Qualcomm JNOV on plaintiff's retained control theory because Qualcomm did not affirmatively contribute to the injuries Sandoval sustained when he came into contact with a live electrical circuit exposed not by Qualcomm, but by the licensed contractor (Frank Sharghi) who hired Sandoval.

In *Horne*, the Court of Appeal held that a trial court properly granted summary judgment on plaintiffs' retained control claim because there was no evidence the hirer affirmatively contributed to the collapse of a forklift that fell on a technician while he was replacing its tires. (*Horne*, *supra*, 50 Cal.App.5th at pp. 194, 201.) The technician's family sued Ahern, a forklift rental company that hired the technician's employer, claiming that Ahern "negligently failed to provide a stable and level surface for the tire change, allowed the tire change to proceed with the forklift's boom raised, which caused the forklift to sway and collapse, and failed to properly train its employees and independent contractors." (*Id.* at p. 195.)

The court held that plaintiffs' claim that Ahern "retained control over the safety conditions of the forklift by performing the

initial set-up for tire service" and by retaining sole authority to operate the forklift was not enough "[a]s a matter of law" to establish an affirmative contribution. (*Horne*, *supra*, 50 Cal.App.5th at p. 201.) As the court explained, "these facts do not show defendant '*exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee.' " (*Ibid.*, quoting *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210 (*Hooker*).)

Agreeing with other lower courts, the court held that the " 'failure to institute specific safety measures is not actionable unless there is some evidence that the hirer . . . had agreed to implement these measures.' " (*Horne*, *supra*, 50 Cal.App.5th at pp. 201–202, quoting *Tverberg v. Fillner Constr.* (2012) 202 Cal.App.4th 1439, 1446 and citing *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718; see *id.* at p. 202 [noting that "[o]ther courts [as well] have affirmed summary judgment for the defense when the undisputed evidence showed the defendant-hirer did not direct, participate in, or interfere with the way the work was done or agree to implement any safety measure"].)

Thus, while it would have been "a different case if [the tire contractor] or one of its employees [had] asked [Ahern] to take safety measures to be sure the forklift was stable" and Ahern had induced the contractor's reliance by promising to do so, that was not the case. (*Horne*, *supra*, 50 Cal.App.5th at p. 203.) There was, in short, "no evidence that [Ahern] ever agreed with [the contractor] to implement any safety measure related to the

position of the forklift (or any other safety measure).” (*Ibid.*) Likewise here there is no evidence that Sharghi requested safety measures or that Qualcomm affirmatively induced Sharghi’s failure to take safety measures by promising to undertake such measures itself. (See *Hooker*, *supra*, 27 Cal.4th at p. 209 [to be liable, a hirer must interfere with the contractor’s taking of precautions “ ‘by direction, *induced reliance*, or other affirmative conduct’ ” (emphasis added)].) In fact, the evidence here showed that plaintiff’s injuries were directly caused by an unsafe action taken by Sharghi without Qualcomm’s knowledge.

There was also evidence in *Horne* that the contractor’s on-site supervisor (like Sharghi, here) knew of the danger. (*Horne*, *supra*, 50 Cal.App.5th at p. 203 [noting that the supervisor analyzed the workspace before the work began, saw the forklift was parked on uneven ground, and knew he could refuse to install the tires until the forklift was set up more safely].) Like Sharghi, “[h]e was the one who made the decision that the location of the forklift was appropriate for him to do the work.” (*Ibid.*; cf. OBOM 33 [noting Sharghi’s testimony that it “ ‘was [his] own decision’ ” to expose the GF-5 circuit without taking precautions].)

The undisputed facts here establish that Qualcomm did nothing to direct its expert contractor’s work and made no promise to undertake particular safety measures that the contractor could have taken. To the contrary, Qualcomm turned a completely safe worksite over to its contractor, who then intentionally created an unsafe worksite and injured his

employee. Thus, as in *Horne*, *Hooker*, and the more than dozen other California appellate decisions cited in Qualcomm's briefs (see, e.g., OBOM 27–28 & fn. 3), there was no affirmative contribution by Qualcomm here as a matter of law. The judgment of the Court of Appeal affirming the trial court's denial of JNOV should be reversed.

2. In *Alaniz v. Sun Pacific Shippers, L.P.* (2020) 48 Cal.App.5th 332, 335 (*Alaniz*), the Court of Appeal addressed the second question presented here—whether juries should be instructed on *Hooker*'s affirmative contribution requirement. The Court of Appeal held that the trial court "prejudicially erred when it omitted" from the jury instructions *Hooker*'s requirement that the hirer's " 'exercise of retained control *affirmatively contributed* to the employee's injuries.' " (*Id.* at p. 335.)

The court explained that this Court's decision in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 is "controlling" on this point. (*Alaniz*, *supra*, 48 Cal.App.5th at p. 338.) Just as *Kinsman* recognized that general premises liability instructions " 'must be modified, after *Privette* [*v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*)],' " retained control instructions must likewise include *Hooker*'s requirement that the hirer's "negligent exercise of retained control over safety conditions *affirmatively contributed* to the harm." (*Alaniz*, at p. 338, emphasis added; see *Kinsman*, at p. 674.)[1]

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[1] At one point, the *Alaniz* opinion mistakenly suggests that *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 595 approved CACI No. 1009B because that instruction puts the "burden of

The Court of Appeal then held the error was prejudicial. (*Alaniz*, *supra*, 48 Cal.App.5th at pp. 340–342.) Although the defendant hirer was not entitled to JNOV on the retained control claim (see *id.* at p. 343), there was evidence from which a properly instructed jury could have "found that [the hirer] merely permitted—rather than directed—the manner of unloading the bins" (*id.* at p. 341). Thus, because the given instructions "did not include the *Privette*/*Hooker* requirement that [the hirer] negligently exercise its retained control in a manner that *affirmatively contributed* to the harm," the given instructions were an "insufficient substitute for a *Privette*/*Hooker* instruction." (*Id.* at pp. 341–342.) Compounding the problem, the instructions allowed plaintiff's counsel to argue negligence "without mentioning the *Privette*/*Hooker* requirements." (*Id.* at p. 342; cf. OBOM 54 [noting how Sandoval's counsel capitalized on CACI No. 1009B's failure to require affirmative contribution].)

Both *Horne* and *Alaniz* thus support Qualcomm's position, as here it was the contractor Sharghi—not Qualcomm—who

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proving [the] elements of retained control *and affirmative conduct* on plaintiff." (*Alaniz*, *supra*, 48 Cal.App.5th at p. 340, emphasis added.) But while CACI No. 1009B includes the retained control element, it omits the crucial affirmative contribution element. (See OBOM 50–53; RBOM 36–38.) *Regalado* did not suggest otherwise. (See *Regalado*, at pp. 594–595 [concluding that CACI No. 1009B need not include *Hooker*'s affirmative contribution requirement because " 'the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury' " and can be satisfied by " 'a failure to act' " rather than " 'active conduct' "].)

turned a safe worksite into an unsafe one (after all Qualcomm employees had left the room) and caused plaintiff's injuries. Because Qualcomm did nothing to affirmatively contribute to the accident, JNOV should be entered for Qualcomm. In the alternative, at a minimum, the case should be remanded for a new trial because, as *Alaniz* held, it is prejudicial error not to instruct the jury on *Hooker*'s affirmative contribution requirement.

April 26, 2021

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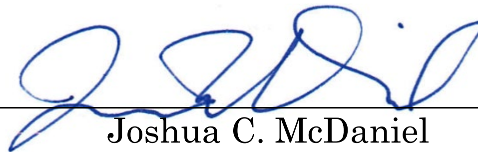
By: 
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Dated: April 26, 2021

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