Supreme Court Case No. S188982
2d Civil No. B217982

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

C.A., A MINOR, ETC.

Plaintiff and Appellant,

vs.

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT, et al.

Defendants and Respondents.

ANSWER TO PETITION FOR REVIEW

After A Decision By The Court of Appeal
Second Appellate District, Division 1, Case No. B217985
Los Angeles Superior Court Case No. PC 044428

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

STATE CASES

STATUTES & CODES

ISSUE PROFFERED

Government Code sections 815.2, 820, and 820.2 limit a public entity's vicarious liability to liability that would otherwise attach to individual private party employees for the same nondiscretionary conduct. In view of that statutory scheme, can a public entity be vicariously liable for its employees' supposed negligent hiring, retention, and oversight of other employees when individual private persons would not be personally so liable?

REVIEW IS NOT WARRANTED BECAUSE THE ESTABLISHED STATUTORY SCHEME PRECLUDES PUBLIC ENTITY VICARIOUS LIABILITY FOR NEGLIGENT EMPLOYEE HIRING, RETENTION OR OVERSIGHT.

The complaint alleges that a female high school counselor engaged in sexual activity with a male high school student. It further alleges that the high school, the school district, and unidentified persons employed by the district knew or should have known about the counselor's activities or proclivities and should have done something (unspecified) to prevent her sexual escapade.

The petition seeks review of a single issue: Whether a public entity can be vicariously liable for the supposed negligent hiring, retention or oversight of other employees, in this case a high school guidance counselor.[1/] Although the petition discusses the school context at length, the issue framed is not dependent on that context. As framed, the issue is limited to a public entity's vicarious liability for its employees' actions in hiring, retaining, or overseeing other employees. But the law in this area is

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[1/] This issue relates at most to the complaint's first four causes of action (for negligence, negligent supervision, negligent hiring, and negligent failure to train). The petition raises no issue as to the complaint's remaining causes of action, the dismissal of which the Court of Appeal's opinion also affirmed.

not unsettled. Rather, it is well established. What the petition seeks is simply a radical remaking of settled law. That is not this Court's role.

The petition is clear as to the issue it frames – vicarious liability for public-entity employees' decisions in hiring, retaining, disciplining or otherwise overseeing other employees. But the established law is that there is and can be no such individual employee personal liability n that regard and without such individual employee liability, there can be no vicarious liability.

I.

The Law Is Well Settled That Privately Employed Individuals Are Not Liable For Negligent Hiring, Retention Or Supervision Of Co-Employees; Hence, Public Entity Employees Have No Such Personal Liability And No Public Entity Vicarious Liability Can Ensue.

In claiming an issue here, the petition seeks to ignore or remake two settled rules. The first is statutory. Absent a direct, statutory mandate, public entity is not liable for its actions as an entity. (Gov. Code, § 815.) Rather, a public entity's liability is vicarious of the liability of individual employees. (Gov. Code, §§ 820, 815.2 [public entity liable only if individual public entity employee would also be liable].) It is this second prong under which the petition is framed. But public entity employees are

liable only to "the same extent as a private person." (Gov. Code, § 820, subd. (a).) Even then, discretionary actions (e.g., normal employee hiring, firing, and oversight) are entirely immune, even if discretion is abused. (Gov. Code, § 820.2.)

Regardless of their wisdom, these are the rules that the Legislature has imposed. They are not open to controversy. But the petition asks this Court to consider remaking these rules. Why? Because, it asserts, this case presents sympathetic circumstances. But that is no reason to usurp the Legislature's choices. Petitioner does not dispute that no statute makes a public entity directly liable to third persons for employee hiring, retention or oversight decisions. Certainly the petition does not identify any such statute (its only statutory references are to the above-cited Government Code sections). Rather, it premises the sole issue for review on supposed vicarious liability.

That leaves the question of whether an individual private person manager or supervisor can be personally liable for negligent hiring, retention, or supervision of an employee. Under section 820, if a co-employee, manager or supervisor as a private individual cannot be personally liable for negligent hiring, firing, or supervision then a public employee cannot be individually liable either. (Gov. Code, § 820, subd.

(a).) At the outset, the complaint does not identify any particular public entity employee who made any employment hiring, retention, or oversight decision. Rather, it merely alleges that the public entity and unidentified Doe employees somehow negligently hired, retained, and oversaw the defalcating employee. There is no allegation as to what any individual employee (upon whom vicarious liability must be premised) did wrong.

In any event, the law is well-settled. Negligent employee hiring, retention and oversight is a claim against the employer, not against individual co-workers, managers, or supervisors. (See *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139-1140; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565 ["An *employer* may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. (Citation.)" Emphasis added]; *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339 ["Liability for negligent hiring and supervision is based upon the reasoning that if *an enterprise* hires individuals with characteristics which might pose a danger to customers or other employees, *the enterprise* should bear the loss caused by the wrongdoing of its incompetent or unfit employees," emphasis added].)

"California follows the rule set forth in the Restatement Second of Agency section 213, which provides in pertinent part: '*A person conducting an activity through servants or other agents* is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . [¶] (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]" (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 836, emphasis added .) Thus, "[l]iability for negligent . . . retention of an employee is one of direct liability for negligence, not vicarious liability. [Citation.]" (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815.)

Individual managers, supervisors and co-employees are not even liable for discriminatory hiring, firing and oversight decisions under the Fair Employment and Housing Act. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173.) Given that lack of statutory liability, there is even less support for the proposition that, as private persons, individual co-employees, managers or supervisors can be personally liable for employee hiring, retention and oversight decisions. Certainly, the petition cites no case holding an individual employee – public or private – personally liable for negligent hiring, retention, or oversight of another employee. But under Government Code section 820, that is what is

required for public-entity vicarious liability. (See *De Villers v. County of San Diego* (2007) 156 Cal.App.4th 238 [where private party employees would not have been personally liable for co-worker's theft of poisons to murder spouse, no public entity liability].)

The petition cites a litany of cases where public entities have been held vicariously liable for their employees' direct negligence in supervising or protecting the injured party. But the conduct of the relevant employee – the counselor – vis à vis the plaintiff, as a matter of law, was outside the scope of employment and something for which the public entity undeniably is not vicariously liable. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438.) What is left is negligent hiring and oversight of the offending employee. No case holds an individual public entity employee liable for such supposed negligence. And, without individual public entity employee liability there can be no vicarious public entity liability. Likewise, the various dicta that the petition cites (some of it not even from opinions garnering majority support) cannot obviate the direct statutory mandate that public entity vicarious liability must be premised on individual public entity employees' personal liability no greater than that which would be imposed on private persons. None of the cited cases considers the impact of Government Code sections 815.2 and 820. Cases do not stand for

propositions not considered. (E.g., *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.)

The statutory law is settled: no private-person individual-employee liability, no public-entity individual-employee liability; and, no public-entity individual-employee liability, no public entity vicarious liability. The law is equally settled that individual co-workers, managers, and supervisory employees are not personally liable for supposed negligent co-employee hiring, retention, and oversight decisions.

II.

There Is No Public Policy Reason For Review.

At heart, the petition is a plea that, as a matter of purported public policy, liability should be imposed on public entities for their employee hiring, retention, and oversight decisions regardless what the law is. But the statutory scheme defines public policy in this arena. The Legislature has defined the limited realm in which public entities may be liable (and the public fisc thereby invaded).[2/]

[2/] The amicus letter filed by The Innocence Mission is even more explicitly a public policy appeal. But it is directed at the wrong audience. The public policy choices have been made by the Legislature. The simple fact is that individual employees are not personally liable for negligent hiring, retention, or oversight of other employees who commit ultra vires acts. The Legislature has limited public entity liability to vicarious liability for the *liability* of individual employees.

It is not surprising that there are not a lot of reported decisions in this area, particularly reported decisions after merits trials. Public entities can and do perform background checks on employees. Criminal laws impose substantial constraints on offensive conduct outside of the scope of employment. The counselor here was fired and criminally prosecuted.

The flip side of the public policy picture is that if the law is changed as petitioner seeks, public entities will face an onslaught of negligent hiring, retention and oversight claims as regards a whole host of employee ultra vires conduct from that of police officers to fire fighters to social workers. And, it will not only be public entities themselves which will be sued. As the necessary predicate to petitioner's vicarious liability theory is individual public entity employee liability, individual public entity managers, supervisors and co-workers will be named as defendants, putting a chill on public entities' ability to hire qualified managers and supervisors and on the effective management of crucial public entity functions.

Nor will suits seeking to impose individual, personal negligent hiring, retention, and supervision liability be limited to public entity managers, supervisors and co-employees under petitioner's novel and radical theory. Because the premise of public entity employee liability statutorily is liability to the "the same extent as a private person" (Gov.

Code, § 820, subd. (a)), what the petition seeks is nothing less than opening an entire new realm of personal liability for managers, supervisors and co-employees whether publicly or privately employed. Rather than unsettled legal issues that need to be resolved, the petition seeks to unsettle firmly established law to create a whole new category of individual, personal liability.

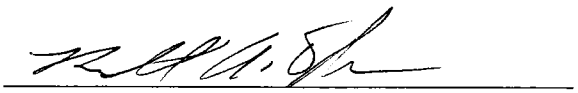
CONCLUSION

The petition raises no unsettled legal issue. Rather, it merely complains about the inevitable result compelled by the statutory scheme. It seeks to unsettle established law and statutory norms, not to resolve any existing uncertainty. There is no basis of review; review should be denied.

DATED: January 3, 2011

McCUNE & HARBER
Stephen M. Harber

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson

By 
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William S. Hart Union High School District sued as itself and as Golden Valley High School

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 3, 2011, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the parties in this action by serving:

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Executed on January 3, 2011, at Los Angeles, California.

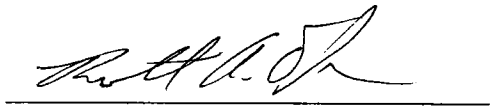
(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Leslie Juarez

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, that the ANSWER TO PETITION FOR REVIEW contains **1,853** words, not including the tables of contents and authorities, the caption page, signature blocks, the proposed order, or this Certification page.

Dated: January 4, 2011



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