In the Supreme Court of the State of California

MAYRA ANTONIA ALVARADO, AN INDIVIDUAL, APPEARING THROUGH HER CONSERVATORS LUIS ALVARADO AND MARIA ALVARADO, AND DYLAN HARBORD-MOORE, A MINOR APPEARING THROUGH KYLE HARBORD-MOORE, HIS GUARDIAN AD LITEM,

Petitioners,

v.

STATE OF CALIFORNIA, acting by and through the Department of the California Highway Patrol,

Respondents.

No. S214221

Orange County Superior Court, Case No. 30-2008-00116111
The Honorable Robert J. Moss, Judge (Dept. C-23, (657) 622-5223)

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

Respondent State of California, acting by and through the Department of the California Highway Patrol (CHP), defendant in the Superior Court case below, answers the petition for review as follows:

INTRODUCTION

The Court of Appeal held that as a matter of law the CHP is not the "special employer" for purposes of vicarious liability of tow truck drivers employed by independent contractors in the Freeway Service Patrols (FSP) program. This holding is correct and there is no basis for review in this case, as the decision neither creates a conflict in decisions nor leaves an important issue of law undecided.

The Court of Appeal matter was a writ of mandate proceeding brought by the CHP to seek review of the trial court's denial of its motion for summary judgment. In the underlying case, plaintiff Mayra Alvarado suffered severe injuries on January 16, 2008 when her car was rear-ended by a FSP tow truck contracted by the Orange County Transportation Authority (OCTA). Ms. Alvarado's minor son Dylan Harbord-Moore was a passenger in her vehicle and suffered less serious injuries.

In the resulting personal injury action the plaintiffs alleged that CHP was vicariously liable for the tow truck driver's negligence on the theory that CHP was a "special employer" by virtue of CHP's extensive field supervision of the drivers. This was the sole theory remaining at the time CHP moved for summary judgment.

The FSP program was created by statute. (Sts. & Hy. Code, §§ 2560, et seq.) Tow truck companies in this program contract with local transportation agencies to patrol urban freeways, provide emergency roadside assistance and towing for disabled vehicles in order to reduce traffic congestion. By statute, the program is jointly administered by CHP, the Department of Transportation, and local regional transportation agencies. (Sts. & Hy. Code, § 2561, subd. (c).) The roles of the partner

agencies is outlined in the enacting statutes, and in related provisions in the Vehicle Code. (Veh. Code, §§ 2430-2435.6.)

In denying CHP's motion for summary judgment, the trial court certified the following controlling question of law for interlocutory review under Code of Civil Procedure section 166.1: "[W]hether, in light of the statutory nature of the [FSP] program, the CHP can be a 'special employer' of a tow truck driver whose general employer is a towing contractor engaged to provide services in the FSP program as a result of the CHP's right to control the activities of FSP tow truck drivers in the performance of FSP duties." (Opinion, p.p. 3-4.)

CHP petitioned for writ of mandate. After full briefing and argument the Court of Appeal reversed the trial court, holding:

Our examination of the relevant statutes in the Streets and Highways Code and the Vehicle Code persuades us that the Legislature intended to distinguish between the people and companies employing tow truck drivers in the FSP program ("employers") on the one hand and the CHP on the other. There was, therefore, no legislative intent to make the CHP liable as a special employer of FSP tow truck drivers for the drivers' negligence. (Opinion, p. 2.)

The Petition does not identify any basis for review of this holding. This Court should deny the petition for review.

WHY THIS CASE IS INAPPROPRIATE FOR REVIEW

I. THE OPINION EVIDENCES NO LACK OF UNIFORMITY IN THE LAW OR UNSETTLED IMPORTANT LEGAL ISSUE.

The issue on a petition for review is not whether the petitioner believes the Court of Appeal reached the result wrong in this instance, which it did not, but whether this Court's intervention is "necessary to secure uniformity of decision or to settle an important question of law."

(C.R.C. Rule 8.500(b)(1).) The issue is whether the Opinion evidences a lack of uniformity of decision or whether there is an unsettled important question of law. Neither is the case here.

There is no lack of uniformity of decision. Although this case decided an issue of first impression, by definition such a decision does not create a conflict with existing law or leave unsettled an important question of law. Only if a second court were to address the same issue could such a lack of uniformity arise. Plaintiffs do not identify any specific appellate decision which on its face conflicts with the Opinion in this case.

Similarly there is no important unsettled legal issue presented by this case. The Court of Appeal resolved the question concerning the intent of the Legislature with respect to CHP liability for FSP contract tow truck drivers. The opinion resolved a narrow issue of statutory construction. Plaintiffs cannot point to any actual important legal issue left unresolved by the opinion.

The petition emphasizes the numerous appellate opinions which have found public entities had a "special employment" relationship with contract workers or "borrowed" employees. (See e.g., *Kowalski v. Shell Oil Co.* (1979) 23 Cal. 3d 168,174-75, *In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 728.) Plaintiffs baldly state "in this case the Court of Appeal concluded that existing law should be cast aside." (Petition, p. 7.) The Court of Appeal stated no such thing. Instead, the Court determined that the legislative intent was to distinguish the CHP from the "employer" of the tow truck drivers, such that the common law rule did not apply as a matter of law.

Plaintiffs argue that the opinion conflicts with cases that have held a common-law definition of "employee" should control where the statutory definition is "circular". (*Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500.) True, the Court

of Appeal concluded that the definition of "employer" in Vehicle Code section 2430 as a "person or entity which employs tow truck drivers" was essentially circular. (Opinion, p. 6.) The opinion did not rest there, however, and does not conflict with the general rule set forth in Metropolitan Water District. The Court discussed in detail the other applicable statutes which "draw a clear distinction between the CHP on the one hand and an 'employer' on the other hand." (Opinion, p. 6.) The Court explained:

For example, the CHP may enter into contracts with "employers" for freeway service patrol operations (Veh. Code, § 2435, subd. (a)), and the CHP, in conjunction with CalTrans, is responsible for establishing minimum training standards for "employers." The CHP must provide training for all employers, and the "employers" are required to attend training sessions. (Veh. Code, §§ 2436.5, 2436.7.) The tow truck drivers are required to inform both their "employers" and the CHP if they are arrested for or convicted of certain crimes. (*Id.*, § 2430.3, subd. (a).) The CHP must obtain employers' fingerprints and verify that the employers have valid California driver's licenses. (*Id.*, § 2431, subd. (a)(1) & (3).) The employer must maintain lists of eligible and non-eligible drivers at its place of business for inspection by the CHP. (Id., § 2430.5, subd. (c).) Vehicle Code section 2432.1 provides for penalties for employers that fail to comply with the requirements of the law on tow truck drivers or the emergency roadside assistance statutes; they may lose their right to participate in the freeway service patrol operation.

(Opinion, p. 6.)

The Court's opinion rested on its interpretation of legislative intent, as expressed in the FSP program. There is nothing in the opinion which conflicts with existing case law or leaves an important legal issue unresolved.

II. THE OPINION SIMPLY INTERPRETS THE INTENT OF THE LEGISLATURE IN THE FSP STATUTES, WHICH DOES NOT REQUIRE REVIEW BY THIS COURT

The Opinion takes as a starting point the fundamental rule of statutory interpretation:

When interpreting statutes, the Legislature's intent should be determined and given effect. Legislative intent is generally determined from the plain or ordinary meaning of the statutory language. The statute's every word and provision should be given effect so that no part is useless, deprived of meaning or contradictory. Interpretation of the statute should be consistent with the purpose of the statute and statutory framework. [Citations.] . . . [¶] Where the meaning of statutory language is uncertain, rules of construction or legislative history may aid in determining legislative intent. [Citations.] Even if the statutory language is clear, a court is not prohibited from considering legislative history in determining whether the literal meaning is consistent with the purpose of the statute. [Citations.] In enacting a statute, the Legislature is deemed to have been aware of existing statutes and judicial interpretations. [Citation.]" (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010) 189 Cal.App.4th 101, 109-110.)

(Opinion, pp. 5-6.)

To adopt Plaintiffs' argument would lead to the absurd conclusion that the Legislature inadvertently imposed vicarious liability on the CHP for the negligence of contract truck drivers, even though (1) there is no reflection of such intent in the statutes or the legislative history; (2) under the statutes CHP does not even have responsibility for choosing tow truck contractors (Sts. & Hy. Code, § 2562.2, subd. (c)(1)), (3) CHP does not have financial control over the program, which instead is funded by

Caltrans and the local transportation agencies, and (4) as emphasized by the Court of Appeal, the Legislature repeatedly distinguished the CHP from the tow truck company "employers". (Veh. Code, §§ 2430.3, subd. (a), 2430.5, subd. (c), 2431, subd. (a)(1) & (3), 2432, 2435, subd. (a), 2436.5, and 2436.7).

The Opinion is well-founded upon established rules of statutory construction. There is no compelling basis for review.

CONCLUSION

As discussed above, there are no grounds for review in this court. The petition should be denied.

Dated: December 19, 2013

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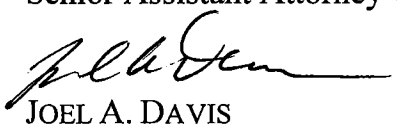

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CERTIFICATE OF COUNSEL

As counsel for Respondent, I certify pursuant to Rule of Court 8.360 that this petition was prepared on a computer using Word 2010. Based upon the calculation by the software, the text of this petition consists of 1,625 words, excluding this certificate and tables of contents and authorities.

Dated: December 19, 2013

JOEL A. DAVIS

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Mayra A. Alvarado, et al. v. California Coach Orange, Inc., et al.**
No.: **30-2008-00116111**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 19, 2013, I served the attached ANSWER TO PETITION FOR REVIEW by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 19, 2013, at Los Angeles, California.

Debbie Mills
Declarant

Debbie Mills
Signature

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