S214221

IN THE

SUPREME COURT OF CALIFORNIA

MAYRA ANTONIA ALVARADO and DYLAN HARBORD-MOORE,

Plaintiffs, Appellants and Petitioners,

vs.

STATE OF CALIFORNIA,

Defendants and Respondents,

REPLY TO ANSWER TO PETITION FOR REVIEW

From a decision of the California Court of Appeal
Fourth Appellate District, Division Three, Case No. G047922

[Orange County Superior Court, Case No. 30-2008 0011611
The Honorable Robert J. Moss, Judge]

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I. INTRODUCTION

The Petitioners seek review of a published Opinion of the Court of Appeal in State ex rel. Department of California Highway Patrol v. Superior Court (2013) 220 Cal.App.4th 612 (hereinafter "the Opinion"), on an issue of first impression. In the Opinion, the Court of Appeal held, in the absence of any Legislative History, that the presence of the term "employer" in California's Freeway Service Patrol ("FSP") statutes evidenced Legislative intent that the special employment doctrine should not apply to the California Highway Patrol's ("CHP") exercise of supervisory powers over day to day freeway patrol activities pursuant to the State's FSP program.

California Streets & Highways Code § 2561(c) defines the "Freeway Service Patrol" as "a program managed by the Department of the California Highway Patrol, the department, and a regional or local entity which provides emergency roadside assistance on a freeway in an urban area." California Streets & Highways Code § 2560.5, contains the Legislature's recognition that in order for the CHP to perform its responsibilities for removal of traffic impediments, the CHP enters into FSP programs which are "a permanent part of the State's overall program to keep California's highway safe and free of traffic congestion." The CHP's responsibility to

remove traffic impediments is codified in California Vehicle Code § 2401 (the CHP "shall make adequate provision for patrol of the highways at all times of the day and night") and Vehicle Code § 2435 (the CHP "is responsible for rapid removal of impediments to traffic on highways within the state").

In the proceedings below, the Petitioners alleged that the CHP was liable as the special employer of the California Coach tow truck driver whose negligence caused their injuries.[1] At the time of the underlying accident, the tow truck driver was, according to the record, engaged in FSP patrol activities and clearly under the control of the CHP. Based upon that record and the applicable law, the trial court denied the CHP's motion for summary judgment on the issue of its liability as a special employer. The CHP sought mandamus in the Court of Appeal.

After briefing and oral argument, the Court of Appeal issued its Opinion, holding (1) that "examination of the relevant statutes in the Streets

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[1] Where an employer sends an employee to perform work for another person, and both have the right to exercise some control over the employee, the employee is deemed to have both an original "general" employer and a second, "special' employer. Kowalski v. Shell Oil Co. (1979) 23 Cal. 3d 168, 174-75 [588 P.2d 811, 814-15]. Both a general and a special employer may be held liable for the employee's negligence where such had some control, not necessarily complete, over the employee, regardless of whether the control is actually exercised. Strait v. Hale Constr. Co. (1972) 26 Cal. App. 3d 941, 946 [103 Cal. Rptr. 487, 491].

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 . . . and the CHP . . . " and (2) that there "was, therefore, no legislative intent to make the CHP liable as a special employer of FSP tow truck drivers for the drivers' negligence." 220 Cal.App.4th at 614-15. This Petition for Review was then filed by the original plaintiffs (Respondents in the Court of Appeal).

In its Answer to the Petition for Review, the CHP argues (1) that the Opinion did not "evidence lack of uniformity in the law" (Answer at 2) and (2) that the Opinion "is well founded upon established rules of statutory construction" (Answer at 6). For the reasons set forth hereinafter, the Petitioners respectfully submit that the CHP is wrong on both counts. As will be shown, the Opinion conflicts with a constellation of authorities governing statutory interpretation, and also conflicts with authority interpreting the Tort Claims Act. That conflict, without more, raises important issues of law. The importance of this case is also evident from the fact, conceded by the CHP's silence in its Answer, that the Opinion will deprive many of the millions of motorists in this state of full compensation for injuries.

II. THE OPINION DOES, IN FACT, CREATE A CONFLICT IN THE LAW OVER AND ABOVE THE ERRONEOUS CONCLUSION REACHED REGARDING LEGISLATIVE INTENT

Although this is a case of first impression insofar as the CHP's liability as a special employer in the FSP program had never before been interpreted, that fact does not preclude the existence of a conflict between the Opinion and existing law, and does not mean that the Opinion was arose in a legal vacuum. To the contrary, the Opinion was rendered against a considerable background of cases which defined key terms in the FSP statutes, and which addressed how statutes such as the FSP are interpreted. Review is appropriate because the Opinion is inconsistent with prior cases in several respects, and because that inconsistency caused the Court of Appeal to draw erroneous conclusions regarding the applicability of the special employment doctrine to the CHP's management of the FSP patrol activities.

The Opinion acknowledges the fact that the FSP statutes are silent regarding the tort liability of the CHP in connection with the FSP program. The Petition demonstrates that the Legislature's silence is a critical factor in ascertaining Legislative intent, and compels the courts to look to the law in

existence when the FSP was enacted to ascertain that intent.

When the FSP was enacted, the state of the law was as follows:

(1) The special employment doctrine was applicable to public entities. County of Los Angeles v. Workers' Comp. Appeals Bd. (1981) 30 Cal.3d 391, 406 [179 Cal.Rptr. 214, 222, 637 P.2d 681, 689] ("[T]he County was the general employer. It sent respondent to work for the District, the special employer.")

(2) The FSP statutes did not contain any special definition of the term "employee."

(3) The common law defined both the terms "employee" and "special employee." Bradley v. California Dept. of Corrections and Rehabilitation (2008) 158 Cal.App.4th 1612, 1626. ("Consequently, when a statute fails to define the term 'employee,' courts routinely look at the common-law definition for guidance, focusing on the amount of control the employer exercises over the employee . . . ")

(4) California Government Code § 810.2 defined the term "employee" as including the term "servant" for purposes of governmental tort liability.

(5) California followed the Restatement of Agency § 220 definition of the term "servant." Societa Per Azioni De Navigazione Italia

v. City of Los Angeles (1982) 31 Cal.3d 446, 461 [183 Cal.Rptr. 51, 60, 645 P.2d 102, 111]. That definition includes someone "employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Isenberg v. California Employment Stabilization Commission (1947) 30 Cal.2d 34, 39 [180 P.2d 11, 15]; California Compensation Ins. Co. v. Industrial Accident Commission (1948) 86 Cal.App.2d 861, 867 [195 P.2d 880, 884].

Thus, the Opinion's silence regarding any intent to exempt the CHP from the special employment doctrine in the FSP context should have been deemed an expression of a Legislative intent to maintain the applicability of the special employment doctrine to the CHP. It follows that the Opinion creates inconsistency in the law and, in addition, was erroneous.

In its Answer, CHP does not address the Opinion's failure to consider the law in existence law as of the FSP's enactment in the analysis of legislative intent. As a result, the CHP has not addressed the conflict between the Opinion and the case law which provides that when a statute contains but does not define a term, the common law definition of the term controls. Metropolitan Water Dist. of Southern California v. Superior Court (2004) 32 Cal.4th 491, 500. Ultimately, both the CHP's Answer and the

Opinion demonstrate a disregard for the general rule that "[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules.'" People v. Ceja (2010) 49 Cal.4th 1, 10.

III. CONCLUSION

The Court of Appeal erroneously held in a published opinion that the CHP cannot, as a matter of law, be liable as the special employer of a tow truck driver who, while under the undisputed supervision of the CHP, negligently performs FSP duties. That holding is the product of an analysis that is so deeply flawed that it risks turning established rules of statutory interpretation upside down. Among other things, the Court of Appeal (1) jettisoned the general liability rules of the California Tort Claims Act without any supporting Legislative history for doing so, (2) disregarded the crucial fact that when the FSP was enacted, both the Tort Claims Act and case law of this State had applied the special employment doctrine to public entities, and (3) disregards the rule that in the absence of a statutory definition, the common law definition of that term applies.

As a result of the Court of Appeal's flawed analysis, literally millions of people (according to Legislative findings) are in danger of an inadequate remedy, or no remedy at all, for injuries sustained as a result of

the CHP's FSP program. Moreover, the fact that the Opinion is published can only undermine well established principles of statutory construction, creating a risk of erroneous decisions in other cases. Under these circumstances, the Supreme Court should review this matter to correct an erroneous precedent, to restore lost remedies, and to avoid launching lines of erroneous analysis that may migrate into other areas of statutory interpretation.

Dated: January 8, 2014

Respectfully submitted,

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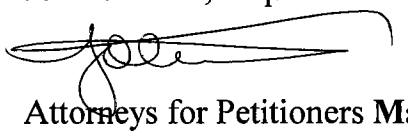


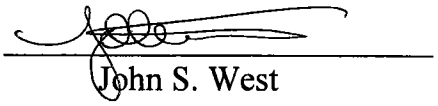
Attorneys for Petitioners **Mayra Antonia Alvarado and Dylan Harbord-Moore**

CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.504(d)(1))

The text of this brief consists of 2394 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: January 8, 2014



John S. West

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: 6300 Wilshire Boulevard, Suite 1500, Los Angeles, California 90048.

On January 8, 2014, I served the foregoing document described as **REPLY TO ANSWER FOR PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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State of California v. Superior Court of Orange County
Appellate Case No. G047922

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Fourth District, Division Three
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Mayra Alvarado, et al. v. California Coach Orange, Inc., et al.
OCSC Case No. 30-2008-00116111

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JENNIFER SHUEMAKER