S214221

IN THE

SUPREME COURT OF CALIFORNIA

CRC 8.25(b)

MAYRA ANTONIA ALVARADO and DYLAN HARBORD-MOORE,

Plaintiffs, Appellants and Petitioners,

vs.

STATE OF CALIFORNIA,

Defendants and Respondents,

PETITIONER'S OPENING BRIEF ON THE MERITS

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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STATEMENT OF ISSUES IN THE PETITION AND ANSWER

[RULE 8.520(b)(2)(B), CALIFORNIA RULES OF COURT]

The Supreme Court's Order granting review did not specify issues to be briefed, and the Answer to the Petition did not contain any Statement of Issues on behalf of the Respondent. Petitioners therefore quote the Statement of Issues in the Petition for Review, as required by Rule 8.520(b)(2)(B), as follows.

1. Before the State's Freeway Service Program ("FSP") was enacted, the California Tort Claims Act definition of "employee" rendered a public entity liable as the special employer of a negligent actor who, because of the public entity's power of supervision, is subject to dual employment. Published decisions had also applied the special employment doctrine to public entities prior to the enactment of the FSP. There is no FSP legislative history or other authority stating that the special employment doctrine is inapplicable to the California Highway Patrol ("CHP") in the context of the CHP's supervision of FSP tow truck drivers. Did the Court of Appeal err in holding that the presence of the term "employer" in FSP statutes evidences Legislative intent that the special employment doctrine not apply to CHP in the FSP context?

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2. The FSP statutes contain an administrative definition of the term "employer." Those statutes also contain, but do not define, the term "employee." When a statute does not define a particular term, the common law definition of that term controls. The common law definition of "employee" includes a special employee. There is no FSP Legislative history or other authority expressing an intent to vary the common law definition of an"employee" in the FSP. Did the Court of Appeal err in holding that the presence of the term "employer"in FSP statutes evidences a Legislative intent that the CHP not be subject to tort liability for the negligence of its special employee in the FSP context?

I. INTRODUCTION

While the Petitioners certainly contend that the Court of Appeal reached an erroneous conclusion by an erroneous process, and that those errors resulted in a loss of legitimate claims, this case is about far more than the Petitioners or their claims. The errors in the Opinion relate to matters of great public importance. And, if the Opinion is allowed to stand, it will serve as precedent for disregarding longstanding legal principles of tort liability and of statutory interpretation in settings beyond the bounds of this dispute. In a very real way, the Opinion may result in unpredictable and inconsistent interpretations of the law in settings of public importance.

By way of background, 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." The FSP was established to enable the Highway Patrol ("CHP") to fulfill statutory patrol responsibilities codified in statutes such as California Vehicle Code § 2401 (providing that the CHP "shall make adequate provision for patrol of the highways at all times of the day and night") and Vehicle Code § 2435 (providing that the CHP "is responsible for rapid removal of impediments to traffic on highways within the state"). Streets and 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."

In AB1248, the bill that gave rise to the FSP, the Legislature illustrated the statewide importance of the program. That bill declares that "(a) California's freeway service patrols are a critical element in the state's efforts to keep our freeways safe and operating efficiently[;] (b) Freeway service patrols provide an effective freeway congestion relief program on

the state highway system." . . . (e) Since the state first implemented freeway service patrol programs on a demonstration basis in 1992, some 4.5 million motorists statewide have received assistance . . . "

This Petition involves centers around the issue of whether existing case law and governmental tort liability statutes impose liability upon the CHP as the special employer of a negligent tow truck driver who is (1) under the control of the CHP and (2) engaged in FSP activities when his negligence causes an injury. In this case, Petitioner Mayra Alvarado was driving on the Interstate 5 freeway, with her minor son Dylan Harbord-Moore as a passenger, when a negligently driven tow truck smashed into the rear of Ms. Alvarado's car while engaged in FSP patrol activities. As a result of the impact, Ms. Alvarado sustained disabling brain injuries, and her son was also injured.[1]

The record contained undisputed evidence establishing the CHP's supervisory powers over the negligent FSP tow truck driver. That record

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[1] In the underlying action, the CHP moved for summary judgment on the Petitioners claim that the supervisory powers vested in the CHP rendered the CHP liable as Guzman's special employer for their injuries. The Orange County Superior Court denied that motion and then issued a certification of this matter under California Code of Civil Procedure § 166.1 (" . . . a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion . . . ").

included a chain of written contracts giving the CHP supervisory power over the day activities of FSP tow truck drivers at the time of the accident. The record also included the testimony of the negligent FSP tow truck driver regarding the CHP's control over his day to day activities at the time of the accident. Even the CHP's own designated "person most knowledgeable" regarding the FSP program testified that the negligent tow truck driver was under the supervision of the CHP at the time of the accident, and his testimony was in the record as well.

Long before the FSP was enacted, our courts had recognized the special employment doctrine. Under that doctrine, when 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 a "general" (original) employer and a "special" employer. The doctrine renders both of them liable for the employee's negligence.[2]

Long before the FSP was enacted, the courts of this state had applied the special employment doctrine to hold public entities liable for the negligence of persons under their control.[3] And, long before the FSP was

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[2] Kowalski v. Shell Oil Co. (1979) 23 Cal. 3d 168, 174-75 [588 P.2d 811, 814-15]; Strait v. Hale Constr. Co. (1972) 26 Cal. App. 3d 941, 946 [103 Cal. Rptr. 487, 491]. See discussion, infra, at Section VI(A).

[3] See, infra, at Section VI (C).

enacted, California's governmental tort liability statutes permitted public entities to be held liable as special employers.[4] There is nothing in the FSP, the Legislative history of the FSP, or case law which even remotely suggests either Legislative intent that the CHP should not be liable as a special employer or Legislative intent that the general principles of the Tort Claims Act (California Government Code § 800 et seq.) should not be applied to the CHP in the FSP context.[5]

Nevertheless, in a case of first impression the Court of Appeal in this matter held that the CHP cannot be held liable as a special employer for the negligence of a tow truck driver who was under CHP control and engaged in official FSP activities for the CHP at the time of his negligence. State ex rel. Department of California Highway Patrol v. Superior Court (2013) 163 Cal.Rptr.3d 333, ("the Opinion"). The Opinion observed that various FSP statutes in the Vehicle Code refer to an "employer" and, elsewhere, to the CHP. Based on that fact alone, the Opinion concluded that there is a "legislative intent to distinguish between employers of tow truck drivers and the CHP" and, therefore, that "the CHP cannot as a matter of law be the

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[4] See the discussion, infra at Section VI (B).

[5] In this regard, the statutes clearly demonstrate that the FSP exists to facilitate the CHP's discharge of its own responsibilities.

special employer" of "a tow truck driver operating under the Freeway Service Patrol Act." Id., 163 Cal.Rptr.3d at 337.

The Opinion concedes that the FSP's legislative history is "quite short" and that it "mainly focuses on funding for the program and on allocating these funds." State ex rel. Department of California Highway Patrol v. Superior Court, 163 Cal.Rptr.3d at 336. Prior cases had held that the "Legislature 'is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof,'" People v. McGuire (1993) 14 Cal.App.4th 687, 694 [18 Cal.Rptr.2d 12, 15]. Under existing law, then, the Legislature's silence on the issue of government tort liability in the FSP should have been seen as evidencing an intent not to modify the law which had already imposed tort liability upon a public entity as a special employer.

As will be shown, the Opinion disregarded the importance of the law in existence when the FSP was enacted, disregarded well established rules of statutory construction, and concluded without authority that the use of the terms "employer" and CHP in FSP statutes translates into an expression of Legislative intent to rewrite rules of governmental tort liability. In fact, there is nothing in the FSP, the Legislative history of the FSP, or case law which even remotely suggests either (1) Legislative intent that the CHP

should not be liable as a special employer, or (2) Legislative intent that the general principles of the Tort Claims Act (California Government Code § 800 et seq.) should be inapplicable to the CHP in the FSP context. As will be shown, the terms "employer" and "employee" in certain Vehicle Code statutes are nothing more than administrative definitions used to assign tasks among participants in the FSP program.[6]

The Court of Appeal has announced a method of statutory construction which has no precedent, and which at the same time undermines existing precedent. The Petitioners hope that Supreme Court review will restore claims against the CHP which were, prior to the Opinion, solidly grounded in the law and fully by the facts. At the same time, it is respectfully submitted that the Opinion, if allowed to stand, may lead to flawed statutory interpretation regarding governmental tort liability, and in any number of other settings. In short, the Opinion has caused injustice to the Petitioners, and is a precedent that may create legal inconsistency and cause injustice in other cases.

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[6] See Section VII, infra.

II. FACTUAL BACKGROUND

(A) The Facts as Summarized in the Opinion

The Court of Appeal considered the factual record from the summary judgment proceedings below. In its Opinion, the Court of Appeal summarized the facts as follows: "A tow truck driven by one J. Guzman on the I–5 freeway rear-ended a car driven by real party Mayra Alvarado. Guzman was employed by California Coach Orange, Inc., which had a contract with the Orange County Transportation Authority (OCTA) to participate in the FSP program. OCTA in turn contracted with the CHP to provide funding for the CHP's involvement in the program in Orange County." State ex rel. Department of California Highway Patrol v. Superior Court (2013) 163 Cal.Rptr.3d 333, 334.

Based on the record provided by the parties, the Court of Appeal described the hierarchy of participants in the FSP program as follows: "Tow truck companies in this program contract with county transportation authorities to patrol urban freeways, helping out stranded motorists. The transportation authorities in turn contract with the CHP, which certifies and supervises both the drivers and the truck companies." Id. The Court of Appeal then acknowledged the control exercised by the CHP over FSP tow truck operations, stating in relevant part: "The CHP supervised the FSP . . .

pursuant to its statutory duty to 'make adequate provision for patrol of the highways at all times of the day and night' (Veh.Code, § 2401) and to rapidly remove all 'impediments to traffic on highways within the state.' (Id., § 2435, subd. (a).)" Id.

(B) The Record That the Petitioners Placed in the Petition for Review, Before the Court of Appeal, and Before the Trial Court, Regarding the Chp's Supervisory Powers over FSP Tow Truck Drivers

Although the Opinion touched upon aspects of the record regarding the CHP's control over FSP operations (163 Cal.Rptr.3d at 334), it did not discuss the full extent of that control. As set forth in the Petition, and in the briefs before the Court of Appeal, the CHP entered into a chain of FSP related agreements all of which provided for the CHP to exercise supervisory power over the day to day performance of FSP operations by tow truck drivers.

At the top of the chain stands the "FSP Statewide Guidelines" among CHP, OCTA and CalTrans. (Before the Court of Appeal as CHP Appendix § 13, Exh. D) The Guidelines provide, inter alia, that the "CHP is generally responsible for . . . supervision of the day to day FSP field operations." In addition, the Guidelines specify that "the CHP is responsible for

dispatching FSP vehicles," and that CHP activities in the FSP "include supervising FSP field operations."[7] According to the Guidelines, "the primary role of the CHP" is "to promote and ensure . . . safe and efficient FSP operations throughout the state."

The record also contained the written agreement between the CHP and the OCTA for OCTA to participate in the FSP. That agreement specifically provides that the CHP is responsible for "performing necessary daily project field supervision, program management and the oversight of the quality of the contractor services."[8] It acknowledges that "authority for FSP derives from (A) section 2435(A) of the California Vehicle Code which allows FSP trucks supervised by the CHP to stop on freeways . . . "

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[7] The guidelines note that the "current FSP regulatory statutes" are "listed in Appendix A,"which expressly references Vehicle Code § 2401, supra. (CHP Appendix § 13, Exh. D, Exh. 3 thereto, p. A1-4) Those Guidelines contain an acknowledgment by the participants that the "CHP is generally responsible for individual tow operator training, that "the CHP is actively involved in. . . . enforcing statutory and program/driver requirements . . . and providing FSP telecommunications and dispatch support," and that local (i.e., County level) CHP activities in the FSP includes "performing real-time dispatching of the local region's FSP fleet of trucks" (CHP Appendix § 13, Exh. D, p.1-2, OCTA 000019).

[8] That agreement provides the "CHP has assigned and staffed for the dedicated purpose of operating the Orange County Freeway Service Patrol with three full-time officers," that all personnel providing services shall be state employees "under the sole direction, supervision and regulation of the CHP," and that "[s]aid personnel shall work out of the appropriate CHP facilities as designated by the CHP." (CHP Appendix § 13, Exh. C, pg. OCTA 0000003).

In addition, the CHP-OCTA agreement contains the following description of the extent of FSP control over tow truck drivers:

> "There may be some instances where FSP drivers may be requested to lend assistance to CHP officers. FSP operators shall follow the instructions of the CHP officer at the scene of any incident within the scope of the Orange County FSP program. Operators must also follow instructions of the CHP officers that may be outside the scope of FSP service, but must advise dispatch first."

The record also contained the agreement between California Coach and the OCTA under which California Coach patrolled FSP beat number 13 in Orange County. (CHP Appendix § 13, Exh. E, pg. OCTA 000316-317). That agreement required California Coach to submit to the paramount right of the CHP to control day to day FSP operations. Among other things, that agreement provided:

- "[A]uthority for FSP derives from (A) section 2435(A) of the California Vehicle Code which allows FSP trucks supervised by the CHP to stop on freeways for the purpose of rapid removal of impediments to traffic . . . " (CHP Appendix § 13, Exh. E, pg. OCTA 000330).

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- "There may be some instances where FSP drivers may be requested to lend assistance to CHP officers. FSP operators shall follow the instructions of the CHP officer at the scene of any incident within the scope of the Orange County FSP program. Operators must also follow instructions of the CHP officers that may be outside the scope of FSP service, but must advise dispatch first" (CHP Appendix § 13, Exh. E, pg. OCTA000334).

- "Each beat will have specific turnaround locations and designated drop locations identified by the CHP" (CHP Appendix § 13, Exh. E, pg. OCTA 000334).

- "If a vehicle cannot be mobilized within the 10-minute time limit, the FSP will tow the vehicle from the freeway to a designated drop location identified by the CHP." (CHP Appendix § 13, Exh. E, pg. OCTA 000334).

- "Each Orange County FSP vehicle shall be equipped with radios to enable the operator to communicate with the CHP communication center . . ." (CHP Appendix § 13, Exh. E, pg. OCTA 000339).[9]

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[9] The agreement also provides that California Coach would be paid (on an hourly basis) for its FSP services "upon approval by Caltrans and CHP," and that any overtime was "subject to prior approval by the CHP and/or Caltrans." (CHP Appendix § 13, Exh. F, pg. OCTA 000317).

The record included the deposition testimony of CHP Officer David Ferrer, whom the CHP designated as its "person most knowledgeable" regarding the role of the CHP in the operation of the Orange County FSP in 2008. Officer Ferrer was a CHP supervisor, called a "David Unit," in the Orange County FSP at the time of the accident. (CHP Appendix § 13, Exh. B, Ferrer 9:7-11). He testified that the CHP was responsible for supervising tow truck operators in the field, dispatching tow truck operators, and ensuring that tow truck contractors comply with their contracts. (CHP Appendix 13, Exh. B, Ferrer 31:3-1 7). Officer Ferrer also testified that the CHP dispatched all tow trucks (CHP Appendix § 13, Exh. B, Ferrer 29:8-17, 45:12-15, 46:9-16), and that CHP Officers could issue orders to tow truck drivers (CHP Appendix § 13, Exh. B, Ferrer 42:18-43:8).

According to Officer Ferrer, the CHP was responsible for "providing in field supervision of operators while they are out there" (CHP Appendix § 13, Exh. B, Ferrer 31:3-17), and also responsible for supervising FSP service performance. (CHP Appendix § 13, Exh. B, Ferrer 35:20-36:23). He stated that CHP supervisors ("David Units") had ultimate authority in the event of a dispute between a tow truck driver and a CHP officer over whether the driver was required to follow the officer's directive (CHP Appendix § 13, Exh. B, Ferrer 41:20-42:15).

Part of the record before the Superior Court (CHP Appendix § 13, Exh. F) consisted of a copy of a page from the CHP's own website. According to the CHP's website, the FSP program consists of "over 300 tow trucks operated by CHP-trained, certified and supervised drivers.

Finally, the record included the deposition testimony of the California Coach tow truck driver, Guzman, who collided with Ms. Alvarado's car. He testified that he was sent to the CHP David Unit for training before he started driving on the freeway for California Coach, and that while at the David Unit, he was told that the CHP is "pretty much running this" FSP operation. (CHP Appendix § 13, Exh. A, Guzman 20:15-21:19, 22:1-14).

(C) Petitioners' Claims Against the CHP

Throughout this dispute, the Petitioners have alleged that the CHP is liable for their injuries as the special employer of the negligent California Coach tow truck driver. The CHP's moved for summary judgment on that issue. Relying upon the extensive record of CHP control over the day to day activities of the FSP tow truck driver, and the clear standards for imposing special employer liability, the Orange County Superior Court denied that motion. Following the denial, however, the Superior Court issued a certification of this matter under California Code of Civil Procedure § 166.1

(" . . . a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion . . . ").

The CHP sought mandamus from the Court of Appeal with regard to the denial of its motion for summary judgment. After briefing and oral argument, the Court of Appeal published the Opinion which gave rise to the pending Petition for Review.

III. THE OPINION RECOGNIZES THE SILENCE OF THE FSP STATUTES AND LEGISLATIVE HISTORY REGARDING ANY INTENT TO ALTER THE PROVISIONS OF THE TORT CLAIMS ACT, THE SPECIAL EMPLOYMENT DOCTRINE, OR ANY OTHER TORT LIABILITY RULES PERTAINING TO THE CHP'S ROLE IN THE FSP PROGRAM

At the outset of its analysis, the Court of Appeal summarized the central issue as "one of legislative intent in general regarding the employment relationship, if any, between the CHP and FSP tow truck drivers." State ex rel. Department of California Highway Patrol v. Superior Court, 163 Cal.Rptr.3d at 335. To resolve that issue, the Court of Appeal turned to the "plain or ordinary meaning"of the FSP's statutory language. Id.

As the Court of Appeal put it: "The legislative mandate for the statewide FSP program can be found in Streets and Highways Code sections 2560 et seq. The chapter is quite short; it mainly focuses on funding for the program and on allocating these funds. It also includes sections on logos for participating tow trucks and on training and certifications for drivers and operators. (Id. §§ 2562.5, 2563.) A final section addresses developing and updating operational guidelines. (Id. § 2565.)" Id, 163 Cal.Rptr.3d at 336.[10]

In that passage, the Court of Appeal recognized that the FSP statutes are completely silent with regard to the issue of tort liability. On their face, the statutes contain no expression of any Legislative intent to (1) alter the application of the Tort Claims Act to the CHP, (2) alter general tort liability principles applicable to the CHP, or (3) render the special employment doctrine inapplicable to the CHP in the context of the FSP program.

Similarly, a reading of the Opinion reveals that the Court of Appeal does not cite any piece of FSP legislative history in support of its holding. In fact, there is no legislative history which even remotely suggests an intent to (1) alter the application of the Tort Claims Act to the CHP, (2)

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[10] The Opinion went on to recognize that "[p]ortions of the Vehicle Code also deal with FSP tow truck drivers..." and that each of those "Vehicle Code articles, as well as the Freeway Service Patrol Act, uses the same definition of "employer." (Veh.Code, §§ 2430.1, subd. (b), 2436, subd. (d); Sts. & Hy.Code, § 2561, subd. (b).)." Id.

alter general tort liability principles applicable to the CHP, or (3) render the special employment doctrine inapplicable to the CHP in the context of the FSP program.

IV. BECAUSE THE FSP STATUTES AND LEGISLATIVE HISTORY OF THE FSP ARE SILENT REGARDING ANY INTENT TO ALTER TORT LIABILITY RULES, THE COURT OF APPEAL SHOULD HAVE INTERPRETED THE LANGUAGE OF THE FSP IN LIGHT OF THE LAW IN EXISTENCE WHEN THE FSP WAS ENACTED

The Court of Appeal could not point to any expression of Legislative intent to alter the general rules of the Tort Claims Act or other liability rules applicable to the CHP's role in the FSP program. In fact, there was no such expression; the Legislature was silent on the issue.

As one court stated, "caution must temper judicial creativity in the face of legislative or regulatory silence." Drennan v. Security Pacific National Bank (1981) 28 Cal.3d 764, 773 [170 Cal.Rptr. 904, 909] Or, as another court held: "We are not at liberty to insert into the statute a term the Legislature chose to omit. Its absence cannot be assumed to be without meaning." Azusa Land Partners v. Department of Indus. Relations (2010) 191 Cal.App.4th 1, 19-20 [120 Cal.Rptr.3d 27, 37]

In circumstances such as this, where a statute is silent on a particular issue, a cardinal principle of statutory interpretation provides that the "Legislature 'is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof,'" People v. McGuire (1993) 14 Cal.App.4th 687, 694 [18 Cal.Rptr.2d 12, 15].[11]

V. GIVEN THE SILENCE OF THE FSP AND ITS LEGISLATIVE HISTORY ON ISSUES OF TORT LIABILITY, THE COURT OF APPEAL SHOULD HAVE FOLLOWED THE PRINCIPLE THAT UNLESS SOME INTENT TO ALTER THE LAW IS EXPRESSLY PROVIDED, STATUTES SHOULD NOT BE INTERPRETED TO ALTER THE COMMON LAW

" 'As a general rule, "[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. [Citation.] 'A statute will be construed in light of common law decisions, unless its language " 'clearly and

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[11] Consistent with that rule, a "statute will be construed in light of the common law unless the Legislature clearly and unequivocally indicates otherwise. (Citations omitted)" Arnold v. Mutual of Omaha Ins. Co. (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213, 218]

In Arnold, supra, the Court of Appeal went on to hold: "Thus, when a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." Id.

unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . ' [Citations.]" [Citation.]' [Citation.]" Accordingly, '[t]here is a presumption that a statute does not, by implication, repeal the common law. [Citation.] Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws.'" People v. Ceja (2010) 49 Cal.4th 1, 10 [108 Cal.Rptr.3d 568][12]

VI. IN THIS MATTER, THE COURT OF APPEAL ABROGATED EXISTING LAW, AND IMPLIED AN INTENT TO ALTER LONGSTANDING PRINCIPLES OF TORT LIABILITY, WITHOUT ANY EXPRESSION OF LEGISLATIVE INTENT TO DO SO

By the time the FSP was enacted, there was a well developed body of statutory (Tort Claims Act) and case law which imposed special employer liability upon governmental entities such as the CHP who exercised powers of control over negligent actors such as the FSP tow truck driver in this case. In the Opinion, the Court of Appeal abrogated existing law without a scrap of evidence that the Legislature intended to alter tort liability law in any way. By doing so, the Court of Appeal stripped the Petitioners of their

[12] See, also, Dillingham-Ray Wilson v. City of Los Angeles (2010) 182 Cal.App.4th 1396, 1407 [106 Cal.Rptr.3d 691, 701].

remedies, and published an Opinion which, if followed, may result in wild variations in statutory interpretation.

(A) Long Before the FSP Was Enacted, the Special Employment Doctrine Was Well Established in this State

The Freeway Service Patrol Act was enacted in 1992. California Streets and Highways Code § 2560. Long before then, our courts viewed the dual employment doctrine as "well recognized in the case law. 'Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers his original or "general" employer and a second, the "special' employer."' (Citations omitted)'" Kowalski v. Shell Oil Co. (1979) 23 Cal. 3d 168, 174-75 [588 P.2d 811, 814-15].

"A general and special employer may both be held liable for the employee's negligence where such had some power, not necessarily complete, of direction and control; the control need not be exercised; it is deemed sufficient if the right to direct the details of the work existed. (Citation omitted) Where, at the time of the accident, both the general and the special employer exerted some measure of control over the employee, both may be held liable for the employee's negligence." Strait v. Hale

Constr. Co. (1972) 26 Cal. App. 3d 941, 946 [103 Cal. Rptr. 487, 491].

By the time the FSP was enacted in 1992, there was a well developed body of case law on the subject. According to the Supreme Court, "[i]n determining whether a special employment relationship exists, the primary consideration is whether the special employer has ' "(t)he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. . . ." ' (citation omitted) . . . And the existence or nonexistence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact.' " Kowalski v. Shell Oil Co. supra, 23 Cal. 3d at 175, 151 Cal.Rptr. at 675.[13]

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[13] It had been made "clear that relinquishment of 'all' control is not necessary for creation of a special employment relationship. 'Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer.' " Brassinga v. City of Mountain View (1998) 66 Cal.App.4th 195, 216 [77 Cal.Rptr.2d 660, 672].

(B) Long Before the FSP Was Enacted, the California Tort Claims Act Had Recognized the Special Employer Liability of Public Entities for Decades Before the Enactment of the FSP

As noted above, the FSP was enacted in 1992. By that time, the Tort Claims Act, which was enacted "[]in 1963 . . . in order to provide a comprehensive codification of the law of governmental liability and immunity in California," Farmers Insurance Group v. County of Santa Clara (1995) 11 Cal.4th 992, 1001 [47 Cal.Rptr.2d 478, 484], had been in effect for more than three decades. Government Code § 815.2, which is part of the Tort Claims Act, has since 1963 defined the tort liability of a public entity as follows: "(a) A public entity is liable for injury proximately caused by an act or omission of an ***employee*** of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that ***employee*** or his personal representative." (Emphasis added).

The term "employee" is defined, for purposes of the Tort Claims Act, in Government Code § 810.2. That section, enacted in 1963 and amended in 1977 (fifteen years before the FSP was enacted), contains the following definition: "'Employee' includes an . . . employee, or ***servant***,

whether or not compensated, but does not include an independent contractor." (Emphasis added).

The term "servant" is not defined in Section 810.2. Under well settled principles of law, when a statute contains but does not define a term, the common law definition of that term controls. That rule is particularly applicable when a statute contains terms relating to employment. Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal.App.4th 1, 10 [64 Cal.Rptr.3d 327, 335]; Metropolitan Water Dist. of Southern California v. Superior Court (2004) 32 Cal.4th 491, 500 [9 Cal.Rptr.3d 857, 862-63, 84 P.3d 966, 971]; Bradley v. California Dept. of Corrections and Rehabilitation (2008) 158 Cal.App.4th 1612, 1626 [71 Cal.Rptr.3d 222, 232]. See, also, Arnold v. Mutual of Omaha Ins. Co. (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213, 218] ("A statute will be construed in light of the common law unless the Legislature clearly and unequivocally indicates otherwise") and Bowman v. Wyatt (2010) 186 Cal.App.4th 286, 299 [111 Cal.Rptr.3d 787, 796].

For almost two decades before the Tort Claims Act was passed, and for almost five decades before the FSP Act was passed, California followed the Restatement of Agency § 220 definition of the term "servant." 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]. See, also, Empire Star Mines Co. v. California Employment Commission (1946) 28 Cal.2d 33, 44 [168 P.2d 686, 692] overruled on other grounds by People v. Sims (1982) 32 Cal.3d 468 [186 Cal.Rptr. 77]; Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal.3d 943, 950 [88 Cal.Rptr. 175, 179]. The same definition is still in use.[14]

Section 220 of the Restatement defines the term "servant" to include 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."[15] The situation described in

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[14] See, e.g., Bowman v. Wyatt (2010) 186 Cal.App.4th 286, 300 [111 Cal.Rptr.3d 787, 796]; Air Couriers Intern. v. Employment Development Dept.(2007) 150 Cal.App.4th 923, 933 [59 Cal.Rptr.3d 37, 43]; Societa Per Azioni De Navigazione Italia v. City of Los Angeles, supra; In-Home Supportive Services v. Workers' Comp. Appeals Bd. (1984)152 Cal.App.3d 720, 728 [199 Cal.Rptr. 697, 701].

[15] FSP tow truck drivers plainly render patrol services for the benefit of the CHP, and which are therefore "services in the affairs of" the CHP. The governing statutes describe FSP program as a device to enable the CHP to carry out its own statutory patrol responsibilities. As noted above, Vehicle Code § 2401 provides that the CHP "shall make adequate provision for patrol of the highways at all times of the day and night," and Vehicle Code § 2435 states that the CHP "is responsible for the rapid removal of impediments to traffic on highways within the state." Section 2435 was adopted as part of AB 123, which contains the following findings by the Legislature with regard to the CHP's duty to remove traffic impediments: "The Legislature also finds that the Department of the California Highway

the Restatement is indistinguishable from the conditions which give rise to special employment."'Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers his original or "general" employer and a second, the "special' employer."'" Kowalski v. Shell Oil Co. (1979) 23 Cal.3d 168, 174 [151 Cal.Rptr. 671, 674-75, 588 P.2d 811, 814]; Brassinga v. City of Mountain View (1998) 66 Cal.App.4th 195, 209 [77 Cal.Rptr.2d 660, 667-68] (applying definition to public entity).

(C) Long Before the FSP Was Enacted, the Special Employment Doctrine Had Been Applied to Governmental Entities

Twenty years before the Legislature's 1992 adoption of the FSP Act, the Courts of this state had held that governmental entities are subject to liability as special employers. Back in 1971, the Supreme Court applied the doctrine to a school district in County of Los Angeles v. Workers' Comp.

Patrol, in cooperation, with the Department of Transportation, is responsible for the rapid removal of impediments to traffic on highways within the state." See, also, Streets & Highways Code § 2560.5, in which the Legislature recognized that in order to perform the CHP's responsibilities relating to removal of traffic impediments, the CHP enters into Freeway Service Patrol programs, which are "a permanent part of the state's overall program to keep California's highways safe and free of traffic congestion."

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.")

Ten years before the FSP was enacted, in 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], the California Supreme Court had no hesitation in relying upon Restatement § 220 as a basis for imposing special employment liability upon a public entity. Addressing special employer liability for the negligence of a ship's pilot (Peterson), the Supreme Court held: "Since Petersen simultaneously served two employers-the City and the Shipowner-at the time of the collision, under the doctrine of respondent superior both masters would be jointly and severally liable to third parties for his negligence."

Eight years before the FSP was adopted, the Court of Appeal decided In-Home Supportive Services v. Workers' Comp. Appeals Bd. (1984) 152 Cal.App.3d 720, 732 [199 Cal.Rptr. 697, 704]. In that case, the dual (joint or special) employment doctrine was applied to the State Department of Social Services in the context of the Welfare & Institutions Code § 12300 et seq. program that paid for domestic services.

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Six years before the FSP was enacted, the special employment doctrine was again recognized as applicable to public entities in In-Home Supportive Services v. Workers' Comp. Appeals Bd. (1984) 152 Cal.App.3d 720, 728 [199 Cal.Rptr. 697, 701]. In language tailor made for the issues now before the Supreme Court, the Court in that case held: "General and special employments occur when a general employer furnishes an employee to another person and during this engagement both employers have some right of control over the performance of the employee's services." 152 Cal.App.3d at 732 [199 Cal.Rptr. at 704].

VII. INTERPRETED ACCORDING TO THEIR PLAIN MEANING, THE FSP STATUTES REVEAL NO LEGISLATIVE INTENT TO ABROGATE ANY ASPECT, STATUTORY OR JUDICIAL, OF TORT LIABILITY IN THE CONTEXT OF THE FSP

In the Opinion, the Court of Appeal concluded that the FSP statutes reflect a Legislative intent to exclude the CHP from the special employer doctrine, despite existing law, because in "other pertinent portions of the Vehicle Code, however, the statutes draw a clear distinction between the CHP on the one hand and an 'employer' on the other." State ex rel. Department of California Highway Patrol v. Superior Court, 163

Cal.Rptr.3d at 336-37. In support of that conclusion, the Opinion notes (1) that Vehicle Code §2435 provides that the CHP may enter into contracts with "employers" for FSP operations, (2) that the CHP, in conjunction with CalTrans, is responsible for establishing minimum training standards for "employers," (3) that the CHP must provide training for all "employers," and the "employers" are required to attend training sessions, (4) that tow truck drivers are required to inform both their "employers" and the CHP of certain arrests or convictions, (5) that the CHP must obtain employers' fingerprints and verify that the employers have valid California driver's licenses, (6) that the employer must maintain lists of eligible and non-eligible drivers at its place of business, and (7) that employers are subject to penalties if they fail to comply with certain legal requirements of the FSP program. Id.

In interpreting the FSP statutes, and in interpreting all statutes, "courts prefer a more natural reading of text to a less natural one." Kurtin v. Elieff (2013) 215 Cal.App.4th 455, 471 [155 Cal.Rptr.3d 573, 586]. That reading begins, of course, with "the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.' [Citation.] If the statutory language is clear and unambiguous our inquiry ends. "If there is no ambiguity in the language, we presume the Legislature

meant what it said and the plain meaning of the statute governs."'" Pineda v. Bank of America, N.A. (2010) 50 Cal.4th 1389, 1394 [117 Cal.Rptr.3d 377, 380-81]. For purposes of statutory interpretation, the "'words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.'" Holland v. Assessment Appeals Bd. No. 1 (2014) 58 Cal.4th 482 [167 Cal.Rptr.3d 74, 79, 316 P.3d 1188].

On their face, the statutes relied upon in the Opinion reveal no intent to abrogate principles of tort liability and, in fact, have nothing whatsoever to do with that subject. Viewed in context, and in light of the ordinary meaning of the words they use, those statutes are merely a device for the allocation of certain administrative responsibilities within the FSP. Each of the Vehicle Code sections cited by the Court of Appeal uses the terms "employer" and/or "employee" in that context.

The Court of Appeal began its statutory interpretation analysis by noting that Vehicle Code § 2430.1(b) defines the term "employer" in the context of FSP statutes. According to that statute: "'Employer' means a person or organization that employs those persons defined in subdivision (a), or who is an owner-operator who performs the activity specified in subdivision (a), and who is involved in freeway service patrol operations pursuant to an agreement or contract with a regional or local entity." Based

upon its plain language and context, § 2430.1 is merely an aid to understanding the meaning of a term in a specific article, as is apparent from the wording of § 2430.1 itself. That section specifies: ***"As used in this article***, each of the following terms has the following meaning . . . " (emphasis added). Section 2430.1 simply defines the two kinds of providers (employers of tow truck operators and owner-operators) with whom the CHP can contract with for FSP towing services. Viewed in the context of Article 3.3 of the Vehicle Code, the § 2430.1 definition of an "employer" was plainly intended by the Legislature as an aid to understanding the allocation of administrative responsibilities within the FSP.

Section 2430.1 does ***not*** say that the definition applies for purposes of the Tort Claims Act, or for purposes of determining tort liability, or for any other purpose. And, since FSP tow truck drivers, like all other special employees, have a general employer, that statute adds nothing to the tort liability discussion.

Likewise, the wording of Vehicle Code § 2435 does not indicate any Legislative intent to abrogate tort liability principles. That statute simply states that "the Department of the California Highway Patrol may enter into agreements with employers for freeway service patrol operations under an agreement or contract with a regional or local entity." Far from negating the

provisions of the Tort Claims Act, that statute merely specifies that two categories of providers of towing services with whom the CHP may contract for FSP towing services as (1) "employers" (defined in subsection (b) as "a person or organization that employs [tow truck drivers]) or"(2) "an owner-operator who performs the activity specified . . . and who is involved in freeway service patrol operations pursuant to an agreement or contract with a regional or local entity." The term "employer" is simply a recognition that tow truck drivers who are not owner operators work for someone, i.e., have a general employer.

Each of the Vehicle Code sections cited by the Court of Appeal, uses the term "employer" in the administrative responsibility context. In this regard, the Petitioners ask the Supreme Court to note:

- Vehicle Code § 2430.5 states that every "employer intending to hire a tow truck driver" must require "the applicant for employment to submit a temporary tow truck driver certificate . . . "
- Vehicle Code § 2430.3 requires every FSP tow truck driver . . . to "notify each of his or her employers and prospective employers and the Department of the California Highway Patrol of an arrest or conviction . . ."
- Vehicle Code § 2431 deals only with procedures for "conducting criminal history and driver history screening of tow truck

drivers and employers." It requires the CHP, among other things, to "[o]btain fingerprints from tow truck drivers and employers," and to "[v]erify that the tow truck driver or employer, or both, have a valid California driver's license . . . "

- Vehicle Code § 2432.1 empowers the CHP to suspend an "employer" who has "failed to comply with the requirements of this article."

- Vehicle Code § 2436.5 requires the CHP to provide "training . . . for all employers and tow truck drivers."

- Vehicle Code § 2436.7 states that every "[t]ow truck driver and employer, involved in a freeway service patrol operation . . . shall attend the training specified . . . ," that "[t]he employer shall maintain this information in the tow truck driver files . . . " and that "[e]very employer shall make the file available for inspection by the department at the employer's primary place of business . . . '

Finally, Vehicle Code § 2435 does not compel any different conclusion. It states that "the Department of the California Highway Patrol may enter into agreements with employers for freeway service patrol operations under an agreement or contract with a regional or local entity." Far from negating the provisions of the Tort Claims Act, that statute merely

specifies that the CHP may contract for FSP towing services with two categories of providers, (1) "employers" (defined in subsection (b) as "a person or organization that employs [tow truck drivers] or"(2) "an owner-operator who performs the activity specified . . . and who is involved in freeway service patrol operations pursuant to an agreement or contract with a regional or local entity." The term "employer" is simply a recognition that tow truck drivers who are not owner operators work for someone and, in the eyes of the law, have a general employer.

VIII. SUPREME COURT REVIEW IS APPROPRIATE IN THIS CASE

Issues of statutory interpretation arise constantly in this state, and "would typically be a matter of general public interest." Kern County Water Agency v. Watershed Enforcers (2010) 185 Cal.App.4th 969, 978 [110 Cal.Rptr.3d 876, 882]. Given the public interest in the correct interpretation of statutes, it is vital that statutes be interpreted in a predictable way. "[C]ertainty, predictability and stability in the law are the major objectives of the legal system." Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal.4th 85, 93 [44 Cal.Rptr.2d 420, 424]. Our courts have therefore crafted rules to follow when issues of statutory interpretation arise. General Electric Capital Auto Financial Services, Inc. v. Appellate Division (2001) 88

Cal.App.4th 136, 143 [105 Cal.Rptr.2d 552, 557].

In the context of this case, well established principles of statutory construction provide, among other things, that the Legislature is deemed to have been aware of statutes and judicial decisions in existence when the FSP was enacted, that the Legislature is deemed to have enacted the FSP in light of those authorities, and that the FSP should not be interpreted to abrogate existing law unless statutes or Legislative history clearly disclose an intent to do so.

Here, however, the Court of Appeal disregarded those principles when it interpreted the FSP. In fact, the Opinion does not contain a single word concerning the state of the law when the FSP was enacted. By disregarding the state of the law when the FSP was enacted, the Court of Appeal reached an erroneous conclusion which deprived the Petitioners of their remedies.

On a broader level, the approach utilized by the Court of Appeal in this case may lead to other courts disregarding principles of statutory construction, interpreting statutes as abrogating important principles of liability despite the absence of any expression of Legislative intent to do so, and interpreting statutes in a way that is contrary to the language of the Tort Claims Act. The result, apart to the injustice to the Petitioners, is the

injection of uncertainty, inconsistency and inequity into the process of interpreting statutes of public concern. Supreme Court review is therefore appropriate to correct an erroneous precedent, to restore remedies to injured persons, and to avoid launching lines of erroneous analysis that may migrate into other areas of statutory interpretation.

Dated: February 20, 2014

Respectfully submitted,

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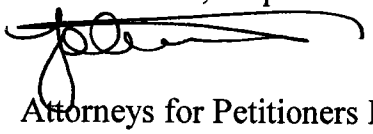

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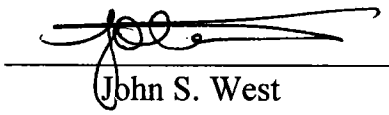
CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 8446 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: February 20, 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 February 20, 2014, I served the foregoing document described as **PETITIONER'S OPENING BRIEF ON THE MERITS** 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
Case No. G047922

Clerk of the Court
CALIFORNIA COURT OF APPEAL
Fourth District, Division Three
601 West Santa Ana Boulevard
Santa Ana, CA 92701

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

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ORANGE COUNTY SUPERIOR COURT
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Santa Ana, CA 92701

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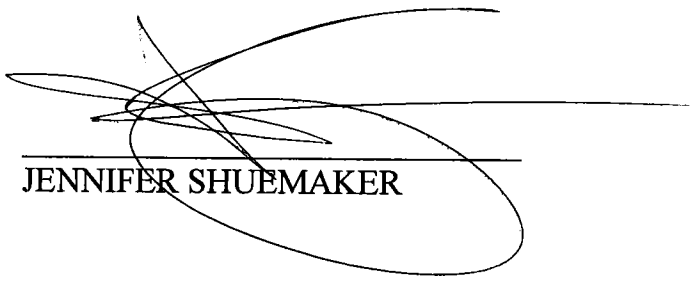
[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service is made.



JENNIFER SHUEMAKER