In the Supreme Court of the State of California

STATE OF CALIFORNIA, ex rel. Department of the California Highway Patrol,
Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF ORANGE,
Respondent,

MAYRA ANTONIO ALVARADO and DYLAN HARBORD-MOORE,
Real Parties in Interest (Petitioners Herein).

Case No. S 214221

ANSWERING PARTY'S BRIEF ON THE MERITS

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

Orange County Superior Court, Case No. 30-2008-00116111
The Honorable Robert J. Moss, Judge

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Answering Party State of California, acting by and through the Department of the California Highway Patrol (CHP), defendant in the Superior Court and Petitioner in the Court of Appeal, presents its brief on the merits 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 both under the liability provisions of the Government Claims Act (Gov. Code, §§ 801, et seq.) and also under the statutes governing the FSP program.

The State's potential vicarious liability for the acts of others is governed by statute, not common law. The FSP program was created by statute. (Sts. & Hy. Code, §§ 2560, et seq.) The statutes governing the FSP program evince a clear legislative intent that the CHP is not an "employer" of tow truck drivers under the FSP.

Tow truck companies in the FSP 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 are outlined in the enacting statutes, and in related provisions in the Vehicle Code. (Veh. Code, §§ 2430-2435.6.) These statutes define the "employer" of tow truck drivers under the FSP program to be towing companies, not the CHP.

Plaintiffs' argument for the "special employment" doctrine to apply to CHP's role in the FSP is erroneous for two primary, interrelated reasons: (1) the text, statutory structure, and legislative history of the FSP program indicates legislative intent that tow truck drivers are employees of towing companies contracted for the FSP, not "special employees" of the State, and (2) the public policy behind the "special employment" doctrine does not support imposing vicarious liability on the CHP for exercising its statutory duties in managing the program.

The Plaintiffs argue that the Court of Appeal opinion could "serve as precedent for disregarding longstanding legal principles of tort liability and of statutory interpretation in settings beyond the bounds of this dispute." (Plaintiffs' Brief, p. 3.) Plaintiffs are incorrect. The holding in this case is limited to the interpretation of the Freeway Service Patrol Act and the legal relationship between the CHP and tow truck drivers employed by contractors in the FSP. Adopting Plaintiffs' broad interpretation of the "special employment" doctrine would expose the State to unintended, unpredictable, and potentially unlimited tort liability for negligence of non-state employee operators of hundreds of tow trucks contracted for the Freeway Service Patrol program statewide.

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 Superior Court case, Plaintiff Mayra Alvarado alleged that she 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, plaintiff Dylan Harbord-Moore, was a passenger in her vehicle and

suffered less serious injuries. The tow truck was driven by Joshua Mark Guzman, an employee of the contractor, California Coach Orange, Inc.

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

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, pp. 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.)

Before reaching this decision, the Court of Appeal first acknowledged and summarized the law on general versus special employment:

> The possibility of dual employment is 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."

(Opinion, p. 4, quoting *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174-175.)

The Court of Appeal did not reject the common law. Instead, it concluded that the "issue before us is one of legislative intent in general regarding the employment relationship, if any, between the CHP and FSP tow truck drivers." In analyzing the statutes setting forth duties and responsibilities of the entities and contractors in the FSP program, the Court concluded that the Legislature intended to distinguish the CHP from "employers" of the tow truck drivers and therefore CHP as a matter of law could not be the "special employer". (Opinion, 6-7.)

This case should be resolved in its favor based upon the plain text of the statutes and the apparent legislative intent behind the FSP statutes. However, in event the Court concludes that this intent is unclear, the application of common law should be viewed in context with the policy purpose of the common law "special employment" doctrine. If the Court were to conclude that CHP could be considered a special employer of FSP tow truck drivers, the decision would impose a substantial potential liability on CHP which could exceed the entire operating budget of the program. It could also lead to imposition of vicarious liability on CHP and other law enforcement agencies which have agreements with contractors to provide non-FSP "rotation tow" services to remove disabled or impounded vehicles from streets and highways. As in the FSP, these agreements authorize

some degree of enforcement "control" by CHP over tow truck drivers performing these services.

FACTUAL AND PROCEDURAL BACKGROUND

A. The FSP and Governing Statutes

1. The Freeway Service Patrol Program

The FSP in Orange County is one of several such programs legislatively implemented and jointly operated in urban areas by the CHP, Caltrans, and regional transit agencies. (Streets & Hwy. Code, § 2561(a).) The program was established as a pilot program, which was later made permanent by the Freeway Service Patrol Act, Streets and Highways Code sections 2560, et seq. (Stats.1992, ch 1109 (AB 3346).)

The FSP is a "partnership between the Department of Transportation, the Department of the California Highway Patrol, and local and regional entities" which uses "teams of specially trained tow truck drivers who patrol the most congested freeways offering stranded motorists help that is free of charge and includes services such as changing a flat tire, 'jump starting' a dead battery, repairing hoses, refilling radiators, and providing a gallon of fuel or a tow to a predetermined safe location off the freeway." (Stats. 2000, ch. 513, §1.)

The program is intended to remove even vehicles which are not directly impeding traffic, given that motorists often slow down merely to gawk at wrecked or disabled vehicles on the shoulder. As Justice Scotland explained:

> Our increasingly congested freeways have caused the Legislature to take steps to promote efficiency, including, among other things, the placement of call boxes to enable

> motorists in need of aid to obtain assistance (Sts. & Hy. Code, § 2550), and the permanent implementation of a freeway service patrol system on traffic-congested urban freeways. (Sts. & Hy. Code, § 2560 et seq.) Distractions that can inhibit the smooth flow of traffic are matters of legitimate governmental concern since such distractions can hamper the ability of freeways to serve the purpose for which they are built and maintained.

(*Sanctity of Human Life Network v. California Highway Patrol* (2003) 105 Cal.App.4th 858, 891 (Scotland, P.J., dissenting.))

"By necessity" the State utilizes private contractors to provide tow services when needed on the highways. (Stats 1988 ch 554, §1(a).)

2. The Freeway Service Patrol Act

The statutes creating the FSP are contained in Streets and Highways Code sections 2560 – 2565. These statutes set forth in some detail how the program is funded and how new programs can be established. Section 2561.3 provides that the FSP in any particular area shall be operated pursuant to an agreement between the CHP, Caltrans, and the local transportation agency. Section 2562.2, subdivision(c)(2) provides that the local transportation agency contracts with the CHP to provide "direct supervisory services" for the FSP.

The statutes also include provisions providing for logos for participating tow trucks and on training and certifications for drivers and operators. (*Id.* §§ 2562.5, 2563.) Section 2565 requires Caltrans, CHP and the participating transportation agencies to develop and periodically update operational guidelines for FSP.

Related provisions in the Vehicle Code provide additional detail on the operation of the FSP. (Veh. Code, §§ 2430, et seq.) Vehicle Code section 2436.5, subdivision (a) provides that CHP is required to provide training for all "employers" and tow truck drivers, pursuant to a reimbursable agreement with the local transportation agency. That section requires that dispatchers for FSP be employees of CHP or Caltrans.

These statutes also define who is the "employer" of the tow truck drivers assigned to FSP duties. Vehicle Code section 2430.1, subdivision (b), defines employer as "a person or organization that employs [tow truck drivers], 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." (Veh. Code, § 2430.1, subd. (b).)

In Orange County, the regional transportation agency is the OCTA. (Pub. Util. Code, §130050, et seq.) The FSP statutes provide for such regional agencies to contract with vendors for FSP tow services. (Veh. Code, § 2430.1, subd. (b).)

3. Operation of the Orange County FSP

As anticipated by the statutes, the FSP in Orange County was operated pursuant to interagency agreements between OCTA, CHP and Caltrans. These include the agreement between OCTA and CHP, which entrusts CHP with responsibility for "performing necessary daily project field supervision, program management and the oversight of the quality of the contractor services." The agreement provides that CHP was to assign three full-time officers to FSP field supervision and that other assigned personnel for dispatch would be state employees working

under the direction of CHP. (CHP Appendix in Support of Petition for Writ of Mandate (App.) 9, Exhibit 10, p. 3.)

The management responsibilities of the three agencies in the FSP are set forth in the Standard Operating Procedures of the Orange County FSP (SOP) and in interagency agreements between the CHP, Caltrans and OCTA. (App. 9, Exhibits 8-10.) The SOP contains rules and procedures required to be followed by FSP tow contractors and their employees. The provisions of these procedures are incorporated into the contracts between OCTA and FSP contractors. FSP drivers are required to keep a copy of the SOP in their vehicles. (App. 9, Exhibit 8.)

CHP and Caltrans also had an interagency agreement, which provided that Caltrans would reimburse CHP for its services in providing field supervision of FSP service, including enforcement of the terms of the SOP agreed upon by CHP, Caltrans and OCTA. (App. 9, Exhibit 9, Interagency Agreement.)

OCTA selected contractors for the Orange County FSP by soliciting requests for proposals from qualified towing contractors. After the deadline for submitting proposals, they were evaluated by a committee consisting of OCTA staff and a representative of CHP. (App. 8, ¶¶ 6-7.)

The committee reviews the proposals and rates them using a rating form. Subsequently, the committee interviews the offerors who presented the highest rated proposals and generally tours their facilities. Thereafter, the committee meets to discuss and adjust the ratings based on the interviews and inspections. (App. 8, ¶ 8.) The evaluation of requests for proposals is based on a "best value" analysis rather than strictly making a recommendation to accept the

lowest bid. The ratings are then reviewed internally by OCTA staff, and a recommendation is made to the full OCTA Board of Directors, which makes the final decision to award the contract. (App. 8, ¶ 9-10.) In this case, the Board accepted the recommendation to award a contract to California Coach. (*Id.*) The contract between California Coach and OCTA provided that California Coach was required to hire and train its drivers and procure the required equipment including dedicated tow trucks. (App. 7, Undisputed Fact (UF) 4, 7.) The contract provided that the drivers would be employees of the contractor, not the OCTA. (App. 7, UF 5.) There was no contract between the CHP and California Coach. (App. 7, UF 3.) California Coach was paid for its services by OCTA, not CHP. (App. 7, UF 11.)

The tow contractors in the FSP, such as California Coach, were paid under the contract by the local entity, here OCTA. As part of its field supervision of the tow truck drivers, assigned CHP officers could issue "docks" for violations of the SOP, such as a driver arriving late to his beat, failing to have the required equipment on the truck, or failure to follow other procedures. The docks would be transmitted to OCTA, which would deduct the contract penalty from payment to the contractor. (App. 8, ¶ 17) Under the contract and SOP, CHP could also suspend or remove a driver from FSP assignment if the driver committed a serious violation of the SOP or state law. (App. 7, UF 17.) The contractor or driver had the right to appeal any dock or other sanction. Such appeals were handled by a review of the evidence by a committee of OCTA and CHP representatives. (App. 7, UF 18.) If a driver was suspended or removed from FSP assignment, it did not terminate the driver's employment with the tow contractor, who was free to continue to employ the driver in non-FSP assignments provided

the driver continued to have a valid license and tow certificate. (App. 8, ¶ 18.)

B. Procedural Background

Plaintiffs' accident occurred on January 16, 2008, when the California Coach tow truck rear-ended Mayra Alvarado's vehicle while on patrol for FSP in Orange County. The Superior Court action was filed on December 15, 2008. (App. 1.) The only claim relevant to this appeal was raised in the second amended complaint, filed on June 7, 2011. (App. 4, ¶17.)

The CHP moved for summary judgment. (App. 6-9.) The motion was heard and denied on November 9, 2012. However, at the request of the CHP, the court agreed to certify the controlling legal issue for review, pursuant to Code of Civil Procedure section 166.1. The order denying summary judgment was filed on January 4, 2013, and notice was served on January 9, 2013. (App. 15.) The CHP thereafter petitioned for writ of mandate, which was granted by the Court of Appeal on September 17, 2013. This Court granted review on January 21, 2014.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY INTERPRETED LEGISLATIVE INTENT THAT FSP TOW TRUCK DRIVERS ARE EMPLOYEES OF THE CONTRACTORS, NOT THE CHP

The Court of Appeal correctly held that the CHP is entitled to summary judgment on Plaintiffs' claims that the CHP should be held vicariously liable as a "special employer" of a tow truck driver under the FSP program. The CHP's potential liability as an "employer" is governed by the statutory definition of "employee". Here, by its plain language, the

FSP Act makes clear that the tow truck companies contracted by local transportation agencies are the "employer" of the drivers, not the CHP.

A. The State's Potential Liability Is Governed by Statute, Not Common Law

The liability of the State for negligent acts of its employees is governed by the Government Claims Act, Government Code sections 810, et seq. Liability is strictly based on statute; there is no common law liability. (Gov. Code, § 815; *Williams v. Horvath* (1976) 16 Cal.3d 834, 838.) Under the Government Claims Act, the State may, under some circumstances, be held liable for negligent acts of an "employee," which is defined as follows:

> "Employee" includes an officer, judicial officer as defined in Section 28 of the Elections Code, employee, or servant, whether or not compensated, but does not include an independent contractor.

(Gov. Code, § 810.2.) This definition is generally narrower than the common-law definition. Indeed, the Legislative Committee comment to section 810.2 states in part:

> "Employee" was originally defined (in the bill as introduced) to include "an officer, agent or employee," but not an "independent contractor." By amendment, the word "servant" was substituted for "agent" because (1) "servant" was considered more appropriate than "agent" when used in a statute relating to tort liability and (2) the public entities feared that to impose liability upon public entities for the torts of "agents" would expand vicarious liability to include a large indefinite class of persons and "servant" was believed to be more restrictive than "agent."

Further, section 810.2 "does not expand" the common-law concept of employment in any respect. (*Townsend v. State of California* (1987) 191 Cal.App.3d 1530, 1533-1534 [holding that State University basketball

player who punched an opposing player was not an "employee" of the University].)

B. The FSP Act Designates the Tow Contractors as the "Employer" Without Limitation and Does Not Treat CHP as an "Employer" for Any Purpose

The FSP Act designates tow contractors as the "employer" of tow truck drivers, and makes clear that the CHP is not considered the employer for any purpose. The plain language of these statutes must be the starting point in the analysis of Plaintiffs' claims.

As this Court has explained:

> Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. *In determining such intent, a court must look first to the words of the statute themselves*, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.

(*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387, emphasis added, citations omitted.)

Legislative intent generally is gleaned "from the plain or ordinary meaning of the statutory language, unless the language or intent is uncertain." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 641.) In such a case both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. (*Dyna-Med, Inc., supra*, at p. 1387.) However, "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." (*Fireman's Fund Insurance Company v. Workers' Compensation Appeals Board* (2010) 189 Cal.App.4th 101, 109-110, citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In enacting a statute, the Legislature is deemed to have been aware of existing statutes and judicial interpretations. (*Fireman's Fund Ins. Co, supra,* at pp. 109-110, citations omitted.) The court must "consider 'the object to be achieved and the evil to be prevented by the legislation.'" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276, [citation omitted].)[1]

The rules of statutory construction require courts to construe a statute to "render it reasonable, and avoid absurd consequences." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 348.) Where uncertainty exists in the meaning of a statute, consideration should be given to the consequences that will flow from a particular interpretation. (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688.)

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[1] *Horwich* considered whether plaintiffs, whose daughter was killed while driving without insurance, were barred from recovering non-economic damages from the other driver. This Court consulted the legislative history of the applicable statute, concluding that an "injured person" barred from recovery did not include the uninsured's parents. (*Id.* at 277.) The goal of the statute was largely to punish the uninsured, and it was not met by depriving their heirs of recovery after their death. (*Id.* at 281-283.)

The starting point in this analysis is the statutory definition of "employer" of FSP tow truck drivers. Vehicle Code section 2430.1 provides in part:

> As used in this article, each of the following terms has the following meaning:
>
> (a) "Tow truck driver" means a person who operates a tow truck, who renders towing service or emergency road service to motorists while involved in freeway service patrol operations, pursuant to an agreement with a regional or local entity, and who has or will have direct and personal contact with the individuals being transported or assisted. As used in this subdivision, "towing service" and "emergency road service" have the same meaning as defined in Section 2436.
>
> (b) "Employer" means any 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.

The plain language of section 2430.1 makes clear that the CHP is not an "employer" of a tow truck driver under the FSP.

Vehicle Code section 2430.1, subdivision (b), defines "employer" as an "organization" that employs FSP drivers, and also uses the term as to "an owner operator" who performs FSP towing service. In this context, the Legislature defines "employer" using the term "organization" to describe a towing company (or membership service such as the Automobile Club) or a self-employed tow truck driver. This is evident in the last phrase in subdivision (b) "and who is involved in freeway service patrol operations pursuant to an agreement or contract with a regional or local entity." Under Streets and Highways Code section 2562.2, subdivision (c)(1), it is the

regional transportation agency such as OCTA which contracts with the "employer" organizations or owner operators.

The conclusion that the term "organization" in Vehicle Code section 2430.1 refers to towing companies or service providers, not CHP, is underscored elsewhere in the relevant statutes by references to "road service organizations" or "highway service organizations." (See Veh. Code, §§ 2430, 2435, and 2436.) Section 2430 appears to use the two terms interchangeably. (See subd. (a) and (b)(8) and (9).) Section 2436, subdivision (e), defines "highway service organization" as a "motor club" such as the Automobile Club or organization which operates or directs service vehicles providing emergency roadside assistance to motorists. None of the statutes refer to CHP in this context.

The statutory scheme as a whole further supports the conclusion that the Legislature intended to distinguish CHP from the "employers" of FSP drivers. Throughout the FSP Act, the term "employer" is repeatedly used in reference to the towing contractor, and never as to CHP, Caltrans or the regional transportation agency. CHP instead is treated as a law enforcement and supervisory partner in the program, overseeing both the field work of tow truck drivers and their "employer."

For example, Streets and Highways Code section 2562.2, subdivision (c)(1), relating to guidelines developed by Caltrans for grants to regional transportation agencies for operating a FSP program, provides that the grants are for "contracting with an employer for the provision of new or expanded freeway service patrol service and for contracting with the Department of the California Highway Patrol for provision of only direct supervisory service."

Section 2430.3, subdivision (a), distinguishes between the CHP and employers:

> Every freeway service patrol tow truck driver and any California Highway Patrol rotation tow truck operator shall notify each of *his or her employers* and prospective employers *and the Department of the California Highway Patrol* of an arrest or conviction of any crime ... prior to beginning the next workshift for that employer.

(Emphasis added.)

The distinction is also made in Vehicle Code section 2430.5:

> (a) *Every employer intending to hire* a tow truck driver on or after July 1, 1992, shall require the applicant for employment to submit a temporary tow truck driver certificate issued by the *department* [CHP] or a permanent tow truck driver certificate issued by the Department of Motor Vehicles. The employer shall review the certificate and obtain a copy to be maintained as required ...

Numerous other sections further demonstrate the Legislature's understanding and intent that the CHP is not considered an "employer" under the FSP. Section 2431 requires the CHP to do background checks of all tow truck drivers and "employers," and to insure that the drivers and their "employers" have valid driver's licenses and tow truck driver certificates. Section 2436.3 requires "every employer" to obtain from CHP a carrier identification number. Section 2432.1 empowers CHP to suspend an employer's highway safety carrier identification number and prohibit the employer from participating in FSP operations for up to two years. Section 2436.5 requires CHP to provide training to all employers and tow truck drivers involved in FSP operations. That training is mandatory for "every tow truck driver and employer" in FSP, and the employer is required to

keep records on the training and make it available for inspection by CHP. (Veh. Code, § 2436.7.) Former Vehicle Code section 2440 (repealed 2003) required the employers to submit to CHP an annual report detailing the numbers of road service calls handled by the towing company, the range of response times, and types and numbers of safety-related complaints received from motorists.

Additionally, Streets and Highway Code section 2562.2 states that grants are "to be awarded to a regional or local agency applicant on a competitive basis for contracting with an employer for the provision of a new or expanded freeway service patrol service and for contracting with the [CHP] for the provision of only direct supervisory services . . . ." (Sts. & Hy. Code, § 2562.2(c)(1).) Again, this section indicates the towing contractor providing the services is the employer, and the CHP is not.

Nowhere do these code sections indicate an intention for the CHP to be considered in any legal sense an "employer" of the tow truck drivers. The language of the statutes, taken as a whole, evidences legislative intent that the FSP drivers be employees of the towing contractors, and CHP not considered an "employer".

C. The Legislative History of the Freeway Service Patrol Act Indicates the Legislature Intended Drivers to be Independent Contractor Employees

The legislative history of the enacting legislation also suggests that the Legislature did not intend for or anticipate FSP drivers to be considered "special employees" of the State. (See Request for Judicial Notice (RJN) filed with this petition.)

Indeed, the legislative history indicates that the Legislature considered the definition of "employer" in the statutes to exclude the State

and thus did not to expose the CHP to potential vicarious liability. The Legislature did not consider or budget for the substantial public liability that would exist if CHP were to be vicariously liable for the negligence of tow truck drivers hired by FSP contractors. Instead, the funding for the program was fairly limited. At one point, the Legislative Analyst's Office noted that the proposal estimated total costs of $10,200,000, with $8,100,000 in vehicle contracts, $1,200,000 to reimburse CHP for its costs, and $900,000 for equipment and personnel. (RJN, p. 165.) A later committee analysis on May 26, 1992 estimated a $8,396,000 budget. (RJN, p. 291; legislative bill analysis at p. 334.) The limited budget for CHP's supervision of the FSP program does not reflect any legislative consideration of potential liability for negligence of FSP drivers.

Caltrans' analysis of the implementing legislation, AB 3346, expressed concern that a pre-existing program using Caltrans employees to provide free emergency tow truck services on and near the San Francisco Bay Bridge could be replaced by private contractors in the FSP:

> Recommend support for the bill with insistence that no existing Caltrans operations or employees be jeopardized. This is consistent with the wishes of the District and the union representing the employees. Any action resulting in discontinuing current operations using civil service employees will likely result in union generated litigation before the State Personnel Board and a demand to meet and confer over impact and/or Unfair Labor Charge before the Public Employee Relations Board.

(RJN, p. 336-337 [Dept. of Transportation Legislative Bill Analysis].)

The bill's author, Assemblyman Richard Katz, responded to these concerns (in a "letter to the journal" fax dated July 22, 1992) by expressly

stating the intent of the statute was not to replace existing services already provided by state employees:

> This letter is designed to clarify the intent of subdivision (d) of Section 2561.5 of the Vehicle Code[2] as proposed to be added by AB 3346 (Katz) of the 1991-92 Session. The subdivision states "no program funded under this chapter shall supplant emergency response towing services provided by the department [of Transportation] as of January 1, 1992".
>
> This subdivision was drafted to address the current provision of emergency response services by Caltrans personnel on the Bay Bridge and its approaches and adjoining freeways. I drafted the language to ensure that current *Caltrans employees* who are providing service at this site *are not replaced by contract employees who are funded by the state freeway service patrol program.*

(RJN, p. 383, italics and footnote added.)

Streets and Highways Code section 2561.5, subdivision (d) was added to the bill as amended on June 26, 1992. (See RJN, pp. 72-73.)

Private towing companies and organizations such as the Auto Club welcomed the FSP enacting legislation: "*Tow Truck Operators groups and motor clubs* such as AAA would support establishment of freeway patrols as it would provide *contract employment opportunities*." (RJN, p. 332 [Dept. of Transportation Legislative Bill Analysis], italics added.)

Nowhere in the legislative history is there any indication that the Legislature considered tow truck drivers assigned to the FSP to be anything other than employees of the independent contractors. The bill's author himself emphasized that the new program not supplant any pre-existing state employees performing similar services, and this intent was expressly

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[2] Assemblyman Katz's letter erroneously refers to the Vehicle Code.

added to the bill by amendment. In this light, given the statutory nature of the FSP program, the common law doctrine of "special employment" is not applicable.

D. Plaintiffs' Arguments for Imposing Vicarious Liability on the CHP as a "Special Employer" Are Contrary to the Text, Structure, History, and Purpose of the FSP Act.

Plaintiffs contend that the CHP should be held vicariously liable as a "special employer" of FSP tow truck drivers under common law. Plaintiffs' argument lacks merit, as it is contrary to the text, structure, history, and purpose of the FSP Act.

First, Plaintiffs contend that the FSP Act's definition of "employer" does not control, and thus that common law principles should apply. Under the common law, where one employer "lends" an employee to another employer, and the second employer also has a right of control over the details of the work of the "borrowed" 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, 174-75, citations omitted.)

Plaintiffs characterize the FSP Act's use of the term "employer" as merely an "administrative definition." (Plaintiff's Opening Brief, p. 3.) That characterization is unsupported by the statutes. Section 2430.1 defines "employer" without limitation. Plaintiffs emphasize the definitional preface "as used in this article," but that is an expansive phrase to show that the definition is to be used consistently throughout those sections of the Vehicle Code. (Veh. Code, Div. 2, Ch. 2, Art. 3.3.) It does not state that it confines the use of the term to administrative matters.

Plaintiffs also argue that the definition of "employer" in subdivision (b) was essentially circular, and that subdivision (a) simply means that the towing companies are the "general employer," which does not preclude CHP being deemed a "special employer." (Plaintiffs' Brief, at pp. 32-33.) Plaintiffs are incorrect. Plaintiffs analogize this case to decisions such as *Metropolitan Water District of Southern California v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, 500, which held that when a statute uses the term "employee" without defining it, the common law definition controls. (Plaintiff's brief, at p. 25.) But here the term "employer" is expressly defined by the statute, a definition reinforced by repeated references to the towing contractor as the "employer".

Where the Legislature gives an express definition of a term, the court must take it as it finds it, and may not apply a different definition. (*People v. McDonald* (2006) 136 Cal.App.4th 521, 531, citing *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 804.) Since the Legislature did not limit the definition of "employer" in section 2430.1 to "general employer" under common law, the Court should not apply the limitation urged by Plaintiffs.

Moreover, to adopt Plaintiffs' argument that the term "employer" could include CHP as a "special employer" would lead to several absurdities; among other things, CHP would in theory have to issue to itself a "carrier identification number" under section 2436.3, and report to itself and make its records available to itself under section 2436.7.

The cases Plaintiffs rely upon to argue that the common law definition of employer should apply are readily distinguishable. For example, *Cargill* involved the application of the State Public Employee Retirement Law (PERL) to long term, temporary workers hired by the

Water District through private labor contractors. Those contract workers were fully integrated into the District's workforce. Since PERL specifically excluded temporary workers hired for less than six months in a year, but not workers contracted for longer periods, the Supreme Court concluded the law required the Water District to enroll these workers in the CalPERS retirement program. (32 Cal.4th at pp. 496-497.) That decision did not involve vicarious liability, and has no application in this case.

Bradley v. California Dept. of Corrections and Rehabilitation (2008) 158 Cal.App.4th 1612, 1626, also involved an integrated "special employee", a social worker hired through a registry who worked in the state prison facility under the direct supervision of regular prison staff. Plaintiff alleged she was sexually harassed by a coworker. *Bradley* also did not involve vicarious liability, but rather whether plaintiff was a state employee for purposes of the Fair Employment and Housing Act (FEHA). The Court noted that "FEHA itself does not contain a precise definition of 'employee.' However, the statutory regulations developed by the Fair Employment and Housing Commission (the administrative agency charged with interpreting the FEHA) do define the term ...." (*Id.*, at p. 1625.) The Court concluded that one of the regulations in question "includes within its definition of 'employee' the common-law requirement that the employer exercise direction and control over the person's work--the keystone of the employment relationship." (*Ibid.*)

Plaintiffs also cite *In-Home Supportive Services v. Workers' Comp. Appeals Board* (1984) 152 Cal.App.3d 720, where the court determined that a home care worker contracted through the State's In-Home Supportive Services (IHSS) program was a state employee for purposes of workers' compensation benefits when she was injured caring for a recipient. By

statute, the IHSS program was administered by the county under state supervision. The IHSS workers were recruited and placed by the county. The court concluded that the State's delegation of duties to the County created a principal/agent relationship. (*Id.* at p. 729.) The Court stressed the public policy behind the worker's compensation laws:

> [A]n employment relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the [Worker's] Compensation Act ....

(*Id.*, at p. 728, citing *Laeng v. Workmen's Compensation Appeals Board* (1972) 6 Cal.3d 771, 777.)

The Court went on to analyze in detail the statutes creating the IHSS program and the governing regulations, as well as the relevant workers' compensation laws, to conclude the worker was a dual employee of both the recipient and the State. (*Id.*, at pp. 720-738.) Since the Workers' Compensation Act has a presumption of employment status (Labor Code, § 3351), and therefore coverage, cases such as *In-Home* are of limited utility in examining employment status for purposes of vicarious liability.

The issue in *Arnold v. Mutual of Omaha* (2011) 202 Cal.App.4th 580 was whether plaintiff, a licensed agent of Mutual of Omaha, was an "employee" for purposes of specific Labor Code statutes and therefore entitled to payment of business expenses and back wages. The Court of Appeal concluded that the common-law definition of "employee" applied since the relevant Labor Code sections did not define the term, and determined that plaintiff was an independent contractor, not an employee. (*Id.*, at pp. 586-598.)

The few cases involving vicarious liability cited by Plaintiffs also do not support applying the special employment doctrine to the CHP's statutory role in the FSP. Among these are *Societa Per Azioni De Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, in which a ship pilot provided by the City to steer a privately owned ship into the harbor collided with a wharf and dock. In *Societa,* there was no dispute that the pilot was a full-time city employee; instead the issue was whether the ship owner shared liability as a "special employer" of the borrowed pilot. This Court found that the trial court erred as a matter of law in finding that the City was the pilot's sole employer, as a ship owner also had a master-servant relationship with the pilot. (*Id.* at p. 459.) Restatement 220, cited by Plaintiffs, was one citation among a variety of authorities considered in *Societa.* This Court initially considered federal maritime law, which provides that courts should apply principles of agency law. (*Id.* at p. 455.) Here, in contrast, the issue is whether the statutes indicate legislative intent that CHP be a special employer of FSP drivers.

Bowman v. Wyatt (2010) 186 Cal.App.4th 286, also did not involve a statutory program. In that case, the City of Los Angeles appealed a judgment finding it was vicariously liable for the negligence of a contract dump truck driver working on a street repair project with a city crew. There was no statutory relationship involved in *Bowman;* the Court applied common law to analyze the employment status of the driver, and concluded that the relevant jury instruction incorrectly stated the law as it allowed the jury to find liability solely based on the city's right of control over the driver without considering the secondary factors to be considered under common law. (*Id.,* at pp. 301-303, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350, 353-355.)

Brassinga v. City of Mountain View (1998) 66 Cal.App.4th 195, did not involve the issue of vicarious liability, but rather whether the workers' compensation exclusive remedy was a defense. In that case, a Palo Alto police officer was accidentally shot to death by a Mountain View police officer during a training session of a joint multi-city regional SWAT team. The City of Mountain View argued that decedent was a "special employee" of the city for purposes of the training session, which would bar his survivors from seeking tort damages. The court found that this defense was a question of fact for trial, and the Court erred in granting a directed verdict for plaintiffs. In its analysis, the Court initially considered whether the "regional team" qualified as a "joint powers agency" under Government Code sections 8616-8617. Since the Court concluded it was not such an entity, and could not be the "employer", the court then simply analyzed the case by considering the common law factors governing "special employment". (*Id.*, at pp. 215-220.) *Brassinga* did not involve a statutory scheme as in the present case.

II. THE PUBLIC POLICY BEHIND THE "SPECIAL EMPLOYMENT" DOCTRINE DOES NOT SUPPORT IMPOSING VICARIOUS LIABILITY ON THE CHP FOR ITS STATUTORY DUTIES IN MANAGING THE FSP PROGRAM

A. The Special Employment Doctrine is Based on the Policy for Allocation of Risk

In considering the application of the common law special employment doctrine to statutory authority in this case, it is essential to consider the underlying public policy behind the development of vicarious liability. An employer's vicarious liability for negligence of its employees has its roots deep in common law. Earlier authorities justified the respondeat superior doctrine on such theories as "control" of the employee

by the employer, the injured third party's innocence in comparison to the employer's selection of the negligent employee or the employer's "deep pocket" to pay for the loss. (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959.) However, later case law developed a "modern justification" for vicarious liability as:

> a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

(*Id.*, at pp. 959-960, citing Prosser, *Law of Torts* (3d ed. 1964) p. 471; fns. omitted.)

This "modern justification" is followed in California. As Chief Justice Traynor explained:

> The principal justification for the application of the doctrine of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business.

(*Johnston v. Long* (1947) 30 Cal.2d 54, 64.)

As discussed below, the Legislature certainly did not account for apportioning risk of accidents caused by FSP tow trucks to CHP's management role in the program.

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B. The CHP's Supervision of FSP Drivers Is Mandated by Statute, Reflects Its Law Enforcement Role, and Does Not Include the Right to Control Details of the Work

Since the Legislature is presumed to be aware of the common law "special employment" doctrine, it is important to examine that doctrine in detail.

In *S. G. Borello & Sons, supra*, this Court reaffirmed that "the principal test" whether a contracted worker is an "employee" is the right to control the manner and means of the work, rather than simply the ends to be accomplished.[3] However, the court emphasized that the "control test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. Thus, the courts need to consider the 'secondary' indicia of the nature of a service relationship which cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (*Id.* at p. 350, citations omitted.)

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[3] The right to discharge a worker can be a significant element of "control" in establishing a "special employment" relationship. (*Kowalski, supra, at p.* 177.) Here, CHP had the power to suspend or remove a driver from FSP duties for serious violation of the Standard Operating Procedures. However, removal of a driver from the program does not terminate his employment with the FSP contractor. A contractor is free to continue to employ the driver in non-FSP tow duties if he is still legally qualified. The driver or operator can appeal termination or suspension, and a review session is scheduled with OCTA, CHP, and the contractor. (App. 7, UF 17 and 18.)

After reviewing the factors traditionally considered to determine whether workers are employees or independent contractors, this Court in *Borello* declined to adopt new standards for examination of the issue. Instead, it determined that "the Restatement guidelines heretofore approved in our state remain a useful reference." (*Id.* at p. 354.) This Court also noted with approval "the six-factor test developed by other jurisdictions . . . . Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [Citation.]" (*Id.* at pp. 354-355.)

The alleged right of "control" vested in CHP over FSP tow truck drivers stems from its statutory management responsibilities. Streets and Highways Code section 2562.1, subdivision (c)(1) provides for CHP to provide "direct supervisory services" pursuant to an agreement with the regional transportation agency. CHP is also required to provide training for "employers" and tow truck drivers regarding the requirements of the FSP, and to perform dispatching for the drivers when tow trucks are needed for disabled vehicles. (Veh. Code, § 2436.5.)

Plaintiffs rely heavily upon the language of the OCTA contract with Coach, the interagency agreement between OCTA and CHP, and deposition testimony of Officer David Ferrer, a CHP field supervisor for the Orange County FSP program. (See Brief, at pp. 12-16.) These agreements and operational details simply reflect the unique statutory nature of the program and CHP's role therein. Since the questions presented before this Court

are ones of statutory interpretation, the details of how the program is run in one county should be of little if any value in determining legislative intent.

All of the agreements cited by plaintiffs are authorized by the statutes:

- The OCTA - California Coach agreement, by Streets and Highways Code section 2561.5, subdivision (e).
- The OCTA - CHP agreement, by Streets and Highways Code sections 2561.3 and 2562.2, subdivision (c)(1).
- The CHP - Caltrans agreement, by Streets and Highways Code section 2561.3 and Vehicle Code section 2436.5.

The "FSP Statewide Guidelines" referenced by plaintiffs (Brief, Answer, p. 11) were in fact promulgated not just by CHP and Caltrans in conjunction with OCTA, but rather in conjunction with all regional transportation districts throughout the state which have established local FSP programs. (CHP App. 13, Exh. D, pp. OCTA00016-20.) These guidelines, which are the basis for the "Standard Operating Procedures" adopted by the Orange County FSP, were also developed under statutory mandate. (Sts. & Hwy. Code, § 2565.)

Moreover, the statute giving CHP responsibility for field supervision of FSP tow truck drivers does not purport to give CHP control over the "details of the work" as required by cases like *Borello, supra.* Streets and Highways Code section 2562.2, subdivision (c)(2) simply provides for CHP to provide "only direct supervisory services warranted by workload standards to reduce traffic congestion." Neither this provision nor any of the other FSP statutes in any way suggest the Legislature intended that CHP

have control over the details of how tow truck drivers do their jobs, apart from following the law and their employers' contractual requirements.

Instead, the CHP's assigned role logically reflects its status as a law enforcement agency with authority for enforcing traffic laws and safety on all state highways. This is evident in the statutes providing among other things that CHP performs background checks on prospective tow truck drivers (Veh. Code, § 2431), has the power to issue and revoke tow truck carrier identification numbers (Veh. Code, § 2432.1), and inspect records of tow truck contractors. (Veh. Code, § 2436.7.)

Moreover, while the "right to control" is the most important factor in determining whether an independent contractor is a "special employee" of another party, it is not controlling. (*State Compensation Insurance Fund v. Brown* (1995) 32 Cal.App.4th 188, 202; *Bowman v. Wyatt, supra,* at pp. 303-304.)

In *Strait v. Hale* (1972) 26 Cal.App.3d 941, 949, the court emphasized that the significance of the "right of control" in determining employment status is tempered by the policy behind vicarious liability:

> Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business. Control, then, at least in the narrow sense suggested by Hale, is not dispositive of this case. The theory having greater integrity in respondeat superior cases is allocation of risk.

In *Strait*, an earthmover assisting in road work collided with another vehicle. The operator of the earthmover was an employee of a farmer (Young), who had hired out the operator and earthmover to the construction

company (Hale). The court concluded that while Hale had "control" over the operator on the construction project,

> Young owned the tractor and was profiting from the renting of the rig as well as [the operator's] employment with Hale ... [¶] If Young did not feel he had sufficient control over of the working conditions or sufficient knowledge of the construction business to guard against the risks, he could have contracted for specific indemnity or obtained the appropriate liability insurance.

(*Id.*, at pp. 950-951.)

Plaintiffs themselves note that "Since the state first implemented freeway service patrol programs on a demonstration basis in 1992, some 4.5 million motorists statewide have received assistance." (Plaintiff's brief, at pp. 4-5.)[4] Here, CHP is not a party to the towing company contracts with the local transportation authority and lacks the budgetary control to provide for sufficient indemnity or insurance to protect against State liability.

C. The FSP Statutes Also Do Not Reflect the Other Factors For a "Special Employment" Relationship Between CHP and Tow Truck Drivers

Most of the other factors considered by *Borello, supra,* are not present here. The CHP is not an "enterprise" making a profit from the FSP program, as are contractors like California Coach. The drivers are not even "hired" by the CHP, but rather are selected by private companies, which in turn are contracted by the local transportation agency. (See Sts. & Hy. Code, § 2562.2, subd. (c)(1), Veh. Code, § 2430.1, subd. (b).) [5]

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[4] See Stats.2000, c. 513, Section 1, subsection (e) (S.B.1428). This legislation made the FSP a permanent program.

[5] In Orange County, CHP provides a representative to the OCTA panel which interviews prospective contractors and rates the various

(continued...)

Citing Restatement of Agency, section 220, which defines the term "servant" to include someone "employed to perform services in the affairs of another ..." Plaintiffs argue that "FSP tow truck drivers plainly render patrol services for the benefit of CHP, and which are therefore 'service in the affairs' of the CHP." (Plaintiffs' brief, at p. 26, n. 15, citing Veh. Code, §§ 2401 and 2435.) The statutes do not support this interpretation.

Section 2401 was enacted before the Freeway Service Patrol Act was passed. (See Stats. 1959, ch. 3.) Section 2401 simply reflects a general declaration of the law enforcement authority of the CHP: to provide for patrol of state highways. CHP is after all a law enforcement agency. None of CHP's law enforcement duties are delegated to tow truck drivers in the FSP program.

Section 2435 primarily states general policy goals:

> (a) The Legislature finds and declares that the emergency roadside assistance provided by highway service organizations is a valuable service that benefits millions of California motorists. The Legislature further finds and declares that emergency roadside assistance is provided statewide, in cooperation with, and shares resources with, public safety agencies. The Legislature also finds that the Department of the California

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(...continued)
companies bidding for contracts for each FSP "beat." However, the final decision concerning who to select for each contract is made by the OCTA Board of Directors. (App. 7, UF 2, Ap.. 8, ¶¶ 6-12.) The contractor, not CHP, supplied the tow truck, tools, equipment, and uniforms for its drivers. (App. 7, UF 4, 7, 19.) OCTA, not CHP, pays the contractors such as California Coach, who in turn directly paid their own employees' wages. (App. 7, UF 11.) OCTA's contract with California Coach provided that the FSP tow truck drivers would be employees of the contractor. (App. 7, UF 5.)

> Highway Patrol, in cooperation with the Department of Transportation, is responsible for the rapid removal of impediments to traffic on highways within the state and 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.
> ...

Certainly, one of the other policy goals set for CHP in this section is the "rapid removal of impediments to traffic." However, CHP's traffic management duties ultimately are discretionary. Vehicle Code section 2410 states: "Members of the California Highway Patrol are authorized to direct traffic according to law, and, in the event of a fire or other emergency, or to expedite traffic or insure safety, may direct traffic as conditions may require notwithstanding the provisions of this code." As noted in *Foremost Dairies, Inc. v. State of California* (1986) 190 Cal.App.3d 361, 365, "[i]n general, the CHP has the right, but not the duty, to direct traffic on state highways. The language of [section 2410] is permissive rather than directive, and therefore imposes no duty on the CHP to act in any fashion, or to act at all. [Citations.]"

CHP does not have a duty to remove stranded vehicles from the highway. Indeed, Vehicle Code section 22651, subdivision (b) permits rather than requires removal of vehicles that are obstructing traffic or creating a hazard. (*Bonds v. State of California ex. rel. California Highway Patrol* (1982) 138 Cal.App.3d 314, 321.) As such, the FSP program is not fulfilling a duty of CHP or "acting in the affairs of" the CHP.

Nothing in the statutes or legislative history before this Court suggests that FSP was created to handle a preexisting function of CHP that was not adequately being fulfilled. The State had no comparable program for free roadside assistance and towing for disabled vehicles directly

provided by CHP before the FSP program was created as a pilot program in Los Angeles County, then made permanent and expanded to other counties including the County of Orange. The Restatement definition should not apply.

Townsend v. State of California, supra, is instructive. In that case, the Court of Appeal concluded that a State University basketball player was not a state "employee" for purposes of tort liability. The court explained:

> It is a matter of common knowledge that colleges and universities in California, in varying degrees, maintain athletic programs which include a number of sports, such as golf, tennis, swimming, track, baseball, gymnastics and wrestling. It is also well known that of all of the various sports programs, at least in California, only two, i.e., basketball and football, generate significant revenue. These revenues in turn support the other nonrevenue producing programs. [¶] Thus, conceptually, the colleges and universities maintaining these athletic programs are not in the "business" of playing football or basketball any more than they are in the "business" of golf, tennis or swimming. Football and basketball are simply part of an integrated multisport program which is part of the education process. Whether on scholarship or not, the athlete is not "hired" by the school to participate in interscholastic competition... [¶] From the standpoint of public policy consideration, exposing those institutions to vicarious liability for torts committed in athletic competition would create a severe financial drain on the State's precious educational resources.

(Id. at pp. 1536-1537.)

Just as the state colleges are not in the "business" of playing basketball and football, neither is the CHP in the "business" of providing tow truck services. The FSP is simply a statutorily created program to reduce freeway congestion, not a routine function of CHP in which it "hires" tow truck drivers.

The CHP's statutory management lacks the "secondary indicia" of an employment relationship with FSP tow truck drivers. Since the Legislature is presumed to be aware of the common law test for a "special employment" relationship, the fact the statutes do not provide for CHP to supply FSP equipment, pay tow contractors or their drivers, or utilize the drivers as an "integral part" of the CHP's functions, strongly indicates legislative intent not to create a common law "special employment" relationship.

No other case has considered the circumstances present here, in which contractors are used in a program created by statute where the public entity has statutory responsibilities related to the alleged "control" over the contractor's employees.

The statutory structure of the FSP, as reflected in the operation of the program in this case, does not demonstrate that the Legislature intended that CHP act as a common law "special employer" in its supervisory role over FSP drivers and their employers. Had the Legislature intended this common law rule, and vicarious liability apply to CHP, presumably the statutes would at the least have given CHP authority over selection of contractors and budgetary control to be able to allocate the financial risk of potential liability.

The policy considerations behind the "special employee" doctrine simply do not apply to CHP's role in the FSP.

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CONCLUSION

As discussed above, the statutes creating the Freeway Service Patrol program reflect legislative intent to distinguish the CHP from the "employers" of FSP tow truck drivers. Neither the statutes nor the legislative history, nor the policy underlying the common law "special employment" doctrine support imposing vicarious liability on the CHP for the negligent driving of an FSP driver. The decision of the Court of Appeal should be affirmed.

Dated: May 8, 2014

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for Respondent, I certify pursuant to Rule of Court 8.360 that this brief was prepared on a computer using Word 2010 with a Times Roman 13 point font. Based upon the calculation by the software, the text of this brief consists of 9,505 words, excluding this certificate and tables of contents and authorities.

Dated: May 8, 2014

JOEL A. DAVIS

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **State of California (Alvarado) v. Superior Court, et al.**
No.: **S 214221**

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 May 8, 2014, I served the attached **ANSWERING PARTY'S BRIEF ON THE MERITS** 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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Clerk of the Court
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Santa Ana, CA 92701
Attn.: Hon. Robert J. Moss

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 May 8, 2014, at Los Angeles, California.

Sylvia Wu
Declarant

Sylvia Wu
Signature