In the Supreme Court of California

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

Petitioners,

v.

SUPERIOR COURT FOR THE COUNTY OF ORANGE,

Respondent,

MAYRA ANTONIO ALVARADO and DYLAN HARBORD-MOORE,

Real Parties in Interest (Petitioners Herein).

No. S214221

SUPREME COURT
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PETITIONERS' REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

The issue before the Supreme Court is whether the California Highway Patrol ("CHP") may be held liable as the special employer of a tow truck driver who, while under the undisputed supervision of the CHP, negligently performs duties in connection with the State's Freeway Service Patrol ("FSP") program.

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

Before FSP was enacted, the California Tort Claims Act definition of "employee" rendered a public entity liable as the special employer of a negligent actor, and published decisions had applied the special employment doctrine to public entities. As conceded by the Court of Appeal in this matter, 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.

Prior to the accident which gave rise to this dispute, the CHP had entered into a chain of agreements by which the CHP obtained the consent of all program

participants to the CHP's supervisory power over tow truck drivers' day to day performance of FSP patrol activities. The "FSP Statewide Guidelines" among CHP, OCTA and CalTrans provide (1) that the "CHP is generally responsible for . . . supervision of the day to day FSP field operations," (2) that "the CHP is responsible for dispatching FSP vehicles", and (3) that CHP activities in the FSP are "to include supervising FSP field operations." The written agreement between the CHP and the OCTA controlling the OCTA's participation in the FSP provides (1) that the CHP is responsible for "performing necessary daily project field supervision, program management and the oversight of the quality of the contractor services," (2) 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 . . . ", and (3) that "[t]here 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 agreement between California Coach and the OCTA provides (1) that FSP tow trucks are "supervised by the CHP . . ."and (2) that "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."

This matter originated in the Orange County Superior Court, which denied the CHP's motion for summary judgment on the issue of its liability as a special employer. In doing so, the Superior Court issued a certification of this matter under California Code of Civil Procedure § 166.1. The CHP then brought the matter before the Court of Appeal through a mandamus proceeding.

After briefing and argument, the Court of Appeal issued its Opinion ("the Opinion") which (1) expressly declined to determine whether the CHP was, in fact, a special employer and (2) issued mandamus based upon a holding that the Legislature did not intend for the CHP to be held liable as a special employer under the FSP Act. In a case of first impression, the Court of Appeal erroneously held that because the word "employee" appears in certain sections of the California Vehicle Code, the CHP "cannot as a matter of law be the special employer of a 'tow truck driver' . . . operating under the Freeway Service Patrol Act."

The Petitioners sought Supreme Court review on the grounds that the FSP contains no evidence of Legislative intent to abrogate existing principles of governmental tort liability, that the Legislature is deemed to enact legislation in light of existing law, and that long before the FSP was enacted, California courts had recognized that a governmental entity may be held liable as the special employer of a negligent actor. They also argued that the Court of Appeal's reliance upon the presence of the term "employer" in Vehicle Code statutes is misplaced because that term is plainly an administrative definition used to allocate operational responsibilities associated with the FSP program.

The Supreme Court granted Review, and the CHP has filed its Answering Brief. In that brief, the CHP reiterates a number of the erroneous arguments adopted by the Court of Appeal. While the CHP introduces some new arguments regarding purported Legislative history, those arguments are tortured and contrary to law. In addition, the CHP has made public policy arguments which, as will be shown, have no legal basis whatsoever. In addition, the CHP has improperly sought to expand the scope of Supreme Court Review to include a factual determination regarding special employer status that the Court of Appeal expressly declined to make.[1]

II. THE CHP'S LEGISLATIVE INTENT ARGUMENTS ARE ILLOGICAL AND CONTRARY TO PRINCIPLES OF STATUTORY INTERPRETATION

The Opinion of the Court of Appeal concluded that because the term "employer" appears in FSP statutes, the Legislature did not intend for the CHP to be liable as a special employer for negligent FSP acts under CHP control. In reaching that conclusion, the Court of Appeal disregarded the law in existence when the FSP was adopted in 1992, as well as other controlling principles of statutory construction. While the CHP has warmly embraced the conclusion reached by the Court of Appeal, its legal analysis contains the same flaws.

[1] The Petitioners also note that at page 4 of its Answering Brief the CHP has gone outside the record to argue that a decision in favor of the Petitioners "would impose a substantial potential liability on CHP, which could exceed the entire operating budget of the program." The operating budget of the program is not in the record, was not considered by the Court of Appeal, and is not relevant. For the record, in Undisputed fact (no.6) at the summary judgment stage, the CHP pointed out that California Coach was required to maintain liability insurance for its operations under its FSP contract.

(A) The Answering Brief and Opinion ignore the law in existence when the FSP was adopted

The CHP does not dispute the principle that the Legislature is deemed to be aware of statutes and judicial decisions in existence, and to have legislated in light of those statutes. Also undisputed is the related principle that a statute will be construed in light of the common law unless the Legislature clearly and unequivocally indicates otherwise. On the tort side of the equation, the CHP concedes that the FSP Act was adopted in 1992, and that by 1992, there was a well-developed body of law which (1) recognized and applied the special employment doctrine to governmental entities, and (2) defined the term "employee" as it appears in the Tort Claims Act to cover special employees.

While the Answering Brief contains as many references in the FSP to the term "employer" as can be mustered, the fact remains that the CHP and the Court of Appeal cannot point to any language in the FSP statutes or Legislative History expressing an intent to abrogate existing tort law (special employer liability) as it applied to CHP controlled operations in the FSP program.[2]

The Petitioners, on the other hand, contend that the Legislature's awareness of existing law when the FSP was enacted, coupled with the silence of the FSP on the issue of tort liability, are powerful evidence of Legislative intent not to vary the application of the special employment doctrine to the CHP in the

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[2] The presence of the term "employer" in the FSP statutes is no more significant than the presence of the term "employee" in the FSP statutes. Vehicle Code § 2435 ("minimum training standards for highway service organization employees"), Vehicle Code § 2436.5 ("Dispatchers for freeway service patrol operations shall be employees...") As pointed out in Petitioners' Opening Brief, the term "employee" is very present in the FSP statutes but is not defined anywhere in those statutes. Under Metropolitan Water Dist. of Southern California v. Superior Court, (2004) 32 Cal.4th 491, 500 [9 Cal.Rptr.3d 857, 862-63] when a statute refers to the term "employee" without defining it, courts generally apply the common law test of employment.

FSP context. In this regard, the CHP has no answer for the principle cited in the Petition that "caution must temper judicial creativity in the face of legislative or regulatory silence." Drennan v. Security Pac. Nat. Bank (1981) 28 Cal.3d 764, 773 [170 Cal.Rptr. 904, 909]

A fair reading of the FSP statutes shows that the term "employer" is used in the context of assigning administrative responsibilities for aspects of the FSP program, and not with regard to tort liability. See, e.g., Vehicle Code § 2430.5 (requiring an "employer" to obtain temporary certificates from tow truck drivers), Vehicle Code § 2430.3 (requires FSP tow truck drivers to notify "employers" of an arrest or conviction . . . "), Vehicle Code § 2431 (procedures for background screening of tow truck drivers and "employers"), Vehicle Code § 2432.1 (allowing the CHP to suspend an "employer" who has fails to comply with FSP requirements), Vehicle Code § 2436.5 (requiring CHP "training . . . for all employers and tow truck drivers"), and Vehicle Code § 2436.7 (requiring every "[t]ow truck driver and employer, involved in a freeway service patrol operation" to attend training and that the "employer" to maintain related information). The Opinion, and the CHP's arguments in support of the Opinion, are contrary to the fundamental notion that if statutory language is clear and unambiguous, the plain meaning of the statute governs. Absher v. AutoZone, Inc. (2008) 164 Cal.App.4th 332, 339 [78 Cal.Rptr.3d 817, 822]

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(B) The Answering Brief's Legislative History Arguments are tortured and amount to a rewriting of the law of statutory interpretation

The CHP's Answering Brief ("AB" hereinafter) reiterates earlier arguments regarding the presence of the term "employer," and attempts to make new arguments based upon "Legislative History" (AB at 17 *et seq.*) As will be shown, those arguments amount to a rewriting of the law concerning statutory interpretation.

The CHP's arguments begin by noting that there were budgetary discussions during the Legislative process, and that those discussions resulted in an estimated budget of $8,396,000. (AB at 18). From that number, without more, the CHP leaps to the conclusion that the Legislature did not consider potential liability under the FSP program. Assuming that to be the case, the Legislature's oversight is not the equivalent of concluding, as the Court of Appeal concluded, that the Legislature affirmatively intended to abrogate principles of governmental tort liability. There is, in fact, a "rule against presuming an intent to overthrow long-established principles of law unless this is made clear by necessary implication" Gaetani v. Goss-Golden West Sheet Metal Profit Sharing Plan (2000) 84 Cal.App.4th 1118, 1131-32 [101 Cal.Rptr.2d 432, 441]. Nor is Legislative oversight a basis for abrogating existing law. As one court put it: "We concede the possibility of legislative oversight. If so, the Legislature should provide the remedy." People v. Pecci (1999) 72 Cal.App.4th 1500, 1506 [86 Cal.Rptr.2d 43, 48]

Next, the CHP turns to the fact that prior to the passage of the FSP legislation, CalTrans expressed concerns about union litigation in the event that the FSP resulted in replacement certain CalTrans employees who provided towing services near the San Francisco Bay Bridge. (AB at 18) According to the CHP's brief, an Assemblyman sent a letter stating that the FSP legislation was not intended to result in the displacement of any current CalTrans employees by "contract employees" funded by the FSP. That exchange, according to the CHP, translates into some kind of expression of intent on the part of the Legislature to abrogate existing tort law and the interpretation of the Tort Claims Act when the CHP exercises control over a negligent tow truck driver. Once again, the CHP's argument, if adopted, would amount to a rewriting of the law of statutory construction.

Finally, the CHP trumpets the fact that towing companies supported the FSP legislation because the FSP would provide "contract employment opportunities." (AB at 19). The language in question could not have a plainer meaning: the industry saw the FSP as a vehicle for generating service contracts and employment of drivers. That industry support cannot possibly be translated into an argument that the Legislature wanted to abrogate tort liability principles.

III. THE CHP'S PUBLIC POLICY ARGUMENT IS WITHOUT LEGAL SUPPORT, AND CONTRARY TO EXISTING LAW

In Section II of its brief, the CHP argues that there is some mystical "public policy" behind the special employment doctrine, and that for some reason not cited in the briefs or in any published opinion, it is "essential to consider the

underlying public policy behind the development of vicarious liability. (Answering Party's Brief on the Merits at 25) Special employment, however, is triggered by factual elements. The special employment relationship, and the resulting liability of the special employer, flow from the borrower's power to supervise the details of the employee's work. Marsh v. Tilley Steel Co. (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 324]. No case has ever held that there is any kind of public policy qualification to, or public policy exception to, the rules imposing liability under the special employment doctrine.

In the absence of such authority, the CHP attempts to argue that the "modern justification" for vicarious liability is a "deliberate allocation of risk." (Answering Party's Brief on the Merits at 26), and that the notion of risk allocation somehow supports the notion that the entire body of applicable law should be disregarded for the benefit of the CHP. To the extent that allocation of risk is part of this discussion, however, it must be pointed out that the concept supports the imposition of special employment liability in this case like a proverbial glove.

Commenting upon the special employment doctrine, the Court in Marsh v. Tilley Steel Co. (1980) 26 Cal.3d 486, 494 [162 Cal.Rptr. 320, 325] held: "Among potentially liable employers, those who have the right to control the employee's activities at any given time are in the best position to predict, evaluate, absorb, and reduce the risk that these activities will injure others." Here, the CHP had the right to control FSP tow truck drivers because, quite apart from the FSP

statutes, the CHP deliberately procured that right from all FSP program participants.

As noted in the Petitioners' prior briefs in this matter, the record unambiguously confirm the CHP's control over day to day FSP patrol activities of tow truck drivers. That record includes:

- All of the agreements which implemented the FSP and resulted in California Coach's participation, including (1) "FSP Statewide Guidelines" among CHP, OCTA and CalTrans (the "CHP is generally responsible for . . . supervision of the day to day FSP field operations") (2) the CHP-OCTA agreement (the CHP is responsible for "performing necessary daily project field supervision…") and (3) and the California Coach-OCTA agreement
- The deposition testimony of the CHP's designated "person most knowledgeable" that the CHP was responsible for supervising tow truck operators in the field, that CHP Officers could issue orders to tow truck drivers, and that the CHP was responsible for "providing in field supervision of operators" (CHP Appendix § 13, Exh. B, Ferrer 31:3-17, 41:20-42:15, 42:18-43:8)
- The CHP's own website, which describes the FSP program as consisting of "over 300 tow trucks operated by CHP…supervised drivers." (CHP Appendix § 13, Exh. F)
- The deposition testimony of the California Coach tow truck driver, Guzman, that during his CHP training 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).

And, when the CHP contracted for all of that control, it was presumed to have knowledge of all existing case law and statutes. California Assn. of Highway Patrolmen v. Department of Personnel Admin. (1986) 185 Cal.App.3d 352, 364 [229 Cal.Rptr. 729, 735] Under that principle, the CHP expropriated control of day to day FSP tow truck drivers knowing that (1) the special or dual employment doctrine was well recognized, and (2) the doctrine was applicable to governmental entities. Having contracted to maintain control over day to day FSP operations with knowledge of existing law, the CHP should not now be able to argue that it faces unintended consequences.

The FSP statutes reflect a decision by the Legislature to impose duties upon the FSP, but do not reflect any intent to impose limitations upon any special employer liability flowing from control over participants in the FSP program. See, e.g., Streets & Highways Code § 2561(c), Vehicle Code § 2401, Vehicle Code § 2435, and Vehicle Code § 2424 ("[I]n order "to carry out the duties and responsibilities of the department," the CHP "may enter into agreements with providers of towing, emergency road...for the purpose of determining which providers shall be summoned by the department . . . "). Here, the CHP simply made sure, through contracts, that control over how its statutory responsibilities were performed was centralized in its hands.

IV. THE CHP'S FACTUAL ARGUMENTS REGARDING RIGHT TO CONTROL WORK ARE OUTSIDE OF THE SCOPE OF SUPREME COURT REVIEW

Beginning at page 27 of its Answering Brief, the CHP launches into a series of factual arguments concerning its alleged lack of control over the FSP tow truck driver. That factual discussion is improper in the context of Supreme Court Review in this case.

By way of background, the CHP was granted mandamus from the Court of Appeal with regard to the denial of the CHP's summary judgment motion based in part upon the Superior Court's 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 . . . "). Based upon that certification, the Court of Appeal declined to ascertain whether the tow truck driver was, in fact, a special employee of the CHP at the time of the accident. In this regard, the Court of appeal reasoned (1) that "[t]his case is in the Court of Appeal because of a certification under Code of Civil Procedure section 166.1" and (2) the issue of "[w]hether Guzman is a special employee of the CHP is not a 'controlling question of law' and thus not subject to interlocutory review." State ex rel. Department of California Highway Patrol v. Superior Court (2013)Id., 163 Cal.Rptr.3d at 335, footnote 5.

The existence of a special employment relationship is a question for the trier of fact. Kowalski v. Shell Oil Co. (1979) 23 Cal.3d 168, 175 [151 Cal.Rptr.

671, 675]. Given the Court of Appeal's determination not to resolve that factual question, a determination of that factual question should be outside the scope of Supreme Court review at this time. "[I]t is our policy not to review issues that are dependent upon development of a factual record when those issues have not been...reached in that court." People v. Peevy (1998) 17 Cal.4th 1184, 1205 [73 Cal.Rptr.2d 865, 879] Although the trial court found triable issues of fact as to the CHP's status as the negligent tow truck driver's special employer, it is the decision of the Court of Appeal that is under Review. California Constitution, Article VI, § 12.

Under Rule 8.500 of the California Rules of Court, Supreme Court Review is appropriate to "secure uniformity of decision or to settle an important question of law..." The Petitioners respectfully submit that the CHP's factual arguments over its control over the tow truck driver are unrelated to important questions (or any questions) of law, and therefore not properly part of the pending Review. And, since the Court of Appeal did not consider whether the CHP was, on the facts, a special employer, there is nothing for the Supreme Court to review on that issue.

V. THE CHP'S ANSWERING BRIEF ARGUES AN INCORRECT STANDARD FOR DETERMINING SPECIAL EMPLOYMENT

In the preceding section, the Petitioners argued that the factual question of whether the CHP had sufficient control to give rise to special employment should not be part of the pending Review. If the Supreme Court is inclined to examine the issue, however, that examination only supports the Superior Court's denial of

summary judgment. Any such examination, however, should begin with a correct statement of the law.

The CHP began its factual discussion with an inappropriate citation to S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 345 [256 Cal.Rptr. 543, 544]. That case does not deal with special employment at all. Instead, the issues in Borello involved a "determination of employee or independent-contractor status" and the "distinction between independent contractors and employees." Id., 48 Cal.3d at 350 [256 Cal.Rptr. at 547]

VI. THE CORRECT TEST FOR DETERMINING SPECIAL EMPLOYMENT

As set forth previously in this Reply, the Petitioners contend that there should be no review of the issue of whether the CHP was, under the facts, a special employer. If the Supreme Court is inclined to consider that issue, any such consideration should begin with a correct summary of the controlling law, given the CHP's misleading citation to S. G. Borello & Sons, Inc.

The correct special employment test is set forth in Kowalski v. Shell Oil Co., supra, 23 Cal.3d at 177-78 [151 Cal.Rptr. at 676-77] as follows: " 'Clearly, when a master lends his servant to another, the servant goes to the other at the direction of the master. In such a situation the master has residuary control. He can recall the servant at will; he can discharge the servant or give him other orders. But this is not the test of special employment. The test is whether the special employer has the right to control the details of the work for which the

employee was loaned.' " Kowalski v. Shell Oil Co. (1979) 23 Cal.3d 168, 177 [151 Cal.Rptr. 671, 677] at footnote 9. Control over the servant/employee, whether exercised or not, is the most important factor for a court to consider in that determination, which is generally a question of fact. Id., 23 Cal.3d at 175, 151 Cal.Rptr. at 675. Special employment may exist in situations where general and special employers share control of an employee's work. In that situation, called "dual employment" the special and general employers are concurrently liable for the employee's torts. Marsh v. Tilley Steel Co. (1980) 26 Cal.3d 486, 494-95 [162 Cal.Rptr. 320, 325, 606 P.2d 355, 360]

And, while courts sometimes consider other factors in determining whether special employment arose (e.g., Brassinga, supra, 66 Cal.App.4th at 217 [77 Cal.Rptr.2d at 673]), "cases agree that a controlling element in deciding the issue of 'special employment' is the existence of a right to control the workman in the details of his work, with other matters—the right to discharge, the immediate payor of wages, and similar matters, being important but not controlling." Thomas v. Edgington Oil Co., (1997) 73 Cal.App.3d 61, 63 [140 Cal.Rptr. 635, 636]

The other factors sometimes considered in special employment cases differ from the factors argued by the CHP in its Answering Brief. No court has held the presence of those factors, or any of them, are required in order for special employment to be present. On this subject, Brassinga expressly states that the existence of special employment may be supported by, but does not turn upon, the various other "factors" (payment of salary, provision of tools, skill, etc.). In a case such as this one, where the trial court and Court of Appeal saw abundant and clear

evidence of the CHP's control over Guzman's FSP patrol activities, there is no real need to resort to those factors. In any event, courts have held that a number of the factors listed in cases like Brassinga are of minimal importance when control is clear.

1. Payment of wages: This factor has been highly discounted. It has been called "not . . . determinative" (Kowalski v. Shell Oil Co. (1979) 23 Cal.3d 168, 177 [151 Cal.Rptr. 671, 676, 588 P.2d 811, 816]) and "not particularly enlightening" (Caso v. Nimrod Productions, Inc., (2008)163 Cal.App.4th 881, 890 [77 Cal.Rptr.3d 313, 320]. Special employment has been found without payment of wages. See, e.g., Sully-Miller Contracting Co. v. California Occupational Safety And Health Appeals Bd., (2006) 138 Cal.App.4th 684, 694 [41 Cal.Rptr.3d 742, 748]

2. Power to discharge: "[T]he ability to terminate the special employment or have the employee removed from the premises of the special employer is not necessarily probative of the existence of a special employment relationship." Wedeck v. Unocal Corp., (1997)59 Cal.App.4th 848, 861[69 Cal.Rptr.2d 501, 509] That is particularly true when the control factor is strong. Id.

3. Work unskilled: Skill negates special employment only when the skilled employee has had "substantial control" over his own "operational details." Riley v. Southwest Marine, Inc., (1988) 203 Cal.App.3d 1242, 1250 [250 Cal.Rptr. 718, 721]. The record shows that by contract, the CHP had control over operational details of a tow truck driver's work. Moreover, Guzman, the tow truck

driver, testified that the only "skills" he had to demonstrate during his CHP training were (1) how to hook up a car to a tow truck and (2) driving around the block. (Guzman 23:7-25:24, 27:9-19, 28:14-24). In any case, special employment has been found to exist in cases involving skilled workers. See, e.g., Wedeck v. Unocal Corp., (1997) 59 Cal.App.4th 848, 852 [69 Cal.Rptr.2d 501, 503] (chemist), Brassinga v. City of Mountain View, (1998) 66 Cal.App.4th 195 [77 Cal.Rptr.2d 660] (triable issue regarding police officer), Johnson v. Berkofsky-Barret Productions, Inc., 211 Cal.App.3d 1067, 1070, 260 Cal.Rptr. 67, 68 (1989) (commercial actor), Angelotti v. Walt Disney Co., (2011) 192 Cal.App.4th 1394, 1399 [121 Cal.Rptr.3d 863, 866] (stunt performer)

4. Work tools: The fact that California Coach supplied the tow truck and materials does not in any way impact the CHP's stated right to supervise day to day patrol activities.

5. Work as part of special employer's regular business: The statutes make it clear that freeway patrol to remove traffic impediments is a permanent responsibility of the CHP. (Vehicle Code §§ 2401, 2435, and 2424, Streets & Highways Code § 2560.5) In addition, the various FSP agreements providing for CHP supervision over FSP operations are for terms of years.

6. Employee consent to a special employment relationship: This element certainly favors special employment. The tow truck driver accepted a job after being told in CHP training that that the CHP is "pretty much running this" FSP operation. (CHP Appendix § 13, Exh. A, Guzman 20:15-21:19, 22:1-14). He

took the job. His general employer, California Coach, also agreed to the CHP's daily supervision of FSP patrol activities.

7. Belief in special employment relationship: This factor also favors finding a special employment. The CHP, OCTA and OCC all agreed in the agreements in the record to CHP supervision of day to day FSP patrol activities.

VII. CONCLUSION

It is certainly true that the Petitioners have been deprived of legal remedies for serious injuries based upon an appellate analysis that disregards established rules of statutory interpretation. While the Petitioners would certainly welcome compensation for their injuries, there is far more at stake here. Motorists throughout California now face inadequate remedies, or no remedies at all, for injuries sustained as a result of FSP operations under CHP control. At the same time, the erroneous analysis in the Opinion undermines principles of statutory construction and creates a risk of similar errors that may migrate into other areas of statutory interpretation.

Under the circumstances, the Petitioners respectfully submit that the Opinion of the Court of Appeal should be reversed, and that it would be appropriate for the Supreme Court to hold that the FSP does not preclude CHP liability as the special employer of a negligent FSP tow truck driver. Should the Supreme Court hold that the FSP does not preclude the CHP's liability, the Petitioners submit that it would also be appropriate to transfer this matter to the Court of Appeal with instructions to enter an order denying the Writ of

Mandamus sought by the CHP with respect to the trial court's denial of summary judgment.

Dated: June 26, 2014

Respectfully submitted,

ALLRED, MAROKO & GOLDBERG
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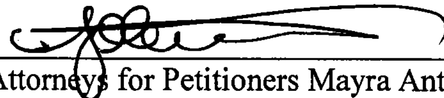

Attorneys for Petitioners Mayra Antonia Alvarado and Dylan Harbord-Moore

CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.520(c)(1)

The text of foregoing Reply Brief on the Merits consists of 4637 words, excluding tables, this Certificate, cover information and signature blocks, as counted by the Microsoft word-processing program used to generate the brief.

Dated: June 26, 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 June 26, 2014, I served the foregoing document described as **PETITIONERS' REPLY 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:

Attorneys for California Highway Patrol

Kamala D. Harris, Esq.
Joel A. Davis, Esq.
Office of the Attorney General
Calif. Department of Justice
300 S. Spring Street, Suite 5212
Los Angeles, CA 90013-1204

[X] BY MAIL: I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on June 26, 2014, at Los Angeles, California.

[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