No.: S252796

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSE M. SANDOVAL, Plaintiff, Respondent, and Cross-Appellant, *vs.* QUALCOMM, INC. Defendant, Appellant, and Cross-Respondent.	Fourth Appellate District Division One No.: C079270 San Diego County Superior Court No.: 37-2014-00012901 CU-PO-CTL

Appeal from a Judgment Following a Jury Trial
Honorable Joan M. Lewis, Judge

APPLICATION TO FILE AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF JOSE M. SANDOVAL

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amicus Curiae Consumer Attorneys of California in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: October 4, 2019 By: /s/ Alan Charles Dell'Ario

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AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA

APPLICATION TO FILE AMICUS BRIEF

Consumer Attorneys of California requests that the attached amicus brief be submitted in support of plaintiff Jose M. Sandoval. Counsel are familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief addresses the "retained control" and "affirmative contribution" exceptions to the *Privette* doctrine in light of their historical antecedents and in light the policy considerations behind *Privette*. No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST

Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals who are injured or killed because of the negligent or wrongful acts of others, including governmental agencies and employees. CAOC has taken a leading role in advancing and protecting the rights of Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent plaintiffs injured or killed as the result of negligence, CAOC is

interested in the significant issues presented by the court of appeal's decision in this case particularly as to the defendant's claims regarding its lack of responsibility for the horrific injuries to Mr. Sandoval the jury found to be caused by defendant's conduct.

AMICUS CURIAE BRIEF

In *Privette v. Superior Court* (1993) 5 Cal.4th 689 *(Privette)*, the Court "held that an employee of a contractor may not sue the hirer of the contractor under either of the alternative versions of the peculiar risk doctrine set forth in sections 413 and 416 [of the Restatement 2d of Torts]. (*Hooker v. Dep't of Transp.* (2002) 27 Cal.4th 198, 201 *(Hooker).*) In *Hooker*, the Court considered "whether an employee of a contractor may sue the hirer of a contractor for the tort of negligent exercise of retained control set forth in section 414." (*Ibid.*) The Court concluded that the "mere" retention of "control over safety conditions at a worksite" was not enough to impose liability. (*Id.* at p. 202.) Rather, "a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries. (*Ibid.* [court emphasis].) This affirmative contribution could consist of action or the proper case, the failure to act. "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions." (*Id.* at p. 212, fn. 3)

> Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively

> contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is not " 'in essence "vicarious" or "derivative" in the sense that it derives from the "act or omission" of the hired contractor.' "

(*Hooker*, *supra*, 27 Cal.4th at pp. 211–212.)

The critical distinction, then, is whether the hirer's participation in the causal chain is direct rather than vicarious. Qualcomm's election to conduct the de-energization of the control room and its failure to do so to the industry standard of care[1] was direct negligence – affirmative contribution to Sandoval's injuries.

I. The Court's "affirmative contribution" requirement in California's "retained control" doctrine serves to ensure the hirer's liability is direct, not vicarious or derivative.

As expressed in *Hooker,* the Court's concern in applying the "retained control" concepts found in the Restatement of Torts, 2d, section 411–416 has been to avoid imposing vicarious or derivative liability on the hirer of a contractor for the contractor's negligence. (*Hooker*, *supra*, 27 Cal.4th at p. 212.) Vicarious liability in this context is contrary to the general non-fault principles on which the workers' compensation scheme is based. The hirer contributes to the contractor's insurance premiums because they are built into the contract price. An employee who is

[1] See Sandoval's ABM at pp. 16-18 citing expert testimony by both sides to this effect.

entitled to recover on a vicarious-liability basis from the hirer would receive a "windfall" compared to other injured workers whose employers fail to provide safe working conditions. (*Id.* at pp. 212–213.)

But these concerns evaporate when the hirer liability is direct rather than derivative.

> [I]f a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, *it is only fair* to impose liability on the hirer.
>
> Similarly, if an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an unwarranted windfall. *The tort liability of the hirer is warranted by the hirer's own affirmative conduct.*

(*Hooker*, *supra*, 27 Cal.4th at pp. 213–214 [emphasis added].)

These conclusions comport fully with the overarching principle of California tort liability. "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person. . . ." (Civ. Code, § 1714.)

The *Hooker* court relied on the Utah Supreme Court's analysis of the retained-control principles. A "duty of care is imposed if the principal employer asserts affirmative control over or actually

participates actively in the manner of performing the contracted work. 'Retained,' to the extent the word implies passivity or nonaction, is inapt." (*Thompson v. Jess* (Utah 1999) 979 P.2d 322, 328 fn. 3 *(Thompson)*, *Hooker*, *supra*, 27 Cal.4th at p. 207.) Thus, where the employee's injury was caused by the contractor's manner of performance over which the hirer "exercised no direction, control or supervision," no hirer liability existed. (*Thompson*, *supra*, at p. 329.)

Paul Hooker, a contractor's employee, was killed operating a crane on a narrow Caltrans overpass with the outriggers retracted. He had retracted the outriggers to allow other construction traffic to pass and did not re-extend them before operating the crane. (*Hooker*, *supra*, 27 Cal.4th at p. 202.) His widow demonstrated Caltrans had retained control of safety conditions. But as in *Thompson,* summary judgment for Caltrans was proper because "Caltrans, by permitting traffic to use the overpass while the crane was being operated, [had not] affirmatively contributed to Mr. Hooker's death." (*Id.* at p. 215.)

For liability to exist, the hirer must retain control and exercise that control in a direct way. Put differently, the hirer must do more than merely retain control, it must exercise that control in a manner that is below the standard of care. It is charged with its own misconduct rather than having liability imposed upon it vicariously or indirectly. (See *Browne v. Turner Constr. Co.* (2005) 127 Cal.App.4th 1334, 1344–1345.)[2]

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[2] "If the principle of these cases can be stated in a sentence, it appears to be that the liability of a hirer of an independent contractor for injuries to an employee of the contractor cannot be

Applying this standard here, the trial court and Court of Appeal clearly got it right. The evidence viewed, as it must be, most favorably to the judgment establishes Qualcomm retained control and exercised it over the de-energizing of the circuit breakers.[3] Its failure to do so with due care was a substantial factor in Sandoval's injuries.

II. CACI 1009B correctly states the law because it requires the plaintiff to prove both retention of control and the exercise of it.

The trial court instructed the jury with Judicial Council of California Civil Jury Instruction 1009B (CACI). [4] Qualcomm asserts CACI 1009B incorrectly states the law because the "substantial factor" element cannot be equated with the "affirmative contribution" requirement the Court established in

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predicated on the *contractor's* negligence; rather the hirer can only be liable where it injures a worker through *its own* negligence."

[3] See ABM 11-15 discussing facts with record references.

[4] "[*Name of plaintiff*] claims that [he/she] was harmed by an unsafe condition while employed by [*name of plaintiff's employer*] and working on [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following: 1. That [*name of defendant*] [owned/leased/occupied/controlled] the property; 2. That [*name of defendant*] retained control over safety conditions at the worksite; 3. That [*name of defendant*] negligently exercised [his/her/its] retained control over safety conditions by [*specify alleged negligent acts or omissions*]; 4. That [*name of plaintiff*] was harmed; and 5. That [*name of defendant*]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [*name of plaintiff*]'s harm." (Judicial Council of California Civil Jury Instruction 1009B (CACI).)

Hooker. But this argument reflects a fundamental misunderstanding of "substantial factor" causation and "affirmative contribution" as used by the *Hooker* court. When "affirmative contribution" is properly understood as excluding vicarious or derivative liability, the instruction conforms perfectly to that what the Court had in mind in *Hooker*.

CACI 1009B provides in elements two, three and four *Hooker's* "retained control" and "affirmative contribution" requirements. Element two requires the plaintiff to prove: "That [hirer] retained control over safety conditions at the worksite." Element three requires: That [hirer] negligently exercised [its] retained control over safety conditions by [specify alleged negligent acts or omissions]." This third element instructs the jury on plaintiff's burden to show the "affirmative" part of the hirer's conduct. "Exercise" means "to bring to bear;" "to implement the terms of." (www.miriam-webster.com/dictionary/exercise (as of 10–03–19).) Exercising control requires affirmative conduct. "Affirmative contribution must be based on a negligent exercise of control." (*Tverberg v. Fillner Const., Inc.* (2012) 202 Cal.App.4th 1439, 1446.) Moreover, by providing for the court to inform the jury of the alleged negligent acts, this element allows the trial court to determine as a matter of law whether the acts, if proven, amount to "affirmative" conduct sufficient under *Hooker*.

The fourth, "substantial factor" element implements the "contribution" portion of the "affirmative contribution" requirement. It instructs the jury on plaintiff's obligation to prove the defendant's negligent exercise was a cause of his harm. The jury will not reach the "substantial factor" question until it first determines the hirer retained and negligently exercised control.

Thus, CACI 1009B represents the correct statement of the law. (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 593–595.) When a hirer retains control over safety conditions and negligently exercises that control in a way that is a substantial factor in plaintiff's injuries, it has made an "affirmative contribution" to them.

CONCLUSION

"The rule of workers' compensation exclusivity does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury." (*Hooker*, *supra*, 27 Cal.4th at p. 214.) The Court's requirement that a hirer's retained control over safety conditions at a worksite "affirmatively contribute" to the victim's injuries operates to limit the hirer's exposure for vicarious or derivative liability. Where, as here, the hirer's negligent exercise of its retained control was a substantial factor in causing the victim's injury, liability is warranted and fairly imposed.

Respectfully submitted,

Dated: October 4, 2019 By: /s/ Alan Charles Dell'Ario

Attorney for Amicus Curiae
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CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **1,638** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Dated: October 4, 2019 By: /s/ Alan Charles Dell'Ario

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 1561 Third St, Suite B, Napa, CA 94559. I served document(s) described as Amicus Curiae Brief as follows:

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