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LIU, J.

SUPREME COURT
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IN THE

SUPREME COURT OF CALIFORNIA

MAYRA ANTONIA ALVARADO and DYLAN HARBORD-MOORE,

Plaintiffs, Appellants and Petitioners,

vs.

STATE OF CALIFORNIA,

Defendants and Respondents,

PETITION FOR REVIEW

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

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

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ISSUES PRESENTED

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

2. The FSP statutes contain an administrative definition of the term "employer." Those statutes also contain, but do not define, the term "employee." When a statute does not define a particular term, the common law definition of that term controls. The common law definition of "employee" includes a special employee. There is no FSP Legislative history or other authority expressing an intent to vary the common law definition of an"employee" in the FSP. Did the Court of Appeal err in

holding that the presence of the term "employer"in FSP statutes evidences a Legislative intent that the CHP not be subject to tort liability for the negligence of its special employee in the FSP context?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

The Petitioners seek review of a published Opinion of the Court of Appeal (the "Opinion") regarding a legal issue of first impression and of statewide importance. That issue is whether the California Highway Patrol ("CHP") may be held liable as the special employer[1] 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.

The FSP was enacted to enable the CHP to fulfill statutory patrol responsibilities which are codified in statutes such as California Vehicle Code § 2401 (providing that the CHP "shall make adequate provision for patrol of the highways at all times of the day and night") and Vehicle Code

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

§ 2435 (providing that the CHP "is responsible for rapid removal of impediments to traffic on highways within the state"). California Streets and Highways Code § 2560.5, contains the Legislature's recognition that in order for the CHP to perform its responsibilities for removal of traffic impediments, the CHP enters into FSP programs which are "a permanent part of the State's overall program to keep California's highway safe and free of traffic congestion." A related statute, Streets & Highways Code § 2561(c) defines the "Freeway Service Patrol" as "a program managed by the Department of the California Highway Patrol, the department, and a regional or local entity which provides emergency roadside assistance on a freeway in an urban area."

The underlying facts are simple. As noted in the Opinion, Petitioner Mayra Alvarado suffered disabling brain injuries, and her minor son Dylan Harbord-Moore was also injured, when Ms. Alvarado's car was rear-ended by a tow truck owned by California Coach and driven by an individual named Guzman.[2] At the time of the accident, Guzman was engaged in FSP patrol operations.

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[2] California Coach had contracted with the Orange County Transportation Authority ("OCTA") to patrol a particular "beat," or designated stretch of freeway, as part of the FSP Program.

Prior to the accident, the CHP had entered into a chain of agreements which resulted in the CHP having supervisory power over Guzman's day to day performance of FSP operations. Those agreements included (1) "FSP Statewide Guidelines" agreed among the CHP, OCTA and CalTrans, (2) the agreement between the CHP and the OCTA for OCTA participation in the FSP program, and (3) the agreement between California Coach and the OCTA for California Coach to participate in the FSP program.[3]

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[3] 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."

In the underlying action, the CHP moved for summary judgment on the Petitioners claim that the supervisory powers vested in the CHP rendered the CHP liable as Guzman's special employer for their injuries. The Orange County Superior Court, relying upon, the various FSP-related agreements, the undisputed testimony of the California Coach driver, and the undisputed testimony of the CHP's "own Person Most Knowledgeable" regarding the CHP's role in the FSP, denied that motion. At the same time, the Superior Court issued a certification of this matter under California Code of Civil Procedure § 166.1 (" . . . a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion . . . ").

The CHP sought mandamus regarding the denial of its summary judgment motion. After briefing and oral argument, the Court of Appeal issued its Opinion, holding that despite the CHP's control over Guzman's performance of FSP duties, the CHP cannot, as a matter of law, be held liable to the petitioners as his special employer.[4] A copy of the Opinion is attached as Exhibit "A" to this Petition.

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[4] This matter came before the Court of Appeal through a mandamus proceeding brought by the CHP after the Superior Court denied the CHP's motion for summary judgment on the issue of special employer liability.

The Opinion concedes that the FSP's legislative history is "quite short" and that it "mainly focuses on funding for the program and on allocating these funds." (Opinion at 5). In fact, there is nothing in the FSP, the Legislative history of the FSP, or case law which even remotely suggests either (1) Legislative intent that the CHP should not be liable as a special employer, or (2) Legislative intent that the general principles of the Tort Claims Act (California Government Code § 800 et seq.) should be inapplicable to the CHP in the FSP context.

Against that background of legislative silence, it is crucial to note that long before the FSP was enacted, California courts had recognized the principle of special employer liability, and had applied that doctrine to public entities.[5] Similarly, long before the FSP was enacted, the Tort Claims Act permitted the imposition of special employer liability upon public entities.[6] Since the "Legislature 'is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof,'" People v. McGuire (1993) 14 Cal.App.4th 687,

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[5] See, infra, Societa Per Azioni De Navigazione Italia v. City of Los Angeles 31 Cal.3d 446, 461 [183 Cal.Rptr. 51, 60, 645 P.2d 102, 111] (1982). In-Home Supportive Services v. Workers' Comp. Appeals Bd. 152 Cal.App.3d 720, 728 [199 Cal.Rptr. 697, 701] (1984).

[6] See the discussion, infra, regarding California Government Code § 810.2 and the definition of the term "servant" under that statute.

694 [18 Cal.Rptr.2d 12, 15], it follows that the Legislature's silence on the issue of government tort liability evidences an intent not to modify existing law (i.e., governmental tort liability as a special employer). Yet, in this case the Court of Appeal concluded that existing law should be cast aside.

The Opinion does not dispute the Superior Court's finding that the Petitioners met the standards for imposing special employer liability upon the CHP.[7] Nor did the Court of Appeal dispute the applicability of the special employment doctrine to public entities. Instead, the Court held for the first time 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." (Opinion at 7).

As will be shown, the Court of Appeal's reliance upon the presence of the term "employer" in certain Vehicle Code statutes is misplaced. As used in the FSP statutes, that term is simply an administrative definition used to allocate administrative responsibilities associated with the program. See, e.g., Vehicle Code § 2430.5 (requiring an "employer" to obtain temporary certificates from tow truck drivers), Vehicle Code § 2430.3

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[7] "We are not called upon to determine whether [the FSP tow truck driver] was a special employee of the CHP at the time of the Alvarado accident." (Opinion at 4).

(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).

As noted in the Opinion (at page 6), the FSP definition of an "employer,"contained in Vehicle Code § 2430.1, is "essentially circular." On its face, that definition specifies that the CHP may contract for FSP towing services with two categories of providers, (1) "employers," who are defined in subsection (b) as "a person or organization that employs [tow truck drivers," or (2) "an owner-operator who performs the activity specified . . . and who is involved in freeway service patrol operations pursuant to an agreement or contract with a regional or local entity."

And, while the Opinion centers almost entirely on the presence of the term "employer" in FSP statutes, it omits the fact that FSP statutes also use, but do not define, the term "employee." Where a statute contains a term but

does not define that term, the common law definition of the term controls. Metropolitan Water Dist. of Southern California v. Superior Court, 32 Cal.4th 491, 500, 9 Cal.Rptr.3d 857, 862-63, (2004) (common law definition of "employee" applied). Since there was, long before the FSP, a common law definition of both "employee" and "special employee," the absence of a definition for the term "employee" in the FSP must be deemed to be an expression of Legislative intent to maintain the common law definition, and thus to maintain the common law special employment doctrine.

In AB1248, the bill that gave rise to the FSP, the Legislature illustrated the statewide importance of the program. That bill declares that "(a) California's freeway service patrols are a critical element in the state's efforts to keep our freeways safe and operating efficiently[;] (b) Freeway service patrols provide an effective freeway congestion relief program on the state highway system." . . . (e) Since the state first implemented freeway service patrol programs on a demonstration basis in 1992, some 4.5 million motorists statewide have received assistance . . . "

Based upon the Legislatures own declarations, it follows that the Opinion in this matter leaves millions of motorists at risk of not receiving full compensation for injuries. The Opinion also undermines well

established principles of statutory construction, and therefore creates a risk of erroneous decisions in other cases.

Supreme Court review is needed to restore remedies to the many people whose remedies are at risk, to stabilize general principles of governmental tort liability and to avoid launching lines of erroneous analysis that may migrate into other areas of statutory interpretation.

BACKGROUND

(A) **The Petitioners were injured by the negligence of a tow truck driver engaged in Freeway Service Patrol ("FSP") activities**.

The Petitioners are Mayra Alvarado ("Ms. Alvarado") and her minor son Dylan Harbord-Moore ("Dylan"). While Ms. Alvarado was driving on the I-5 freeway, a tow truck owned by California Coach, and negligently driven by its employee Guzman, hit the rear of the car. The impact caused Ms. Alvarado to sustain disabling brain injuries.[8] (Opinion at 2) At the time of the accident, the California Coach provided FSP patrol services under an agreement with the Orange County Transportation Authority ("OCTA"). (Opinion at 3).

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[8] Dylan, who was a passenger in his mother's car, was also injured.

(B) **<u>Undisputed evidence of CHP control over the day to day FSP activities of the negligent FSP tow truck driver</u>**.

As noted in the Introduction to this Petition, the CHP entered into a chain of agreements relating to the FSP program. Those agreements all provided for the CHP to exercise supervisory power over the day to day performance of FSP operations by tow truck drivers such as Guzman. Although the Opinion touched upon the CHP's control over FSP operations (Opinion at 3), it did not consider the full extent of that control.

At the top of the chain stands the "FSP Statewide Guidelines" among CHP, OCTA and CalTrans. The Guidelines provide, inter alia, that the "CHP is generally responsible for . . . supervision of the day to day FSP field operations" In addition, the Guidelines specify that "the CHP is responsible for dispatching FSP vehicles," and that CHP activities in the FSP "include supervising FSP field operations."

There was also a written agreement between the CHP and the OCTA for OCTA to participate in the FSP. That agreement specifically provides that the CHP is responsible for "performing necessary daily project field supervision, program management and the oversight of the quality of the contractor services," It goes on to acknowledge 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 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."

California Coach, in turn, contracted with the OCTA to provide FSP patrol services on an I-5 "beat." The California Coach-OCTA agreement provides that FSP tow trucks are "supervised by the CHP . . . "and 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"

LEGAL DISCUSSION

(A) **The Tort Claims Act allows a governmental entity to be held liable as the special employer of a negligent actor. Numerous cases have applied the doctrine to public entities.**

In trial court proceedings and before the Court of Appeal, the Petitioners argued (1) that the Tort Claims Act imposed special employer

liability upon public entities, and (2) that the CHP was liable for the Petitioners' injuries as the special employer of the negligent California Coach tow truck driver. The Petitioners relied upon the Tort Claims Act definition of an "employee" set forth in Government Code § 810.2, which includes an "employee, or servant, whether or not compensated, but does not include an independent contractor."

For purposes of § 810.2, the term "servant" as it appears in Government Code § 810.2 has been defined to include special employees and individuals with dual employers. In this regard, California has adopted Restatement of Agency § 220 as its definition of the term "servant" in the governmental tort liability context. Societa Per Azioni De Navigazione Italia v. City of Los Angeles, supra; In-Home Supportive Services v. Workers' Comp. Appeals Bd. 152 Cal.App.3d 720, 728 [199 Cal.Rptr. 697, 701] (1984); Metropolitan Water Dist. of Southern California v. Superior Court 32 Cal.4th 491, 498 [9 Cal.Rptr.3d 857, 861, 84 P.3d 966, 970] (2004); Bowman v. Wyatt 186 Cal.App.4th 286, 299 [111 Cal.Rptr.3d 787, 796] (2010). Restatement § 220 defines the term "servant" as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

Relying on § 220 of the Restatement, the Supreme Court held in Societa Per Azioni De Navigazione Italia v. City of Los Angeles, supra, that the City of Los Angeles Could be held liable as a dual employer for the negligence of a ship's pilot. That Court specifically held: ""Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable [to third parties] for the employee's torts.'" (. . . see generally, Rest.2d Agency, § 220 . . .)) 31 Cal.3d at 460 [183 Cal.Rptr. 51at 59]).

(B) As acknowledged by the Court of Appeal, the Legislative history of the FSP Act is silent on the issue of the CHP's liability as a special employer. That silence is an important indication that the Legislature did not intend to discard longstanding governmental tort liability rules in the context of the FSP.

Neither the CHP nor the Court of Appeal has been able to cite any statute or piece of Legislative history in support of the argument that the Legislature did not intend for the CHP to be liable as a special employer in the FSP program.[9] That inability is easily explained by the fact that there is

[9] The Court of Appeal candidly described the FSP's legislative history as "quite short" and acknowledges that the it "mainly focuses on funding for the program and on allocating these funds." (Opinion at 5).

nothing in the FSP or its Legislative history which even remotely suggests either (1) that the CHP should not be held liable as a special employer of tow truck drivers engaged in the FSP program, or (2) that the Legislature intended that the general rules and definitions of the Tort Claims Act (California Government Code § 800 et seq.) should not apply to the CHP in the FSP context.

From the Petitioners' perspective, then, there is no ambiguity in any of the FSP statutes. The Legislature's silence on the subject of modifying the ordinary principles of governmental tort liability is itself an expression of the Legislature's intent not to modify those principles.

(C) When the FSP was enacted, the Legislature was, as a matter of law, deemed to be aware of existing law which supported the imposition of special employer liability upon the CHP. The Legislature's silence on the subject evidences its intent not to modify that law.

(1) Caution must temper judicial creativity in the face of legislative or regulatory silence.

The holding in the Opinion is premised on the repeated use of the term "employer" in FSP statutes. (Opinion at 6-7) While that term certainly appears in a number of FSP statutes, none of those statutes even remotely

suggests that the Legislature intended to either (1) ban the application of the special employment doctrine to the CHP (or any other party), or (2) address the tort liability of any FSP participant. "Accordingly, 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]

(2) The Tort Claims Act had recognized the special employer liability of public entities for decades before the enactment of the FSP.

The FSP was enacted in 1992. By that time, the Tort Claims Act, which was enacted "[]in 1963 . . . in order to provide a comprehensive codification of the law of governmental liability and immunity in California," Farmers Insurance Group v. County of Santa Clara (1995) 11 Cal.4th 992, 1001 [47 Cal.Rptr.2d 478, 484], was twenty-nine years old. Thus, for twenty nine years before the FSP was enacted, California Government Code § 810.2 defined the term "employee" as including the term "servant" for purposes of governmental tort liability.

For almost two decades before the Tort Claims Act, and for almost five decades before the FSP Act, California had been following the Restatement of Agency § 220 definition of the term "servant." Isenberg v.

California Employment Stabilization Commission (1947) 30 Cal.2d 34, 39 [180 P.2d 11, 15]; California Compensation Ins. Co. v. Industrial Accident Commission (1948) 86 Cal.App.2d 861, 867 [195 P.2d 880, 884][10] As noted above, Section 220 defines the term "servant" to include someone "employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

(3) Long before the enactment of the FSP, the Courts of this State applied special employer liability to public entities.

"A statute will be construed in light of the common law unless the Legislature clearly and unequivocally indicates otherwise." Arnold v. Mutual of Omaha Ins. Co. (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213, 218] The application of that principle here compels the conclusion that the Court of Appeal's decision is erroneous.

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

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[10] See, also, Empire Star Mines Co. v. California Employment Commission (1946) 28 Cal.2d 33, 44 [168 P.2d 686, 692] overruled on other grounds by People v. Sims (1982) 32 Cal.3d 468 [186 Cal.Rptr. 77]

Appeals Bd. (1981) 30 Cal.3d 391, 406 [179 Cal.Rptr. 214, 222, 637 P.2d 681, 689] ("[T]he County was the general employer. It sent respondent to work for the District, the special employer.")

Ten years before the FSP was enacted, in Societa Per Azioni De Navigazione Italia v. City of Los Angeles 31 Cal.3d 446, 461 [183 Cal.Rptr. 51, 60, 645 P.2d 102, 111] (1982), the California Supreme Court had no hesitation in relying upon Restatement § 220 as a basis for imposing special employment liability upon a public entity. Addressing special employer liability for the negligence of a ship's pilot (Peterson), the Supreme Court held: "Since Petersen simultaneously served two employers-the City and the Shipowner-at the time of the collision, under the doctrine of respondent superior both masters would be jointly and severally liable to third parties for his negligence."

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

applicable to public entities in In-Home Supportive Services v. Workers' Comp. Appeals Bd. 152 Cal.App.3d 720, 728 [199 Cal.Rptr. 697, 701] (1984).

The Legislature's awareness of those authorities when the FSP was enacted, coupled with the silence of the FSP on the issue of special employment liability/governmental tort liability is evidence of Legislative intent not to vary the existing law on the subject.

(D) Under well established principles of statutory construction, the silence of the Legislative history and statutes of the FSP compel the conclusion that the Government Code definition of "employee" and/or the common law definition of that term apply for purposes of tort liability in the FSP setting.

By way of background, the FSP Act was adopted in 1992 (Stats.1992, c. 1109 (A.B.3346)). By then, the law of this state had recognized the special employment liability of governmental entities for decades. Since the "Legislature 'is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof,'" People v. McGuire (1993) 14 Cal.App.4th 687, 694 [18 Cal.Rptr.2d 12, 15], it follows that the Legislature's silence evidences an intent not to modify existing law.

As noted in the Opinion, several statutes within the FSP use the term "employer. Omitted from the Court of Appeal's Opinion, however, is the fact that FSP statutes also use the term "employee," but do not define that critical term.

While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." Arden Carmichael, Inc. v. County of Sacramento (2001) 93 Cal.App.4th 507, 516 [113 Cal.Rptr.2d 248, 254] Thus, when a statute contains a term but does not define that term, the common law definition of the term in question controls. In language tailor made for this situation, the Supreme Court in Metropolitan Water Dist. of Southern California v. Superior Court, 32 Cal.4th 491, 500, 9 Cal.Rptr.3d 857, 862-63, 84 P.3d 966, 971 (2004) held:

> "In this circumstance—a statute referring to employees without defining the term—courts have generally applied the common law test of employment . . . People v. Palma (1995) 40 Cal.App.4th 1559, 1565–1566, 48 Cal.Rptr.2d 334 ['as a general rule, when "employee" is used in a statute without a definition, the

> Legislature intended to adopt the common law
> definition and to exclude independent
> contractors'].) California courts have applied
> this interpretive rule to various statutes dealing
> with public and private employment."

See, also, Arnold v. Mutual of Omaha Ins. Co. (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213, 218] ("A statute will be construed in light of the common law unless the Legislature clearly and unequivocally indicates otherwise. (Citations omitted) Thus, when a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute.") and Bowman v. Wyatt 186 Cal.App.4th 286, 299 [111 Cal.Rptr.3d 787, 796] (2010).

Clearly, there is a common law definition of both "employee" and "special employee" Bradley v. California Dept. of Corrections and Rehabilitation (2008) 158 Cal.App.4th 1612, 1626 [71 Cal.Rptr.3d 222, 232]("Consequently, when a statute fails to define the term 'employee,' courts routinely look at the common-law definition for guidance, focusing on the amount of control the employer exercises over the employee . . . We believe that, under either the common-law definition or the regulatory definition, Bradley was a special "employee' of CDC for FEHA purposes.")

Thus, the absence of a definition of the term "employee" in the FSP shows the intent of the Legislature to maintain the common law definition, and thus to maintain the common law special employment doctrine.

(E) The Court of Appeal's reliance upon the presence of the term "employer" in certain Vehicle Code statutes is misplaced. As utilized in the FSP statutes, that term is simply an administrative definition used to allocate administrative responsibilities associated with the program.

"' "In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the 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]

The Court of Appeal's began its statutory interpretation by noting that Vehicle Code § 2430.1(b) defines the term "employer" in the context of FSP statutes. Section 2430.5 provides as follows: " 'Employer' means a person or organization that employs those persons defined in subdivision (a), or who is an owner-operator who performs the activity specified in

subdivision (a), and who is involved in freeway service patrol operations pursuant to an agreement or contract with a regional or local entity."

On its face, section 2430.1 has nothing whatsoever to do with the subject of tort liability. It simply defines the two kinds of providers (employers of tow truck operators and owner-operators) with whom the CHP can contract with for FSP towing services.

Viewed in the context of Article 3.3 of the Vehicle Code, the § 2430.1 definition of an "employer" was plainly intended by the Legislature as merely an aid to understanding the allocation of certain administrative responsibilities within the FSP. Each of the statutes in that Article, and each of the Vehicle Code sections cited by the Court of Appeal, uses the term "employer" in that context. In this regard, the Petitioners ask the Supreme Court to note:

- Vehicle Code § 2430.5 states that every "employer intending to hire a tow truck driver" must require "the applicant for employment to submit a temporary tow truck driver certificate . . . "

- Vehicle Code § 2430.3 requires every FSP tow truck driver . . . to "notify each of his or her employers and prospective employers and the Department of the California Highway Patrol of an arrest or conviction . . ."

/ / /

- Vehicle Code § 2431 deals only with procedures for "conducting criminal history and driver history screening of tow truck drivers and employers." It requires the CHP, among other things, to "[o]btain fingerprints from tow truck drivers and employers," and to "[v]erify that the tow truck driver or employer, or both, have a valid California driver's license . . . "

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

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

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

Finally, Vehicle Code § 2435 does not compel any different conclusion. It states that "the Department of the California Highway Patrol may enter into agreements with employers for freeway service patrol

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

CONCLUSION

The Court of Appeal erroneously held in a published opinion that the CHP cannot, as a matter of law, be liable as the special employer of a tow truck driver who, while under the undisputed supervision of the CHP, negligently performs FSP duties. That holding is the product of an analysis that is so deeply flawed that it risks turning established rules of statutory interpretation upside down. Among other things, the Court of Appeal jettisoned the general liability rules of the California Tort Claims Act without any supporting Legislative history for doing so. At the same time, the Opinion disregards the crucial fact that when the FSP was enacted, both

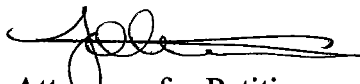
the Tort Claims Act and case law of this State had applied the special employment doctrine to public entities. The holding also disregards the presence of the undefined term "employee" in FSP statutes, and the rule that in the absence of a statutory definition, the common law definition of a term applies.

Aa a result of the Court of Appeal's flawed analysis, literally millions of people (according to Legislative findings) are in danger of an inadequate remedy, or no remedy at all, for injuries sustained as a result of the CHP's FSP program. Moreover, the fact that the Opinion is published can only undermine well established principles of statutory construction, and create a risk of erroneous decisions in other cases. Under these circumstances, the Supreme Court should review this matter to correct an erroneous precedent, to avoid launching lines of erroneous analysis that may migrate into other areas of statutory interpretation.

Dated: October 24, 2013

Respectfully submitted,

ALLRED, MAROKO & GOLDBERG
Michael Maroko, Esq.
John S. West, Esq.



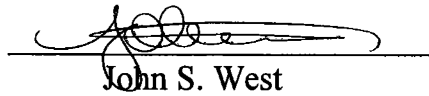
Attorneys for Petitioners **Mayra Antonia Alvarado and Dylan Harbord-Moore**

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 6979 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: October 24, 2013



John S. West

EXHIBIT A

Filed 9/17/13; pub. order 10/15/13 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STATE OF CALIFORNIA ex rel. DEPARTMENT OF CALIFORNIA HIGHWAY PATROL, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; MAYRA ANTONIA ALVARADO et al., Real Parties in Interest.	G047922 (Super. Ct. No. 30-2008-00116111) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Robert J. Moss, Judge. Petition granted.

Kamala D. Harris, Attorney General, Kathleen A. Kenealy, Chief Assistant Attorney General, Alberto L. Gonzalez and Joel A. Davis, Deputy Attorneys General for Petitioner.

No Appearance for Respondent.

Allred, Maroko & Goldberg, Michael Maroko and John S. West for Real Parties in Interest.

INTRODUCTION

The California Highway Patrol (CHP) has petitioned for a writ of mandate to compel the trial court to grant a summary judgment motion made in a personal injury lawsuit involving the CHP's Freeway Service Patrol (FSP) program. Tow truck companies in this program contract with county transportation authorities to patrol urban freeways, helping out stranded motorists. The transportation authorities in turn contract with the CHP, which certifies and supervises both the drivers and the truck companies.

One of the FSP tow trucks collided with a car, injuring the driver and her infant son. The CHP moved for summary judgment in the subsequent lawsuit, on the ground that it was not the driver's special employer and therefore not responsible for his negligence. The trial court denied the motion, and the CHP has petitioned for a writ of mandate to reverse the trial court. The writ petition is based solely on the legislative intent behind the FSP program.

We grant the petition. 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.

FACTS

A tow truck driven by one J. Guzman[1] on the I-5 freeway rear-ended a car driven by real party Mayra Alvarado. Guzman was employed by California Coach

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[1] There is some confusion about the driver's first name. The caption of the second amended complaint identifies him as Joshua Guzman. His name in the body of the complaint is given as Juan Guzman. The CHP officer whose declaration was used to support the CHP's motion for summary judgment called him Jose Guzman. The driver's deposition transcript identifies him as Joshua Guzman.

Orange, Inc., which had a contract with the Orange County Transportation Authority (OCTA) to participate in the FSP program.[2] OCTA in turn contracted with the CHP to provide funding for the CHP's involvement in the program in Orange County. The CHP supervised the FSP – performing background checks, training the drivers, inspecting the vehicles, dispatching drivers, and investigating complaints – pursuant to its statutory duty to "make adequate provision for patrol of the highways at all times of the day and night" (Veh. Code, § 2401) and to rapidly remove all "impediments to traffic on highways within the state." (*Id.*, § 2435, subd. (a).)[3]

Alvarado sustained catastrophic brain injuries in the accident. She is permanently disabled. Her infant son was also injured, although less seriously than his mother. Alvarado and her son sued the driver, the tow truck company, OCTA, and the CHP for damages.

By the time of the second amended complaint, the sole remaining issue with respect to the CHP was whether it was Guzman's special employer and therefore liable for his negligence. The CHP moved for summary judgment on this issue, arguing that it did not meet the definition of special employer and that legislative intent prevented FSP drivers from being considered special employees of the CHP.

The trial court denied the motion for summary judgment and 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

2 See Streets and Highways Code sections 2560 et seq.

3 FSP drivers patrol a "beat," which consists of a designated stretch of freeway. They may be sent to the scene of a problem by a CHP dispatcher, but they are also authorized to stop and help stranded motorists without being dispatched. Each tow truck is required to display two FSP logos. "The FSP logo signifies the three different governmental agencies responsible for the FSP Program, Caltrans, OCTA, and CHP. . . . The magnets serve to identify the truck as working for the FSP Program and put motorists in disabled vehicles at ease when they see the truck."

result of the CHP's right to control the activities of FSP tow truck drivers in the performance of FSP duties."[4] The CHP then filed a petition for a writ of mandate to order the trial court to grant its motion for summary judgment.

DISCUSSION

"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.' [Citation.] . . . [T]his court [has] stated that 'an employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor comes under the control and direction of the other party to the contract, a dual employment relation is held to exist. [Citations.]'" (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174-175.)

We are not called upon to determine whether Guzman was a special employee of the CHP at the time of the Alvarado accident. [5] 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.

We review the interpretation of a statute de novo. "When interpreting statutes, the Legislature's intent should be determined and given effect. Legislative intent is generally determined from the plain or ordinary meaning of the statutory language.

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4 Code of Civil Procedure section 166.1 provides: "Upon the written request of any party or his or her counsel, or at the judge's discretion, 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, appellate resolution of which may materially advance the conclusion of the litigation. Neither the denial of a request for, nor the objection of another party or counsel to, such a commentary in the interlocutory order, may be grounds for a writ or appeal."

5 This case is in the Court of Appeal because of a certification under Code of Civil Procedure section 166.1. Whether Guzman is a special employee of the CHP is not a "controlling question of law" and thus not subject to interlocutory review.

The statute's every word and provision should be given effect so that no part is useless, deprived of meaning or contradictory. Interpretation of the statute should be consistent with the purpose of the statute and statutory framework. [Citations.] . . . [¶] Where the meaning of statutory language is uncertain, rules of construction or legislative history may aid in determining legislative intent. [Citations.] 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. [Citations.] In enacting a statute, the Legislature is deemed to have been aware of existing statutes and judicial interpretations. [Citation.]" (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010) 189 Cal.App.4th 101, 109-110.)

The legislative mandate for the statewide FSP program can be found in Streets and Highways Code sections 2560 et seq. The chapter is quite short; it mainly focuses on funding for the program and on allocating these funds. It also includes sections on logos for participating tow trucks and on training and certifications for drivers and operators. (*Id.* §§ 2562.5, 2563.) A final section addresses developing and updating operational guidelines. (*Id.* § 2565.)

Legislation concerning the FSP program is, however, not restricted to the Streets and Highways Code. Portions of the Vehicle Code also deal with FSP tow truck drivers (Veh. Code, §§ 2430 et seq.) and with emergency roadside assistance, including the FSP program. (Veh. Code, §§ 2435 et seq.) Each of these Vehicle Code articles, as well as the Freeway Service Patrol Act, uses the same definition of "employer." (Veh. Code, §§ 2430.1, subd. (b), 2436, subd. (d); Sts. & Hy. Code, § 2561, subd. (b).)[6]

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6 "[A] person or organization that employs those persons defined in subdivision (a), or who is an owner-operator who performs the activity specified in subdivision (a), and who is involved in freeway service patrol operations pursuant to an agreement or contract with a regional or local entity." (Veh. Code, § 2430.1, subd. (b).)

Vehicle Code section 2430.1, subdivision (a), provides in pertinent part: "'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."

The definition of "employer" itself does not, as the CHP argues, show that the Legislature did not intend the CHP to be the special employer of the FSP tow truck drivers. The definition is essentially circular. An "employer" is, among other things, an organization that employs FSP tow truck drivers. If the CHP, an organization, meets the criteria of a special employer, most notably *control*, then it is an "employer" of FSP tow truck drivers.[7]

In other pertinent portions of the Vehicle Code, however, the statutes draw a clear distinction between the CHP on the one hand and an "employer" on the other. For example, the CHP may enter into contracts with "employers" for freeway service patrol operations (Veh. Code, § 2435, subd. (a)), and the CHP, in conjunction with CalTrans, is responsible for establishing minimum training standards for "employers." The CHP must provide training for all "employers," and the "employers" are required to attend training sessions. (Veh. Code, §§ 2436.5, 2436.7.) The tow truck drivers are required to inform both their "employers" *and* the CHP if they are arrested for or convicted of certain crimes. (*Id.*, § 2430.3, subd. (a).)[8] The CHP must obtain employers' fingerprints and verify that the employers have valid California driver's licenses. (*Id.,* § 2431, subd. (a)(1) & (3).) The employer must maintain lists of eligible and non-eligible drivers at its place of business for inspection by the CHP. (*Id.,* § 2430.5, subd. (c).) Vehicle Code section 2432.1 provides for penalties for employers that fail to comply with the requirements of the law on tow truck drivers or the emergency roadside assistance statutes; they may lose their right to participate in the freeway service patrol operation.

We believe these Vehicle Code statutes, to which the Freeway Service Patrol Act explicitly refers (see Sts. & Hy. Code, §§ 2561, 2563), establish a legislative

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[7] The CHP also argues that tow truck drivers are independent contractors, rather than special employees. Guzman, the driver of the truck involved in the accident in this case, was indisputably not an independent contractor. At the very least, he was an employee of California Coach Orange, Inc.

[8] This statute was amended in 2001 to require the tow truck drivers to notify the CHP, in addition to their employers, if they were arrested or convicted.

intent to distinguish between employers of tow truck drivers and the CHP.[9] Accordingly, the CHP cannot as a matter of law be the special employer of a "tow truck driver" as defined in Vehicle Code section 2430.1, subdivision (a), and by extension of a tow truck driver operating under the Freeway Service Patrol Act.

DISPOSITION

The State's petition is granted. Let a peremptory writ of mandate issue directing respondent the Superior Court of Orange County to vacate its order of January 4, 2013, and to enter an order granting the motion for summary judgment in favor of the California Highway Patrol. The temporary stay is lifted upon finality of this opinion as to this court. Each party is to bear its or her own costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.

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[9] We do not hold, as advocated by the CHP, that the statutory nature of the FSP program in and of itself precludes a special employer/special employee relationship. Other government agencies have been found to be special employers, notwithstanding the statutory origins of their existence. (See, e.g., *Societa Per Azioni De Navigazione Italia v. City of Los Angeles (*1982) 31 Cal.3d 446, 459-462 [collision in Los Angeles Harbor]; *County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 405-406 [workers' compensation for injured employee]; *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1627, 1628 [FEHA claim by Department contract employee]; *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 983-984 [county child welfare workers]; *Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 215-217 [police officer killed while participating in training exercise]; *In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 732 [injured home services worker employee of both state and of home services recipient].)

Filed 10/15/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STATE OF CALIFORNIA ex rel. DEPARTMENT OF CALIFORNIA HIGHWAY PATROL,	
Petitioner,	G047922
v.	(Super. Ct. No. 30-2008-00116111)
THE SUPERIOR COURT OF ORANGE COUNTY,	ORDER GRANTING REQUEST FOR PUBLICATION
Respondent;	
MAYRA ANTONIA ALVARADO et al.,	
Real Parties in Interest.	

Petitioner has requested that our opinion, filed on September 17, 2013, be certified for publication. Pursuant to California Rules of Court, rule 8.1105(c)(6), the request is GRANTED.

The opinion is ordered published in the Official Reports.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.

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 October 24, 2013, I served the foregoing document described as **PETITION FOR REVIEW** 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

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

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

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

Clerk of the Court
ORANGE COUNTY SUPERIOR COURT
700 Civic Center Drive West
Santa Ana, CA 92701

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

[ ] **BY PERSONAL SERVICE:** I caused such envelope to be hand-delivered to the offices of the addressee(s).

[ ] **BY FAX**: by transmitting a true copy via facsimile transmission from telecopier number (323) 653-1660 located at 6300 Wilshire Blvd., Ste. 1500, Los Angeles, California 90048.

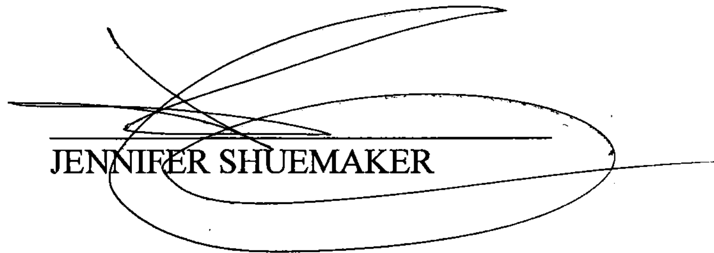
[ ] **BY EMAIL:** I caused such document to be electronically served via email to the email address of the addressee(s).

[X] **BY FEDERAL EXPRESS:** I caused such document(s) to be delivered via Federal Express in a package designated to be picked up by Federal Express with delivery fees provided for to the addressee(s) designated. I am readily familiar with the business practice of collecting and processing correspondence to be picked up by an employee of Federal Express.

Executed on October 24, 2013, 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