S252796

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOSE M. SANDOVAL,
Plaintiff, Respondent and Cross-Appellant,

v.

QUALCOMM, INC.,
Defendant, Appellant and Cross-Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D070431
JUDGE JOEL WOHLFEIL, CASE NO. 37-2014-00012901-CU-PO-CTL

ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

The primary issue being reviewed concerns just what this Court meant when it recognized the "affirmative contribution" exception to workers' compensation under *Privette v. Superior Court* (1993) 5 Cal.4th 689. As explained, under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, that exception applies where the hirer of an independent contractor elects *not* to delegate the responsibility for preparing the premises for the contractor to safely perform its work but instead affirmatively performs that work itself in a negligent manner that causes harm to the contractor's employee.

Plaintiff Martin Sandoval was severely burned over 35% of his body by an "arc flash" coming from a live current breaker in the switchgear room at defendant Qualcomm's campus. The current breakers are contained in rows of metal cabinets and the entire breaker system is called the "switchgear." Plaintiff was there to assist a contractor (TransPower) that had been retained by Qualcomm to inspect its circuit breakers in the switchgear room. Qualcomm could have but elected not to delegate the task of deenergizing the switchgear so that TransPower and plaintiff could safely perform their work. Rather, Qualcomm retained responsibility for performing that critical task.

Plaintiff saw that Qualcomm had deenergized the breaker gear before they started working in the room. Unbeknownst to plaintiff, Qualcomm had only partially deenergized the switchgear leaving certain current breakers energized and very dangerous. There were no outward indications as to which breakers remained energized and which breakers were safe to inspect. Just the opposite was true. The switchgear that remained energized actually appeared to be deenergized. The jury heard expert testimony from both plaintiff's witnesses *and* Qualcomm's witnesses

as to a variety of steps Qualcomm should have taken when it partially deenergized the switchgear to protect individuals who would be working in the switchgear room. Qualcomm itself recognized that it retained control as to what was "hot" and what was not and also recognized certain protective measures that should have been – but were not – taken.

The jury agreed with plaintiff that Qualcomm negligently exercised its retained control over safety conditions and that this negligent exercise of retained control over safety conditions was a substantial factor in causing plaintiff's harm and the Court of Appeal affirmed. Qualcomm has now obtained review by this Court and argues that it is entitled to judgment as a matter of law because plaintiff's claims are barred under *Privette v. Superior Court* (1993) 5 Cal.4th 689 since plaintiff did not submit evidence that Qualcomm's negligence affirmatively contributed to his injures under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198. Qualcomm is wrong.

Here, the jury heard ample evidence that Qualcomm took it upon itself to control the manner in which current breakers in the switchgear room were to be deenergized. The jury also heard ample evidence that the manner in which Qualcomm affirmatively undertook to perform this task was negligent because it failed to use available safeguards to protect individuals (such as plaintiff) who were working in the switchgear room. This negligence is the personification of "affirmative contribution" under *Hooker*. No matter how many times Qualcomm says it, this case is not simply about Qualcomm's failure to implement its internal safety procedures. Rather, it is about the negligent manner Qualcomm acted in partially deenergizing the switchgear equipment in the room where plaintiff was to be working.

Nor does it matter, that Frank Sharghi (the owner of TransPower, the contractor hired by Qualcomm) was also negligent. Qualcomm spends

considerable energy focusing on the negligent manner in which Mr. Sharghi removed the back panel from the metal cabinet containing an energized circuit breaker that injured plaintiff. However, the fact that Mr. Sharghi was also negligent does not exonerate Qualcomm from its own negligence that affirmatively contributed to plaintiff's injuries. Qualcomm did not (and still does not) claim that Mr. Sharghi's negligence was a superseding cause that somehow served to sever causation and insulate Qualcomm from liability. The fact remains that no matter how much mud Qualcomm slings at Mr. Sharghi, it does not establish that Qualcomm did not engage in tortious conduct under *Hooker*.

Finally, Qualcomm's effort to attack CACI 1009B, the pattern instruction setting forth the elements of plaintiff's claim, likewise fails. That pattern instruction correctly informed the jury that for Qualcomm to be liable, it must have "negligently exercised its retained control over safety conditions" and that its "negligent exercise of retained control over safety conditions was a substantial factor in causing [plaintiff's] harm." This instruction correctly described the standard under *Hooker* even though it did not expressly use the term "affirmative contribution." As the Advisory Comment to that instruction explains, the term "affirmative contribution" was not used because of the risk its use would mislead the jury to conclude that the conduct required to satisfy that standard would be narrower than allowed under *Hooker*. Indeed, that unduly restricted view of affirmative contribution, which the Advisory Committee was concerned about, mirrors the position now taken by Qualcomm. Qualcomm's own arguments therefore help explain why CACI 1009B is a correct statement of the law.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

A Qualcomm plant operator was in the control room at Qualcomm's power plant when he heard a loud bang, like a large canon or thunderclap. (8 RT 739-741.) Several alarms went off and he knew something was wrong. (8 RT 739-740.)

Minutes earlier, the operator and two of his Qualcomm colleagues had deenergized some of their circuit breakers in order to allow for their inspection. (8 RT 723.) After hearing the bang, the operator went upstairs to the room with the circuit breakers to tell the men inspecting the circuit breakers there was a problem and to get out of the room. (8 RT 740.)

When the operator arrived in the room there was a lot of smoke and it smelled of ozone. (8 RT 742.) He then saw one of the men lying face down, screaming. (8 RT 744.) The man was smoldering, and parts of his clothing were smoking. (8 RT 744-745.) The man's body fat had liquified, and when the operator attempted to treat him, the man's skin came off in the operator's hands. (8 RT 745.) The man's arms and legs were jerking around while the man was yelling, "Why was it live? It shouldn't be live." (8 RT 745.)

A. Qualcomm Hires Frank Sharghi To Inspect Its Circuit Breakers; Qualcomm's Plant Engineer Expresses Concern About Proceeding With The Inspection But Is Overruled By His Supervisor.

Qualcomm was upgrading its power generation system and hired Frank Sharghi, an electrical engineer and President of TransPower Testing, Inc., to determine if Qualcomm's current circuit breakers could handle the increase in power from the new turbine. (7 RT 562-563, 569-572; 4 AA 796, 800.) This inspection was part of the biggest upgrade that plant had ever seen, and entailed every working part of the plant. (8 RT 678.) Qualcomm began planning for the inspection months earlier, as the inspection required coordination such as notifying others there would be an interruption in service. (8 RT 715-716.)

As part of this preparation, Qualcomm's plant operation team had a conference call to discuss their readiness to be able to carry out the shutdown. (8 RT 716.) The plant operation team consisted of five people: two plant operators, two plant engineers, and a senior facilities manager. (7 RT 466-467.) One of the plant engineers, Brian Higuera, supervised the other plant engineer and the two plant operators. (7 RT 466-467.) Higuera reported to Kirk Redding, the senior facilities manager. (7 RT 466-467.)

During this conference call, Higuera expressed his concern about proceeding with the inspection. (8 RT 682-683, 716.) Higuera wanted to postpone the inspection for two weeks because he had to be out of state that day. (8 RT 682-683.) He felt that they were understaffed without him. (8 RT 682-683.)

The TransPower inspection was not the only project going on that day; in addition to the TransPower inspection, there were four other projects scheduled on the site for the same time period, as well as three

more projects listed as "to be announced." (7 RT 470.) In total, there were over 15 contractors on site that day. (8 RT 721; 2 AA 371.) As a result, in Higuera's opinion, they did not have enough manpower to cover the shutdown. (8 RT 683-684.) While the two operators and the other engineer would be there to perform their jobs, Higuera noted that there would be no one to perform his job of overseeing the different projects. (8 RT 684.) Redding overruled Higuera and decided to go ahead with the shutdown because he felt confident in the team and because he would be on site that day. (8 RT 685, 717.) Redding did not end up coming to the plant the day of the shutdown as Saturday was his day off. (6 RT 333; 7 RT 473, 483.)

B. Believing Qualcomm Has Deenergized The Circuit Breakers, Martin Sandoval Inspects A Circuit Breaker; An Arc Flash Severely Burns 35% Of His Body.

On the day of the shutdown, Sharghi left his office around 6 a.m. to arrive at Qualcomm by 7 a.m. (7 RT 592.) Sharghi was accompanied by his son, Omid, and by Martin Sandoval. (7 RT 563, 592.) In order for Sharghi's work to be safely done, the breakers needed to be deenergized. According to Kirk Redding, the Qualcomm senior facility manager, although Qualcomm could have delegated authority to deenergize the switchgear, it decided to retain that control itself. *Thus, Qualcomm retained and exercised the exclusive authority to deenergize the switchgear and to implement the necessary safety measures associated with that procedure.* (10 RT 952.)

Sandoval worked for ROS Electrical Supply, a company that sold electrical breakers parts and reconditioned old equipment. (11 RT 1149; 12 RT 1417-1418.) Sharghi brought Sandoval for the inspection so Sandoval

could determine the size of Qualcomm's circuit breaker's busbars[1], which would reflect whether Qualcomm needed to upgrade its equipment for compatibility with the increased power generation. (7 RT 474-475, 579; 8 RT 715; 10 RT 1061; see also 8 RT 662-663.) When Sharghi told Sandoval about the job, he told Sandoval that Qualcomm would be shutting down the breakers. (7 RT 582.) Sandoval had never done live electrical work. (10 RT 1054.)

When Sharghi, his son, and Sandoval arrived at Qualcomm, they were met by another of Sharghi's employees, George Guadana. (7 RT 525.) The group then signed in at Qualcomm's control room, where Qualcomm's employees were doing a "very broad" safety briefing for all of the contractors on site that day. (7 RT 593; 8 RT 722.)

After the safety briefing, the Qualcomm employees released the contractors to go do their work and then started the process of performing two different lockout/tagout procedures. (8 RT 723.) A lockout/tagout is the process of deenergizing a circuit breaker and ensuring no one inadvertently restores the power before it is supposed to be restored. (10 RT 925-926.) To accomplish this, the operator utilizes a lock to prevent anyone from reconnecting the breaker, and a tag to identify who locked out the breaker. (10 RT 925-927.)

Before entering the switchgear room to perform the lockout/tagout, the Qualcomm employees put on personal protective equipment, known as "PPE," which is designed to protect the wearer from the most serious burns in the event of an arc flash. (6 RT 348; 8 RT 723-724; see 2 AA 416.) An arc flash occurs when there is a short circuit, creating an arc of electrical energy. (6 RT 355; 8 RT 620.) An arc flash is thousands of degrees in temperature. (10 RT 1034.)

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[1] A busbar is a very heavy metal conductor. (10 RT 907.)

The switchgear room where the inspection was going to occur is a complex system. (7 RT 568-569; 9 RT 889-890.) The switchgear system has two sources of power: power that Qualcomm generated on its own and power that is provided to Qualcomm by the utility. (6 RT 364; 7 RT 569; 10 RT 928.) The breaker providing the Qualcomm-generated power is referred to as the main generator breaker or the cogen breaker. (10 RT 928-929.) It is this breaker that Qualcomm needed Sharghi to inspect. (8 RT 659; 4 AA 796.) As a result, Qualcomm needed to deenergize that cogen breaker as well as the breakers in proximity to allow for safe inspection. (8 RT 659; 4 AA 796.)

In addition to being a complex system, the switchgear room can be confusing because it is "a sea of sameness." (8 RT 736.) It is very easy to lose your place and become disoriented because the cubicles containing the breakers look alike. (8 RT 736-737; 9 RT 801; see also 2 AA 405.) One Qualcomm plant operator would count the cubicles to maintain his orientation. (9 RT 801.)

To conduct the lockout/tagout process, Qualcomm's plant operators, in full PPE, re-aligned their power systems so that all of the electrical power was transferred from the generation side to the utility side. (9 RT 796-797.) They then disconnected the sync-tie breaker. (8 RT 733.) The sync-tie connects the utility side of the bus and the generation side of the bus. (10 RT 929, 1014.) After that, Qualcomm's plant operators removed the cogen breaker from its cabinet. (9 RT 797.) The cogen breaker takes all the power Qualcomm generates and connects it to the GF series of breakers. (10 RT 928-929.) The effect of this lockout/tagout was deenergizing the line side of the circuit breakers powered by the cogen breaker; the load side of these breakers remained energized, however. (9 RT 801-802.) It is impossible to tell if a breaker is energized just by looking at it or listening to it. (7 RT 520-521; 10 RT 1022.)

While Qualcomm's plant operators were deenergizing the breakers for Sharghi to perform his inspection, Sandoval was in the corner of the room and could hear them working but could not see what they were doing. (10 RT 1070.) When the Qualcomm plant operators finished, one of them explained to Sharghi that they transferred all the loads to the utility side, but he did not specify which breakers remained energized. (7 RT 597; 8 RT 738.) **None of them communicated to Sandoval which breakers remained energized.** (10 RT 1071.) **The Qualcomm plant operators left no signage indicating which areas were still energized, either.** (11 RT 1097.) Qualcomm's plant operators then left to work on their other jobs for the morning. (8 RT 738-739.)

Qualcomm's expert agreed that Qualcomm had a duty to tell Sandoval what remained "hot and what is not." (Joint Motion to Augment Record, Exhibit D, p. 92.)

To begin the inspection, Sharghi instructed Guadana to open the back of the cogen breaker. (7 RT 532.) Guadana was wearing PPE but Sharghi, Omid, and Sandoval were not. (7 RT 531, 545, 591-592.) Guadana then removed the top and bottom panels on the back of the cogen breaker. (7 RT 532.) The purpose of removing these panels was to allow Sandoval to inspect the breakers to determine if they contained the proper equipment to handle the increase in power. (7 RT 533-534.)

After Guadana removed the two panels on the cogen breaker, Sharghi instructed Guadana to remove the back panel off of the GF-5 breaker. (7 RT 536.) When a breaker is disconnected, its green indicating light goes out; **as a result of Qualcomm's lockout/tagout procedure, the green indicating light on GF-5 was out, even though GF-5 remained**

energized[2], and the breaker appeared to be disconnected or in test position. (8 RT 626-628.) An inspection of GF-5 was not within the scope of work. (4 AA 796.) GF-5 was located below GF-4, which was within the scope of the work. (8 RT 757; 4 AA 796.)

Seeing the panel removed from GF-5 and believing that everything was deenergized, Sandoval began inspecting GF-5 to try to examine the busbars. (11 RT 1102.) Sandoval asked Guadana to help him by removing a panel on the front side of the switchgear so Sandoval could see the busbar. (11 RT 1103.) Sandoval could not make out the size so he asked Guadana to go to the other (back) side of the breaker with him. (11 RT 1103; see also 7 RT 544 [the line side busbar system can only be viewed from the back].) Guadana walked with Sandoval to the other side of the breaker. (11 RT 1104.) When they got to the breaker, Sandoval leaned in with measuring tape and the area went blue. (11 RT 1104.)

As the load side of the GF-5 breaker was energized, when Sandoval leaned in with the measuring tape, the circuit shorted, creating an arc flash. (10 RT 1033.) The arc flash, thousands of degrees in temperature, ignited the air, along with Sandoval. (10 RT 1033-1034.) Sandoval sustained burns to the face, neck, chest, both arms, and both hands, accounting for 35% of his body. (11 RT 1128, 1132.) Sandoval underwent four surgical procedures, including skin grafts, and he also developed pneumonia, a urinary tract infection, and a blood clot. (11 RT 1138, 1142-1144.)

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[2] This is because the breaker's utility source of power had been disconnected, but only the breaker's line side was deenergized; its load side remained energized. (10 RT 1014-1015; see also 10 RT 1017 [GF-5's line side was deenergized, but the load side was still energized].)

C. After Hearing Testimony Regarding Qualcomm's Contributions To Sandoval's Injury, A Jury Finds Qualcomm Less Than Half At Fault; The Trial Court, Disagreeing With The Jury's Apportionment Of Fault, Grants A New Trial. The Court Of Appeal Affirms In Full.

Sandoval brought this action against Qualcomm, TransPower, ROS Electrical Supply, Sharghi, and John Jauregui (Sandoval's employer), alleging causes of action for negligence and premises liability. (1 AA 35-40.)

At trial, Sandoval presented expert evidence that his injury would not have occurred if Qualcomm had followed its own policies and industry standards when it partially deenergized the control room. (9 RT 841.) Specifically, Sandoval's expert noted that there was no one present to supervise the work, and that Higuera testified that it was his policy to supervise work. (9 RT 842; see 8 RT 680 [Higuera testimony]; see also 8 RT 694 ["They did exactly what they were supposed to for their job for what the plant operator is. They didn't do mine."].) Second, Sandoval's expert noted that Qualcomm failed to identify—whether by direct communication or by signage—which areas were deenergized and which remained energized. (9 RT 843-846; see also 7 RT 597; 8 RT 738; 10 RT 1071.) Third, Sandoval's expert testified that, pursuant to industry standards, no one should have been allowed in the switchgear room without PPE. (9 RT 847, 850-851; see also 7 RT 592 [Sandoval was not wearing PPE].) Sandoval's expert also explained that Sandoval was not qualified to independently verify whether or not a particular circuit breaker was energized, as he was not a qualified electrical worker, but was merely participating in the inspection to measure the busbars. (9 RT 852.)

Sandoval's expert further explained that Qualcomm violated the industry standard for electrical safety in the workplace by failing to develop protections when workers will be working with "look-a-like equipment," such as Qualcomm's switchgear, which looks similar from the front and the back and from one piece of equipment to the other. (9 RT 854.) The industry standard explains that, in such a situation, Qualcomm should have done at least one of three things: (1) have clear safety signs indicating what is energized and what is not energized; (2) barricade off the side of the equipment that is energized; (3) provide an attendant for the room to make sure no one enters the energized area. (9 RT 854-857; see also 8 RT 736 [Qualcomm plant operator describing the switchgear room as a "sea of sameness"].)

The jury also heard testimony from Qualcomm's expert (John Loud), concluding that Qualcomm retained control over the switchgear in regard to what parts were energized and which were not. (10 RT 952.) Qualcomm's expert also testified that Qualcomm owed Sandoval a duty to tell him what was energized and what was not energized, and that if Qualcomm did not train their operators according to their policy that would fall below the standard of care. (10 RT 955, 968.) Further, Qualcomm's expert acknowledged there was no warning label on the GF-5 breaker at the time of the incident and he had no criticism of Sandoval for going around the back to look at the load side busbars. (10 RT 1011, 1020.)

The jury returned a special verdict finding that Qualcomm retained control over the safety conditions at the worksite and that Qualcomm, TransPower/Sharghi, ROS Electrical/Jauregui, and Sandoval were all negligent. (1 AA 184-187.) The jury found that ROS Electrical's negligence was not a substantial cause of Sandoval's injury and apportioned the fault 46% to Qualcomm, 45% to TransPower/Sharghi, and 9% to Sandoval. (1 AA 187.)

Qualcomm moved for new trial and judgment notwithstanding the verdict. (1 AA 196, 233.) In its Motion for New Trial, Qualcomm argued the trial court improperly did not instruct the jury that it could not find liability on a retained control theory unless Qualcomm "affirmatively contributed" to Sandoval's injuries. (1 AA 201-211.) Qualcomm also argued that the jury's verdict was contrary to the weight of the evidence (1 AA 212) and that the jury's allocation of fault was contrary to the weight of the evidence (1 AA 212-213).

After hearing the motions and taking the matter under submission, the trial court granted Qualcomm's Motion for New Trial, concluding the jury improperly apportioned liability. (2 AA 316, 318.) The trial court denied the Motion for New Trial on all other grounds and denied the Motion for Judgment Notwithstanding the Verdict. (2 AA 317, 320.)

Qualcomm appealed from the order denying its Motion for Judgment Notwithstanding the Verdict, the order granting a partial new trial, as well as from the original judgment. (2 AA 330-331.) Sandoval appealed from the order granting a partial new trial. (2 AA 344-345.)

The Court of Appeal affirmed in full. As detailed below, in rejecting Qualcomm's appeal, the Court of Appeal concluded that the manner in which Qualcomm affirmatively retained and exercised control to partially deenergize the switchgear so that plaintiff could perform his work obligated Qualcomm to perform that work in a nonnegligent manner. The Court agreed that there was ample evidence that the manner in which Qualcomm affirmatively performed that work was negligent and that its negligence was a cause of plaintiff's serious injuries. The Court further agreed with its earlier decision in *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, that standardized CACI instruction 1009B correctly states the law that a hirer could be liable under *Hooker* if the jury determines that Qualcomm "negligently exercised its retained control over safety conditions" and that

its "negligent exercise of retained control over safety conditions was a substantial factor in causing [plaintiff's] harm."

The Court further recognized that "the proposed special instructions proffered by Qualcomm regarding 'affirmative contribution' were somewhat misleading in that they strongly suggested Qualcomm must have engaged in some sort of 'active conduct' —such as being "'involved in, or assert[ing] control over, the manner of performance of the contracted work,'" or "'interfer[ing] with the means and methods by which the work [was] to be accomplished"' — in order to be liable under this exception." (*Sandoval v. Qualcomm Inc.* (2018) 28 Cal.App.5th 381, 417.)

ARGUMENT

I. WHERE, AS HERE, THE HIRER OF AN INDEPENDENT CONTRACTOR RETAINS CONTROL OF PREPARING THE WORKSITE SO THAT THE CONTRACTOR CAN PERFORM ITS SERVICES AND WHERE IT AFFIRMATIVELY EXERCISES THAT CONTROL IN A NEGLIGENT MANNER CAUSING AN EMPLOYEE HARM, *HOOKER'S* AFFIRMATIVE CONTRIBUTION STANDARD IS SATISFIED.

This Court has framed the first issue being reviewed as follows: "Can a company that hires an independent contractor be liable in tort for injuries sustained by the contractor's employee based solely on the company's negligent failure to undertake safety measures or is more affirmative action required to implicate *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198?"

As explained below, where, as here, the hirer does not delegate certain work necessary for the contractor to perform its work, then the hirer must perform that work in a non-negligent manner, which includes undertaking certain safety measures which are necessary to render the hirer's conduct reasonably safe.

Contrary to the manner Qualcomm frames its issue (which is different than how the Court has framed the issue) it is not necessary for the hirer to always direct the contractor's work, induce the contractor's reliance or otherwise interfere with the contractor's delegated responsibility to provide a safe worksite. While those are also instances in which *Hooker* is satisfied, they are not required where the hirer has elected not to delegate a certain necessary task to the contractor and the employee is injured due to

the negligent manner in which the hirer has performed that non-delegated task.

As further explained, even under Qualcomm's standard, the trial court correctly denied JNOV and the Court of Appeal correctly affirmed the judgment.

A. *Hooker's* "Affirmative Contribution" Standard.

In *Hooker*, 27 Cal.4th 198, the widow of a deceased crane operator who had been employed by a general contractor hired by the California Department of Transportation (Caltrans) to construct an overpass sued Caltrans for negligently exercising its retained control over safety conditions at the jobsite. (*Id.* at p. 202.) The Caltrans construction manual provided Caltrans was responsible for obtaining the contractor's compliance with safety laws and regulations, and Caltrans's onsite engineer had the power to shut the project down because of safety conditions and to remove employees of the contractor for failing to comply with safety regulations. (*Id.* at pp. 202–203.) The crane operator retracted the crane's outriggers to allow Caltrans vehicles and other construction vehicles to use the narrow overpass. (*Id.* at pp. 202, 214.) When the crane operator then attempted to operate the crane without reextending the outriggers, the crane tipped over and the operator was killed. (*Id.* at p. 202.) The plaintiff alleged Caltrans was negligent in permitting traffic to use the overpass while the crane was being operated. (*Id.* at pp. 202–203, 214–215.)

The court found the plaintiff had raised triable issues of material fact as to whether Caltrans retained control over safety conditions at the worksite, but not as to whether Caltrans actually exercised the retained control so as to affirmatively contribute to the death of the plaintiff's husband. (*Hooker*, *supra*, 27 Cal.4th at pp. 202, 215.) The court stated: "

'[A] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff....' [Citation.]" (*Id.* at p. 209.)

However, the *Hooker* Court stated, that an omission may constitute an affirmative contribution in some circumstances: "[A]ffirmative 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. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Id.* at p. 212, fn. 3.)

Applying these standards, the *Hooker* Court found that, although Caltrans permitted vehicles to use the overpass while the crane was being operated, and the operator had a practice of retracting the outriggers to permit traffic to pass, Caltrans did not direct the crane operator to adopt that practice. (*Hooker*, *supra*, 27 Cal.4th at pp. 214–215.) Under those circumstances, the court held there was no evidence Caltrans affirmatively contributed to the crane operator's death. (*Id.* at p. 215.) Instead, "[t]here was, at most, evidence that Caltrans's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it." (*Ibid.*)

Qualcomm's argument hinges on a misunderstanding as to what this Court held in *Hooker*. According to Qualcomm, this Court "explained that just as the hirer in *Kinney* was not liable for exercising 'a high degree of control over safety conditions at the job site'. . . ." (OB 25.) That is not what this Court said. Rather, the passage Qualcomm references provides in

full: "although the hirer in theory retained a high degree of control over safety conditions at the jobsite, there was no indication the hirer contributed to the accident by affirmative exercise of control." (27 Cal.4th at p. 211.) Thus, what plaintiff submits this Court was saying is that the mere right to control safety at the jobsite is generally not sufficient if the hirer does not actually exercise that control to create an unsafe condition that causes the plaintiff harm. Plaintiff is not arguing to the contrary here.

B. Under *Hooker* – And Contrary To Qualcomm's Position -- It Is Not Necessary For The Hirer To Direct The Contractor's Work, Induce The Contractor's Reliance Or Otherwise Interfere With The Contractor's Delegated Responsibility To Provide A Safe Worksite.

Qualcomm argues that there is supposedly insufficient evidence to support liability under *Hooker's* "affirmative contribution" standard based on the misnomer that the hirer's exercise of retained control must take place while the plaintiff (employee of a contractor) is performing his or her work in order for that conduct to constitute affirmative contribution. Neither *Hooker* nor the rationale underlying *Privette*, support such a position.

First, in reaching its conclusion, this Court in *Hooker* cited favorably to the "nuanced position" taken by the Utah Supreme Court which employed an "active participation" standard. As this Court described, the Utah Court concluded that the "active participation" standard would be satisfied "'if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. [Citation.] Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or

otherwise interferes with the means and methods by which the work is to be accomplished. [Citations.]'" (27 Cal.4th at p. 215.)

Significantly, however, this Court chose not to phrase its standard as "active participation" which perhaps creates the misimpression that the hirer's negligent conduct must occur while the contractor is also working. By instead using the phrase "affirmative contribution" this Court focused on whether the contractor's affirmative conduct contributed to the unsafe condition that caused the plaintiff injuries and shifted the focus away from whether that conduct occurred in unison with the contractor's work.

The *Hooker* Court then reinforced its intention in its discussion of California Court of Appeal decisions on point, continuing:

> Under *Kinney . . . mere retention of the ability to control safety conditions is not enough.* "[A] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff. Insofar as section 414 might permit the imposition of liability on a general contractor for mere failure to intervene in a subcontractor's working methods or procedures, *without evidence that the general contractor affirmatively contributed to the employment of those methods or procedures, that section is inapplicable to claims by subcontractors' employees against the general contractor.*" (*Kinney*, at p. 39.)
>
> The *Kinney* court, we conclude, correctly applied the principles of our decisions in *Privette* and *Toland. . . .*

(*Id.* at pp. 208-209, italics added.)

Thus, this Court was focused on ensuring that the mere retention of control would not be sufficient here (although as the Court summarized, that is enough in a number of jurisdictions). The passage of *Hooker* on which Qualcomm relies (OB 23) to assert that the hirer must direct the manner in which the contractor is performing its work, is where *Hooker*

rejected the plaintiff's argument that "by permitting traffic to use the overpass while the crane was being operated, affirmatively contributed to Mr. Hooker's death." (*Hooker*, *supra*, 27 Cal.4th at p. 215.) In rejecting this assertion, the *Hooker* Court quoted language from the decision of the Utah Supreme Court relied upon by plaintiff to explain that simply permitting traffic to pass was not enough to establish "affirmative contribution." However, the Court did not hold that, in order to establish affirmative contribution, it was always necessary for the principal to actually direct the manner in which the work that ultimately injured the plaintiff is being performed.

Nowhere in *Hooker* did this Court say that when the defendant actually creates the very physical condition that causes the plaintiff's injuries, then there is still not affirmative contribution. Numerous cases illustrate that where the hirer actually creates the condition that causes the plaintiff's injuries then "affirmative contribution" is satisfied (or at least a question of fact exists). For instance, when a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence." (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225.)

Likewise, in *Tverberg v. Fillner Const., Inc.* (2012) 202 Cal.App.4th 1439, 1446 the owner ordered that certain holes be created and required the workers to conduct work nearby. Further, the owner's determination that there was no need to cover or barricade the holes was sufficient on summary judgment to allow "an inference that the [owner] affirmatively assumed the responsibility for the safety of the workers near the bollard holes, and discharged that responsibility in a negligent manner, resulting in injury." (*Id.* at 1448.)

Similarly, in *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, the employee of a road construction subcontractor died when he was hit by falling construction materials. The *Ray* Court first observed that "Given the recent decisions in *Camargo, Hooker* and *McKown,* it is clear the *Privette/Toland* rationale does not bar all direct liability actions filed by injured employees of independent contractors against property owners and general contractors. Appellant has framed a cause of action based on direct liability, not vicarious liability. That being so, it was error to grant summary judgment on the basis the *Privette/Toland* rationale precludes Appellant's action against TCA and Silverado as a matter of law." *(Id.* at p. 1129.)

C. The Rationales Underlying *Privette* Support Recognition Of A Duty Here.

The rationale underlying *Privette* further supports recognition that (1) when a hirer retains control of the premises and exercises that retained control to prepare the worksite so that the contractor could perform the task for which it was retained then (2) if that hirer performs that work negligently and an employee of the contractor is injured, the hirer may be liable.

First, the *Privette* doctrine is based "principally [on] the availability of workers' compensation" to injured employees under California's Workers' Compensation Act. (*Kinsman*, supra, 37 Cal.4th at p. 671.) Under the Act, "all employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' " (*Privette*, supra, 5 Cal.4th at pp. 696-697, citing Lab. Code, § 3600, subd. (a).) In relying on the availability of workers' compensation to limit hirer liability, this Court has determined that the Workers' Compensation Act

achieves many of the purposes underlying tort recovery by contractors' employees against hirers: "[i]t ensures compensation for injury by providing swift and sure compensation to employees for any workplace injury; it spreads the risk created by the performance of dangerous work to those who contract for and thus benefit from such work . . .; and it encourages industrial safety." (*Privette*, supra, 5 Cal.4th at p. 701.) Under the Workers' Compensation Act, moreover, an employee injured in a work-related accident is also assured of obtaining benefits "regardless of fault," thus assuring that injured employees will be compensated for their injury. (*Ibid.*)

This primary rationale that the cost of worker's compensation insurance is built into the contract price does not justify precluding liability here. Since Qualcomm could have delegated the task of preparing the jobsite – but did not do so – then presumably the price Qualcomm paid less than it would have been absent such a retention. In other words, the contractor (TransPower) was paid nothing to safely deenergize the switchgear room and therefore Qualcomm was not subsidizing TransPower for workers' compensation premiums for those services.

Second, because employers are shielded from negligence liability for work-related injuries to employees, *Privette* is grounded on the premise that permitting a contractor's employee to recover from a hirer for work-related injuries attributable to the contractor's conduct would lead to "the anomalous result that a nonnegligent person's liability," i.e., that of the hirer, could be "greater than that" of the contractor, whose negligence caused the employee's injuries. (*Privette*, supra, 5 Cal.4th at p. 698.) As the Court explained in *Toland*, "it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation." (*Toland v. Sunland Housing Group, Inc.* (1998)

18 Cal.4th 253, 267; accord, *Hooker*, supra, 27 Cal.4th at p. 210 ["because the liability of the contractor, the person primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage, it would be unfair to impose tort liability on the hirer . . . merely because the hirer retained the ability to exercise control over safety at the worksite"].)

That perceived unfairness doesn't exist where, as here, the hirer has not delegated to the contractor the responsibility for performing a particular task that is necessary to render the worksite safe for the contractor's employees and the hirer has negligently performed that task. Under these circumstances the hirer is being held responsible for its own affirmative negligence. There is no unfairness.

Next, this Court has stated that to allow contractors' employees to sue a hirer for negligence for work-related injuries also gives rise to an "unwarranted windfall" because other employees who are injured in work-related accidents are not permitted to bring negligence actions against their employers as a result of their work-related injuries. (*Privette*, supra, 5 Cal.4th at pp. 699-700; *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245 [permitting recovery against the hirer "would give employees of independent contractors an unwarranted windfall, something that is denied other workers--the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment"].)

However, in *Hooker*, this Court recognized that "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. The rule of

workers' compensation exclusivity 'does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury' . . ., and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer." (*Hooker*, *supra*, 27 Cal.4th at pp. 212-214, italics omitted.) Thus, whereas here, the hirer is being held to answer for its own affirmative negligence, there is no windfall.

This Court was next concerned with avoiding creation of disincentives to hirers' retention of contractors. The limitations on hirer liability under *Privette* encourage hirers to retain contractors to perform work that is often hazardous and requires special precautions. Conversely, imposing broad-based liability on hirers for injuries arising from the performance of the contract work discourages hirers from retaining contractors. To discourage hirers from retaining contractors is contrary to public policy because it is contractors who typically have the technical skills and specialized training necessary to perform what is often hazardous work in a safe manner. (See *Privette*, supra, 5 Cal.4th at p. 700.) Here, recognition of liability will not act as such a deterrence. Instead, if the hirer is concerned with its ability to safely perform the tasks over which it has retained control, it will delegate those tasks as well.

Finally, this Court has cited the hirer's right to delegate work to contractors, including the right to delegate responsibility for assuring the safety of the contractors' own employees, as a basis for limiting hirer liability to contractors. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671.) Prior to *Privette*, courts "severely limited the hirer's ability to delegate responsibility and escape liability." (Ibid.) "But in *Privette* and its progeny," this Court has concluded that, "these policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an independent

contractor the duty to provide the contractor's employees with a safe working environment." (*Ibid.*; accord, *Hooker*, supra, 27 Cal.4th at p. 211 [*Privette* doctrine precludes hirer liability "for mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice"].) Here, again the liability of Qualcomm is because it declined to delegate certain tasks and not the other way around.

D. Contrary To Qualcomm's Assertion, The Court Of Appeal Did Not Hold That The "Affirmative Contribution Simply Means Causation And May Consist Of A Mere Failure To Act." (OB 30.)

Qualcomm next launches an attack on the strawman that the Court of Appeal concluded that a naked finding of causation or the "mere" failure to act is sufficient to satisfy the affirmative contribution standard. The Court of Appeal held no such thing. Rather, it "conclude[d] substantial evidence supports the jury's finding that Qualcomm negligently exercised retained control over the safety conditions at the jobsite." (28 Cal.App.5th at p. 385.)

The Court explained: "The record shows that Qualcomm owned the property where Sandoval was injured (see CACI No. 1009B) and that it retained control over the safety conditions at the worksite." (*Id.* at p. 417.) In reaching this conclusion, the Court referenced the evidence describing the manner Qualcomm affirmatively exercised its retained control. For example, the Court referenced that "the record shows that Qualcomm, and not TransPower or ROS, conducted the lockout/tagout procedure on several breakers in order for TransPower to conduct its limited inspection of the bus bars in the main cogen breaker generator." (28 Cal.App.5th at p. 417.) The Court then detailed the various affirmative steps undertaken by

Qualcomm exercising its retained control over the manner in which the switchgear was only partially deenergized. (*Ibid.*)

The Court then described that there is "substantial record evidence supporting the jury's finding that Qualcomm negligently exercised retained control over the safety conditions of the inspection." (*Id.* at pp. 417-418.)

The Court of Appeal thus did not reach the "bewildering conclusion" as Qualcomm puts it that "affirmative contribution requires nothing affirmative." (OB 31.) Of course, as this Court noted in *Hooker*, affirmative contribution is not always required. But it is not the case that, as Qualcomm, argues that the Court of Appeal held that affirmative contribution is never required.

As now explained, the evidence in this case, construed in favor of plaintiff, supports a finding that Qualcomm affirmatively assumed the responsibility for deenergizing the breakers and to affirmatively implement safeguards to protect those breakers which it did not de-energize. Because Qualcomm discharged this responsibility in a negligent manner resulting in plaintiff's injuries, the jury properly held Qualcomm partially at fault. (See *Tverberg v. Fillner Const., Inc.* (2012) 202 Cal.App.4th 1439, 1446; *Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334, 1345–1346 [the defendants undertook to provide safety systems and devices and then withdrew them]; *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1128–1129, 1133–1134 [under *Hooker*, omission can constitute affirmative contribution].)

E. There Is Ample Evidence That Qualcomm's Direct Negligence Affirmatively Contributed To Plaintiff's Injuries.

1. Evidence of Qualcomm's affirmative contribution.

According to Qualcomm "[o]nce the correct standard is applied" then "this is an easy case" to conclude that there was no affirmative contribution. (OB 33.) Qualcomm can only make this argument by slanting the evidence in its favor in direct contravention of the appropriate JNOV standard.

Throughout its brief, Qualcomm attempts to dissect the actions which plaintiff claims it should have taken and to argue why each of them does not independently constitute affirmative contribution (OB 33-49) misses the point. Each of the steps Qualcomm failed to take must be viewed in the context of its overarching and conceded responsibility to deenergize the switchgear safely. Each of those failed steps would have allowed Qualcomm to satisfy this obligation – but it failed to take any of them. Thus, if Qualcomm had required the use of protective gear, that would have protected individuals entering the switchgear room such as plaintiff – when Qualcomm only partially deenergized the switchgear.

As described in the statement of facts above, there were two sources of electricity at the Qualcomm campus. One source was the electricity generated by Qualcomm itself and the second source was generated by the public utility. Both electricity sources feed into the switchgear which was the subject of the inspection. Qualcomm decided to upgrade its own electrical generating facility and hired TransPower to assist it in doing so. TransPower in turn enlisted Ros Electrical Supply – plaintiff's employer. (7 RT 572-573, 575-578.)

On the day in question, Frank Sharghi, an electrical engineer with TransPower, and plaintiff traveled to Qualcomm to inspect and measure the breakers. In order for this to be safely done, the breakers needed to be deenergized. According to Kirk Redding, the Qualcomm senior facility manager, although Qualcomm could have delegated authority to deenergize the switchgear, it decided to retain that control itself. *Thus, Qualcomm retained and exercised the exclusive authority to deenergize the switchgear and to implement the necessary safety measures associated with that procedure.* (10 RT 952.)

In affirmatively exercising this power, Qualcomm made the conscious decision to deenergize only the switchgear related to the power generated by Qualcomm (and not as to the switchgear relating to the electricity generated by the utility). The switchgear relating to the utility-produced electricity looked identical to the switchgear that was deenergized and was in the same area. (8 RT 736-737; 9 RT 800-801, 854, 880.) In fact, Qualcomm employees were themselves sometimes confused as to which was which. (8 RT 736-737; 9 RT 800-801.) Moreover, and to make matters even more dangerous, once Qualcomm deenergized the switchgear that was to be inspected, the light panels on the switchgear went dark leaving no indication as to which switchgear remained energized. (8 RT 626-628.) Upon deenergizing the switchgear, Qualcomm implemented its lockout/tagout ("LOTO") procedure. Once the switchgear was deenergized by Qualcomm employees wearing protective suits, the employees left the room leaving Mr. Sharghi unsupervised. (8 RT 738-739.)

Mr. Sandoval had been told that the switchgear would be shut down and he watched as the grounding cables were installed as an additional safety measure. (10 RT 1064, 1071; 11 RT 1095-1096; 9 RT 893, 8 RT 732.) Mr. Sandoval thus thought that the entire switchgear line was

deenergized and there was nothing observable to dissuade him from that belief.

The jury heard evidence both by Mr. Redding and Mr. Loud – *Qualcomm's own expert* – that Qualcomm owed a duty to plaintiff to inform him which portions of the switchgear remained energized after the LOTO procedure was completed. For instance, Mr. Redding answered "yes" to the following deposition question (read to the jury): "[A]s the senior man, do you expect that the Qualcomm personnel working under you once you de-energize part of the switchgear in the mezzanine room that they shall tell everybody in the room what is turned on and what is turned off?" (4 AA 890.) He explained further that this was required "so everybody in the space is aware of the hazards" and to "reduce the risk of somebody getting hurt." (4 AA 890.)

Qualcomm's expert Loud agreed with this testifying that "Yes concerning what is hot and what is not they [i,e, Qualcomm] are the ones who did lock out/tag out. Therefore, they retained control of what was hot and what was not. They did lock out/tag out." (10 RT 952.)

He explained that by "retained control" he meant that Qualcomm "retained control of what is hot and what's not. . . , I'm saying that it was Qualcomm who decided which generators to turn off, all of them, which breakers to disconnect from the equipment, and to bring all of the equipment in the Co-Gen cubicle to be in a de-energized state." (10 RT 952.)

Further Mr. Loud answered "Yes. They would have that obligation" to the question: "[D]id the Qualcomm personnel, having retained control to determine what is hot and what is not, have an obligation to anyone who was going to be working in or near that switchgear that morning to let them know, other persons in the room, what's hot and what is not?" (Motion to Augment, Exhibit D, p. 92.)

He further answered "yes" to the question: "After the Qualcomm personnel complete their rack out and lock out as we understand it, after they are done, do they have a duty to those persons that are going to be working on or near that equipment to communicate to those persons orally and in a clear and unequivocal way what is hot and what is not in the 4160 line?" (Id. at p. 95.)

This was because "if there is any exposed energized equipment, then it poses a hazard. So when you have taken covers off and you've opened cubicles, you have to tell people that's de-energized and that's safe to work on. And you have to not only tell them that, you have to show them by demonstrating it. So Mr. Sandoval needs to know that the equipment that he's supposed to be inspecting is safe to work on. So they have to tell him because they did the lock out/tag out." (10 RT 955-956.)

Plaintiff's expert Brad Averit testified that when there is look-alike equipment such as this and where it cannot be determined which part of the equipment is deenergized and which is hot, then Qualcomm had the obligation to post a guard, issue a warning, or place a barricade to prevent access to the still hot breaker. (9 RT 854-857.)

Qualcomm utterly failed to do any of these. Qualcomm not only failed to inform plaintiff which switchgear remained energized, there were no warning signs or other indications that some of the switchgear remained energized. (10 RT 1071; 11 RT 1097; 13 RT 1504, 1510.)

Qualcomm could have delegated the responsibility to deenergize the breakers but elected not to do so. It is now Qualcomm's policy to delegate that responsibility. (9 RT 781-782.) Finally, Brian Higuerra, the immediate supervisor of the individuals who deenergized the equipment expressly directed that the inspection be delayed because he was out of town and needed to be there to ensure safety. The inspection was allowed to proceed only because Mr. Redding said he would be present. However,

Mr. Redding decided to take that Saturday morning off and the dangerous procedure was therefore allowed to proceed absent a qualified Qualcomm supervisor. (6 RT 333; 8 RT 681-685, 717.) Plaintiff ultimately paid the price for this.

Thus, the jury heard evidence that Qualcomm affirmatively contributed to plaintiff's injuries by its affirmative conduct in electing to assume responsibility for deenergizing the switchgear but doing so in a negligent manner.

2. Nothing Qualcomm argues absolves it of liability for the negligent manner in which it exercised its retained control.

Viewed against this backdrop of Qualcomm's express retention of control over deenergizing the control panels, it becomes evident that each of the singular acts on which Qualcomm relies in isolation, precludes its conduct in whole from meeting the affirmative contribution test.

First, Qualcomm asserts that it did not (a) "prevent Sharghi from taking safety measures" to protect plaintiff (OB 33); or (b) induce Sharghi's reliance by promising to take a safety measure. (OB 34.) Qualcomm simply ignores that it retained control of deenergizing the switchgear. Each of the acts which plaintiff claims Qualcomm should have, but failed to take, directly arise from the fact that Qualcomm elected to only partially deenergize that switchgear and did so in a negligent manner. This is in stark contrast to what occurred in *Hooker* where this Court concluded that Caltrans did not affirmatively exercise its retained control over roadway.

Second, and for the same reason, Qualcomm's criticism of the Court of Appeal's recognition that Qualcomm should have warned plaintiff that Qualcomm itself decided to only partially deenergize the switchgear

because the switchgear "looks like '"a sea of sameness"'" (OB 36), fails. Again, Qualcomm seeks to divorce the step that it should have but failed to take (a warning) from the fact that the reason such a warning was warranted was because of the manner in which Qualcomm itself elected to deenergize the switchgear. Once again, *Hooker* does not preclude liability against a hirer who elects not to delegate a certain task to the contractor and an employee of the contractor is injured due to the negligent manner the hirer performed that task. Whether the contractor is also negligent and partially at fault for the employee's injuries, does not alter this. Thus, Qualcomm's efforts to blame Sharghi (OB 37-38) is beside the point.

None of the cases on which Qualcomm relies exonerates it for the negligent manner in which it retained control. For instance, in *Khosh v. Staples Construction Company, Inc.* (2016) 4 Cal.App.5th 712, 718–19, the plaintiff was an employee of a subcontractor who sued a general contract (Staples) for his work place injuries. The plaintiff claimed that he could pursue his claim against Staples under *Hooker*, relying on provisions in the contract between Staples and the University (where the work was performed) which "required Staples to 'exercise precaution at all times for the protection of persons and their property,' and to 'retain a competent, full-time, on-site superintendent to ... direct the project at all times,' among other things. It made Staples 'exclusively responsible' for the health and safety of its subcontractors, and required Staples to submit 'comprehensive written work plans for all activities affecting University operations,' including utility shutdowns." (*Id.* at p. 715.)

The Court concluded that these provisions were sufficient to create retained control but then concluded that the general duties under the contract were not sufficient to establish affirmative contribution. The Court explained:

> "This case is unlike *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 207 Cal.Rptr.3d 712 (*Regalado*) in which evidence of an affirmative contribution supported a jury's verdict against the hirer. There, the defendant hired a contractor to install a pool and spa at his home. The plaintiff, an employee of the pool contractor, was injured by an explosion in an underground vault which housed a propane heater for the pool. The defendant participated in the construction work, including installation of the underground vault. He worked with another contractor to modify the entry and exit points to the underground vault, and ran a propane line to the vault. He also obtained the permits for the plumbing to the vault, but did not obtain permits for the vault or the propane line, even though he represented to plaintiff's employer that he did so. The plaintiff's injury occurred when he ignited the propane heater in the inadequately ventilated vault, causing an explosion.
>
> "Unlike the facts in *Regalado*, Staples did not directly participate in construction activities. Staples did not assist in building the electrical substation or its component parts. Nor did Staples represent that all steps of the construction had passed inspection before Khosh began his work.
>
> "Like the contract in *Padilla*, Staples's agreement with the University imposed only a general duty to prevent accidents. It did not impose specific measures that Staples was required to undertake in response to an identified safety concern. There is no evidence that Staples refused a request to shut off electrical power or prevented Khosh from waiting until the scheduled shutdown before starting work. There is no evidence Myers or Khosh relied on a specific promise by Staples. There is no evidence of an act by Staples which affirmatively contributed to Khosh's injury."

(*Id.* at pp. 718-719.)

Unlike *Khosh*, here there is not *just* a generalized agreement to assume workplace safety. As just described, it was the actual creation of the condition that led to plaintiff's injuries without taking the necessary safety measures that Qualcomm agreed to undertake that would have served to protect plaintiff, along with the express recognition of unique ability and

responsibility to monitor the precise activity that led to plaintiff's injury. As already explained, this is exactly what this Court, in *Hooker*, concluded was sufficient to support a finding of affirmative contribution.

Likewise, this case is easily distinguishable from *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 65–67. There, an employee of a contractor was killed at a San Diego Gas & Electric ("SDG&E") work site and his estate sued a separate contractor that had been retained by SDG&E to review plans and feasibility and for monitoring the construction work and contract compliance. (*Id.* at p. 56.) The decedent's employer had an agreement that expressly required it to "'take all necessary precautions for safety of its employees. . . on the jobsite. . . ." (*Id.* at p. 56.) The central issue decided by the Court was whether the defendant was entitled to rely upon *Privette* to avoid liability since it did not directly hire the decedent's employer. The Court concluded that *Privette* applied under these circumstances (*id.* at pp. 61-62) and then proceeded to consider whether the plaintiff introduced evidence of affirmative contribution as to bring the case within *Hooker*.

In concluding that no such evidence was introduced, the Court reasoned:

> As discussed above, the evidence shows that Henkels was responsible for the work and for ensuring that the work was properly and safely performed and that it contractually assumed responsibility for the safety of its employees. Although SDG & E retained the ability to control safety conditions at the jobsite and hired HWI to monitor such conditions, HWI's failure to exercise control in the face of unsafe work practices by the Henkels crew is not actionable. (*Hooker*, *supra*, 27 Cal.4th at p. 215, 115 Cal.Rptr.2d 853, 38 P.3d 1081.) *Similarly, HWI's failure to institute particular safety measures at the jobsite is also not actionable absent some evidence that either HWI or SDG & E had agreed to implement such measures.* (See id. at p. 212, fn. 3, 115 Cal.Rptr.2d 853, 38 P.3d 1081.) As the Estate's counsel

> admitted at oral argument in the proceedings below, there is no evidence that HWI (through Richards) asserted authority over the crew or instructed them as to what safety procedures to use; thus, the evidence, even viewed in the light most favorable to the Estate, does not show that HWI contributed to Ruiz's death by some negligent act or omission that was independent of Henkels's negligence. Rather, it is HWI's failure to exercise control, rather than a negligent exercise of control, that is at the heart of the Estate's case.

(*Id.* at p. 66, italics added.)

In *Ruiz* there was no evidence discussed by the Court supporting a finding that there was direct action by the defendant which actually created the condition that caused the plaintiff's injury. Rather, in that case there was purely a failure to exercise a general power to institute safety measures. As already explained, here there was evidence of direct action by Qualcomm – partially deenergizing the control room – without taking any of the necessary steps to protect workers such as plaintiff. To repeat, this is not a case where the defendant simply failed to exercise a general power to institute safety measures.

Next, Qualcomm makes a confusing argument related to the evidence both by Qualcomm's own witnesses and expert testimony, as to the scope of duty owed once it retained and performed the task of deenergizing the switchgear. (OB 42-41-44.) Qualcomm's arguments in this section range from "duty is an issue of law" to, even if Qualcomm owed a duty, it was still insulated from liability under *Privette*. Qualcomm appears to again miss the point. The evidence in question is not limited to whether Qualcomm as a property owner that retained control of its premises owed a duty of care generally to those on its premises, including employees of contractors working there. Rather, the evidence in question was targeted to the scope of the duty owed by a premises owner who declines to delegate the task of deenergizing switchgear. Of course, the

scope of this duty is outside the understanding of ordinary jurors and is therefore the proper subject of expert testimony.

This argument is thus again a misguided effort by Qualcomm to ignore that the duties in question all flow from Qualcomm's own decision not to delegate the responsibility to deenergize the switchgear and to instead undertake that task itself.

Finally, Qualcomm targets the alleged "other theories of affirmative contribution, which the Court of Appeal did not adopt. . . ." (OB 44.) But each of these steps which should have been, but were not, taken flow directly from Qualcomm's decision to only partially deenergize the switchgear – an act it could have but did not delegate. This included the (1) failure to erect a barrier because of the partial deenergizing; (2) the absence of adequate supervision; and (3) not requiring protective gear.

Moreover, even if Qualcomm's liability was based only upon its failure to act, there is still sufficient evidence to impose liability. Unlike the defendant in *Ruiz*, here there was evidence that Qualcomm had a longstanding practice of supervising work of the very nature that was being performed on the day in question and that it was supposed to be supervising that particular work when Mr. Sandoval was injured – but failed to do so.

Qualcomm's argument that there was no affirmative contribution because Sharghi testified that he did not need a monitor and did not ask Qualcomm to remain present (OB 46), also misses the point. First, as already explained, plaintiff's claims are not dependent upon Qualcomm's mere failure to provide safety measures since it affirmatively created the dangerous condition in the first place. In any event, and unlike *Ruiz*, here there was evidence from which the jury could conclude – based on the Qualcomm's practice of supervising TransPower – that it had at least an implied agreement that such supervision would occur. Mr. Sharghi regularly performed work at the Qualcomm facility numerous times over

the past few years and for the last two years had worked there two or three times a week. (7 RT 571.) Mr. Higuera testified that it was his "*policy definitely that somebody from Qualcomm be present at all given times when there's a possibility during a live electrical break.*" (8 RT 679-680, italics added.)[3]

The manner in which these parties acted in the past when TransPower performed similar services for Qualcomm is sufficient to imply a term into the parties' agreement on the day in question under which TransPower agreed to succumb to Qualcomm's supervision to ensure that TransPower was performing its services safely. "The acts of the parties under the contract afford one of the most reliable means of arriving at their intention; and, while not conclusive, the construction thus given to a contract by the parties before any controversy has arisen as to its meaning will, when reasonable, be adopted and enforced by the courts.'" (*Crestview Cemetery Ass'n v. Dieden* (1960) 54 Cal.2d 744, 753.) Consistent with this rule is the rule that when the parties to a contract have previously performed under earlier similar contracts, then the evidence of the manner they performed is "evidence of prior dealings between parties [which] is admissible where tending 'to illustrate the transaction in question [citation] (10 Cal.Jur. p. 825).'" (*Empire Steel Bldg. Co. v. Harvey Mach. Co.* (1954) 122 Cal.App.2d 411, 416.)

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[3] Qualcomm references (at OB 43, fn. 4) Mr. Higuera's testimony that "[a]t the time of this event with Martin Sandoval, did Qualcomm [did not] have a policy either by custom and habit or written that when there's going to be an inspection like we had here with Martin Sandoval that day, that a manager, supervisor, shall be present during the inspection[.]" (8 RT 681.) But whether there was a Qualcomm policy that there be a manager or supervisor present does not establish that there was no Qualcomm policy to have any Qualcomm personnel present.

Thus, Qualcomm's policy here was more than just an internal policy that was not communicated to TransPower. Rather, it was a policy that TransPower was well aware of through its prior repeated dealings with Qualcomm.

In short, the evidence here is that Qualcomm was guilty of much more than passively failing to exercise its authority to control a contractor working on its premises. Further, there is evidence from which the jury could conclude that Qualcomm affirmatively agreed to undertake safety measures. For both of these reasons, there was sufficient evidence of affirmative contribution under *Hooker*.

II. WHEN HOOKER'S "AFFIRMATIVE CONTRIBUTION" STANDARD IS CORRECTLY UNDERSTOOD, IT IS EVIDENT THAT THE CACI COMMITTEE GOT IT RIGHT AND IT IS QUALCOMM THAT IS MISTAKEN. CACI 1009B CORRECTLY STATES THE LAW.

Qualcomm ends its brief by attacking CACI 1009B which was given here and argues that it is entitled to a new trial because the trial court refused its special instructions purporting to describe the "affirmative contribution" standard. As now explained, CACI 1009B correctly states the law and, in any event. Qualcomm's special instructions were properly rejected by the trial court. There is no basis to order a new trial here.

CACI No. 1009B informed the jury that for Qualcomm to be liable, it must have "negligently exercised its retained control over safety conditions" and that its "negligent exercise of retained control over safety conditions was a substantial factor in causing [plaintiff's] harm." Based on *Hooker*, Qualcomm sought to amplify CACI No. 1009B with a series of argumentative special instructions. (See 1 AA 106, 109-110, 216.)

Qualcomm argues that the trial of this matter should be rendered a nullity because the Court erroneously instructed the jury using CACI 1009B and did not modify that instruction or give special instructions informing the jury that "affirmative contribution" was necessary in order to impose liability. In *Regalado v. Callaghan, supra,* 3 Cal.App.5th at pp. 593–95, the Court rejected the identical argument.

There, as here, the defendant argued that CACI 1009B was an incorrect statement of the law because it failed to sufficiently explain "affirmative contribution" to the jury. In concluding that the trial court correctly rejected the defendant's special instructions, the *Regalado* Court explained:

> "Here, the trial court instructed the jury with CACI No. 1009B, which provided that for Callaghan to be liable, he must have 'negligently exercised his retained control over safety conditions" and that his "negligent exercise of retained control over safety conditions was a substantial factor in causing Victor M. Regalado's harm.' Based on *Hooker*, Callaghan sought to amplify CACI No. 1009B with Special Instruction No. 2, which provided: "an owner-builder can only be held liable for injuries to the employee of its contractor if the owner-builder affirmatively contributed to the unsafe procedure or practices by direction, induced reliance, or other affirmative conduct" (Special Instruction No. 2). Additionally, based on *Tverberg v. Fillner Const., Inc.* (2012) 202 Cal.App.4th 1439, 1446, 136 Cal.Rptr.3d 521, Callaghan requested Special Instruction No. 8 that "passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution" (Special Instruction No. 8).
>
> "Although drawn directly from case law, Callaghan's proposed Special Instruction Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to "affirmatively contribute" to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, "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." (*Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3, 115 Cal.Rptr.2d 853, 38 P.3d 1081.) The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including "affirmative contribution" language in CACI No. 1009B. The committee's use note states:

> "The hirer's retained control must have 'affirmatively contributed' to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the 'affirmative contribution' requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because 'affirmative contribution' might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard 'substantial factor' element adequately expresses the 'affirmative contribution' requirement." (Use Note to CACI No. 1009B.)

> *"We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the "affirmative contribution" requirement set forth in Hooker. Callaghan's proposed Special Instruction Nos. 2 and 8 had the potential of misleading the jury and did not provide a clear statement of the law. Thus, the trial court did not err in refusing these proposed special instructions."*

(*Regalado v. Callaghan*, *supra*, 3 Cal.App.5th at pp. 593–595, italics added.)

Qualcomm's argument attack on CACI 1009B is that it wrongly equates "substantial factor" causation with "affirmative contribution" even though they are distinct legal concepts. That is not the case. Rather, under CACI 1009B requires the plaintiff to prove that Qualcomm's "negligent exercise of retained control over safety conditions was a substantial factor in causing [plaintiff's] harm." In other words, the jury was told that Qualcomm must have exercised its retained control (in contrast to simply

having the right to exercise that control) and that this exercise of control needed to be a substantial factor of plaintiff's injuries. This is precisely what this Court held was necessary in *Hooker*.

The alternate instructions proposed by Qualcomm were designed to confuse the jury into concluding that more was necessary. As the Court of Appeal explained, "[w]e conclude the proposed special instructions proffered by Qualcomm regarding 'affirmative contribution' were somewhat misleading in that they strongly suggested Qualcomm must have engaged in some sort of 'active conduct' —such as being '"involved in, or assert[ing] control over, the manner of performance of the contracted work,"' or '"interfer[ing] with the means and methods by which the work [was] to be accomplished"' —in order to be liable under this exception." (28 Cal.App.5th 417.) As explained, under *Hooker* affirmative conduct is not always necessary to satisfy the affirmative contribution standard and, in any event, the standards proposed by Qualcomm tracks its arguments in its Opening Brief that in order to affirmatively contribute to the plaintiff's injuries under *Hooker*, the hirer must actually be involved in the manner in which the contractor is performing its work.

The facts of this case are testament to why that is not the case. To repeat, where as here, the hirer does not delegate a task which is necessary for the contractor to safely perform its work, and instead retains the obligation to perform that work itself, then (1) if the hirer negligently performs that retained work and (2) if that negligent performance harms the plaintiff, then the hirer may be liable under *Hooker*. It has retained control and the manner in which it has exercised that retained control causes the plaintiff harm. This is precisely what the jury was instructed using 1009B. The fact that the jury was instructed using that legally correct standard provides no basis to require a new trial.

In any event, Qualcomm cannot establish prejudice. In order to warrant reversal, an error in instructing the jury warrants reversal only if it likely affected the outcome of the trial. (*Bristow v. Ferguson* (1981) 121 Cal.App.3d 823, 829.) The same standard of prejudicial error is employed on appellate review and requires a determination that it is probable that the error prejudicially affected the verdict. Mere possibility is insufficient. (*Soule v. General Motors, Corp.* (1994) 8 Cal.4th 548, 580.) Actual prejudice must be assessed in the context of the entire record including the state of the evidence, the effect of other instructions, the effect of counsel's argument, any indication the jury was misled and the closeness of the verdict. (*Daum v. Spine Care Medical Group. Inc.* (1997) 52 Cal.App.4th 1285, 1313.)

Here, Qualcomm does not and cannot claim that CACI 1009B is an incorrect statement of the law. No published case had criticized let alone disapproved of that pattern instruction. Instead, Qualcomm argues that additional language was needed to clarify for the jury about affirmative contribution. The trial court expressly permitted its counsel to argue to the jury what was necessary for it to find affirmative contribution. (12 RT 1450.) Courts routinely look to argument of counsel to determine whether any error in jury instructions was or was not prejudicial. (See *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 817 ["Prejudice from an erroneous instruction is never presumed; it must be effectively demonstrated by the appellant. (*Kostecky v. Henry, supra*, 113 Cal.App.3d 362, 374, 170 Cal.Rptr. 197; *Brokopp v. Ford Motor Co., supra*, 71 Cal.App.3d 841, 853-854, 139 Cal.Rptr. 888.) One of the factors to be considered in measuring the effect of an erroneous instruction is whether a party's argument to the jury may have given the instruction a misleading effect. (*LeMons v. Regents of Univ. of Cal.*, 21 Cal.3d 869, 876, 148 Cal.Rptr. 355, 582 P.2d 946; *Kostecky v. Henry, supra*, 113 Cal.App.3d

362, 374-375, 170 Cal.Rptr. 197.)"]; *Thompson v. Package Machinery Co.* (1971) 22 Cal.App.3d 188, 193 ["We reject defendant's contention that the instruction limiting the manufacturer's liability 'to hidden defects and concealed dangers' was non-prejudicial. In his closing argument counsel for defendant repeatedly called the 'hidden danger' instruction to the jury's attention, stating 'it's my contention in this case that all the parts that they are making charges against were open and obvious, as was the manner of function . . . you will also hear further (in the Court's instructions) that generally a manufacturer's liability is limited to hidden defects and concealed danger . . .'"].)

Here, if Qualcomm failed to avail itself of the expressly given opportunity to explain to the jury about the need for it to find affirmative contribution, then it has only itself to blame. Further, and most significantly, as explained above, there is ample evidence that Qualcomm affirmatively contributed to plaintiff's catastrophic injuries. (See ante at pp. 32-36.)

In sum, even if this Court were to now agree that CACI 1009B is incomplete – and there is no reason for it do so – then it should nevertheless conclude that Qualcomm has failed to demonstrate prejudice.

CONCLUSION

For the foregoing reasons, plaintiff urges this Court to affirm the Court of Appeal.

Dated: July 10, 2019

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 12,556 words as counted by the word processing program used to generate the brief.

Stuart B. Esner

PROOF OF SERVICE

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 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **ANSWERING BRIEF ON THE MERITS**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 10, 2019, at Pasadena, California.

Marina Mayhez

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