S252796

IN THE SUPREME COURT OF CALIFORNIA

JOSE M. SANDOVAL,
Plaintiff and Appellant,

v.

QUALCOMM INCORPORATED,
Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D070431

ANSWER TO BRIEF OF AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA

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INTRODUCTION

Of the many amici submitting briefs in this case, the only group to endorse Sandoval's position is the plaintiffs' bar—the Consumer Attorneys of California. And they do so by advocating for positions that have no basis in law or fact. Remarkably, they do not even mention *Privette*'s " 'framework of delegation,' " which as this Court has repeatedly "stressed," is the linchpin that "explain[s]" *Hooker*. (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 599-600 (*SeaBright*).)

In contrast, the amici supporting Qualcomm represent a wide array of stakeholders—from homeowners and real estate

licensees to businesses, insurance carriers, financial institutions, and oil and gas producers. In their amicus briefing, these groups persuasively explain why the Court of Appeal decision below spells "a recipe for disaster." (WSPA Br. 21.) If that decision were upheld, they explain, it would cause "overall workplace safety [to] be diminished, as hirers will be forced, as a defensive measure, to insinuate themselves into safety matters that are better left to the expertise of contractors." (Chamber/APCIA/CJAC Br. 15.) These disastrous effects would not be limited to businesses. Individuals would also be affected. As the California Association of Realtors explains, Sandoval's position would "unnecessarily expose hundreds of thousands of unexpecting residential property owners to the risk of . . . lawsuits and increased costs of liability insurance." (CAR Br. 5.)

The Consumer Attorneys dispute none of these real-world consequences. Instead, they purport to focus on the legal issues at hand—yet they do so without discussing *Privette*'s strong presumption of delegation, without addressing this Court's decisions in *Kinsman* and *SeaBright*, and without citing or distinguishing any of the more than one dozen Court of Appeal decisions finding no affirmative contribution as a matter of law.

Even putting aside those glaring omissions, the Consumer Attorneys offer no persuasive defense of the Court of Appeal's decision. They invite this Court to shift to a direct vs. vicarious liability distinction that the Court has repeatedly rejected (including in *Hooker* itself), and they contend that juries will all

interpret CACI No. 1009B in a way that not even the CACI advisory committee understood it. Neither argument has merit.

DISCUSSION

I. This Court has repeatedly rejected imposing any form of vicarious liability on a hirer for failing to take safety measures that the contractor could have taken.

The Consumer Attorneys argue that the "critical distinction" when applying *Hooker*'s standard "is whether the hirer's participation in the causal chain is direct rather than vicarious." (Consumer Attorneys Br. 7.) This approach, they argue, follows the principle that everyone is responsible " 'for an injury occasioned to another by his or her want of ordinary care.' " (Consumer Attorneys Br. 8.)

But this reasoning overlooks the bedrock principle of delegation underlying the *Privette* doctrine. When a property owner hires a contractor, the hirer "implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*SeaBright*, *supra*, 52 Cal.4th at p. 594, emphasis omitted.) To hold otherwise would deter property owners from hiring contractors, penalizing those individuals and entities "who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees." (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 700 (*Privette*).)

Because a hirer "delegates the responsibility of employee safety to the contractor, the teaching of the *Privette* line of cases is

that a hirer has no duty to act to protect the employee when the contractor fails in that task and therefore [has] no liability." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674.) Were such liability imposed, this Court stressed, it "would essentially be *derivative and vicarious*." (*Ibid.*, emphasis added.)

Thus, as this Court reiterated in *Hooker*, the mere fact that "a hirer's liability can be characterized as *direct* does not end the inquiry." (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210 (*Hooker*).) Even if the hirer " 'is, in a sense, being taxed with his *own* negligence under a theory of *direct* liability,' " the hirer's liability is still " ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor" ' "—who has assumed complete responsibility for workplace safety. (*Ibid.*; accord, *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1243 ["the rationale of our decision in *Privette* extends to cases where the hirer is *directly* negligent in the sense of having failed to take precautions against the peculiar risk involved in the work entrusted to the contractor"].) Put simply, under the *Privette* doctrine, a hirer cannot be held either directly or vicariously liable for failing to carry out a duty that was delegated to the contractor. That duty does not belong to the hirer.

Rather than focus on whether the hirer's negligence can be labeled "direct" or "vicarious," this Court has instructed that retained control liability should turn on whether the hirer exercised control over the work "in a manner that *affirmatively* contributed to the injury"—that is, whether the hirer contributed "to the contractor's negligent performance by, e.g., inducing

injurious action or inaction through actual direction, reliance on the hirer, or otherwise." (*Hooker*, *supra*, 27 Cal.4th at pp. 210-211.) If the hirer affirmatively prevents the contractor from fulfilling its delegated responsibility to provide a safe worksite, the chain of delegation is broken. Then and only then does the hirer's conduct become sufficiently direct to subject it to potential liability.

By overlooking this Court's repeated guidance, the Consumer Attorneys illogically read *Hooker* as adopting a rule that fails to explain *Hooker*'s outcome. They also purport to find a difference between this case and *Hooker* when there is none. If all that a plaintiff need show is some act or omission by the hirer that contributed to the accident, then Caltrans should have been liable in *Hooker*. After all, Caltrans undeniably exercised control over construction zone traffic, and (by the Consumer Attorneys' logic) its "failure to do so with due care was a substantial factor in [causing the decedent's] injuries." (Consumer Attorneys Br. 10; see RBOM 16-17.)

But this Court held that Caltrans was not liable because *Privette* strictly prohibits holding a hirer liable for merely failing to ensure that its contractor's employees perform their work in a safe manner—a duty that belongs to the contractor. In keeping with *Privette*'s presumption of delegation, the test applied by this Court was thus not whether Caltrans negligently exercised its retained control by acting or failing to act in any way that contributed to the accident (as the pre-*Privette* common law test would have been). Instead, the test was whether Caltrans broke the presumptive chain of delegation by affirmatively directing the

contractor, inducing the contractor's reliance, or otherwise interfering with the contractor's ability to provide a safe workplace. (See *Hooker*, *supra*, 27 Cal.4th at p. 215 [holding that Caltrans did not affirmatively contribute, even though it permitted the flow of traffic on the overpass, because it "did not direct the crane operator" to act unsafely (emphasis omitted)].)

The same result follows here. There is no evidence that Qualcomm contributed in any way to TransPower's extreme and unforeseeable misconduct or prevented TransPower from taking safety measures as it saw fit. Indeed, unlike in *Hooker*, Qualcomm did not know or even suspect that its highly experienced contractor would deliberately exceed the authorized scope of work and put everyone's lives at risk. All necessary safety measures were thus delegated to TransPower, and holding Qualcomm responsible for not taking those measures itself would amount to imposing vicarious liability.

The Consumer Attorneys nevertheless argue that Qualcomm should be liable because experts testified at trial that Qualcomm did not follow "the industry standard of care." (Consumer Attorneys Br. 7.) That is beside the point. As Qualcomm has explained at length (see OBOM 41-42; RBOM 31-32 & fn. 6)—and the Consumer Attorney do not dispute—even if industry standards required that some safety measures be taken, the responsibility to take those measures was delegated by law to Qualcomm's contractor, Sharghi (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 720 [holding that, in keeping

with *SeaBright*, any duty to comply with industry standards is delegated to the contractor]).[1]

At bottom, the Consumer Attorneys' argument boils down to saying that if a hirer undertakes *any* affirmative step to prepare for the contractor's work (here, "Qualcomm's election to conduct the de-energization of the control room" (Consumer Attorneys Br. 7)), then the hirer has an overarching, nondelegable, and unending responsibility to ensure the worksite's safety—even for a contractor's unforeseeable negligent acts *after* the hirer hands over the keys to the contractor. But it simply is not the law that *Hooker* and *Privette* go out the window when a hirer participates in some aspect of the work. In *Hooker* itself, the hirer was actively involved in the work.

The proper test is whether the hirer contributed to the contractor's negligent action or inaction by " 'direction, induced reliance, or other affirmative conduct.' " (*Hooker*, *supra*, 27 Cal.4th at p. 209.) Nothing about Qualcomm's lockout-tagout procedure affirmatively contributed to Sharghi's decision to expose a live circuit—or prevented Sharghi from taking any of the safety measures Sandoval claims Qualcomm could have taken. Quite the opposite: when Qualcomm completed the lockout-tagout and turned the worksite over to Sharghi, the area to be inspected was

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[1] In any case, the relevant industry standard here—NFPA 70E—aligns with *Privette*'s delegation principle. It provides that the *contractor*, not the hirer, is responsible for communicating electrical hazards to the contractor's workers. (See OBOM 20, fn. 2.) Thus, under both *Privette* and the industry standard, it was entirely Sharghi's responsibility to warn Sandoval.

safely turned off and all live circuits were safely enclosed by bolted-on covers. In short, the room was in an electrically safe condition. On these facts, *Hooker*'s affirmative contribution standard is not even remotely met.

II. CACI No. 1009B does not instruct the jury on *Hooker*'s affirmative contribution requirement.

The Consumer Attorneys next argue that CACI No. 1009B adequately instructs the jury on affirmative contribution even though it does not mention affirmative contribution. (Consumer Attorneys Br. 10-12.) This is so, they argue, because the word *exercise* in the third element "requires affirmative conduct," and the substantial factor test in the fourth element satisfies "the 'contribution' portion." (Consumer Attorneys Br. 11.) Combine these two, they say, and "the instruction conforms perfectly to . . . what the Court had in mind in *Hooker*." (*Ibid.*)

The Consumer Attorneys are incorrect. Even putting aside that the word *exercise* does not always imply affirmative conduct—a child can *exercise* self-control by not eating a candy, a suspect in custody can *exercise* his constitutional rights by remaining silent, and so on—the CACI instruction has never been understood to require affirmative conduct. (See, e.g., *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594 [rejecting any variation of CACI No. 1009B that would even "suggest that in order for the hirer to [be liable], the hirer must have engaged in some form of active direction or conduct"].) On its face, CACI No. 1009B asks the jury to find that the defendant negligently "exercised" its retained

control "by [specify alleged negligent acts *or omissions*]." (CACI No. 1009B (2017), original formatting omitted.)

Even before *Hooker*, it was well understood that a hirer could negligently *exercise* retained control by *failing to act*. At common law, a hirer could be liable for the tort of " 'Negligence in Exercising [Retained] Control' " if it " 'fail[ed] to prevent [its contractor] from doing even the details of the work in a way unreasonably dangerous to others.' " (*Morehouse v. Taubman Co.* (1970) 5 Cal.App.3d 548, 557; accord, *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 977 (*McCarty*).) CACI No. 1009B is thus nothing more than a black-letter version of the pre-*Hooker* common law tort.

Justice Werdegar would have maintained the common law standard when this Court decided *Hooker*, but her view did not carry the day. (See RBOM 13-14; *McCarty*, *supra*, 164 Cal.App.4th at p. 977, fn. 6 ["Justice Werdegar dissented precisely because she believed that the hirer should be liable, as a matter of common law negligence, even in the absence of any affirmative contribution"].) Instead, the majority held that something more—affirmative contribution—must be shown. *Hooker* thus added "a limitation on the liability that the hirer would otherwise have." (*McCarty*, at p. 977, emphasis omitted.)

By collapsing affirmative contribution into the traditional common law standard for retained control liability, the Consumer Attorneys, like Sandoval, would have the Court erase the very distinction that divided the majority and the dissent in *Hooker*. They would have the Court read *Hooker* as though it worked no

change in the law when in fact *Hooker* fundamentally changed the scope of a hirer's liability for the tort of negligent exercise of retained control.

Indeed, like Sandoval, the Consumer Attorneys never deny that a jury applying CACI No. 1009B could have easily found Caltrans liable in *Hooker*. There was evidence that Caltrans negligently exercised its retained control by allowing construction vehicles to use the narrow overpass, and in doing so contributed to the crane's toppling over. (See RBOM 36-37.) That result would be unsurprising, though, because CACI No. 1009B altogether omits *Hooker*'s core requirement and instead recites the pre-*Hooker* standard verbatim.

At any rate, the Consumer Attorneys' reinterpretation of CACI No. 1009B would come as news to the CACI advisory committee, which "believe[d] that . . . 'affirmative contribution' . . . simply means that there must be causation between the hirer's conduct and the plaintiff's injury" and "need not be active conduct." (Directions for Use to CACI No. 1009B (2017) pp. 605-606.) In fact, the committee specifically drafted the instruction to avoid any possibility that it "might be construed by a jury to require active conduct rather than a failure to act." *(Id.* at p. 606.*)* This Court should decline to assume that juries will read a pattern instruction in a way that even the drafters did not read it.

Ultimately, the Consumer Attorneys' arguments are in conflict. On one hand, they argue that CACI No. 1009B "requires affirmative conduct" and thus "conforms perfectly to . . . what the Court had in mind in *Hooker*." (Consumer Attorneys Br. 11.) On

the other, they read *Hooker* to mean that a hirer can be liable for simply "fail[ing] to act." (Consumer Attorneys Br. 6.) They in fact have it precisely backwards: *Hooker* requires " 'direction, induced reliance, or other *affirmative conduct*' " (*Hooker*, *supra*, 27 Cal.4th at p. 209, emphasis added), and CACI No. 1009B does not. The instruction omits *Hooker*'s key element and should be corrected.

CONCLUSION

Even in the light most favorable to Sandoval, the facts of this case do not support imposing liability on Qualcomm. This Court should reverse the decision below and direct entry of JNOV in Qualcomm's favor, and the Court should clarify that CACI No. 1009B must be corrected. If JNOV is not granted, the Court should reverse the decision below and remand the case for a new trial of all liability issues with correct jury instructions.

November 12, 2019

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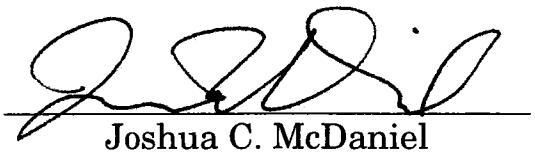
Dated: November 12, 2019



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On November 12, 2019, I served true copies of the following document(s) described as **ANSWER TO BRIEF OF AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA** on the interested parties in this action as follows:

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