Case No. S222732

IN THE SUPREME COURT OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

CHARLES LEE et al.,
Real Parties in Interest.

ON REVIEW FROM A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN, CASE NO. B249546

LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC 332016
MICHAEL L. STERN, JUDGE

PETITIONER DYNAMEX OPERATIONS WEST, INC.'S PETITION FOR REHEARING

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

I.

INTRODUCTION

Pursuant to California Rule of the Court 8.268(b), Petitioner Dynamex Operations West, Inc. files this petition for rehearing solely on an issue not addressed in this Court's April 30, 2018 Opinion, namely whether its adoption of an "ABC" test should apply retroactively.

For the reasons set forth herein, Dynamex submits that the Court's ruling should apply on a prospective basis only. Businesses in California have long relied on consistent judicial and administrative guidance regarding the standard for differentiating employees from independent contractors in wage and hour cases. No business could have reasonably divined that the "suffer or permit" language in California Wage Orders equated to the specific verbiage of the "ABC" test that is peculiar to Massachusetts. Before April 30, 2018, that test was entirely foreign to California.

Both established California authority and principles of equity require that this Court's decision be given prospective effect only. The Court is respectfully requested to grant a hearing on this limited issue only, or alternatively to modify its Opinion accordingly.

II.

ARGUMENT

I.

As this Court recently noted, "Considerations of fairness and public policy may require that a decision be given only prospective application. Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the

administration of justice, and the purposes to be served by the new rule." *Williams & Fickett v. Cty. of Fresno*, (2017) 2 Cal. 5th 1258, 1282–83 (holding that prospective application of the Court's holding was proper because the language of existing case-law was "unequivocal, lending itself to reasonable reliance by plaintiff and others in its position") *citing Claxton v. Waters* (2004) 34 Cal.4th 367, 378-379. "[P]rospective application might be appropriate, for example, when a judicial decision changes a settled rule on which the parties below have relied." *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542, 573, 411 P.3d 528, 546 (2018), *as modified* (Apr. 25, 2018).

This Court has declined to make new rules retroactive where doing so would violate the parties' due process rights. The Court has explained that "retroactive application of a decision disapproving prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties," much "[l]ike retroactive application of an 'unforeseeable and retroactive judicial expansion of a statute" "denies due process." *Moss v. Superior Court* (1998) 17 Cal.4th 396, 429, quoting *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352. That rule applies not only to cases involving civil penalties, sanctions or punitive damages, but to all types of civil liability. For example, in *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 829 (*Olszewski*), this Court invalidated two state statutes as preempted by federal law, but still concluded that they provided the defendant a safe harbor from a plaintiff's claim for restitution under Business and Professions Code section 17200. (*Id.* at p. 829.) The Court refused to apply its decision retroactively in *Olszewski* because the defendant could have reasonably relied on the statutes at issue, and thus subjecting the defendant to civil liability would have violated due process. (*See id.* at pp. 829-830.)

Likewise, in *Estate of Propst v. Stillman*, 50 Cal 3d 448 (1990), this Court noted that retroactive application may be inappropriate given "unforeseeability to counsel." Here, the Court's Opinion adopted a Massachusetts ABC test that was never addressed in briefing or oral argument (only the New Jersey test was discussed, and that test was first raised when the Court requested a final round of supplemental briefing.) The parties and counsel were given no clue that the Massachusetts test was under consideration.

Turning to the "particular considerations" identified in this Court's *Williams* and *Alvarado* decisions, the first of those factors is reasonable reliance. Since the issuance of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, (1989) 48 Cal. 3d 341 (*Borello*), California businesses have relied on the *Borello* decision in determining whether to clarify individuals as employees or independent contractors. Such reliance was not only reasonable, it was inescapable. Dynamex is not aware of any California court that failed to apply the *Borello* test to issues arising under IWC Wage Orders, until the Court of Appeal decision in this case. No California court, and no California administrative agency, has ever used the ABC test for any purpose. *Borello* was the one and only test for all wage and hour statutes.

The California agency which administers the Wage Orders provided explicit guidance to businesses. The Department of Labor Standards Enforcement webpage "Independent Contractor versus Employee" states:

> Not all workers are employees as they may be volunteers or independent contractors. ... There is no set definition of the term "independent contractor" and as such, one must look to the interpretations of the courts and enforcement agencies to decide if in a particular situation a worker is an employee or independent contractor. ... For most matters before the

> Division of Labor Standards Enforcement (DLSE), depending on the remedial nature of the legislation at issue, this means applying the "multi-factor" or the "economic realities" test adopted by the California Supreme Court in the case of *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341.[1]

Statutes outside the scope of the Wage Orders have been interpreted similarly. The California Unemployment Insurance Appeals Board (CUIAB), in precedent decision *In re NCM Direct Delivery* (2008) P-T-495, held that the *Borello* factors applied to the Unemployment Insurance Code, a finding that was upheld by the court of appeal. (*Messenger Courier Assoc. v. California Unempl. Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074, 1092.) Similarly, the Worker's Compensation Appeals Board (WCAB) applies the *Borello* factors, given that *Borello* itself was a case involving the Worker's Compensation Act (WCA).

Borello has proven to be a sturdy and adaptable test over the 30 years it has been used by courts and agencies. In *Messenger Courier Assoc. v. California Unempl. Ins. Appeals Bd.*, *supra*, the court rejected the argument that the test used to determine a worker's status as an employee or independent contractor was outdated. Citing to the Restatement of Jurisprudence and Restatement of Agency, the court explained that the *Borello* factor's "most significant feature is its inherent capacity for growth and change." *Messenger Courier Assoc.*, (2009) 175 Cal.App.4th at 1090.

For all these reasons, it was eminently reasonable for California businesses to rely upon *Borello* when making operational decisions. Retroactive application of a decision is not appropriate when that decision "constitutes a 'clear break' from (i) prior decisions of the California

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[1] DLSE Website, available at https://www.dir.ca.gov/dlse/faq_independentcontractor.htm

Supreme Court, (ii) a practice impliedly sanctioned by prior decisions of the California Supreme Court, or (iii) 'a longstanding and widespread practice expressly approved by a near-unanimous body of lower court authorities." *Dardarian v. Office Max N. Am, Inc.*, 875 F. Supp. 2d 1084, 1090 (N.D. Cal 2012). (citations omitted) On all three of these grounds, the *Dynamex* opinion was such a "clean break." It should not be applied retroactively.

Equally compelling is the second of the "particular considerations" identified in *Williams* and *Alvarado*. This Court's new ABC test is not just procedural in nature. Rather it is a substantive change to the meaning and effect of Wage Orders. This Court has chosen three new stringent requirements, all of which must be met to establish independent contractor status. The Court specifically repudiated the multi-factor test of *Borello* in the interest of creating a simpler and less subjective set of rules. This was a fundamental change of substantive law.

Notably, every other state that uses the ABC test in the wage and hour context has a specific statute authorizing its use. For example, New Jersey expressly adopted the ABC test by statute for unemployment compensation purposes in N.J.S.A. 43:21-19(i)(6), and subsequently by regulation for the WHL in N.J.A.C. 12:56-16:1. Similarly, the six other states that utilize an ABC test also have statutory and/or regulatory authority from which the test emerged. [2] Dynamex has not found any state court that has adopted the ABC test without it being grounded in an existing state statute or regulation. Clearly, the ABC test is a substantive

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[2] See, e.g., *Colorado*: Colo. Rev. Stat. § 8-4-101(5); *Connecticut*: Conn. Gen. Stat. § 31-222(a)(1)(B),; *Tianti v. Raveis Real Estate*, (Conn. 1995) 651 A.2d 1286 ; *Illinois*: 820 ILCS 115/2, *Adams v. Catrambone*, (7th Cir. 2004) 359 F.3d 858 ; *Massachusetts*: Mass. Gen. Laws c. 149, § 148B; *Montana*: Mont. Admin. R 24.35.302(1)(a)-(o); 24.35.303(1)(a)-(n); *Vermont*: Vt. Stat. tit. 21, § 341.

one that has always (until now) required legislative enactment.[3]

The third and fourth "particular considerations" for prospective enforcement are retroactivity's effect on the administration of justice, and the purposes to be served by the new rule. *Williams* at 1282-83; *Alvarado* at 546. These more general considerations further support prospective application here. Retroactive application could void existing contractual relationships statewide. It could require re-litigation of independent contractor/employee issues in administrative agencies and courts. None of this would be consistent with orderly administration of justice. As for the purposes served by the new rule, this Court has declared that its goal was to increase clarity and achieve greater simplicity. That goal can only be achieved prospectively: it is too late to assist businesses which reasonably made past decisions in reliance on *Borello*.

III.

CONCLUSION

In its Opinion, this Court announced that a new rule of law, the Massachusetts variant of the ABC test, would now govern independent contractor status under the Wage Orders. This newly adopted ABC test has never been followed by any regulatory agency, trial court or appellate court

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[3] In its Opinion here, the Court adopted the Massachusetts version of the ABC test. In Massachusetts, a new test of this magnitude would likely not be given retroactive effect. The Massachusetts Supreme Court has held that "it is sometimes necessary to depart from the general rule of retroactivity, in order to protect the reasonable expectations of parties. *Tamerlane Corp. v. Warwick Ins. Co.* (1992), 412 Mass 486, 490 (declining to apply new decision retroactively). The Massachusetts court noted these as the crucial factors: (1) the extent to which the decision creates a novel and unforeshadowed rule; (2) the benefits of retroactive application in furthering the purpose of the new rule; and (3) the hardship or inequity likely to follow from retroactive application. *Id* at 490 (citation omitted).

in the state of California. To apply this new rule of law to Dynamex and every California employer retroactively would be fundamentally unfair.

Accordingly, Dynamex requests that the Court amend its Opinion to state that the ABC test will apply prospectively only, or alternatively grant rehearing solely on the issue of retroactive application.

DATED: May 15, 2018, LITTLER MENDELSON, P.C.

By: _____
ROBERT G. HULTENG
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Attorneys for Defendant and Petitioner
DYNAMEX OPERATIONS WEST, INC.

CERTIFICATE OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this Petition for Rehearing, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and this certification, consists of 3,298 words in 13-point Times New Roman type as counted by the word-processing program used to generate the text.

DATED: May 15, 2018, LITTLER MENDELSON, P.C.

By: Robt G. Hulteng
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 333 Bush Street, 34th Floor, San Francisco, California 94104. On May 15, 2018, I served the within document(s):

PETITIONER DYNAMEX OPERATIONS WEST, INC.'S PETITION FOR REHEARING

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☐ Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is _____@littler.com.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 15, 2018, at San Francisco, California.

KARA VALLS

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