S252796

IN THE SUPREME COURT OF CALIFORNIA

JOSE M. SANDOVAL
Petitioner,

v.

QUALCOMM INCORPORATED,
Respondent.

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

APPLICATION TO FILE AMICI CURIAE BRIEF & BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION & THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF QUALCOMM INCORPORATED

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The Chamber of Commerce of the United States of America (U.S. Chamber), the American Property Casualty Insurance Association, and the Civil Justice Association of California respectfully apply for leave to file the accompanying amici curiae brief in support of Qualcomm Incorporated pursuant to rule 8.520(f) of the California Rules of Court.

Amici are familiar with the content of the parties' briefs.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of over 3 million businesses and professional organizations of every size, from every sector, and in every geographic region of the country. The U.S. Chamber has many members in California and other members who conduct substantial business in the state and have a significant interest in the sound and equitable development of California tort law. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of concern. In fulfilling that role, the U.S. Chamber has appeared often before this court, the California Courts of Appeal, the United States Supreme Court, and the supreme courts of various other states.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA was recently formed through a merger of two

longstanding trade associations, the American Insurance Association and the Property Casualty Insurance Association of America. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and business in the U.S. and across the globe.

The Civil Justice Association of California ("CJAC") is a long-standing non-profit organization representing businesses, professional associations and financial institutions. CJAC's principal purpose is to make civil liability laws more fair, certain, and economical. Toward this end, CJAC petitions the government, including the judiciary, about ways to improve laws regarding compensation for injuries. The "peculiar risk" doctrine has featured prominently in CJAC's efforts because many of its members hire independent contractors to undertake services that entail peculiar risks for which the contractors have expertise or training that CJAC's members' employees do not. (See, e.g., *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235; *Hooker v. Department*

of Transportation (2002) 27 Cal.4th 198; *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219.)

Amici offer this brief to explain that the Court of Appeal's decision to impose liability on a hirer for mere omissions threatens well-established lines of responsibility that are essential to ensure industrial safety and to rationally spread the risk created by the performance of dangerous work

No party or counsel for a party authored the proposed amici brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the amici curiae, their members, or their counsel in the pending appeal funded the preparation and submission of the proposed amici brief. (Cal. Rules of Court, rule 8.520(f)(4)(A).)

Dated: October 3, 2019

Respectfully Submitted,

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BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION & THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF QUALCOMM INCORPORATED

Introduction

A safe worksite requires clear lines of authority and communication. For more than 25 years, it has been settled in California that employees of a contractor injured on the job may not, except under narrowly prescribed circumstances, sue the person who hired their employer. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 697; *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594.) The injured employee's exclusive remedy against the hirer is worker's compensation, a remedy which is available regardless of fault. (*Privette*, at p. 697.)

This rule prevents unfair windfalls, and encourages industrial safety. (*Privette*, *supra*, 5 Cal.4th at pp. 699-700.) Industrial safety is enhanced when specialized contractors, who have the greatest experience in dealing with the particular hazards of their professions, are responsible for

ensuring the safety of those who help them perform hazardous work. (*SeaBright*, *supra*, 52 Cal.4th at p. 603; *Privette*, at p. 700.) "[T]o impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees." (*Privette*, at p. 700.)

This court has permitted an employee of an independent contractor to impose tort liability on the person who hired the independent contractor only under limited exceptions to the *Privette* rule. (See *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202.) At issue here is the scope of the retained control exception: an exception that applies when the person who hires the independent contractor retains control over safety conditions at the worksite and the "hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Ibid.*, original italics.)

The uncontradicted evidence in this case showed that Qualcomm told TransPower, the independent contractor it hired for electrical work,

that a particular compartment was energized and no work was authorized to be done on that compartment. Qualcomm even bolted the energized compartment closed. TransPower nevertheless directed one of its employees to open the compartment so TransPower's principal could take a photograph unrelated to the authorized work. When the TransPower employee opened the compartment, an electric arc injured Jose Sandoval, an employee of TransPower's subcontractor.

The Court of Appeal imposed liability on Qualcomm based on evidence that it did not tell Sandoval *directly* that the compartment was energized. Its analysis allowing liability to be imposed on Qualcomm under these circumstances would severely erode industrial safety by leaving hirers with little choice but to interfere with a contractor's supervision of its employees and subcontractors. Such overlapping lines of communication and responsibility are unsafe on an industrial jobsite.

This court should clarify *Hooker* and clearly state that a hirer will only be liable for an omission under the retained control exception to *Privette* if it

affirmatively promises the contractor that it has acted or that it will act.

Discussion

I. *Privette* enhances industrial safety by encouraging hirers to delegate to specialized contractors the responsibility for ensuring the safety of those who help them perform hazardous work.

As Sandoval acknowledges, "it is contractors who typically have the technical skills and specialized training necessary to perform what is often hazardous work in a safe manner." (Answering Brief on the Merits, p. 29, citing *Privette*, *supra*, 5 Cal.4th at p. 700.) Contractors have authority to determine the manner in which inherently dangerous work is to be performed, so they are in the best position to know what precautions to take to ensure their employees' safety. (*SeaBright*, *supra*, 52 Cal.4th at p. 600.)

For these reasons, a hirer has the "right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 269.) It is critical to worksite safety that the independent contractor "has authority to determine the manner in which inherently dangerous . . . work

is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 522.) "By hiring an independent 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, italics omitted.)

The "policy favoring delegation of responsibility and assignment of liability is very strong in this context [citation], and a hirer generally has no duty to act to protect the [contractor's] employee when the contractor fails in that task." (*SeaBright*, *supra*, 52 Cal.4th at p. 602, internal quotation marks omitted.) The delegation principle controls even where worker's compensation recovery is absent. (*Tverberg*, *supra*, 49 Cal.4th at pp. 528-529 [in which the injured contractor was not entitled to workers' compensation benefits, but his claim against the hirer nevertheless failed because of the hirer's presumed delegation to

the contractor of responsibility for workplace safety]; see also *SeaBright*, at p. 600.)

The hirer "has *no* obligation to specify the precautions an independent hired contractor should take for the safety of *the contractor's employees*." (*Toland*, *supra*, 18 Cal.4th at p. 267, original italics.) And the hirer has no duty to directly inform the contractor's employees of a hazard it has made known to their employer. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 673-674.)

Industrial regulations have developed along *Privette*'s clear lines of delegation for many years. For example, National Fire Protection Association standard 70E, section 110.1, which applied at the worksite in this case, required Qualcomm as the "host employer" to inform the "contractor employers" of known hazards, and it required TransPower as the contractor to "ensure that each of [its] employees [was] instructed in the hazards communicated to [it] by the host employer." (*Sandoval v. Qualcomm, Inc.* (2018) 28 Cal.App.5th 381, 405, rev. granted Jan. 16, 2019.)

If the outcome of this case disturbs the delicate balance underlying the delegation of responsibility

for the safety of contactor's workers, overall workplace safety will 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.

II. The retained control exception to the *Privette* doctrine honors the delegation principle by imposing liability only when the hirer "actually exercises" control over safety, thus affirmatively crossing the delegation line.

Limited exceptions to the *Privette* doctrine honor the wisdom of establishing clear lines that delegate responsibility for workplace safety: (1) the non-delegable duty exception arises when it is not legally possible for the hirer to delegate responsibility because of a specific statute or regulation (*SeaBright*, *supra*, 52 Cal.4th at pp. 600-601); (2) the concealed hazards exception arises when the hirer needs to disclose a hidden danger so the contractor may effectively protect its employees (*Kinsman*, *supra*, 37 Cal.4th at p. 675); and (3) the retained control exception arises when the hirer breaks the lines of delegated responsibility by "actually exercis[ing]" retained control over safety (*Hooker*, *supra*, 27 Cal.4th at p. 215).

In *Hooker*, *supra*, 27 Cal.4th 198, 202, this court announced the retained control exception, which applies when a hirer interferes in some affirmative way with the contractor's delegated safety responsibility. The hirer is liable for workplace injuries suffered by its contractor's employees if it (1) retains control over any part of the work, and (2) negligently "exercise[s]" that control (3) in a manner that "affirmatively contribute[s]" to the employee's injury. (*Hooker*, at p. 209.) The exception requires affirmative conduct – it does not apply to a mere failure to act that is not coupled with a promise to act, or some other affirmative conduct. An omission alone does nothing to alter the contractor's responsibility for the safety of its employees.

Hooker recognized it would be fair to impose tort liability on the hirer of an independent contractor who retained control over safety at the worksite only if "the hirer *exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee." (*Hooker*, *supra*, 27 Cal.4th at p. 210, original italics.) As the opinion in *Hooker* explained:

> 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 of the contractor merely because the hirer retained the ability to exercise control over safety at the worksite. . . . [T]he imposition of tort liability on a hirer should depend on whether the hirer *exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee.

(*Ibid.*, original italics.)

Thus, "a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but [rather] a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202.)

In a footnote, the opinion in *Hooker* added that a hirer's "omission" may give rise to liability if, for example, it is accompanied by some affirmative act, such as a promise to the contractor that the hirer will do something it then fails to do. The *Hooker* footnote states in full:

> Such affirmative contribution need not always be in the form of actively directing

> a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. 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.

(*Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3.)

The Court of Appeal interpreted this footnote too broadly to mean that a hirer may be liable for omissions alone, when there is no evidence of any affirmative act such as the promise given in the example.

The issue now before this court is whether tort liability may be imposed on the hirer of an independent contractor for negligent exercise of retained control based solely on the failure of the hirer to undertake measures to ensure the safety of the contractor's employees. The answer must be no. Such an interpretation would render the word "exercise" meaningless in this context, and it would create uncertainty and undermine safety on hazardous worksites.

The *Hooker* court did not hold that a hirer's failure to act is, by itself, sufficient to trigger liability; and it did not intend "affirmative contribution" to simply require a conventional causation analysis.

Justice Werdegar argued for such an approach in her dissent, but garnered no other votes. (*Hooker*, *supra*, 27 Cal.4th at pp. 215-216 (dis. opn. of Werdegar, J.).)

No other published case since *Hooker* has imposed liability on a hirer under the retained control exception for a pure omission, as Qualcomm's Opening Brief on the Merits explains. (Opening Brief on the Merits, pp. 26-29; see also *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718-719.) Until now, omissions could result in liability only if coupled with an "actual exercise" of control, such as a promise to the contractor to do something or that something has been done. (*Hooker*, *supra*, 27 Cal.4th at p. 217; see *id.* at p. 212, fn. 3 [promise to contractor to undertake a particular safety measure]; *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 597 [promise to contractor that a safety inspection had been performed].)

For example, in *Regalado,* an underground vault exploded due to accumulated propane gas. The pool owner was liable for injuries to his contractor's employee because he falsely told the contractor he had permits and the county had conducted a safety inspection which would have cleared propane from

the vault. (3 Cal.App.5th at pp. 588-589.) Conversely, in *Hooker*, Caltrans was free from liability for failing to close all lanes of traffic on an overpass (instead of just the lane in which the contractor's employees were authorized to work) because it did not promise the contractor it would close the entire overpass. (27 Cal.4th at pp. 215-216.) Likewise, in *Padilla,* the building owner was not liable for failing to shut off water to all pipes in a building (instead of just the pipes on which the contractor's employees were authorized to work) because it did not promise the contractor it would shut off water to all pipes. (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 673-674.)

Until the appellate decision in this case, California courts have routinely understood *Hooker*'s footnote to require some affirmative promise to the contractor that the hirer will act before an omission could render the hirer liable under the retained control exception. This unbroken line of cases created certainty in safety planning and should not be disturbed.

III. The Court of Appeal's analysis renders the word "exercise" meaningless by imposing liability on a hirer who does not interfere with its subcontractor's work.

The retained control exception requires proof that the defendant "actually exercised the retained control so as to affirmatively contribute to" the injury. (*Hooker*, *supra*, 27 Cal.4th at p. 215.) The Court of Appeal's conclusion that a hirer "could be liable . . . for its failure to act," under the retained control exception renders the word "exercise" meaningless. (*Sandoval*, *supra*, 28 Cal.App.5th at p. 417.) Its decision runs afoul of the delegation framework by penalizing a hirer who respects the lines of delegation and does not directly interfere with the employees of its contractor.

The word "exercise" has meaning; an omission is not enough unless coupled with an affirmative act, such as a promise to the contractor. The "hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but . . . is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202, original italics.) As was

more recently explained in *Tverberg,* "[P]assively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution." (*Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446, citing *Hooker*, at pp. 214-215.) As Sandoval concedes, "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." (Answering Brief on the Merits, p. 23.)

There is nothing "affirmative" about the omission in this case; it is wholly unlike those cases in which a hirer promised the contractor it would provide a safety measure and then failed to do so. Qualcomm did not promise the contractor it had de-energized the GF-5 box.

As the trial court noted in its order granting new trial, "Qualcomm had no reason to think its expert electrical contractor – who had done work on the switchgear 'hundreds of times' [citation] – would go beyond the approved scope of work and expose a live circuit." (2 AA 319.) "Qualcomm could not have known that it should de-energize the GF-5 cell, as

GF-5 was not included within the scope of the work proposed by Transpower." (2 AA 319.)

A complete outage was never promised or planned. Like the hirer in *Hooker* who did not shut down the entire overpass, or the hirer in *Padilla* who did not shut off all water to the building, Qualcomm shut down only the area it promised it would. It safely de-energized the cogeneration side of the plant, disclosed the utility-side hazard to its specialized contractor, and entrusted the contractor to protect its employees and subcontractors.

Sandoval argues the equipment was a "sea of sameness" and that the energized and de-energized boxes looked alike (Answering Brief on the Merits, pp. 17, 37), but TransPower did not confuse the GF-5 box with the de-energized cogeneration box. (*Sandoval*, *supra*, 28 Cal.App.5th at pp. 389-390.) A TransPower employee opened the GF-5 box because TransPower's principal told him to. (*Ibid.*; 2 AA 319.) TransPower's principal "knew the GF-5 was energized when he asked [his employee] to remove the bolted-on panel." (*Id.* at p. 390.) And the employee who opened it " 'assumed' " it was " 'hot.' " (*Id.* at p. 392.)

TransPower created the hazard by exceeding the scope of authorized work, and was in the best position to protect its employees and subcontractors. As its principal acknowledged, he did not need Qualcomm to supervise the work, he " 'knew what [he was] doing,' " and he did not have permission to open the box. (*Sandoval*, *supra*, 28 Cal.App.5th at p. 390, original brackets.)

The severity of the injuries undoubtedly encouraged the jury to impose liability on Qualcomm for mere failure to act. The trial court acknowledged as much when it reduced the jury's allocation of fault to Qualcomm. (2 AA 318-319.)

A clarifying instruction on affirmative conduct would have protected the bright line that delineates the retained control exception. This court's clarification of the *Hooker* footnote will help guide juries, trial courts, and prudent hirers going forward so that clear lines of delegation can continue to facilitate safe conditions for hazardous industrial work.

Conclusion

This court should clarify *Hooker*'s footnote and clearly state that the hirer will only be liable for an omission under the retained control exception to *Privette* if it affirmatively promises the contractor that it has acted or that it will act. Accordingly, the judgment of the Court of Appeal should be reversed.

Dated: October 3, 2019

Respectfully Submitted,

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Dated: October 3, 2019

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