



Association of Defense
Counsel of Northern
California and Nevada



March 4, 2021

Tani G. Cantil-Sakauye, Chief Justice
And Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-7303

Re: *Plascencia v. Deese*
(2021) 59 Cal.App.5th 1148
[Supreme Court No. S267121 (petition for review)
Court of Appeal No. B299142 Consolidated with B299925]
Opposition to Request for Depublication

Honorable Justices:

The Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada (the “Associations”) respectfully urge this Court to deny the request to depublish the Court of Appeal’s opinion in this matter and, instead, to leave the opinion published.

The Associations’ Interest.

The Associations are two of the nation’s largest and preeminent regional organizations of lawyers who routinely defend civil actions, comprised of over 2,000 leading civil defense bar attorneys in California. Their members routinely represent clients in defending civil actions. They strongly believe in and promote civility, equal treatment of all involved in the litigation system, and strong, but fair, advocacy.

The Associations actively monitor California case law and frequently participate as amici before this Court and the Courts of Appeal.

No party has paid for or drafted this letter.

The Opinion Should Remain Published.

The Opinion in this case is an important and much needed reminder that our system depends on fair advocacy, and that there are—and should be—consequences when counsel overstep the bounds of fair advocacy, arguing such things as “‘You can’t stone him to death’ but you can ‘make him pay’ and ‘imagine’ it was ‘your daughter.’” Far too often, appeals to passion, prejudice, and base instincts are allowed to stand in the judicial process. It has gotten so bad that now there are books, seminars, and lectures on how counsel can best flout the rules and appeal to the passion, prejudice, and emotion of jurors guiding them away from dispassionate analysis of the facts and application of the law. (See, e.g., Ball & Keenan, *Reptile: The 2009 Manual of the Plaintiff’s Revolution*; <https://www.lexisnexis.com/community/lexis-legal-advantage/b/trends/posts/the-reptile-theory-a-game-changing-strategy-in-personal-injury-lawsuits> [“The Reptile Theory allows plaintiffs’ attorneys to sidestep the Golden Rule, while making a similar impression on jurors”]; cf. Howard & Dymott, *A Field Guide to Southern California Snakes: Identifying and Catching Plaintiffs’ Reptile Theory in the Wild* (Assn. So. Cal. Defense Counsel, 2013) *Verdict*, Vol. 3.) Allowing appeals to passion and prejudice unchecked ultimately undermines the credibility of the judicial system. Yet, the judicial system will encourage such tactics unless courts impose consequences as the Court of Appeal’s published opinion does here. Counsel will benefit from published examples of what crosses the line, so they will avoid it.

The letter requesting depublishation asks the courts to turn a blind eye to blatant misconduct, misconduct that not only affects the outcomes in individual cases but that undermines the fairness and credibility of the civil jury system as a whole. It does so, seeking to remove pages of guidance on this important topic, because of *one sentence*. That sentence does not even bear on the issue of counsel’s misconduct. What’s more, it misconstrues this sentence as sexist and racist, and maybe even ageist. That sentence is mere background. If the Court were to depublish that sentence, it would matter not a whit to the Court of Appeal’s rationale, or to the result.

Perhaps more troubling is the resort to an accusation of implicit racism and sexism. In doing so, the letter impugns the integrity of not only the individual justices but of the appellate system as a whole. This is the same division that authored a decision,

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Pebley v. Santa Clara Organics, LLC (2018) 22 Cal.App.5th 1266, with which the Associations strongly disagree, but they have never suggested that the justices lack integrity or judge cases, explicitly or implicitly, based on litigants' race, ethnicity, or gender. In evaluating whether an appellate opinion—any appellate opinion—should remain published, it should not matter whether the appellate panel was, for example, all women, all of Asian-Pacific descent, or all white males.

Nothing in the request justifies denying courts and counsel the benefit of this ringing lesson in trial ethics. The resort to personal attacks on the integrity of the appellate panel is beyond the pale. It should be rejected. The request to depublish must be denied.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On March 4, 2021, I served the foregoing document described as: **OPPOSITION TO REQUEST FOR DEPUBLICATION** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Mail: I am “readily familiar” with this firm’s practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on March 4, 2021, at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Monique N. Aguirre

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