A·D·C VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

February 21, 2018

Presiding Justice Frances Rothschild
Associate Justice Jeffrey W. Johnson
Judge Helen Bendix
Court of Appeal of the State of California
Second Appellate District, Division One
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: Request for Publication of *Sakai v. Massco Investments, LLC* (Feb. 8, 2018, B279275)

Honorable Justices:

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADCNCN") and the Association of Southern California Defense Counsel ("ASCDC") write jointly to urge the Court to order publication of its opinion in this case.

Interest of the Requesting Organizations

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on

issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Although ASCDC and ADCNCN are separate organizations, they coordinate from time to time on matters of shared interest, such as this letter. Together and separately, they have appeared as *amicus curiae* in numerous cases before both the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients, a broad cross-section of California businesses and organizations. Their members have extensive experience with, and interest in, premises-liability cases and questions of duty.

Why the opinion deserves publication

Based on its treatment of rules relating to duty, foreseeability, the effect of third-party actions, and consideration of alternative safety measures, the decision meets the standards for publication in multiple ways. In general, it:

• "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions" (Cal. Rules of Court, rule 8.1105(c)(2)), including but not limited to applying the *Rowland v. Christian* (1968) 69 Cal.2d 108, 113 (*Rowland*) factors to "pop-up" taco truck operations in an era where mobile food vendors are becoming ever more prevalent;

• "explains …with reasons given, an existing rule of law" (Cal. Rules of Court, rule 8.1105(c)(3)), including the need to limit duty concepts to avoid imposing premises liability for any and every injury occurring on premises;

• "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)), because determinations of duty and foreseeability underlie many lawsuits; and

• "[m]akes a significant contribution to legal literature by reviewing ... the development of a common law rule." (Cal. Rules of Court, rule 8.1105(c)(7)), by collecting and addressing significant duty and foreseeability decisions, and applying them to the specific facts at issue. The Associations, for example, believe that *Sakai* is the first decision to cite the duty analysis in the Supreme Court's recent decision in *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077.

Sakai addresses an important question of law: Whether the gas station owner who allowed the taco truck on his premises owed a duty to the plaintiff to prevent the injury caused by the other vehicle's driver exiting the parking lot at an excessive speed. This Court recognized that the duty question depends on applying the *Rowland* factors. In applying those factors to find no duty, *Sakai* makes several important contributions to premise-liability discourse that warrant publication.

First, the decision helps demonstrate the proper application of the *Rowland* factors by rejecting overbroad concepts of "foreseeability." *Sakai* reiterates the formulation in *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772, "that the *Rowland* factors are 'evaluated at a relatively broad level of factual generality. Thus, as to foreseeability, [our high court has] explained that the court's task in determining duty "is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed."'" (Opn. at 7, citation omitted, original emphasis.) Plaintiffs and courts often cite *Cabral*'s formulation in arguing for, or in finding, a duty of care. But *Sakai* demonstrates that a proper application of *Cabral* can support a finding of no duty. It therefore provides important contours to the standards pronounced in *Rowland* and *Cabral.*

Second, in addressing the injury's foreseeability, *Sakai* focuses on a *Rowland* factor that few published decisions address—the "closeness of the connection between the defendant's conduct and the injury suffered." (Opn. at 8.) The decision finds that *Rowland*'s "general foreseeability" and "degree of certainty of the injury" factors support a finding of duty. (*Ibid*.) It concludes, however, that the "closeness of connection" factor supports a finding of *no* duty, because the injury resulted from the unexpected act of a third person. (*Ibid.*) "[T]he conduct of the driver of the Avalos vehicle was not

foreseeable or derivative of Massco's conduct in designing, leasing or operating the parking lot. In fact, neither Sakai nor his wife anticipated or expected the driver of the Avalos vehicle to suddenly reverse his car out of the crowded parking lot and into the street at high speed. . . ." (Opn. at 10.) Little precedent addresses this "closeness of connection" limitation on foreseeability.

The decision also importantly explains the type of evidence needed to establish the requisite foreseeability, including evidence of prior similar incidents: "[W]hile Massco may have been on notice that its parking lot was or would be more crowded with cars and pedestrians when the food truck was in operation, there was no evidence that Massco was also on notice that at the same time cars were exiting (or entering or transiting) the parking lot at dangerous rates of speed and putting pedestrians in the lot at risk of serious injury." (Opn. at 12.) The decision's confirmation that legal foreseeability generally requires proof of prior similar incidents is important not just for premises-liability cases but for tort cases in general.

The decision is also important because it confirms that courts can and should grant summary judgment on no-duty grounds even where a plaintiff contends the defendant landowner could have employed greater safety measures. The decision properly cabins consideration of such "alternative safety measures" in two ways. First, as to whether the owner had to take affirmative steps to control the acts of third parties, the court found "there is no logical connection between Massco's alleged failure to more closely regulate/supervise the parking lot and the conduct that directly caused Sakai's injuries." (Opn. at 13.) Second, as to whether the owner should have imposed parking controls, such as parking attendants or security personnel, there was no evidence such measures would have made a difference and the burden of implementing such measures "would be onerous." (Opn. at 16.) Thus, "the exact opposite conditions for the finding of a duty apply—there was a low degree of foreseeability and the burden of preventing similar harm is high." (*Ibid.*) This type of analysis will be instructive in all sorts of premises liability cases. It will facilitate the important goal of resolving non-meritorious cases at the summary judgment stage.

For these reasons, ADCNCN and ASCDC urge this Court to certify its opinion for publication.

Respectfully submitted,

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PROOF OF SERVICE

California Court of Appeal, Second Appellate District
Case No. BB279275

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: Gordon Rees Scully Mansukhani, LLP, 1111 Broadway, Suite 1700, Oakland, CA 94607. On the date below, I served the within document(s):

REQUEST FOR PUBLICATION
***Sakai v. Massco Investments, LLC* (Feb. 8, 2018, B279275)**

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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 February 21, 2018, at Oakland, California.

/s/ Eileen Spiers
Eileen Spiers