ASCDC
Association of Southern California Defense Counsel

2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(800) 564-6791 • (916) 239-4082 • (916) 924-7323 – Fax
ascdc@camgmt.com • www.ascdc.org

July 13, 2020

Presiding Justice Tricia A. Bigelow
Associate Justice Maria E. Stratton
Associate Justice Elizabeth A. Grimes
Second Appellate District, Division Eight
California Court of Appeal
Ronald Reagan State Building
300 South Spring Street
2nd Floor, North Tower
Los Angeles, California 90013

Re: *Savaikie, et al. v. Kaiser Foundation Hospitals*
Court of Appeal No. B291120
Request for Publication of June 23, 2020 Opinion

Honorable Justices:

The Association of Southern California Defense Counsel (the Association) respectfully requests that the court publish its recent opinion in this case ("Opinion"). The Opinion's affirmance of a summary judgment based upon the "going and coming" rule readily meets the publication standard.

The Association's interest

The Association is the nation's largest and most preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. The Association frequently appears as amicus curiae in the Court of Appeals and the California Supreme Court.

The Association's members frequently defend against personal-injury cases that involve the "going and coming" rule—the rule that employers are generally not liable for accidents that occur while the employee is commuting to or from work. Given the rule's importance to the Association's members, the Association previously has obtained publication of other decisions that, like the Opinion here, have upheld summary judgments for employer defendants based upon the "going and coming" rule. (See *Bingener v. City of Los Angeles* (2019) 44 Cal.App.5th 134; *Morales-Simental v. Genentech, Inc.* (2017) 16 Cal.App.5th 445.)

The Association has a direct interest that the law regarding the "going and coming" rule be clear, particularly the application of exceptions to that rule, and that defendants be able to obtain summary judgment and promote judicial efficiency where, as in this particular case, undisputed facts defeat any exception to the rule. *Published* precedent furthers that goal.

Why publication is warranted

The Opinion meets the standard for publication in multiple respects. It "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions," "explains . . . an existing rule of law," and "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(2), (3), (6).)

When employees get in accidents while commuting to or from work, the plaintiffs often sue the employer in search of a deep pocket and contend there is a triable fact issue under exceptions to the "going and coming" rule. The plaintiffs here made three such attempts. They claimed a triable issue under the "required vehicle use" exception, as well as two related exceptions that they referred to as the "incidental benefit" exception and the "special mode of transportation" exception. (Typed opn. 3.) Publication of the Opinion will provide trial courts with guidance regarding the scope of the exceptions to the "going and coming" rule and what type of evidence is required to create triable issues. Also, by impeding the pursuit of meritless claims and preventing future plaintiffs from re-asserting the same type of arguments raised here without sufficient evidence, publication will further the public-policy predicates for the "going and coming" rule and foster judicial efficiency.

The Opinion warrants publication as it defeats an attempt to water down the "going and coming" rule by extending the facts and the law beyond existing jurisprudence. We know of no published decision addressing the "going and coming" rule in the context presented here—the transporting of an animal in a vehicle for use at a worksite, or a plaintiff characterizing an animal "as necessary work material," or claiming the vehicle was specially equipped for the transport of the animal or other work materials. (Typed opn. 11.)

With respect to the "required vehicle use" exception, the Opinion provides valuable guidance as to that exception's limited scope. Among other things, the Opinion correctly recognizes that:

- the employee's "need to transport work material does not support a reasonable inference that [the employer] required [the employee] to use his own personal vehicle to provide pet therapy";
- the employer permitted the employee to select the means of transportation for himself and his animal, rather than require any particular mode;
- the employee's vague reference in a deposition that the employer's "arrangement" was that he drive his own vehicle was not enough to establish a requirement;
- the employee's vague testimony about his employer offering some mileage reimbursement in the past that he declined did not suffice to create a triable issue;
- mere testimony that the employer sometimes checked to ensure employees had insurance coverage for their vehicles did not create a triable issue; and
- the employee's need to show up at a different work site each day did not, by itself, support a reasonable inference that the employee was required to commute in his own personal vehicle. (Typed opn. 9-12.)

The Opinion likewise provides valuable guidance as to the limited scope of the so-called "incidental benefit" exception. In virtually every case where there is insufficient evidence that the employer *required* the employee to commute in a personal vehicle, the plaintiff will try to sidestep the "going and coming" rule by claiming there is a triable issue that the employer *incidentally benefitted* from the vehicle's use. The Opinion helpfully explains that the so-called "incidental benefit" exception is limited.

First, analyzing existing case law, the Opinion "question[s] whether this is an independent basis for the exception," instead of "merely a factor to be considered in deciding whether an implied vehicle use requirement exists." (Typed opn. 12-13.) This case analysis, in itself, is helpful guidance for future courts and litigants.

Second, the Opinion recognizes that *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, which is often treated as the source of the "incidental benefit" exception, merely "stated in dicta" that such an exception could exist "'if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has "reasonably come to rely on its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment."'" (Typed opn. 14.) The Opinion recognizes that there was no such evidence here. It also recognizes that case law describes the incidental benefit "as the employee's use of the vehicle *during working hours to carry out the employer's business*," rather than the employer

merely benefitting from the employee *commuting* in the personal vehicle from home to the worksite, which is all that occurred here. (*Id.* at 14-15.) Again, even standing alone, this is valuable guidance for future courts and litigants.

The Opinion also provides valuable guidance as to the so-called "special mode of transportation" exception. The plaintiffs argued that a "special mode of transportation" exception exists, relying on language in *Wilson v. Workers' Comp. Appeals Bd. (*1976) 16 Cal.3d 181, 185, suggesting that an exception to the "going and coming" rule might exist where essential work materials needed at a worksite required a special mode of transportation. (Typed opn. 16.) Plaintiffs claimed a triable issue under this exception. (*Ibid.*) Undoubtedly, plaintiffs will *not* be the last to attempt such an argument. The Opinion helpfully explains that even assuming for the sake of argument that such an exception exists, the exception should be narrowly construed and the facts here would not create a triable issue. (*Id.* at 16-17.) The Opinion explains that there was no evidence that the employee had to modify his vehicle or permanently install special equipment, nor evidence that the employer required the employee "to use a specially outfitted vehicle," nor evidence that such a vehicle "was necessary to transport" the employee's dog. (*Id.* at 17.) We know of no other case addressing this issue.

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The "going and coming" rule comes into play on a daily basis in commuter-happy Southern California. Published precedent that confirms the propriety of summary judgment under that rule, and that explains and further defines the reach of its exceptions, is extremely important.

For each of these reasons, the Association respectfully urges the Court to publish its June 23, 2020 opinion.

Respectfully submitted,
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

By: /s/ Edward L. Xanders
Edward L. Xanders

EDWARD L. XANDERS (SBN 145779)
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811

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 July 13, 2020, I served the foregoing document described as: **CORRESPONDENCE TO THE COURT** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(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 July 13, 2020, at Los Angeles, California.

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
Monique N. Aguirre

SERVICE LIST

Via Truefilng:

Paul S. Zuckerman
Robert John Ounjian
Carpenter Zuckerman & Rowley
8827 West Olympic Blvd.
Beverly Hills, CA 90211
T: (310) 273-1230
F: (310) 858-1063
E: robert@czrlaw.com
Attorneys for Plaintiffs and Appellants Teresa and Michael Savaikie

Alan John Mish
LeBeau Thelen
5001 E Commercenter Dr #300
PO Box 12092
Bakersfield, CA 93389
T: (661) 325-8962
F: (661) 325-1127
E: amish@lebeauthelen.com
Attorneys for Defendant and Respondent Kaiser Foundation Hospitals

CALIFORNIA SUPREME COURT
[Electronic Service under Rule 8.212(c)(2)]

John Kenneth Paulson
Ford Walker et al
1 World Trade Center 27 FL
Long Beach, CA 90831-2700
T: (562) 983-2590
F: (562) 590-3556
E: jpaulson@fwhb.com
Attorneys for Defendant and Respondent Ralph August Steger

Kenneth R. Pedroza
Matthew S. Levinson
Cole Pedroza LLP
2295 Huntington Drive
San Marino, CA 91108
T: (626) 431-2787
F: (626) 431-2788
E: kpedroza@colepedroza.com
E: mlevinson@colepedroza.com
Attorneys for Defendant and Respondent Kaiser Foundation Hospitals