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November 16, 2020

Request To Publish Opinion
(Cal. Rules of Court, rules 8.1105 and 8.1120)

The Honorable Thomas L. Willhite, Acting Presiding Justice
The Honorable Audrey B. Collins, Associate Justice
The Honorable Brian S. Currey, Associate Justice
California Court of Appeal
Second Appellate District, Division Four
Ronald Reagan State Building
300 South Spring Street,
Los Angeles, California 90013

Re: Request To Publish Opinion
De La Fuente v. Walmart, Inc., No. B299185

Dear Honorable Justices:

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Southern California Defense Counsel ("ASCDC") urges the Court to order publication of its opinion in this case.

Interest Of The Requesting Organization

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.

ASCDC has appeared as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal across the state to express the interests of its members and their clients. Many of its members defend businesses against personal injury actions, such as the "slip and fall" lawsuit against Walmart, Inc. addressed in the Opinion.

Why The Opinion Should Be Published

The Opinion meets multiple publication standards and should be certified for publication. In particular, it:

- "explains . . . an existing rule of law" (Cal. Rules of Court, rule 8.1105(c)(3)) regarding the evidentiary requirements for opposing summary judgment and establishing a genuine factual dispute regarding causation;

- "explains . . . an existing rule of law" (Cal. Rules of Court, rule 8.1105(c)(3)) regarding evidentiary procedure on summary judgment, clarifying that trial courts have discretion to summarily sustain a set of well-taken, limited, pinpoint evidentiary objections, and doing so does not contradict the rules in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 (*Nazir*), and *Twenty-Nine Palms Enters. Corp.* v. *Bardos* (2012) 210 Cal.App.4th 1435 (*Palms*); and,

- "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)), given the importance of determining causation, including the propriety of expert causation evidence, in the thousands of recurring "slip and fall" lawsuits routinely filed against California retailers and supermarkets.

If published, the Opinion would be beneficial to all trial courts addressing evidentiary objections on summary judgment, and it would be

particularly useful to trial courts ruling on motions for summary judgment in "slip and fall" cases. Here's why:

1. Speculative And Inadmissible Expert Testimony

Summary judgment is no longer a disfavored remedy. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542.) In many instances, defendants in "slip and fall" cases move for summary judgment by pointing out that the plaintiff lacks sufficient evidence connecting his or her "slip and fall" to the defendant-retailer's acts or omissions. And in these recurring circumstances, plaintiffs often present conclusory, speculative, or otherwise inadmissible "expert" testimony opining that the incident is consistent with retailer wrongdoing and therefore the dispute must go to the jury.

As the Opinion makes clear, that is impermissible. Speculative expert testimony that "the flooring used in the Walmart store . . . is unreasonably slippery when wet" is inadmissible where it is unsupported by any expert analysis or a statement that "the floor was in fact tested for slipperiness." (Opinion, p. 15.) Similarly, an expert's unsupported, conclusory opinion that "it would have been 'difficult' for [an employee] to 'spot a spill on the subject area,'" was correctly excluded where the expert "provide[d] no reasoned explanation to support [his] conclusion." (*Ibid.*) And, conclusory expert testimony that spills "'would be relatively difficult for a pedestrian to perceive' because customers are often distracted by merchandise displays and advertisements" is inadmissible where it is not supported by "any evidence concerning customer behavior." (*Ibid.*)

This reasoning falls well in line with the Supreme Court's direction that trial courts are evidentiary gatekeepers, and must prevent the admission of unreliable and improper expert testimony. (*Sargon Enters., Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 769 & fn. 5.) Even after *Sargon*, the problem of conclusory expert declarations remains rampant. By publishing the Opinion, the Court would provide useful guidance to trial courts as they conduct gatekeeping in the frequently-recurring context of "slip and fall" summary judgment proceedings.

The Opinion also addresses a theory—that a premises owner has to have slip-proof flooring—that does not appear to have been previously addressed in any published decisions. (See Opinion, pp. 11-12 ["De La Fuente

has not cited – nor were we able to find – any authority requiring store owners to conduct reasonable inspections *and* install slip-proof flooring to prevent injury," original italics], pp. 4-5 ["De La Fuente did not cite, nor was the trial court aware of, any 'appellate authority holding that a store owner can be held liable for a slip on a spill, without notice of the spill itself, merely because the store owner chose the wrong composition of flooring.'"].) Publication would provide valuable guidance for this reason too.

2. Resolving Evidentiary Objections On Summary Judgment

The Opinion also clarifies the procedures for ruling on evidentiary objections during summary judgment proceedings by distinguishing *Nazir* and *Palms*.

In *Nazir* and *Palms*, appellate courts reversed evidentiary rulings where trial courts had sustained tens or hundreds of omnibus evidentiary objections (many of which were clearly meritless) without providing much, if any, reasoned explanation. (*Nazir*, *supra*, 178 Cal.App.4th at pp. 254-257 [trial court sustained 763 objections and committed "manifest abuse of discretion" where hundreds of the objections failed to even quote the evidence of objected to, and others were patently frivolous]; *Palms*, *supra*, 210 Cal.App.4th at pp. 1447-1449 [sustaining "sweeping" set of 39 evidentiary objections was abuse of discretion where "it appears the trial court did not consider the individual objections"].)

The plaintiff here relied on *Nazir* and *Palms* in arguing that "the trial court abused its discretion by sustaining Walmart's objections 'without any explanation'…." (Opinion, p. 13.) But, as the Opinion recognizes, *Nazir* and *Palms* should not be read to stand for some blanket rule that our already-overburdened trial courts must address and resolve each and every evidentiary objection in painstaking detail—particularly where objections are targeted and their bases are clearly described. The Opinion correctly holds that *Nazir* and *Palms* "are distinguishable from the present case." (Opinion, p. 13.) While the trial court sustained multiple defense objections, "far fewer objections were asserted in the present case" compared with *Nazir* and *Palms* because "Walmart raised 12 objections across 13 pages to various portions of Avrit's declaration." (Opinion, p. 14.) And, the defense objections were "in proper form" and "were not patently frivolous or meritless"—indeed, they were well-taken and "the trial court did not err by sustaining" them. (Opinion, pp.

14-16.) Publication of the Opinion will encourage parties to file limited evidentiary objections.

Plaintiff is not the first to attempt this argument, nor will she be the last. Publishing the Opinion will therefore provide useful guidance to trial courts resolving summary-judgment motions: What matters is not wading into the weeds and spilling judicial ink on each and every objection, but getting the rulings right. (See Opinion, pp. 13-14.) The Opinion also provides guidance to trial counsel: On summary judgment, objections should be used carefully and placed "in proper form" with specific testimony and grounds identified; doing so assists trial courts in reviewing the summary-judgment record and helps appellate courts understand the basis for the trial court's rulings. (Opinion, pp. 14, 16.)

3. The Recurring Nature Of Speculative And Inadmissible Expert Testimony In "Slip And Fall" Cases

Additionally, the problem of speculative expert testimony on summary judgment in "slip and fall" cases is not limited to this case. The type of inadmissible testimony described in the Opinion has become the modus operandi of this particular plaintiff's expert, Brad Avrit.

As numerous unpublished decisions make plain, Mr. Avrit frequently appears in "slip and fall" cases against retailers to provide speculative or otherwise legally inadmissible testimony:

- *Lowell v. Albertson's LLC* (Nov. 22, 2019, B294107, unpublished) 2019 WL 6242394, *2-3 (affirming trial court summary judgment ruling and order sustaining objections to expert declaration; Avrit "opined that the 'subject area was in an unsafe condition' because the kind of flooring typically used in Albertson's stores was slippery when liquid was present" although defense contended he had never personally seen the area where incident occurred).

- *Martinez v. Northgate Gonzalez, LLC* (Oct. 16, 2019, G055924, unpublished) 2019 WL 5205983, at *1 ("Rather than opining that Northgate's flooring choice fell below the

current standard of care in the industry, Avrit testified that in his opinion all grocery store owners should be subjected to a new and different standard" requiring use of slip-resistant flooring; "Avrit was in effect advocating for the imposition of a new legal duty, rather than suggesting Northgate's conduct had fallen below the existing standard of care"; trial court correctly refused to instruct jury on that theory).

- *Medina v. Costco Wholesale Corp.* (Feb. 22, 2018, E066387, unpublished) 2018 WL 1008209, *6 ("Avrit merely speculated that there was some type of contaminant, which caused Medina's fall . . . . [I]t was equally speculative that Medina may have tripped over her own feet. Avrit's speculative testimony was properly excluded").

- *Rabbani v. Trader Joe's Co.* (Oct. 16, 2015, B256819, unpublished) 2015 WL 6122242, *7 ("The Avrit declaration does not establish a dispute of fact"; "Avrit never claimed to have inspected the Store himself"; "that the frequent presence of liquids on the floor was in Avrit's view 'foreseeable' does not establish a disputed issue as to whether such liquids were in fact frequently present").

- *Leiterman v. Costco Wholesale Corp.* (Sept. 17, 2013, B241885, unpublished) 2013 WL 5211374, *3-4 ("Avrit's real expertise is testifying against Costco in food court slip and fall cases, which he has done 'on many, many occasions' . . . always working and testifying against Costco," and at times simply "narrating what he saw on the video and giving non-expert opinions").

- *Simon v. Cerritos Towne Center, LLC* (Mar. 28, 2012, B228597, unpublished) 2012 WL 1022387, *8 ("Avrit concluded that the painted area in front of the store entrances was congested . . . and was therefore dangerous. The accident, however, did not occur in the painted area"; "Avrit's opinions were properly rejected as speculative and

conjectural because they were based on dangers posed by congestion in an area where the accident did not occur.").[1]

Thus, the Opinion addresses a recurring and significant issue in these extremely common "slip and fall" cases, but other opinions regarding the issue have avoided publication, perhaps because they involve case-specific facts. Publication of the Opinion will allow the bench and bar to point to published precedent on this recurring issue, bring clarity to evidentiary procedures in any summary-judgment context, and promote a fair and level summary-judgment playing field for both plaintiffs and defendants.

For all these reasons, ASCDC respectfully requests that this Court certify the Opinion for publication.

Respectfully submitted,
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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[1] Unpublished California opinions cannot be cited as authority regarding California law. (Cal. Rules of Court, rule 8.1115(a).) We do not cite these opinions as authority, but simply to point out that they address a recurring issue. (See, e.g., *Mangini v. J.G. Durand Int'l* (1994) 31 Cal.App.4th 214, 219 [Court of Appeal citing two unpublished opinions to illustrate issue was a "recurring issue"]; *Ray v. First Federal Bank* (1998) 61 Cal.App.4th 315, 318, fn. 1 [unpublished opinion may be cited as a "historical fact"].)

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 November 16, 2020, I served the foregoing document described as: **REQUEST TO PUBLISH OPINION** on the parties in this action by serving:

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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 November 16, 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/Valerie Worell
Valerie Worrell