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CIVIL JUSTICE ASSOCIATION OF CALIFORNIA

April 9, 2018

Hon. Tani G. Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Amici Curiae* Letter Brief in Support of Review in *Priscilla O'Malley, et al. v. Hospitality Staffing Solutions, LLC*, S247501. CRC 8.500(g).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

IMPORTANCE OF ISSUE AND INTEREST OF AMICI

The Civil Justice Association of California (CJAC) and the American Tort Reform Association (ATRA) ("amici curiae") urge the Court to grant review of this case to provide uniformity of decision and clarify an issue of statewide importance:

> Does a residential timeshare maintenance worker asked by a desk clerk to check at 10:30 in the evening to see if a guest is in her room have a duty to do more than knock on the door of that room, announce his presence, and then open the door and call out again to ascertain if anyone is in the room, or must he enter and look around the room because it is reasonably foreseeable the guest may be in distress and unable to respond to the worker's vocal inquiries?

In a summary judgment ruling, the trial court answered "No" to this question, concluding the maintenance worker owed no duty to do more than he did, but the appellate court in a seven page

published opinion reversed, stating "[t]he risk [the timeshare guest] *may* have been lying incapacitated somewhere in the hotel room (beyond the threshold of the front door) *may* have been reasonably foreseeable." (Slip Opinion ("Opn."), p. 7; emphasis added.)

Thus, unless this Court corrects or clarifies the appellate opinion's holding and reasoning, the well-established and long-standing role of courts in determining the scope and application of legal duty in negligence actions will now be determined by the trier-of-fact based solely on "what may have been [in hindsight] reasonably foreseeable." (*Id.*) In this case, that means the defendant now faces a trial for damage liability to a guest who suffered an aneurysm and, as a result, was lying incapacitated behind a couch that was down the hall and around the corner from the entrance door the worker opened.

CJAC and ATRA are concerned about the expansion of liability and consequent increased litigation this opinion portends. Formed 40 years ago, CJAC's membership of businesses, professional associations and financial institutions is dedicated to making our civil liability laws more fair, economical, uniform and certain. Toward this end, CJAC regularly petitions the government for redress when it comes to determining who owes, how much, and to whom when some claim that the conduct of others occasions them harm. The issue presented by this case falls plainly within CJAC's principal objectives.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed amicus briefs in cases involving important liability issues.

Amici have digested the petition for review, the answer to it and legal authorities cited in these briefs and the opinion. From this we are struck by the undisputed fact the defendant did what he was asked to do by the desk clerk — check on the room to see if the registered guest was in it. Plaintiff mistakenly asserts the worker was asked to do a "welfare check" on the guest's well-being, a phrase presumably conjured up from the telephone conversation the desk clerk had with the guest's husband who told her he was concerned whether his wife was "okay." (Opn., p. 3.) A "welfare check" implies a more intensive inquiry or perusal of the room, but that phrase is not what was communicated to the maintenance worker by the desk clerk. As the opinion states, the desk

clerk "instructed [the maintenance worker] to go to the room and see if [the guest] was there. [The worker] understood that [the husband] was trying to find out whether his wife was in the room, and if she was there, why she was not answering the phone." (*Id.*) There may well have been a failure of communication between what the husband said to the desk clerk, and what the desk clerk in turn requested of the defendant worker, but there is no evidence in the record to suggest the worker was informed of any concern that the guest may have been injured or incapacitated and that, accordingly, he should enter the room and look around it to see if that was the case. There was, in other words, no triable issues of material fact as to what the maintenance worker was asked to do, which was not a "welfare check" on the physical or health condition of the timeshare guest.

REASONS REVIEW SHOULD BE GRANTED

1. The Opinion Conflicts with this Court's Decisions that, in Actions Sounding in Negligence, "Duty" is a Legal Question to be Determined by Courts, not a Factual Issue of "Foreseeability" to be Decided by Juries.

Plaintiffs' complaint alleges defendant's failure to engage in an intensive room perusal constituted a "negligent undertaking," a theory of liability sometimes referred to as the "Good Samaritan" rule that is "[f]irmly rooted in the common law [of negligence]." (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 613.) Accordingly, "the threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a *question of law to be resolved by the court*." (*Id.* at 614 (emphasis added) and other authorities therein cited.)[1] Here, however, the appellate opinion converts court determination of the legal issue of *duty* into a

[1] See also *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161 ("[T]he existence and scope of a defendant's duty is an issue of law, to be decided by a court, not a jury."); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477 ("The existence and scope of duty are legal questions for the court."); and *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465 ("Duty, being a question of law, is particularly amenable to resolution by summary judgment.").

trier-of-fact determination of *foreseeability*.[2]

As a matter of law, this is plainly wrong. Removal of the duty question from courts to juries on the basis of foreseeability will effectively force every future requested hotel "room check" that turns out not to have been sufficiently thorough to discover a hotel guest who has suffered an aneurysm, stroke, heart attack or other mishap, into a threatened trial over liability. Here, the foreseeable risk was that the hotel guest who did not answer her phone may not have done so because of an adverse medical or accidental mishap, or a myriad of other speculative events that would explain why she did not respond to the maintenance worker's call-outs as to whether she was in the room both before and after he opened the room's locked door. This notion of foreseeabilty – based on the opinion's compound use of the verb "may" indicating "possibility" – is an extrapolation to the stars, one that mistakenly transforms duty determinations by courts into foreseeability determinations by juries. As this court has observed, "[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 668.)

This is not to deny that foreseeability is a factor to consider in ascertaining duty. But, it is only one of *many* factors that must be balanced along with others that the appellate opinion neglected to even address. These considerations (sometimes referred to as the *Rowland* factors) include "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Parsons, supra,* 15 Cal.4th at 473.)

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[2] "[A] reasonable trier of fact might infer that [the worker] assumed a duty to check on whether the [guest] was in her . . . room, and if she was there, why she was not answering . . .. If [the worker] had such a duty, the scope of his duty would depend on the nature of the harm that was foreseeable. The risk that [the guest] was incapacitated and needed assistance may have been reasonably foreseeable, but this is a jury question . . .." (Opn. at 8.)

Here the duty of a hotel or timeshare worker, absent a direct request or order from a superior to enter the room and look for a guest who is not answering her phone to assure she is not physically injured or incapacitated, to nonetheless engage in an intensive examination of the guest's room runs counter to several of these factors. Not the least of these is the consequences to the community of imposing a duty to exercise that level of care with resulting liability for breach and "the availability, cost, and prevalence of insurance for the risk involved." Certainly, hotel guests have a reasonable and constitutional expectation of privacy in their rooms. (Cal. Const. Art. 1, § 1.) A charge to a hotel worker to check and see if a guest is in her room does not justify the worker entering the room and walking around in it to see if the guest is asleep, in the bathroom, engaged in a tryst, or unconscious and hidden from normal room sight due to illness, inebriation or whatever. Hotel employees who embark on that kind of intrusion are likely to end up themselves as defendants in lawsuits by guests who did not consent to, and reasonably may object to, such invasions of their privacy. Of course, this would raise the cost of insurance and the corresponding charges for hotel rooms.

2. The Opinion's Categorizing of the "Duty" Issue as one of "Breach" Ignores the Policy Aspects of Causation which Courts, not Juries, Determine.

The contract worker's employer in this case argued that "a third party cannot just barge in on a spouse in the privacy of a residential space because another spouse directed him to do so." (Opn. at 8.) Though here the worker never had any conversation or request from the husband to do that, the appellate court nonetheless dismissed this argument on the ground that it "really goes to the issue of breach" or causation. (*Id.*) But legal causation, like duty, also requires a weighing of policy factors by the court which the appellate opinion ignores.

"Proximate [legal] cause involves *two* elements." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 (*PPG*).) "One is *cause in fact.* An act is a cause in fact if it is a necessary antecedent of an event." (*Ibid.*) "Whether defendant's negligence was a cause in fact of plaintiff's damage . . . is a factual question for the jury to resolve." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 360, fn. 9.) By contrast, the second element focuses on public policy considerations. Because the purported causes of an event may be traced back to the dawn of humanity, the law has imposed additional "limitations on liability other than simple

causality." (*PPG, supra,* 20 Cal.4th at 315-16.) "These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." (*Id.* at 316.) Thus, "proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' " (*Ibid.,* quoting *Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 221 (conc. opn. of Traynor, J.).) In short, proximate cause is "a policy-based legal filter on 'but for' causation that *courts apply* to those more or less undefined considerations which limit liability even where the fact of causation is clearly established. [Citation.]" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 464; emphasis added.)

Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763 illustrates this distinction and instructs as to what the appellate court here could, and should, have done. As with this case, the trial court in *Saelzler* granted summary judgment for defendant apartment owners sued for negligence by a Federal Express delivery person assaulted by unknown assailants when attempting a package delivery at an apartment complex. The trial court found plaintiff failed to show defendants' breach of duty to safeguard her was a proximate cause of her assault. Based on the parties' submissions, the court found "overwhelming evidence" of prior incidents of trespass and broken or inoperable perimeter fences or gates, and a long list of criminal activity on the premises, including a juvenile gang possibly "headquartered" there. But, despite establishing the "high foreseeability" that violent crime would occur on the premises, and defendants' resultant duty to provide increased security, the court found plaintiff failed to establish a "reasonably probable causal connection" between defendants' breach of duty and plaintiff's injuries.

A majority of the *Saelzer* appellate court reversed, concluding, as did the appellate court here, that plaintiff's showing of foreseeability was sufficient to raise a triable causation issue for the jury. But, this Court reversed explaining that "Here, we are solely concerned with the issue of *causation.* Was defendants' possible breach of duty a substantial factor in causing plaintiff's injuries?" (*Id.* at 772.) *Saelzler* began its discussion by recognizing important policy factors that needed to be balanced when considering legal causation, what the appellate opinion here characterizes as "breach" of the duty owed in these kind of cases: "society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on

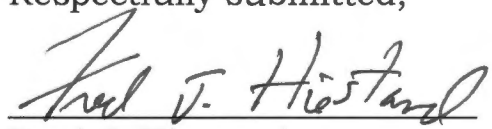
property owners conducting legitimate business enterprises on their premises." (*Id.* at 766.) It correctly concluded, as the appellate court here should have, that "the trial court properly granted summary judgment to defendants based on plaintiff's failure adequately to demonstrate that defendants' negligence was an actual, legal cause of her injuries." (*Id.*)

Plaintiff's injury here was from an aneurysm, an occurrence unrelated to anything defendant did or did not do. Nonetheless, defendant is being sued for allegedly contributing to it by failing to engage in a late night examination of plaintiff's room to discover her in her stricken condition when all he was asked to do was check to see if the room was occupied. Defendant undertook this task by knocking on the door of plaintiff's room and calling out his presence, and then unlocking the door, opening it and calling into the room. Defendant had not been asked to undertake a more intrusive "welfare check" or been given any information that plaintiff was or may be in distress and unable to acknowledge her presence. An "averment" by plaintiff's expert that plaintiff's injuries "would have been less severe had she received treatment earlier in the evening" (Opn. at 4) is too speculative to constitute sufficient legal cause and impose unrealistic financial burdens on property owners conducting legitimate business enterprises on their premises.

CONCLUSION

For all the aforementioned reasons, amici ask the Court to review this case and provide greater clarity and certainty about the comparative roles of courts and juries in the determination of duty and the public policy aspects of legal causation applicable to hotels asked to check whether a guest is in her room.

Respectfully submitted,



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Proof of service attached

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On April 9, 2018, I served the foregoing document(s) described as: CJAC/ATRA *Amici Curiae* Letter Brief in Support of Review in *O'Malley, et al. v. Hospitality Staffing Solutions, LLC*, S247501 on all interested parties in this action by transmitting via TrueFiling **(except where indicated)** to the following:

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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 this 9th day of April 2018 at Sacramento, California.

David Cooper