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January 6, 2020

Associate Justice Luis A. Lavin (Acting P.J.)  
Associate Justice Anne H. Egerton  
Justice pro tem Ann Jones  
Second Appellate District, Division Three  
California Court of Appeal  
Ronald Reagan State Building  
300 South Spring Street  
2nd Floor, North Tower  
Los Angeles, California 90013

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Re: *Mark Bingener, et al. v. City of Los Angeles*  
Court of Appeal No. B291112  
**Request for Publication of December 16, 2019 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. 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

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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 an employee gets in an accident while commuting to or from work, the plaintiff will often sue the employer in search of a deep pocket and contend that a triable fact issue exists under one of the exceptions to the “going and coming” rule. Here, the plaintiffs claimed that a triable issue existed under an exception that the “going and coming” rule does not apply where an employee endangers others “with a risk arising from or related to work.” (Typed opn. 2.) In *Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 803 (*Bussard*), for example, the “going and coming” rule was held inapplicable because the employer’s improper use of pesticides at the workplace made the employee unfit to drive home; “[i]n such an instance, conditions for the occurrence of the accident had been created within the scope of the driver’s employment.” (Typed opn. 9; see also Typed opn. 3.)

The plaintiffs in *Bingener* attempted to shoehorn this case into this exception by claiming the employer (a) knew the employee had a health condition that might impair his ability to drive, because the employer’s workers’ compensation program was paying for his medical expenses, and (b) allowed the employee “to return to work prematurely without placing any restrictions on his driving.” (Typed opn. 3.) The Opinion, after surveying the law, holds that the plaintiffs have failed to submit any evidence sufficient to create a triable issue under any exception to the “going and coming” rule, and it rejects plaintiffs’ attempt to analogize the circumstances to *Bussard*. (Typed opn. 3, 8-10.) The Opinion cogently summarizes: “Nothing about the enterprise for which the City employed Rushton made his hitting a pedestrian while commuting a foreseeable risk of this enterprise. The ‘going and coming rule’ was created for precisely the situation presented here . . . .” (Typed opn. 3-4.)

The Opinion warrants publication as it helps explain the rationale behind the “going and coming” rule and defeats an attempt to water down the rule by extending the facts and the law beyond existing jurisprudence. We know of no

published decision addressing the medical-expense argument that the plaintiffs urged here or plaintiffs' attempt to extend *Bussard* to these types of facts. Publication 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.

In a commuter-happy city such as Los Angeles, the "going and coming" rule comes into play on a daily basis. Published precedent confirming the propriety of summary judgment under that rule, and explaining and further defining the reach of its exceptions, is extremely important.

For each of these reasons, the Association respectfully urges the Court to publish its December 16, 2019 opinion.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA  
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By:           /s/ Edward L. Xanders            
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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 January 6, 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 January 6, 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

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CALIFORNIA SUPREME COURT  
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8.212(c)(2)]

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