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

ASCDC
Association of Southern California Defense Counsel

January 20, 2015

ELECTRONICALLY FILED

Honorable William R. McGuiness, Administrative Presiding Justice
and the Associate Justices
California Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102

Re: ***Doe v. Wells Fargo Bank, N.A., et al.***
Case No. A137502
Opinion Date: December 31, 2014
Request for Publication

Dear Presiding Justice McGuiness and Associate Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC) and the Association of Defense Counsel of Northern California and Nevada (ADCNCN), collectively "Associations," to request publication of this court's decision filed on December 31, 2014.

The Associations are the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions, comprised of over 2,000 leading civil defense bar attorneys in California. They are active in assisting courts on issues of interest to their members and have appeared as amicus curiae in numerous appellate cases. The Associations also provide their members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multi-faceted support, including a forum for the exchange of information and ideas.

No party or their counsel has paid for or drafted this letter in support of publication.

In addition to representation in appellate matters, the Associations' provide 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 focusing on the improvement of the administration of justice, trial, and litigation practice.

The Associations' members routinely represent corporate employers faced with potential liability for acts or omissions of employees committed within the scope of those employees' employment, with issues arising in a variety of contexts.

Additionally, the Associations have participated as amicus in proceedings pertaining to issues of importance to corporate employers. Recently, for example, the Associations supported a petition for review in *Kesner v. The Superior Court of Alameda County*, now pending in the Supreme Court (S219534), on the issue of whether an employer owes a duty of care to members of an employee's household who could be affected by asbestos brought home on the employee's clothing. In *Kesner*, the Court of Appeal had concluded "that the likelihood of causing harm to a person with recurring and nonincidental contact with the employer's employee, in this case Kesner's uncle, is sufficient to bring Kesner within the scope of those to whom the employer … owes the duty to take reasonable measures to avoid causing harm." (Previously published at 226 Cal.App.4th 251, 254.)

Further, at least one of the Associations was amicus in the following important decisions: *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 [scope of the attorney-client privilege relative to statements of a corporate employee, relative to issues of whether some managers had been misclassified as "exempt" from California's wage and overtime laws]; *Fairmont Insurance Company v. Superior Court* (2000) 22 Cal.4th 245, 247 [employee's alleged injury during the course of employment, and issue of reopening of discovery after an order granting a new trial or remand for a new trial after reversal of a judgment on appeal]; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 9 [the preservation for appellate review of objections to evidence in the context of motions for summary judgment]; *Parkview Villas Association v. State Farm Fire & Casualty* (2005) 133 Cal.App.4th 1197, 1213, fn. 10 [treatment of separate statements in the resolution of motions for summary judgment].

THE DECISION SHOULD BE PUBLISHED FOR ITS TIMELY DISCUSSION REGARDING THE DEFINITION OF "SCOPE OF EMPLOYMENT"

This Court's decision should be published because its discussion relative to determination of the "scope of employment" and potential liability because of employees' consumption of alcohol at employee hosted events addresses "a legal issue of continuing public interest." (California Rules of Court, Rule 8.1105(c)(6).) Further, considering the published decisions from other courts of appeal, this Court's decision also should be published because it [a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions" and "[m]odifies, explains, or criticizes with reasons given, an existing rule of law." (Rule 8.1105(c)(2), (3).)

For many decades, the courts and legislature have grappled with the issue of whether the provider of alcoholic beverages can be held liable for torts of those who become intoxicated from their consumption of alcohol. Vividly illustrating this, in *Vesely v. Sager* (1971) 5 Cal.3d 153, the Supreme Court departed from what it acknowledged had been the "traditional common law rule" that "would deny recovery on the ground that the furnishing of alcoholic beverages is not the proximate cause of the injuries suffered by the third person," holding in that case "that civil liability results when a vendor furnishes alcoholic beverages to a customer." (*Id.* at 157.)

In response to *Vesely*, and other cases following its lead, in 1978 the Legislature superseded the Supreme Court's decision. As observed in *Ennabe v. Manosa* (2014) 58 Cal.4th 697, legislation, particularly Civil Code section 1714(b), abrogated the holding of *Vesely*, "largely reinstating the prior common law rule that the consumption of alcohol, not the service of alcohol, is the proximate cause of any resulting injury." (*Id.* at 701; also citing Bus. & Prof. Code §25602(c).) *Ennabe* recognized a "single statutory exception to the broad immunity" given by statutes to the providers of alcohol, the allowance of causes of action against those licensed to sell alcohol who provide alcoholic beverages to obviously intoxicated minors who later injure themselves or others. (*Id.* at 707-708.)

Against that larger backdrop, the courts of appeal have published decisions permitting liability to be imposed against employers who provide alcohol to employees who then cause injuries while intoxicated. Those cases have based the employer's exposure upon the proposition that their employees' consumption of alcohol was within the scope of their employment

and, therefore, the employer can be held vicariously liable based upon the doctrine of respondeat superior.

This Court's decision describes limits of the exposure faced by employers as a consequence of hosting, or otherwise facilitating, events at which employees consume alcohol and should be available as precedent. The Court observed that "employers who furnish alcohol to their employees can be held vicariously liable for the employees' tortious conduct." (Slip op., p. 8.) The examples cited by the Court included the recent decision in *Purton v. Marriott Internat., Inc.* (2013) 218 Cal.App.4th 499, (*Purton*), wherein this Court observed that an employee who became intoxicated at his employer's party could be found by a jury to have become an "instrumentality of danger," under circumstances in which the employee had made it home safely before deciding "to get back on the road" when he caused a fatal accident. (Slip op., p. 8.) As this Court also observed, *Purton* broadly stated that "the employer's potential liability under these circumstances continues until the risk that was created within the scope of the employee's employment dissipates." (Slip op., p. 8.)

Purton itself recognized that divergent views exist in the jurisprudence regarding the extent to which an employee's allegedly negligent act should be considered to be within the scope of employment. (*Id.* at 506-508.) For instance, although not cited by *Purton*, in *Depew v. Crocodile Enterprises* (1998) 63 Cal.App.4th 480, the Court of Appeal published a decision concluding that the scope of employment did not include the circumstance in which an employee, allegedly fatigued from excessive work hours and drive home in a state of exhaustion, fell asleep causing a fatal accident. (*Id.* at 483.)

This Court set a reasonable limit upon the broad liability to which employers are exposed based upon *Purton* and other cases cited in this Court's decision, recognizing that although "the scope of employment must be interpreted broadly when assessing claims for vicarious liability," employers are not generally vicariously liable in the context of sexual assaults, concluding that the "scope of employment" was not broad enough "to encompass a sexual assault that occurred at a private residence and was prompted by offsite, after hours drinking." (Slip op., p. 11.) The determination that "the causal chain is too long and attenuated to support a finding of vicarious liability" (slip op., p. 9), and its specifications of the reasons why, provide vitally important guidance for both the bench and bar in the wake of *Purton*.

As these aspects of this Court's decision demonstrates, the decision explains the limitations of *Purton*, considering the differences in the facts at issue, and modifies or explains the rule of law relative to scope of employment. If published, the decision would provide much needed guidance relative to the limits of scope of employment.

This Court's decision appears to have been written with the degree of careful attention consistent with decisions certified for publication.

For these reasons, the Associations request the Court certify its decision for publication.

Respectfully submitted,

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cc: See attached Service List

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 111 West Ocean Boulevard, 14th Floor, Long Beach, CA 90802-4646. On January 20, 2015, I served a true and correct copy of the following document(s) on the attached list of interested parties:

REQUEST FOR PUBLICATION

( ) **By United States Mail** (CCP §§1013a, et seq.): I enclosed said document(s) in a sealed envelope or package to each addressee. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, with postage fully prepaid.

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( ) **By Messenger Service**: I enclosed said document(s) in a sealed envelope or package to each addressee. I provided them to a professional messenger service (Signal Attorney Service) for service. An original proof of service by messenger will be filed pursuant to California Rules of Court, Rule 3.1300(c).

I declare under penalty of perjury under the laws of the State of California and of the United States that the above is true and correct. I declare that I am employed in the office of a member of the Bar of the within court at whose direction this service was made.

Executed on January 20, 2015, at Long Beach, California.

LAURIE THEOBALD

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