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

ASCDC
Association of Southern California Defense Counsel

March 21, 2018

AMICUS LETTER IN SUPPORT OF REVIEW
(California Rules of Court, rule 8.500(g)(1)

Via Federal Express
Honorable Tani Gorre Cantil-Sakauye, Chief Justice
Honorable Ming W. Chin, Associate Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin H. Liu, Associate Justice
Honorable Mariano-Florentino Cuéllar, Associate Justice
Honorable Leondra R. Kruger, Associate Justice
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *O'Malley v. Hospitality Staffing Solutions, LLC*, No. S247501

Dear Honorable 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 ("ADC-NCN"), to urge this Court to grant review. The Court of Appeal opinion greatly expands the potential liability of anyone who, out of common courtesy, agrees to check to see if someone is in their residence because they have not been reachable by phone. The opinion cedes to the jury the determination whether the undertaking must include a thorough search of the entire residence and invasion of the occupant's privacy to ensure she was not medically incapacitated even where, as here, the individual who agrees to go check was not made aware of any medical concern, and was a maintenance worker who "had never before been asked to do a welfare check of a guest in a room." (Opinion, p. 3.)

The expansion of potential liability is not only unprecedented, it is unwise. It will discourage any courtesy checks by anyone. This will affect not only those in the hospitality and apartment leasing industries, but literally every person who lives in a community. Insurance companies will change their underwriting practices and policies to ward off the now-legitimate concern that liability can be imposed *no matter what* course of action the volunteer might take. Respecting California's constitutionally-protected privacy rights now risks imposition of liability for failing to conduct an intrusive inspection. Under this opinion, one may have a duty (as determined by the jury) to *ensure* not only that the person appears to be absent from the premises, but also that there is no medical emergency, *even where that concern was not communicated as the reason for the*

courtesy check. Even under the Court of Appeal's expressed rationale of "foreseeability," a resident's medical emergency is hardly foreseeable to a maintenance worker who has been told nothing of any medical situation.

Interest of the Requesting Organizations

ADC-NCN is an association of approximately 800 attorneys primarily engaged in the defense of civil actions. ADC-NCN members have a strong interest in the development of substantive and procedural law in California. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC is an association of over 1,000 leading attorneys who specialize in defending civil actions in Southern and Central California. It is active in assisting courts on issues of interest to its members, and provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and a forum for the exchange of information and ideas.

Both organizations have extensive experience with defending clients in the hospitality and apartment leasing industries, and regarding the wide-ranging effects liability claims can have on insurance companies and their insureds.

Why Review Should be Granted

The Court of Appeal dispensed with the *Rowland* factors in favor of foreseeability as the sole measure of duty. It characterized the undertaking by the maintenance worker as a "welfare check," which intimates the existence of facts that were never communicated to him. The Court of Appeal also left to the jury the determination whether the foreseeability of a medical emergency—based on the husband's inability to contact his wife by telephone—gave rise to an obligation to enter and thoroughly inspect the entire premises. (Opinion, p. 5.) There is no dispute the hotel clerk, through whom the husband's request was communicated, never told the maintenance worker there was a concern the wife was injured or had some other medical emergency. And still the Court of Appeal held the jury might find it was reasonably foreseeable there was some urgency to the husband's requests that would have required a more thorough investigation of the premises. (Opinion, p. 7.)

The Court of Appeal's reliance on *Bloomberg v. Interinsurance Exchange* (1984) 162 Cal.App.3d 571, is misplaced not only because it provides no justification for relying solely on foreseeability as a substitute for the *Rowland* factors, but also because, in *Bloomberg*, it is undisputed the defendant tow-truck driver knew the plaintiffs were at risk of danger.

It is a fact of life that illness and accidents occur, sometimes suddenly. Thus it is always *possible* a person has not answered the phone because they've suffered a medical

emergency. Likewise, there are obvious, non-medical reasons that persistent phone calls might be ignored. And since California has a constitutional right of privacy, the mere foreseeability of a medical emergency without more cannot be the test for imposing a duty to barge in and stumble around a person's private quarters, uninvited, at the behest of another. It would be inimical to both the California Constitution and the concept of voluntary undertaking to impose liability for failing to inspect a premises thoroughly for evidence of a medical emergency where one has simply been asked to determine if the person is, or is not, home because they have not responded to phone calls.

If such liability is to be imposed, it should be this Court to explain its parameters. As it stands, courtesy checks on hotel guests, and neighbors in any community will be a thing of the past, because the potential liability is far too great to risk getting involved. Therefore, this Court is respectfully requested to grant review.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in Los Angeles, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 21, 2018, I served the following documents in the manner described below:

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X (BY U.S. MAIL) I am personally and readily familiar with the business practice of Polsinelli LLP for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Los Angeles, California.

On the following part(ies) in this action:

Party	Attorney
Priscilla O'Malley: Plaintiff and Appellant	Matthew B.F. Biren Anne Marie Huarte Biren Law Group 12301 Wilshire Boulevard, Suite 500 Los Angeles, CA 90025
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Hospitality Staffing Solutions : Defendant and Respondent	Robert A. Olson Cynthia E. Tobisman Greines, Martin, Stein & Richland, LLP 5900 Wilshire Boulevard, 12th Floor Los Angeles, CA 90036

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 21, 2018, at Los Angeles, California.

Michelle Moya

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