



ASSOCIATION OF
SOUTHERN CALIFORNIA
DEFENSE COUNSEL

2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(800) 564-6791 • (916) 239-4082 • (916) 924-7323 – Fax
ascdc@camgmt.com • www.ascdc.org

OFFICERS

PRESIDENT
Marta A. Alcumbrac

PRESIDENT-ELECT
Ninos P. Saroukhanioff

VICE PRESIDENT
Eric Schwettmann

SECRETARY-TREASURER
Lisa Collinson

PAST PRESIDENT
Diana P. Lytel

EXECUTIVE DIRECTOR
Jennifer Blevins, CMP

May 26, 2022

Via Federal Express

Honorable Tani Gorre Cantil-Sakauye, Chief Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin H. Liu, Associate Justice
Honorable Leondra R. Kruger, Associate Justice
Honorable Joshua P. Groban, Associate Justice
Honorable Martin J. Jenkins, Associate Justice
Honorable Patricia Guerrero, Associate Justice
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

BOARD OF DIRECTORS

KERN COUNTY
Thomas P. Feher

LOS ANGELES COUNTY
Lindy F. Bradley
Alice Chen Smith
Bron E. D'Angelo
Julianne DeMarco
Steven S. Fleischman
Natalia Greene
R. Bryan Martin
Heather L. Mills
Hannah L. Mohrman
David A. Napper
Lisa Perrochet

ORANGE COUNTY
David J. Byassee
Lisa J. McMains

RIVERSIDE COUNTY
Gary T. Montgomery

SAN BERNARDINO COUNTY
Jeffrey A. Walker

SAN DIEGO COUNTY
Colin Harrison
Benjamin J. Howard
Patrick J. Kearns

SANTA BARBARA COUNTY
Seana B. Thomas

Re: ***Samantha B. et al. v. Aurora Vista Del Mar, LLC et al.***
Supreme Court Case No. S274553
Amicus Letter in Support of Review
(California Rules of Court, rule 8.500(g)(1)), Opinion
filed April 5, 2022

Dear Honorable Justices:

I write on behalf of the Association of Southern California Defense Counsel (“ASCDC”) to urge this Court to grant review in this case. The published *Samantha B.* opinion contains a troubling extension of an employer’s vicarious liability for sexual assault, contrary to this Court’s holding in *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, and holds that Defendants’ compliance with regulatory and statutory authority constitutes a basis to impose liability. It also affirms a minimal allocation of fault to a serial rapist (35%) while the lion’s share of fault remains allocated to the hospital and its management company (65%) for their failure to prevent those intentional acts, notwithstanding guidance from this Court in *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861.

VENTURA COUNTY
Michael LeBow

Honorable Tani Gorre Cantil-Sakauye, Chief Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin H. Liu, Associate Justice
Honorable Leondra R. Kruger, Associate Justice
Honorable Joshua P. Groban, Associate Justice
Honorable Martin J. Jenkins, Associate Justice
Honorable Patricia Guerrero, Associate Justice

May 26, 2022

Page 2

Interest of ASCDC

ASCDC is the nation's largest and preeminent regional organization of lawyers. Its members are devoted to defending civil actions in Southern and Central California. ASCDC has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. Many of ASCDC's members defend employers who are sued for failing to prevent an assailant's physical or sexual assault. Perhaps due to the fact that the corporate defendants were the target of this litigation, resulting in a jury verdict form that did not even ask whether the perpetrator acted with malice or oppression (when those questions were asked regarding the corporate defendants), the resulting verdict imposed only minimal fault on the intentional tortfeasor. In affirming the judgment entered on that verdict, the Court of Appeal's opinion contains a number of troubling assertions, including a novel extension of the law, which require this Court's clarifying guidance.

Why Review Should Be Granted

- 1. The Court of Appeal Opinion Expands the Vicarious Liability of a Healthcare Employer Under *Mary M.*, Contrary To This Court's Direction in *Lisa M.***

In general, courts in this state have held that an employee's sexual misconduct is not within the scope of employment and thus an employer cannot be held vicariously liable. In *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, ("*Mary M.*"), this Court announced an exception in which a police department may be held vicariously liable for the conduct of an on-duty police officer who, under color of authority, raped a woman he had detained for a traffic violation.

In *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291 ("*Lisa M.*"), this Court held the hospital was not liable for an ultrasound technician's sexual misconduct, because it was not within the scope of employment, and specifically held that the reasoning in *Mary M.* did not apply, stating *Mary M.*'s holding was "expressly limited" to the "unique authority vested in police officers." 12

Honorable Tani Gorre Cantil-Sakauye, Chief Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin H. Liu, Associate Justice
Honorable Leondra R. Kruger, Associate Justice
Honorable Joshua P. Groban, Associate Justice
Honorable Martin J. Jenkins, Associate Justice
Honorable Patricia Guerrero, Associate Justice

May 26, 2022

Page 3

Cal.4th at 304. By expanding *Mary M.* to the facts here, which are far more similar to those in *Lisa M.*, the *Samantha B.* opinion is in conflict with *Lisa M.*

2. The Court of Appeal Imposed an Elevated Standard of Care for Background Checks, Which Conflicts With *Civil Code* §1786.18

The Court of Appeal noted that Defendants hired a professional to conduct a background check on prospective employee Juan Valencia, and that no criminal conduct was reported. (Opinion, p. 3.) The investigative consumer reporting agency Defendants hired was regulated by statute, which prohibited it from reporting incidents from 11 years prior and any dismissed charges, under *Civil Code* §1786.18(a)(7). (Opinion, p. 3.) Nevertheless, the Court of Appeal suggests that Defendants should have conducted the background check themselves (to avoid the statutory restrictions). (Opinion, p. 17.) The imposition of such a high standard on an employer is disconcerting.

3. The *Samantha B.* Opinion Contradicts a Governing Regulation by Suggesting Liability May Be Imposed for Hiring Unlicensed Mental Health Workers

Psychiatric hospitals are expressly permitted by regulation to employ unlicensed mental health care workers to assist with nursing procedures. See California Code of Regulations, title 22, §71053(a)(7), and §71215(f). And yet the Court of Appeal held that Defendants' hiring of unlicensed mental health workers breached their duty of care because it prevented them from discovering prior convictions. The opinion states, "Had Aurora hired certified nursing assistants (CNAs), instead of unlicensed mental health workers, it would have had notice of any such prior conviction. CNA's are fingerprinted and licensed." (Opinion, p. 3.) "Aurora and Signature knew or should have known that their ability to do background checks on [unlicensed mental health workers] is limited. Instead, they could have hired CNA's who are trained, licensed, and fingerprinted, and subject to unlimited background checks." (Opinion, p. 14.)

Honorable Tani Gorre Cantil-Sakauye, Chief Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin H. Liu, Associate Justice
Honorable Leondra R. Kruger, Associate Justice
Honorable Joshua P. Groban, Associate Justice
Honorable Martin J. Jenkins, Associate Justice
Honorable Patricia Guerrero, Associate Justice

May 26, 2022

Page 4

It's one thing to hold that compliance with the law is not necessarily sufficient to *satisfy* one's duty. But the holding here is that Defendants *breached* their duty of care by complying with the law, which is a pronouncement that deserves this Court's attention.

4. It Is Troubling That a Defendant Who Was Never at the Premises Was Held Liable to Precisely the Same Degree as the Serial Rapist

While *Samantha B.* does not directly conflict with this Court's opinion in *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861 ("*Hart*"), its analysis and singular focus on the corporate defendants will likely be misleading.

The Court of Appeal rejected the defense argument that *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, "stands for the proposition that an apportionment of fault is not supportable when it overlooks or minimizes the fault of the party who plays the most direct and culpable role in the injury." *Id* at 148. (Opinion, p. 21.) It responded that the *Scott* case "does not say that," even though the *Scott* decision reversed a 1% fault allocation to the grandmother who intentionally scalded the child and a 99% fault allocation to the County that failed to prevent it. (Opinion, p. 21.) While the *Scott* opinion certainly supports the proposition for which Defendants cited it, this Court's pronouncement in *Hart* does so expressly.

In *Hart*, this Court noted the "undesirable consequences that could flow from imposing vicarious liability on public school districts for sexual misconduct by teachers," and held that, "even when negligence by an administrator or supervisor is established, ***the greater share of fault will ordinarily lie with the individual who intentionally abused or harassed*** the student than with any other party, and that fact should be reflected in any allocation of comparative fault." 53 Cal.4th at 878-879. (Emphasis added.)

In support of its affirmance of a mere 35% fault allocation to a serial rapist, the *Samantha B.* court cited the Court of Appeal opinion in *Rosh v. Cave Imaging*

Honorable Tani Gorre Cantil-Sakauye, Chief Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin H. Liu, Associate Justice
Honorable Leondra R. Kruger, Associate Justice
Honorable Joshua P. Groban, Associate Justice
Honorable Martin J. Jenkins, Associate Justice
Honorable Patricia Guerrero, Associate Justice

May 26, 2022

Page 5

Systems, Inc. (1994) 26 Cal.App.4th 1225, 1238, where the court declined to disturb a jury's apportionment of 25% fault to an assailant who deliberately shot plaintiff and 75% fault to the employer's private security company who failed to protect him. (Opinion, p. 22.) However, *Rosh* is consistent with this Court's decision in *Hart*, rejecting the absolute proposition that a reasonable person could *never* "conclude a negligent tortfeasor was more responsible for an injury than an intentional tortfeasor." The *Samantha B.* opinion, however, goes much further.

In its attempt to find support for the jury's inverted fault allocation, the *Samantha B.* court simply assumes that the rape of three different psychiatric patients was "inevitable" due to lack of supervision, placing outsized emphasis on operational changes that might have prevented the intentional conduct, as well as the defendants' sophistication and wealth. Its approach runs counter to this Court's guidance that "ordinarily" an intentional tortfeasor's share of fault will be greater than a negligent tortfeasor, which should be reflected in the allocation of fault.

For the foregoing reasons, ASCDC respectfully requests that the Court grant review.

Respectfully submitted,

**ASSOCIATION OF SOUTHERN CALIFORNIA
DEFENSE COUNSEL**



By: _____

J. Alan Warfield

J. ALAN WARFIELD (SBN 186559)
Polsinelli, LLP
2049 Century Park East, Suite 2900
Los Angeles, CA 90067

cc: See attached Proof of Service

SERVICE LIST

<u>PARTY</u>	<u>ATTORNEY</u>
Samantha B.: Plaintiff and Appellant	David Michael Feldman Law Office of David Feldman 100 Wilshire Boulevard, Suite 700 Santa Monica, CA 90401-3602
Crystal F.: Plaintiff and Appellant	David Michael Feldman Law Office of David Feldman 100 Wilshire Boulevard, Suite 700 Santa Monica, CA 90401-3602
Danielle W.: Plaintiff and Appellant	David Michael Feldman Law Office of David Feldman 100 Wilshire Boulevard, Suite 700 Santa Monica, CA 90401-3602
Aurora Vista Del Mar, LLC : Defendant and Appellant	Thomas E. Beach Beach Law Group, LLP 500 E. Esplanade Drive, Suite 1400 Oxnard, CA 93036 Mindee J Stekkinger Beach Law Group, LLP 500 E Esplanade Drive, Suite 1400 Oxnard, CA 93036 Andrea M. Gauthier Horvitz & Levy 15760 Ventura Boulevard, 18th Floor Encino, CA 91436-3000 Bradley Scott Pauley Horvitz & Levy LLP 3601 W. Olive Avenue, 8th Floor Burbank, CA 91505-4681

SERVICE LIST

	<p>Nicholas Frederic Daum Kendall Brill & Kelly, LLP 10100 Santa Monica Boulevard, Suite 1725 Los Angeles, CA 90067</p>
<p>Signature Healthcare Services, LLC.: Defendant and Appellant</p>	<p>Thomas E. Beach Beach Law Group, LLP 500 E. Esplanade Drive, Suite 1400 Oxnard, CA 93036</p> <p>Mindee J Stekkinger Beach Law Group, LLP 500 E Esplanade Drive, Suite 1400 Oxnard, CA 93036</p> <p>Andrea M. Gauthier Horvitz & Levy 15760 Ventura Boulevard, 18th Floor Encino, CA 91436-3000</p> <p>Bradley Scott Pauley Horvitz & Levy LLP 3601 W. Olive Avenue, 8th Floor Burbank, CA 91505-4681</p> <p>Nicholas Frederic Daum Kendall Brill & Kelly, LLP 10100 Santa Monica Boulevard, Suite 1725 Los Angeles, CA 90067</p>
<p>Vista Del Mar Hospital : Defendant and Appellant</p>	<p>Thomas E. Beach Beach Law Group, LLP 500 E. Esplanade Drive, Suite 1400 Oxnard, CA 93036</p> <p>Mindee J Stekkinger Beach Law Group, LLP 500 E Esplanade Drive, Suite 1400 Oxnard, CA 93036</p> <p>Andrea M. Gauthier Horvitz & Levy 15760 Ventura Boulevard, 18th Floor Encino, CA 91436-3000</p>

SERVICE LIST

	<p>Bradley Scott Pauley Horvitz & Levy LLP 3601 W. Olive Avenue, 8th Floor Burbank, CA 91505-4681</p> <p>Nicholas Frederic Daum Kendall Brill & Kelly, LLP 10100 Santa Monica Boulevard, Suite 1725 Los Angeles, CA 90067</p>
Alliance of Schools for Cooperative Insurance Programs : Pub/Depublication Requestor	<p>Robert A. Olson Greines Martin Stein & Richland, LLP 5900 Wilshire Boulevard, 12th Floor Los Angeles, CA 90036-3697</p>
Schools Excess Liability Fund: Pub/Depublication Requestor	<p>Robert A. Olson Greines Martin Stein & Richland, LLP 5900 Wilshire Boulevard, 12th Floor Los Angeles, CA 90036-3697</p>