S235412

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALEKSANDR VASILENKO, et al., Plaintiffs and Appellants, v. GRACE FAMILY CHURCH, Defendant and Respondent.	Court of Appeal No. C074801 Sacramento County No. 34201100097580

PLAINTIFFS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS OF: (1) ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL and ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF DEFENDANT; and (2) CALIFORNIA WALKS IN SUPPORT OF PLAINTIFFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

OUT-OF-STATE CASES

FEDERAL CASES

CALIFORNIA STATUTES

LOUISIANA STATUTES

LOCAL ORDINANCES

RESTATEMENTS

OTHER AUTHORITIES

CALIFORNIA RULES OF COURT

Plaintiffs Aleksandr and Larisa Vasilenko respectfully submit this consolidated answer to the amicus curiae briefs of: (1) Association of Southern California Defense Counsel and Association of Defense Counsel of Northern California and Nevada; and (2) California Walks.

INTRODUCTION

The duty of care this Court should recognize in this category of case is both narrow and easily satisfied. An entity that possesses premises abutting a public street and directs invitees to park in an overflow lot across the street owes a duty to provide reasonably safe passage across the street when the facts indicate:

(1) The entity controls that overflow parking lot; and

(2) The entity knows it is unreasonably dangerous to cross the street at the place along the route that it is foreseeable the pedestrian invitees may travel from that lot to the main premises; and

(3) The entity is able to reduce the risk of harm to invitees by taking a precaution that is simple, inexpensive, and reasonable under the circumstances, such as:

    (a) Warning them not to cross at the dangerous place, by means of a sign posted in that lot or a spoken warning from a parking attendant (here, warning them not to cross Marconi Avenue midblock, but instead at the corner

where attendants were helping invitees make a safer crossing of Marconi); or

(b) Informing invitees they may park instead at an available safer location known to the entity (here, for example, the business plaza lot); or

(c) Not using the lot that may foreseeably induce a dangerous street crossing (permanently, or during times when visibility is poorer, e.g., as here, at night in heavy rain).

This duty does not require the entity to control traffic on a public road; erect signs on a public road; maintain a public road; provide on-premises parking for all invitees' cars; or take any other impracticable, onerous, or expensive action.

ARGUMENT

I.

THE PERTINENT OUT-OF-STATE DECISIONS SUPPORT RECOGNIZING A DUTY OF CARE

Comparing out-of-state cases cited by defense amici (Def. Assn. ACB 18) to sister state cases advanced by plaintiffs reveals the "only courts that have squarely addressed cases . . . factually comparable to the case[ ] before us, and that have applied general tort law principles commensurate with our own" reach the conclusion urged by plaintiffs, and that the cases cited by defense amici are distinguishable. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1161.)

A. Louisiana Law Favorable to Plaintiffs

Defense amici fail to discuss *Donavan v. Jones* (La. Ct. App. 1995) 658 So.2d 755, the sister state case legally and factually most similar to ours. It was cited in both parties' merits briefs (though GFC dismissed it based on the faulty view it is "premised upon precedent involving the duty of an employer"). (RBM 32, ABM 49) *Donavan* rests on the ordinary tort duty under Louisiana statutes and common law similar to those of California.

The plaintiff in *Donavan* was employed by an independent contractor (BE&K) hired to make repairs at defendant Riverwood's plant on the east side of Highway 34. (*Donavan, supra,* 658 So.2d at p. 759.) Donavan was not Riverwood's employee.

The Louisiana Court of Appeal explained, " 'the owner or operator of a facility has the duty of exercising reasonable care for the safety of persons on his premises and the duty of not exposing such persons to unreasonable risks of injury or harm.' *Mundy v. Dept. of Health and Human Resources*, 620 So.2d [811] at 813 [(La. 1993)], and citations therein. This duty extends to employees of independent contractors, for whom the owner must take reasonable steps to ensure a safe working environment. *Dupre v. Chevron U.S.A.*, Inc., 20 F.3d 154, 157 (5th Cir. 1994) [citing, at p. 157, fn. 11, *Mundy,* 620 So.2d at p. 813]; [citation]. As an owner of property abutting a highway, an

employer may be liable for causing or contributing to a defective or dangerous condition in the area, despite the fact that a public authority is charged with maintaining the highway. *Lenoir v. Sewerage and Water Bd.*, 535 So.2d 490 (La. App. 4th Cir. 1988). . . ; *Ford v. City of Shreveport,* 165 So.2d 325 (La. App. 2d Cir. 1964)." (*Donavan, supra,* 658 So.2d at pp. 763-764.)

The main duty case *Donavan* cited was the Louisiana Supreme Court decision in *Mundy*, which stated: "In general, the owner or operator of a facility has the duty of exercising reasonable care for the safety of persons on his premises and the duty of not exposing such persons to unreasonable risks of injury or harm. *St. Hill v. Tabor*, 542 So.2d 499, 502 (La. 1989); [citations]. The relationship of an employer to his employee gives rise to a similar duty. See Restatement (Second) of Torts § 314A comment (a) (1965)." (*Mundy,* 620 So.2d at p. 813.)

Thus, although the *Mundy* defendant was the employer of the plaintiff attacked by a third party while at work, the duty flowed from ordinary tort rules stated in *St. Hill, supra,* 542 So.2d 499, another Louisiana Supreme Court case, where the plaintiffs were the parents of a 16-year-old who drowned at Falgout's swimming pool party. As stated there:

"Next we consider the extent of Mrs. Falgout's duty to her guests. . . . The duty of a property owner was delineated by this court

in *Walker v. Union Oil Mill, Inc.*, 369 So.2d 1043, 1047 (La. 1979) [also a Louisiana Supreme Court general tort duty case]: 'In determining an owner's liability under Civil Code Articles 2315 and 2316 the test has been stated to be whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others.' " (*St. Hill, supra,* 542 So.2d at p. 502.)

Under Louisiana Civil Code article 2316, "[e]very person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill," while Louisiana Civil Code article 2315(A), states "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Together, those express the same policy as California Civil Code section 1714, subdivision (a) (hereafter, "section 1714(a)"): "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person. . . ."

Ford, supra, 165 So.2d 325, cited by *Donavan*, also involved the ordinary tort duty. Plaintiff fell on a city-owned sidewalk abutting the property of Gorton, whose trucks "created a dangerous condition" on the sidewalk by driving over and damaging it. (165 So.2d at pp. 327-328.) *Ford* explained "the responsibility of an abutting owner does not

rest on such ownership, but rather on his negligence in creating and failing to repair the damage. [Citation.]" (*Id.* at p. 328.)

Lenoir, supra, 535 So.2d 490 was another ordinary tort duty case. Plaintiff fell into a hole a Water Board created in a city sidewalk. The Board owed him a duty because it excavated the hole, but the abutting hotel had no duty because there was no evidence the hotel contributed to the dangerous condition. (*Id.* at pp. 492-493.)

Having shown the duty recognized in *Donavan* is the ordinary tort duty, plaintiffs now discuss its facts. Plaintiff was struck by a car in the dark while crossing the five-lane, 45 m.p.h., highway between defendant Riverwood's plant and defendant's parking lot he was instructed to use, while walking along the shortest route directly from the lot to the plant. (*Donavan, supra,* 658 So.2d at pp. 759-760.) An unlit crosswalk was provided, but plaintiff did not know about it, and other workers did not use it because they preferred the "obvious straight path across the highway. . . ." (*Id.* at pp. 760, 767.)

The trial court found "Riverwood . . . knew or should have known that contractor employees, many [of] whom were not familiar with Riverwood's facilities, continued to take the shortest and most obvious route across the highway even after the DOTD [Dept. of Transportation & Development] installed the crosswalk; yet the company failed to take reasonable preventative measures (such as

relocating the parking lot . . . , lighting it, [or] installing channeling fences directing contractor employees to the crosswalk . . . to eliminate the known hazard." (*Donavan, supra,* 658 So.2d at p. 762.)

The Louisiana Court of Appeal agreed and affirmed a judgment allocating 10% fault to Riverwood. (*Donavan, supra,* 658 So.2d at pp. 758-759.) It explained: "Riverwood not only knew about the hazardous crossing situation, but also required the contractor employees to cross the highway to access the plant entrance. The most obvious and effective solution was to eliminate the need to cross the highway. Nevertheless, several other options would have enhanced safety. . . . [¶] . . . [¶] DOTD's statutory duty to maintain the highway . . . does not relieve Riverwood of its responsibility, once it designates a parking lot across a major highway for contractor employees, to provide them with reasonably safe access to the work premises. [Citations.]" (*Id.* at p. 766.)[1]

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[1] A decision of the Louisiana Court of Appeal was cited with approval by this Court in *Morris v. De La Torre* (2005) 36 Cal.4th 260, 270, which also reached the same holding as the Louisiana court: "*Johnston v. Fontana* (La. Ct. App. 1992) 610 So.2d 1119, 1121-1122 (*Johnson*) [restaurant proprietor whose customer threatened to attack another customer had duty to 'call[ ] the police for assistance'][.]"

B. New Jersey Law Favorable to Plaintiffs

Defense amici do not discuss New Jersey cases favorable to plaintiffs and cited by the parties. (ABM 45, 49; RBM 32.) The seminal case is *Warrington v. Bird* (1985) 204 N.J.Super. 611 [499 A.2d 1026], distinguished in *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, at page 493, footnote 9.

Defendant Dan-Pas operated a restaurant and provided parking on the opposite side of the road. Plaintiffs and their decedent were hit by a car while crossing from the restaurant to their car in the lot. *Warrington* reversed the verdict in favor of defendant because the trial judge had misinstructed the jury. (*Warrington,* 204 N.J.Super. at p. 612.) *Warrington* explained:

"[T]he critical element should not be the question of the proprietor's control over the area to be traversed but rather the expectation of the invitee that safe passage will be afforded from the parking facility to the establishment to which they are invited. Commercial entrepreneurs know in providing the parking facility that their customers will travel a definite route to reach their premises. The benefiting proprietor should not be permitted to cause or ignore an unsafe condition in that route which it might reasonably remedy, whether the path leads along a sidewalk or across a roadway." (*Warrington, supra,* 204 N.J.Super. at p. 617.)

"[T]he question of control of the roadway has little bearing" because, for example, a sign might have been erected *on defendant's premises* to alert patrons of the dangers. (*Warrington, supra,* 204 N.J.Super. at p. 617.) "[W]hen a business provides a parking lot across the roadway from its establishment, the duty of the proprietor to exercise reasonable care for the safety of its patrons extends to conditions obtaining at the parking lot and requires that the patrons not be subjected to an unreasonable risk of harm in traversing the expected route between the two locations." (*Ibid.*)

Mulraney v. Auletto's Catering (1996) 293 N.J.Super. 315 [680 A.2d 793] found a duty even though defendant did *not* control the parking area.[2] Decedent was told to leave defendant's valet lot where she had self-parked, but because the entrance to defendant's other lot was blocked, she parked on the opposite side of the highway with other invitees. (*Id.* at pp. 317-318.) She was hit by a car while recrossing to her car after the event. (*Id.* at p. 318.)

Mulraney stated: " 'The proprietor of premises to which the public is invited for business purposes of the proprietor owes a duty of reasonable care to those who enter the premises upon that invitation to provide a reasonably safe place to do that which is within the scope

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2 Plaintiffs do not contend the duty exists when a defendant does *not* control the overflow lot – i.e., this Court may rule in plaintiffs' favor without going as far as *Mulraney* did.

of the invitation.' [Citation.] . . . [It] extends beyond a business simply safeguarding its customers from dangerous physical conditions on its property." (*Mulraney, supra,* 293 N.J.Super. at pp. 317-318.)

Mulraney rejected the argument there should be no duty because "a private party is prohibited from erecting traffic control devices along a public highway." (*Mulraney, supra,* 293 N.J.Super. at p. 324.) Defendant "could have taken a variety of measures for the protection of its patrons who had to cross the county highway to reach their cars that would not have involved the erection of traffic signs which would fall within this prohibition, including . . . the posting of signs to warn patrons of the danger involved in crossing the highway." (*Ibid.*) *Mulraney* relied on *Warrington* and other cases where "the business proprietor's alleged liability was predicated upon *negligence in the conduct of its business* rather than a dangerous physical condition of its premises. . . ." (*Id.* at p. 320, italics added.)

Mulraney also explained the "relationship between a business enterprise and persons invited to its premises to further its commercial interests has traditionally required the exercise of 'a higher degree of care' than is owed to other persons." (*Mulraney, supra,* 293 N.J.Super. at p. 321.) This is analogous to California's "special relationship" imposing an affirmative duty to "undertak[e] reasonable, relatively simple, and minimally burdensome measures" to protect patrons and

invitees from foreseeable harm by third parties. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 241, 245.)[3]

There is no evidence *Warrington* and *Mulraney* have caused runaway liability in New Jersey. Rather, subsequent New Jersey decisions have delineated the scope of the duty in a way that protects *both* pedestrian invitees *and* potential defendants. California courts are capable of doing the same.

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3 In the trial court it was undisputed Mr. Vasilenko intended to attend GFC's "function." (I CT 269, 278, II CT 445) GFC admitted he was an "invitee" to GFC's "educational function" or "seminar." (I CT 279, 284) Pastor Oselsky called it a "conference." (II CT 504-505)

In the Court of Appeal, plaintiffs observed Mr. Vasilenko was GFC's business invitee. (AOB 25-26, 29-30, 43-44, 46-47, 50- 51; ARB 2, 10, 15, 27.) At no time there did GFC contend (1) Mr. Vasilenko was not its business invitee or (2) plaintiffs erred in stating he was; rather, it conceded he, like the plaintiff in *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, was an "invitee" who was "invited to the function. . . ." (RB 12)

The Court of Appeal found Mr. Vasilenko was an "invitee" to a "function." (*Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th 146 at pp. 149, 150, 154 & p. 159 [dis. opn. of Raye, P.J.] [rev. granted Sep. 21, 2016, S235412].) GFC did not petition for rehearing. Finally, GFC framed the Issue for Review as involving the duty to an "invitee," and this Court granted review with reference to an "invitee."

The special relationship-based duty to aid or protect flows from a " 'possessor of land who holds it open to the public . . . to members of the public who enter in response to his invitation.' " (*Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 335, fn. 17; *Morris, supra,* 36 Cal.4th at p. 264 [to "patrons or invitees"], p. 270 [to "customers or invitees"], p. 269 [to " 'members of the public who enter in response to the landowner's invitation' " [quoting *Peterson v. San Francisco Community College District* (1984) 36 Cal.3d 799, 806].)

For example, *Chimiente v. Adam Corp.* (1987) 221 N.J.Super. 580 [535 A.2d 528] held defendant shopping center owners had no duty to provide safe passage across a State-owned grassy slope between their parking lot and a public sidewalk adjacent to their shopping center, even though they knew invitees used the slope as a pathway between their two premises. (221 N.J.Super. at p. 581.) Unlike in *Warrington,* defendants "provided safe passage to their parking lot through existing entrances [from two other locations]. It was reasonable for defendants to expect that their invitees would use these 'definite route[s],' designed for that purpose, to reach the shopping center." (*Id.* at p. 584.)

MacGrath v. Levin Properties (1992) 256 N.J.Super. 247 [606 A.2d 1108] held a shopping center had no duty to provide safe passage across an adjacent highway or warn its invitee of the dangers of crossing because, unlike in *Warrington,* there was no parking lot involved at all. (*MacGrath,* 256 N.J. Super. at pp. 248, 254.)

In *Puterman v. City of Long Branch* (2004) 372 N.J.Super. 567, 569, 576 [859 A.2d 1246] a strip mall owner owed no duty to a plaintiff who parked in an adjacent municipal parking lot and then slipped and fell on ice *within that municipal lot* on the way to defendant's mall.

Brierley v. Rode (2007) 396 N.J.Super. 52, 57 [931 A.2d 614] held the third-party owner of a car wash across the road from a tavern,

which permitted tavern customers to self-park in its lot, owed no duty *to the tavern's customer* as he crossed the road. The *Brierley* scenario would be as if Mr. Vasilenko alleged the Debbie Meyer Swim Center, owner of GFC's pool lot (I CT 213), owed him a duty of care while he crossed Marconi. No such claim is involved here.

C. Arizona Law Favorable to Plaintiffs

Stephens v. Bashas' Inc. (Az. Ct. App. 1996) 186 Ariz. 427 [924 P.2d 117] supports a duty. Plaintiff, a truck driver and business invitee, drove a load of groceries to defendant's warehouse on 35th Avenue, arriving at 3:30 a.m. (186 Ariz. at p. 428.) As he began turning into the premises, defendant's security guard stopped him and told him he would have to park somewhere off that property. (*Ibid.*) Plaintiff drove around but there was nowhere to park nearby, so he returned, parked on 35th Avenue, and again spoke with the guard, who told him he needed to get a loading dock assignment. (*Id.* at p. 429.)

While waiting for his assignment, plaintiff parked his truck in the center two-way left turn lane on 35th Avenue. (*Stephens, supra,* 186 Ariz. at p. 429.) Truckers waiting to make deliveries routinely parked there as there was nowhere else they could open their doors before backing up to the docks. (*Ibid.*) Plaintiff got out of his cab, walked to the back of his truck, and opened its doors; as he tried to

return to his cab, another truck strayed into the center lane and struck him. (*Ibid.*)

The trial court granted summary judgment for defendant but the appellate court reversed, explaining: "In Arizona, a business owner has a duty to maintain its premises in a reasonably safe condition for invitees. [Citation.] This duty includes an obligation 'to provide reasonably safe means of ingress and egress.' [Citation.]" (*Stephens, supra,* 186 Ariz. at p. 430.) " 'Harm that is caused, in whole or in part, by an activity or condition on particular premises cannot be viewed as unforeseeable as a matter of law merely because it happens to manifest itself beyond the property line.' [Citation.]" (*Ibid.*) "The occurrence of Stephens' injury beyond Bashas' warehouse premises may be relevant to whether Bashas acted reasonably under the circumstances. It does not mean, however, that Bashas owed Stephens no duty of care." (*Id.* at pp. 430-431.)

The defendant in *Stephens* relied on some of the same cases cited by defense amici and GFC – *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 739, *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799, *Davis v. Westwood Group* (Mass. 1995) 420 Mass. 739 [652 N.E.2d 567], and *Ferreira v. Strack* (R.I. 1994) 636 A.2d 682 – but the court distinguished them all. (*Stephens, supra,* 186 Ariz. at p. 431 & fn. 3.)

Stephens noted "most of those cases deal primarily with whether a landowner has the duty to control an adjacent public road" (*Stephens, supra,* at p. 431, fn. omitted), but "Stephens has not alleged that Bashas had a duty to control 35th Avenue. . . . When the activities conducted on the business premises affect the risk of injury off-premises, the landowner may have an obligation 'to correct the condition or guard against foreseeable injuries.' [Citation.]" (*Ibid.*)

D. Indiana Law Favorable to Plaintiffs

In *Lutheran Hospital of Indiana, Inc. v. Blaser* (Ind. Ct. App. 1994) 634 N.E.2d 864, an invitee parked her car in defendant hospital's lot across the street. While attempting to return to her car at 10 p.m., she crossed midblock and was walking up the driveway to the lot when she was struck by a car entering the driveway. (634 N.E.2d at p. 867.)

Pedestrians who had parked in the lot were required to cross Fairfield Avenue, and usually crossed midblock to and from the hospital's conspicuous midblock canopy entrance instead of at the lighted intersections with marked crosswalks at the north and south ends of Fairfield. (*Lutheran, supra,* 634 N.E.2d at p. 869.) Neither defendant's parking attendants nor its security guards tried to dissuade invitees from crossing midblock. (*Ibid.*) The hospital had assured the city engineer it would discourage people from using the

canopy doors for ingress and egress, but it failed to do that "or to direct pedestrians to the crosswalks." (*Ibid.*)

The driveway where the incident occurred was intended as an entrance for delivery trucks and as an "exit" for cars. (*Lutheran, supra,* 634 N.E.2d at p. 869.) However, to drivers on Fairfield the "exit" looked like a lot entrance. (*Ibid.*) Pedestrians crossing midblock on Fairfield walked into the "exit" towards their cars. (*Ibid.*) This "funneling" of pedestrians and cars into the driveway created a hazard. (*Ibid.*)

The court held the hospital owed a duty to the pedestrian even if "the accident occurred on a public right-of-way over which it had no control. . . . When the activities conducted on the business premises affect the risk of injury off the premises, the landowner may be under a duty to correct the condition or guard against foreseeable injuries. . . . The standard of care for carrying out an activity is no different from that for maintaining property. . . . Lutheran used its premises, the parking lot, in such a way to affect the risk of injury of its invitees off its premises. . . ." (*Lutheran, supra,* 634 N.E.2d at p. 870.)

E. Foreign Cases Cited By Defense Amici Are Inapposite

Defense amici cite selected out-of-state decisions that found no duty owed to a person off the premises under the particular law and facts of those cases, but none of those cases are edifying in our context.

Those cases are discussed in the same order presented by those amici. (Def. Assn. ACB 16-18.)

Defense amici rely mainly on two decisions they assert followed California law. (Def. Assn. ACB 7, 16.) The first is *Davis, supra,* 420 Mass. 739. Plaintiff attempted to attend the races at defendant's greyhound track and parked in its lot located across State Route 1A. (*Id.* at p. 741.) He and other patrons walked to the edge of the lot, where pedestrians would cross to the track via a painted crosswalk while uniformed city police officers used hand signals to stop traffic in both directions. (*Id.* at pp. 741-742.) While trying to cross the road, plaintiff was hit by a drunk driver who failed to heed one of the officers. (*Id.* at p. 742.)

Davis's no-duty holding flowed almost exclusively from its unwillingness to impose the extremely onerous duty urged by plaintiff, i.e., to "provide a pedestrian bridge over Route 1A or a traffic signal at the pedestrian crossing" – the burdensome nature of which the court emphasized *eleven times* in its opinion. (*Davis, supra,* 420 Mass. at pp. 740 & fn. 4, 742 & fn. 7, 743-744; 745, 747 & fn. 13, 748.) *Davis* contained virtually no other analysis as to plaintiff's first theory of liability.

Davis did not "adopt[ ] California law" (contrary to Def. Assn. ACB 7), but fleetingly cited *Owens, supra,* 198 Cal.App.3d 739 in a

footnote purporting to collect decisions from other jurisdictions holding a landowner's duty does not extend to public streets. (*Davis,* 420 Mass. at p. 744, fn. 10.) Footnote 10 reveals *Davis* cannot be regarded as comprehensive or impeccable authority.

Davis cited the 1992 New Jersey decision in *MacGrath, supra,* 256 N.J.Super. 247 as support for a no-duty rule, but simultaneously ignored the 1985 New Jersey decision recognizing a duty – *Warrington, supra,* 204 N.J.Super. 611 – even though *Warrington*'s facts were far more similar to *Davis*'s. (*Davis, supra,* 420 Mass. at p. 744, fn. 10.) Footnote 10 also omitted *Donavan, supra,* 658 So.2d 755, the Louisiana case cited *ante* and decided a month before *Davis.*

Plaintiff's second theory of liability in *Davis* was that the track was vicariously liable for the alleged negligence of police officer Falzarano, who failed to stop the driver who struck plaintiff. (*Davis, supra,* 420 Mass. at pp. 740, 742, 745-747.) The court rejected the theory on grounds that would not defeat a duty here: (1) the jury was instructed Falzarano was acting in the scope of his employment for the city, and that the city would be liable for his negligence, if any, but the jury found the city not liable, and thus must have concluded Falzarano was not negligent; and (2) Falzarano was an independent contractor, not the track's agent. (*Id.* at p. 748 & fn. 14.)

Here, the attendants working when Mr. Vasilenko was injured were GFC's agents, and no factfinder has absolved them or their principal of negligence. Thus, GFC still has potential: (1) *direct liability* for directing Mr. Vasilenko to park at the pool lot and failure to warn (third cause of action, I CT 67); (2) *direct liability* for negligent failure to train and supervise its agents (fourth cause of action, I CT 68); and (3) *vicarious liability* for all of its agents' negligent acts and omissions.[4]

Davis could easily have come out the other way (if the duty urged by plaintiffs were reasonable, such as issuing warnings in the lot) if: (1) the track knew or should have known the police it assigned to help invitees cross the highway were incompetent to perform that task (direct liability); or (2) the police acted negligently while acting as the track's agents (vicarious liability).[5]

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[4] For purposes of GFC's direct and vicarious liability, its agents, inter alia, failed to advise Mr. Vasilenko to walk to the intersection with Root Avenue where other attendants (equipped with flashlights and reflective vests) were stationed to help him cross Marconi Avenue, and there were two dim street lights (II CT 500) that might have alerted drivers to the presence of the intersection (and thus an unmarked crosswalk), all of which would have made pedestrians crossing there more visible to drivers on Marconi.

[5] *Davis* also concluded defendant's voluntary assumption of "one specific task, that of hiring police officers to direct pedestrians across Route 1A," did not amount to undertaking the "much broader" and "expansive" duty of erecting a traffic signal or building a pedestrian bridge. (*Davis, supra,* 420 Mass. at p. 746-747.) Also, *Davis* noted that the jury's implied verdict that the *police officers were not negligent* also established the *track* exercised due care in its assumed duty of hiring

Defense amici also cite *Ferreira, supra,* 636 A.2d 682, 686, 688, which relied in part on *Steinmetz, supra,* 169 Cal.App.3d 1142. (Def. Assn. ACB 16.) *Ferreira* is similar to *Steinmetz,* and more similar to *Seaber, supra,* 1 Cal.App.4th 481, both relied on heavily by defense amici. (Def. Assn. ACB 4-5, 8-13, 27.) Plaintiffs previously explained why *Steinmetz* and *Seaber* are not germane. (ABM 33, 37-38, 44-47; ARB 18-21)

In *Ferreira,* plaintiffs and their decedent were hit by a drunk driver as they walked in a crosswalk from defendant's church to their car located in a parking lot on the other side of the street. (*Ferreira, supra,* 636 A.2d at p. 684.) Defendant did not provide or control the lot, which was owned by a third party (*Ferreira,* at p. 684), and nothing in *Ferreira* suggested defendant directed invitees to park there. Rather, the plaintiffs claimed only that defendant knew or should have known its invitees would park there. (*Ferreira,* 636 A.2d at pp. 684, 688.)

The duty alleged by plaintiffs was one to control traffic on a public highway. (*Id.* at p. 684.) *Ferreira* resorted to the truism there is no " 'premises liability' " for premises not under defendant's control. (*Ferreira, supra,* 636 A.2d at p. 685.) This Court rejected a similar analysis in *Kesner, supra,* 1 Cal.5th at p. 1159 ("the duty arising from possession and control of property is adherence to the same standard of

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those officers. (*Id.* at p. 747, fn. 13.)

care that applies in negligence cases. . . . [¶] We have never held that the physical or spatial boundaries of a property define the scope of a landowner's liability"). Besides, plaintiffs do not assert GFC had a duty to control traffic on Marconi Avenue.

Ferreira also held defendant did not voluntarily assume a duty to control traffic by, occasionally in the past, asking police to control traffic in front of the church (which the police did); defendant did not request traffic control on the night of the incident. (*Ferreira, supra,* 636 A.2d at p. 688.) It held public policy precluded the assumption of the "wholly governmental" duty to control a highway. (*Id.* at p. 689.) Here, there is no claim GFC assumed a duty to control traffic on Marconi Avenue or to request a law enforcement agency to do so.[6]

Kopveiler v. Northern Pacific Railway Co. (Minn. 1968) 280 Minn. 489 [160 N.W.2d 142], found no duty was owed a plaintiff who fell into a hole on a public street in an area "customarily used for parking" adjacent to the depot platform. (280 Minn. at p. 489.) There were no facts suggesting the railroad directed him to park in that area.

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6 *Ferreira* properly determined the "fact that defendant is a church has no bearing upon our analysis. As we have recognized in past decisions, the liability of a church for personal injuries to its parishioners is determined in the same manner as that of a private landowner. [Citations.] Furthermore, the rule we enunciate herein is applicable to individual landowners and commercial establishments as well as to religious and nonprofit corporations." (*Ferreira, supra,* 636 A.2d at p. 686, fn. 3.)

Tripp v. Granite Holding Co. (Utah 1969) 22 Utah 2d 175 [450 P.2d 99] involved nothing more than a business invitee injured by a defect on a public sidewalk after she left defendant's premises abutting the sidewalk.

In *Holter v. City of Sheyenne* (N.D. 1992) 480 N.W.2d 736, a 10-year-old girl was killed by a car while crossing the highway after leaving a restaurant. Her parents sued the restaurant and the City. Pedestrians' and motorists' visibility was obscured by cars parked on the highway shoulder south of the premises. (*Id.* at p. 737.) Plaintiffs alleged the restaurant owed a duty to (1) warn decedent of the danger of crossing, and (2) prevent, or ask the city to prevent, cars from parking on the shoulder. (*Id.* at p. 738.) The court found no duty because the shoulder was state property and not controlled by the restaurant. (*Id.* at p. 738.) *Holter* did not state the restaurant caused cars to park on the adjacent shoulder.

Grapotte v. Adams (Tex. 1938) 130 Tex. 587 [111 S.W.2d 690] held a garage owed no duty to a passer-by who stepped into a hole or depression while walking on a public sidewalk, *even though the court agreed defendant contributed to creating the hazard* by causing 300 to 350 of its invitees' cars to drive over the sidewalk every day. (130 Tex. at p. 589.)

Grapotte is contrary to California law. (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 48-49; *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1174, 1178, 1179, 1183 [dis. opn. of Kennard, J.] [duty arises when a defendant creates a dangerous condition on someone else's property *or* by some affirmative conduct aggravates the danger to the plaintiff, citing, inter alia, *Schwartz v. Bakery, Ltd.* (1967) 67 Cal.2d 232, 235-239]; accord, Rest.3d Torts, § 54(c) ["a possessor of land adjacent to a public walkway has no duty . . . with regard to a risk posed by the condition of the walkway to pedestrians or others *if the land possessor did not create the risk*"], italics added.)

In *Swett v. Village of Algonquin* (1988) 169 Ill.App.3d 78 [523 N.E.2d 594] plaintiff and others left defendant's restaurant and were hit by a car while walking across the highway toward defendant's parking lot. (169 Ill.App.3d at p. 81.) *Sweet* found no duty under the specific facts, but conceded Illinois law imposes "a duty to provide an invitee with a reasonably safe means of ingress and egress, both within the confines of the premises owned or controlled by the inviter *and, within limitations dictated by the facts of the case, beyond the precise boundaries of such premises.* [Citations.]" (*Id.* at p. 87, italics added.)

Obiechina v. Colleges of the Seneca (Ontario County 1996) 652 N.Y.2d 702 [171 Misc.2d 56] was a trial court order granting summary judgment. Plaintiff was a student hit by a car while on a city street

that ran through campus and that students had to cross. (171 Misc.2d at p. 57.) No parking lot was involved. The judge distinguished *Mulraney, supra,* 293 N.J.Super. 315, because "the duty of care only extends to matters over which the landowner has some control, and not, for example, 'to the system of vehicular and pedestrian control established by the responsible government agency.' " (*Obiechina,* 171 Misc.2d at p. 60.) Here, plaintiffs allege a duty only as to matters within GFC's control.

In *Laumann v. Plakakis* (1987) 84 N.C.App. 131 [351 S.E.2d 765] defendant's customer was struck by a car on a public road as she crossed from defendant's store to its parking lot on the other side. She alleged defendant's fence "encouraged" patrons to cross at a place where there were no lights, warning signs, or crosswalk. (84 N.C.App at p. 133.) The court held there was no duty because the fence did not "force" pedestrians to cross at that spot, and "even if the fence were not there" customers would still need to cross the same road. (*Id.* at p. 134.) It also found no duty to warn of the "hazard of jaywalking across a busy thoroughfare, an obvious, not hidden danger." (*Ibid.*)

Here, however: (1) directing invitees to park at the pool lot required them to cross Marconi *and* induced them to do so at the most dangerous midblock location; (2) there was no need to cross Marconi at all because unlimited parking was available across much safer Root

Avenue; and (3) Mr. Vasilenko was not jaywalking (in any event, that allegation goes to comparative fault, not defendant's duty).

In *Mahle v. Wilson* (S.C. Ct. App. 1984) 283 S.C. 486 [323 S.E.2d 65] a minor was hit by a car while crossing the highway after leaving defendant's skating rink. The court held (as relevant here) defendant owed no duty to prevent cars from parking on the shoulder of the road opposite its premises, or to provide its own parking lot for customers. (283 S.C. at p. 487.) Here, GFC controlled a parking lot in a dangerous location across the road and directed invitees to use it.

Smith v. Bank of Utah (Utah Ct. App. 1987) 157 P.2d 817 held a bank owed no duty to a bicyclist who was riding on the sidewalk when he was hit by a car leaving the bank's drive-through teller exit, even though the bank's building made it difficult for exiting cars to see people using the sidewalk. (*Id.* at p. 818.) *Smith* conflicts with California law. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32.)

In *Allen v. Mellinger* (1993) 156 Pa.Comwlth. 113 [625 A.2d 1326] the plaintiff was driving on a public road and hit by another car as she tried to enter defendant's property at the crest of a hill with limited visibility, where *state-controlled* lane markings invited motorists to turn. (156 Pa.Comwlth. at p. 115-116.) "Nothing in the parking lot indicate[d] the best or worst place for patrons to enter and

exit." (*Id.* at p. 115.) *Allen* might well have found a duty had *defendant* instructed its invitees to enter its premises at that dangerous place.

The final sister state case cited by defense amici is *Walton v. UCC X, Inc.* (2006) 282 Ga.App. 847 [640 S.E.2d 325]. Plaintiff's decedent rented an apartment from defendant, whose agent directed tenants to park their cars "across the street" while defendant's parking lot was being resurfaced. (282 Ga.App. at p. 847.) Decedent parked in a lot across the road and was then killed trying to cross to the apartment complex. (*Ibid.*)

The court held no duty was owed. (*Walton, supra,* 282 Ga.App. at p. 850.) *Walton* is inapposite because: (1) decedent was not directed to park in that particular lot; (2) the lot was owned by a third party, defendant did not have permission to have tenants park there (*id.* at p. 847), and there were no facts stating defendant controlled the lot; and (3) under Georgia law, "no special . . . relationship" existed between defendant and decedent (*id.* at p. 850).

II.

THE DEFENSE AMICI MISCHARACTERIZE THE *ROWLAND v. CHRISTIAN* DUTY ANALYSIS AND MISAPPLY THE *ROWLAND* FACTORS

A. GFC Is Not Entitled to a Third Bite at the *Rowland* Apple After Spurning Its First Two Opportunities

There is no basis for defense amici's criticisms that the Court of Appeal's opinion is "perfunctory" and "flawed." (Def. Assn. ACB 19.) To the extent that court's analysis as to *Rowland v. Christian* (1968) 69 Cal.2d 108 does not satisfy defense amici's tastes, they should lay the blame at the feet of GFC because it was GFC that, in the trial court and Court of Appeal, denied *Rowland* applied at all.

GFC's initial MSJ memorandum of points and authorities did not mention *Rowland.* (I CT 278-286) Plaintiffs' opposition discussed *Rowland* extensively and explained why a balancing of the *Rowland* factors should not negate the duty here. (II CT 325-329)

Nevertheless, defendant's reply memorandum declined to take part in a *Rowland* analysis. Instead, it employed the rhetorical dodge that "[i]n an implied concession that the authority cited by defendant requires a favorable ruling on this motion, plaintiffs fall back on the case of *Rowland v. Christian.* . . ." (II CT 482) To the extent GFC strayed into *Rowland*'s neighborhood, it was only to make the straw man argument that it would be burdensome "to take people by the

hand and guide them across public streets" (II CT 483), a duty the plaintiffs did not ask the trial court to impose.

At the MSJ hearing, plaintiffs' counsel continued to argue the *Rowland* factors did not negate a duty here. (RT 23) Defense counsel did not address *Rowland* at the hearing (RT 14-31), but the court expressly accepted GFC's written position that *Rowland* did not apply because Mr. Vasilenko was injured in the street. (RT 28) The court then failed to cite *Rowland* in its summary judgment order. (III CT 623-630)

GFC also refused to address the *Rowland* factors in the Court of Appeal. Plaintiffs' AOB observed: (1) the section 1714(a) duty applies unless a *defendant* meets its burden to justify an exception under *Rowland*; and (2) it is not a plaintiff's burden to establish the duty in the first place. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 & fn. 2; AOB 17-18.) Plaintiffs then analyzed the *Rowland* factors to show why *GFC's* burden could not be met. (AOB 18-29)

The AOB also noted *Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1479, had explained: (1) the "*Rowland* factors determine the scope of the duty of care whether the risk of harm is located on site or off site"; (2) the fact the injury occurred on a street over which defendant had no control is not dispositive under *Rowland*; and (3) reversal of summary

judgment is appropriate when a defendant fails to negate the *Rowland* factors. (AOB 19)

GFC again sidestepped *Rowland*, and now also *Barnes v. Black*, by arguing section 1714(a) applies only to on-premises injuries, such that there was no section 1714(a) duty to negate here. (RB 6) GFC observed that in *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, this Court analyzed the *Rowland* factors in deciding a duty care was owed by the hospital defendant, but did not discuss *Rowland* in deciding no duty was owed by the *insurance company* defendant. (RB 7) As shown next, however, *Isaacs* did not absolve GFC of its *Rowland* burden.

1. *Isaacs* Does Not Obviate A *Rowland* Analysis

As relevant here, *Isaacs* affirmed summary judgment in favor of the hospital's liability insurer, Truck Insurance Exchange (Exchange), on the ground it owed no negligence duty to a doctor shot by an unknown assailant in the hospital parking lot. (*Isaacs, supra,* 38 Cal.3d at p. 135.) Plaintiffs alleged Exchange participated in the hospital's decision to disarm its security guards and thus had "some degree of control over the hospital's security system." (*Id.* at pp. 120-121, 134.)

This Court opined that a "defendant cannot be held liable for the defective or dangerous condition of property which it did not own,

possess, or control. Where the absence of ownership, possession, or control has been unequivocally established, summary judgment is proper. [Citations.]" (*Isaacs, supra,* 38 Cal.3d at p. 134.) The Court's statement was entirely correct, as far as it goes.

First Hypothetical: For example, if a person on land controlled by defendant "A" is injured by a hazard on A's land, and *defendant "B" had no control of the injury-producing circumstances* existing on A's land (i.e., B did not create or increase the risk of harm to persons on A's land), then B normally should not owe a duty to the injured person. The same applies whether B possessed land adjacent to A's land, or land far from A's land, or no land at all, since the existence of B's duty depends on B's *conduct, not B's mere status as a land possessor.*

In this hypothetical, an important *Rowland* factor – closeness of the connection between defendant's conduct and the injury suffered (*Rowland, supra,* 69 Cal.2d at p. 113) – would very strongly favor a no-duty finding because the connection would be *nonexistent* and thus less than "attenuated," "distant," or "indirect." (*Cabral, supra,* 51 Cal.4th at p. 779.) If there is literally no connection between the conduct and the injury, it is difficult to see how the other *Rowland* factors could ever weigh in favor a duty.

The above was all *Isaacs* really decided after scrutinizing the moving and opposition evidence, and its reasoning fully comported

with *Rowland*, though implicitly. *Isaacs* determined the evidence "unequivocally established that Exchange had no . . . control of the hospital's premises" because it "exercised no authority or control" over security; "took no part" in deciding what measures to implement; and, though it provided some information to the hospital, it " 'had no specific recommendation . . . that security officers should or should not carry arms. . . .' " (*Isaacs, supra,* 38 Cal.3d at p. 135.)

Isaacs appeared to concede, however, that if the facts were different, Exchange might have owed a duty to plaintiffs: "Relying on out-of-state authority, plaintiffs argue that an insurer should be subject to liability 'where it did not merely perform an insurance function [but] undertook to assume or participate in control over the affairs of its insured.' Even assuming the applicability of that authority here, the facts do not support the contention. There was no evidence that Exchange had any degree of control over the affairs of the hospital." (*Isaacs, supra,* 38 Cal.3d at p. 135, fn. 10.)

Thus, *Isaacs* did not hold an insurer can *never* owe a duty of care to a person injured on its insured's land, and nothing in *Isaacs* compels a conclusion that a possessor of land (such as GFC, which possessed the pool lot and its church premises) can *never* owe a duty of care to a person injured on adjacent land (such as Marconi Avenue).

Second Hypothetical: The point is illustrated by a variation on the earlier hypothetical. If a person on land controlled by defendant A is injured by a hazard on A's land, *but defendant B also had some control of the injury-producing circumstances existing on A's land (i.e., B created or increased the risk of harm found on A's land), then B owes a duty to the injured person* unless the connection between B's conduct and the injury is too "attenuated," "distant," or "indirect" (*Cabral, supra,* 51 Cal.4th at p. 779) or other *Rowland* factors negate the duty.

In this Second Hypothetical, as with the First, the duty question does not turn on whether or not defendant B has land adjacent to A's land; the existence of B's duty depends on B's *conduct, not its status as a land possessor*. Thus, B is not entitled to a judicially-created immunity or a "premises liability" exemption just because it happens to possess land adjacent to A's land. If that duty exception existed, entities would paradoxically have less responsibility for risks they create *adjacent* to their land (and thus more likely to harm their invitees) than for risks they create *far away* from their land.

Crucially, *Isaacs* did *not* state "ownership, possession, or control" of the land where an injury occurs are the *only possible bases* from which a duty toward persons on that land may arise. (RBM 16, 19) If those were the only bases for a duty, negligent drivers on public roads could conceivably argue they owe no duty to other persons on those

roads, since only *government authorities* control roads and the traffic upon them. Such an argument would be fallacious, but no more so than one claiming immunity for land possessors who increase the risk of harm to persons on public roads.

2. GFC Failed To Satisfy Its *Rowland* Burden

Under these circumstances, the Court of Appeal was right to decide that GFC's total failure to address the *Rowland* factors meant GFC could not establish a duty exception. (*Vasilenko, supra,* 248 Cal.App.4th at p. 155.) It was not the Court of Appeal's job to serve as backup appellate counsel for GFC by raising issues and arguments for that party (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164) – especially as GFC's avoidance of *Rowland* seemed to comprise the core of its litigation strategy in the trial court and Court of Appeal.

Not until its Reply to Plaintiffs' Answer to Petition for Review (RTA) – after the Answer noted the Petition failed to cite *Rowland* (APR 7) – did defendant concede, for the first time in this suit, that "[t]here is no question that *Rowland* . . . sets forth the considerations to be evaluated in order to determine whether there is an exception to the duty set forth in Civil Code section 1714." (RTA 5)

GFC was able to convince the trial court *Rowland* did not apply, and then gambled it could lead the Court of Appeal down the same wrong path. It lost that wager, and now defense amici ask this Court to

allow GFC to shift its bet to the *Rowland* horse mid-race. (Def. Assn. ACB 20, citing *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [new legal theory based on facts in record may be considered for first time on appeal]; but see *Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 92 [*Ward* did not apply, and new claim forfeited, because relevant facts not developed in trial court].)

Summary judgment is unavailable if there exist triable issues of fact material to the duty issue. (*Alcaraz, supra,* 14 Cal.4th at p. 1162, fn. 4.) GFC failed, e.g., to develop evidence proving *beyond dispute* its appellate claims that: (1) the pool lot was "merely an option" and Mr. Vasilenko had the option to park on "the street" (OBM 33), though he was told he "need[ed]" to park at the pool lot and the map GFC gave him decreed "NO PARKING ON THE STREETS!" (II CT 593, 595, 433); and (2) he was not a business invitee, a fact GFC did not dispute prior to coming to this Court (RBM 18).

Regardless whether this Court agrees with defense amici that there is no forfeiture by GFC, a full analysis of the *Rowland* factors will show defendant cannot justify a duty exception based on the *disputed* and undisputed facts in this record.[7]

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[7] Contrary to defense amici's implication (Def. Assn. ACB 19-20) "perform[ing] a full analysis of the *Rowland* factors" and finding that GFC forfeited its reliance on the *Rowland* factors are not mutually exclusive.

B. Defense Amici Define the Issue and the Relevant Facts Too Vaguely for the Purposes of *Rowland*

Defense amici ask this Court to evaluate the *Rowland* factors at a level of factual generality that is too broad and define the "category" of the case too vaguely. (Def. Assn. ACB 19.) The category, they claim, is "whether, as a general matter, landowners owe a duty to protect against off-premises hazards." (Def. Assn. ACB 19)[8] It would defeat the purpose of these proceedings to define these matters as nebulously as these amici suggest.

Verdugo, supra, 59 Cal.4th 312 shows why the defense amici are wrong. This Court granted the Ninth Circuit's request to address an issue of state law affecting a pending appeal. (*Id.* at p. 316.) This Court noted "the question of state law, as submitted by the Ninth Circuit panel, was phrased in broader terms. . . ." (*Id.* at p. 316, fn. 1.) This Court therefore "reformulated and narrowed" the question "to conform to the facts of the pending appeal. . . ." (*Id.* at p. 316.) It explained that "[b]ecause we do not resolve abstract questions of law but rather address only issues that 'are presented on a factual record' [citation],

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8 GFC has framed the Issue Presented as: "Does one who owns, possesses, or controls premises abutting a public street have a duty to an invitee to provide safe passage across that public street if that entity directs its invitees to park in its overflow parking lot across the street?" (OBM 1) It is this Issue Presented that plaintiffs address here and in their ABM, and that this Court has set out.

we have restated the issue to conform to the facts at issue in the underlying action." (*Ibid.*)

Justice Werdegar's concurring opinion in *Verdugo* reiterated the point: "To be sure, the *Rowland* factors are correctly applied to a *category* of allegedly negligent conduct rather than to the conduct of the particular defendant in the case at bar [citation], but the category should be framed in a manner that allows for meaningful analysis of the factors. The issue in this case is whether large retailers have a duty to install and maintain AEDs, not whether businesses in general have a duty to take precautionary safety measures in general. The latter would be too broad for meaningful analysis." (*Verdugo, supra,* 59 Cal.4th at p. 346 [conc. opn. of Werdegar, J.], original italics.)

Although it is true that "[w]hen addressing the duty question, 'the factual details of the accident are not of central importance' " (Def. Assn. ACB 19, quoting *Cabral, supra,* 51 Cal.4th at p. 774), the defense amici stretch that concept beyond its breaking point. Whenever there is a duty question, the facts of the case at bar are instrumental because they determine whether the case is emblematic of the "category of case" for which the defendant seeks a "categorical" exception.

The rule that defense amici seek to wield in favor of GFC is designed to protect *plaintiffs* (and the integrity of the duty analyses performed by courts) from *defendants'* attempts to distort *Rowland*'s

foreseeability factor by arguing a particular injury resulted in such an unusual way that the particular defendant should *not* have liability in that specific situation.

Courts are not authorized to determine a particular injury was "categorically" *unforeseeable* on the ground the defendant could not have predicted the "precise nature or manner of occurrence" of the injury in the case under consideration. (*Kesner, supra,* 1 Cal.5th at pp. 1145-1146.)

This prevents confounding the more general "foreseeability" a *court* examines as part of the duty analysis with the more specific "foreseeability" the *jury* considers in deciding breach and causation. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.) "To base a duty ruling on the detailed facts of a case risks usurping the jury's proper function of deciding what reasonable prudence dictates under those particular circumstances." (*Cabral, supra,* 51 Cal.3d at p. 774.) Courts must not make "no breach" rulings in the guise of "no duty" rulings.

Cabral made it clear this rule is to guard against defendants' attempts to merge the elements of duty and breach. (*Cabral, supra,* 51 Cal.4th at p. 774 [citing with approval, and quoting, *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1841, noting *Jackson* "reject[ed], as an improper 'ultra-specific manner' of defining risk, the defendant's claim that 'it was not reasonably foreseeable that the

decedent would be struck by an errant vehicle "while standing on the shoulder of the roadway four feet inside the fog line." ']".)

Courts "rely on [*Rowland*] factors not to determine 'whether a *new duty* should be created, but whether an *exception* to Civil Code section 1714 . . . should be created." (*Kesner, supra,* 1 Cal.5th at p. 1143.) " 'In applying the . . . *Rowland* factors . . . we have asked not whether they support an *exception* to the general duty of reasonable care on the facts of the particular case before us, but whether *carving out* an entire category of cases from that general duty rule is justified by clear considerations of policy. . . . [¶] By making *exceptions* to [ ] section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction" between the findings of duty and breach of duty. (*Kesner, supra,* 1 Cal.5th at pp. 1143-1144, quoting *Cabral, supra,* 51 Cal.4th at p. 772, italics added.)

Thus, in applying the rule, the focus is *always* on whether a duty *exception* should be made in the case at bar because it is representative of a "general class of cases" for which an exception should be made. (*Kesner, supra,* 1 Cal.4th at p. 1144.) If the case under consideration, because of its specific facts, is not amenable to the fashioning of a more general categorical *exception*, defendant's burden to establish a duty exception *in that case* must fail.

As it would be unfeasible for the Court to determine whether the "category" of cases represented by the instant one is entitled to an exception unless it examines the facts with sufficient specificity, it should reject defense amici's attempt to turn this shield into a sword.

C. Defense Amici's Analysis of the *Rowland* Factors Is Faulty

Plaintiffs have addressed each of the eight *Rowland* factors thrice on appeal so far. (AOB 20-29, ARB 17-30, ABM 23-31) In this brief, plaintiffs discuss only the defense amici's erroneous positions as to six of the factors.[9]

1. Foreseeability

Defense amici's first argument is that foreseeability should not be accorded much weight here, "[o]therwise this factor will support imposing a duty on every defendant that is located anywhere near a busy road or high crime area." (Def. Assn. ACB 20.) They overstate their thesis.

Although foreseeability is "the most important factor" (*Kesner, supra,* 1 Cal.5th 1145), it does not preclude a duty exception if that factor is outweighed by the other *Rowland* factors – most especially, if the connection between defendant's conduct and the injury suffered is weak or nonexistent.

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9 Defense amici do not address Factor 2 (degree of certainty that plaintiff suffered injury) or Factor 5 (policy of preventing future harm).

The closeness-of-connection factor is "strongly related" to the question of foreseeability itself (*Cabral, supra*, 51 Cal.4th at p. 779), but they are not the same. Thus, even when an injury to an invitee is foreseeable, there may be no duty if the injury is "too attenuated" from, and especially if it is completely unconnected to, defendant's conduct. (*Ibid.*) Normally, a land possessor should not owe a duty to an invitee injured off its premises if the *only* link between the defendant and the injury is the hazard's proximity to the premises. (ABM 47) But here, in addition to proximity, there is a close connection between GFC's *negligent conduct* and the injury to Mr. Vasilenko. (See Part II.C.2, *post.*)

Defense amici's second argument as to foreseeability – that "it is not foreseeable that a pedestrian would endanger himself by crossing a street without ensuring he could make it across safely" (Def. Assn. ACB 20) – is nonsensical. There is no reason to believe all pedestrians hit by cars are 100% at fault or that they enjoy being hit by cars. Human experience teaches that pedestrians will try to cross only when they are convinced they can make it to the other side, but sometimes the negligence of one or more parties proves them wrong.

2. Closeness of Connection Between Defendant's Conduct and the Injury Suffered

Defense amici's argument as to Factor 3 misstates the record by claiming GFC "did nothing more than provide parking in a location

that required invitees to cross Marconi to reach the church." (Def. Assn. ACB 21.) The evidence is that besides providing the pool lot, GFC, inter alia: (1) told invitees they "need[ed]" to park in that lot (II CT 593, 595); (2) knew it was very dangerous to cross Marconi Avenue without the assistance of its attendants, especially midblock directly to the church (II 539-540, 546); and (3) did not tell invitees the business plaza lot had unlimited parking that did not require crossing Marconi (II CT 479, 483).

Kesner explained " '[i]t is well established . . . that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person.' " (*Kesner, supra,* 1 Cal.5th at p. 1148, quoting *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716.) It is highly foreseeable that speeding motorists might negligently fail to stop for pedestrians.

3. Moral Blame

Defense amici deny GFC is morally blameworthy by arguing it is no more than negligent. (Def. Assn. ACB 21.) However, this Court has assigned moral blame to negligence when "plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue," or the

defendants failed to take steps to avert foreseeable harm. (*Kesner, supra,* 1 Cal.5th at p. 1151.) There is extensive evidence of moral blame here:

Mr. Vasilenko was on his first visit to GFC and unaware of the extreme danger of crossing Marconi on foot in that vicinity (especially midblock). GFC, however, was acutely aware of that danger for many years before Mr. Vasilenko's visit, so much so that it asked the County of Sacramento to install a signal or crosswalk, but then it continued using the pool lot after those requests were denied. (I CT 235, II CT 518)

GFC was so concerned about the magnitude of the risks created by using the pool lot that assigned some attendants to advise invitees where, when, and how to cross Marconi, but then failed to train them how to perform those duties competently. GFC also ordered invitees to park at the pool lot even though it knew there was plenty of parking at the business plaza overflow lot that required only crossing the much safer Root Avenue. (I CT 235, II CT 433, 518)

Defense amici's claim that allowing invitees to search for their own off-premises parking "might have created different and greater risks than directing them to a nearby parking lot" – by which they seek to recast GFC's conduct as "admirable" – is conjecture. (Def. Assn. ACB 21.) It also disregards the *fact* that GFC had two overflow lots but told

Mr. Vasilenko and other invitees they needed to park *only* in the dangerous one. There is moral blame in these circumstances.

4. Burden on Defendants and Consequences to the Community

Defense amici err in contending these factors weigh "heavily against" plaintiffs and, as shown in Part II.B, *ante*, the facts of the case under consideration are not "irrelevant." (Def. Assn. ACB 21.) These amici fail to discern the broader ramifications of the discussion in plaintiffs' merits brief regarding these intertwined *Rowland* factors. (ABM 28-30)

Plaintiffs referred to the "accumulation of the large number of unique facts existing in this case" (ABM 28) to illustrate why this case is *different* from the "category" of cases for which GFC seeks immunity. Plaintiffs do not disregard supposed effects on other potential defendants or limit their consideration to the absence of burdens on GFC alone.[10]

No one here is asking that a "general duty of due care [be] imposed on *all* owners of private property located adjacent to public

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10 As stated in plaintiffs' answer brief on the merits: "**Factor 6** shields *a defendant* from liability where it can prove it would have been too costly or impractical for it to have done something that was less likely to injure the plaintiff, but GFC cannot make that showing on this record. *In the category of cases like the one at bar*, where a defendant has already decided to direct its invitees where to park, and can just as easily direct them to safer parking instead of dangerous parking, *a duty of ordinary care imposes no burden.*" (ABM 28, italics added, original bolding.)

streets," and it is hyperbolical and speculative for defense amici to assert "*millions* of property owners would be required to assume responsibility for safe passage from *any* off-site parking lot they *suggest* their visitors might use." (Def. Assn. ACB 22, italics added.)

Although the Court must decide this case with an eye toward how its opinion will impact the entire State of California, it is still only *this case* that it must decide. Contrary to the invitation extended by defense amici's litany of "what ifs" (Def. Assn. ACB 22), this Court need not devise a "grand unified theory" omnisciently covering every possible factual scenario that might ever arise in the future.

Like all appellate court decisions, the holdings made here will necessarily be limited to the facts under which this case arose (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1005-1006), and it will be for future courts to decide whether and how its holdings should apply to novel facts of which this Court cannot currently conceive.

Defense amici also speculate about what land possessors might need to do to avoid liability if "a patron jaywalks. . . ." (Def. Assoc. ACB 22.) Mr. Vasilenko did not jaywalk. (Sac. County Code, tit. 10, ch. 10.20.040; ABM 7, 11, 50.) As explained in VERDICT, the magazine of defense amicus Association of Southern California Defense Counsel:

"The term 'jaywalking' is clearly used to make a fast and forceful impression that the pedestrian was crossing in an illegal manner

outside of a crosswalk. *However, is this really a fair assessment?* . . . [¶] . . . [¶] . . . *No, it is not.* . . . Most often, pedestrians can cross at any location they perceive is appropriate as long as they do so without creating unsafe conflicts or violating the right-of-way provisions contained in the [California Vehicle Code]. In the end, we must admit that societal perspectives on 'jaywalking' tend to give short shrift to pedestrians as they travel about our auto-dominated culture." (Manjarrez, M., P.E., MEA Forensic Engineers & Scientists, Inc., *Jaywalking and the Elusive Unmarked Crosswalk*, VERDICT (2011, Vol. 3) at pp. 9, 12 <http://www. ascdc.org/PDF/ASCDC%2011-3.pdf> [as of Feb. 14, 2017].)

Defense amici's analysis of the consequences to the community of recognizing a duty is also faulty. Unlike defense amici, plaintiffs' amicus curiae California Walks supplies verifiable facts showing that, too often, crossing a street in California means risking one's life. Besides having the nation's largest *number* of pedestrian fatalities (probably because it has the largest population), pedestrians also comprise over 21% of all California traffic fatalities, a *proportion 50% higher* than the national average.[11] Since only 3% of all traffic

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11 See authorities at Cal. Walks ACB 10, fn. 3 & p. 14, fn. 7.

collisions involve pedestrians, they are over-represented *seven-fold* among traffic fatalities.[12]

Even more tragically, those most likely to benefit the most from a little help in crossing – pedestrians under age 20 and over age 65 – constitute *50%* of the pedestrians killed.[13]

A rational and humane contemplation of community advantages (far-reaching) and disadvantages (essentially nil) of recognizing a duty of care indicates it is proper to require possessors of land to take simple and inexpensive precautions when their conduct increases the risk of harm to their pedestrian invitees. Virtually every person in California is a pedestrian almost every day (Cal. Walks ACB 15), and pedestrians who use off-premises lots must far outnumber small businesses that provide off-site parking for invitees.

Defense amici proclaim concern about ill-defined financial and emotional hardships for small businesses (Def. Assn. ACB 23-24), but provide no facts about how many small businesses provide off-premises parking across a public road. Logically, however, recognizing a duty of care will financially benefit businesses because it will motivate them to take simple steps to *reduce and prevent* injuries in the first place and

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12 See authorities at Cal. Walks ACB 15, fn. 10, & p. 16.

13 See authority at Cal. Walks ACB 10, fn. 3.

thus necessarily reduce the number of injured persons who might require expensive medical care and file lawsuits.

When negligence does cause an injury, the costs of caring for the injured should be shared by *all parties* whose negligence contributed to the injury's occurrence, including negligent land possessors (and their liability insurance companies).

As for business owners' emotional wellness, far more severe mental anguish will be suffered by the increased number of injured pedestrians and their families that will result if land possessors have no incentive to use ordinary care.

The plaintiffs do not ask this Court to impose on any private party any duty to "place[ ] traffic control devices and markings on any road," "attempt[ ] to direct the movement of traffic," "control public streets" (Def. Assn. ACB 12), "regulate traffic," or "alter[ ] public roadways" (Def. Assn. ACB 23). Nor is there any request for "hand-holding" of pedestrians as they cross the street. (II CT 483)

Defense amici do not deny that GFC and similarly situated defendants can easily satisfy the duty urged by plaintiffs. Nonetheless, these amici criticize plaintiffs for urging this Court to "focus on the burden of discharging the duty (see ABOM 28-29), rather than the burden that would result from imposing liability for breach of the duty" (Def. Assn. ACB 24-25).

Kesner shows that the plaintiffs are correct, however: "[O]ur duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care. [Citations.]" (*Kesner, supra,* 1 Cal.5th at p. 1152.)

Finally, although pedestrians hit by cars or their survivors may attempt to obtain redress from government agencies when there is an incident on a public street (Def. Assn. ACB 23), this does not mean that private parties who are also responsible should be absolved. Each negligent actor (public *and* private) should be liable for its comparative share of the fault.

5. Insurance

Defense amici's claims as to the final *Rowland* factor also fail. "[T]he tort system contemplates that the cost of an injury, instead of amounting to a 'needless' and 'overwhelming misfortune to the person injured,' will instead 'be insured by the [defendant] and distributed among the public as a cost of doing business.' [Citation.] Such allocation of costs serves to ensure that those 'best situated' to prevent such injuries are incentivized to do so. [Citations.]" (*Kesner, supra,* 1 Cal.5th at p. 1153.)

III.

ALL OF THE PLAINTIFF'S ARGUMENTS AND THEORIES ARE ENCOMPASSED IN THE OPERATIVE COMPLAINT AND WITHIN THE SCOPE OF THE ISSUE ON REVIEW

California Walks correctly asserts plaintiffs have not raised any "new theories" regarding the duty owed, and that all the factual and legal arguments in plaintiffs' merits brief are reasonably encompassed by the first amended complaint's allegations, which "must be construed broadly." (Cal. Walks ACB 20 & authorities cited there.)

Plaintiffs agree the complaint must be broadly construed, but also wish point out that little or no "construction" appears necessary because complaint's allegations *on their face* appear to encompass the arguments advanced by the plaintiffs.

As shown by the summary in Table A on the following page, GFC errs when it alleges plaintiffs are raising "new claims" (RBM 1, 3-6) as to the duty: (1) not to direct invitees to the pool lot instead of the business plaza lot: and (2) not to use the pool lot at night in bad weather, or on a permanent basis:

TABLE A

Cause of Action & Allegations	*Arguments & Citations*
Third: GFC created unreasonable risk of harm to invitee by using, controlling, and maintaining the pool lot (I CT 68).	GFC used pool lot despite knowledge of danger to invitee (AOB 8, 30, ARB 6, ABM 6, 38). GFC had a duty not to use lot located there (AOB 23, 35, 39, ARB 11, 18, ABM 2, 38). GFC controlled location of overflow lots (AOB 45).
Third: GFC induced and required invitee to park in the pool lot.	Attendant directed invitee to park at pool lot (AOB 1, 30, ARB 6, 18, ABM 2-3, 10, 24,-25).
Third: GFC induced and required invitee to cross Marconi without assistance or instruction regarding safe access to the church from the pool lot.	Attendants failed to tell invitee not to cross midblock (AOB 2, ARB 15, 18, ABM 3, 11). GFC induced invitee to cross midblock (AOB 44, 51, ABM 24, 33, 38, 40).
Third: GFC knew or should have known invitee required the assistance and instruction from attendants, but failed to offer it.	Attendants failed to tell invitee not to cross midblock (AOB 2, ARB 15, 18, ABM 3, 11).
Fourth: GFC's inadequate training, qualification, and supervision of attendants created risk of harm to invitees who relied on attendants to "direct them to a safe place to park" (I CT 69).	Attendants failed to tell invitee not to cross midblock (AOB 2, ARB 15, 18, ABM 3, 11) and about safe parking at business plaza (AOB 1-2, 23, 25-26, 30, 37, ARB 6, 11, 15, ABM 3, 8-9, 12-13, 20, 25, 38); opened pool lot in rain and darkness (AOB 23, 25, 30, ARB 11, 15, 18, ABM 3).
Fourth: GFC's inadequate training and supervision of attendants created risk of harm to invitee who relied on them for other assistance in crossing Marconi.	Attendants failed to tell invitee not to cross midblock (AOB 2, 23, ARB 15, 18, ABM 3, 11).

California Walks also notes the "Court of Appeal's opinion does not address this issue," i.e., GFC's claim that the above matters are outside the pleadings. (Cal. Walks ACB 20, fn. 13.) What the amicus apparently means (correctly) to imply, but does not fully explicate, is that plaintiffs raised in the Court of Appeal the *same* legal and factual arguments that GFC claims are raised for the first time in this Court. (AOB 10-11, 23-26, 30; ARB 11, 15, 18-19, 24) In the Court of Appeal, however, GFC – in accordance with its overall litigation strategy – simply disregarded plaintiffs' arguments; it never asserted they were not cognizable by the Court of Appeal.

The fact the Court of Appeal found GFC owed a duty of care in one respect and reversed summary judgment on that basis, such that it did not need to reach plaintiffs' other asserted bases for a duty, does not preclude plaintiffs' arguing them here.

California Walks is also correct that voluntary assumption of a duty is cognizable here, but that observation by the amicus likewise requires some clarification. (Cal. Walks, p. 22, fn. 14.) Amicus could have added that GFC, without objection, *actually briefed* voluntary assumption of a duty in the Court of Appeal. (RB 16-17, RB 18; see ABM 54-55.) GFC's claim that this is also a "new" issue must fail.

The theory that GFC voluntarily undertook a duty is also within the scope of the complaint's allegations (on their face or construed

broadly, if need be). Inter alia, plaintiffs alleged: GFC's attendants told Mr. Vasilenko where to park; he relied on the attendants to direct him to a safe place to park and to assist him in crossing Marconi safely; and the attendants failed to carry out those tasks. (I CT 68-69 & Table A, *ante*.) This Court may decide the issue, if necessary, even though the Court of Appeal had no need to do so. (ABM 54-55)

Further, all three of the supposedly "new" issues (RBM 3) are "fairly included in the petition or answer." (Cal. Rules of Court, rule 8.516(b)(1).) Plaintiffs' Answer to the Petition for Review included these three issues. (APR 4-5, 10, 17-20) (*Goldstein v. Superior Court* (2008) 45 Cal.4th 218, 225 [arguments included in answer to petition for review "are properly before us"].)

Finally, this Court may find it "necessary to address [those] point[s] in order to state and decide fairly and accurately the legal questions inherent in the case." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 234, fn. 13.) It would be unjust to allow GFC to argue it had no duty to " 'rescue or protect' " Mr. Vasilenko or "take affirmative action for [his] protection" on the ground this case involves only "nonfeasance" (OBM 18, 22, RBM 9-10, 31-32, see ACB Cal. Walks 22, fn. 14), but then preclude plaintiffs from showing GFC

voluntarily assumed a duty to perform those very same protective activities (establishing its duty to do them with ordinary care).[14]

IV.

THE DUTY HERE WAS APPROPRIATELY LIMITED BY THE COURT OF APPEAL, AND DEFENSE AMICI'S RELIANCE ON INAPPOSITE CALIFORNIA CASE LAW IS MISPLACED

A. The Court of Appeal Properly Confined the Duty of Care To Defendants Who "Control" Overflow Parking Lots

Defense amici argue the Court of Appeal's limitation of the duty to defendants who *control* the parking lots they direct invitees to use is insufficient to prevent "unlimited liability," and thus the duty should be totally obliterated. (Def. Assn. ACB 26, citing *Vasilenko, supra,* 248 Cal.App.4th at p. 157.) The Court of Appeal's modification of the duty was both sensible and proper, however. (*Kesner, supra,* 1 Cal.5th at p.

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[14] In this Court (OBM 34, 39-40, RBM 34-35), GFC also seeks reversal of the Court of Appeal's judgment based on two alternative MSJ arguments it made in the trial court (causation and negligent training) but that it *failed* to raise in the Court of Appeal, though that court addressed them sua sponte. (*Vasilenko, supra,* 248 Cal.App.4th at pp. 158-159).

It is thus incongruous for GFC to assert plaintiffs must not raise in this Court claims that were briefed in the Court of Appeal by *both parties* or briefed there by plaintiffs *without objection* by GFC. The issues GFC labels as "new" (but which go to the central issue of whether a duty exists) are more "fairly included in the petition or answer" than are defendant's alternative MSJ issues raised here. (Cal. Rules of Court, rule 8.516(b)(1).) GFC's Petition for Review *omitted* the causation issue; failed to note its MSJ raised causation as a basis for summary judgment; mentioned negligent training only in a summary of the fourth cause of action; and did not argue the Court of Appeal erred in rejecting both of GFC's alternative claims.

1155 [limitation of scope of duty "strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims"].)

The line the Court of Appeal drew is not "arbitrary." (Def. Assn. ACB 28.) An entity that *controls* an off-site parking lot is in a far better position to provide invitees with such warnings as may be necessary to make the street crossing reasonably safe (for example, it can post signs in the lot, or have its lot attendants provide brief spoken instructions as invitees drive in or walk out). Control of the lot also gives an entity the ability to close the lot permanently, or when temporary conditions make crossing the street even more hazardous.

The Court of Appeal's duty limitation also resolves the concerns of defense amici about the impracticability of imposing on potential defendants the duty to exercise control over the property of others, including public property. (Def. Assn. ACB 26.) It also honors this Court's view that the "crucial element is control." (*Schwartz, supra,* 67 Cal.2d at 239.) The defense amici bemoan the supposed difficulty of "defin[ing] the scope of such a duty" even as they fail to notice that the Court of Appeal easily did so. (Def. Assn. ACB 27.)

It was not merely GFC's "selection" of the pool lot that "drove this case." (Def. Assn. ACB 26.) Control of the lot gave GFC the: (1)

power to decide whether and when to use it; (2) ability to direct invitees to park there or not; (3) right to post portable, inexpensive, and reusable warning signs inside the lot (if it wished); and (4) staff it with attendants assigned, inter alia, to warn invitees not to cross midblock. It may also be inferred GFC would not have used the lot at all if it were not allowed to staff it with agents assigned there *for the very purpose of ameliorating the risks it knew its use of the lot created.*

In any event, plaintiffs do not object to this Court restating the duty limitation that the Court of Appeal made clear.

B. The Additional California Case Law Relied on By Defense Amici Is Inapposite

Sexton v. Brooks (1952) 39 Cal.2d 153 does not justify a duty exception here. It involved a physical defect on a public sidewalk that was "completely independent" of defendant's property. (*Id.* at pp. 156, 157). *Sexton* explained no duty was owed because its facts differed from those of *Johnston v. De La Guerra Properties, Inc.* (1946) 28 Cal.2d 394: The step-down in *Sexton* was entirely on the other premises (*Sexton,* 39 Cal.2d at pp. 156, 157), whereas the step-down in *Johnston* was at the point where defendant's private walk abutted the other premises (*Johnston,* 28 Cal.2d at p. 398).

The facts of the instant case are more like those in *Johnston* because they involve the dangerous interaction of GFC's property with an adjacent hazard. (ABM 41-44) *Sexton* is also inapposite to the

extent it rests on the proposition that a landowner has no duty to maintain an abutting public street (*Sexton, supra,* 39 Cal.2d at p. 157), since no such duty is urged here.

McGarvey v. Pacific Gas & Electric Co. (1971) 18 Cal.App.3d 555 also does not support a no-duty ruling. PG&E's employee (Howell) stopped at the curb in front of PG&E's premises to drop off co-employee Perry (his carpooling partner). (*Id.* at p. 558.) Howell then continued down Fruitridge Road and started to make a U-turn, at which point he struck the plaintiff motorcyclist. (*Ibid.*)

PG&E provided off-street parking for employees but Howell did not use the lot because it was too far away from the shop where he worked, and *PG&E did not give him directions about where to park.* (*McGarvey, supra,* 18 Cal.App.3d at p. 558.) PG&E's foreman knew shop employees, like Howell, usually made U-turns on Fruitridge before parking along that street so that their cars would be pointing toward their homes at the end of the day; this practice also reduced traffic congestion when shop employees arrived and departed. (*Ibid.*)

Regarding PG&E's alleged direct liability (the second cause of action, as to which a *demurrer* was sustained), plaintiff alleged PG&E owed him duties to: (1) provide sufficient off-street parking for all employees' cars; (2) direct traffic so as not to discourage employees from using PG&E's lot; (3) not require or encourage parking on the

street; and (4) refrain from tolerating the making of U-turns before parking. (*McGarvey, supra,* 18 Cal.App.3d at p. 559.)

Plaintiff also alleged PG&E " 'dictated' " to its employees where they could or could not park, but the court found that allegation "too sweeping" because, in the context of "P.G. & E's responsibility for Howell having made a U-turn," the allegation was too "divorced from any relationship with [PG&E's] parking lot on its premises more than a block away. . . ." (*McGarvey, supra,* 18 Cal.App.3d at p. 559, fn. 1.) In the case at bar, *evidence* indicates a close connection (spatial and causal) between GFC's negligence, GFC's pool lot, and the injury to Mr. Vasilenko.

Our case is more similar to *Annocki, supra,* 232 Cal.App.4th at p. 38, which distinguished *McGarvey* and observed that *McGarvey* itself admitted: " 'We need not, and do not, fix an inflexible rule by this decision. Circumstances can be conceived where an occupier of land could . . . unleash forces onto public streets the nature of which would require a court to say that injury to third persons was foreseeable and that a duty of care existed and was breached.' ([*McGarvey, supra,* 18 Cal.App.3d] at p. 562.)"

McGarvey's analysis of PG&E's alleged vicarious liability for the acts of Howell (the first cause of action, as to which PG&E obtained

summary judgment) is instructive, however, and indicates GFC has a duty here based on vicarious liability.

Plaintiff argued Howell was in the scope of his employment because he was going to work when the incident occurred. (*McGarvey, supra,* 18 Cal.App.3d at p. 563.) The evidence showed, however, that Howell was not traveling to a job site (as opposed to commuting) and was not on company time at the time of the incident, and so the injury was not PG&E's responsibility. (*Id.* at p. 564.) Here, GFC is vicariously liable for the negligent acts and omissions of its attendants, who were acting as its agents when their conduct caused plaintiffs' injuries.

All remaining arguments of defense amici that not addressed in the instant brief were refuted in the ABM, and are not conceded by plaintiffs.

CONCLUSION

The plaintiffs respectfully request this Court to affirm the judgment of the Court of Appeal in full, on an any theory supported by the record. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19; *People v. Hernandez* (2008) 45 Cal.4th 295, 298 [this Court "affirm[s] the judgment of the Court of Appeal"]; *Construction Protective Services v. TIG Specialty Insurance Co.* (2002) 29 Cal.4th 189, 193 [this Court "affirm[s] the judgment of the Court of Appeal,

without adopting that court's reasoning"].) Plaintiffs also request such other and further relief as the Court may deem appropriate.

Respectfully Submitted,

Dated: February 23, 2017 /s/ Frank Torrano

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CERTIFICATION OF WORD COUNT

Appellate counsel certifies that this brief contains 13,953 words. Counsel relies on the word count of the computer program used to prepare the brief. (Cal. Rules of Court, rule 8.204(c).)

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 23, 2017 /s/ Frank Torrano

Frank J. Torrano

PROOF OF SERVICE BY MAIL

Caption: *Vasilenko v. Grace Family Church,* Supreme Court No. S235412

Document: **PLAINTIFFS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS OF: (1) ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL and ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF DEFENDANT; and (2) CALIFORNIA WALKS IN SUPPORT OF PLAINTIFFS**

Filed: In the Supreme Court of the State of California. **(One original and eight copies constructively filed on this date under Cal. Rules of Court, rule 8.25(b)(3)(A) using Priority Mail.)**

I, Frank J. Torrano, declare: I am at least 18 years of age and not a party to this legal action; I am employed in the County of Sacramento, where the mailing occurred; and my business address is 8801 Folsom Blvd., Suite 230, Sacramento, CA 95826.

On this date, I mailed a copy of the above-entitled document by enclosing a true copy of the document in a sealed envelope addressed to each addressee, respectively, as follows, and depositing the sealed envelope with the U.S. Postal Service, with First Class postage fully prepaid:

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Frank J. Torrano
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/ s / Frank Torrano
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