

S.Ct. Case No.: S259216

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

YAZMIN BROWN, *et al.*
Plaintiffs/Appellants/Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE
Defendant/Respondent.

After Decision by the Court of Appeal
Second Appellate District, Div. Seven (B280550)
(Superior Court of Los Angeles County, Hon. Michael P. Vicencia
BC599321)

REPLY IN SUPPORT OF PETITION FOR REVIEW

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Plaintiffs and Appellants, KENDRA GATT, BRIANNA BORDON, and YAZMIN BROWN (collectively “Petitioners”), hereby file this Reply in further support of their Petition to this Court for review of the published decision of the Court of Appeal, Second Appellate District (Div. Seven) issued on October 8, 2019, affirming the trial court’s Judgment in favor of Defendant/Respondent, UNITED STATES OLYMPIC COMMITTEE, in the underlying sexual abuse dispute.

I.

INTRODUCTION

In their Petition for Review, Petitioners ask this Court to grant review to clarify the appropriate test minor plaintiffs must satisfy to establish a duty by defendants to protect them from the sexual abuse of third parties. In doing so, Petitioners explained how the decisional law is inconsistent and conflicting on the two predominate tests which have evolved to define that duty of care, the Restatement’s “Special Relationship” test, and the “*Rowland* factors” test, derived from this Court’s seminal decision in *Rowland v. Christian* (1968) 69 Cal.2d 108. As Petitioners further detailed, some courts have employed *either* test to determine the existence and scope of such a duty of care,

viewing them as *independent, alternative bases* on which such a duty could be established. Other courts (like the Court of Appeal) have viewed the *Rowland* factors test only as a subsidiary mechanism to limit or qualify a duty if it is first established under the Special Relationship test, thereby requiring plaintiffs to satisfy *both* tests before they can establish a duty of care.

In response, USOC pretends that conflict does not exist. In doing so, USOC ignores several lead cases which have applied either or both tests, in a variety of circumstances, all with inconsistent outcomes. In short, USOC flouts the principal ground for review and the essence of the conflict this Court is now compelled to resolve. Petitioners reply here to further crystallize the nature of that conflict and to seek this Court's intervention so minor victims of sexual abuse will know with certainty what they must plead and prove to establish a duty of care against defendants (like USOC) charged with their protection.

II.

DISCUSSION

A. USOC's Answer Ignores One of the Principal Grounds Compelling This Court's Review.

USOC contorts to deny that several reported case – from this Court and the various Courts of Appeal – have tested the duty of care question by independently applying the Special Relationship test and the *Rowland* factors test. As Petitioners previously explained, in *Nally v. Grace Community Church* (1988) 47 Cal.3d 278 this Court independently analyzed both the Special Relationship doctrine and the *Rowland* factors test in deciding whether church pastors had a duty to prevent a foreseeable suicide. Specifically, the Court engaged in the *Rowland* factors analysis even after finding that no special relationship compelled a duty of care under the Restatement's test. (*Id.* at 296 [declining to find a duty under the Special Relationship test but then turning to “the other considerations articulated in *Rowland*” to determine whether a duty separately arises under those factors].) As such, *Nally's* application of the *Rowland* factors test was *not* limited to a situation where a duty had first been established under the Special Relationship test, as the Court of Appeal required in this case and as

USOC maintains the “well-established” analysis for finding such a duty of care necessarily requires.

The First District’s subsequent decision in *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377 – a leading case in establishing a duty of care owed by a national governing organization for the sexual abuse of its minor members – only further solidified the independence of those two tests. While USOC weakly claims that *Juarez* took an “untraditional approach” to that duty analysis by employing the *Rowland* factors test *before* ever considering whether there was also a special relationship which would support a finding of duty, *Juarez*, in fact, did much more than that. Specifically, after finding a duty of care under *Rowland*, it only reluctantly applied the Special Relationship test as “an alternative analysis” after thoroughly criticizing the Special Relationship doctrine and questioning its continued utility. In doing so, *Juarez* agreed with other cases which have concluded that “the expanding view in tort jurisprudence that the use of special relationships to create duties has been largely eclipsed by the more modern use of balancing policy factors enumerated in *Rowland*.” (*Id.* at 410-411.) *Juarez* further joined the criticism that the “pedantic use” of

the Restatement's Special Relationship test "to establish the parameters of tort duty, while eschewing public policy concerns, is contrary to modern jurisprudential duty analysis." (*Ibid.*) Thus, *Juarez* espoused the primacy of the *Rowland* factors test to find a duty of care and independently (and subsequently) applied the Special Relationship test only to reinforce its finding of a duty of care under *Rowland* first.

USOC intimates that *Juarez* is some kind of outlier in its independent use of those two tests and in its resort to *Rowland* before any analysis under the Special Relationship test. But USOC is wrong. The exact same analytical approach espoused in *Juarez* was followed by the Court of Appeal in *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, 913-918. There, as in *Juarez*, the reviewing court first applied the *Rowland* factors test to find a duty of care, and then further supported that conclusion through what it viewed as the "alternative" Special Relationship test. (See also *Conti v. Watchtower Bible & Tract Society of New York* (2015) 235 Cal.App.4th 1214, 1227-1231 [also independently applying both the Special Relationship test and the *Rowland* factors test to find that church elders had no duty to warn their congregation about one member's past child sexual abuse];

University of Southern California v. Superior Court (2018) 30 Cal.App.5th 429, 447-448, 451-455 [similarly considering both the Special Relationship test and the *Rowland* factors tests to conclude that a university owed no duty of care to protect an attendee at an off-campus fraternity party from a dangerous condition at that party].) In short, although USOC would certainly like it to be otherwise, there are several Court of Appeal decisions which employ the Special Relationship and *Rowland* factors tests as *independent, alternative tests*. In doing so, many of those decisions also proceed with the *Rowland* factors analysis *first*, before ever considering whether a special relationship can alternatively support a finding of duty.

Contrast that approach with an entirely different line of authority which treats the Special Relationship and the *Rowland* factors tests as *interdependent*, meaning that if one is not satisfied, the other cannot be used to provide an alternative rationale for establishing a duty. In doing so, that line of cases (including *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1129-1139; and *Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 244-248) requires that a duty be found *first* under the Special Relationship test before the *Rowland*

factors test can ever be applied, relegating *Rowland* to the role of a subsidiary inquiry to the Restatement's Special Relationship test.

An additional line of decisions (including this Court's Opinion) takes that subsidiary relationship another step further, requiring that plaintiffs must satisfy *both* the Special Relationship test *and* the *Rowland* factors test before such a duty of care can ever be established. (See also *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 77.) Those cases ostensibly cite this Court's recent decision in *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607 for support of that proposition, although this Court in *Regents* neither addressed nor analyzed that issue, even on the page cited by *Barenborg*. (Compare *Barenborg, supra*, 33 Cal.App.5th at 77 [citing *Regents, supra*, 4 Cal.5th at 628 for the proposition that plaintiffs must satisfy *both* the Special Relationship test and the *Rowland* factors test before they can establish a duty of care] with *Regents, supra*, 4 Cal.5th at 628 [where the Court, on that very same cited page, does little more than explain the policy rationale of any duty finding and then discusses the *Rowland* factors without any mention of the Special Relationship test].)

How Second District in *Barenborg* (and then again in the Court of Appeal's decision in *this* case) could fairly view that cited page from *Regents* as requiring that *both* tests must be satisfied before a duty can be established remains unclear. But what is clear is that position on the required criteria for finding a duty conflicts significantly with the *Nally*, *Juarez*, *City of Murrieta*, and *Conti* decisions, the consequence of which is confusion for victims of sexual abuse who should know with certainty what criteria they must satisfy to properly plead and prove their claims. Again, absent that clarity and consistency, liability in those cases will continue to be uncertain and contradictory, with outcomes that needlessly deny recovery and impose a substantial injustice to a particularly vulnerable class of victims. Thus, Petitioners reprise their request for this Court to grant review in order to examine the Special Relationship and *Rowland* factors tests, to clarify whether they operate either independently or in conjunction with each other, and to confirm the correct legal criteria required to establish a duty of care employing either or both of those tests.

B. This Case Provides an Excellent Platform for Review.

USOC has not disputed that this case presents a compelling platform for this Court’s review so Petitioners will not belabor the point. Suffice it to say that because the duty issues in this case were decided at the demurrer stage, it presents pure issues of law on a fixed set of properly pled facts which the parties and the Court must accept as true for purposes of that analysis. Moreover, the contrast in the Court of Appeal’s duty analysis for co-defendant, USA TAEKWONDO (“USAT”), on the one hand (where the Court of Appeal applied *both* the Special Relationship test *and* the *Rowland* factors test to find a duty flowing from USAT to Plaintiffs), and for USOC on the other (where the Court of Appeal applied only the Special Relationship test but refused to apply the *Rowland* factors test) could not be more clear. The fact that the Court of Appeal reached different outcomes after employing two tests in two different ways only further demonstrates why this case is a good vehicle for clarifying both when and how those tests should be properly applied by the lower courts.

Finally, given that this Court’s decision in *Rowland* has been the “gold standard” for decades in defining duty in a variety of contexts, this

case presents a favorable scenario for this Court to confirm the primacy of the *Rowland* factors test, or alternatively, to clarify that its multi-factored considerations are merely subsidiary to the Restatement's Special Relationship test and only come into play when that other test is satisfied first.

In sum, not only is there a conflict in the decisional law which requires this Court's consideration. But so, too, does this case present an ideal vehicle for addressing and resolving that conflict. Accordingly, Petitioners respectfully request the Court to grant their Petition for Review.

III.

CONCLUSION

As the courts have inconsistently applied different tests used for analyzing that the duty of care owed to minor victims of sexual abuse, this Court's intervention is required now to resolve that conflict. Accordingly, Petitioners reprise their request for this Court to grant their Petition for Review.

Respectfully submitted,

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DATED: Dec. 20, 2019

**CERTIFICATE OF COMPLIANCE PURSUANT TO THE
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Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2015), contains 2,311 words.

DATED: Dec. 20, 2019



Jon R. Williams

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Supreme Court of the State of California
CA Supreme Court Case No.: S259216
Court of Appeal Case No.: B280550
Los Angeles County Superior Court Case No.: BC599321

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