California Court of Appeal, Second Appellate District, Division 3 - No. B188076(L), B189254
Superior Court of Los Angeles- Hon. Howard J. Schwab PC034945

S 152360

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALEXANDRA VAN HORN, Plaintiff and Appellant,

v.

ANTHONY GLEN WATSON, Defendant and Appellant;

LISA TORTI, Defendant and Respondent
and Consolidated Cases.

ANSWER TO AMICUS CURIAE BRIEF

OF BOY SCOUTS OF AMERICA

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INTRODUCTION

AMICUS CURIAE, seems to raise two issues, one based upon legal reasoning and the other upon policy considerations. Attacking the Court of Appeal's decision, it argues that Health & Safety Code Section 1799.102 should have been construed by the court to include rescue efforts or mere assistance under the umbrella of immunity granted by that enactment or, that the term "medical" should be broadly construed to encompass rescue efforts such as the one TORTI allegedly engaged in here.

AMICUS CURIAE also seems to argue, on policy grounds, that brave and heroic acts such as those chronicled in its brief will somehow be deterred by the Court of Appeal's decision.

ARGUMENT

A. The Court of Appeal Correctly Construed The Language of Section 1799.01 Based Upon That Enactment's Legislative History.

Amicus raises the same arguments Defendant and Respondent TORTI has raised regarding the Court of Appeal's construction of the language of Section 1799.102 so Plaintiff and Appellant VAN HORN will not burden the Court by rehashing the points, arguments and citations already raised in her brief in answer to the petition for review.

Amicus's citation to decisions in foreign jurisdictions is of no help because those cases were decided under statutes that do not share a similar legislative history with California's Health and Safety Code Section 1799.102.

B. The Court of Appeal's Decision Will Not Have a Chilling Effect on Volunteers.

Amicus suggests that the Court of Appeals decision "injects confusion into the law that would chill its members' efforts to come to the aid of people in need. Presumably Amicus is suggesting that its members might no longer engage in the kind of heroic acts described in its brief, contrary to their teaching to "help other people at all times." But Amicus goes further to suggest that the Court of Appeal's decision creates a "perverse incentive" in that the would-be rescurer who "desires immunity" must wait for the victim to suffer burns before removing him from a fire in order for his action to become medical in nature. [1] The argument is

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[1]This argument is offered in criticism of the Court of Appeal's 'hypotheses that the immunity might apply where a person is removed from a vehicle to avoid carbon monoxide poisoning. See 148 Cal.App.4th 1013, 1021 footnote 8. That supposition by the court was irrelevant to its holding in this case and Plaintiff/Appellant VAN HORN does not adopt the Court's reasoning on that issue. A rescue effort, regardless of the reason for it is not the rendering of "medical care." A medical license is not required to perform such an act whereas one is required to prescribe and inject into the body a drug or medicine to treat a disease. But, as Plaintiff/Appellant VAN HORN has repeatedly argued, the rescuer who removes someone from a carbon monoxide filled space or engages in any other act to remove someone from a place of harm to a place of safety is fully protected by the common law rule which holds the actor to only a duty to use due care under the circumstances.

ludicrous on two levels. There is no logical basis much less anecdotal evidence that would be rescurers "desire immunity" or even think about or are aware of immunity provisions. Secondly, would-be rescuers who come to the aid of someone in actual danger of being caught in a fire have ample protection under the common law rule which holds them only to a duty to use due care under the circumstances.

Amicus regales us with nine tales of its members who have performed heroic acts. To be sure those young people and millions more like them who have done incredibly brave and unselfish acts in aid of others are deserving of society's gratitude and praise. But what Amicus fails to provide us is any anectodal evidence that any of those young heroes ever gave a moment's thought to potential legal liability before they acted. Nor has it provided any reason to believe that any of its members ever withheld rescue efforts for fear of legal liability. Given the dearth of cases dealing with Good Samaritan liability it is evident that, like the nine episodes described in Amicus's brief, people who act selflessly to aid another in a true emergency rarely get sued even if some unintended injury results as a consequence of the action.

The implicit argument that, as a consequence of the Court of Appeal's decision, Scouts will stop doing good deeds, has no basis in logic or reason. Thirty years ago the legislature adopted Division 2.5 of the

Health and Safety Code to "promote the . . . accessibility . . . of emergency medical services to the people of the State of California." H&S Code Section 1797. It clearly expressed its policy that people should be encouraged and trained to assist others at the scene of a **medical emergency.** H&S Code Section 1797.5 (Emphasis added).

At that time the legislature said nothing about abrogating the common law rule except as to the rendering of emergency medical services. Over the succeeding three decades California citizens and California courts have operated as though the common law rule applied to those good Samaritans who came to the aid or assistance of others in a time of need. Neither Defendant/Respondent TORTI nor Amicus have offered any evidence or logical argument that those good Samaritans relied on any immunity provision such that they would now be deterred from acting because of the lower court's decision.

C. The Term "Medical Care" And "Medical" Emergency Cannot Be Construed To Include Rescue Efforts.

The suggestion that "medical care"should be construed broadly to encompass rescue efforts such as TORTI allegedly engaged in here is nothing more than an alternative route to arrive at the same destination; construing Section 1799.102 to include non-medical care within the ambit

of the immunity.

Amicus's brief raises *Perkins v. Howard* (1991) 232 Cal.App.3d 708 and argues that the Court of Appeal's decision in impractical under the definition of "emergency" adopted in that case because would-be good Samaritan has little time to determine if their assistance will constitute "medical" care or not. This argument misses the point. In a true emergency the gravity of the danger is obviously a factor to be considered when determining whether the volunteer exercised due care under the circumstances. The common law rule adequately protects the volunteer while still affording some protection to the victim from the actions of an "officious intermeddler."

Reference to *Perkins v. Howard*, supra, highlights an additional problem with Amicus's argument. Whether an actual "emergency" existed when TORTI acted was one for the jury to determine, not the trial Judge.

In *Perkins,* the court noted that Business and Professions Code Section 2396 (providing for a qualified immunity to a licensed physician who renders emergency medical care) contained no definition of "emergency" so it turned to a case decision arising out of a charge of unauthorized practice of medicine. See *Newhouse v. Bd. of Osteopathic Examinees* (1958) 159 Cal.App.2d 728, 735. Thus, the definition carries no greater breadth than what is considered an emergency with respect to the

rendering of medical care. Additionally, the court in *Perkins* cited *Kearns v. Superior Court* (1988) 204 Cal.App. 3d 1325, 1328 which held that the test for determining whether an emergency existed is an objective one, that "the undisputed facts establish the existence of an exigency of "so pressing a character that some kind of action must be taken." Id at 1328. It is for the trier of fact to determine if an "emergency" existed, based upon the circumstances in each case including the "gravity, the certainty and the immediacy of the consequences to be expected if no action is taken . . . " *Breazeal v. Henry Mayo Newhall Memorial Hospital* (1991) 234 Cal.App.3d 1329, 1338.

There are no facts whatsoever, from an objective perspective, that the situation confronting TORTI was "so pressing a character that some kind of action" should have been taken. No "emergency"existed, medical or otherwise . VAN HORN was not in a life threatening situation. She was conscious. She was breathing and she was not bleeding. There was no fire, no flames, no smell of gasoline and no sparks. None of the other persons on the scene perceived any need to remove VAN HORN from the vehicle. Indeed, TORTI's friend OFOEGBU shouted at her to "not touch" VAN HORN. In short, there are no objective facts from which a reasonable trier of fact could infer that some immediate action was required. On the contrary, the only thing required was to await the arrival of professional

help so that VAN HORN could have been carefully and deftly removed from the vehicle and transported to a hospital where her medical condition could be assessed and treated.

Defendant/Respondent TORTI's subjective belief, whether believable or not, is irrelevant to the issue of whether an "emergency" existed and the trial court committed error when it took that issue away from the jury.

CONCLUSION

Amicus has not provided any public policy reasons for reversal of the Court of Appeal's decision. This Court should affirm that holding.

DATED: January 28, 2008

Respectfully submitted,

LAW OFFICES OF HUTCHINSON & SNIDER

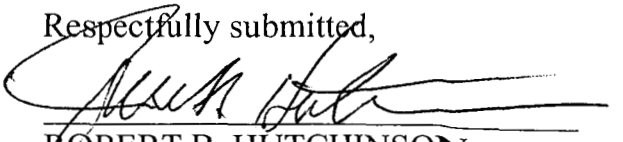
ROBERT B. HUTCHINSON (SBN45367)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this brief contains 1,512 words (as counted by the word processing system used to prepare the brief) and thus is in compliance with the word limitation set forth in Rule 8.520(c).

Dated: January 28, 2008

Respectfully submitted,



ROBERT B. HUTCHINSON

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ERIN COLLINS MALAGA

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