S235412

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEKSANDR VASILENKO, et al.,

Plaintiffs and Appellants,

vs.

GRACE FAMILY CHURCH,

Defendant and Respondent.

REPLY TO ANSWER TO PETITION FOR REVIEW

AFTER A DECISION
BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
[3d Civil No. C074801]

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REPLY TO ANSWER TO PETITION FOR REVIEW

I.

INTRODUCTION

Plaintiffs and Appellants Aleksandr Vasilenko and Larisa Vasilenko's Answer to Defendant and Respondent Grace Family Church's Petition for Review misses the point and fails to address the determinative question concerning any petition for review. The question for a petition for review is whether the court of appeal opinion conflicts with other court of appeal decisions, necessitating review "to secure uniformity of decision," or to "settle an important question of law." (Cal. Rules of Court ("CRC"), Rule 8.500(b)(1).) It is not whether the Court of Appeal decision was rightly decided as argued by Plaintiffs and Appellants Aleksandr Vasilenko and Larisa Vasilenko ("Appellant" or "Vasilenko"). Rather than negate the conflict in the law resulting from the Third Appellate District's published decision or the importance of the issue of landowner liability and duty, Appellant ignores conflicting case law, and devotes the Answer to the Petition for Review ("Answer") to arguing that there are no grounds for review because the Third Appellate District's Opinion on which review is sought was correctly decided. In short, the Answer fails to show the absence of a conflict in the law resulting from the Third Appellate District's Opinion, and fails to address the issue for the Petition for Review ("Petition").

Review is warranted to right the conflict in case law on the issue of duty on a landowner for injuries to invitees occurring on a public street adjacent to

the premises arising from the Third Appellate District's departure from the general principle of premises liability in circumstances heretofore unseen, and the Court's imposition of a duty on a landowner for injuries occurring on premises which the landowner does not own, possess, or control. The Third Appellate District's Opinion conflicts with other decisions by the Courts of Appeal which have consistently upheld the general principle of premises liability – that a landowner owes no duty to invitees that are injured on adjacent land that is not owned, operated, or controlled by the landowner. (*See, e.g., Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 487 ("*Seaber*").) Guidance from this Court is required to resolve this conflict, to clarify the issue of landowner duty for an invitee who is injured on a public street adjacent to the premises, and to stem the inevitable tide of litigation against landowners which the Third Appellate District's Opinion no doubt will unleash.

II.

LEGAL DISCUSSION

A. The Petition for Review Should Be Granted to Secure Uniformity in the Law Regarding the Existence of a Duty On a Landowner for Invitees Injured Off-site, on a Public Street Abutting the Premises

In perfunctory, sweeping fashion, Appellant claims, "There is no split of authority that needs to be rectified, and the issue presented by these facts has long been resolved by well-established and unassailable California Supreme Court precedents and intermediate appellate court decisions consistent with them." (Answer at pp. 5-6.) This claim does not withstand

scrutiny. Appellant misrepresents the state of California law and turns a blind eye to the general principle of premises liability and case law which has routinely affirmed the general principle, in attempts to sidestep from the primary issue for the Petition–whether there is a conflict requiring this Court review for "to secure uniformity of decision or to settle an important question of law." (CRC 8.500(b)(1).)

Appellant asserts that the Third Appellate District's Opinion "proceed[s] directly from controlling Supreme Court case law," and disingenuously asserts that it is "in harmony with prior Court of Appeal cases applying the same Supreme Court precedents," presumably referring to *Barnes v. Black* (1999) 71 Cal.App.4th 1473 ("*Barnes*") and *Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, but fails to address all of the cases cited in GFC's Petition which conflict with the Third Appellate District's Opinion. (Answer at p. 8.) Instead, Appellant dodges the application of these cases, stating, "The decision [the Third Appellate District's Opinion] also cogently explains why the cases relied on by defendant are distinguishable." (Answer at p. 8.) This is the sum total of Appellant's treatment of the cases which conflict with the Third Appellate District's Opinion.

Specifically, Appellant does not address, let alone acknowledge, the fundamental general principle of premises liability pronounced by the California Supreme Court and upheld by numerous court of appeal decisions, in view of *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, that a defendant cannot be held liable for a defective or dangerous condition of property which defendant does not own, possess, or control. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134 ("*Isaacs*").) This is because a landowner generally has no right to control and manage property owned by another.

(*Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 725.) Additionally, "This follows from the rule that the duty to take affirmative action for the protection of individuals coming onto one's property 'is grounded in the possession of the premises and the attendant right to control and manage the premises.' [citation.] Without the 'crucial element' of control over the subject premises [citation], no duty to exercise reasonable care to prevent injury on such property can be found." (*Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 81.)

Appellant ignores *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 386 ("*Owens*"), where the court found that the supermarket owed no duty to the customer who was struck by a car in the public street adjacent to the supermarket even though plaintiff asserted that the market used that area in the public street as a parking area for customers. The fact that plaintiff was injured on a public street was dispositive on the finding of no duty. (*See, id.* at p. 384 fn. 3 ("The fact that plaintiff was injured while in the public street, rather than on the premises possessed by the supermarket, also precludes application of the duty . . . .").) Appellant also ignores *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, 146-1147 ("*Steinmetz*"), where the court reaffirmed the general principle that a landowner does not owe a duty of care to another who is injured on property not owned, possessed, or controlled by the landowners. Appellant further ignores *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799, 802-804 ("*Nevarez*"), which similarly found that a supermarket owed no duty to a child for injuries he sustained when he ran into a public street and was struck by a car while returning home from the market's grand opening.

More importantly, the fact that the Third Appellate District relied on certain cases while dismissing others does not refute the existence of a conflict, especially where the Third Appellate District's Opinion creates a conflict unto itself. Moreover, Appellant's Answer which ignores the general principle of premises liability likewise fails to demonstrate the absence of a conflict. Appellant's selective review of case law, as Appellant must, in order to claim that the issue presented by the facts in this case have "long been resolved," distorts and paints an incomplete picture of California law regarding the issue of duty in premises liability.

Appellant notes that *Rowland v. Christian* (1968) 69 Cal.2d 108 was not cited in the Petition and that there was no application of the *Rowland* factors. There is no question that *Rowland v. Christian* (1968) 69 Cal.2d 108 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. However, Appellant again confuses the question at issue in the Petition with arguments as to why the Third Appellate District's Opinion was incorrectly decided. An analysis of the factors set forth in *Rowland* is not pertinent to the issue in the Petition, while it may be pertinent and may be addressed in the briefing should the Court grant review.

B. The Third Appellate District's Opinion Conflicts With the General Principle of Premises Liability and Prior Decisions by the Courts of Appeal

The Third Appellate District concluded "that the location of the overflow lot, which required GFC's [Defendant and Respondent Grace Family Church's] invitees who parked there to cross a busy thoroughfare in an area

that lacked a marked crosswalk or traffic signal in order to reach the church, exposed those invitees to an unreasonable risk of injury offsite, thus giving rise to a duty on the part of GFC." (*Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th 146, 149 ("*Vasilenko*").) However, Defendant and Respondent Grace Family Church ("GFC") does not own, operate, possess, or control the busy thoroughfare, Marconi Avenue, such that it could create a marked crosswalk or erect a traffic signal on Marconi Avenue, nor did GFC exert actual control over the physical location of the overflow lot or erect the overflow lot in its location. Therein lies the rub.

The Third Appellate District's reliance on *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139 ("*Bonanno*") and Appellant's discussion of *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232 ("*Schwartz*"), upon which *Bonanno* is based, highlights the conflict between the Third Appellate District's Opinion and the general rule of landowner liability. The Courts of Appeal have routinely rejected prior attempts to apply the duty imposed on street vendors to premises at fixed locations, as articulated in *Schwartz*, until the Third Appellate District's Opinion. As explained in *Owens*, there was a very narrow exception to the general rule that a person had no duty to exercise ordinary care to render safe property over which he or she had no right of possession or control set forth in *Schwartz*, where a duty was imposed on street vendors for injuries to patrons incurred on public streets. (*Owens, supra,* 198 Cal.App. at p. 387.) However, as *Owens* notes, "the court [in *Nevarez, supra,* 7 Cal.App.3d at p. 805 and *Steinmetz, supra,* 169 Cal.App.3d at p. 1146] limited the street vendor 'exception' to the unique operation of a traveling business." (*Ibid.*) Accordingly, based on the distinctions made by the court in *Nevarez* and *Steinmetz*, the court in *Owens* "decline[d] to extend the duty recognized in street vendor cases to a

commercial enterprise operating at a fixed location." (*Id.* at p. 388.) As the reasoning from *Schwartz* for imposing a duty on street vendors, on which *Bonanno* is based, has been rejected in cases involving fixed locations such as the property at issue here, so too should *Bonanno*'s reasoning be rejected for imposing a duty here. Not only does Appellant fail to demonstrate an absence of a conflict created by the Third Appellate District's Opinion, but Appellant also fails to even demonstrate that the Third Appellate District Opinion is correctly decided.

Appellant asserts that the reasoning in *Bonanno* applies here due the facts of the case. Not so. The reason why *Bonanno* was closer to *Schwartz* than *Seaber* is because the defendant in *Bonanno* erected the bus stop such that the defendant exerted actual control over the location of the bus stop, and placed the bus stop in a location that could only be reached by crossing a dangerous crosswalk. Conversely, here, GFC did not erect or create the overflow lot; it was a pre-existing lot. GFC could not physically move the overflow lot at will so that it would be located at a marked crosswalk or traffic signal. Hence, this case differs from *Bonanno.*

Appellant asserts that GFC could have " 'relocated' its overflow parking by sending invitees instead to safe parking at the business plaza on the same side of Marconi as the church," however, this assertion still raises the issue of the duty owed by landowners to protect invitees or prevent injuries on adjacent public streets. The duty issue remains as invitees who park at the business plaza lot would still have to cross a public street to get to the church. (Answer at p. 10.) As seen from Figure 1, parking at the business plaza would require invitees to cross a public street, albeit a different public street, Root Avenue. It is unknown if the Northeast corner of Root Avenue at Marconi

Avenue has a marked crosswalk or a traffic signal, or whether the premises of the business plaza is open in a manner such that persons can cross midblock on Root Avenue to get to the church. The speed of traffic, and other details of the traffic on Root Avenue are also unknown. Thus, despite Appellant's speculative claims regarding parking at the business plaza, GFC is left in no better position if an invitee were struck while crossing Root Avenue after having parked at the business plaza parking lot. Appellant fails to establish that this is a viable "safer" overflow lot, and the issue of the existence of a duty, and the contours of that duty if one exists, still remain unresolved.

Appellant's reliance on *Johnston v. De La Guerra Properties, Inc.* (1946) 28 Cal.2d 394 is also misplaced. The landlord was liable because the landlord was in control of the adjoining property that was used as a parking lot and had graded it so that it sloped down to the private walk. (*Id.* at p. 397.) Notably, the court found that the property owner "encouraged patrons of its tenants to park their cars on the adjoining property and approach the building by way of the private walk." (*Id.* at p. 400.) Here, GFC did nothing to the design of the overflow lot to encourage invitees to cross what was obviously a public street with five lanes of traffic, midblock, where there was no marked or unmarked crosswalk or traffic signal.

Appellant does not address the Third Appellate District's reliance on *Barnes*; nevertheless, like *Bonanno*, *Barnes* involved actual control and management of the property that led to the imposition of a duty. While *Barnes* expanded landowner liability to "encompass a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite," *Barnes, supra,* 71 Cal.App.4th at p. 1478, it is not the maintenance of

the overflow parking lot that exposed Mr. Vasilenko to an unreasonable risk of injury on the public street, but merely the location of the overflow lot, nothing more. (*Vasilenko, supra,* 248 Cal.App.4th at p. 149.) The key fact that renders the duty articulated in *Barnes* inapplicable here is that Mr. Vasilenko's injuries are alleged to have been caused by the failure to exercise reasonable care with respect to providing safe passage across a public street as a result of the use of the overflow parking lot which required invitees to cross a public street that was not owned, possessed, or controlled by GFC.

C. The Facts and Evidence Presented By Appellant Are Immaterial to the Question to be Determined by the Petition

Appellant presents all of the facts upon which the Third Appellate District Opinion is based, and claims that GFC "misapprehends the record and misallocates the burdens controlling the resolution of the duty question." (Answer at pp. 13-14.) Appellant's citation to all of the evidence and facts again misses the point of the Petition. GFC did not and will not engage in arguments about whether the Third Appellate District Opinion properly analyzed all the facts and the merits of Appellant's claim for the purposes of the Petition. GFC has not attempted to fully address all aspects of the Third Appellate District Opinion's analysis as such argument goes beyond the issue for this Petition. This argument may be fully briefed by the parties upon this Court's grant of review. Until that point however, Appellant's recitation of other evidence and facts is not material to determining whether this Court should grant review and resolve the conflict about when a duty should be imposed on a landowner when an invitee is injured on an adjacent public street.

D. The Issue Presented Squarely Addresses The Fundamental Fact Which Lies At the Heart of the Conflict Between the Third Appellate District's Opinion and the General Principle of Premises Liability

Appellant's claim that the duty at issue or the Third Appellate District's holding did not involve a duty to take steps to protect invitees against the unreasonable risk of harm in having to cross the public street is wholly incorrect and contradicted by the Third Appellate District's Opinion. (Answer at pp. 14-15.)

The unreasonable risk of injury upon which the Third Appellate District found a duty was the necessity for invitees of GFC to cross a public street, here, Marconi Avenue, when they parked in the off-site overflow lot: "We shall conclude that the location of the overflow lot, which required GFC's invitees who parked there to cross a busy thoroughfare in an area that lacked a marked crosswalk or traffic signal in order to reach the church, exposed those invitees to an unreasonable risk of injury offsite, thus giving rise to a duty on the part of GFC." (*Vasilenko, supra,* 248 Cal.App.4th at p. 149.) The Third Appellate District's Opinion repeats this basis for the imposition of a duty on GFC: "[T]he location of the overflow lot, which GFC concedes it controlled at the time of the accident, **required GFC's invitees who parked there to cross a busy thoroughfare in an area that lacked a marked crosswalk or traffic signal in order to reach the church, thereby exposing them to an unreasonable risk of injury offsite.**" (*Id.* at p. 154, emphasis added.) Moreover, Appellant's claim is undercut by its own citation to the Third Appellate District's Opinion: "Vasilenko's claim is that while GFC may

not have had a duty to provide additional parking for its invitees, **its maintenance and operation of an overflow parking lot in a location that it knew or should have known would induce and/or require its invitees to cross Marconi Avenue created a foreseeable risk of harm to such persons**." (*Id.* at p. 156, emphasis added.) The Third Appellate District again provides, "[B]y maintaining its overflow lot across the street from the church, GFC exposed its invitees who utilized that lot to an unreasonable risk of harm, and thus, owed them a duty to take steps to protect against that risk," and that "[T]his is a case where an entity maintained and operated a parking lot in a location that required its invitees to cross a busy thoroughfare . . . ." (*Id.* at p. 157.) In other words, GFC had a duty to protect against the foreseeable risk of harm – crossing a public street adjacent to the church – arising from "maintaining" and "operating" an overflow parking lot which required invitees to cross Marconi Avenue to get to the church. The imposition of a duty was not based whether or not GFC directed Mr. Vasilenko to parking at the overflow lot, as claimed by Appellant. (*Ibid.* ("This is not simply a case where a business merely provided instructions about where to park . . . ."); Answer at pp. 12-15.) Thus, the Issue Presented directly addresses the Third Appellate District's imposition of a duty in this case. While it appears that the Third Appellate District considered the lack of a marked crosswalk or traffic signal, the parameters of this duty to protect against the foreseeable risk of harm is not delineated by the Third Appellate District. (*Vasilenko, supra,* 248 Cal.App.4th at pp. 149, 154, 157.)

E. Whether There Was a Voluntary Undertaking Is Not Pertinent to the Purpose of the Petition and Should be Disregarded

Whether or not GFC voluntarily undertook a duty toward Mr. Vasilenko is a separate issue that is not raised in the Petition, and was not addressed by the Third Appellate District. (Answer at pp. 17-18.) More importantly, as Appellant has not requested this Court to consider additional issues and has not only failed to, but also cannot comply with, CRC 8.500(a)(2) and 8.504(c) in raising this particular issue for review, GFC will not address this issue at this time.

Notwithstanding these facts, this issue does not alter the need for this Court's guidance to resolve the conflict created by the anomalous Third Appellate District's Opinion with other decisions by the Courts of Appeal, and to provide clarity regarding the existence of a duty and to define the parameters of that duty if one exists, regarding landowner liability involving off-site injuries. Ultimately, for the purposes of the Petition, the arguable existence of an alternative and independent duty toward Mr. Vasilenko does nothing to lessen the necessity for review on the issue of duty on a landowner for injuries which occur to invitees on an adjacent public street, and the assertion of an alternative basis upon which this Court can affirm the Third Appellate District's Opinion is not appropriate for the purpose of the Petition.

Instead, Appellant's assertion of this argument in the Answer underscores the need for this Court to grant review as the Answer impliedly acknowledges the potential finding of no duty under the circumstances of this case based on general principle of landowner liability and the lack of GFC's ownership, operation or control of the public street where Mr. Vasilenko was

injured. Should the Court grant review and wish to the parties to address the alternative and independent issue of a duty created by a voluntary undertaking, pursuant to its authority under CRC 8.5169(b)(2), GFC will brief this issue at that time.

F. The Petition Should Be Granted to Settle an Important Question of Law Regarding the Duty Owed by a Landowner for Injuries Off-site on a Public Street Abutting the Premises As The Third Appellate District's Opinion Has Significant Public Policy Consequences for Landowners Throughout California

Under the Third Appellate District's Opinion, a landowner now owes a duty to invitees who are injured while crossing a public street which is adjacent to the land, even though the landowner does not own, operate, or control the public street, and even though the landowner cannot put in a marked crosswalk or traffic signal wherever it would like to in the public street. The extent of such a duty and what it would require of the landowner is unclear. The repercussions of the Third Appellate District's Opinion cannot be overlooked due to the far reaching implications on all landowners who simply do not have sufficient parking spaces available for all potential invitees in today's society. As noted by Presiding Justice Raye in dissent, "[I]t is worth noting that parking lots servicing a multiplicity of businesses are frequently located next to busy streets. More will be built in the future as metropolitan areas become increasingly congested . . . . There is no compelling reason to refashion the rules of premises liability or principles of negligence to impose a duty on parking lot operators or owners of land adjacent to busy

thoroughfares to guarantee the safety of pedestrians who cross such roadways." (*Vasilenko, supra,* 248 Cal.App.4th at pp. 162-163.)

This sentiment is echoed in the amicus curiae letter filed in favor of granting review, where it is argued "[p]olicy considerations dictate against the Court of Appeal's new-found duty. It is an unavoidable fact of modem life that pedestrians must cross busy streetsf from time to time to get to where they are going. Few businesses, churches, or others can afford unlimited onsite parking, and in urban areas onsite parking often is impossible. Still fewer could afford, and none would even have the authority, to provide safe passage over public streets to the premises from wherever a visitor parked. [Citation omitted.]" (Amicus Curiae letter, Respondent, at p. 3.)

III.

CONCLUSION

For the foregoing reasons, Defendant and Respondent GFC respectfully requests this Court to review this important question of law resulting from the Third Appellate District's Opinion in this case.

Dated: August 17, 2016

Respectfully submitted,

McKAY, de LORIMIER & ACAIN

By: _____
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed Reply to Answer to Petition for Review has been produced using 13-point Roman type including footnotes and contains approximately 3,963 words, which is less than the words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 17, 2016

Respectfully Submitted,

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PROOF OF SERVICE BY MAIL

In Re: REPLY TO ANSWER TO PETITION FOR REVIEW; No. S235412
Caption: ALEKSANDR VASILENKO, et al. v. GRACE FAMILY CHURCH
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
(Constructively filed on this date pursuant to CRC R. 8.25(b)(3)(B).)

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 200 Del Mar Blvd., Suite 216, Pasadena, California 91105. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Pasadena, California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on August 18, 2016, at Pasadena, California.

E. Gonzales