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Seeking Justice for All

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October 12, 2016

The Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Regalado v. Callaghan*
Court of Appeal docket number D069647

May It Please the Court:

Request for Depublication of Decision

Consumer Attorneys of California requests depublication of *Regalado v. Callaghan*, Fourth Appellate District, Division One, docket number D069647 or, in the alternative, depublication of Section III (slip op. pp. 19-21) of the opinion.

Consumer Attorneys takes issue with one part of *Regalado*: In *dicta*, it criticized a small part of the plaintiff's closing argument, in which counsel advocated to the jury that it is the conscience of the community and that, through its verdict, it tells people what is reasonable and acceptable behavior in the community.

Regalado thus undermines two important public policies. First, one of the goals of tort law is to promote safety and deter harmful and unreasonable conduct through the jury's verdicts on liability and, if a defendant is liable, holding it to account for the harm it caused. Second, counsel has wide latitude to argue a case to the jury, including invoking arguments of the law and the facts, and asking the jury to return a verdict that vindicates important public policies.

Statement of Interest

The Consumer Attorneys of California is a voluntary membership organization representing approximately 6,000 attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent plaintiffs in personal injury, including medical

negligence, actions. Consumer Attorneys has taken a leading role in advancing and advocating the rights of injured Californians in both the Courts and the Legislature.

Mr. Bronson, the co-author of this request, is a trial attorney in San Diego whose career has focused on representing injury victims and consumers, in both trial and appellate courts. He is a member of Consumer Attorney's Amicus Curiae Committee.

Mr. Stevens, the co-author of this request, is a certified specialist in appellate advocacy (State Bar of California Board of Legal Specialization) and certified in medical negligence law (American Board of Professional Liability Attorneys). He has handled dozens of personal injury cases and is a member of Consumer Attorney's Amicus Curiae Committee.

Timeliness of Request

Any person can request depublication of a decision within thirty days of the date the decision was final in the Court of Appeal. Cal.R.Ct. 8.1125(a)(4). The Court of Appeal issued its unpublished decision on September 16, 2016, and certified it for publication on September 22, 2016. The opinion is final October 16, 2016, thirty days after it was filed in the Court of Appeal. Cal.R.Ct. 8.264(b)(1). This request for depublication, therefore, is timely.

The Public Policy of Tort Law

Tort law, in its broadest sense, defines the obligations that individuals and entities owe to each other in society. "[T]ort law is primarily designed to vindicate social policy." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683, 254 Cal.Rptr. 211, 227 (1988) (internal quotations omitted). Social policy promotes safety and deters unreasonable conduct. "One of the purposes of tort law is to deter future harm." *Burgess v. Superior Court*, 2 Cal.4th 1064, 1081, 9 Cal.Rptr.2d 615, 624 (1992).

The public policy of safety, deterrence, and accountability are not only embedded in California law, they have common law and civil law roots. The California Legislature, in 1872, articulated the public policy of ordinary care towards others in Civil Code sections 1708 and 1714:

> Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights.

Civ.Code § 1708

> 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, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

Civ.Code § 1714(a). Civil Code section 1714 is a "basic policy of this state." *Rowland v. Christian*, 69 Cal.2d 108, 118-119, 70 Cal.Rptr. 97, 104 (1968) (noting the similarity between Section 1714 and common law).

This Court, in *Rowland*, 69 Cal.2d at 113, 70 Cal.Rptr. at 100, observing that these statutes embody the foundation of our law of negligence, cited the concurring opinion in *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883), in which Brett, M.R., explained —

> [W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Foreseeability of injury or danger is a key element of duty, *Dillon v. Legg*, 68 Cal.2d 728, 739, 69 Cal.Rptr. 72, 79 (1968), but it is not the only element. Whether, in a particular type of case, a court should depart from Section 1714's articulation of a duty of care depends on several factors:

> [T]he major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, *the policy of preventing future harm*, the extent of the burden to the defendant and *consequences to the community of imposing a duty to exercise care* with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland, 69 Cal.2d at 113, 70 Cal.Rptr. at 100 (emphasis added).

Raymond v. Paradise Unified Sch. Dist. of Butte County, 218 Cal.App.2d 1, 8, 31 Cal.Rptr. 847, 851-852 (1963), reviewed these goals in more detail. The public policies of tort law include:

- "The *social utility of the activity* out of which the injury arises, compared with the risks involved in its conduct";
- the "ability to adopt practical means of *preventing injury*";
- "the *prophylactic effect* of a rule of liability";
- "the *moral imperatives* which judges share with their fellow citizens."

"The prophylactic effect of a rule of liability" is the very consideration of what types of conduct and decision-making the law should encourage. It is a recognition that the law should encourage safe choices when danger is foreseeable. *See Isaacs v. Huntington Mem. Hosp.*, 38 Cal.3d 112, 125-126, 211 Cal.Rptr. 356, 361 (1985) (a rule of law must not contravene "the policy of preventing future harm."); *Burgess v. Superior Court*, 2 Cal.4th 1064, 1081, 9 Cal.Rptr.2d 615, 624 (1992) ("One of the purposes of tort law is to deter future harm.").

Awarding damages to people injured by the unreasonable conduct of defendants is integral to the safety and deterrent purpose of tort law. "The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible." *Cabral v. Ralphs Grocery Co.*, 51 Cal.4th 764, 781, 122 Cal.Rptr.3d 313, 327 (2011). Civil Code section 3281 articulates this principle: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

This rule of law is given to the jury in California's pattern instruction, CACI 3902:

> The amount of damages must include an award for each item of harm that was caused by [defendant]'s wrongful conduct, even if the particular harm could not have been anticipated.

Full compensation for injuries caused by unreasonable conduct, thus, is a critical part of the public policies that are the foundation of California tort law.

Attorneys Have Wide Latitude to Persuade a Jury about The Virtue and Reasonableness of Their Clients' Positions

This Court has endorsed the principle that counsel for both sides have wide latitude to persuade a jury about the reasonableness of their positions.

> In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. The right of counsel to discuss the merits of a case, *both as to the law* and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury. . . . Counsel may vigorously argue his case and is not limited to "Chesterfieldian politeness." . . . An attorney is permitted to argue all reasonable inferences from the evidence. . .. Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety.

Cassim v. Allstate Ins. Co., 33 Cal.4th 780, 795, 16 Cal.Rptr.3d 374, 383-384 (2004) (citations and internal quotations omitted; emphasis added).

This wide latitude extends to arguments of what the community, organized as the jury in a particular case, should find to be reasonable or unreasonable conduct. The genius of the jury system is that it brings together people of diverse backgrounds and experiences and, together, they determine whether a defendant's conduct (or a plaintiff's) was reasonable. It is a determination of whether the conduct was reasonable by the standards expected of members of the community and, if unreasonable, that the defendant should be accountable for the harm it caused (or whether the plaintiff must also bear some responsibility for the harm).

Over 140 years ago, the United States Supreme Court recognized that the jury is the conscience of the community. Though it did not use that phrase, it adopted the philosophy that the jury is in the best position to determine what members of that community should expect from each other. *Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 21 L.Ed. 745 (1873), affirming a judgment finding a railroad negligent in its maintenance of a turntable that injured a child, reposed its trust in the jury to determine the reasonable safety it expects from the companies operating in the community:

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, *that they can draw wiser and safer conclusions* from admitted facts thus occurring than can a single judge.

Railroad Co., 84 U.S. (17 Wall.) at 663-664 (emphasis added).

"The jury represent the ideal prudent man whose assumed course of conduct under given circumstances constitutes ordinary care, and whether such care was used in view of the facts of a particular case the question having been submitted to a jury is necessarily *determined by the sense and experience of the individual jurors collectively expressed in the verdict*." *Chalmers v. Hawkins*, 78 Cal.App. 733, 741, 248 P. 727, 731 (1926) (internal quotations omitted; emphasis added).

In 1873 and 1926, the courts wrote about twelve "men" and prudent "men" drawn from the community. Society thankfully has progressed since then, but the core principle remains sound: Twelve people of higher education and little education, scholars and merchants, professionals and laborers, apply their collective experience to "draw wiser *and safer*" conclusions about what conduct is reasonable or unreasonable.

Justice Mosk, in his concurring opinion in *Ballard v. Uribe*, 41 Cal.3d 564, 224 Cal.Rptr. 664 (1986), expressed the same philosophy and characterized it with the familiar shorthand, the "conscience of the community":

> A jury has also been frequently described as "the conscience of the community." . . . In addition, courts have long recognized that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation . . .. The very purpose of the right to trial by a jury drawn from a representative cross-section of the community is to achieve an overall impartiality by allowing the interaction

> of the diverse beliefs and values the jurors bring from their group experiences.

Ballard, 41 Cal.3d at 577, 224 Cal.Rptr. at 672 (J. Mosk, con.) (citations and internal quotations omitted).

This collective wisdom of what may be reasonably expected of fellow members of the community is articulated in California's pattern jury instruction, CACI 3902:

> Negligence is the failure to use reasonable care to prevent harm to oneself or to others.
>
> A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.
>
> *You must decide how a reasonably careful person would have acted* in [name of plaintiff/defendant]'s situation.

Arguing the purposes of safety and deterrence of harm in the community is thus fully consistent with the goals of tort law as articulated in this Court's cases as well as in the jury instructions approved by the Judicial Council. One of the "public policies underlying our tort system . . . [is] . . .as a general matter . . . to maintain or reinforce a reasonable standard of care in community life." *City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 755, 62 Cal.Rptr.3d 527, 532 (2007).

The wide latitude given to counsel includes argument to the jury to return a verdict that promotes the public policies of the law. In *Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 9 Cal.Rptr.3d 544 (2004), for example, the plaintiff's counsel argued that overtime compensation laws embody public policy and workers must be paid overtime at premium rates. The appellate court rejected a challenge to the propriety this argument. "*[C]ounsel simply appealed to the jury to vindicate the public policy* underlying the overtime laws by holding [defendant] accountable for the full amount of overtime compensation owing to plaintiffs. We do not view this argument as suggesting that the jury should inflate the damage award or award the equivalent of punitive damages." *Bell*, 115 Cal.App.4th at 763-764, 9 Cal.Rptr.3d at 585 (emphasis added).

Consumer Attorneys does not suggest that there are no limits to closing argument. Of course appeals to bigotry or prejudice, *Kolaric v. Kaufman*, 261 Cal.App.2d 20, 67 Cal.Rptr. 729 (1968), or direct appeals to financial self-interest of jurors as taxpayers, *Du Jardin v. Oxnard*, 38 Cal.App.4th 174, 179, 45 Cal.Rptr.2d 48, 50 (1995), are unseemly and unprofessional. Those arguments, however, are

entirely different from advocating safety as the reasonable standard of care to be expected of all people in the community, even if a verdicts has the indirect effect of making the community safer.

Regalado Should be Depublished
Because its _Dicta_ is Contrary to these Settled Principles
Of Tort Law and the Right to Argue One's Case

Regalado quotes from the trial transcript that the plaintiff's counsel argued to the jury that it is "the conscience of the community"; that its decision would tell "what is acceptable, what is not acceptable; what is save, and what is not safe." (*Regalado*, slip op. at 19-20.) Counsel also argued that the function of the jury is to keep the community safe by identifying negligent conduct and telling the wrongdoer that "you are going to compensate the person you hurt." (*Regalado*, slip op. at 20.) According to *Regalado*, the defendant belatedly objected to the plaintiff's counsel's argument on the ground that "he's talking about the role of the jury verdict in enforcing the greater good for the general public" and "protecting the community." (*Regalado*, slip op. at 20.)

The appellate court acknowledged that it did not need to reach the issue of whether the remarks were improper or prejudicial, because of the defense counsel failed to offer a timely objection and curative instruction. (*Regalado*, slip op. at 21.) Despite that acknowledgment, the appellate court criticized them anyway.

Regalado called counsel's remarks "improper" because they told the jury that its verdict had an impact on the community and would keep the community safe. (*Regalado*, slip op. at 21.) The appellate court's criticism of plaintiff's closing argument, thus, was *dicta.* Without a timely objection, the supposed misconduct was waived. (*Regalado*, slip op. at 21.)

More important — and the reason to depublish the opinion or, at least, Section III of the opinion — *Regalado's* dicta is contrary to settled law. As *Bell* explained, appealing to the jury to vindicate public policy is fully consistent with the purposes of the law and advocacy. *Bell*, 115 Cal.App.4th at 763-764, 9 Cal.Rptr.3d at 585 (emphasis added).

Reminding the jury that it speaks for the community when it determines what is reasonable conduct is consistent with the public policy of tort law, including the policy of deterrence of future conduct by this particular defendant and preventing future harm by others. *Rowland* itself invokes community standards as a fundamental principle of tort law. *Rowland*, 69 Cal.2d at 113, 70 Cal.Rptr. at 100.

Its often-cited passage about the factors that determine duty includes not only foreseeability of harm but, as well:

- "the moral blame attached to the defendant's conduct";
- "the . . . consequences to the community of imposing a duty to exercise care"

An argument that a reasonable person should choose safety is an argument based firmly on well-settled societal goals of common and civil law. These principles are embodied in the pattern jury instructions. California Civil Instruction 401 instructs the jury: "A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. *You [the jury] must decide how a reasonably careful person would have acted in [defendant's] situation*."

That last sentence is the very definition of the "conscience of the community." "Moral blame" and "consequences to the community," *Rowland*, *supra*, implicate judgments of reasonable people, assembled as a jury, to determine the reasonable expectations of conduct and behavior of fellow members of the community. It is proper for counsel to advocate the implications of those expectations and "consequences to the community."

"Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety." *Beagle v. Vasold*, 65 Cal.2d 166, 181, 53 Cal.Rptr. 129, 137 (1966). The right of a plaintiff's counsel (as that of defense counsel) "to *discuss the merits of a case*, both *as to the law* and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. . . . [S]uch matters are ultimately for the consideration of the jury." *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 798-799, 174 Cal. Rptr. 348, 375 (1981) (internal quotations and citations omitted; emphasis added).

Advocating safety as the standard of care is nothing more than advocating for holding a defendant liable for unreasonable conduct, just as the jury is instructed. An argument to "tell the defendant" that he must pay for the harm he caused also vindicates one of the fundamental public policies of the tort system. Arguing the unreasonableness and danger of the defendant's conduct, and the implications of a verdict, is fully consistent with the goals and policies of tort law and, thus, is not improper.

Conclusion

The Consumer Attorneys of California request this Court to order depublication of *Regalado* or, in the alternative, depublication of Section III (slip op. pp. 19-21) of the opinion.

Respectfully submitted,

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