Case No. B276847 (Civil)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

LOUIS WILLIAM TYLER, et al.,

Plaintiffs, Respondents/Cross-Appellants,

v.

AMERICAN OPTICAL CORPORATION,

Defendant, Appellant and Cross-Respondent.

Appeal from the Superior Court of Los Angeles County
Hon. John J. Kralik, Judge, Case Nos. BC 588866 and JCC4674

AMICI CURIAE BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC., INTERNATIONAL SAFETY EQUIPMENT ASSOCIATION, AMERICAN TORT REFORM ASSOCIATION, AND AMERICAN INSURANCE ASSOCIATION, IN SUPPORT OF AMERICAN OPTICAL CORPORATION

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QUESTION PRESENTED

Whether the traditional substantial factor causation standard (CACI 430) or the special standard developed for manufacturers and suppliers of asbestos-containing products (CACI 435) applies to respirator manufacturers.

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent manufacturers of safety equipment, other companies doing business in California, and insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law rules, and reflects sound public policy. *Amici* are well-suited to provide a broad perspective to this Court as to the context in which this case should be considered and the reasons why the special, lenient causation standard applied to manufacturers and suppliers of asbestos-containing products should not be extended to companies that make protective devices.

INTRODUCTION AND SUMMARY OF ARGUMENT

California's traditional substantial factor causation standard, including the "but for" test (*see Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241), which is reflected in CACI 430, should apply here. The trial court, however, instructed the jury based on CACI 435, which embraces a permissive "contribution to the *risk*" standard for claims against

manufacturers and suppliers of asbestos-containing products. *See Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953.

The jury responded with a $32 million verdict, placing 70% of the liability on a former respirator manufacturer, American Optical Corporation (AO). The jury allocated just 20% of the liability to plaintiff's employer, a factory that exposed its workers to high concentrations of asbestos while selecting and providing them with a type of respirator that was not designed, labeled, or federally-approved for protection against asbestos. The jury found Johns Manville, the insolvent company that made and supplied all of the asbestos-containing products to which the plaintiff was exposed, not at fault.[1]

Imposing such extraordinary liability on a protective device company is contrary to California law, poses a threat to public safety, will attract more cases to California, and represents a form of deep-pocket jurisprudence that this Court should firmly reject. This Court should reverse the trial court's decision and find that the traditional causation standard (CACI 430) applies to respirator manufacturers that are drawn into asbestos cases. The alternative approach taken by the court below fails to recognize the critical distinction between manufacturers and suppliers of asbestos-containing products and manufacturers of products that, when selected and

[1] The jury allocated the remaining fault to 3M Company (5%), a nonparty that also supplied respirators to the plaintiff's employer, and to the plaintiff himself (5%). *See* 8JA.1811.

used properly and in accordance with federal regulations, protect workers from exposure.

ARGUMENT

I. CLAIMS AGAINST RESPIRATOR MANUFACTURERS ARE PART OF A BROADER ATTEMPT TO TARGET SOLVENT COMPANIES WITH INCREASINGLY REMOTE CONNECTIONS TO ASBESTOS LITIGATION

A. Asbestos Claims Have Led to Nearly 120 Bankruptcies, Leading Plaintiffs' Lawyers to Routinely Name Scores of Companies as Defendants

Since the asbestos litigation began over four decades ago, nearly 120 companies have been forced into bankruptcy at least partly due to asbestos-related liabilities. *See* Mark D. Plevin et al., *Where Are They Now: Part Eight: An Update on Developments in Asbestos-Related Bankruptcy Cases*, Mealey's Asbestos Bankr. Rep., Vol. 16, No. 2, Sept. 2016, at 13-17.[2] Particularly in the years 2000-2003, virtually all of the major asbestos producers filed bankruptcy in what is commonly referred to as the "asbestos bankruptcy wave." *See id.*

Subsequent to the bankruptcy wave, the asbestos litigation has been sustained by a relentless search for new defendants and new theories of

[2] Through reorganization, the bankrupt entities are exempt from asbestos-related personal injury lawsuits, but trusts have been funded with tens of billions in assets to pay claims for exposure to their products. According to the U.S. Government Accountability Office, asbestos trusts collectively held *$36.8 billion* as of 2011. *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (Sept. 2011); *see also* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011).

liability. The litigation has become as an "endless search for a solvent bystander." *Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz* (Mar. 1, 2002) 17:3 Mealey's Litig. Rep.: Asbestos 5 (quoting Mr. Scruggs). The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. *See* Towers Watson, *A Synthesis of Asbestos Disclosures from Form 10-Ks – Updated, Insights*, June 2013, at 1. Lawsuits targeting respirator manufacturers are an example of this widening net. *See* Victor E. Schwartz et al., *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products That Make Us Safer* (2010) 33 Am. J. Trial Advoc. 13, 48-49.

About 5,000 asbestos claims are filed in courts nationwide each year, with filings of high value mesothelioma and lung cancer claims remaining steady over the last decade and no end on the horizon. *See* KCIC, *Asbestos Litigation: 2016 Year in Review* 3-4 (2017).[3] Respirator manufacturers are among the types of companies frequently named as defendants in such litigation.

[3] *See also* Towers Watson, *supra,* at 5 ("Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years.").

B. Relaxing the Causation Standard Will Encourage Forum Shopping, Burdening the California Judiciary and Jurors

Relaxing the causation standard applied to respirator manufacturers drawn into asbestos cases will encourage the filing of more cases in California courts, burdening the judiciary and jurors.

Historically, certain areas of California have drawn significant asbestos litigation. Plaintiffs' law firms have "steer[ed] cases" to the San Francisco-Oakland area as well as Los Angeles. Patrick M. Hanlon & Anne Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 599. Firms in Texas and elsewhere have already opened offices in California particularly to bring asbestos claims. *See* Steven D. Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L. Rev. 883, 885. Many of these plaintiffs lack a meaningful connection to California. *See* Mark A. Behrens, *What's New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501, 540 (30% of a sample of 1,047 California plaintiffs had addresses outside the state). Today, Los Angeles is among the top ten jurisdictions nationwide for all asbestos claim filings, while Alameda is among the top ten jurisdictions for mesothelioma claim filings. *See* KCIC, *supra*, at 4-5.

Judges in California have acknowledged the burden placed on the judicial system by the state's asbestos docket. San Francisco Presiding Superior Court Judge James McBride observed that the length of asbestos

trials causes hardship for jurors, leaving many citizens unable to serve and forces the courts to "use jurors at an absolutely abominable rate." *Judicial Forum on Asbestos*, HB Litigation Conferences, New York City, June 3, 2009, *at* http://litigationconferences.com/?p=6669 (providing video of remarks of Judge McBride). The case before this Court, for example, required one-month of juror time. Easing the causation standard in lawsuits targeting companies that make protective equipment will invite plaintiffs' lawyers to being more of these claims in California courts.

C. Respirator Manufacturers Are Ensnarled in the "Endless Search for the Solvent Bystander"

The broad naming of respirator manufacturer defendants in asbestos cases is particularly disturbing given the lack of evidence supporting liability in many cases; the public health consensus that respirators are intended to be the last, not first, line of defense against hazardous contaminants; and the level of regulation already dedicated to approving the design, labeling, and use of respirators. *See generally Respirators to the Rescue*, 33 Am. J. Trial Advoc. at 27-41 (examining the federal regulatory and certification process for respirators).

Yet, despite these distinctions, more than 325,000 individual asbestos and silica lawsuits included claims against respirator manufacturers alleging design and warning defects between 2000 and mid-2008. *See id.* at 49 (citing Letter from Daniel K. Shipp, President, Int'l

Safety Equip. Ass'n to Edwin G. Foulke, Jr., Asst. Sec. of Labor for Occupational Safety & Health and Leon R. Sequeira, Asst. Sec. of Labor for Policy, U.S. Dep't of Labor (May 19, 2008)).

Even where these claims are baseless, the cumulative amount of defense costs and nuisance-value settlements can damage the viability of respirator manufacturers. For example, as concerns regarding the flu pandemic rose, United States respirator manufacturers warned that they had spent ninety percent of net income from respirator sales on litigation costs in one year. *See* Coalition for Breathing Safety, *Can the U.S. Afford a Shortage of Respirator Masks to Fight Flu Pandemic?,* Sept. 19, 2006.

Application of a lenient causation standard could spur a new surge of litigation in California and pressure respirator manufacturers to settle meritless claims. Indeed, plaintiffs' law firms across the country are already using the *Tyler* verdict to advertise for new claims against respirator makers. *See, e.g.*, Thornton Law Firm LLP, *Defective Mask: $32.8M Mesothelioma Verdict, at* http://www.tenlaw.com/2016/05/defective-mask-32-8m-mesothelioma-verdict/.

II. IMPOSING UNDUE LIABILITY AND DEFENSE COSTS ON RESPIRATOR MANUFACTURERS MAY ADVERSELY IMPACT PUBLIC HEALTH AND SAFETY

Although the case before this Court involves a substantial damage award, most claims against respirator manufacturers are brought largely for their nominal settlement value. These claims, more of which would be

sparked by applying a lenient causation standard, are not only damaging to the companies, but threaten to have a broader adverse effect on the public health and safety.

The financial impact of such suits, even if ultimately dropped or settled for small amounts, provides a strong disincentive for respirator manufacturers to continue producing these safety devices for sale in the United States or for new companies to enter the respirator market. If the evolution of asbestos and silica mass tort litigation provides any guide, mounting liabilities could force respirator manufacturers to shut down. These results, at the very least, would reduce the availability and affordability of respirators. Should their supply fail to keep pace with demand, industrial workers and the public would be exposed to considerable, and entirely unnecessary, risk.

Such negative effects are heightened in times of emergency or crisis. An integral part of the United States emergency planners' and first responders' strategy in the case of a pandemic is the use of respirators – a strategy which, depending on the severity of the outbreak, may fail due to litigation costs depleting the capital resources among the major domestic respirator manufacturers. For example, there was significant concern during the swine flu and avian flu threats that there would not be sufficient masks available should the virus reach pandemic proportions. *See* Bevan Schneck, *A New Pandemic Fear: A Shortage of Surgical Masks*, Time

(May 19, 2009); *U.S. Pandemic Could Severely Strain Face Mask, Other PPE Supply Pipeline*, Infection Control Today (Oct. 4, 2008).

Most respirator production has moved outside the United States with nine out of ten masks (disposable respirators and the less sturdy surgical masks) manufactured in China and Mexico, *see* Schneck, *A New Pandemic Fear,* where they are not subject to American tort litigation. This reliance on foreign manufacturers has led some to question whether sufficient respirators would be available to Americans in an emergency situation because foreign manufacturers are likely to divert their supplies to the countries in which they are located. *See id.*; *see also* Occupational Safety & Health Admin., Proposed Guidance on Workplace Stockpiling of Respirators and Facemasks for Pandemic Influenza (May 9, 2008) (encouraging employers to purchase and stockpile facemasks and respirators because "manufacturing capacity at the time of an outbreak would not meet the expected demand for respiratory protection devices during the pandemic").

More recently, the U.S. Department of Health and Human Services recognized that U.S. manufacturing companies do not have the capacity to make the number of respirators that would be needed to protect health care workers and other patient caregivers in an influenza pandemic or other public health emergency. *See* U.S. Dep't of Health & Human Servs., *HHS*

Funds Development of High-Speed Manufacturing for N95 Respirators, Dec. 10, 2015.

Shifting the liability of companies that made asbestos-containing products or employers that inadequately protect the safety of their workers to respirators manufacturers may result in additional companies leaving the respirator market or moving operations abroad.

III. THE TRADITIONAL CAUSATION STANDARD SHOULD APPLY TO PROTECTIVE DEVICE DEFENDANTS

It is essential that this Court properly require plaintiffs to show a defect in the design of the protective equipment or its accompanying warnings *and* that such a flaw caused the plaintiff to develop the injury at issue.

The trial court's instruction to the jury based on application of the relaxed causation standard based on CACI 435 was improper. Under this standard, "the plaintiff must first establish some threshold exposure to the defendant's asbestos-containing products." *Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953. Once such exposure is shown, "the plaintiff need not prove that *fibers* from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth." *Id.* at 982-83 (emphasis added). Instead, the plaintiff need only prove that "exposure to defendant's product was a substantial factor causing the illness by showing . . . it contributed to the plaintiff's . . . risk of developing

cancer." *Id.* The court adopted this approach specifically for claims against manufacturers and suppliers of *asbestos-containing* products. *See id.* at 976-77. Yet, the trial court here modified and applied this approach to a protective safety device, instructing the jury to that it could find the defendant liable if Mr. Tyler's use of the company's respirators was a substantial factor in contributing to his risk of developing mesothelioma. *See* 9JA2062.57.

Protective safety equipment, however, does not contribute to a worker's exposure in the same manner as asbestos-containing products or an unsafe work environment. This equipment, when properly selected by the employer and used by the worker as instructed, reduces a worker's exposure to asbestos fibers. Respirators lower the risk of developing cancer; they do not emit and contribute to a plaintiff's asbestos exposure.

CACI 430, the traditional causation standard, is appropriate in tort claims involving products that do not contain asbestos. The commentary to the instruction recognizes that CACI 430 "subsumes the 'but for' test of causation—e.g., plaintiff must prove that but for defendant's conduct, the same harm would not have occurred." CACI 430 (citing *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052, 1 Cal.Rptr.2d 913). In fact, when the Advisory Committee on Civil Jury Instructions recommended that the Judicial Council amend CACI 430 and 435 in 2007, the Committee indicated that traditional but-for causation would apply to manufacturers of

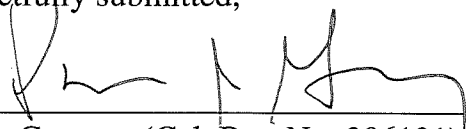
non-asbestos products, such as respirators. *See* Judicial Council of Cal., Civil Jury Instructions: Approve Publication of Revisions (Cal. Rules of Court, rule 2.1050) (Oct. 20, 2007), at 20.

Under CACI 430, a plaintiff must show that but for a defect in the defendant's respirator with respect to its design or instructions, the plaintiff would not have developed mesothelioma. The evidence here indicated that the Plaintiff did not use an AO product for the first three years of his employment and that his employer failed to implement basic engineering or administrative controls that would have reduced his exposure to asbestos. Other cases may arise in which an employer did not provide proper respiratory safety gear to a plaintiff or a plaintiff only intermittently wore a respirator when exposed to a hazardous substance. In such cases, the plaintiff could have developed cancer regardless of the defendant's product. The alternative, CACI 435, unjustly suggests that juries impose liability on companies that supplied equipment to protect workers from contaminants as if they supplied hazardous asbestos-containing products.

CONCLUSION

For these reasons, the Court should find that the traditional causation standard reflected in CACI 430 applies here, reverse the judgment below, and enter a new judgment in AO's favor on all claims.

Respectfully submitted,



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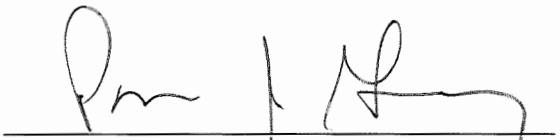
CERTIFICATE OF WORD COUNT

I, Patrick Gregory, an attorney duly admitted to practice before all courts of the State of California and a member of Shook, Hardy & Bacon L.L.P., counsel of record for *amici curiae*, certify that the foregoing complies with the requirements of Rules 8.520 and 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point font, double spaced, and contains less than 14,000 words as measured using the word count function of "Word 2010."



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