Case No. S228087

In the

Supreme Court of California

MICHAEL SHERMAN, et al.,

Plaintiffs and Appellants,

v.

HENNESSY INDUSTRIES, INC.,

Defendant, Respondent and Petitioner

From a Decision by the Court of Appeal, Second Appellate District,
Division Four, Case No. B252566,
Appeal from the Los Angeles County Superior Court
Hon. Emilie H. Elias, Case No. JCCP 4674, Case No. BC 42182

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I

INTRODUCTION

The Petition pointed out that review is justified because the Court of Appeal's decision conflicts with the long-standing rule in California, set forth in many decisions and most recently addressed by this Court in *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335 ("*O'Neil*"), that a product liability defendant is not liable unless it is in the chain of commerce of the product that caused injury. In this case, plaintiffs allege injury from asbestos: Hennessy's alleged predecessor did not make any products containing asbestos, but did make a tool that was used with products of others, some of which contained asbestos.

The Court of Appeal over-extended an exception set forth in *O'Neil* that was based on the same District's decision in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (1997) 129 Cal.App.4th 577 ("*Tellez-Cordova*"). Just as in *O'Neil* this Court rejected "[t]he Court of Appeal's extension of *Tellez-Cordova* beyond its unique factual context" (53 Cal.4th at p. 361), the Court should do the same here.

The Answer either does not address, or cursorily dismisses, many of the points raised in the Petition, and thereby concedes both their validity and the need for this Court's review. The Court should grant review.

II

ARGUMENT

A. The "indirectly derived economic benefit" test is unprecedented and could make the *Tellez-Cordova* exception swallow the *O'Neil* general rule.

The Petition takes issue with the Court of Appeal's new "derived economic benefit" test, which imposes liability on the maker of one product if the maker "indirectly derived economic benefit" from the existence of the injury-producing product. (Op., p. 19.) The Answer denies that this is a new test. (Answer, p. 30.) But just as the Petition stated that no reported decision ever utilized this theory of product liability, the Answer cites no such decision. Instead, the Answer simply parrots the opinion's purported basis for adopting the new formulation. According to the Answer, the Court of Appeal did not announce a new test, "it simply addressed the policy rationale underlying the *Tellez-Cordova* exception." (Answer, p. 30, citing Op. at pp. 18-19.) A "rationale" that is not expressed by either *Tellez-Cordova*, or *O'Neil*, or any other case is a new test.

The Petition demonstrated this by setting forth a number of situations where the Court of Appeal's "derived economic benefit" test would result in liability, but existing law would reject liability. (Pet., pp. 16-17.) For example, the makers of component parts could be potentially liable for defects elsewhere in the finished products, including other

components, because plainly the component part maker derives an economic benefit from the existence of the finished product and the other components. In contrast, under existing law the seller of a component part is not strictly liable for any defect in the completed product but only for those defects in the component part it sold. (*Jimenez v. Superior Court (T.M. Cobb. Co.)* (2002) 29 Cal.4th 473, 480.) Similarly, the maker of tools used on surfaces or materials that are potentially toxic derives an economic benefit from the existence of a need for the tool. Arguably, the maker of any product "derives economic benefit" from the existence of other products used with the manufacturer's. The Answer does not dispute or address any of these hypotheticals, and thereby concedes that the effect of this decision could be wide-ranging. (Whether that effect is desirable is perhaps a matter for merits briefing: that it is wide-ranging is why review is proper.)

The Petition also pointed out that the "derived economic benefit" rule espoused by the Court of Appeal's opinion would impose liability in a host of cases where this Court and others have rejected it. (Pet., pp. 17-19.) The Answer is silent on the point. For example, a hotel derives economic benefit from providing bathtubs to its guests, but this Court has held the hotel not liable for defects in the tub because it is not in the chain of commerce. (*Peterson v. Superior Court (Banque Paribas)* (1995) 10 Cal.4th 1185.) Similarly, stove manufacturers derive an economic benefit

from the existence of pipe, but a stove manufacturer is not liable for defects in the pipe. (*Garman v. Magic Chef, Inc.* (1981) 117 Cal.App.3d 634.) Suppliers of sulfuric acid plainly derive economic benefit from the existence of tank cars to transport their product, but they are not liable for injuries when the acid spilled out of a defective tank car, even where the suppliers loaded the car. (*Blackwell v. Phelps Dodge Corp.* (1984) 157 Cal.App.3d 372.) The Answer does not even mention these other cases, much less explain how the Court of Appeal's "derived economic benefit" theory is consistent with them, or with any of the many other cases either underlying this Court's decision in *O'Neil* or consistent with it, but dismissed by the *Sherman* Court of Appeal in a footnote. (Op. n.6, pp. 20-21.)

The Petition pointed out that brake linings are composed of many different materials, in proprietary blends that change over time, and that the law could not reasonably require (though the "indirectly derived economic benefit" test would require) Ammco to research all these materials used by other companies. (Pet., p. 24.) The Answer does not address either point.

"Indirectly derived economic benefit" is not the proper test. "Chain of commerce" is the proper test. "Derived economic benefit" is not the equivalent of "chain of commerce."

B. The Answer avoids addressing a key conflict with *O'Neil* and inadequately addresses others.

1. The Answer flat-out ignores the single clearest conflict between *Sherman* and *O'Neil*.

The Petition pointed out the most textually glaring example of how *Sherman* conflicts with *O'Neil*:

> "Hennessy argues that a product falls outside the exception unless it can be used *only* in an injury-producing manner. We disagree." (*Sherman* opinion at pp. 17-18, emphasis in original.)
>
> "The facts in *Tellez-Cordova* differed from the present case in two significant respects. First, the power tools in *Tellez-Cordova* could *only* be used in a potentially injury-producing manner. Their sole purpose was to grind metals in a process that inevitably produced harmful dust." (*O'Neil*, 53 Cal.4th at p. 361, emphasis in original.)

(Pet., p. 11.)

The Answer does not mention these two passages, much less reconcile them. Small wonder. They are irreconcilable. They give irreconcilably different guidelines to trial courts faced with "associational" product liability claims.

2. The Answer distinguishes saws and grinders in a way that *O'Neil* would not.

The Petition pointed out that *O'Neil* expressly disapproved holding manufacturers of saws liable for harm from asbestos-containing insulation (*O'Neil*, 53 Cal.4th at pp. 361-362), and that brake grinders are in the same relation to asbestos-containing brakes as saws are to insulation. (Pet., pp. 9-10.) On this point, the Answer at least acknowledges the words this Court used in *O'Neil*, but its purported distinction fails. The Answer argues that saws may be used for many purposes other than cutting insulation, while grinders were used only on brake linings. Absolutely true, but irrelevant. The reason this Court gave for excluding saw manufacturers from liability was not the number of alternative uses for a saw, but that a saw would not "inevitably create[] a hazardous situation," because it is not always used on asbestos-containing insulation. (*O'Neil*, 53 Cal.4th at p. 361.) So too here, use of the grinders did not "inevitably create[] a hazardous situation," because they were not always used on asbestos-containing brake linings.

That saws may be used for multiple purposes was not the reason why their manufacturers are excluded from liability for uses that result in harm, but serves to illustrate the wrong-headedness of the argument that parties should be liable for defects in the products of others.

C. The Answer's additional statement of facts contains no reasons why review should not be granted.

The Answer chides the Petition for not presenting "a detailed statement of the facts and evidence," and goes on to provide a lengthy statement of the facts. (Answer, p. 4 and pp. 4-11.) The few facts really necessary to understand the Court of Appeal's departure from the *O'Neil* line of cases and why review is proper were contained in the Petition, and are not contested by the Answer. The Shermans claimed injury from asbestos; the Ammco grinders did not contain or require the use of asbestos; the grinders were used on brake linings, many but not all of which contained asbestos; Mr. Sherman himself used the Ammco grinders on brake linings that contained asbestos and brake linings that did not; a co-worker at his shop said that during his time at the shop, he worked "70%" on non-asbestos linings.

Most all of the additional facts presented in the Answer, however interesting they may be on their own, or in the context of merits briefing, are at best irrelevant to why this Court should grant review. For example, the first fact cited is when Mr. and Mrs. Sherman were married. (Answer, p. 4.) The Answer describes a "Model 8925" dust collector bag (*id.*, p. 7), but it was developed after Mr. Sherman's time at the shop, and Mr. Sherman never used it. The Answer describes studies performed for Ammco in 1978 and 1986 (*id.*, pp. 10-11), but these too were long after 1974, when Mr.

Sherman last worked with an Ammco grinder. The Answer observes that the grinding brake linings "necessarily result[s] in the creation of dust" (*id.*, p. 5), but the Shermans do not allege injury from dust, they allege injury from a particular kind of dust, dust that contains asbestos. Neither these, nor most of the rest of the facts set forth in the Answer, bear on the issue of whether a defendant should be liable for harms from a product it did not manufacture.

The Answer points out that plaintiffs submitted an expert declaration supporting their position, but it makes no difference, particularly as to the propriety of review. The declaration admits that "other [i.e., non-asbestos] friction materials were available at the time" (4 AA 1029:2) and concedes "the limited availability of metallic [i.e., non-asbestos] brake linings." (4 AA 1029:16). The declaration of plaintiffs' expert did not contest that non-asbestos brake linings were also in more frequent use on non-American cars. Instead, in something of a non sequitur given these concessions, but purportedly based on the prevalence of asbestos-containing brake linings compared to non-asbestos brake linings, the expert ventured: "In the 1960s and 1970s, any mechanic whose job duties included performing brake installation and repair, and who used an Ammco brake arc grinding machine in the course of those occupational duties, would inevitably be exposed to asbestos from the use of the machine." (4 AA 1030:1-3.)

This statement ignores both the fact that the asbestos was not in "the machine" but in some of the linings on which it was used, and that many linings did not contain asbestos. It is more true that, in the 1940s to the 1960s, any Navy worker whose duties included repairing pumps and valves "would inevitably be exposed to asbestos" from gaskets, packing and insulation. Yet this Court, faced with that situation in *O'Neil*, held that the makers of the "bare metal" pumps and valves were not liable for harms resulting from the asbestos in those other products. "Inevitable," in the *O'Neil* sense of the word for purposes of the *Tellez-Cordova* exception, means does every use of the product inevitably involve the danger that resulted in injury. Not "over the course of an occupational lifetime, would it be statistically inevitable that a worker would encounter that danger?"

III

CONCLUSION

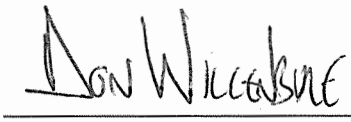
As the Petition pointed out, the *Sherman* opinion conflicts with *O'Neil* and decades of sound product liability decisions, and threatens to impose on defendants liability for products they never manufactured, designed, or sold, or had any control over. The Answer pretends that "indirectly derived economic benefit" has always been the law, and ignores that the Court of Appeal's *ratio decidendi* is inconsistent with many other

cases that refuse to impose liability for harms caused by the products of others. This Court should grant review.

Respectfully submitted,

Dated: September 4, 2015

GORDON & REES LLP

By: 

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WORD COUNT CERTIFICATION

Pursuant to Rules of Court, rules 8.204 (d) and 8.504(d)(1), I hereby certify based on the word count of the computer program used to prepare the document that the word count of the foregoing Reply is 1,993 words.

Dated: September 4, 2015

Don Willenburg

PROOF OF SERVICE

Sherman v. Hennessy Industries, Inc.

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP, 1111 Broadway, Suite 1700, Oakland, CA 94607. On the date stated below, I served the following documents:

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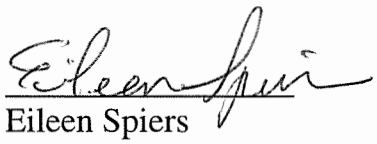

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