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December 5, 2014

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The Hon. Chief Justice Tani Cantil-Sakauye
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Re: *Kaiser Gypsum Company, Inc. v. Superior Court*
Supreme Court Case No. S222641
First Appellate District, Division 3, Case No. A143265

Dear Chief Justice and Associate Justices:

In *Kaiser Gypsum Co., Inc. v. Superior Court (Steele)*, the First Appellate District upheld the trial court's standard for determining whether a product manufacturer may be held liable, in a strict products liability action, for "take-home" exposure to asbestos. Under the trial court's approach, a plaintiff asserting a strict products liability claim need not establish that a manufacturer has any duty of care to the plaintiff. This decision is at odds with decisions of this Court, the California courts of appeal, and other courts across the country. If left to stand, the trial court's ruling will not only deepen the ever-expanding asbestos litigation quagmire, but also will create a conflict as to whether duty is an element of strict products liability. The petition should be granted to clarify that, to prevail on a strict liability claim, a plaintiff must establish that a defendant owes a legal duty of care to the plaintiff. The Court should also grant the petition to re-affirm that a defendant owes no duty of care where, as here, the connection between the plaintiff's alleged injury and the defendant's conduct is, at best, remote and indirect. (See Pet. p. 8.)

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I. Interest of the Chamber of Commerce of the United States

The Chamber of Commerce of the United States is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including in California. Many of the Chamber's members in California are defendants in strict products liability litigation, and thus have an acute interest in the proper and predictable application of the law of strict products liability.

II. The Court Should Grant the Petition

This Court, as well as the courts of appeal, have long recognized that a plaintiff in a strict product liability action must show that the defendant owed him or her a legal duty of care. (E.g., *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362-366 [noting that under negligence and strict liability law, liability lies only where a duty is owed to a plaintiff]; *Taylor v. Elliott Turbo-machinery Co.* (2009) 171 Cal.App.4th 564, 575-592 [analyzing whether defendant owed a duty to strict liability plaintiff]; *Macias v. State of California* (1995) 10 Cal.4th 844, 850-852, 860 [upholding summary judgment for manufacturers on plaintiffs' negligence *and* strict product liability claims because "defendants owed plaintiffs no duty"].) Despite this authority, the trial court categorically ruled that duty "is not an element of strict products liability," (vol. 3, exh. 12, pp. 613-614), relying solely on *Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451. But as the petition points out, *Elsheref* failed to cite any authority for this proposition, and both *Elsheref* and the trial court below failed to grapple with contrary authority from this Court cutting off manufacturer liability for harm suffered by plaintiffs with a tenuous connection to the defendant. (See Pet. pp. 10-11; *O'Neil, supra*, at p. 342; *Macias, supra*, at p. 847.) Review is warranted to reaffirm that a duty analysis applies in a strict product liability action.

Allowing strict liability plaintiffs to assert claims against manufacturers who owe them no duty would invite a new wave of asbestos litigation in California. This is a classic "bystander-of-a-bystander" case. It involves a plaintiff who admittedly never used the defendant's product, but instead *might* have been exposed to asbestos by her husband—who, in turn, *also* admittedly never used the defendant's product, but who *might* have experienced *secondhand* exposure via co-workers at his jobsite. If such a "bystander-squared" case is permitted to proceed, it will continue a troubling trend in which asbestos plaintiffs seek to expand tort liability to reach new defendants with an increasingly attenuated link to the plaintiffs. (E.g., Mark Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009).) This Court should grant review to prevent this "unprecedented expansion." (*O'Neil, supra*, 53 Cal.4th at p. 342.)


This Court has granted review on the related issue of take-home exposure liability in a negligence action. (See *Kesner v. Superior Court* (2014) 226 Cal.App.4th 251, review granted August 20, 2014 (S219534), and *Haver v. BNSF Railway Co.* (2014) 226 Cal.App.4th 1104, review granted August 20, 2014 (S219919).) Review here would allow this Court to resolve

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fully the key issues concerning take-home exposure liability by addressing the lower courts' erroneous rulings that duty is not an element of a strict liability claim.

For these reasons, the Chamber urges this Court to grant Kaiser Gypsum's petition. The Chamber thanks the Court for considering its views.

Very truly yours,


Fred A. Rowley, Jr.

EMR

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, CA 94105-2907.

On December 5, 2014, I served true copies of the following document(s) described as on the interested parties in this action as follows:

U.S. CHAMBER OF COMMERCE AMICUS LETTER

See Attached Service List

BY FedEx: I enclosed the document(s) in a sealed Fed Ex envelope addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is schedule for pickup in the ordinary course of business with FedEx, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on December 5, 2014, at San Francisco, California.



Barbara Palomo

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