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August 31, 2017

**Via Overnight Delivery**

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: ***Petitpas v. Ford Motor Co., et al.*** **(S243799; B245037; BC473216)**
**Consumer Attorneys of California's letter requesting depublication (CRC 8.500(g))**

**REQUEST FOR DEPUBLICATION**

Dear Justices:

## INTRODUCTION

Consumer Attorneys of California urges this Court to depublish the Court of Appeal's decision in *Petitpas v. Ford Motor Co., et al.*, S243799 ("the Opinion"). On the issue of a manufacturer's tort liability for harmful combined uses of its products with other manufacturers' products, the Opinion does not meet the standards for publication because: (1) the Opinion misapplies the uniform published case law; (2) the Opinion misstates the factual record; and (3) the factual record is missing some of the best available evidence pertaining to Ford Motor Company's brake assemblies.

The correct rule – as distilled from recent case law that this Court has managed through its own writing, through its publication and depublication orders,

and through its denials of review – is that a manufacturer may be found liable for the "inevitable" harmful combined uses of its products with other manufacturers' products, subject to comparative-fault principles. Instead of applying that rule, the Opinion commits legal error by insulating Ford from all liability merely because the end-user's exposures to the asbestos-containing brake-wear dust occurred while the vehicles were turned off during maintenance and repair work, and because the end-user could have been more careful. [*Petitpas v. Ford Motor Co*. (2017) 13 Cal.App.5th 261, 297.] The Opinion's "new rule of law" is unsupported by precedent or fairness, and therefore is unworthy of publication. [Cal. Rules of Court, rule 8.1105(c)(1).]

The Opinion also commits factual error by ignoring the evidence in the record showing that Ford's brake assemblies indeed could not function without asbestos-containing friction linings until after Ford belatedly redesigned those brake assemblies. Because the Opinion does not apply the law to the actual "set of facts" here, the Opinion likewise is unworthy of publication. [Cal. Rules of Court, rule 8.1105(c)(2).]

Plus, even if the factual record were too thin in this case, that would weigh against publication of the Opinion because better evidence from other lawsuits shows that Ford's brake assemblies themselves were defective due to Ford's design and warning decisions. Without analysis of that better evidence, the Opinion does not make "a significant contribution to legal literature," and again is unworthy of publication. [Cal. Rules of Court, rule 8.1105(c)(7).]

## INTEREST OF CONSUMER ATTORNEYS OF CALIFORNIA

Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent plaintiffs injured or killed as the result of asbestos and other toxic exposures, Consumer Attorneys is interested in the significant issues presented by the appellate court's decision in this case.

## DISCUSSION

### I. The Opinion misapplies the uniform published case law.

Since 2005, this Court has shaped the development of the uniform published case law that explains how a manufacturer may be found liable for harmful combined uses of its products with other manufacturers' products. This Court has ordered publication (*Tellez-Cordova*), written its own opinion (*O'Neil*), ordered depublication (*Barker*), declined to grant review on its own motion (*Shields*, *Bettencourt*, *Sanchez, and Johnson*), and denied review (*Sherman*, *Hetzel*, and *Rondon*). The Opinion here threatens to undo this Court's work.

***Tellez-Cordova* – published by order of this Court**: In *Tellez-Cordova*, the plaintiff used grinders, sanders, and saws. [*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577, 579.] The plaintiff developed lung disease from his exposures to the toxic dust that was released from the discs, belts, and wheels that were attached to the power tools. [*Id.*] *Tellez-Cordova* held that the power-tool manufacturers could be found liable based upon their power tools' "inevitable" and dangerous use in conjunction with toxic materials. [*Id*. at 580, 584.] The power tools arguably should have been designed to include adequate exhaust ventilation systems, and the power tools arguably should have included adequate warnings. [*Id.*] The power-tool manufacturers had such duties because the normal operation of their own products created the hazardous dust, "even if the dust did not come directly from the tools." [*Id*. at 585.] This Court ordered publication of *Tellez-Cordova*. [S131397, 5/18/2005 Docket Entry.]

***O'Neil* – this Court's opinion**: In *O'Neil*, this Court reinforced *Tellez-Cordova* while articulating the standards for liability arising from the harmful combined uses of separate manufacturers' products. [*O'Neil v. Crane Co.* (2012)

53 Cal.4th 335, 362.] The main test for such liability is whether the "defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm (citation), or because the defendant participated substantially in creating a harmful combined use of the products (citation)." [*Id.*] Stated differently, "[w]here the intended use of a product inevitably creates a hazardous situation, it is reasonable to expect the manufacturer to give warnings." [*Id.* at 361.] *O'Neil* noted that liability also may be appropriate if "a product [] *required* the use of a defective part in order to operate," or if "the product manufacturer specified or required the use of a defective replacement part." [*Id.* at 350, fn. 6 (emphasis in original).]

***Barker* – depublished by order of this Court**: After *O'Neil*, *Barker* incorrectly stated the law and therefore affirmed a summary judgment in favor of the defendant brake-grinder manufacturer – the machine was designed to unsafely pulverize brake friction linings that almost always contained asbestos during the relevant period, although the machine itself "did not contain asbestos and could be operated independently without asbestos-containing materials." [*Barker v. Hennessy Industries, Inc.* (2012) 141 Cal.Rptr.3d 616, 618-619.] *Barker* would have permitted liability only if the brake grinder "necessarily operated with asbestos-containing brake parts because non-asbestos-containing brake parts were not manufactured at the time Barker was exposed to asbestos dust." [*Id.* at 629.] *Barker* thus set the standard too high, requiring proof of an exclusive harmful combined use rather than an inevitable harmful combined use. This Court ordered depublication of *Barker*. [S204106, 8/29/2012 Docket Entry.]

***Shields, Bettencourt, Sanchez, and Johnson* – opinions for which review was not requested**: *Shields* and *Bettencourt* again involved brake grinders that inevitably were used with asbestos-containing brake friction linings, and the plaintiffs there alleged more than enough facts to support the defendant's liability. [*Shields v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 782, 797 (alleging both exclusive and inevitable harmful combined uses); *Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1117 (same).]

In contrast, *Sanchez* involved a plaintiff whose case properly was dismissed because he had attached a saw blade to a grinder machine. [*Sanchez v. Hitachi Koki, Co., Ltd.* (2013) 217 Cal.App.4th 948, 951 ("The safety instructions and

instruction manual for the Hitachi grinder expressly warned that saw blades should never be used with the grinder.").]

*Johnson* involved brake assemblies like those here, but the *Johnson* plaintiff lacked evidence regarding the defendant brake-assembly manufacturers' design-defect responsibility for the decedent's asbestos exposures, and the plaintiff did not allege failure-to-warn liability. [*Johnson v. ArvinMeritor* (2017) 9 Cal.App.5th 234, 246-248, fn. 14.] *Johnson* emphasized the undeveloped factual record: "[T]here is no evidence that the brake assemblies *required* asbestos-containing materials in order to function generally. . . . There is no evidence Rockwell needed to redesign its brake assemblies to accommodate asbestos-free linings." [*Id.* at 248 (emphasis in original).] As we show below, such evidence exists here and in other lawsuits that involve Ford's brake assemblies. The *Johnson* plaintiff only requested depublication of the opinion, which this Court denied. [S241600, 5/24/2017 Docket Entry.]

***Sherman*, *Hetzel*, and *Rondon* – review denied by this Court**: *Sherman*, *Hetzel*, and *Rondon* again involved brake grinders that inevitably were used with asbestos-containing brake friction linings, and each case involved a summary-judgment factual record that was based upon evidence rather than mere allegations. [*Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133, 1137-1138; *Hetzel v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 521, 523-524; *Rondon v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 1367, 1371-1372.] Each opinion explained that liability was appropriate based upon the brake grinders' "inevitable," intended, and normal uses. [*Sherman*, 237 Cal.App.4th at 1147-1148; *Hetzel*, 247 Cal.App.4th at 530; *Rondon*, 247 Cal.App.4th at 1379.] This Court denied review of each opinion. [S228087, 9/30/2015 Docket Entry; S235086, 7/20/2016 Docket Entry; S234839, 8/24/2016 Docket Entry.]

**The Opinion creates a new and unfair rule**: Inconsistent with the above authorities, the Opinion wrongly holds that a defendant brake-assembly manufacturer cannot be liable for asbestos that is released from other manufacturers' brake friction linings, purportedly because an end-user always is to blame for breathing the brake-wear dust during maintenance and repair work when the vehicle is not operating. The Opinion states, "And even if we were to define the 'normal operation' of a vehicle to include routine repair and maintenance, as

the Court did in *O'Neil*, liability still would not attach. Only the manner in which Joseph or others chose to clean the brake drums—by blowing the dust out with compressed air or tapping the dust out onto the ground—released the dust into the air. Had Joseph or others chosen to clean brake drums in some other manner, such as vacuuming brake dust out of the drums or wiping the drums with wet rags, presumably the existence of airborne dust would have been minimized." [*Petitpas*, 13 Cal.App.5th at 297.]

Instead of receiving the undeserved and complete immunity granted by the Opinion, defendants such as Ford properly may shift comparative fault to an end-user plaintiff who unreasonably increased his or her asbestos exposures during the product's operation, maintenance, or repair. [*Scott v. Ford Motor Co.* (2014) 224 Cal.App.4th 1492, 1502 (plaintiff was an automotive shop owner and a "sophisticated user" during part of his exposure period, justifying a partial affirmative defense based upon his contributory negligence).]

In sum, this Court should depublish the Opinion because it departs, without justification, from the uniform published case law that has recently developed under this Court's direction.

## II. The Opinion misstates the factual record.

Beyond the Opinion's legal error, the Opinion wrongly concludes that the evidence was insufficient to support Ford's liability under *O'Neil* and the other appellate decisions discussed above.

The Opinion states that the plaintiff submitted "no evidence" supporting liability under *O'Neil*:

> • "Plaintiffs did not present any evidence to show that cars originally equipped with asbestos-containing brakes were unable to use non-asbestos brake parts. No evidence suggested that Ford-designed brake drums or disks were incompatible with lining materials that did not contain asbestos." [*Petitpas*, 13 Cal.App.5th at 294.]

> • "Other than presenting evidence that replacement brake linings typically contained asbestos at the time, plaintiffs presented no evidence that the very design of Ford cars from that time period *required* brakes that contained asbestos." [*Id.* at 295 (emphasis in original).]
>
> • "There was no evidence presented that using a car's brakes created airborne dust that exposed the user to respirable asbestos fibers." [*Id.* at 297.]

The Opinion is wrong about that. As the Petition for Review shows at pages 15 and 16, the Opinion fails to address the following relevant evidence that is in the record:

> • Ford's corporate representative (Mark Taylor) admitted specifically that Ford's cars were designed for asbestos brakes, and non-asbestos replacement brakes *could not* be used: "you just can't willy-nilly replace" asbestos brakes with non-asbestos brakes. [13 AA 3454, Segments 196-199.]
>
> • Per Taylor, changing brake types would necessitate a "whole testing protocol" to "make sure that the vehicle meets [expected] *functionality*." [*Id.* (emphasis added)]
>
> • Another Ford corporate representative (Lawrence Roslinski) thus confirmed that, when Fords had asbestos in the original equipment, "then the replacement parts *would be* containing asbestos, too." [13 AA 3454, Segments 30-32 (emphasis added).]
>
> • Several Ford documents submitted at trial also showed that Ford's brakes were designed to work with asbestos parts, and no substitutes existed. [*E.g.*, (12 AA 3042) (1977 Ford memo: "[T]here are no asbestos-free brake linings currently available that will be satisfactory

> for normal customer usage."); *see also* Exh. 1775 (10 AA 2536:19-20; 12 AA 3055-3056) (1977 Ford memo: "no known development is in process" to find a replacement for asbestos-containing brake linings in drum brakes); Exh. 1783 (12 AA 3039) (1971 Ford memo: "Alternatives for asbestos based linings are few and all have some disadvantages."); (12 AA 3059, 1971 Ford Memo: "I indicated we were exploring [formulations not containing asbestos] but that, to date, I do not know of any such materials which can satisfy the performance requirements under all operating conditions.".]

The Opinion ignores all of this evidence while incorrectly stating that "no evidence" was presented. It therefore should be depublished.

## III. The factual record is missing some of the best available evidence pertaining to Ford Motor Company's brake assemblies.

Finally, Consumer Attorneys respectfully submits that, based upon our members' participation in other lawsuits against Ford, this case is an insufficient vehicle to support a published appellate decision on this significant legal issue. The record here is missing critical evidence that shows what was wrong with Ford's brake assemblies. Those products truly were defectively designed, and they truly should have included asbestos warnings, because Ford required the use of asbestos-containing friction linings. Ford has admitted as much in various documents, including a 1985 letter to the United States Environmental Protection Agency:

> Car and truck brakes are sophisticated systems made up of parts which are carefully matched to function compatibly with each other, so as to provide appropriate braking characteristics for their vehicles under a wide range of operating conditions. A brake system is not simply a collection of disparate parts pads, shoes, discs, drums, etc.

> The pads and shoes of car and truck braking systems that use asbestos friction materials have very different properties from the pads and shoes of those that do not contain asbestos. One cannot simply use a non-asbestos substitute brake shoe in conjunction with a drum that was designed for an asbestos-containing friction material. Likewise, a disc brake that was designed for a semi-metallic friction material will not perform satisfactorily if an asbestos-containing pad is substituted.
>
> Although current car and truck brake systems are being designed without asbestos materials to the extent now feasible, past models continue to require for replacement those asbestos parts which they were designed to use. Asbestos containing pads and linings have different performance characteristics from the pads and linings that do not contain asbestos. For that reason, one cannot simply use a non-asbestos substitute brake lining in conjunction with a drum that was designed for an asbestos-containing friction material.

[*Baxley v. Advance Auto Parts, Inc.* (E.D.Pa. 2013) Not Reported in F.Supp.2d, 2013 WL 1100783, at fn. 1.] Other such Ford documents exist but apparently were not put into the *Petitpas* record.

Any published appellate decision that addresses Ford's potential liability for its asbestos-dust-laden brake assemblies should analyze this and other similar evidence.

## CONCLUSION

This Court should depublish the Opinion because: (1) it is legally incorrect under *O'Neil* and its progeny; (2) the Opinion is factually incorrect in light of the evidence that is in the record; and (3) the Opinion also is factually incorrect because it did not have the benefit of the best evidence that exists.

Sincerely,

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Valerie T. McGinty