S218176

IN THE Supreme Court
OF THE STATE OF CALIFORNIA

==========

FLAVIO RAMOS, et al.

Plaintiffs and Appellants,

vs.

BRENNTAG SPECIALTIES, INC., et al.,

Defendant and Respondent,

==========

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT • DIVISION FOUR • CASE NO. B248038

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BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS *AMICUS CURIAE*

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
C.R.C. Rule 8.208

The following application and brief are made by the Consumer Attorneys of California ("CAOC"). CAOC is a non-profit organization of attorneys and is not a party to this action. CAOC is not aware of any entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Dated: April 6, 2015

Respectfully submitted,

By: _____

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE:

The undersigned respectfully request permission to file a brief as *amicus curiae* in the matter of Ramos v. Brenntag Specialties (2014) 174 Cal.Rptr.3d 81 (hereafter Ramos) under Rule 8.520(t) in support of Plaintiffs and Appellants and on behalf of Consumer Attorneys of California ("CAOC").

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including personal injuries, consumer fraud, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. In particular, CAOC has participated as *amicus* in numerous important consumer and employee rights cases, including: Rose v. Bank of America, N.A. (2013) 57 Cal.4th 390; Aryeh v. Canon Business Solutions, Inc. (2013) 55 Cal.4th 1185; and Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004. CAOC has also participated as an *amicus* in many cases pending at

the intermediate appellate level.

CAOC has a substantive and abiding interest in ensuring that employees injured by third-parties in California are provided redress and access to justice. This is particularly true in the area of workplace injuries caused by third-party manufacturers of dangerous products who fail to adequately provide warnings to workers and end users of raw materials that are toxic and/or hazardous.

Request for Leave to File Late Filed Application for Permission to File CAOC's Amicus Brief

The Ramos matter was brought to the attention of the undersigned authors of the proposed amicus brief of CAOC on Friday, April 3, 2015. According the Court's docket, between March 19 and 20, several applications for permission to file amicus briefs were filed in support of defendants. Pursuant to Rule 8.520(f), any application to file an amicus brief was due no later than 30 days after all briefs of the parties were filed. As will be discussed below, the issues presented in Ramos are of great importance to CAOC and employees injured by allegedly dangerous products in the workplace in California. Accordingly, CAOC respectfully requests permission to file the instant late filed application for permission to file an amicus brief.

With respect to Rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. No party or counsel for a party, and indeed no person, save the authors themselves, has made a monetary contribution to fund the preparation or submission of the following amicus brief.

The proposed brief follows.

Executed in Los Angeles, California, this 6th day of April, 2015.

Application for Leave to File Amicus Brief

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INTRODUCTION

Amicus curiae Consumer Attorneys of California ("CAOC") respectfully submits that the holding of Second Appellate District was proper and should be upheld by this Court. The issues in this case are whether suppliers of materials that are inherently dangerous when used as intended had an obligation to provide warnings of those dangers to the foundry workers who would be using those materials. The Court of Appeal below agreed with Plaintiffs Flavio and Modesta Ramos ("Ramos") that, at the pleading stage, their causes of action for negligence, strict liability and loss of consortium were adequately alleged. CAOC also agrees.

Therefore, the CAOC respectfully requests that this Court uphold the sound decision of the Second Appellate District.

LEGAL DISCUSSION

I. The Court of Appeal's Sound Decision Reversing the Trial Court Sustaining Defendant's Motion for Judgment on the Pleadings Should be Upheld

A. A Motion for Judgment on the Pleadings Tests the Pleadings, Not the Facts Alleged

The standard on a motion for judgment on the pleadings is well-settled. (Smiley v. Citibank (1995) 11 Cal.4th 138, 145.) The trial court's task is to accept well-pleaded facts as true and determine whether the plaintiff's complaint

states facts sufficient to constitute a cause of action against the defendant. Here, the Court of Appeal strictly adhered to this well-settled standard and found that the plaintiff's causes of action for negligence, strict liability and loss of consortium were adequately pleaded. It therefore is not surprising that the Court of Appeal, Second Appellate District, Division 1 in Uriarte v. Scott Sales Co. (2014) 226 Cal.App.4th 1396, rev. granted September 17, 2014, S220088), reached a similar conclusion that the plaintiff had stated proper causes of action at the pleading stage.

In stark contrast, the Second Appellate District, Division 3 in Maxton v. Western States Metals (2012) 203 Cal.App.4th 81 abandoned the well-settled pleading standard and invaded the province of the trier of fact by deciding the ultimate question of whether the products at issue in that case were inherently dangerous when used as intended and whether adequate warnings were provided to the workers who used them. In particular, "[t]he component parts doctrine provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm." (O'Neil v. Crane Co. (2012) 53 Cal.4th 335, 355, emphasis added.) The doctrine does not excuse liability for harm caused by the component itself rather, it only excuses harm "caused by a product into which the component is integrated . . . ." (Rest.3d Torts, Products Liability, § 5.) The Courts of Appeal in Ramos and Uriarte

keenly observed this distinction and correctly found that the plaintiffs had adequately pled proper causes of action against the manufacturers of those inherently dangerous products.

Similarly, the adequacy of a manufacturer's warnings of toxic hazards is always a question of fact. (Schwoerer v. Union Oil Co. (1993) 14 Cal.App.4th 103, 111-114.) So too is the issue of whether an employer is "sophisticated" a question of fact. (Mozeke v. International Paper Co. (5th Cir. 1991) 933 F.2d 1293, 1297.) Moreover, whether a manufacturer reasonably relies on an intermediary to convey adequate warnings to an ultimate user is yet another prerequisite left to the trier of fact. (Carmichael v. Reitz (1971) 17 Cal.App.3d 958, 989.)

CAOC therefore urges this Court to uphold the well-reasoned Ramos decision.

II. California's Workers' Compensation Scheme Does Not and Should Not Provide Immunity to Third-Party Manufacturers and Suppliers of Materials for Failure to Warn.

Alcoa argues that "purchasing manufacturers are in the best position to make sure that workplace injuries are compensated, through workers' compensation benefits that workers receive without having to show fault by anyone." (Reply at 6.) Alcoa's argument has two obvious flaws: (1) it assumes that workers' compensation and third party recovery are equivalent, which they are not; and (2) there is no logical difference between this position and stating

that if a person has medical insurance they should have no need or right to file a third-party lawsuit.

A. Workers' Compensation Is Not Equivalent In Any Manner To Payment For Damages Legally Owed.

As California courts have recognized, a fundamental problem with categorizing workers' compensation benefits as any particular form of damages is that such benefits are not damages. (Moore S. Corp. v. Industrial Acc. Corn. (1921) 185 Cal. 200, 205; 1 Herlick, Cal. Workers' Compensation Law (5th ed. 1995) §§ 5.17, 6.1, pp. 5-15, 6-4.) Another problem is that the benefits payable do not correspond to the actual economic and non-economic damages sustained. "The workers' compensation law is indeed different than tort law." (Torres v. Xomox Corp. (1996), 49 Cal.App.4th 1, 30.)

Contrary to Alcoa's assertion, California courts have recognized that workers' compensation benefits are not equal to or the same as tort damages an employee might otherwise be able to recover for his injury. As stated in Solari v. Atlas-Universal Services. Inc. (1963) 215 Cal.App.2d 587, 599-600:

> The purpose of workmens' compensation is to rehabilitate, not to indemnify; and its intent is limited to assuring the injured workman subsistence while he is unable to work and to effectuate his speedy rehabilitation and reentry in to the labor marker. [citation omitted.] The liability under the Workman's Compensation Act is neither strictly in tort nor in contract, but is imposed incident to employment and against the employee's employer or the employer's insurance carrier....[T]he issues

> and items in an industrial accident proceeding for compensation are different from those recoverable in an action for damages against a third party by whose negligence the employee has been injured. [citation omitted.] Thus, physical pain and mental suffering are not compensable in a workmen's compensation proceeding unless they affect the employee's ability to work, while in an action against such third person damages for such pain and suffering may be awarded irrespective of their effect upon the ability to work. [citation omitted.]

Workers' compensation is not a complete remedy by any measure. It does not allow for any recovery for pain and suffering, nor does it account for past or future wage loss. A person whose recovery is limited to workers' compensation benefits will forever lose the ability to recover for these types of damages. The reason for this great reduction in compensation is rooted in the history and purpose of the workers' compensation system, which:

> ....balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation payments. Conversely, while the employee receives expeditious compensation, he surrenders his right to a potentially larger recovery in a common law action for the negligence or willful misconduct of his employer.

(Spratley v. Winchell Donut House, Inc. (1987) 188 Cal.App.3d 1408, 1413.) Therefore, while an employee agrees to accept this bargain with his own employer, he does not agree to this bargain as to all other third parties. Labor Code §3852, allows without limitation suits against any third parties for their

contribution to the happening of an incident. Labor Code §3852 states in part: "The claim of an employee, including, but not limited to, any peace officer or firefighter, for compensation ***does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer***." (Emphasis added.) If an employee's injuries are caused solely by the negligence of his employer, then the exclusive remedy must be workers' compensation. However, when the injuries are caused in whole or in part by the negligence of another – here the manufacturers and suppliers of materials that are inherently dangerous when used as intended – the employee has the right under the Labor Code to maintain a suit for tort damages. Damages that may extend far beyond the benefits the employee might receive under workers' compensation.

B. Receipt Of Workers' Compensation Collateral Source Payments That Are Subtracted From The Judgment Are Not A Basis For Providing Immunity.

The law has developed rules to deal with collateral source payments of all kinds, including workers' compensation benefits. If a person receives payment for medical bills by an insurance company, this is not a reasonable basis to deny a claim against the person who caused the need for those bills in the first place. While the insurance company may have a right of subrogation, just like a workers' compensation carrier, the ultimate responsibility rests with the person who causes the need for the bills.

Simply because workers' compensation pays for the medical bills and provides bare subsistence to injured workers when off work as the result of injuries sustained on the job, there is no public policy reason to provide complete immunity to third-party defendants who negligently caused the injury. Certainly, there is no public policy justification for preventing an injured employee from being made whole, or, as nearly whole as possible, by allowing the employee to seek damages against all individuals or entities that are responsible for his or her injuries.

III. The Important Public Policy Issues Involved in this Matter Should Be Determined Based Upon a Complete Factual Record.

Alcoa asks this Court to decide this matter on public policy considerations, based solely on the pleadings of this case, without any factual record developed through discovery. CAOC urges this Court to decline to do so because the issues are not ripe for appeal. (See Cal. Rules of Court, rule 8.500(c)(1) "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.")

Here, Alcoa abandoned its component parts doctrine argument – the basis of its argument to the Court of Appeal – thereby conceding its inapplicability to this case. Now, for the first time, Alcoa asks this Court to create new law, without a factual record, based upon public policy arguments

under its so-called "raw material" and "sophisticated intermediary" defenses. Both of these doctrines require a detailed factual analysis, which cannot occur at this stage of this case.

In its Reply Brief, Alcoa cites People v. Braxton (2004) 34 Cal.4th 798, 809 and asks this Court to consider its so-called "raw material" and "sophisticated intermediary" defenses for "public policy" reasons. (Reply pp. 2-3.) These new arguments were not raised or addressed below and the applicability of these factually based defenses should be decided upon a developed factual record, not on just the pleadings.

In Braxton, this Court merely explained the procedural requirements of a statute, as opposed to what Alcoa seeks here, a factual determination of an unripe issue based solely on the pleadings without the support of a factual record. The sophisticated intermediary defense is already before this Court in another case with a full evidentiary record that is more suitable for review. (See Webb v. Special Electric Co., Inc. (2013) 214 Cal.App.4th 595, rev. granted June 12, 2013, S209927.) Accordingly, CAOC urges this Court to dismiss review under Rule 8.528(b)(1).

CONCLUSION

For the forgoing reasons, CAOC urges this Court to uphold the Court of Appeals order revering the trial court's order sustaining Defendants motion for

judgment on the pleadings. In the alternative, CAOC respectfully requests that the Court dismiss review pursuant to Rule 8.528(b)(1).

Dated: April 6, 2015 Respectfully submitted,

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned counsel certifies that the text of this petition uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this petition consists of 1882 words as counted by the Corel WordPerfect X5 program used to generate this petition.

Dated: April 6, 2015

_____

David M. Arbogast

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 8117 W. Manchester Ave., Suite 530, Playa Del Rey, California 90293.

2. That on April 6, 2015, declarant served the **BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS AMICUS CURIAE** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of April, at Los Angeles, California.

_____

David M. Arbogast

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