Docket No. B239677

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE

SHERRELL VANHOOSER,

Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES

Respondent.

HENNESSY INDUSTRIES, INC.,

Real Party in Interest.

Los Angeles County Superior Court Case No. BC468065
Coordinated Proceeding No. JCCP 4674
The Hon. Emilie H. Elias, Judge Presiding

AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONER SHERRELL VANHOOSER

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, amicus and its counsel certify that apart from the attorneys representing amicus in this proceeding, as disclosed on the cover of this Brief, amicus and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that amicus or its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: March 15, 2012

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SHARON J. ARKIN

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WHY EXTRAORDINARY RELIEF SHOULD BE GRANTED

All of the asbestos cases filed in Los Angeles, Orange and San Diego Counties have been coordinated and assigned to the Honorable Emilie Elias under JCCP 4647. Judge Elias has granted several summary judgment motions on the basis of the issue presented in this proceeding, and intends to continue to do so. Essentially, Judge Elias has ruled in this and other cases that where an asbestos plaintiff is married ***after being exposed*** to asbestos but ***before being diagnosed*** with an asbestos-related illness, the injured plaintiff's spouse has no loss of consortium claim. The flaw in Judge Elias' rationale is that it ignores the effect of the Supreme Court's decision in *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, which held that, for purposes of asbestos cases, a plaintiff's ***injury*** does not accrue until ***diagnosis***. Mere exposure, the *Buttram* court held, does not create any right of action. Thus, if a plaintiff marries after exposure but ***before diagnosis***, the spouse has no injury for loss of consortium unless and until the plaintiff is diagnosed. But Judge Elias' rulings contravene this holding.

Immediate review – and even the immediate rendition of a decision

reversing Judge Elias under *Palma*[1] – is necessary for two reasons. First, unless immediate relief is granted, the petitioner in this case will lose her right to obtain her loss of consortium damages in this action – presently scheduled for trial on April 30, 2012. By the time this issue is resolved on appeal, her husband – diagnosed with mesothelioma – will be dead and her right to recover for pre-death loss of consortium will be have to be tried long after her husband's death.

Second – and more broadly – unless relief is granted and this issue decided immediately, hundreds of spouses in the coordinated proceedings will suffer the same fate and will lose their right to pre-death loss of consortium claims and/or will be forced to appeal this identical issue, thereby requiring this Court to devote substantial resources to the repeated resolution of the same issue. An immediate published decision on this issue correcting Judge Elias' erroneous analysis in this proceeding will provide direction to all the trial courts and will preserve the resources of both the courts and the litigants.

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[1] As reflected in Exhibit A, issuance of a *Palma* notice on this issue is appropriate. In *Pounds v. Superior Court*, Second District Court of Appeal Case No. B198666, Division Eight of this Court issued such a notice on this issue in a similar case. Because that notice was not published, however, it is not precedential. It is attached here only for purposes of demonstrating that at least one other court has recognized the urgency of the matter.

Consumer Attorneys of California therefore urges this Court to accept review of this matter and to resolve this issue as quickly as possible by reversing the grant of summary judgment in this case.

INTEREST OF THE AMICUS

The 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 injured 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 consumers injured by asbestos, it has a particular interest in assuring that loss of consortium claims of spouses of injured plaintiffs are protected.

LEGAL ARGUMENT

1.

IMMEDIATE REVIEW OF THIS ISSUE AND CORRECTION OF THE TRIAL COURT'S DECISION WILL BENEFIT INNUMERABLE PLAINTIFFS AND WILL PRESERVE THE RESOURCES OF THE PARTIES AND THE COURTS

Judge Elias has so far granted at least three motions for summary judgment against loss-of-consortium plaintiffs in the coordinated proceedings and has indicated that she intends to continue to do so. What that means is that all those plaintiffs will be required to appeal this issue – resulting in substantial resource allocation by the parties and this Court. Absent an immediate resolution of this issue hundreds of similar cases will have to be appealed. Immediate review and correction of Judge Elias' ruling on this issue by way of a published decision will avoid that outcome. In these days of strained court budgets, preservation of the Court's

resources is of utmost importance.

Also significant is the fact that many of the cases pending in the coordinated asbestos proceedings involve living mesothelioma plaintiffs. Those plaintiffs require preferential trial setting because their life expectancy is extremely short – as little as six to fourteen months from the date of diagnosis. Their deaths are inevitable and resolution of this issue only by way of appeal will impair their spouses' ability to successfully challenge the trial court's decision because, once the injured plaintiffs have died, the loss-of-consortium plaintiffs will, for all intents and purposes lose their ability to recover pre-death loss of consortium damages. And the trial court's holding will similarly preclude recovery of wrongful death loss of consortium damages, absent a lengthy appeal. Because of this unique conjunction of the loss of legal rights in situations where death of the spouse is imminent, this is an issue that will repeatedly recur, yet evade review.

As such, Consumer Attorneys urges this Court to consider and resolve this issue by way of a published decision in this writ proceeding, thereby providing guidance to the trial courts and prevention of unnecessary expenditure of resources by the courts and the parties.

2.

THE TRIAL COURT'S RESOLUTION OF THIS ISSUE FLIES IN THE FACE OF CONTROLLING SUPREME COURT AUTHORITY AND MUST BE REVERSED

Relying on the somewhat muddled analysis in a Third District decision, *Zwicker v. Altamont Emergency Room Physicians Medical Group* (2002) 98 Cal.App.4th 26, the trial court held in this case – and in several other similar cases in the coordinated proceeding – that any right to recover loss of consortium damages is triggered only at the time of the defendant's negligent act and not at the time of the manifestation of the plaintiff's injury by way of diagnosis. But that conclusion misapplies the controlling rule of law established by our Supreme Court in latent disease cases. The rule that *should* be applied – at least in latent disease cases – is that loss of consortium damages are triggered by the marital status of the parties at the time of the *injury* to the injured spouse, i.e., at the time of the diagnosis of

disease, and not the marital status of the parties at the time of the negligent act of the defendant that *causes* the injury. In the context of asbestos disease, the long latency period results in a factual matrix in which the marriage may well occur long after exposure, but before diagnosis. The trial court's focus on the marital status of the parties at the time of exposure rather than at the time of the resulting injury as a basis for triggering loss of consortium claims flies in the face of controlling law and must be reversed.

A. **No asbestos injury occurs until diagnosis of the asbestos-related disease and, as such, it is the marital status of the parties at the time of diagnosis, not at time of exposure, which controls the accrual of the loss of consortium claim**.

In the context of latent diseases, the California Supreme Court has consistently held that no injury accrues unless and until the latent disease is diagnosed. In other words, neither the defendant's misconduct nor the plaintiff's exposure triggers any right of action; only the diagnosis of disease provides a legal basis for claiming damages. The Supreme Court reached that conclusion in the asbestos context in *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 510, 529 and *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127 and in the tobacco context in

Grisham v. Philip Morris (2007) 40 Cal.4th 623, 639-646.

Thus, under the Supreme Court's analysis, an injured plaintiff's cause of action does not accrue in a latent disease case – such as an asbestos-related disease – at the time of the misconduct or at the time of exposure, but at the time of diagnosis.

Because the injured plaintiff's cause of action does not accrue at the time of exposure, the spouse's loss of consortium damage claim is necessarily triggered on the same basis. Logically, if the injured plaintiff has no claim, the spouse has no claim. But when the injured plaintiff has a legally cognizable injury, it is the injured plaintiff's marital status at that time which determines the existence of the spouse's loss of consortium claims. Whether viewed as a derivative claim or viewed as an independent claim for damages triggered by the plaintiff's injury, loss of consortium damages cannot logically accrue unless and until the injured plaintiff's claim accrues. (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1089-1090; *Brumley v. FDCC California, Inc.* (2008) 156 Cal.App.4th 312, 323-324; *Bartolo v. Superior Court* (1975) 51 Cal.App.3d 526, 533.)

Because the plaintiff's injury does not accrue until diagnosis, it necessarily follows that loss of consortium damages also do not accrue until

diagnosis. Thus, it is the injured plaintiff's marital status at the time of diagnosis which establishes the right to loss of consortium damages, not his or her marital status at the time of exposure.

And this is only logical. The diagnosis of a latent disease in a plaintiff who was married to one spouse at the time of exposure but who has since been divorced or widowed would not trigger any loss of consortium claim at all on the part of the former spouse. But where there is a marriage after exposure but before accrual of the injury claim by the injured plaintiff (e.g., at the time of diagnosis), it is that spouse who is deprived of the care, comfort and society of the injured spouse as the result of the illness.

Because the undisputed facts in this case are that the plaintiffs in this case were married before the husband's diagnosis of his latent, asbestos-related illness, the petitioner has a valid loss of consortium claim. Summary judgment on that claim was improper and should be reversed.

B. ***Zwicker* is inapplicable**.

In granting summary judgment on the loss of consortium claims, the trial court relied on the decision of the Third District Court of Appeal in *Zwicker v. Altamont Emergency Room Physicians Medical Group* (2002) 98

Cal.App.4th 26. *Zwicker* is inapplicable because its rationale does not apply in the context of a latent disease case.

First, *Zwicker* is distinguishable on its facts. In *Zwicker*, the plaintiff husband suffered an injury to his left testicle that was not timely diagnosed. That medical malpractice resulted in the amputation of his left testicle. After three tests demonstrated his infertility, he married the plaintiff wife. Two weeks after the marriage, the husband sued the emergency room and the doctors who had failed to diagnose the condition in time to save his testicle and his fertility and the wife asserted a loss of consortium claim. The *Zwicker* court held that even though the ultimate harm (i.e., permanent infertility) was not discovered until after the marriage, the "injury" upon which the damage claims were predicated occurred before the marriage and the wife could not state a loss of consortium claim.

First, of course, mesothelioma is different. In California, asbestos ***exposure*** alone ***is not compensable***. (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1133 fn. 1 (citing *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 985 fn.8, 997 fn.15).) Damages for mere fear of cancer cannot be awarded unless "it [is] more likely than not that the cancer will occur." (*Hamilton*, 22 Cal.4th at 1133 fn. 1; *Potter*, 6 Cal.4th at 985 fn.8, 997 fn.15.) Additionally, the California Supreme Court has stated

that "mesothelioma may be triggered by asbestos exposure, but its incidence is extremely low," and "mesothelioma is a very rare cancer, even among persons exposed to asbestos." (*Hamilton,* 22 Cal.4th at 1133 fn. 1, 1135-1136.) Thus, in cases involving asbestos exposure, mesothelioma is not "more likely than not likely" to occur as a result of asbestos exposure.

For this reason, there is no legally cognizable loss of consortium claim for a spouse ***until his or her spouse has an injury of actual and provable mesothelioma***. Mesothelioma does not exist at the time of ***exposure***; in fact, it does not become a diagnosable injury until decades after the exposure has occurred. If a medical expert cannot diagnose mesothelioma, it does not exist, and therefore no tort exists. (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1416 (requiring competent medical expert testimony to establish the causal link between asbestos exposure and mesothelioma); *see also Kociemba v. G.D. Searle & Co.* (D. Minn. 1988) 683 F.Supp. 1577 [stating that there is no injury until mesothelioma has been diagnosed].)

In this case, plaintiffs were married at the time the husband was diagnosed with mesothelioma. Because petitioner was married to her husband at the time he was diagnosed with mesothelioma - i.e., at the time

his tort claim first existed – petitioner has a valid claim for loss of consortium.

Unlike the situation with mesothelioma, *Zwicker* involved facts where the tortious act and the injury occurred simultaneously. Recognizing this, the *Zwicker* court observed, "the cause of action accrues, *generally*, when the tort is committed." (*Id.* at 32; emphasis added.) However, the *Zwicker* court added, "it is by now well settled that a cause of action for loss of consortium does not lie if the alleged tortious conduct *and resultant injuries* occurred prior to the marriage." (*Id.* at 33; emphasis added.)

The resultant injury is as essential in determining the timing of a loss of consortium claim as the initial tortious conduct. Because the California Supreme Court explicitly declined to recognize mere asbestos ***exposure*** as a legally compensable injury, it is improper to recognize mere asbestos ***exposure*** as the basis for a loss of consortium claim.

Second, even assuming an injury occurred when petitioner's husband was ***exposed*** to asbestos, the *Zwicker* court's policy rationale for its decision is illogical. Essentially, *Zwicker* concluded that whenever one a plaintiff is injured, even if the injury is latent, the spouse has no basis for recovery unless the spouse was married to the injured plaintiff at the time the latent injury is discovered. But that entire discussion in *Zwicker* was

wholly unnecessary to resolve the case. Indeed, application of standard estoppel or waiver principles were more than sufficient to reach the stated result because, as the facts demonstrated, ***the wife in* Zwicker *knew that her husband had lost a testicle and that he was infertile before she married him***. (*Zwicker*, at 29.)

Because there was no factual basis for the *Zwicker* court to reach the question of latent injury, its conclusion on that issue is dicta and is not, therefore, binding under principles of stare decisis. (See, e.g., Eisenberg, Horvitz & Weiner, *California Practice Guide: Civil Appeals and Writs* (Rutter 2012) ¶¶ 14:191, et seq.)

Third, the *Zwicker* rationale has been convincingly rejected by a Maryland court in *Owens-Illinois, Inc. v. Cook* (2005) 386 Md. 468. In *Cook*, the court conducted an analysis of all the cases nationwide on this issue and rejected the rationale of *Zwicker* and its ilk. (*Id*., at 489-494.) As the *Cook* court explained, "it is undisputed that Mr. Gianotti's mesothelioma had not been diagnosed" at the time the couple married and that it was also undisputed that they "neither knew, nor reasonably could have known, of the injury that formed the basis for the joint claim." As the court went on to explain, "it would be fundamentally unfair not to permit the loss of consortium claim in this context." The court was persuaded that

"where 'neither the wrongful conduct nor the fact of injury was known prior to marriage,' a cause of action for loss of consortium as to which the underlying injury is a premarital one, accrues when the injury is discovered, or reasonably discoverable." That is the approach most consistent with the California Supreme Court's concept of latent injuries and is the approach applicable here.

In issuing its *Palma* notice in the *Pounds* case, Division Eight of this Court provided a very apt example demonstrating the general error in the *Zwicker* court's determination that the right to loss of consortium damages accrues at the time of the defendant's wrongful act rather than at the time of the resulting injury:

> The following hypothetical is instructive: On the morning of his scheduled wedding, a man brings his car to a shop to replace a tire. The attendant fails to adequately secure the new tire onto the car. The man drives away and gets married that night as scheduled. The following day, while driving the car, the tire comes off the car, causing an accident in which the man is seriously injured. Under these facts, we believe the new bride would be entitled to assert a cause of action for loss of consortium, even though the attendant's

negligent act occurred before the marriage. This is because her new husband suffered no injury before the marriage." (Ex. A, pp 4-5.)

Whether correct on the facts before it, it is indisputable that the *Zwicker* analysis cannot apply in the context of a latent disease claim. Accordingly, not only should writ relief be granted, but the trial court's ruling should be reversed.

CONCLUSION

In light of the importance of this issue to the numerous claims pending in the coordinated proceedings, and in light of the imminent impact on petitioner's claims in her individual case, the petition should be decided and the trial court's ruling should be reversed.

Dated: March 15, 2012

FARRISE FIRM, P.C.

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By:_____
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CERTIFICATE OF LENGTH OF BRIEF

I, Simona A. Farrise, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 2983 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: March 15, 2012

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SHARON J. ARKIN