



CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

August 9, 2021

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

Re: Letter Brief in Support of Review in *Phipps v. Copeland Corporation LLC*, S269582. CRC 8.500(g).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

INTRODUCTION: ISSUES PRESENTED

The Civil Justice Association of California (“CJAC”) supports petitioner’s request for a grant of review in this case because it presents two related issues of statewide importance over which published appellate opinions are in conflict (CRC 8.500(b)):

- Must a defendant prove the “percentage of fault” attributable to other defendants in an asbestos caused mesothelioma case in order to preserve an appellate challenge to the jury’s apportionment of fault to that defendant?
- When multiple defendants independently contribute to a plaintiff’s harm, may a jury increase a defendant’s share of damages above its causal contribution to the injury based on that defendant’s “more culpable” state of mind?

IMPORTANCE OF ISSUES AND INTEREST OF CJAC

The appellate opinion answered “yes” to both questions, affirming in full the lower court’s judgment that at the time of trial the sole defendant remaining out of 15 listed entities on the verdict form,¹

¹ Originally 22 defendants were named in the complaint, but all besides Copeland had been dismissed by trial because they settled, were bankrupt or immune. Slip Opn. (“Opn.”), p. 3; Petition for Review (“PFR”), p. 21.

(continued...)

petitioner Copeland Corporation, was 60% responsible for the plaintiffs' loss of \$26.5 million, including \$25 million in noneconomic damages. This conclusion seems anomalous given plaintiff William Phipps's own expert's testimony that his "aggregate lifetime exposure [as an air conditioning technician working for many years on various compressor units] to be just .05 'fiber years' [for exposure to Copeland products], which is cumulatively commensurate with ambient asbestos exposure simply from living in California." PFR, p. 9. Nonetheless, the opinion's preclusion of a challenge to this skewed apportionment verdict because defendant did not prove the precise percentage each defendant contributed to plaintiffs' total damages, unfairly increases defendant's burden at trial and on appeal contrary to other well-settled law.

Review of this opinion is of utmost importance to CJAC, a long-standing non-profit organization representing businesses, professional associations and financial institutions. CJAC's principal purpose is to inform the public and government about ways to make our civil liability laws more fair, economical, clear and certain. Toward this end, CJAC participates as amicus curiae in cases concerning public interest issues of concern to our members, including asbestos exposure lawsuits. This is such a case because, as petitioner states, it inflicts "significant consequences for the fair and efficient litigation of asbestos cases" and, if left undisturbed for courts to follow in lieu of countervailing precedent, would make "mesothelioma cases (expedited preference trials) entirely unworkable . . ." PFR, p. 12. Moreover, by increasing defendant's burden of proof, the opinion guts apportionment as a viable protection against defendants having to pay "more than [their fair] share of noneconomic damages." *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1193. This result has repercussions beyond asbestos cases, affecting environmental, products liability and construction defect litigation by neutralizing effective apportionment.

¹(...continued)

Apportionment is applicable to defendants who settle before trial and to non-joined tortfeasors. *DaFonte v. Upright, Inc.* (1992) 2 Cal.4th 593, 603.

SPECIFIC REASONS TO GRANT REVIEW

1. The opinion conflicts with other approved authority over who bears what burdens in apportioning fault and consequent damages between and amongst those causally responsible for a plaintiff's injuries.

We start with CACI 406, adopted by the Judicial Council to, along with all approved civil jury instructions, “accurately state the law.” CRC 2.1050(a) & (b). The Opinion does not discuss this instruction, which was given at trial. CACI 406 requires that petitioner’s defense that others also contributed to plaintiffs’ harm be proven by evidence showing they “were negligent or at fault”; and “that the negligence or fault of others was a substantial factor in causing plaintiffs’ harm.” It says nothing about the defendant having the burden to prove the percentage of fault attributable to each entity listed on the verdict form. Petitioner complied with CACI 406’s two requirements.

Further, numerous appellate opinions hold and instruct that a defendant need only show that others substantially contributed to a plaintiff’s injuries to successfully invoke comparative apportionment of responsibility to each. *Putt v. Ford Motor Co.*, for instance, is the most recent opinion to hold, consistent with CACI 406, that requiring defendants to prove “a specific and precise percentage of fault would be inconsistent with the very nature of apportionment itself.”² That nature requires that courts be “flexible” and use “commonsense” (*Knight v Jewett* (1992) 3 Cal4th 296, 314), recognizing that apportionment does not lend itself “to the exact measurements of micrometer-caliper.” *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 736.

Putt bases its holding on other intermediate appellate court opinions that make clear the defendant’s burden to satisfy apportionment is to simply show that “some *nonzero percentage of fault* is properly attributable to” others, and not to prove specifically what that amount may be for each. *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 (emphasis added); *CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1261, fn. 4. Indeed, the same district court of appeal that issued the opinion here previously held that defendants in

² *In re LAOSD Asbestos Cases* (Cal. Ct. App., March 25, 2021, No. B303627), 2021 WL 1135548, at p.*7, review denied, unpublished.

an analogous position to petitioner satisfy their burden for apportionment by showing only that “some nonzero percentage of fault is properly attributable to other entities.” *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 202.

The above authorities sharply contrast with the opinion’s holding that “the defendant has the burden at trial to show *the percentage of fault attributable to other parties* who may have contributed to causing the plaintiff’s harm . . .” Opn., p. 2; emphasis added. That plaintiffs cite opinions they claim are contrary to the above authorities underscores the confusion and uncertainty existing on this fundamental issue, a conflict necessitating this Court’s review to provide uniformity of decision on this important issue of law.

2. The opinion’s endorsement for increasing a defendant’s proportionate share of responsibility for noneconomic damages beyond its actual contribution to plaintiffs’ injury due to defendant’s “culpable state of mind” is inconsistent with *Rutherford* and is bad law.

Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 958 highlights that apportionment in asbestos cases like this serves, or at least should serve “to limit damages ultimately assessed against” defendants. That goal is accomplished by limiting the damages for each defendant to its proportionate “share of causation.” Yet the opinion in this case runs amok to rationalize the jury’s lopsided assessment of noneconomic damages against petitioner based on a so-called permissible “inference” that petitioner “was consciously indifferent to the risks” of exposing plaintiff to asbestos. Opn., p. 22.

Pfeifer, supra, 220 Cal.App.4th at 1289-1290 is cited in the opinion here as authority for this proposition, but *Pfeifer* permitted an enhancement increase for *punitive* damages based on the defendant’s culpability, not for noneconomic compensatory damages. Noneconomic compensatory damages cannot be used to punish a defendant. CACI 3924. When confronted with the basic differences between these two kind of damages, the opinion attempts to dodge that distinction by erecting yet another, splitting-hairs between “indifference” and “extreme indifference.” Opn., p. 22. According to the appellate opinion, “indifference” by itself satisfies the court’s enhancement of “noneconomic damages” beyond a defendant’s causal share of responsibility for

plaintiff's injury, while the stricter test of "extreme indifference" is required to increase punitive damages against defendants. How a court or jury is supposed to distinguish between "indifference" and "extreme indifference" is not explained, but it brings to mind the difficulty of trying to distinguish between pregnancy and "extreme" pregnancy.

Under the opinion's rationale, however, juries can now use a defendant's "state of mind" in a compensatory damage case (punitive damages here were disallowed by the trial court's summary judgment ruling in favor of petitioner) as "a stealth form of punitive damages." Reply to Answer to Petition, p. 16. To increase a defendant's share of compensatory damages beyond its actual comparative contribution to the plaintiff's injury because of defendant's mental state is, however one names it, judicial *punishment*. It is also inconsistent with the opinion's holding that petitioner and future defendants must prove the "percentage fault" of others, for what is the purpose of such a determination if it can then be adjusted upwards according to the defendant's subjective state of mind?

CONCLUSION

The opinion's two holdings are inconsistent with each other and conflict with better reasoned authorities. Accordingly, this Court should grant review and clarify whether a defendant seeking apportionment amongst those responsible for plaintiff's injuries need show more than a nonzero percentage of fault for each and instead prove the actual percentage of comparative fault for each toward the total damages; and if the defendant shows only a nonzero percentage of fault at trial, an appeal based on the lack of substantial evidence for the damages found is foreclosed when a defendant does not prove the actual percentage of fault for each other responsible party. Review is also warranted to clarify whether a jury can increase a defendant's share of noneconomic damages beyond its comparative causal contribution because of that defendant's culpable state of mind.

Respectfully,

/s/ Fred J. Hiestand
Fred J. Hiestand
CJAC General Counsel

Proof of service attached

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On August 9, 2021, I served the foregoing document(s) described as: CJAC *Amicus Curiae* Letter Brief in Support of Review in *Phipps v. Copeland Corporation LLC*, S269582 on all interested parties in this action by transmitting via TrueFiling to the following:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 9th day of August 2021 at Sacramento, California.

/s/ David Cooper
David Cooper