No. S250734

IN THE SUPREME COURT OF CALIFORNIA

B.B., a Minor, et al.,
Plaintiffs, Respondents and Petitioners,

v.

COUNTY OF LOS ANGELES et al.,
Defendants and Appellants.

T.E., a Minor, etc.,
Plaintiffs, Respondents and Petitioners,

v.

COUNTY OF LOS ANGELES et al.,
Defendants and Appellants.

D.B., a Minor, et al.,
Plaintiffs, Respondents and Petitioners,

v.

COUNTY OF LOS ANGELES et al.,
Defendants and Appellants.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B264946

AMICUS CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

Page

ISSUE PRESENTED 1

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. CARVING OUT INTENTIONAL TORTS FROM THE FAIR RESPONSIBILITY ACT WILL BE EXPLOITED IN ASBESTOS LITIGATION TO IMPOSE FULL LIABILITY ON MINIMALLY RESPONSIBLE SOLVENT DEFENDANTS 4

II. THIS COURT HAS REPEATEDLY RECOGNIZED THAT CALIFORNIA LAW REQUIRES ALLOCATION OF FAULT AMONG ALL PARTIES, NOT JUST THOSE WHOSE NEGLIGENCE CONTRIBUTES TO A PLAINTIFF'S INJURY 11

CONCLUSION 13

CERTIFICATE OF COMPLIANCE ..... End

PROOF OF SERVICE ..... End

TABLE OF AUTHORITIES

Cases **Page(s)**

Amchem Prods. Inc. v. Windsor (1997) 521 U.S. 591 4

Arena v. Owens Corning Fiberglas Corp. (1998) 63 Cal.App.4th 1178 13

Burch v. CertainTeed Corp. (Cal. Ct. App., Apr. 15, 2019, Nos. A151633, A152252, A153624) __Cal.Rptr.3d__ (2019 WL 1594460) 3, 7, 8

Daly v. General Motors Corp. (1978) 20 Cal.3d 725 ..... 9, 11

DaFonte v. Up-Right, Inc. (1992) 2 Cal.4th 593 ..... 12, 13

Norfolk & Western Ry. v. Ayers (2003) 538 U.S. 135 10

Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953 9

Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal.3d 322 ..... 9, 12

Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 11

Statutes

Civ. Code § 1431.1 ..... 8, 12-13

Civ. Code § 1431.2 ..... *passim*

Other Authorities

American Academy of Actuaries' Mass Torts Subcommittee, Overview of Asbestos Claims Issues and Trends (Aug. 2007) 5-6

Biggs et al., A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated (Towers Watson, June 2013) 5, 6

Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation* (2013) 23 Widener L.J. 299 10

Carroll et al., Asbestos Litigation (RAND Corp., 2005) 4, 5

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Edley & Weiler, *Asbestos: A Multi-Billion-Dollar Crisis* (1993) 30 Harv. J. on Legis. 383 10

Hanlon & Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525 5

Kakalik et al., Costs of Asbestos Litigation (RAND Corp., 1983) 4

KCIC, Asbestos Litigation: 2018 Year in Review (2019) 5

'Medical Monitoring and Asbestos Litigation'– A Discussion with Richard Scruggs and Victor Schwartz, 17 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) 5

Plevin et al., *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11 Mealey's Asb. Bankr. Rep. 1 (Feb. 2012) 5

Riehle et al., *Product Liability for Third Party Replacement or Connected Parts: Changing Tides from the West* (2009) 44 U.S.F. L.Rev 33 7

Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27 Mealey's Litig. Rep.: Asbestos 1 (Nov. 7, 2012)..... 5

Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next* (2012) 36 Am. J. of Trial Advoc. 1 6

Stengel, *The Asbestos End-Game* (2006) 62 N.Y.U. Ann. Surv. Am. L. 223 ..... 4, 10

Stern & Allen, Snapshot of Recent Trends in Asbestos Litigation: 2018 Update (NERA Econ. Consulting, June 2018) 6

Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* (2003) 12 J. Bankr. L. & Prac. 51 10

ISSUE PRESENTED

Civil Code section 1431.2 provides that "[i]n any action for personal injury, property damage, or wrongful death . . . [e]ach defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault" based on comparative fault principles. The issue is whether this statute's instruction that liability for non-economic damages is "several only" applies in any action to each defendant or permits courts to impose full joint liability on a defendant found liable for an intentional tort.

STATEMENT OF INTEREST

The Coalition for Litigation Justice, Inc. is a nonprofit association formed by insurers in 2000 to address the asbestos litigation environment.[1] The Coalition has filed over 150 *amicus* briefs and has appeared as *amicus* in this Court. The Coalition is concerned that accepting the Plaintiffs-Respondents' invitation to impose full joint liability on defendants found liable for an intentional tort will lead to manipulation and excessive liability in asbestos litigation. This approach may lead plaintiffs to pressure courts and juries to convert traditional negligence, failure to warn, and strict liability claims into fraudulent concealment and misrepresentation actions. As a result, minimally responsible, solvent companies may face liability for the actions of bankrupt entities.

STATEMENT OF THE CASE

The Coalition adopts the County of Los Angeles's Statement of the Case to the extent relevant to the arguments in this *amicus* brief. As more fully detailed in the County's brief, this is a wrongful death case alleging

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[1] The Coalition includes Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

that Daune Burley, who had assaulted a woman while under the apparent influence of cocaine, marijuana, and PCP, died as a result of excessive force used by police officers in restraining him. A jury allocated 40% of the fault to Mr. Burley, 20% to Deputy Aviles, 20% to Deputy Beserra, and 20% among several other deputies. Because the jury found Deputy Aviles liable on a claim of battery, an intentional tort, while the other defendants were found liable for negligence, the trial court entered judgment against Deputy Aviles for 100% of the jury's award—$8 million in noneconomic damages. The Court of Appeal reversed and directed the trial court to allocate noneconomic damages in proportion to the jury's comparative fault determinations for each defendant.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

While this case arises in the context of allegations of excessive force by police officers, the Plaintiffs' theory, if accepted by this Court, will have dire consequences for companies pulled into the continuing search for solvent bystanders in asbestos litigation.

As a result of a domino fall of bankruptcies, today's asbestos litigation is often an exercise in attempting to impose liability on one company—one that may bear little, if any, responsibility for a plaintiff's injury—for the conduct of companies that supplied asbestos or made asbestos-containing insulation that can no longer be sued. Opening the door for courts to impose full joint liability for noneconomic damages on a defendant found liable for an intentional tort will provide a sharp quiver in this quest to levy deep pocket jurisprudence.

In approving Proposition 51, known as the Fair Responsibility Act, Californians demanded a different result. Voters struck a balance by retaining joint liability to make plaintiffs whole for medical expenses and other objectively provable losses, while providing that each defendant would be responsible only for its fair share of an award for a plaintiff's

inherently subjective non-monetary losses. The Act's unequivocal language states that *each* defendant in *any* personal injury or wrongful death case is , liable for no more than its proportionate share of liability for noneconomic damages based on its percentage of fault. Civ. Code § 1431.2. The statute does not refer to negligence claims; nor does it contain an exception for intentional torts.

Carving out intentional torts from Civ. Code section 1431.2 will lead to a resurrection of full joint liability in asbestos cases, as claims for fraudulent concealment and misrepresentation are often asserted side-by-side with negligence, failure to warn, and strict product liability theories. Already, the First District Court of Appeal has imposed full joint liability on a pipe manufacturer in a mesothelioma case, despite questionable evidence supporting intentional tort claims. *See Burch v. CertainTeed Corp.* (Cal. Ct. App., Apr. 15, 2019, Nos. A151633, A152252, A153624) __Cal.Rptr.3d__ (2019 WL 1594460).

The nature of a tort as negligence-based, strict product liability-oriented, or an intentional tort should have no significance in allocating fault and applying the proportional responsibility statute. The category of a tort claim does not indicate a defendant's level of responsibility for a plaintiff's injuries in an excessive force case, the asbestos context, or otherwise. Rather, as this Court has found in rejecting a distinction between negligence and product liability claims, and as experience proves, a jury is perfectly capable of fairly allocating fault among all parties that contributed to a plaintiff's injury, irrespective of the legal theory. If a party that has committed an intentional tort is more responsible for a plaintiff's harm than a defendant that has negligently contributed to the plaintiff's injury, then a jury can and will allocate fault accordingly.

This Court should affirm the Court of Appeal's ruling requiring the trial court to allocate noneconomic damages to each defendant in direct

proportion to the each defendant's degree of fault and reject the Plaintiffs' invitation to create an exception to Civ. Code section 1431.2 that resurrects full joint liability.

ARGUMENT

I. CARVING OUT INTENTIONAL TORTS FROM THE FAIR RESPONSIBILITY ACT WILL BE EXPLOITED IN ASBESTOS LITIGATION TO IMPOSE FULL LIABILITY ON MINIMALLY RESPONSIBLE SOLVENT DEFENDANTS

Reviving full joint liability in cases in which a defendant is found liable for an intentional tort will impose significant pressure on companies named as defendants in asbestos litigation, who often bear little responsibility for a plaintiff's injuries.

Originally and for many years, the primary defendants in asbestos cases were companies that mined asbestos or manufactured friable, amphibole-containing thermal insulation. *See* Kakalik et al., Costs of Asbestos Litigation (RAND Corp., 1983) p. 3. Hundreds of thousands of claims were filed against the major asbestos producers, such as Johns-Manville Corp, Owens Corning Corp., and W.R. Grace & Co. *See* Carroll et al., Asbestos Litigation (RAND Corp., 2005) p. xxiv ("Approximately 730,000 people had filed an asbestos claim through 2002."); Stengel, *The Asbestos End-Game* (2006) 62 N.Y.U. Ann. Surv. Am. L. 223, 237 ("As leading plaintiffs' counsel Ron Motley and Joe Rice observed some time ago, the first seventeen asbestos defendants to go into bankruptcy represented 'one-half to three-quarters of the original liability share.'").

By the late 1990s, asbestos litigation had reached such proportions that the United States Supreme Court referred to the litigation as a "crisis." *Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591, 597. Mass filings pressured "most of the lead defendants and scores of other companies" into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation. Carroll et al., *supra*, at p. 67.

Following a wave of bankruptcies among asbestos manufacturers between 2000 and 2002, *see* Plevin et al., *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11 Mealey's Asb. Bankr. Rep. 1 (Feb. 2012) Chart 1 (finding asbestos-related bankruptcies during this period equaled the previous two decades combined), "plaintiffs' attorneys shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants. . . ." Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27 Mealey's Litig. Rep.: Asbestos 1 (Nov. 7, 2012) p. 1; *see also* Hanlon & Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (observing the "surge of bankruptcies" triggered "a search for new recruits to fill the gap in the ranks of defendants").

Plaintiffs began to "press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease." Carroll et al., *supra*, at p. xxiii. The litigation became an "endless search for a solvent bystander," according to one plaintiffs' attorney. *'Medical Monitoring and Asbestos Litigation'– A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

The Towers Watson consulting firm has identified "more than 10,000 companies, including subsidiaries, named in asbestos litigation." Biggs et al., A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated (Towers Watson, June 2013) p. 1. Today, the typical asbestos complaint names 64 companies as defendants. *See* KCIC, Asbestos Litigation: 2018 Year in Review (2019) p. 9. Companies formerly viewed as peripheral defendants are "now bearing the majority of the costs of awards relating to decades of asbestos use." American Academy of

Actuaries' Mass Torts Subcommittee, Overview of Asbestos Claims Issues and Trends (Aug. 2007) p. 3.

Plaintiffs' lawyers have widened the net of potential defendants because the major asbestos producers have exited the tort system through bankruptcy. *See* Riehle et al., *Product Liability for Third Party Replacement or Connected Parts: Changing Tides from the West* (2009) 44 U.S.F. L.Rev 33, 38 ("Not content with the remedies available through bankruptcy trusts and state and federal worker compensation programs, claimants' lawyers have extended the reach of products liability law to 'ever-more peripheral defendants'" whose products may have been used by others with asbestos-containing products) (citation omitted); Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next* (2012) 36 Am. J. of Trial Advoc. 1, 24–25 ("As a substitute [for bankrupt former defendants], plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold.").

Asbestos litigation shows no sign of abating. A review of asbestos-related liabilities reported to the U.S. Securities and Exchange Commission by more than 150 publicly traded companies found that more than half of the companies indicated they experienced no change or an increase in new asbestos claims in 2017. *See* Stern & Allen, Snapshot of Recent Trends in Asbestos Litigation: 2018 Update (NERA Econ. Consulting, June 2018) p. 7. Another study found that mesothelioma claim filings have "remained near peak levels since 2000." Biggs et al., *supra*, at p. 1. "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years." *Id.* at p. 5.

Imposing full joint liability on asbestos defendants based on an intentional tort represents the latest tactic to shift responsibility from

bankrupt companies to those that may be minimally responsible for a plaintiff's exposure to asbestos, but remain solvent. It is common for asbestos complaints to include a variety of alternative legal theories focusing on what a company knew or should have known about the dangers of asbestos exposure, when the company gained that knowledge, and how the company shared or did not share that information. Plaintiffs often allege negligence, failure to warn, and strict product liability claims, but may also allege intentional torts, including concealment and fraudulent misrepresentation claims, based on the same evidence.

If the Court accepts Plaintiffs' invitation to carve intentional torts out of the several liability statute, then plaintiffs will routinely pursue intentional tort theories in asbestos litigation to impose liability on defendants for more than their fair share of noneconomic damage awards. Indeed, this is already occurring, as the First District sanctioned this approach in *Burch v. CertainTeed Corp.*, *supra*, 2019 WL 1594460. There, a former pipe installer sued who contracted mesothelioma sued numerous defendants, asserting negligence, failure to warn, strict product liability, intentional misrepresentation, and fraudulent concealment. *Id.* at p. *1. The case, however, went to trial against just one defendant, a pipe manufacturer, CertainTeed Corporation. *Id.* at p. *2. The jury returned a plaintiffs' verdict on all claims, awarding the pipefitter and his spouse $776,201 in economic damages and $9.25 million in noneconomic damages. *Ibid.* The jury apportioned 62% of the fault to the defendant, 25% of the fault to Johns-Manville, which also made the asbestos-containing pipe, 10% of the fault to the plaintiff's employer, a family-owned business, and 3% of the fault among three other pipe manufacturers. *See ibid.*

Due to the inclusion of an intentional tort, however, CertainTeed found itself subject to far greater liability than the jury allocated to it based on its responsibility for the plaintiff's injury. While the First District found

no evidence that the plaintiff had relied on any false statement made by CertainTeed, and therefore affirmed the trial court's decision to set aside the jury's verdict on the intentional misrepresentation claim, the appellate court sustained the jury's fraudulent concealment verdict. *See Burch v. CertainTeed Corp.*, *supra*, 2019 WL 1594460 at pp. *4–9. CertainTeed's liability for a single intentional tort led the Court of Appeal to find the company "jointly and severally liable for all of plaintiff's economic and noneconomic damages." *Id.* at p. *18.

The adverse and unfair consequences of recognizing a judicially created exception for intentional torts on asbestos liability cannot be overstated. Had the First District adhered to the jury's allocation of fault and several liability for noneconomic damages, as Civ. Code section 1431.2 instructs, CertainTeed's liability would have been $6.5 million. *See id.* at p. *2. Instead, a single company is subject to a judgment of over $10 million. *See ibid.* And, while CertainTeed's percentage of fault in that case was substantial (62%), the same outcome will even more unjustly result when a jury finds a defendant just twenty percent at fault for a plaintiff's injuries in an intentional tort claim, as occurred in the case before this Court. This is the very type of "unfair and inequitable" treatment that California voters intended to end when they found "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault." Civ. Code § 1431.1.

The nature of a tort as negligence-based, strict product liability-oriented, or an intentional tort should have no significance in allocating fault and applying the proportional responsibility statute. The category of a tort claim does not indicate a defendant's level of responsibility for a plaintiff's injuries in an excessive force case, the asbestos context, or otherwise. Rather, as this Court has found in rejecting a distinction for product liability claims, and as experience proves, a jury is perfectly

capable of fairly allocating fault among all parties that contributed to a plaintiff's injury, irrespective of the legal theory. *See Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322; *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725. If a party that has committed an intentional tort is more responsible for a plaintiff's harm than a defendant that has negligently contributed to the plaintiff's injury, then a jury will allocate fault accordingly. The fundamental goals of tort law will be met, as the jury will hold the wrongdoer accountable, the plaintiff will be compensated for his or her injury, and liability will deter improper behavior.

If the Court imposes full joint liability on defendants based on the inclusion of an intentional tort claim, then the remaining solvent targets in asbestos litigation will be required to shoulder the cost of harms caused by others' asbestos products in addition to those caused by their own products. A bankrupt company may be 98% responsible for a worker's exposure to asbestos, but a solvent company will be required to pay 100% of the plaintiff's damages if a jury finds that it misrepresented as safe an asbestos-containing product that the worker may have briefly come in contact with decades ago. Alternatively, one defendant may have produced a product with a form of asbestos that is far less toxic than another defendant, though the former may have allegedly engaged in an intentional tort leading to full joint liability, while the later may be found negligent and therefore limited in its liability for noneconomic damages to its proportionate share. *See Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 972 (recognizing that "[a]sbestos products have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others").

Due to the imposition of full joint liability, more companies may be forced into bankruptcy, like scores of other asbestos defendants.[2] So far, over 120 companies have declared bankruptcy due at least in part to asbestos-related liabilities. *See* Crowell & Moring LLP, Company Name and Year of Bankruptcy Filing (Chronologically) (revised Feb. 14, 2019), *at* https://www.crowell.com/files/List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf. Bankruptcies have terrible consequences for claimants, affected companies, workers, retirees, and communities.[3] Further, plaintiff recoveries are substantially delayed while companies are in bankruptcy.[4] As the U.S. Supreme Court has recognized, "[w]ith each bankruptcy the remaining defendants come under greater financial strain, and the funds available for compensation become closer to exhaustion." *Norfolk & Western Ry. v. Ayers* (2003) 538 U.S. 135, 169 (internal citations omitted) (Kennedy, J., concurring in part and dissenting in part). Reviving

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[2] *See* Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation* (2013) 23 Widener L.J. 299, 306 ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.").

[3] *See also* Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* (2003) 12 J. Bankr. L. & Prac. 51, 70–88 (exploring effect of asbestos-related bankruptcies on employment, retirement security, government finances, and other economic factors); Edley & Weiler, *Asbestos: A Multi-Billion-Dollar Crisis* (1993) 30 Harv. J. on Legis. 383, 386 (bankruptcy puts substantial burdens on "shareholders, employees, pensioners, and communities of asbestos defendants").

[4] *See* Stengel, *supra*, 62 N.Y.U. Ann. Surv. Am. L. at pp. 260–61 ("RAND looked at eleven major asbestos bankruptcies and found that the average duration between filing and plan confirmation (which is the earliest date payments could start) was six years. One case took ten years. During these periods the trusts pay no money to claimants. Furthermore, in the typical case plan confirmation itself can precede any payment by months, if not years, due to various startup delays.").

full joint and several liability in asbestos claims will accelerate this process by imposing damages for intangible losses—not medical expenses or financial loss—in excess of a company's responsibility for a plaintiff's injury.

II. THIS COURT HAS REPEATEDLY RECOGNIZED THAT CALIFORNIA LAW REQUIRES ALLOCATION OF FAULT AMONG ALL PARTIES, NOT JUST THOSE WHOSE NEGLIGENCE CONTRIBUTES TO A PLAINTIFF'S INJURY

Adhering to a jury's allocation of fault in determining liability for noneconomic damages where a case includes an intentional tort is fully consistent with this Court's jurisprudence.

Even before California voters passed Proposition 51 in 1986, this Court recognized that allocation of fault is not dependent on the mix of legal theories present in a case. In *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, the Court abandoned contributory negligence and replaced it with a system of pure comparative fault. As a result, plaintiffs who were partially responsible for their own injuries could recover damages reduced to reflect their percentage of fault. While often referred to a "comparative negligence," this Court soon clarified that comparative fault principles not only apply in situations involving a negligent plaintiff and a negligent defendant, but also extend to product liability actions involving a negligent plaintiff and strictly liable defendant. *See Daly*, *supra*, 20 Cal.3d at p. 737. The Court was unpersuaded by the argument that a plaintiff's negligence is "apples," a defendant's strict liability is "oranges," and jurors cannot compare fault among the two. *Id.* at pp. 734, 737–38. Rather, the Court found that removing strict liability from the comparative fault calculus is contrary to public policy, as it would require a defendant to pay damages that stem from the plaintiff's own fault. *Id.* at p. 737. "Loss," the Court found, "should be assessed equitably in proportion to fault." *Ibid.*

The Court then extended the same principle to cases in which a jury is asked to allocate fault for a plaintiff's injuries among multiple defendants who are subject to different legal theories. *See Nest-Kart*, *supra*, 21 Cal.3d at p. 325. There, the Court observed that a jury had no difficulty allocating twenty percent of the fault to the manufacturer of a defective shopping cart and eighty percent of the fault to a supermarket that failed to properly maintain the cart in safe working condition when the cart broke and seriously injured the plaintiff's foot. *Id.* at pp. 331–32. The Court found "no reason to assume that a similar common sense determination of proportional fault or proportional responsibility will be beyond the ken of other juries in similar cases." *Id.* at 332.

While the Court rejected the inequity of all-or-nothing recovery for plaintiffs in abandoning contributory negligence, "so-called 'deep pocket' defendants whose fault was slight could still be saddled with large damage awards mainly attributable to the greater fault of others who were able to escape their full proportionate contribution." *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 599. Thus, soon after the decisions establishing that jurors are capable of allocating fault among plaintiffs and defendants irrespective of the theory of liability, California voters approved Proposition 51 to provide similar fairness to defendants. The Act's unequivocal language states:

> In *any action* for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of *each defendant* for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

Civ. Code § 1431.2(a) (emphasis added). The Act's findings and declarations of purpose twice refers to the need for curbing liability in "tort

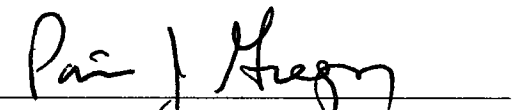
actions." Civ. Code § 1431.1. The statute does not refer to negligence claims; nor does it contain an exception for intentional torts. *See DaFonte, supra*, 2 Cal.4th at p. 601 (finding section 1431.2 "declares plainly and clearly" that it eliminates joint liability for noneconomic damages for every tortfeasor and "neither states nor implies an exception" where damages are attributed to an employer that is immune from tort liability). Courts have properly applied Proposition 51's allocation of proportional fault for noneconomic damages to strict liability asbestos exposure cases involving multiple products and defendants. *See, e.g., Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1198.

Now, forty years after *Daly* and *Nest-Kart,* the Court is again invited to carve non-negligence claims out of the comparative fault system. It should decline to do so based on the text of the statute as well as the sound public policy underlying Civ. Code section 1431.2: each defendant in a tort action is subject to liability for noneconomic damages in direct proportion to its degree of fault.

CONCLUSION

For these reasons, the Court should affirm the Court of Appeal's ruling requiring the trial court to allocate noneconomic damages in direct proportion to each defendant's degree of fault.

Respectfully submitted,



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Dated: May 2, 2019

CERTIFICATE OF COMPLIANCE

I, Patrick Gregory, counsel of record for *amicus curiae*, certify pursuant to Rule 8.204(c)(1) of the California Rules of Court, that the enclosed brief of the Coalition for Litigation Justice, Inc., is produced using Times Roman 13-point font and contains 3,854 words, which less than 14,000 words permitted by the rules of court. Counsel relies on the word count function of the computer program used to prepare this brief.

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Dated: May 2, 2019

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I, Patrick Gregory, declare as follows:

I am a California resident over the age of 18 and not a party to this action. I filed an original and copy of the foregoing by hand delivery with:

Clerk, Supreme Court of California
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I also served a copy on the following by placing true and correct copies in sealed envelopes sent by U.S. Mail first-class mail, postage pre-paid, to:

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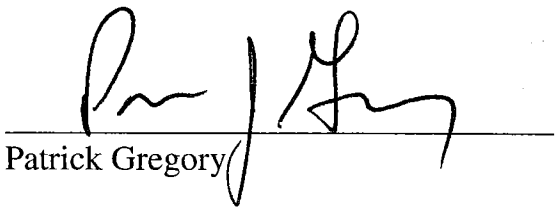

Patrick Gregory

Dated: May 2, 2019