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Stewart v Union Carbide xxxxx-xxxx
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January 13, 2011

SENT VIA HAND-DELIVERY

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

Re: Stewart v. Union Carbide Corp. (Petition for Review No.: S187287)
Second District, Division Five Court of Appeal Case No.: B216193

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule of Court 8.1120, counsel for plaintiffs and respondents Larry and Janet Stewart in the above-referenced matter, hereby request that this Court's deny defendant and appellant Union Carbide Corporation's (Union Carbide) and *Amici curiae* the American Chemistry Council and the Chamber of the United States of America's requests to depublish the Opinion in this matter, filed November 16, 2010 by Division Five of the Second Appellate District.

The Court of Appeal properly certified the Opinion for publication because it meets the following standards for publication and Union Carbide and *Amici curiae* have failed to show otherwise.

A. The Opinion "explains . . . with reasons given, an existing rule of law" and applies existing law to a set of facts significantly different that those stated in published opinions. (Rule 8.1110, subd. (c)(2) and (3))

1. Section A of the *Stewart* Opinion.

The *Stewart* Opinion explains the existing rules of law that were set forth in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56. As the *Stewart* Opinion notes, *Johnson* recognized an exception to the rule that "manufacturers have a duty to warn *consumers* about hazards inherent in their products" holding that "sophisticated *users* need not be warned about dangers of which they are already aware or should be aware." [Opinion at 5, italics in the Opinion (*citing Johnson* at pp.64-65.)]

In *Johnson*, this Court settled the issue of whether a manufacturer could negate its duty to warn through evidence that its product's user was a member of a class of persons with sophistication about the specific dangers of the

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product that caused the user harm. Nothing about the Court of Appeal decision in *Stewart* confuses or calls into question this holding.

The *Stewart* Opinion explains that the rule Union Carbide asked for, by way of a jury instruction during the trial of this matter, sought to impute an intermediary purchaser's knowledge of a products hazard to the end user, and that this rule is not a rule expressed or suggested by *Johnson.*

Under its expanded interpretation of the reasoning of *Johnson*, Union Carbide asked that the jury be instructed that "where the risk of using a hazardous product is already known, or should be known, by the purchaser of that product, the product supplier has no duty to warn of the product's potential hazards," that a bulk supplier's or raw material supplier's duty to warn "is measured by what is generally known or should be known to purchasers of the raw product, rather than by the individual plaintiff's subjective knowledge," and that "the sale of a raw material to a sophisticated intermediary purchaser who knew or should have known of the risks of that raw material cannot be the legal cause of harm the raw material may cause." [Opinion at 4-5.]

The *Stewart* Opinion distinguished the facts in *Johnson* from those presented in *Stewart* and properly concluded that Union Carbide's proposed instruction was not based upon the theory that Larry Stewart had an opportunity to acquire any knowledge of the dangers of asbestos unlike the plaintiff in *Johnson*. [Opinion at 5.]

The Court of Appeal decision correctly explains the holding of *Johnson*, a holding which has not generated any unpredictable nor inconsistent Court of Appeal rulings since its issuance two and a half years ago.

The *Stewart* Opinion also properly explains that *Johnson* did not change existing law under *Jenkins v. T & N PLC* (1996) 45 Cal.App. 1224; *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651); *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal.App., Ltd* (2008) 63 Cal.App.4th 1178, 1188, regarding the bulk supplier/component parts doctrine as it relates to asbestos suppliers such as Union Carbide. [Opinion at 6.] Contrary to Union Carbide's position that this doctrine should be governed by what the "purchaser knows or should knows" after the *Johnson* decision, the *Stewart* Opinion correctly explains that "*Johnson* was not concerned with the knowledge of the purchaser, but with the knowledge of the user" and thus *Johnson* does not affect this prior line of cases.

Moreover, the *Stewart* Opinion also explains existing law that where a "sophisticated intermediary doctrine" does apply, it has been in situations where the manufacture has provided a warning to the intermediary. *Carmichael v. Reitz* (1971) 17

Cal.App.3d 958, 994; *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 170-172, 175-178; *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 21. [Opinion at 7.] The Opinion properly observes that Union Carbide did not seek an instruction under that theory and that Union Carbide gave no warning in any event. [Opinion at 3, 7.]

The Opinion "explains . . . with reasons given, an existing rule of law" and applies existing law to a set of facts significantly different that those stated in published opinions. (Rule 8.1110, subd. (c)(2) and (3)) The Opinion does not contradict established law and its reasoned holding has not been shown to likely to generate confusion it its application. Rather, the *Stewart* Opinion provides clear guidance on what is not an appropriate jury instruction under *Johnson* in regard to this issue and was properly certified for publication.

2. Section B of the *Stewart* Opinion

Union Carbide also seeks depublication of Section B of the *Stewart* Opinion concerning the issue of the jury's allocation of fault. However, this portion of the Opinion is properly certified for publication. The Opinion explains existing law, that Union Carbide bore the burden of production of evidence at trial on the issue of allocation of fault. *Sparks v. Owens-Illinois*, (1995) 32 Cal. App. 4th 461, 4780. It further found that the jury was entitled to conclude that Union Carbide had not met its burden. [Opinion at 11 and 12.] This portion of the Opinion which has not been challenge in Union Carbide's petition for review, does not create confusion nor does it create conflict in existing law.

The Opinion notes that the statements by plaintiffs 'counsel during oral argument concerning other asbestos exposures where in fact coupled with other statements explaining that evidence of exposure is not enough to allocate fault to others and that Union Carbide needed to produce evidence of fault --that these other exposures were a substantial factor in causing Larry Stewart's injuries—and that the jury was entitled to find that Union Carbide had not carried its burden. This portion of the Opinion explains existing law as appropriate to a case where no affirmative evidence on the issue has been offered by a defendant. There is nothing in this portion of the Opinion that would lead to a risk that other courts and litigants would prevent a jury from considering the evidence presented at trial on the issue of allocation of fault. This argument simply does not make sense.

After hearing and considering evidence from both parties at trial, the jury found Union Carbide to be 85 percent at fault for Mr. Stewart's damages. The verdict form itself had four separate questions concerning causation and one additional question directly about Mr. Stewart's exposure to Union Carbide's asbestos via Hamilton and USG products. The jury answered all in the affirmative. [AA Vol. 5, 1086].

The *Stewart* Opinion correctly explains that at trial, Union Carbide had the burden to establish concurrent or alternate causes by proving that "[Mr. Stewart] was exposed to defective asbestos-containing products of other companies; that the defective designs of the other companies' products were legal causes of the plaintiffs' injuries; and the percentage of legal cause attributable to the other companies" [Opinion at 11, citing. *Sparks, supra.*] As in *Sparks*, there was nothing in this case to prevent Union Carbide from presenting evidence and arguing that other equally defective products were concurrent causes of Mr. Stewart's mesothelioma. In fact, Union Carbide Corporation made an attempt. As far as the record discloses, however, Union Carbide did not carry its burden and the jury was not convinced. The Opinion follows existing law that allocating fault or responsibility is an issue that has generally been left to the sound discretion of the jury. *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 334, [146 Cal. Rptr. 550].

At trial, Union Carbide offered no independent evidence--from either lay or expert witnesses--about the specific properties (e.g., the asbestos content), performance, extent of usage, or effects of the other products to which Mr. Stewart was exposed. Plaintiffs' medical expert testimony relied upon by Union Carbide was only that all of Mr. Stewart's asbestos exposure contributed to his disease. This testimony did not include an exposure assessment as to other manufacturers and did not include testimony as to facts giving rise to fault on behalf of other entities. In short, Union Carbide did not prove any basis for an allocation of fault to any other company or companies as it failed to present evidence to prove the elements of negligence or strict products liability as to other manufacturers.

Union Carbide seeks to depublish an opinion that correctly explains what a defendant's burden of proof is on the issue of allocation of fault and why the jury decision to reject additional findings of fault in this regard should not be disturbed. The Opinion is not confusing and appropriately addresses this issue and will provide guidance to future litigants.

3. Section C of the *Stewart* Opinion

Section C of the Opinion concerns the various meritless challenges Union Carbide made to the award of punitive damages against it, which Union Carbide also did not petition this Court to review. Union Carbide greatly misstates the Opinion's discussion on the sufficiency of plaintiffs' proof on their punitive damages claim in its argument for depublication.

Contrary to Union Carbide's statement that the Opinion makes no mention of the requirements that a plaintiff must prove for a punitive damage finding, (Union Carbide Corporation Ltr. Brief at 8), the very first sentence of this section of the Opinion states exactly what Union Carbide claims is missing, "[p]unitive damages can be awarded only where a jury finds oppression, fraud, or malice by clear and convincing evidence." (Opinion at 12).

Also contrary to Union Carbide's statement on page 5 of its letter brief, here is no holding in *Stewart* that "the mere commission of a tort is all that is required for punitive damages." (Union Carbide Corporation Ltr. brief at 5.) Indeed, the Opinion reflects the correct law on the issue and does not need to be depublished in order to prevent any contrived confusion or imagined misuse of the opinion.

The factual references by the Court of Appeal are appropriate to support its conclusions. Union Carbide incorrectly argues that the Court of Appeal held that the specific facts recited in the opinion are sufficient on their own to support a finding of malice, oppression or fraud and that this conclusion will be used against it in other actions. No such statement is in the opinion. Rather, the Opinion states that Union Carbide failed in its obligation to set forth all material evidence on this point in its opening brief which constitutes a waiver of error claimed. [Opinion at 12.] The Opinion the goes on to explain that plaintiffs' presented through a variety of documents and witnesses evidence "that Union Carbide did not share its knowledge of the dangerous of asbestos with its customers or with individuals who would predictably, be exposed to dust from its products, and that it instead sought to downplay the risk" which Union Carbide did not address in its appeal. [Opinion at 12-13.]

The Opinion gives examples of some of the more apprehensible and egregious conduct undertaken by Union Carbide in this regard which the jury considered, such as the Union Carbide manager's advice on how to "soothe" worried customers seeking information about Union Carbide's products by responding in "aggressive and submissive" ways to confuse them and by dolling out asbestos hazard information "like shots for rabies" "spaced at moderate intervals." [Opinion at 13-14.]

The Opinion did not recite all of plaintiffs' evidence presented at trial nor state that a threshold had been met merely because of the "instances" recounted in the Opinion.

There is no valid basis for Union Carbide's request to depublish this portion of the opinion. Its arguments are not sound and the request should be denied.

B. The Opinion "[i]nvolves a legal issue of continuing public interest" (Rule 8.1110, subd. (c)(6)).

The *Stewart* Opinion also involves a legal issue of continuing public interest: whether *Johnson* changes the law on the sophisticated intermediary doctrine and supersedes the established law bulk supplier/component parts doctrine as it relates to asbestos suppliers by imputing an intermediary purchaser's knowledge of a products hazard to the end user, when no warning has been given by the manufacturer, thus providing a new defense in many toxin exposure cases. The holding in the *Stewart* Opinion that *Johnson* did not, will assist the courts as defendants in toxic exposure cases,

are increasingly advocating a "no duty to warn" sophisticated intermediary doctrine defense based upon the imputation of knowledge. Publication of this Opinion provides the courts with much needed guidance on the parameters of that defense.

Similarly, the Opinion's discussion on a defendant's burden of proof for allocating fault not only explains existing law on allocation and the jury's role in determining this issue, but does so in the unique context of a trial where a defendant puts on no affirmative evidence and merely wants to rely upon argument of its own counsel and/or the argument of opposing counsel. This portion of the Opinion addresses a recurrent issue in asbestos trials, does not create conflict in existing law, and contrary to Union Carbide's argument, will promote clarity not confusion on the application of Proposition 51 in cases were alternate or concurrent causes are claimed to exist.

Courts and litigants alike are also well served by the Opinion's discussion of punitive damages in the context of an asbestos personal injury matter where the claims arose out of negligence and strict products theories of liability. The court's examination of the conduct, of the type presented against Union Carbide in this case in purposefully manipulating critical safety information with the intent to boost its sales, which led to devastating injuries, gives guidance on this important issue.

In conclusion, Union Carbide and *Amici curiae* attempt to create conflict and confusion where none exist in this Opinion. The Opinion qualifies for publication under the foregoing standards expressed in Rule 8.1110. The Opinion should remain published to guide future courts that will, in both asbestos -exposure cases and potentially other toxic-tort cases, face similar arguments by defendants that a dangerous product manufacturer/supplier has a complete defense regardless of what the end-user plaintiff knows or reasonably should know about the hazards of the product and regardless of whether the asbestos product manufacture/supplier provided a warning with its product because of what a product purchaser knew or should have known about the product.

Similarly, no confusion will be created by this Opinion in regard to its discussion of law and the sufficiency of the evidence in this case on allocation of fault and punitive damages. Instead, the Opinion correctly explains the law and how it was applied in this case, which promotes a uniform understanding of these issues.

As such, it is respectfully requested that the *Stewart* Opinion remain published.

Respectfully submitted,

PAUL & HANLEY, LLP

By:
Kelly A. McMeekin

KAM/ams

PROOF OF SERVICE

I am employed in the County of Alameda, State of California, I am over the age of 18 years and not a party to the within action. My business address is 1608 Fourth Street, Suite 300, Berkeley, CA 94710.

On January 14, 2011, I served the foregoing:

LETTER IN OPPOSITION TO REQUESTS FOR DEPUBLICATION OF OPINION (STEWART V. UNION CARBIDE)

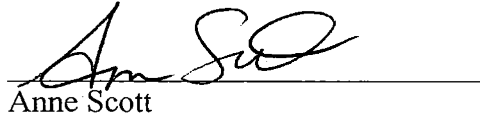
and a copy of this declaration to the interested parties herein as follows:

[X] By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Berkeley, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Berkeley, California.

DATE: January 14, 2011



Anne Scott

Larry Stewart v. Union Carbide Corp., et al.
Court of Appeal Case No.: B216193
Supreme Court Case No.: S189287

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