S246669

IN SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNA GAS CO.,

Respondent to Petition for Review

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent to Petition for Writ of Mandate

FIRST AMERICAN WHOLESALE LENDING, etc., et al.,

Real Parties in Interest.

After a Decision in the Court of Appeal
Second Appellate District, Division Five, Case No. B259424
Los Angeles Superior Court, Case No. SC108504
The Hon. John Shepard Wiley, Jr., Judge Presiding

APPLICATION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONERS ON PETITION FOR REVIEW

CRC 8.25(b)

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. Amicus and its counsel certify that *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 the *amicus* and 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: September 5, 2018

SHARON J. ARKIN

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APPLICATION TO FILE AMICUS BRIEF

Consumer Attorneys of California hereby requests that the attached amicus brief submitted in support of plaintiffs and real parties in interest be accepted for filing in this action.

Counsel is familiar with all of the briefing filed in this action to date. The attached amicus brief addresses fundamental public policy issues not otherwise considered or argued by the parties and amicus believes the brief will assist this Court in its consideration of the issue presented. In particular, this brief discusses the importance of tort remedies as a deterrent to negligent and injurious conduct, as an important adjunct to governmental regulation.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST OF THE *AMICUS*

Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals who are injured or killed because of the negligent or wrongful acts of others, including those injured physically and/or financially by mass disasters. CAOC has taken a leading role in advancing and protecting the rights of 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 plaintiffs damaged the result of negligence, CAOC is interested in the significant issues presented by this case, particularly with respect to the determination of whether economic damages are recoverable as the result of mass disasters caused by corporate malfeasance.

AMICUS BRIEF OF CAOC IN SUPPORT OF REAL PARTIES IN INTEREST

ISSUE PRESENTED FOR REVIEW

Can a plaintiff who is harmed by a man-made environmental disaster state a claim for negligence against the gas company that allegedly caused the disaster if the damages sustained are economic?

INTRODUCTION

The primary issue before this Court is whether economic damages (i.e., economic injury claims not accompanied by personal injury or property damage) are recoverable in a mass disaster caused by the negligence of an entity or person. Unsurprisingly, CAOC strongly supports the arguments presented by the real parties in interest. This brief will not, however, rehash those presentations but will, instead, expand on one issue raised by Southern California Gas Co. ("SoCalGas") in its Answer Brief on the Merits.

Specifically, at page 51 of its brief, SoCalGas asserts that permitting recovery of economic damages is unnecessary as a deterrent to future negligence because "SoCalGas is required to comply with detailed safety regulations and requirements imposed by the California Public Utilities Commission and other public agencies. These existing obligations give SoCalGas ample

incentive to take appropriate safety precautions."

That assertion is demonstrably false. Not only do the allegations in this case confirm that SoCalGas misrepresented *for decades* the safety of its natural gas storage and transportation network to its own regulators prior to this disaster, but governmental regulation – for many reasons – is frequently insufficient to protect health and safety in numerous industries. The tort system is an important adjunct to the regulatory system in incentivizing corporations to make sure their operations are safe. That, in turn, supports the conclusion that imposition of a duty of care to avoid causing economic injury is warranted in order to deter future misconduct and reduce future injuries.

LEGAL ARGUMENT

THE TORT SYSTEM PROVIDES A NECESSARY ADJUNCT TO GOVERNMENT REGULATIONS IN COMPENSATING AND PROTECTING THOSE INJURED IN MASS DISASTERS

There are three reasons why SoCalGas is wrong in its assertion that governmental regulatory oversight is sufficient to protect the public from economic harm as a result of future mass disasters. First, the allegations that SoCalGas flaunted existing regulatory in causing *this* disaster belie that contention. Second, whether because of a lack of resources or a lack of will, numerous

industries ignore regulatory requirements and, as a result, the tort system is the only backstop that can effectively incentivize corporations to take into account the health and safety of the community in their operations. And third, academic scholarship confirms that, both specifically and in general, the tort system is an important adjunct to government regulation.

A. Government regulation did not prevent this disaster.

SoCalGas' assertion that regulatory oversight is sufficient to prevent future disasters is belied by the allegations in this action. As alleged in the operative complaint (which, at this early stage in the litigation must be accepted as true), prior to the blowout of well SS-25, SoGalGas reported to its government regulator consistently for years and years that the SS-25 well had an operable safety valve. (1 Exhibits to Petition, pp 177-178, ¶ 58.) After the blowout, however, SoCalGas finally admitted *it had removed the safety valve more than three decades earlier.* (*Ibid.*)

SoCalGas essentially argues that more recent and more stringent regulatory controls currently in place are sufficient to protect the public on a going-forward basis, and that, as such, the tort system is not needed as a deterrent. (ABOM, p. 51.) There are two reasons to reject that analysis.

First, current regulations are not relevant given that it was the legal framework as it existed at the time of SoCalGas' negligent misconduct that it at issue. Furthermore, the fact that

SoCalGas failed to comply with the prior regulations is a legitimate basis to distrust its compliance with current regulations.

More importantly, as this Court repeatedly reaffirmed in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143-1144 duty is "evaluated at a relatively broad level of factual generality" and the issue is not whether *SoCalGas* will engage in similar misconduct in the future but whether imposition of tort liability generally will deter *other* corporations from disregarding regulatory requirements and putting communities at risk.

The facts alleged here highlight a fundamental problem with reliance solely on governmental regulations to prevent disasters. Unless a corporation has an internal corporate culture focused on safety, no governmental regulator is likely to be able to prevent disasters. Because of either a lack of resources or the lack of will to take on an industry, government regulators must frequently rely on self-policing by the entities they are charged with regulating. That, in turn, means there is less incentive to comply with often expensive, though necessary, safety efforts. As such, government regulation may be the *least* effective way to prevent future harm.

B. The inability of government agencies to effectively regulate corporate operations is not uncommon.

As discussed more extensively, below, in his 2011

Pepperdine Law Review article a noted torts scholar, Michael Rustad, identified several examples of industry regulation that failed to provide the necessary deterrent to negligent conduct. (See, Rustad, Torts as Public Wrongs, 38 Pepp. L. Rev. 433 (2011).)

For example, in discussing the Deepwater Horizon oil spill disaster in the Gulf of Mexico, Rustad confirmed that the "Interior Department's Mineral Management Service, the supposed regulator of oil drilling, was more a lap dog than an industry watchdog." (Rustad, at 538.) And indeed, a Coast Guard report cited by Rustad confirms that, with only two exceptions, annual penalties recovered under the Oil Spill Liability Trust Fund were minute. (United States Department of Homeland Security, United States Coast Guard, Report on the Implementation of the Oil Pollution Act of 1990, p. 8, available at www.uscg.mil/Portals/0/NPFC/docs/PDFs/ Reports, accessed on 9/5/18)

Rustad also identified nursing home regulation as inadequate to protect seniors from elder abuse, harm and injury:

> Nursing home negligence cases, for example, show the role of torts *in filling the regulatory gap created by too few resources devoted to enforcing federal safety standards*:
>
> "Public regulation has proved insufficient to combat the problems in our nursing homes. States differ in

the effectiveness with which they enforce Medicare and Medicaid nursing home regulations. . . . Although every jurisdiction has a reporting requirement for elder abuse, the regulation of the reporting is not consistent and there is widespread underreporting of elder abuse despite criminal penalties for omissions.

"Moreover, inspectors are often too lenient when it comes to protecting our most vulnerable elderly citizens. The Center for Medicare and Medicaid Services has expressed concerns that inspector leniency leads to substandard facilities and patient care. For example, . . . eighty-six percent of Texas nursing homes have substantial deficiencies in safety, causing potential or actual harm to nursing home residents. Nearly forty percent of the nursing home violations in Texas facilities cause actual harm to patients or place them at risk of imminent death or serious injury. Further, ninety-four percent of Texas nursing homes failed to comply with Health and Human Services' minimum staffing levels. While Texas is just an example of substandard living conditions in nursing homes, the record of failure in nursing home compliance is a serious issue in most states. Something needs to be done to ensure that

safety standards--governmental standards as well as societal standards--are met. Often regulation by litigation, in the form of nursing home lawsuits, can provide a remedy for the problem."

[¶¶]

Plaintiffs who bring nursing home lawsuits can similarly be dubbed private attorneys general because they sue not only for individual compensation, but also for the safety of other residents. Suing for safety is especially necessary to help regulate the nursing home industry, whose practices routinely violate state and federal safety standards. The private attorney general's role is critical in uncovering and correcting neglect, abuse, and mistreatment in nursing homes where the residents do not have a voice. As in the field of products liability, the private attorney general's role of enforcement in the nursing home arena is a market-based solution for the serious social problems of neglect and abuse.

[¶¶]

Thus, plaintiffs and their attorneys acting as private

> *attorneys general serve as consumer watchdogs where government watchdogs lack the resources, if not the will, to carry out their role.*

(Rustad, at 526 -527, 529 citing to and quoting from Rustad, Heart of Stone: What is Revealed about the Attitude of Compassionate Conservatives Towards Nursing Home Practices, Tort Reform, and Noneconomic Damages, 35 N. M. L. Rev. 337, 366-367 (2005), emphasis added.)

Rustad also cited to the Ford/Firestone Tire cases as another example where deterrence was provided by the tort system rather than regulators: "The Firestone-Ford Explorer cases are emblematic of how the tort serves a larger purpose beyond the bipolar relationship between the plaintiff and the defendant. Torts send a signal of general deterrence that "tort does not pay." (Rustad, at 536.) Rustad further explains why this is so, citing to and quoting from Stephen Lubet, In the Firestone Case, the Trial Lawyers Are the Real Heroes, The San Diego Union-Tribune, Oct. 11, 2000, at B-11, available at LexisNexis.

> So how did the whole story finally come out, with Ford and Firestone in deep denial and *the NHTSA overwhelmed and short-staffed*? The answer is that a group of personal injury lawyers began filing lawsuits--and eventually succeeded in bringing the

problem tires to public attention."

(Rustad, at 536, emphasis added.)

Another area in which it is demonstrable that government regulations alone are insufficient to deter corporations from misconduct is insurance. California has had detailed claims practices statutes and regulations on the books for decades. (Ins. Code § 790.03(h); 10 Cal. Code Regs. §§ 2695.1 – 2695.17.) Yet, while admittedly non-empirical, there is a rough measure that supports the inference that mere regulation is not enough. For example, a Westlaw search of the phrase "insurance & bad & faith" in the California case law library between the beginning of 2010 and the end of 2017 yields 1,169 appellate cases, both reported and unreported, rendered in that eight-year period.

There were undoubtedly, however, exponentially more bad faith cases actually *filed* in this state during that period given that, generally, most civil cases are settled and few are appealed. In fact, a rough "rule of thumb" can be extracted from the Judicial Council's own data sets. As reported in the Judicial Council's 2017 Court Statistics Report, Statewide Caseload Trends, 2006-2007 through 2015-2026, an average of approximately 200,000 unlimited civil cases are filed annually in the state's Superior Courts. (*Id.*, at 95.) But only about 3,000 civil cases result in rendered appellate decisions, both reported and unreported. (*Ibid*, p. 92.) Applying that ratio to the average number of insurance bad faith appellate decisions rendered

annually (146) translates into over 9,600 actual bad faith cases *filed* every year.

These examples highlight why the tort system provides an important adjunct to regulatory oversight. These examples demonstrate why SoCalGas' suggestion that this Court rely solely on regulatory mandates as a sufficient deterrent to prevent future harm is insupportable.

C. The court system can properly help the regulatory system deter future negligence.

There are, as always, academic debates about the value of the tort system and whether it should be restricted or abandoned. While few argue that the tort system should be wholly dismantled, even calls moderate for limitations generate robust debate.

One "moderate" proposal is to return the tort system to its Blackstonian roots as a means of regulating relationships between the parties and deterring one party from vindicating his or her rights through self-help, i.e., violence. These scholars believe that expanding the goals of the tort system beyond the individual relations between the two litigating parties is unnecessary and unwarranted. (See, e.g., Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L. J. 695 (2003), Benjamin C. Zipursky, Introduction, 75 Fordham L. Rev. 1143 (2006); and John C.P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of

Wrongs, 115 Yale L. J. 524 (2005).

Rustad, however, like Dean Roscoe Pound, Judge Learned Hand and others, believes that "that tort law vindicates public wrongs and often serves as a consumer watchdog . . . [i]n a world where corporations sometimes dominate legislatures and regulatory agencies, tort law maintains some independence, and its importance as an arena addressing corporate misbehavior should be permitted to evolve." (Rustad, at 439, see, also, pp 519-525.) Quoting from an analysis from the Chicago School of Economics, Rustad referenced "the capture theory of regulation," in which "'firms (or others) capture the regulatory process because each firm potentially bears a high cost if regulation constrains its behavior ...." Steven C. Hackett, Environmental and Natural Resources Economics: Theory, Policy, and the Sustainable Society 206 (M.E. Sharpe, 3d ed. 2006) [explaining how firms capture the regulatory process and discussing political economy of lobbying for favorable regulation].)

And that process has only accelerated since the last presidential election. (See, e.g., Lindsey Dillon, et al, The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture, American Public Health Association Journal, April 2018, available at https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360, accessed 9/5/18; Andrew Martin and Shruti Singh, Trump's USDA is Killing Rules that Organic Food Makers Want, Bloomberg (July 11, 2018), available at https://www.bloomberg.

com/news/features/2018-07-11/trump-s-usda-is-killing-rules-that-organic-food-makers-want, accessed 9/5/18.)

As recently discussed in Forbes Magazine, "overall there are 611 'Deregulatory' actions and 234 'Regulatory' ones" in the current Unified Agenda of Federal Regulations and Deregulations issued by the White House. Thus, deregulation is on a far faster pace than regulation and it appears that the rate of deregulation will increase substantially in the near future, as also reflected in that article: "In the 'Active' (pre-rule, proposed, and final) category, there are 499 'Deregulatory' and 133 'Regulatory' actions in the pipeline, for a nearly four-to-one favorable ratio for rules-in-motion." (Wayne Crews, Forbes Magazine, May 10, 2018, available at https://www.forbes.com/sites/waynecrews/2018 /05/10/trumps-2018-regulatory-reform-agenda-by-the-numbers/#77f6013f7cd2, accessed September 5, 2018.)

Thus regulatory agencies my be less able to perform safety functions, either through deregulations or inadequate staffing. That is why it is essential that the tort system act as an adjunct to persuade corporations to act conscientiously.

Technological advancements also impact the issue. In earlier eras, torts arose from narrow circumstances and caused harm to smaller numbers of people – normally only a few at a time. But as technology has advanced over the last 150 years, the harm caused by negligent misconduct has grown proportionally. Whereas negligence could cause injury to a few

individuals at the turn of the 20th Century, it can now, at the turn of the 21st Century cause catastrophic injury to a wide swath of people at the same time

This is especially true of environmental torts. Gradually, thanks to industrial and technological advances, it has grown ever more possible to cause injury to ever more individuals, businesses and the environment.

Thus, the need for the tort system to act as a bulwark against the hurdles erected on regulatory agencies in controlling corporate behavior is greater than ever, and growing. SoCalGas' assertion that regulatory controls are sufficient to deter corporate misconduct that can cause economic loss – especially losses to small businesses – is insupportable. Indeed, for the foreseeable future, government regulatory action is likely to be substantially *less* robust than at any other time in the modern era.

"In American society, it is up to tort to serve as 'the default regulator of safety and economic power.' Regulatory torts mobilize private claimants 'to identify and deal with problems that have not been adequately addressed by other institutions.' As Judge Jack Weinstein notes, the law of torts serves as a 'bottom-up' alternative to 'the topdown bureaucratic method operating through administrative agencies . . . .'" (Rustad, at 578-579, internal footnotes omitted.]

With appropriate application, the bottom-up remedy of the tort system can meet with the top-down alternative of the regulatory system in the hope and expectation that where they

meet in the middle, damages from negligence can be averted.

CONCLUSION

SoCalGas' entire premise, i.e., that government regulation is sufficient to deter corporate misconduct, is built on a flawed foundation. This Court should continue its long history of considering public policy to support its duty analysis. That consideration in this case – given the specific circumstances here, and the general push towards deregulation everywhere – fully warrants the conclusion that SoCalGas owed a duty to protect these small business owners from the financial losses they foreseeably suffered. The small businesses who suffered injuries at the hands of SoCalGas should be entitled to pursue their claims.

Dated: September 5, 2018

THE ARKIN LAW FIRM

By:_____

SHARON J. ARKIN
Attorneys for Amicus Curie
Consumer Attorneys of
California

CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, 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 3728 words as calculated utilizing the word count feature of the Word:Mac software used to create this document.

Dated: September 5, 2018

_____

SHARON J. ARKIN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 and not a party to the within action; my business address is 1720 Winchuck River Road, Brookings, OR 97415.

On **September 5, 2018**, I served the within document described as:

APPLICATION TO FILE AMICUSE BRIEF; AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as set forth in the attached service list and by depositing the envelopes with the U.S. Postal Service on this day, with postage thereon fully prepaid, at Smith River, CA.

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

Executed on September 5, 2018 at Brookings, Oregon.

SHARON J. ARKIN

SOUTHERN CALIFORNIA GAS LEAK CASES
Division SF
Case Number S246669

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Court of Appeal	Second District Court of Appeal Division Five 300 S. Spring Street Second Floor, North Tower Los Angeles, CA 90012

CA Supreme Court	PROOF OF SERVICE
S246669	

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