



November 15, 2019

Hon. Jim Humes, Presiding Justice
California Court of Appeal
First Appellate District, Division 1
350 McAllister Street
San Francisco, CA 94102-7421

Re: Request to Publish Opinion in *Berg v. Colgate-Palmolive Company*, A154245.

Dear Presiding Justice Humes and
Associate Justices:

The Civil Justice Association of California (“CJAC”)¹ supports Respondent’s request to publish the opinion in *Berg v. Colgate-Palmolive Company*, A154245, filed October 28, 2019. CRC 8.1120(a).

An opinion “should be certified for publication in the Official Reports” if it meets *any* of the listed criteria in California Rules of Court, rule 8.1105(c). *Berg*, which affirms summary judgment in a talcum powder case based on the lack of evidence to support causation, squarely meets three criteria for publication:

- (1) It “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions”;
 - (2) It “explains. . . an existing rule of law”; and
 - (3) It “[i]nvolves a legal issue of continuing public interest.”
- Cal. Rules of Court, rule 8.1105(c)(2)-(3), (6).

¹ CJAC is a nonprofit organization representing businesses, professional associations and financial institutions dedicated to achieving and maintaining civil liability laws that are fair, efficient, economical and certain. The parties to the appeal have not authored this letter in whole or in part, nor have the parties to the appeal made a monetary contribution for the preparation of this letter.

I. The Opinion applies an existing rule of law to a significantly different set of facts (CRC 8.1105(c)(2)).

The Court’s opinion should be published because it provides useful guidance to courts and litigants for analyzing whether evidence is sufficient to prove causation. Importantly, the opinion provides this important guidance in a newly addressed context: asbestos product liability cases where asbestos is alleged to be present in the product as a contaminant rather than as an intended constituent. Such guidance in that context is important as the number of such cases, particularly those involving allegations of asbestos contamination in cosmetic talcum products used by consumers, has been expanding rapidly.

The importance of proving causation with evidence satisfying the more-probable-than-not standard was first addressed in premises liability cases such as *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763. *See* pp. 775-776 [affirming summary judgment because “[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant”]; *see also* *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 480-488. Following those cases, the standard was addressed in product liability cases alleging exposure to asbestos, where defendants made products and equipment that contained asbestos as an intended component, such as *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1105, *Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252, and *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 108, cited by the Court here.

This Court’s opinion in *Berg* now provides valuable guidance for applying the threshold standard for proving causation in the talcum context. Among other things, the Court explained it “was not enough for plaintiffs to produce some evidence that Berg was exposed to a product that possibly contained asbestos.” *Opn.* at p. 7. Rather, “[t]he evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment.” *Id.*, quoting *Shiffer, supra*, 240 Cal.App.4th at 252. Ultimately, the Court required Berg to show that it was “more likely than not that the containers [he] used contained asbestos.” *Id.* at pp. 5-6. This Court’s analysis, if published, will help guide future disputes where analogous causation issues are present.

II. The Opinion explains an existing rule of law (rule 8.1105(c)(3)).

The Court's opinion also warrants publication because it explains the evidentiary standards necessary for surviving summary judgment in this context. Plaintiffs' overarching theory, rejected by the Court, was that their expert's declaration created a triable issue of fact. The Court concluded that the deficiency in the factual foundation supporting the expert's conclusions were apparent and that the declaration, therefore, could not defeat summary judgment. *Opn.* at pp. 6-7. The Court's ruling explains that it was not enough for plaintiffs to produce *some* evidence that Berg was exposed to a product that *might* possibly contain asbestos. *Id.* at p. 7.

The Court's opinion provides complementary but distinguishing analysis to *Lyons v. Colgate-Palmolive Co.* (2017) 16 Cal.App.5th 463, which precluded summary judgment because a genuine issue of material fact existed in that case as to whether the plaintiff's alleged use of talcum powder contained asbestos. Here, the Court's ruling shows that summary judgment can still be appropriate in a talc case where the evidence submitted by plaintiff does not support a finding that it was more likely than not that the talcum powder plaintiff used was contaminated with asbestos and caused plaintiff to develop cancer. The analysis employed by the Court in *Berg* will be helpful to courts and litigants addressing similar issues in other cases.

III. The Opinion involves a legal issue of continuing public interest (rule 8.1105(c)(6)).

California courts regularly adjudicate asbestos-related litigation. The legal issue of what evidence is sufficient to prove causation at the summary judgment stage is crucial for weeding out meritless cases. Publication would afford substantial benefit by furthering certainty and consistency in the law, avoiding future disputes, and preventing repeated litigation of the similar issues.

The Court's thoughtful treatment of the subject and the clear rule it applies will afford substantial guidance if published, especially as the circumstances here, or closely analogous ones, are likely to recur. If published, the opinion will help resolve cases sooner rather than later, thereby lessening unnecessary litigation burdens on the courts and containing litigants' legal expenses. And, it will help parties understand their rights and burdens before they even cross the judicial threshold.

For the foregoing reasons, CJAC respectfully supports this Court ordering publication of its opinion in *Berg v. Colgate-Palmolive*.

Respectfully submitted,



Fred J. Hiestand
CJAC General Counsel

Proof of Service attached

PROOF OF SERVICE

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

On November 15, 2019, I served the foregoing document described as: Publication Request of the Civil Justice Association of California in *Berg v. Colgate-Palmolive Co.*, A154245 on all interested parties in this action by placing a true copy thereof electronically as follows:

Richard M. Grant
Brayton Purcell LLP
222 Rush Landing Road
Novato, CA 94948
**Attorneys for Plaintiffs/Appellants
(Electronic Copy)**

Adam Abensohn
Quinn Emanuel Urquhart &
Sullivan
51 Madison Avenue, 22nd Floor
New York, NY 10010
**Attorney for
Defendant/Respondent
(Electronic Copy)**

Tina B. VanDam
Karen P. Agelson
Manning, Gross + Massenburg, LLP
400 Spectrum Center Dr., Suite 1450
Irvine, CA 92618
**Attorney for Defendant/Respondent
(Electronic Copy)**

(VIA E-SERVICE) I electronically served the foregoing document via the TrueFiling website.

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

Executed this 15th day of November 2019 at Sacramento, California.



David Cooper