No. S264607

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Angela Bolger,
Plaintiff/Appellant,

v.

Amazon.com, Inc.,
Defendant/Respondent.

After a decision by the Court of Appeal for the State of California
Fourth Appellate District, Division One, Case No. D075738
Superior Court Case No. 37-2017-00003009-CU-PL-CTL
Hon. Randa Trapp

Answer to Petition for Review

Thomas D. Luneau (Bar No. 145804)
*Jeremy Robinson (Bar No. 188325)
Jillian F. Hayes (Bar No. 297536)
CASEY, GERRY, SCHENK, FRANCAVILLA, BLATT & PENFIELD, LLP
110 Laurel Street
San Diego, California 92101
Tel: (619) 238-1811
Fax: (619) 544-9232

Attorneys for Appellant ***Angela Bolger***

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

Summary of Argument

While Appellant Angela Bolger can hardly dispute the Court of Appeal's opinion addresses a matter of statewide significance—she argued as much in her appeal and the holding attracted significant press coverage[1]— Amazon has not given this Court any reason to interfere with that well-reasoned decision. On the contrary, Amazon's Petition advances conflicting arguments predicated on a purposeful misreading of the lower court's decision.

For example, at different points in its Petition, Amazon disparages the Court of Appeal's opinion as both too narrow in scope (Pet. for Review, p. 18) and too broad (Pet. for Review, p. 25). Amazon also contends the Court of Appeal should have deferred to the Legislature because the Legislature was then considering a measure aimed at holding online marketplaces strictly liable. What Amazon's Petition fails to mention is

---

[1] See, e.g., Palmer, *California court rules Amazon can be liable for defective goods sold on its marketplace*, CNBC (Aug, 13, 2020, 6:44 pm), https://www.cnbc.com/2020/08/13/amazon-can-be-held-liable-for-faulty-goods-court-rules.html; Graham, *Amazon liable for defective products from third-party sellers, California court says*, USA Today (Aug. 13, 2020, 5:43 pm), https://www.usatoday.com/story/tech/2020/08/13/amazon-retailer-liable-3rd-party-product-defects-california-court-rules/3369886001/; Barash, et al., *Amazon Can Be Liable in California for Defective Products*, Bloomberg (Aug. 13, 2020, 4:29 p.m.), https://news.bloomberglaw.com/product-liability-and-toxics-law/amazon-can-be-liable-in-california-for-defective-products.

Amazon *supported* that legislation. So, Amazon is arguing the Court of Appeal committed an egregious legal error in holding it strictly liable and instead should have deferred to unsuccessful legislation that would have imposed even broader liability on Amazon.

Amazon's Petition even goes so far as to suggest this Court is ill suited to resolve this issue of strict liability. (Pet. for Review, p. 23.) Thus, Amazon is asking this Court to grant review, declare itself the wrong forum to decide a question of judicially-created common law, and await a future legislative solution, if one ever arrives.

Beyond these spurious claims, the remainder of the Petition offers a mixed bag of legally dubious arguments, none of which supports review. First, Amazon claims the Court of Appeal was wrong to extend strict liability to every entity in the vertical distribution of goods, so long as suppoorted by public policy. (Pet. for Review, p. 9.) But that is the law in California, and has been for many years. (See, e.g., *Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 773). Second, Amazon faults the Court of Appeal for basing its decision on the social policies underlying strict liability (Pet. for Review, pp. 11-12, 21-28) even though that is exactly what this Court has directed the appellate courts to do. (See, *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 479–480.) Third, Amazon parses quotes from this Court's opinion in *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, falsely

implying that decision has any bearing on the outcome here when it does not.

And finally, Amazon contends the Court of Appeal should have brushed aside decades of bedrock product liability jurisprudence, starting with this Court's landmark decision in *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256. (Pet. for Review, pp. 11, 21, 25.) Which, of course, the Court of Appeal could not do even if inclined to. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

These arguments are not grounds for review by this Court. The unanimous, published decision of the Court of Appeal is based on the careful application of established product liability principles to a new but now-ubiquitous form of commerce.

Nevertheless, should this Court feel the importance of this case warrants review, Ms. Bolger asks this Court to consider the proper framing of the issue set forth on page 15 of this Answer.

Background and Statement of the Case

The Court of Appeal's opinion states the relevant facts accurately. (Opinion, Attachment A to Pet. for Review ("Opinion"), pp. 5-13.)[2] Amazon's Petition does not. Instead,

---

[2] Confusingly, Amazon's Petition for Review attaches a copy of the Court of Appeal opinion but does not cite to the pagination in it. Instead, Amazon cites to the Westlaw pagination, which is different. For ease of reference, Ms. Bolger cites to the

Amazon selectively advances the facts it believes favors its position, often extracting quotes from the opinion that are incomplete or taken out of context. Below, Ms. Bolger provides key facts omitted from Amazon's Petition so this Court has the complete picture.

1. Amazon was an integral part of the distribution, marketing, and sale of the defective battery

Amazon's Petition misleadingly portrays Amazon as a bystander to a sale between a third-party supplier, here Lenoge Technology (HK) Ltd., and Ms. Bolger[3]. In so doing, Amazon glosses over several pages of the opinion detailing Amazon's exquisite control over this transaction (Opinion, pp. 5-13) and also the court's outright repudiation of Amazon's claim: "Amazon is no mere bystander to the vast digital and physical apparatus it designed and controls." (*Id.* at p. 32.)

The Court of Appeal is correct; Amazon was not a bystander. Rather, Amazon was a "direct link in the chain of distribution" acting as a "powerful intermediary" between the third-party supplier and Ms. Bolger. (Opinion, p. 4.) Throughout the entire process, Ms. Bolger "had no contact with Lenoge or anyone other than Amazon." (Opinion, p. 11.)

---

opinion attached to Amazon's Petition.

[3] Lenoge went by the fake name of "E-Life" on the Amazon.com site. Ms. Bolger did not know the true identity of Lenoge until after Amazon revealed it. She then served Lenoge and Lenoge failed to appear in the case and was defaulted. (1 AA 196, 2 AA 541.)

Amazon absolute authority starts with its Business Solutions Agreement ("BSA"), an adhesion contracted foisted on suppliers by Amazon. The BSA gives Amazon the unilateral ability to dictate the format and content of the listing, bars suppliers from offering certain products through the Amazon website, and prohibits suppliers from listing a product at a higher price than the supplier offers elsewhere. (Opinion, p. 9.) Amazon also "prohibits third-party sellers from contacting customers to collect payments or influence their purchasing decisions." (*Id*. at p. 8.) Indeed, "third party sellers may not use Amazon customer or transaction information 'for any marketing or promotional purposes whatsoever.' " (*Ibid.*)

The BSA also states Amazon, not the supplier, has the exclusive right to collects all payments for product sales. (Opinion, p. 6.) Rather than paying its suppliers per sale, Amazon periodically remits aggregated sales proceeds after deducting its substantial fees and commissions. (*Id*. at pp. 6-7.) If a third-party supplier violates Amazon's policies, Amazon may take corrective action, including suspending the supplier, destroying inventory without compensation, and permanently withholding payments. (*Ibid.*)

To buy the battery, Ms. Bolger dealt exclusively with Amazon. (Opinion, p. 25.) She added the battery to her Amazon cart. (*Id*. at p. 24.) She paid Amazon for the product. (Opinion, pp. 24-25.) The third-party supplier was not involved in the sale. Under Amazon's model, a supplier "does not approve the

sale before it is made. It may not even know a sale has occurred until it receives a report from Amazon." (Opinion, p. 25.) The supplier also "does not receive payment until Amazon chooses to remit the proceeds." (*Ibid.*)

Further, Amazon allowed the supplier here to use the fictitious name "E-Life" in its product listing, effectively rendering it unidentifiable by Ms. Bolger or, indeed, anyone other than Amazon. (Opinion, p. 24.) And, even setting aside the use of a fictitious name, the product listing did not "conspicuously inform the consumer of the identity of the third-party seller or the nature of Amazon's relationship to the sale." (*Ibid.*)

2. Fulfillment by Amazon gave Amazon even more control over the sale of the defective battery

In this case, the battery was also "Fulfilled by Amazon." When Amazon "Fulfills" an order, Amazon stores the product in its warehouse and, when purchased, retrieves the product and ships it. (Opinion, p. 7.) Amazon controls the packaging for the shipment, "which may include Amazon branding and Amazon-specific messaging." (*Ibid.*) If convenient, Amazon will ship the product together with products listed by other third-party suppliers or by Amazon itself. (*Ibid.*) If a customer wishes to return a Fulfilled product, she ships it back to Amazon. (*Ibid.*) Amazon personnel then inspect it, determine whether it can be resold, and if so, return it to inventory in the Amazon warehouse. (*Ibid.*)

Amazon's Petition discounts the significance of Fulfillment, suggesting it is just another "logistics service." Hardly. When a product is Fulfilled by Amazon, Amazon effectively " 'owns' the customer." (Opinion, p. 7.) This means that Amazon "owns and controls the relationship with the buyer; the individual or company supplying products to the [Fulfillment] program does not." (*Id*. at p. 7-8.) Under Fulfillment, the supplier "has no direct relationship with the buyer, and indeed in most cases does not even have an indirect relationship with the buyer." (*Id*. at p. 8.) Typically, there are no communications between supplier and buyer; "the [Fulfillment] supplier simply discovers in a report or some other form of notification that a product has been sold to the buyer." (*Ibid*.) Amazon does not contact the seller for approval of the purchase and decides on its own whether to allow the transaction to go through. (*Ibid*.)

All of these facts, from the BSA to Fulfillment, provide the foundation for the Court of Appeal's application strict liability to the transaction here. After a careful analysis of the record and the applicable law, the Court of Appeal held Amazon was strictly liable for the defective battery that scalded Ms. Bolger because "[a]s a factual and legal matter, Amazon placed itself between Lenoge and Bolger in the chain of distribution of the product at issue here." (Opinion, p. 3.) The court found all the policies underlying strict product liability are satisfied by holding Amazon liable because "Amazon is the only member of

the enterprise reasonably available" to Ms. Bolger, Amazon "plays a substantial part in ensuring the products listed on its website are safe" and "can and does exert pressure on upstream distributors (like Lenoge) to enhance safety," and Amazon "has the ability to adjust the cost of liability between itself and its third-party sellers." (Opinion, p. 4.)

The court's unanimous decision was not, as Amazon suggests, a drastic and unsupported expansion of strict liability to a defendant with minimal participation in the distribution and sale of the defective product. Amazon had its hands all over this transaction from start to finish. As the Court of Appeal observed, Amazon "made these choices for its own commercial purposes. It should share in the consequences." (Opinion, p. 32.)

Response to Issues Presented for Review

1. Amazon's proposed issues for review are fatally flawed

Amazon frames two issues it believes warrant review. First, Amazon asks this Court to decide if online marketplace providers in general are "strictly liable for defects in a product sold by a third party…" (Pet. for Review, p. 7.) Second, and somewhat contradictorily, Amazon asks this Court to proclaim a wholly new policy of legislative deference in this area of law. (*Ibid.*)

Neither issue, as framed, is appropriate for consideration by this Court. The first—asking for a global pronouncement on strict liability applicable to every online marketplace—is drastically overbroad and well beyond the scope of this case. The question here is whether the principles of strict liability support holding Amazon liable under *these* facts, not "whether 'websites for products sold by others' should generally be held strictly liable." (Opinion, p. 36.) As the Court of Appeal recognized, "[o]ther factual situations involving 'websites for products sold by others,' including other sales through Amazon, may be distinguishable." (*Id*. at pp. 36-37.)

Amazon's effort to sweep in every model of online marketplace under the guise of seeking review of an individual case is inappropriate. Each marketplace has its own structure and liability cannot be decided as a blanket proposition. Indeed, Amazon itself has different ways products are sold on its marketplace. (Opinion, pp. 5, 36-37.)

Amazon's other "issue for review"—that the Court of Appeal should have deferred to the Legislature—requires little discussion. The lower court easily dispatched that argument, noting "Amazon does not cite any California authority for this claim, which is unsurprising because it runs directly contrary to California law." (Opinion, p. 36.) Strict liability is a common law doctrine in California. "It was created by the courts, which have expanded and contracted the doctrine where warranted by its purposes." (*Ibid*., citing *Daly v. General Motors Corp*.

(1978) 20 Cal.3d 725, 733; *Acqua Vista Homeowners Assn. v. MWI, Inc.* (2017) 7 Cal.App.5th 1129, 1143.) While the Legislature can weigh in on these issues, that does not relieve the courts of their duty to adapt the common law and resolve the disputes presented to them.

2. If this Court is inclined to grant review, it should do so on the following issue

Should this Court decide the significance of this case justifies review, Ms. Bolger respectfully suggests the issue is properly framed as:

> Is Amazon an integral part of the overall producing and marketing enterprise of the defective battery such that Amazon is strictly liable for Ms. Bolger's burn injuries?

This framing properly limits the scope of review to the facts and legal issues presented here and avoids requests for grandiose proclamations of law on matters extrinsic to this appeal.

Argument

1. Review should be denied because the Court of Appeal correctly applied California law to find Amazon strictly liable

Amazon's Petition for Review complains the Court of Appeal unfairly expanded product liability law. The Petition argues the court "created entirely new rules of strict liability" (Pet. for Review, p. 6), and "expanded strict liability beyond

well-established limits" (Pet. for Review, p. 13), creating a "potentially vast" "blast radius" in the world of e-commerce. (Pet. for Review, p. 28.)[4]

This complaint is unfounded. The Court of Appeal did not fabricate new rules of strict liability; it simply applied well-established rules to an emerging form of commerce. In fact, the principal decisions relied on by the Court of Appeal, *Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44 and *Barth v. B. F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228, have been the law in this state for over fifty years.

Amazon's erroneous position appears born of two faulty and overlapping beliefs: that strict liability in California is limited to "[t]raditional and well-established strict liability categories" such as a manufacturer, distributor, or seller (Pet. for Review, pp. 9-10); and that Amazon, merely a "service provider" in its view, is categorically exempt from strict liability. (*Id.* at pp. 6, 10, 14-16) The first belief is wrong as a matter of law and the second is wrong as a matter of fact.

On the first point, Amazon cannot cite to anything so much as hinting that California product liability is restricted to "traditional" categories of businesses. To the contrary, our courts have repeatedly held that strict product liability extends to *any* entity in the chain of distribution. (See, e.g., *Sharufa v.*

---

[4] Ironically, in the same document, Amazon accuses the Court of Appeal of fashioning an overly narrow "result-oriented, eye-of-the-beholder policy assessment aimed at the business of a single defendant," i.e., Amazon. (Pet. for Review, p. 19.)

Festival Fun Parks, LLC (2020) 49 Cal.App.5th 493, 502 ("[l]iability extends to the entire distribution chain because the purpose of products liability is to hold responsible all who place a defective product into the stream of commerce"); *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 88 ("[t]he doctrine of strict products liability imposes strict liability on all the participants in the chain of distribution of a defective product"); *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 628 (a consumer injured by a defective product "may now sue 'any business entity in the chain of production and marketing,' "); *Kaminski v. Western MacArthur Co.* (1985) 175 Cal.App.3d 445, 455 (same).)

The Court of Appeal simply applied that well-established rule to conclude "Amazon is an 'integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.' " (Opinion, p. 25.) The court also rebuffed Amazon's efforts to confine strict liability to "traditional" businesses, correctly noting "[d]ictionary defintions of seller and distributor do not define the scope ot strict liability in California." (Opinion, p. 25.) Indeed, Amazon's desire for a limited set of "recognized categories of strict liability" is disingenuous to say the least, considering Amazon's entire business model is based *avoiding* fitting into any of those "recognized categories" and upending the traditional retail models it claims should be held liable.

On Amazon's second point, the "service provider" exception to strict liability, while certainly real, is inapplicable to Amazon. Amazon does not provide services to buyers, it sells them products.

Our courts draw a distinction "between a transaction where the primary objective is the acquisition of ownership or use of a product and one where the dominant purpose is to obtain services…" (*Murphy v. E. R. Squibb & Sons, Inc.* (1985) 40 Cal.3d 672, 677.) In the latter case, strict product liability does not apply. (*Ibid.*) But, where the "purchase of a product is the primary objective or essence of the transaction, strict liability applies even to those who are mere conduits in distributing the product to the consumer." (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 344*; see also Sharufa*, *supra*, 49 Cal.App.5th at p. 502 (summary judgment denied for injuries from waterpark slide because primary purpose of using waterpark could be to access products).)

There is no question the primary purpose of Amazon's transaction with Ms. Bolger was to sell her a product, and Amazon cannot realistically contend otherwise. Ms. Bolger did not visit Amazon's website seeking services, and Amazon did not provide her any. She bought a product off Amazon.com and paid Amazon for it.

Instead, the "services" to which Amazon refers are Amazon's arrangements with upstream manufacturers and

distributors to make products available for purchase on Amazon.com. But a retailer cannot unilaterally transform itself into a service provider exempt from product liability by way of business arrangements with other entities in the chain of distribution. If that were the test, Amazon's self-characterization could be employed by any distributor or retailer seeking to dodge responsibility. The particulars of how a retailer or distributor structures its upstream business should not determine strict liability. (See, e.g., *Apple Inc. v. Pepper* (2019) 139 S.Ct. 1514, 1523 [203 L.Ed.2d 802] ("we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a … retailer").)

Similarly, Amazon's supposed concern that holding it liable here would ensnare delivery services such as UPS and FedEx or e-commerce businesses such as Postmates and Redfin, is baseless. The Court of Appeal easily dispensed with that contention, observing "Amazon does not support this claim with any legal argument and the obvious differences between Amazon and those entities do not need to be elucidated here." (Opinion, p. 35, n. 8.)

And so, foiled by the Court of Appeal's refusal to accept its specious arguments, Amazon now resorts to distorting the holding to create the impression the court based liability on the barest of threads. Amazon makes bald assertions such as the Court of Appeal held it liable merely for "providing a website

where a third party sold its own product" (Pet. for Review, p. 6), or the court believed "it was sufficient to impose liability that 'Amazon created the environment (its website) that allowed Lenoge to offer the replacement battery for sale" (Pet. for Review, p. 11), or the court found Amazon "could be strictly liable even if it were "merely [a] 'facilitator.' " (Pet. for Review, p. 15, brackets in original.)

Even a cursory reading of the opinion belies those misstatements. For example, Amazon's suggestion the Court of Appeal held Amazon liable just because "Amazon created the environment … that allowed Lenoge to offer the replacement battery for sale" (Pet. for Review, p. 11) is simply untrue. To make that claim, Amazon must ignore the entire explanation following that quote. For this Court's benefit, the full quote reads:

> Amazon created the environment (its website) that allowed Lenoge to offer the replacement battery for sale. Amazon attracted customers through its own activities, including its direct offers for sales and its Amazon Prime membership program, which includes benefits for some products offered by third-party sellers (including the Lenoge replacement battery at issue here). Amazon set the terms of Lenoge's involvement, and it demanded fees in exchange for Lenoge's participation. Amazon required Lenoge to indemnify it and, assuming Lenoge met the sales threshold, to obtain general commercial liability insurance listing Amazon as an additional named insured. Because Lenoge participated in the FBA program, Amazon accepted possession of Lenoge's products, registered them in its inventory system, and stored them in an Amazon warehouse

> awaiting sale. Amazon created the format for Lenoge's offer for sale and allowed Lenoge to use a fictitious name in its product listing. The listing itself conforms to requirements set by Amazon. Even setting aside the use of a fictitious name, the listing does not conspicuously inform the consumer of the identity of the third-party seller or the nature of Amazon's relationship to the sale.

(Opinion, p. 24.) Obviously, the Court of Appeal was not holding Amazon strictly liable just because it operated a website where third parties listed products for sale.

Likewise, Amazon's insinuation that the Court of Appeal imposed liability on Amazon despite being "merely a facilitator" (Pet. for Review, p. 15) cannot be seen as anything other than an intentional misconstruction of the opinion. Amazon's quoted phrase comes from the court's explanation that the precise terminology used to define Amazon's business—be it "retailer," "distributor," or "facilitator"—is *unimportant*; what matters is that Amazon was "pivotal to bringing the product here to the consumer." (Opinion, p. 3.) Nowhere does the court rest liability on Amazon being "merely a facilitator."

Amazon was instrumental in this product sale and the imposition of strict liability by the Court of Appeal was entirely justified. "But for Amazon's own acts, Bolger would not have been injured. Amazon's own acts, and its control over the product in question, form the basis for its liability." (Opinion, p. 31.)

2. **The Court of Appeal correctly analyzed the policies underlying strict liability and should not have deferred to the Legislature to resolve this case**

A. **Strict product liability is a common law doctrine and its application to any given setting is fashioned by the courts**

Amazon's criticism of the Court of Appeal for deciding the case presented to it rather than awaiting possible legislative action[5], is misguided. To begin with, Amazon's Petition carefully omits a key fact: that Amazon conditionally supported AB 3262, the Assembly Bill addressing strict liability of online marketplaces, provided it would apply to all online marketplaces. The pertinent section of Amazon's position on AB 3262 reads:

> We share the California legislature's goal of keeping consumers safe. To further that goal, this legislation aimed at protecting consumers should apply equally to **all** stores, including all online marketplaces. Injured consumers should be able to seek compensation regardless of how a particular online marketplace makes money. For example, some online marketplaces charge third-party sellers up-front fees to post a product, while others charge sellers by taking a percentage of their sales, while others charge advertisers in order to be compensated for operating their marketplaces. The common thread is that all online marketplaces—like all marketplaces everywhere—bring buyers and sellers together. For AB 3262 to be a successful, lasting, and meaningful law, it cannot leave open loopholes for

[5] That AB 3262 did not pass should be indication enough that waiting for some proclamation from the Legislature is not the appropriate course of action.

> some marketplaces to escape accountability. This will merely incentivize companies to restructure how they operate to avoid being held to this strict liability[6].

The problem with this support is Amazon now argues the Court of Appeal's imposition of strict liability was legally wrong (Pet. for Review, pp. 14-20) and could have a "blast radius" that would be damaging to new and emerging online marketplaces. (Pet. for Review, p. 28) Considering Amazon supported a bill that would expand liability far beyond any conceivable "blast radius" of the Court of Appeal decision, its logic here seems suspect[7].

Reading between the lines, it is fairly obvious Amazon wants online marketplace liability to be an all or nothing proposition—either everyone is strictly liable or no one is. And while this position is perhaps understandable from a business perspective, it is not defensible from a legal one. Online marketplaces are not fungible, and the level of involvement in any given product sale, and thus the basis for liability, can vary widely.

---

[6] Huseman, Brian, *Amazon stands ready to support AB 3262 if all stores are held to the same standards*, (Aug. 21, 2020), https://blog.aboutamazon.com/policy/amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards (emphasis in original).

[7] Amazon's newfound concern for legislative deference was nowhere to be found at the trial court level, and Amazon still has no qualms touting the trial court's ruling—which involved no mention of the Legislature—as legally correct. (Pet. for Review, p. 9.)

In any event, Amazon's proposed solution of legislative deference not only fails to explain how it would solve Ms. Bolger's case, it also runs headfirst into the fact that California product liability is judge-made law. (*Daly*, *supra*, 20 Cal.3d at p. 733 [Strict product liability "was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society"].) As such, its evolution is fashioned by the courts, not the Legislature. Indeed, as this Court observed many years ago, "[t]he inherent capacity of the common law for growth and change is its most significant feature." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394.)

Amazon's response is the rather breathtaking argument that the principles underlying nearly 60 years of product liability jurisprudence—including several landmark decisions from this Court—are no longer relevant. (See, e.g., Pet. for Review, p. 26 ("Even if the *Vandermark* policies were the universe of relevant considerations, subsequent developments have eroded them as useful measures of liability") and p. 25 ("60 years after *Vandermark*, the Court of Appeal relied on the same three policies cited a half century ago, without seriously considering whether any new or different policies might bear on the question").) Amazon also suggests the courts are too slow and cumbersome to resolve these kinds of questions (*ibid.*); this point being urged even though there are dozens of cases around the country addressing the liability of online

marketplaces and not a single legislative enactment on that subject.

As an example of developments that have supposedly rendered *Vandermark* and its progeny obsolete, Amazon references the passage of Proposition 51 (Civ. Code, § 1431.1,-1431.5) by the voters in 1986. What Amazon fails to mention is that Proposition 51 does not apply to strict product liability cases like this one. (See, *Bostick*, *supra*, 147 Cal.App.4th at p. 92 ("To limit a defendant's responsibility in strict products liability for noneconomic damages to a proportionate share based on fault would undermine the purpose of strict products liability").) Thus, it is hard to see how Proposition 51 has any relevance to the principles of strict liability, much less renders them a musty antique of a forgotten era.

Amazon also provides bare citations to a handful of statutes enacted in other states, extrapolating from them the claim that the modern national trend is to restrict strict product liability. (Pet. for Review, p. 21.) However, Amazon provides zero discussion of those enactments—or even an excerpt of their language—rendering a meaningful comparison impossible. Regardless, there has always been some variance in product liability laws between states like California that prioritize consumer protection and those that do not.

Amazon's general attack on the continued validity of this Court's strict liability jurisprudence does demonstrate, though, that if review is granted here, it should be done with an eye

toward reiterating the continued vitality of the *Vandermark* policy factors rather than a wholesale dismantling of an entire body of law to suit a single defendant unhappy with the outcome in one case. As the Court of Appeal aptly noted, "California courts have examined the applicability of strict liability in numerous diverse contexts… Amazon has provided no reason why the courts cannot examine the doctrine in this context as well." (Opinion, p. 36, n. 9.)

B. Amazon's arguments about the application of the policies underlying strict liability here are specious

In *Vandermark*, this Court laid out the three policy justifications for imposing strict liability: (1) enhancing product safety, (2) maximizing protection to the injured plaintiff, and (3) apportioning costs among the defendants. (*Vandermark*, *supra*, 61 Cal.2d at pp. 262-263.) And while Amazon argues they are irrelevant to the modern economy, it cannot refute the Court of Appeal's conclusion that they support imposing liability on Amazon here. Indeed, that is likely *why* Amazon takes the position they are no longer meaningful.

Amazon makes no effort to suggest the policy analysis conducted by the Court of Appeal is deficient. Instead, it argues that loss spreading should not be the "exclusive criterion" for determining liability because "[t]o use this rationale for imposing strict liability in isolation of other rationales is to write a judicial ticket to impose strict liability

in any area of law where there are injured plaintiffs who may not be compensated." (Pet. for Review, p. 27.) Putting aside that this argument appears to conflate two separate policies, it is simply inapposite here.

The Court of Appeal rejected the identical argument below, noting "strict liability for Amazon under the circumstances here would promote *each* of the policies underlying the doctrine. It is not solely predicated on Amazon's availability as a defendant." (Opinion, p. 38, italics added.) The court also added that "[t]he risk of nonpayment, in such a circumstance, should fall on the entity that benefitted from the sale of the product rather than the injured plaintiff." (*Id*. at p. 39.)

Amazon's argument about risk spreading amounts to nothing more than a baseless protest against doing what other retailers already do. How does Amazon suppose Home Depot spreads the cost of product injuries across society? All the tools available to every other retailer to engage in risk spreading are available to Amazon. Indeed, Amazon's claim that it, unlike all its competitors, should not have to absorb or redistribute any risk is further evidence Amazon wants all the benefit with none of the responsibility. That runs directly contrary to this Court's pronouncement fifty-seven years ago that product liability was created to further the "public policy of insuring the costs of injuries caused by defective products are borne by those putting them on the market, 'rather than by the injured

persons who are powerless to protect themselves.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63.)

Conclusion

Amazon has not provided this Court with any reason to disturb the well-reasoned opinion of the Court of Appeal. Nevertheless, recognizing the importance of this issue, if this Court does grant review, it should do so on the issue framed by Ms. Bolger above rather than Amazon's argumentative "issues."

Dated: October 13, 2020

Casey, Gerry, Schenk, Francavilla, Blatt & Penfield, LLP

/s/ Jeremy Robinson
Jeremy Robinson

Certificate of Compliance

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this Answer is proportionally spaced and contains 5,195 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: /s/ Jeremy Robinson
Jeremy Robinson

Declaration of Service

I am employed in the County of San Diego, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 110 Laurel Street, San Diego, CA 92101.

On October 13, 2020, I caused to be served the following document(s): **Answer to Petition for Review** on the interested parties in this action addressed as follows:

Attorneys for Respondent Amazon:

Julie L. Hussey, Esq.
Julian Feldbein-Vinderman, Esq.
Perkins Coie LLP
11452 El Camino Real, Suite 300
San Diego, CA 92130-2594

W. Brendan Murphy, Esq.
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099

Attorneys for Amicus Curiae Public Justice:

Jonathan D. Selbin
Lieff Cabraser Heimann & Bernstein, LLP
Hudson St., 8th Floor
New York, NY 10013

Evan J. Ballan
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery St., 29th Floor
San Francisco, CA 94111

Attorneys for Amicus Curiae Consumer Attorneys of California:

Benjamin I. Siminou
Appeals, Inc.
2305 Historic Decatur Rd., Ste. 100
San Diego, CA 92106

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America:

Christopher J. Carr
Navi Singh Dhillon
Baker Botts LLP
101 California Street, Ste. 3600
San Francisco, CA 94111

[X] (BY ELECTRONIC SERVICE THROUGH TRUFILING) These documents are being e-filed through the Court of Appeal's Trufiling service. Under California Rules of Court rule 8.71 and Rule 9(a) of the Supreme Court Rules Regarding Electronic Filing, the electronic copy of all documents that will be provided by the Trufiling service constitutes proper and complete service.

On October 13, 2020, I also caused the **Petition for Review** to be served on the following interested parties:

California Court of Appeal
Fourth Appellate District – Division One
705 B Street, Suite 300
San Diego, CA 92101

Superior Court of California, County of San Diego
Honorable Randa Trapp
330 West Broadway, Department 70
San Diego, CA 92101

[X] (BY REGULAR MAIL) I have placed a true copy of said document in a sealed envelope and caused such envelope to be deposited in the United States mail at San Diego, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 13, 2020 at San Diego, California.

/S/ Jeremy Robinson
JEREMY ROBINSON