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June 10, 2020

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Court of Appeal of the State of California
First Appellate District, Division One
350 McAllister Street
San Francisco, CA 94102

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Re: Request for Publication of *Verrazono v. Gehl Company*, First Civil No. A152318 (May 22, 2020)

Honorable Justices:

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Pursuant to Rules 8.1105 and 8.1120 of the California *Rules of Court*, the Association of Southern California Defense Counsel (“ASCDC”) writes to request the Court to order publication of its opinion in *Verrazono v. Gehl Company*, First Civil No. A152318 (“*Verrazono*”).

The ASCDC is the nation’s largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has approximately 1,000 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California’s civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and a forum for exchanging information and ideas.

ASCDC has appeared as amicus curiae in numerous cases before both the California Supreme Court and Courts of Appeal across the state to express the interests and concerns of the civil litigation attorneys who comprise its membership.

The *Verrazono* opinion held the consumer expectations test is inapplicable as a matter of law to alleged design defects that conflicting expert testimony demonstrated were beyond the jurors’ lay experience. It would also be the first published opinion to address the “dynamite instruction” (CACI 5013). It meets the standards for publication in at least three respects.

Document received by the CA 1st District Court of Appeal.

First, it explains with reasons given an existing rule of law (Rule 8.1105(c)(3).) It provides useful examples of what is properly considered “the behavior of ‘obscure components under complex circumstances’ outside the ordinary experience of the consumer.” (Opinion, p. 8.) It also contains a discussion of other cases that provides much needed guidance to the bench and bar. This includes distinguishing *Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545 (*Demara*), another forklift case. After discussing that both cases involved a product “in specialized use with a limited group of consumers,” the *Verrazono* opinion explains that the evidence presented at the jury trial of this case showed that the claimed defects (an alleged “lack of features”) required an evaluation of complex technical issues and design considerations that jurors were not equipped to make without competing expert testimony.

Second, the opinion makes a significant contribution to legal literature by reviewing the development of a common law rule. (Rule 8.1105(c)(7).) It contains a scholarly discussion of product liability jurisprudence, analyzing the major cases, from *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, to *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, to *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, and explains the contours of the consumer expectations test to various claimed defects. (Opinion, pp. 6-11.) Thus, if published, it would provide useful guidance to other litigants and trial courts on the recurring issue of when it is legally improper to provide an instruction to the jury on the consumer expectation test.

Third, it applies an existing rule of law to a set of facts significantly different from those stated in published opinions (Rule 8.1105(c)(2).) It appears this would be the first published decision to address CACI 5013. (Opinion, pp. 15-18.) Publication would reinforce the line that trial judges should walk—as the trial court in this case appropriately did—when encouraging further discussion by jurors without engaging in undue coercion. The opinion also explains the derivation of the approved jury instruction from prior case law (*Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648). (Opinion, pp. 17-18.) Thus, as with its discussion of product liability jurisprudence, it makes a significant contribution to the legal literature (Rule 8.1105(c)(7)), and provides clear guidance on this issue that would benefit litigants across the state.

For these reasons, ASCDC urges this Court to certify its *Verrazono* opinion for publication.

Respectfully submitted,

POLSINELLI, LLP

By: J. Alan Warfield

J. Alan Warfield

On Behalf of the Association of
Southern California Defense Counsel

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/s/J.Alan Warfield

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Warfield, J.Alan (186559)

Last Name, First Name (Attorney Number)

Polsinelli LLP

Firm Name



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