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January 29, 2016

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

RE: Hernandezcueva v. American Standard Inc. et al, Court of Appeal Case No. B251933, (Los Angeles County Superior Court Case No. BC475956, Strict Liability Related to work by Subcontractors

Dear California Supreme Court:

By this letter the American Subcontractors Association ("ASA") and the American Subcontractors Association of California ("ASAC") request that this Court grant the petition for review of the above-referenced case or de-publish this case. This is based on the adverse impact to the Construction Industry and the Insurance Industry (as related to construction insurance) because the Court of Appeal decision has created strict liability against subcontractors that did not previously exist, a result that unfairly places a burden on subcontractors with a substantial risk they cannot control.

## I. About the American Subcontractors Association and American Subcontractors Association of California

The American Subcontractors Association, Inc. ("ASA") is a non-profit corporation supported by the membership dues paid by its approximately 2500 member businesses trading as construction subcontractors and suppliers throughout the country. ASAC is a member of ASA and includes the 300 plus members with four chapters in the State of California.

Because of ASA's unique, national perspective as a representative of Construction Industry subcontractors, ASA's applications for leave to submit *amicus curiae* briefs have been approved in many previous California cases, including in this case before the Court of Appeals as well as in in *Wm. R. Clarke v. Safeco Ins.* (1997) 15 Cal.4th 882; *Vandenberg v. Superior Court* (1999) 21 Cal. 4th 818; *Crawford v. Weather Shield Mfg* (2008) 44Cal.4th 441; and *Los Angeles Unified School District v. Great American Insurance* (2010) 49 Cal.4th 739. ASA has also participated *amicus curiae* in many jurisdictions regarding construction issues including most recently in *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas,* (2013) 134 S.Ct. 568.

## II. This Case creates a conflict in Appellate Cases between *Hernandezcueva* and *Monte Vista Development Corp. v. Superior Court* (1991) 226 Cal.App.3d 1681.

In this case the court did something never before done in any previous California cases: it imposed strict liability against a subcontractor. The *Hernandezcueva* court, as explained below, argued that the subcontractor defendant was more than a mere provider of services. The facts of Hernandezcueva are very similar as those in Monte *Vista Development Corp. v. Superior Court* (1991) 226 Cal.App.3d 1681, but the Appellate Court used different reasoning to reach a different, and unprecedented, result.

In both *Hernandezcueva* and *Monte Vista* the subcontractor purchased materials for its work as required by its contract, with the material costs passed on to the contractor who was purchasing the subcontractors services. In *Monte Vista* the court did not use the purchase of materials as a deciding factor for strict liability. However, in *Hernandezcueva* the court went a step further to see what influence the subcontractor allegedly had in the purchase of materials.

In *Monte Vista* the court acknowledged,

> "[the subcontractor] purchased the soap dish that injured plaintiff, as well as other fixtures, in order to complete its subcontract with *Monte Vista*." *Id.* at 1688.

Despite this fact (that the subcontractor purchased the defective product) the court in *Monte Vista* concluded:

> "under the guidelines of the Restatement Second of Torts, Willey Tile is not an entity which is subject to strict

liability for supplying a defective product." *Id.*

In this case the *Hernandezcueva* court acknowledges:

"[subcontractor] could not get a job . . . unless your bid included labor and material" p. 19.

However, in *Hernandezcueva* the court held the opposite the *Monte Vista* court and found that:

"E.F. Brady's [subcontractor's] substantial purchases of the defective products, coupled with its ongoing relationships with their manufacturers, thus support the imposition of strict liability." p.19

In *Hernandezcueva* the Court attempted to explain this different result by stating that the *Monte Vista* Court had noted that,

"It mattered not to [the subcontractor] whether [the developer] or someone else supplied the tile fixtures."

However, in both cases the subcontractor's job was to do the work specified in its Contract: work that required supplying and installing materials approved by others. In both cases the subcontractor supplied the defective materials as required by its Subcontract.

As a result, there is now a direct conflict between the cases because *Hernandezcueva* looks further into the purchases of supplies to be installed than called for in *Monte Vista*. *Hernandezcueva* argued that the subcontractor somehow can control the process of the product specified; however, both cases agree the subcontractor supplied the materials and then used a different test and interpretations of *Second Restatement of Torts* Section 402A regarding Strict Liability and reach different conclusions.

## III. This Case creates a conflict in Interpretation of *Second Restatement of Torts* Section 402A regarding Strict Liability for Subcontractors

The Construction and Insurance industry need clear direction from this Court on the law and a resolution of the conflict between *Hernandezcueva* and *Monte Vista,* regarding the proper interpretation of *Second Restatement of Torts* Section 402A relating to work performed by subcontractors on a construction project. Under *Hernandezcueva,* insurance is being asked to insure a risk

subcontractors cannot control for installing material specified and approved by others, without explaining how subcontractors are sellers as required under *Second Restatement of Torts* Section 402A. In contrast in *Monte Vista* the court acknowledges subcontractors are simply installing their work and are not sellers.

Second restatement Section 402A states

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property
> is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if "(a) *the seller is engaged*
> *in the business of selling such a product*, and "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> "(2) The rule stated in Subsection (1) applies although
> "(a) the seller has exercised all possible care in the preparation and sale of his product, and
> "(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." (Rest.2d Torts, § 402A, italics added.)

Amicus argue that a subcontractor is not a "seller" as referred to in the Section 402A above, but is merely, as stated in in *Monte Vista* providing a service to "do the work" as specified and directed by others. Amicus seek this court clarify this conflict between *Hernandezcueva* and *Monte Vista*.

## IV. The Court of Appeal's Decision Expands Strict Liability to Subcontractors and Public Policy Calls for this Court to Limit and Reverse this warrantless expansion to Subcontractors.

The Court of Appeal decision also creates *for the first time* a new test to determine Strict Liability against a subcontractor stating:

> "[s]ubcontractor's substantial purchases of the defective products, coupled with ongoing relationships with their manufacturers support the imposition of strict liability."

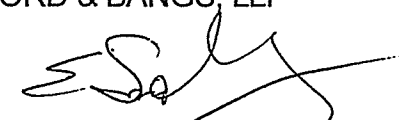
This standard ignores Second Restatement of Torts Section 402A cited above regarding whether a subcontractor is a "seller", a determination California law previously required to

impose strict liability. The decision ignores the fact that, E.F. Brady and other similarly situated subcontractors are doing nothing more than installing material; they are not "selling", distributing or marketing a product. E. F. Brady and other similarly situated subcontractors simply purchase and install material in compliance with specifications written by others and approved by an architect. As such the decision creates a warrantless burden for subcontractors to control a risk over which they do not control for a product they do not sell.

As explained above, the Court of Appeals decision has unduly broadened Strict Liability by adding subcontractors whose primary purpose is installing material specified and approved by others. In the process it has ignored the "seller" requirement of *Second Restatement of Torts* Section 402A. Such broadening of Strict Liability and interpretation of Restatement Section 402A places new and substantial risks on numerous California subcontractors. The *Hernandezcueva* decision is not supported by either prior law, or public policy because it imposes a risk on parties that cannot control the risk. Clearly, this needs to be corrected by this Court to grant certification to review the decision and correct the conflict between this case and *Monte Vista*. At a minimum, Amicus Curiae ASA and ASAC request this Court de-publish the decision to insure subcontractors and the construction industry that they will not be burdened with a risk subcontractors cannot control.

Sincerely,

CRAWFORD & BANGS, LLP



BY: E. SCOTT HOLBROOK, JR.
For the Firm

ESH/mcg(4158.06)

**B251933**

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service, and the correspondence will be deposited with the United States Postal Service that same day in the ordinary course of business; my business address is 1290 E. Center Court Drive, Covina California 91724

On January 29, 2015, I served the following document described as: **LETTER BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION, THE ASSOCIATION OF THE WALL AND CEILING INDUSTRY, AND THE ROOFING CONTRACTORS ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENT E.F. BRADY COMPANY, INC.**

on the interested parties in this action by placing copies thereof enclosed in sealed envelopes addressed as follows:

California Supreme Court
Via Electronic Filing

Court of Appeals
Second Appellate District
Division Four
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_X_ **(BY FEDERAL EXPRESS)** By causing such envelope to be delivered via Federal Express, next day service, to the offices of the addressee. **EXECUTED ON** January 29, 2016, at Covina, California.

__X_ **FEDERAL** I declare that I am employed in the officer of a member of the bar of this court at whose direction the service was made.

MARIE MELENDEZ BY Marie Melendez
**SIGNATURE**