



September 17, 2019

Honorable Chief Justice Cantil-Sakauye  
and Honorable Associate Justices  
Supreme Court of California  
Earl Warren Building  
350 McAllister Street  
San Francisco, CA 94102-4797

**Re: *In re Johnson & Johnson Talcum Powder Cases:  
Echeverria v. Johnson & Johnson, et al.*  
Supreme Court of California Case No. S257378**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The American Association for Justice (“AAJ”) urges this Court to grant Elisha Echevarria’s Petition for Review of the decision by the Court of Appeal of the State of California, reported at (2019) 37 Cal.App.5th 292. AAJ has studied and fully agrees with the letter brief submitted by the Consumer Attorneys of California (“CAOC”) in support of the Petition. Based on its nationwide perspective, AAJ wishes to expand upon the need for this Court’s review of the lower court’s narrow application of this Court’s landmark decision in *T.H. v. Novartis Pharm. Corp.*, (2017) 4 Cal.5th 145 (“*Novartis*”).

### **Interest of the American Association for Justice as Amicus Curiae**

The American Association for Justice (“AAJ”) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world’s largest plaintiff trial bar. AAJ’s members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in California. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ and CAOC filed a joint brief as amici curiae in *Novartis*. AAJ is concerned that the court of appeal’s decision in this case failed to follow this Court’s precedential lead.

## Why this Court Should Grant Review

AAJ fully agrees with the CAOC letter brief that review in this case is required (1) to guide lower courts as to the proper scope of this Court's *Novartis* decision, (2) to instruct against improperly weighing evidence and assessing credibility in violation of the constitutionally inviolate right to trial by jury, and (3) to provide lower courts with the proper standard of review of jury awards of punitive damages. AAJ is particularly concerned that the first issue requires added guidance from this Court.

In *Novartis*, this Court moved the law of product liability law a significant step forward. *See, e.g., McNair v. Johnson & Johnson*, 241 W. Va. 26, 818 S.E.2d 852, 870 (2018) (Workman, C.J., dissenting) (calling *Novartis* "persuasive and indicative of the concepts this Court should espouse"); Sijin Choi, *It Is Emphatically the Province and Duty of State Courts to Say What Tort Law Is*, 87 Fordham L. Rev. 2213, 2223 (2019) (noting this Court's "well-reasoned" decision in *Novartis*). This Court held in *Novartis* that the manufacturer of a name-brand pharmaceutical could be liable for the failure of another company, manufacturing a generic version of the drug, to warn of known dangers. 4 Cal.5th at 180 & 191 (affirming *Conte v. Wyeth, Inc.*, (2008) 168 Cal.App.4th 89, 85 Cal.Rptr.3d 299).

In this case, the court of appeal dismissed Plaintiff's reliance on *Novartis*, stating that "the *Novartis* court's reasoning and analysis are inextricably tied to the 'distinctive legal framework governing labeling for brand-name and generic pharmaceuticals.'" 37 Cal.App.5th at 317 (quoting *Novartis*, 4 Cal.5th at 156). However, this Court in *Novartis* did not hold that the duty to warn arose only out of the FDA's prescription drug regulations. Rather, this Court ruled that the *relationship* between the name-brand manufacturer and the generic manufacturer under those regulations was such that it was clearly foreseeable that the name-brand manufacturer's negligence in failing to warn of known dangers would result in harm to consumers of the generic manufacturer's product. *Novartis*, 4 Cal.5th at 177-78. Here, the lower court made no similar inquiry into whether the relationship between Johnson & Johnson and its wholly-owned subsidiary Johnson & Johnson Consumer Inc. was such that the parent company's failure to warn of dangers associated with Johnson's Baby Powder would foreseeably harm consumers like Eva Echevarria.

Secondly, the portion of the *Novartis* holding relied upon by the court of appeal in this case was this Court's holding that "[l]iability may continue even after the original drug maker sells its rights in the brand-name drug to a successor." 37 Cal.App.5th at 317 (citing *Novartis*, 4 Cal.5th at 156). But that portion of this Court's holding had nothing to do with the FDA's regulations or with proscriptive drugs. As Justice Corrigan pointed out, the majority's decision "would extend indefinitely a drug manufacturer's duty to warn the customers of its successor, even after sale of the product line. No special feature of FDA law or practice warrants this rule." *Novartis*, 4 Cal.5th at 193 (Corrigan, J., concurring in part and dissenting in part) (citing out-of-state decisions involving non-pharmaceutical products).

Finally, even if this Court's decision in *Novartis* is not controlling outside the context of brand-name and generic prescription drugs, the court of appeal in this case failed to heed this Court's guidance. In determining whether a duty to warn should be imposed, this Court instructed that a careful assessment is required:

[W]e balance a number of considerations, including "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved."

*Novartis*, 4 Cal.5th at 164 (quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 443 P.2d 561).

The first three factors focus on the important element of foreseeability; the remaining four focus on public policy. *Id.* at 165. This Court in *Novartis* concluded that the *Rowland* factors supported recognition of a duty in that case. In this case, not only did the court of appeal dismiss *Novartis* as inapplicable, but the court made no independent assessment of the *Rowland* factors in the circumstances presented here.

### Conclusion

For these reasons, AAJ asks this Court to grant the Petition for Review.

Respectfully submitted,



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cc. See attached Proof of Service

**PROOF OF SERVICE**

**Re: *In re Johnson & Johnson Talcum Powder Cases:  
Echeverria v. Johnson & Johnson, et al.*  
Supreme Court of California Case No. S257378**

I, Amy L. Brogioli, declare that I am over 18 years of age and not a party to this action. I am employed in the District of Columbia. My business address is American Association for Justice, 777 6th Street NW, Suite 200, Washington, DC 20001.


On September 17, 2019, I served a true and correct copy of the attached document, described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW**, on the interested parties in this action, as follows:

***SEE ATTACHED SERVICE LIST***

**BY ELECTRONIC MAIL:** I served the parties, as indicated below, via Electronic Mail at the addresses listed below.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 17, 2019 in Washington, District of Columbia.

  
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Amy L. Brogioli  
American Association for Justice  
*Attorney for Amicus Curiae*

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