No. S177401

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA J. O'NEIL, individually and as successor in interest to PATRICK J. O'NEIL; et al.,

Plaintiffs and Appellants,

v.

CRANE CO. and WARREN PUMPS, LLC,

Defendants and Respondents.

WARREN PUMPS, LLC'S REPLY IN SUPPORT OF PETITION FOR REVIEW

Court of Appeal, Second Appellate District, Div. Five, No. B208225
Los Angeles County Superior Court, No. BC360274
The Honorable Elihu Berle, Judge Presiding

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I

THERE IS NO DISPUTE ABOUT THE NEED FOR REVIEW, AND LITTLE DISPUTE ABOUT THE PROPER SCOPE OF REVIEW

Plaintiffs' Answer does not oppose review. Indeed, all parties agree, at the very least, that "*O'Neil* and *Taylor* present a lack of uniformity in the decisions of the Court of Appeal, on an issue of recurring importance in asbestos litigation." (Answer at p. 3.) Warren Pumps, LLC's non-argumentative framing of that issue, to which Plaintiffs never propose an alternative, is:

> Under what circumstances, if any, is the manufacturer of a product liable for harm caused when the purchaser incorporates replacement parts, or affixes new parts, made and supplied by third parties?

Both sides agree that this case – like *Taylor* – involves no exposure to asbestos from parts originally sold or distributed by Defendants. (Petition at p. 8.) The core of the legal dispute is whether that matters. Plaintiffs say it does not; Defendants say it very much does. Warren's "Issue Presented" advances neither position.

Fairly included within that Issue are several questions on which, the parties agree, *O'Neil* and *Taylor* directly conflict. These include liability for failure to warn of a product defect (see Answer at pp. 2-3) and application of the "component part" defense (*id.* at p. 3). Plaintiffs also urge, and Warren agrees, that if the Court accepts review, it should address

"negligence as an alternative basis for liability." (*Id.* at p. 21.)[1]

As for the theory of design defect, Plaintiffs deny there is a conflict between the First District (*Taylor*) and the Second District (*O'Neil*). (Answer at p. 3 and fn. 2.) Their reading of *Taylor* is overly technical. While *Taylor* did not expressly reach a design-defect claim, its rationale applies equally to design-defect – as *O'Neil*'s sister division has since expressly held. (*Merrill v. Leslie Controls, Inc.* (2nd Dist., Div. 3, November 17, 2009) ---- Cal.Rptr.3d ----, 2009 WL 3824383, p. *10.) *Merrill*, like both *Taylor* and *O'Neil*, is a Navy-equipment case involving exposure to asbestos from parts not sold by the defendants (*id.* at pp. *1, 8), and it expressly rejects the design-defect claims that *O'Neil* permits (*id.* at p. *10 [not mentioning *O'Neil*]). Thus, at the very least, the Second District is internally divided on manufacturers' design-defect liability for harm allegedly caused by replacement or affixed parts – and as a practical matter, the First and Second Districts are as well.

In sum: there is no disagreement between Plaintiffs and Defendants on the need for review of *O'Neil*, and very little disagreement about the *scope* of such review. Numerous amici curiae likewise support review of *O'Neil*. Warren respectfully asks this Court to grant its Petition.

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[1] Plaintiffs acknowledge that Crane Co. included this issue in its nonsuit motion at trial, contrary to the appellate court's assertion. (Answer at p.

II

IF THE COURT GRANTS REVIEW, IT SHOULD FOLLOW THE STANDARD PRACTICE OF AUTOMATIC DEPUBLICATION

Plaintiffs ask the Court, if it grants review, to do something it virtually never does: order the continued publication in full of *O'Neil*. Indeed, Warren says "virtually never" only as a precaution, as it is aware of no such order in the Court's recent history, and assumes that Plaintiffs would have cited any such order that they uncovered.

There is no good reason to leave this decision citable as authority on issues that this Court elects to resolve. The Court's institutional role is to promote – not to undermine – statewide uniformity in the law. (See, e.g., *Smiley v. Citibank* (1995) 11 Cal.4th 138, 146 [Court's priority is to "further the uniform articulation and application of the law within [its] jurisdiction"].) The Court's primary method of achieving uniformity is to decide the merits of selected issues on which appellate courts disagree – but substantial time typically passes between grant of review and final decision. In this case, a secondary means of increasing uniformity during that time is the standard operation of Rule of Court 8.1105, subd. (e)(1) to render *O'Neil* non-citable pending review.

21.) They should have done likewise as to Warren, since Warren joined entirely in Crane Co.'s nonsuit motion. (See Petition at p. 18.)

Subdivision (e)(2) of the same rule does allow the Court to "order publication of an opinion, in whole or in part, at any time after granting review," but that subdivision should not be read to condone continued precedential force of an appellate opinion *during* this Court's review. The rule is more appropriately invoked *at the conclusion* of the review process, with respect to issues (if any) that were usefully decided by the appellate court and *not* selected for review. (See, e.g., *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709 ["Without ruling on the remaining issues addressed in the Court of Appeal opinion, we order that it be published in the Official Reports"], citing the predecessor of Rule 8.1105(e).[2]) Even when this Court orders such "re-publication" at the end of its review, such an order "does not necessarily imply agreement with the Court of Appeal's analysis on issues

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[2] See also *White v. Davis* (2003) 30 Cal.4th 528, 563 fn.14: "In this case, as in *Tex-Cal*, we find that the issues that were decided by the Court of Appeal but *upon which review was not sought* are significant issues, and that the discussion of those issues in the Court of Appeal's opinion is worthy of publication. Accordingly, in order to preserve that court's analysis of those issues as citable Court of Appeal precedent, we shall order the Court of Appeal opinion to be published in the Official Reports. ... [W]e express no opinion on the merits of those issues, ..." (italics added).

The Court may also apply Rule 8.1105(e)(2) to restore the published status of an opinion when it dismisses review as improvidently granted. (Cf. *Coon v. Joseph* (1987) 192 Cal. App. 3d 1296, 1283 fn.1 [such an order possible, but not issued in that case].)

not addressed in [the Court's] opinion." (*Agricultural Labor Relations Bd.*, *supra*, at 43 Cal.3d p. 709 fn. 12.)

Plaintiffs invite the Court to hedge a bet that it will ultimately decide *O'Neil* is right and *Taylor* wrong, by issuing an order allowing plaintiffs statewide to cite *O'Neil* in the meantime. (Answer at p. 4.) The Court should decline that invitation for institutional and practical reasons – as well as substantive reasons, should it choose to consider them.

A. This Court Should Not Promote Conflict In the Law, or Create Pointless Extra Work at Every Layer of the Judicial System

Plaintiffs' non-opposition to review necessarily implies that they agree this Court should resolve the conflict *O'Neil* creates. But their request that *O'Neil* remain published during any such review would *perpetuate* the conflict now besetting the two busiest county court systems in California (Los Angeles and San Francisco). That is unsustainable, and this Court should not assist such an effort.

Moreover, this Court is not and should not be in the business of predicting how review on the merits may turn out, in order to decide whether to disturb the automatic-depublication rule. Such a regime would impose a heavy new layer of judicial work at the start of review proceedings, for which Plaintiffs offer no institutional justification. An extra layer of useless work and speculation would follow for lower courts and practitioners as well, since even occasional orders of the kind Plaintiffs

seek would compel the bench and bar to attempt to draw inferences from each such order (or lack thereof) about which direction review is headed. It would be nothing but wasteful to add such "white noise" to the already complex processes of advocacy and adjudication.

Plaintiffs' supplemental letter of November 20 (final page) has the latter point backward. A standard grant of review in this case would not "fuel speculation over which of these viewpoints [*Taylor/Merrill* or *O'Neil*] will ultimately be the law"; all courts and practitioners know or should know that this Court's grant of review never implies any prejudgment of the merits. What *would* "fuel speculation" is a departure from this Court's standard practice for grants of review, such as Plaintiffs request.

B. As A Practical Matter, Plaintiffs' Proposal Would Not Achieve Anything They Seek

Plaintiffs argue that "[i]f this Court were to ultimately decide *Taylor* is wrong, and *O'Neil* is correct, the interim period during which review is pending will lead to scores of incorrect judgments and needless appeals." (Answer at p. 4.) But the same will occur under Plaintiffs' "let everyone cite everything" approach, *no matter which way the Court ultimately ruled.* Since *O'Neil* and *Taylor* cannot both be right, scores of litigants would end up with faulty judgments either way.

They also argue that individuals with mesothelioma "cannot survive the extended trial and appellate proceedings that would be

necessary to reverse a judgment entered by a trial court bound to follow the *Taylor* decision." (Answer at p. 4.) But no *fewer* trial and appellate proceedings will occur if this Court follows the automatic-depublication standard, because defendants that believe a trial court was wrong to follow *O'Neil* will continue to seek redress on appeal until this Court resolves the law. That would be no less a "waste of judicial resources" (Answer at p. 5) than the free-for-all Plaintiffs propose.[3]

In sum, there is no benefit and a substantial downside to treating this situation differently from any other upon a grant of review. Widespread waste and confusion would continue as they have ever since *O'Neil* threw the world of asbestos litigation into disarray.

However, in the unlikely event the Court has some general interest in Plaintiffs' proposal, Warren highlights a few of the substantive reasons the Court should reject that proposal in this case.

C. On the Merits, *O'Neil* Does Not Warrant Any Departure From the Usual Depublication Rule

To support Plaintiffs' request that *O'Neil* remain Second District precedent pending a grant of review, the Answer argues at some length that

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[3] In the margin Plaintiffs float an even more troubling scenario: the belated depublication of *Taylor* "on the Court's own motion" upon a grant of review that depublishes *O'Neil*. (Answer at p. 5, fn. 4.) Presumably this idea would have to extend to *Merrill* as well, leaving *no* citable precedent on point. That approach would just leave trial courts to re-create *Taylor* (or *O'Neil*) "sequel opinions" in order to resolve the stream of cases before them, which accomplishes nothing.

O'Neil was right and *Taylor* was wrong. It should be sufficient to reject Plaintiffs' request that in *Merrill v. Leslie Controls, Inc.*, *supra*, a co-equal division of the Second District fully endorsed (and extended) *Taylor*. Division 3 published its original decision in *Merrill* one week after *O'Neil*, and re-issued the same decision on November 17 after consideration of Mrs. Merrill's rehearing petition.

Plaintiffs' supplemental letter of November 20 attacks *Merrill* for its heavy citation of *Taylor*, but that reliance merely illustrates Division 3's complete concurrence with *Taylor*'s rationale. *Taylor* is a thorough and thoughtful decision that did not need shoring up from the *Merrill* court.[4]

Beyond that, the precedents Plaintiffs rely on do not support the rule they ask this Court to condone by leaving *O'Neil* published pending review. At this stage Warren confines its discussion to a few standout examples.

The Answer continues Plaintiffs' reliance (see pp. 6, 7, 15, 16) on this Court's decision in *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256 – but never acknowledges that *Vandermark*, unlike *O'Neil*, concerned liability for an original part. It was "established" in *Vandermark* that "when the car was delivered to Vandermark, the master cylinder

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[4] Plaintiffs' November 20 letter also chides the Second District, Division 3 for not expressly confronting *O'Neil*, but *Merrill*'s disagreement with *O'Neil* needed no elaboration, given *O'Neil*'s abject rejection of *Taylor*.

assembly had a defect that caused the accident." (61 Cal.2d at p. 260, explained in Warren's Petition at fn. 8.)

In contrast, Plaintiffs here concede that the parts allegedly making Defendants' pumps and valves defective – asbestos-containing gaskets and packing (and on one pump, metal-encapsulated insulation) – were long gone by the time Mr. O'Neil boarded the Navy ship bearing that equipment. Thus, *Vandermark* never confronted the Issue Presented here, which concerns harm allegedly caused by asbestos from replacement or affixed parts made by others and added (foreseeably, Plaintiffs argue) by the Navy.

Turning to two intermediate appellate authorities, *O'Neil* rejects *Cadlo v. Owens Illinois Inc.* (2004) 125 Cal.App.4th 513, and *Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357, as "remote." (Answer at pp. 17-18, citing Slip Op. at pp. 16-17.) The Answer touts this as correct, but it is not. By Plaintiffs' own description, *Cadlo* and *Powell* rejected liability under the same circumstances in which *O'Neil* imposed it:

- In *O'Neil*, Division 5 reversed a nonsuit judgment because it found Defendants' equipment was arguably defective for having "incorporated asbestos-containing products," and there was "no relevance to the fact that the injury was caused by the operation of its product in conjunction with a

replacement part [sold by someone else] which [was] no different than the original." (Slip Op. at p. 18.)

- The *Cadlo* and *Powell* courts rejected liability in the same situation: "the defendant had arguably manufactured a defective product, but plaintiff was injured by a similar (and similarly defective) product made by an entirely different manufacturer ... ." (Answer at p. 17.)

Plaintiffs seek to justify *O'Neil*'s heavy reliance on a decision that *Taylor* distinguished, *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577, as follows:

> *Taylor*'s attempted distinction of *Tellez-Cordova* is off the mark because *Taylor* focused only on the "inherently dangerous" nature of asbestos, and ignored the fact that asbestos exposures occur during maintenance of the defendants' equipment, and thus it is the use of defendants' products that is causing the exposure. *O'Neil* therefore held that "*Tellez-Cordova* cannot be distinguished." (*O'Neil* Opn., p. 20.)

(Answer at p. 14.) This argument mistakes coincidence-in-time for causation. That asbestos exposures occur "during" maintenance of the defendants' equipment does not mean "it is the use of defendants' products that is causing the exposure," as the *O'Neil* court insisted. Rather, it is the use of the replacement or affixed asbestos-containing parts for *their* intended purpose that is causing the exposure. Neither *O'Neil* nor Plaintiffs cite any evidence to the contrary.

There are many more reasons that *O'Neil* does not reflect the law as it is or as it should be – which Warren requests the opportunity to brief on the merits. For now, suffice it to say that the *Merrill* court was on solid ground when it followed *Taylor*, and that both are more consonant with this Court's precedents than *O'Neil*. On facts indistinguishable from those in *Taylor/Merrill*, the *O'Neil* decision expands manufacturers' strict liability in tort well beyond any point supported by public policy as this Court has articulated it. *Taylor* and *Merrill* recognize appropriate limits on such liability.

III

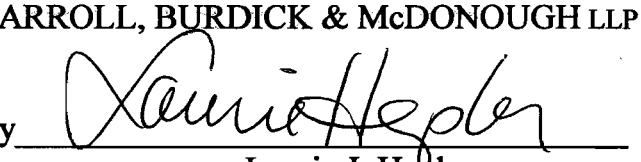
CONCLUSION

All parties (and numerous amici) agree that review of *O'Neil* is necessary and proper. If the Court concurs, it should allow Rule 8.1105(e) to operate in its usual fashion, treating this case no differently from any other presenting a conflict in the law.

Dated: November 24, 2009

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH LLP

By 

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CERTIFICATE OF WORD COUNT

I certify that the word-processing program used to produce this brief indicates that the brief contains 2,208 words.

Dated: November 24, 2009

Respectfully submitted,

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By _____
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Supreme Court of California, Action No. S177401
California Court of Appeal, Second Appellate District, Div. p, Action No. B208225
Los Angeles County Superior Court, Action No. BC360274

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On November 25, 2009 I served the enclosed:

WARREN PUMPS, LLC'S REPLY IN SUPPORT OF PETITION FOR REVIEW

on the following interested party(s) in said cause:

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1 Copy

Via Mail by enclosing a true and correct copy thereof in a sealed envelope and, following ordinary business practices, said envelope was placed for mailing and collection in the offices of Carroll, Burdick & McDonough LLP in the appropriate place for mail collected for deposit with the United States Postal Service. I am readily familiar with the Firm's practice for collection and processing of correspondence/documents for mailing with the United States Postal Service; they are deposited with the United States Postal Service in the ordinary course of business on the same day.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on November 25, 2009 at San Francisco, California.

Stephanie Ferrell