S177401

IN THE
SUPREME COURT OF CALIFORNIA

BARBARA J. O'NEIL *et al.*,
Plaintiffs and Appellants,

v.

CRANE CO. *et al.*,
Defendants and Respondents.

After a Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B208225

REPLY IN SUPPORT OF PETITION FOR REVIEW

HORVITZ LEVY LLP
David M. Axelrad (Bar No. 75731)
Jason R. Litt (Bar No. 163743)
Curt Cutting (Bar No. 199906)
15760 Ventura Blvd., 18th Floor
Encino, California 91436
818.995.0800
818.995.3157 (fax)
daxelrad@horvitzlevy.com
jlitt@horvitzlevy.com
ccutting@horvitzlevy.com

K&L GATES LLP
Raymond L. Gill (Bar No. 153529)
Robert E. Feyder (Bar No. 130688)
10100 Santa Monica Blvd., 7th Floor
Los Angeles, California 90067
310.552.5000
310.552.5001 (fax)
ray.gill@klgates.com
robert.feyder@klgates.com

Of Counsel:
Paul J. Lawrence
Nicholas P. Vari
K&L GATES LLP

Counsel for Defendant and Respondent

CRANE CO.

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Los Angeles, California 90067
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robert.feyder@klgates.com

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Paul J. Lawrence
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The parties agree that this case presents a conflict among Court of Appeal opinions over an important question of California law. (See APFR 3 [noting "a lack of uniformity in the decisions of the Court of Appeal, on an issue of recurring importance in asbestos litigation"].) Indeed, the only real dispute between the parties is whether this Court should depart from its normal practice and either order the Court of Appeal opinion here to remain published pending review, or depublish an already final opinion that creates the conflict requiring review. The Court should simply grant review and deny these extraordinary requests.

The Court of Appeal in this case expressly noted its disagreement with the conclusion reached by the First District in *Taylor v. Elliott*

Turbomachinery (2009) 171 Cal. App. 4th 564—a decision recently supported by and expanded upon in *Merrill v. Leslie Controls, Inc.* (Nov. 17, 2009, B200006) ___ Cal. App. 4th ____ [2009 WL 3824383] [Second Dist., Div. Three].[1] Plaintiffs ask this court to prematurely (and wrongly) conclude that the Court of Appeal opinion in this case is correct and *Taylor and Merrill* are wrong. Plaintiffs make this request as a prelude to asking this Court to exercise one of two extraordinary remedies: keeping *O'Neil* published pending review or alternatively depublishing *Taylor* long after it became final.

Neither remedy is appropriate. This Court has already rejected requests for review and depublication in *Taylor*, an opinion that became final almost a year ago. Granting depublication now is unwarranted and would be virtually unprecedented.

Similarly, this Court should not agree to depart from the standard practice of leaving an opinion depublished once review is granted. The long-held practice of this court has been to deny publication of a Court of Appeal opinion once it is accepted for review. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 951, p. 1006, citing *Knouse v. Nimocks*

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[1] In a letter to the Court dated November 20, 2009, plaintiffs contend that *Merrill* , which adopted *Taylor* in its entirety, represents a tacit acceptance of the logic of the *O'Neil* opinion, because *Merrill* does not reference *O'Neil* by name. Given the directly conflicting holdings of the two cases, however, it is difficult to see how *Merrill* reflects an acceptance of any aspect of *O'Neil*.

(1937) 8 Cal.2d 482; *Agricultural Labor Relations Board v. Tex-Cal Land Management* (1987) 43 Cal.3d 696, 709 n.12 (*ALRB*).) Although the rules permit the Court to publish, in whole or in part, an opinion that is accepted for review (9 Witkin, Cal. Procedure, *supra*, Appeal, § 951, pp. 1006-1007, citing Cal. Rules of Court, rule 8.1105(f)(2); *ALRB*, 43 Cal.3d at 709, fn. 12), that power is for the purpose of allowing Court of Appeal opinions to remain published pending review "with respect to issues not reached by [the Supreme Court] on subsequent review" (*ALRB*, 43 Cal.3d at 709, fn. 12). With respect to issues that the Court has accepted for review, the Court has recognized that "our authority to order publication of the lower court opinion would be pointless, since the relevant analysis and precedent would then appear in *our* opinion." (*Ibid.*, emphasis added.)

Here, plaintiffs do not point to any aspect of the Court of Appeal opinion that would be outside of the proposed scope of this Court's review.[2] Thus, the continued publication of the Court of Appeal's opinion would be "pointless."

Moreover, ordering the publication of the Court of Appeal opinion pending review would be virtually unprecedented. When this Court grants review based on a lack of uniformity, it will always be true that the state of

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[2] While plaintiffs seem to have some quarrel with the manner in which defendants framed the issue presented to this Court's review (APFR at 1-2), plaintiffs do not suggest that any aspect of the *O'Neil* opinion would fall outside of the core issues that require this Court's review.

the law will either be left in conflict pending review (if there was a conflict before review was granted) or the first decision will remain binding on the lower courts merely because it was first (if the court accepts review with the first conflicting decision). Nevertheless, plaintiffs fail to cite to a single instance in which this Court has either reversed its prior refusal to depublish a case, or in which it has agreed to leave a case published pending review.

In sum, plaintiffs are asking this Court to prejudge the merits of this case pending review and to promote confusion and uncertainty in California courts by either leaving the state of the law in conflict or removing all guidance to trial courts on the issue. This Court should recognize the conflict that exists among the Court of Appeal opinions on a matter of statewide importance and accept this matter for review. The Court should

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also follow its historical practice not permitting Court of Appeal decisions on issues accepted for review to remain published pending review.

Dated: November 30, 2009

HORVITZ LEVY LLP
David M. Axelrad
Jason R. Litt
Curt Cutting
K&L GATES LLP
Raymond E. Gill
Robert E. Feyder

(of Counsel)
Paul J. Lawrence
Nicholas P. Vari

Michele C. Barnes for Robert Feyder
Counsel for Defendant and Respondent
CRANE CO.

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), I hereby certify that the foregoing contains 823 words, excluding the tables, attachments, and this certificate, calculated using the word count feature of Microsoft Office Word 2003.

Robert E. Feyder (Bar No. 130688)
K&L GATES LLP
10100 Santa Monica Boulevard, 7th Floor
Los Angeles, California 90067
310.552.5000
310.552.5001 (fax)

Counsel for Defendant and Respondent
CRANE CO.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the county of San Francisco, State of California. I am over the age of 18 and am not a party to this action. My business address is Four Embarcadero Center, Suite 1200, San Francisco, California 94111.

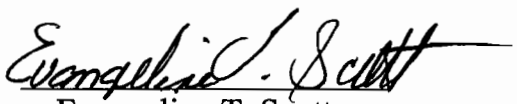
On November 30, 2009, I served true copies of the following document(s) described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with K&L Gates LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction service was made.

Executed on November 30, 2009, at San Francisco, California.



Evangeline T. Scott

SERVICE LIST

O'Neil v. Crane Co. et al

Court of Appeal Case No.: B208225 - Supreme Court Case No.: S177401

INDIVIDUAL SERVED	PARTY REPRESENTED
Paul C. Cook Michael B. Gurien Michael L. Armitage Waters Kraus & Paul LLP 222 North Sepulveda Blvd., Ste. 1900 El Segundo, CA 90245 310.414.8146 310.414.8156 (fax)	Plaintiffs & Appellants
Jeffrey I. Ehrlich The Ehrlich Law Firm 411 Harvard Ave. Claremont, CA 91711 909.625.5565 909.625.5477 (fax)	Plaintiffs & Appellants
James C. Cunningham Laurie J. Hepler Carroll Burdick & McDonough LLP 44 Montgomery Street, Ste. 400 San Francisco, CA 94104 415.989.5900 415.989.0932 (fax)	Defendant & Respondent Warren Pumps LLC
Clerk of the Court California Court of Appeal 2nd Appellate District, Division 5 Ronald Reagan State Building 300 South Spring Street, 2nd Floor Los Angeles, CA 90013	Case No. B208225
Clerk, Los Angeles Superior Court (for delivery to The Honorable Elihu M. Berle, Dept. 1) Stanley Mosk Courthouse 111 North Hill Street Los Angeles, CA 90012	Case No. BC360274