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IN THE
SUPREME COURT OF CALIFORNIA

PEGGY IRENE NORRIS, et al.,
Plaintiffs and Respondents,

vs.

CRANE CO.,
Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B196031

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Where the plaintiff claims a personal injury caused by exposure to asbestos from a product manufactured by the defendant, can the plaintiff establish causation based solely on expert testimony that *every* exposure to asbestos contributes to asbestos-related diseases?

2. Does the consumer expectations test for design defect apply when the alleged product defect involves the low dose emission of a substance producing complex, scientifically debated biological effects?

3. Does the consumer expectations test apply where the injured party is not a product user but a bystander?

WHY REVIEW SHOULD BE GRANTED

This case presents an opportunity for this court to review several recurring legal issues arising from the unceasing torrent of asbestos cases that is burdening California courts. The plaintiffs' decedent here had an extraordinarily tenuous claim to asbestos exposure from the defendant's product (he was a passerby on a few occasions while others worked with defendant's product), and he had heavy occupational exposures to a "fog" of asbestos dust from other products. Nevertheless, by presenting expert testimony that "any" exposure to asbestos should be considered a substantial factor in causing cancer, the plaintiffs obtained a jury verdict awarding 50% fault to the defendant.

Amazingly, this result is not anomalous, because the law governing asbestos cases in California has developed in a way that allows for litigation results contrary to common sense, and contrary to the liability and causation principles that govern all other contexts. This court should grant review to examine a number of ways in which California asbestos jurisprudence has gone way off track.

First, this court should grant review to determine whether the "every exposure" theory is insufficient, as a matter of law, to establish causation under California law. This question is being raised in courts around the country struggling with how to manage the peculiar problems posed by asbestos litigation. Two other state supreme courts (Pennsylvania and Texas) have recently addressed this issue and

squarely held that the "every exposure" theory is not sufficient to satisfy the Restatement's substantial factor causation test, which this court has adopted.

This court's opinion in *Rutherford v. Owens-Illinois, Inc.* (1977) 16 Cal.4th 953 (*Rutherford*) suggested that not all exposures to asbestos are sufficient to meet the "substantial factor" test. The court said "the length, frequency, proximity and intensity of exposure" should be considered to determine whether a particular exposure contributed "significantly enough." (*Id.* at pp. 975, 977.) But the Court of Appeal in this case and in *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990 (*Jones*) interpreted *Rutherford* as permitting plaintiffs to prove causation merely by showing *some* exposure to the defendant's asbestos and presenting expert testimony that every exposure is a substantial factor contributing to the plaintiff's disease.

The tension between *Rutherford* and *Jones* has created confusion, which came to the forefront when the Judicial Council's Civil Advisory Committee on Jury Instructions attempted to revise the CACI jury instructions on causation in asbestos cases. One member of the committee took the position that *Rutherford* requires an instruction that only exposures in excess of a minimum threshold can constitute a "substantial factor." The majority of the committee declined to include that language in the instruction, but the committee could not reach agreement as to whether a defendant would be entitled to such an instruction on request. The committee decided to await further

guidance. This case presents the opportunity to provide that guidance.

Second, this court should grant review to address the application of the consumer expectations test for design defect in cases where, as here, the alleged product defect involves the complex biology behind latent diseases occurring years after low dose release of asbestos fibers from a product the plaintiff did not use, but was exposed to only as a passerby.

In *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 (*Soule*), this court held that the consumer expectations test is reserved for cases in which the defect is within the product user's "*everyday experience*." (*Id*. at p. 567.) The court explained that "[t]he crucial question in each individual case is whether *the circumstances of the product's failure* permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety *assumptions of its ordinary consumers*." (*Id*. at pp. 568-569, emphases added.)

The Court of Appeal here, however, applied the consumer expectations test without addressing how the potential emission of low doses of asbestos fibers was within an ordinary consumer's "everyday experience," particularly in the 1950's. The court simply concluded that any emission of asbestos fibers is sufficient for a jury to conclude that the product violated minimum safety expectations. Sidestepping the question whether the plaintiff would have had any affirmative expectation one way or the other about science he didn't understand concerning a product he wasn't using, the court's

approach reduces the consumer expectations test to the simplistic question of whether the person expected to be injured by the product. That is precisely the construction of the consumer expectations test that this court cautioned against in *Soule.*

The lower courts have been unable to settle on a standard for applying the consumer expectations test in toxic tort cases despite a lay plaintiff's lack of any assumptions about the science of toxicology. (Compare *Morson v. Superior Court* (2001) 90 Cal.App.4th 775 (*Morson*) [consumer expectations test inapplicable to claim that latex gloves caused allergic sensitivity] with *Jones*, *supra*, 132 Cal.App.4th 990 [consumer expectations test applicable to low dose release of asbestos fibers from asbestos packing enclosed in valves and pumps].) Moreover, no published California opinion has previously applied the consumer expectations test to a bystander, who cannot be said to have any expectations at all regarding the safety of the product. Indeed, the application of the consumer expectations test is particularly inappropriate here given that the actual consumer of Crane Co.'s products—the Navy—was indisputably aware of the dangers and, to the extent anyone could have an expectation, would have expected Crane Co's product to function exactly as it did.

The time is right for this court to address these issues. This case arises in the context of a wave of California asbestos litigation targeting peripheral defendants like Crane Co., who did not manufacture asbestos products but sold metal valves that sometimes contained asbestos gaskets and packing made by others. As the actual

manufacturers of asbestos products have gone into bankruptcy[1/], the focus of the plaintiffs' bar has shifted. As one prominent plaintiff's lawyer put it, asbestos litigation has become an "endless search for a solvent bystander." (*Medical Monitoring and Asbestos Litigation* (Discussion with Richard Scruggs and Victor Schwartz) 1-7 Mealey's Asbestos Bankr. Report 21 (Feb 2002) p. *5.)

This new wave of litigation against peripheral defendants has greatly expanded the asbestos dockets of California's courts. When asbestos litigation focused on actual producers of asbestos and asbestos-containing products, a few hundred defendants were involved nationwide. (See James S. Kakalik et al., Variation in Asbestos Litigation Compensation and Expenses (1984) p. 5 [RAND Institute for Civil Justice].) Now, the plaintiffs' bar has named over *8,500* defendants in California asbestos litigation alone. (Deborah R. Hensler, California Asbestos Litigation—The Big Picture (HarrisMartin Aug. 2004) p. 5.)

With this sort of litigation on the rise in California, questions concerning the "every exposure" theory of causation and the consumer expectations test are bound to recur in the future. Such questions are also likely to arise in toxic tort cases involving other allegedly dangerous substances. (See, e.g., *Arnold v. Dow Chemical Co.*

1/ See *Norfolk & Western Ry. Co. v. Ayers* (2003) 538 U.S. 135, 169 [123 S.Ct. 1210, 155 L.Ed.2d 261] (conc. & dis. opn. of Kennedy, J.) ("[a]sbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000").

(2001) 91 Cal.App.4th 698, 727 [citing *Sparks* to support application of consumer expectations test in case involving exposure to pesticides].) The present case presents the ideal opportunity for this court to resolve these issues.

STATEMENT OF THE CASE

A. Joseph Norris served on a naval vessel containing large quantities of asbestos. He was repeatedly exposed to asbestos fibers from products not made or supplied by Crane Co.

Plaintiffs' decedent Joseph Norris served in the United States Navy in the 1950's. The ship on which Mr. Norris was stationed was the scene of a "fog" of asbestos dust from a variety of sources. (See typed opn., pp. 7, 9.)

Mr. Norris stood watch on the bow of the ship while men scraped and wire-brushed dusty insulation off the exterior of valves that were part of the pipe system. (Typed opn, p. 6.)[2/] He had to sweep the decks after the repair work, which stirred up dust that he breathed. (*Ibid*.)

2/ All the factual references in this Statement of the Case are taken directly from the Court of Appeal's opinion. (See Cal. Rules of Court, rule 8.500(c)(2).)

He worked above deck the majority of the time but he ate and slept below deck, where he saw men insulating pipes. (Typed opn., pp. 6, 7.) He also saw them using hammers, chippers, scrapers, and grinders to remove old materials. (Typed opn., p. 7.) Sometimes the men used wire brushes that released dust into the air. (*Ibid*.) He frequently inhaled the dust from pipe insulation. (*Ibid*.)

He walked within a few feet of men who, while working on pumps in the pipe system, became so dusty that their hair and faces became white. (Typed opn., p. 7.) The air in these areas were so dusty that it looked like smoke or fog. (*Ibid*.) He could not help but breathe that dust. (*Ibid*.)

He slept in a top bunk under an air vent wrapped in asbestos insulation that released dust into the air when the ship vibrated due to sudden increases in speed. (Typed opn., pp. 7, 8.) He breathed asbestos dust while he was sleeping under the vent. (Typed opn., p. 7.) He sometimes returned to his bunk and found dust on his blanket and clothing because maintenance work had been performed. (Typed opn., p. 8.)

As a gunner's mate, he was trained to install asbestos insulation in the ship's gun turret. (Typed opn., p. 8.) Firing the gun vibrated the insulation, produced dust in the turret area, and caused dust to be released from the pipe insulation throughout the ship. (*Ibid*.)

Near the end of Mr. Norris' time on the ship, it went into dry dock for a complete overhaul. (Typed opn., p. 8.) During that time, he saw men cleaning pipes all over the ship, stripping the insulation,

grinding or wire brushing the pipes, installing new insulation, scraping or wire-brushing asbestos gaskets that were used to create seals in the pipe system, and mixing mud insulation. (Typed opn., pp. 5, 8.) The gaskets had to be replaced periodically and would release fibers into the air when the crew scraped off the old gasket material. (Typed opn., p. 5.)

At the time of Mr. Norris's service, the Navy was aware that asbestos was dangerous and had adopted measures for reducing asbestos dust. (Typed opn., p. 3.) The Navy, however, did not employ these measures to protect Mr. Norris. (See typed opn., p. 10.)

B. The Navy purchased metal valves from Crane Co., some of which had asbestos-containing components. Mr. Norris never worked on a Crane Co. valve, but he was a passerby on a few occasions when others worked on them.

Defendant Crane Co. had nothing to do with the vast majority of the asbestos on the ship; it made metal valves that the Navy used in a shipboard pipe system. (Typed opn., pp. 3-4.)[3/] Some of those valves contained gaskets and packing made of chrysotile asbestos, which is less harmful than other types of asbestos. (Typed opn., p. 4, fn. 4.)

3/ Crane Co. is not related to John Crane, Inc., the party in *Jones*, *supra*, 132 Cal.App.4th 990.

Mr. Norris never worked on a Crane Co. valve, but on roughly five occasions he passed by as others worked on Crane Co. valves. (Typed opn., p. 8.) He never saw anyone remove any gaskets or packing from the valves. In other words, he never even saw anyone working with any of the asbestos-containing material supplied by Crane Co. But "[o]nce or twice he saw someone poke around with a screwdriver on the inside of one or two valves." (Typed opn., p. 9.)

Mr. Norris also saw two Crane Co. steam valves removed in his sleeping quarters. (Typed opn., p. 9.) He saw men scraping off the insulation from the *outside* of the valves and reinsulating them. (*Ibid*.) The men cleaned up the big chunks of insulation but they left some dust behind. (*Ibid*.) Crane Co. was not responsible for the asbestos insulation the Navy placed on the *outside* of the valves.[4/]

C. Norris was diagnosed with mesothelioma and sued Crane Co. The jury awarded $3.9 million and assigned 50 percent fault to Crane Co.

In 2005, Mr. Norris was diagnosed with mesothelioma. (Typed opn., p. 10.) He sued Crane Co. and 17 others. (Typed opn., p. 12.) The complaint alleged causes of action for negligence, breach of

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4/ Plaintiffs' counsel agreed that he would only seek liability for the asbestos-containing components Crane Co. initially supplied with its valves. (Typed opn., pp. 12-13.) The trial court agreed that Crane Co. could not be liable for asbestos affixed to the outside of its valves and instructed the jury accordingly. (Typed opn., pp. 13-16.)

warranty, and strict products liability. (*Ibid*.) By the time the trial concluded, Crane Co. was the only defendant left in the case. (Typed opn., pp. 13-14.) The trial court instructed the jury on the consumer expectations test for design defect. (Typed opn., p. 16.) The plaintiffs had also asserted a claim for strict product liability based on a failure to warn theory, but they abandoned that theory during jury deliberations. (Typed opn., p. 17.)

The jury found that Crane Co.'s valves were defective because they failed to perform as an ordinary consumer would have expected. (Typed opn., p. 18.) The jury also found that Crane Co. was negligent, and that both the negligence and the product defect were a substantial factor in causing Mr. Norris's mesothelioma. (*Ibid*.)

The jury awarded over $3.9 million in total damages and allocated 50 percent fault to Crane Co. and 50 percent to "'all others.'" (Typed opn., p. 18.) After reducing the award to account for settlement offsets and the allocation of fault, the trial court entered a judgment totaling roughly $2.15 million against Crane Co. (Typed opn., p. 9.)

D. The Court of Appeal's opinion affirming the judgment.

1. The court found that plaintiffs established causation through expert testimony that "every exposure" to asbestos is a substantial factor.

Given the lack of testimony quantifying any amount of asbestos fibers that Mr. Norris might have breathed from Crane Co. valves, Crane Co. argued on appeal that no substantial evidence supported the jury's findings that Mr. Norris was exposed to a Crane Co. product or that any such exposure caused his illness. (Typed opn., p. 20.) The Court of Appeal disagreed.

According to the court, the jury could have concluded Mr. Norris was exposed to asbestos from the materials inside a Crane Co. valve based on testimony that Crane Co. valves were in Mr. Norris's sleeping quarters, and that he saw employees working on two valves in there. (Typed opn., pp. 21-22.) There was no evidence the workers disturbed asbestos-containing gaskets or packing in the valves during that work, but the court said the jury could infer that the valves contained asbestos packing and that the workers had removed the packing during their work, releasing fibers. (Typed opn., pp. 9, 21-22).

The court also said the jury could have inferred Mr. Norris was exposed to asbestos in a Crane Co. valve when he encountered someone working on a Crane Co. valve in a passageway on the ship. (Typed opn., pp. 9, 21-22.) Although the court acknowledged that Mr.

Norris had not seen anyone removing asbestos from a Crane Co. valve, and had only seen someone "pok[ing] around with a screwdriver" on one or two occasions (typed opn., p. 9), the court nevertheless concluded the jury could infer that Mr. Norris breathed asbestos from a Crane Co. valve during these encounters (typed opn., pp. 21-22).

The court was not troubled by the fact that these exposures were negligible in comparison to Mr. Norris's extensive exposure to asbestos insulation throughout the ship. The court held that his brief passerby exposure to Crane Co.'s valves was a substantial factor in causing his mesothelioma, in light of the testimony by his experts that *"every exposure to asbestos fibers"* increased the total dose that led to the development of his disease. (Typed opn., p. 22, emphasis added.)

2. The court found that plaintiffs established a product defect under the "consumer expectations" test.

Crane Co. argued on appeal that the trial court erred by instructing the jury on the consumer expectations test for product defect, instead of the risk-benefit test. (Typed opn., p. 22.) The Court of Appeal acknowledged that the consumer expectations test "is inappropriate 'when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit.'" (Typed opn., p. 23, citing *Soule*, *supra*, 8 Cal.4th at pp. 562-563.) In such cases, when ordinary experience would not inform a consumer how safely

the product design should perform, expert testimony is necessary to illuminate the merits of the design. (Typed opn., p. 23.)

Nevertheless, the court affirmed the use of the consumer expectations test, citing other cases in which the test was applied to asbestos products. (Typed opn., p. 24.) The court concluded that the use of asbestos in Crane Co.'s valves was a design issue that an ordinary consumer could evaluate, and that a consumer would not expect a product to emit toxic asbestos fibers during ordinary use. (*Ibid*.) The court did not address the impropriety of applying a consumer expectations analysis to a case in which the plaintiff was not a consumer but a passerby.

No petition for rehearing was filed.

LEGAL DISCUSSION

I.

REVIEW IS NECESSARY TO RESOLVE WHETHER THE "EVERY EXPOSURE" THEORY IS A SUFFICIENT BASIS FOR ESTABLISHING CAUSATION IN ASBESTOS CASES.

A. This court seemed to indicate in *Rutherford* that not all exposures to asbestos are sufficient to establish causation.

This court addressed the question of causation in the asbestos context in *Rutherford*, *supra*, 16 Cal.4th 953. The plaintiffs in *Rutherford* alleged that their decedent developed cancer due to his exposure to the defendant's asbestos insulation, one of many different asbestos products he used. The trial court instructed the jury that if plaintiffs showed the decedent was exposed to the defendant's product, then the burden of proof on causation would shift to the defendants to prove their products did *not* harm the decedent. (See *id.* at p. 957.) On the defendant's appeal from an adverse verdict, the plaintiff attempted to defend the burden-shifting instruction by arguing that ordinary causation rules should not apply to asbestos cases. (See *id.* at pp. 978-981.)

This court rejected the plaintiffs' argument, holding that asbestos plaintiffs must meet the same standards for proving causation as other

plaintiffs in personal injury cases, and therefore must satisfy the "substantial factor" test of the Restatement Second of Torts: "*[A]sbestos plaintiffs can meet their burden of proving legal causation under traditional tort principles*, without the need for an 'alternative liability' burden-shifting instruction." (*Rutherford*, *supra*, 16 Cal.4th at p. 968, emphasis added.)

This court explained that the Restatement test for causation, as applied to asbestos cases, has two components—evidence of some level of exposure and further evidence linking that exposure to plaintiff's injury: "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must *first* establish some threshold *exposure* to the defendant's defective asbestos-containing products, *and* must further establish in reasonable medical probability that a particular exposure or series of exposures was a '*legal cause*' of his injury, i.e., a *substantial factor* in bringing about the injury." (*Rutherford*, *supra*, 16 Cal.4th at p. 982, first & fourth emphasis added, fn. omitted.)

Several aspects of the court's opinion strongly suggested that not *all* asbestos exposures are sufficient to establish causation. For example, the court held that a proper causation analysis takes into account "the length, frequency, proximity and intensity of exposure." (*Rutherford*, *supra*, 16 Cal.4th at p. 975.) There would be no need to consider such factors if every exposure were sufficient to satisfy the substantial factor test.

In addition, the court held that plaintiffs bear the burden of proving whether a particular exposure "contributed *significantly enough*

to the total occupational dose to be considered [a] 'substantial factor[]' in causing the disease." (*Rutherford*, *supra*, 16 Cal.4th at p. 977.) The reference to "significantly enough" would have been superfluous if the court intended to endorse a test under which every exposure to asbestos constitutes a substantial factor.

B. The Court of Appeal, relying on *Jones v. John Crane*, endorsed liability based on the theory that *every* exposure to asbestos is a substantial factor.

The Court of Appeal here held that Mr. Norris satisfied his burden of proving causation by (1) showing that he had at least some exposure to Crane Co.'s products, and (2) by presenting expert testimony that "every exposure" to asbestos constitutes a substantial factor. (Typed opn., p. 22.)

The Court of Appeal's causation analysis was based in large part on *Jones*, *supra*, 132 Cal.App.4th 990. (See typed opn., p. 21.) *Jones* was another case in which the plaintiff served in the Navy, was exposed to many asbestos-containing products, and developed cancer many years later. (*Jones*, at p. 996.) A jury found that the plaintiff's cancer was caused by the defendant's valve and pump packing materials. (*Id*. at pp. 996-997.) On appeal, the defendant in *Jones* argued that no substantial evidence supported the jury's causation finding because the fibers released from the defendant's products were comparable to the

background levels of asbestos that are present everywhere. (*Id*. at p. 998.)

The Court of Appeal, purporting to apply the *Rutherford* causation standard, concluded that exposures no greater than background can still be a substantial factor. (*Jones*, *supra*, 132 Cal.App.4th at p. 1000.) The court relied on expert testimony that "*every exposure*, including asbestos releases from defendant's packing and gasket products, contributed to the risk of developing lung cancer." (*Id.* at p. 999, emphasis added.) Based on that testimony, the court concluded that "*each of many separate exposures [to asbestos] constituted substantial factors contributing to [plaintiff]'s risk of injury*." (*Ibid*., emphasis added.) The *Jones* court did not attempt to reconcile this holding with the language in *Rutherford,* quoted above, suggesting that not all asbestos exposures satisfy the Restatement's "substantial factor" test.

C. The adoption of the "every exposure" test in *Jones* has created widespread confusion, as illustrated by the disagreements among the members of the CACI committee regarding the proper causation standard for asbestos cases.

The *Jones* court's approval of the "every exposure" theory has created confusion and disagreement throughout the state, including

disagreement among the members of the Judicial Council's Advisory Committee on Civil Jury Instructions. After *Jones* was decided, the committee created a special version of the "substantial factor" causation instruction for asbestos cases. (See CACI No. 435 (2007).) The standard instruction for all other cases states that "[A substantial factor] must be more than a remote or trivial factor." (CACI No. 430 (2007).) The committee removed that language from the definition of "substantial factor" in asbestos cases. (See CACI No. 435.)

When the committee circulated that proposal for public comment, the proposal "generated considerable interest and controversy." (Judicial Council of California, Advisory Committee on Civil Jury Instructions, Report (Oct. 12, 2007), p. 3 (Advisory Committee Report).)[5/] Nevertheless, the committee proceeded with the proposal, citing *Jones* for the proposition that the ordinary definition of "substantial factor" is not applicable to asbestos cases. (See *id.* at pp. 4-5 & fns. 5-6; see also *id.* at p. 17 ["The committee believes that the aggregate-dose standard justifies a different causation rule for asbestos"].)

One of the members of the committee dissented, believing that *Rutherford* requires that juries be instructed that there is a minimum threshold of exposure which must be exceeded to prove causation in asbestos cases. (See Advisory Committee Report, at p. 5 & fn. 9.) Even the committee members who believed *Rutherford* does not require such

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5/ Available at: http://www.courtinfo.ca.gov/jc/documents/reports/120707item4.pdf

an instruction were split as to whether a defendant would be entitled to a de minimis instruction upon request. (*Id*. at pp. 5-6.) The committee deferred a decision on that issue "*[u]ntil there is additional legal guidance*." (*Id*. at p. 6.)

This case presents the opportunity for this court to provide the additional legal guidance sought by the committee.

D. This court should grant review to examine whether, as other jurisdictions have found, a causation analysis that allows liability based on the "every exposure" test is bad public policy.

The Court of Appeal's acceptance of the "every exposure" theory here and in *Jones* reflects a public policy determination that is out of step with the trend of the law in other jurisdictions. In the past three years, several other jurisdictions that follow the Restatement's substantial factor test for causation have rejected the "every exposure" theory.

The Pennsylvania Supreme Court addressed this issue recently in a case in which the plaintiff alleged that his mesothelioma was caused by exposure to asbestos brakes and gaskets while repairing his personal car. (See *Gregg v. V-J Auto Parts, Inc.* (Pa. 2007) 943 A.2d 216.) The court categorically rejected the notion that plaintiffs could establish

causation simply by demonstrating *some* exposure to the defendant's product and then presenting expert testimony that every exposure is a substantial factor:

> [W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation . . . .

(*Id.* at pp. 226-227 [citations omitted]; see also *Summers v. Certainteed Corp.* (Pa.Super.Ct. 2005) 886 A.2d 240, 244 [rejecting plaintiff's attempt to prove causation through expert's conclusory statement that "[e]ach and every exposure to asbestos has been a substantial contributing factor"; the court analogized that testimony to a statement that "if one took a bucket of water and dumped it in the ocean, that was a 'substantial contributing factor' to the size of the ocean"].)

Six months earlier, the Texas Supreme Court had reached the same conclusion. In *Borg-Warner Corp. v. Flores* (Tex. 2007) 232 S.W.3d 765 (*Borg-Warner*), a mechanic claimed he developed asbestosis as a result of repeated low dose exposures to asbestos brake pads. He won at trial merely by showing he inhaled some asbestos fibers from the defendant's product. (*Id.* at pp. 768-769.) The Texas Supreme Court reversed, rejecting the notion that mere proof of some exposure alone is sufficient to establish causation:

> While science has confirmed the threat posed by asbestos, we have not had the occasion to decide whether a person's exposure to "some" respirable fibers is sufficient to show

> that a product containing asbestos was a substantial factor in causing asbestosis . . . *[W]e conclude that it is not.*

(*Id.* at pp. 765-766, emphasis added; see also *Georgia-Pacific Corp. v. Stephens* (Tex.Ct.App. 2007) 239 S.W.3d 304, 313, 319 [evidence that plaintiff used Georgia Pacific's asbestos-containing joint compound "quite a bit" and on a "substantial" number of jobs was insufficient to show causation because plaintiff did not quantify the exposure].)

The *Borg-Warner* court held that, under the Restatement's substantial factor test for causation, a plaintiff in an asbestos case must provide defendant-specific evidence quantifying the approximate dose to which the plaintiff was exposed, and evidence that such a dose was a substantial factor in causing the plaintiff's disease. (*Borg-Warner*, *supra*, 232 S.W.3d at p. 773.) Citing with approval to *Rutherford*, the court held that the plaintiff's proof "need not be reduced to mathematical precision," but at the same time "'*[i]t is not adequate to simply establish that "some" exposure occurred*.'" (*Ibid*., emphasis added.)

Other jurisdictions have rejected the "every exposure" theory by precluding plaintiffs' experts from testifying about it. A federal district court in Ohio held such testimony is inadmissible because it cannot, as a matter of law, satisfy the "substantial factor" test:

> Dr. Frank and Dr. Suzuki[] testified that every exposure to asbestos Lindstrom had during his working carrier, no matter how small, was a substantial factor in causing his peritoneal mesothelioma . . . *If an opinion such as [this] would be sufficient for plaintiff to meet his burden, the Sixth Circuit's "substantial factor" test would be meaningless* . . . .

(*Bartel v. John Crane, Inc.* (N.D.Ohio 2004) 316 F.Supp.2d 603, 611, emphasis added.) The Sixth Circuit affirmed that ruling on appeal. (See *Lindstrom v. A-C Prod. Liab. Trust* (6th Cir. 2005) 424 F.3d 488, 498 ["[Plaintiff's expert argument] appears to be that a showing of any level of asbestos exposure attributable to John Crane's products was sufficient for the court to have entered a judgment in their favor. We reject plaintiffs-appellants' argument on this point"].) Other courts have taken a similar approach.[6/]

This court should grant review to expressly reject the "every exposure" theory and the notion that "substantial factor" means something different in asbestos cases than in all other cases. By crediting the "every exposure" testimony, the court effectively eliminated Mr. Norris's burden of proving causation—all he had to show was that he was in the vicinity of a Crane Co. valve at some point

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6/ See *In re Toxic Substances Cases* (Pa.Com.Pl., Aug. 17, 2006, A.D. 03-319, GD 02-018135, 05-010028, 05-004662, 04-010451) 2006 WL 2404008, at p. *8 (nonpub. opn.) ("Plaintiffs have not proffered any generally accepted methodology to support the contention that a single exposure or an otherwise vanishingly small exposure has, in fact, in any case, ever caused or contributed to any specific individual's disease, or even less, that in this case such a small exposure did, in fact, contribute to this specific plaintiff's disease"); *In re W.R. Grace & Co.* (Bankr. D. Del. 2006) 355 B.R. 462, 474, 476 (excluding expert testimony that "any exposure to asbestos fibers is an unreasonable risk" because the experts failed to establish what level of exposure would actually cause the disease: "The use of the no safe level or linear 'no threshold' model for showing unreasonable risk 'flies in the face of the toxicological law of dose-response, that is, that 'the dose makes the poison'").

in time. The only way Crane Co. could defeat causation would be to demonstrate that Mr. Norris had *zero* fiber exposure from gaskets or packing in a Crane Co. valve during his two and one-half years on the ship, a nearly impossible burden. (See, e.g., *Blackston v. Shook & Fletcher Insulation Co.* (11th Cir. 1985) 764 F.2d 1480, 1483 [observing a lenient standard "would shift the burden of producing evidence to the defendant"].) That is precisely the sort of burden shifting this court rejected in *Rutherford.*

II.

REVIEW IS NECESSARY TO ADDRESS AN UNRESOLVED ISSUE CONCERNING THE LIMITS OF THE CONSUMER EXPECTATIONS TEST.

A. This court has previously attempted to clarify and limit the consumer expectations test.

Thirty years ago, in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413 (*Barker*), this court established a two-prong approach for determining whether a product is defective in design. Under the "consumer expectations" test, a product is defectively designed if "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Id.* at p. 432.) Under the "risk-benefit" test, a product is defectively

designed if "the benefits of the challenged design outweigh the risk of danger inherent in such design." (*Ibid*.)

The consumer expectations test has been "repeatedly and widely criticized." (McIntosh, *Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II* (1997) 17 Miss. C. L.Rev. 277, 286-287.) Commentators have noted that consumers "are often ill-equipped to formulate reasoned expectations about safety" and that the test "'is so open-ended and unstructured, that it provides almost no guidance to the jury in determining whether a defect existed.'" (*Id*. at pp. 286-287; see also Henderson & Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts* (1992) 77 Cornell L.Rev. 1512, 1534.)

Commentators have also described the test as an "incoherent basis upon which to measure producer responsibility." (Henderson & Twerski, *Achieving Consensus on Defective Product Design* (1998) 83 Cornell L.Rev. 867, 880.) "In many instances, avoiding one type of design-related risk by incorporating one safety feature can be accomplished only by increasing the probability of encountering another risk of equal or even greater magnitude. Persons injured by either risk will contend that their expectations were disappointed; and in each separate context, the consumer expectations test provides no means of evaluating one set of expectations against the other." (*Ibid*.)

Over ten years ago, in *Soule*, *supra*, 8 Cal.4th 548, this court sought to address some of these criticisms. Faced with the contention that the consumer expectations test was an "'unworkable, amorphic,

fleeting standard'" (*id*. at p. 569), this court attempted to clarify the test and limit its applicability (*id*. at p . 570).

The *Soule* court began by noting that, under *Barker*, the consumer expectations test would *not* be appropriate "when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit." (*Soule*, *supra*, 8 Cal.4th at p. 562.) Refining *Barker's* analysis, the *Soule* court concluded that the consumer expectations test "is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Id*. at p. 567.)

The *Soule* court provided several examples of situations in which the facts "may permit an inference that the product did not perform as safely as it should." (*Soule*, *supra*, 8 Cal.4th at p. 566.) For example, "ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions." (*Id*. at p. 566, fn. 3.) The court explained, "The crucial question in each individual case is whether *the circumstances of the product's failure* permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (*Id*. at pp. 568-569, emphasis added.) The court believed that if the test were limited in this manner as *Barker* intended, it would

remain "a workable means of determining the existence of design defect." (*Id*. at p. 569.)

B. Further clarification is necessary, particularly in those cases where the "product's failure" involves the low dose emission of a substance producing complex biological effects.

In the fourteen years that have elapsed since *Soule*, the lower courts have struggled to apply this court's refinement of the *Barker* test, with inconsistent results.

For example, in *Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, Division Two of the Second Appellate District held that the consumer expectations test would apply to assess whether an automobile's air bag had defectively deployed in a minor collision. (*Id*. at p. 1568.) Four years later, in *Pruitt v. General Motors Corp*. (1999) 72 Cal.App.4th 1480 (*Pruitt*), Division Six of the Second Appellate District expressly disagreed with *Bresnahan* in a case involving similar facts. The *Pruitt* court held that the deployment of an air bag was not part of the "'everyday experience' of the consuming public," and that "[m]inimum safety standards for air bags are not within the common knowledge of lay jurors." (*Id*. at p. 1483.) At the same time, the *Pruitt* court recognized that the test might be appropriate in an obvious case of extreme product failure, such as "air bags inflating for no apparent

reason while one is cruising down the road at 65 miles per hour." (*Ibid*.)

A few years later, in *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, Division Seven of the Second Appellate District found sufficient evidence to support the application of the consumer expectation test in a case involving the *non*deployment of an air bag in a high speed collision. (*Id*. at p. 1125.) The court cited with approval language from *Pruitt* suggesting that the consumer expectation test was reserved for "'res ipsa-like cases that do not require the application of a general standard to determine defective design.'" (*Id*. at p. 1126, fn. 7, citing *Pruitt*, *supra*, 72 Cal.App.4th at p. 1484, quoting Henderson & Twerski, *Achieving Consensus on Defective Product Design*, *supra*, 83 Cornell L.Rev. at pp. 899-900.)

In *Morson*, *supra*, 90 Cal.App.4th 775, Division One of the Fourth Appellate District considered a more complex product failure—latex gloves that caused allergic sensitivity. The court recognized the difficulty of "reconciling products liability law that has developed in the context of merchandise, such as soda bottles and automobiles, with the body of knowledge that deals with medical and allergic conditions and their genesis." (*Id.* at p. 791.) Guided by *Soule*, the court observed that the consumer expectations test could be applied to complex products, "but only where the circumstances of the product's failure are relatively straightforward." (*Id*. at p. 792.) The court concluded that the test could not be applied to the latex gloves because "the alleged circumstances of the product's failure involve technical and

mechanical details about the operation of the manufacturing process, and then the effect of the product upon an individual plaintiff's health." (*Ibid*.)

More generally, the court observed that consumer expectations should not "ordinarily play a determinative role in determining defectiveness" except in those instances noted by *Soule* involving "extreme type of product failure that may readily be evaluated by lay persons." (*Morson*, *supra*, 90 Cal.App.4th at p. 795.)

Morson's analytical approach stands in stark contrast to the more superficial approach adopted by the First Appellate District in asbestos cases, where the courts have effectively concluded that the consumer expectations test applies *regardless* of the particular circumstances of the product's failure and the resulting injury.

In *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461 (*Sparks*), for example, Division Two of the First Appellate District held that the consumer expectations test applied to determine whether insulation containing asbestos was defectively designed. (*Id*. at pp. 474-475.) Reasoning that there "were neither 'complicated design considerations,' nor 'obscure components,' nor 'esoteric circumstances' surrounding the 'accident'," the *Sparks* court summarily concluded that the emission of fibers "capable of causing a fatal lung disease after a long latency period" was "a product failure" beyond an ordinary consumer's "'legitimate, commonly accepted minimum safety assumptions.'" (*Ibid.*) The court did not explain how the mechanics and complex biological impact of the claimed *product failure*—the

emission of fibers producing a latent injury—was within the "*everyday experience* of the product's users." (*Soule*, *supra*, 8 Cal.4th at p. 567.) Without identifying any affirmative expectation that a lay consumer might have one way or the other regarding the characteristics of asbestos-containing products, the court in effect concluded that the test applied simply because a consumer would not *expect* to contract lung disease from using the product.

The First Appellate District has followed *Spark's* reasoning in asbestos cases involving both asbestos insulation and raw asbestos. In *Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, Division Two again held that the test applied to asbestos insulation. Several years later, in *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1185-1191 (*Arena*), Division One applied the same reasoning to raw asbestos. Just a few weeks ago, in *Garza v. Asbestos Corp.* (March 28, 2008, A116523, A119262 ___ Cal.App.4th ___ [2008 WL 820584], Division Three declined to "revisit" or "overrule" Division One's decision in *Arena*.

In *Jones*, Division Three of the First Appellate District extended *Sparks'* analysis to a situation that did *not* involve heavy industrial exposure to raw asbestos or insulation, but a far more subtle product failure—the low dose release of asbestos fibers from asbestos packing enclosed in valves and pumps. (*Jones*, *supra*, 132 Cal.App.4th at pp. 1001-1004.) Citing *Sparks*, the court held that there was "nothing complicated or obscure about the design and operation of the products" and that "'[t]he design failure was in [the products']

emission of highly toxic, respirable fibers in the normal course of [their] intended use and maintenance.'" (*Id.* at p. 1003.) As in *Sparks*, the *Jones* court did not explain how the claimed *product failure*—the emission of fibers cumulatively producing a latent injury—was within the everyday experience of ordinary consumers. By accepting the notion that the consumer expectations test applies whenever injury from use of a product is unexpected, the court endorsed an analysis under which any product is "defective" if an unexpected injury occurs.

In the present case, which like *Jones* involves the low dose release of asbestos fibers from valve components, the Court of Appeal followed the First Appellate District's approach. Without first addressing the preliminary question of how the emission of asbestos fibers was within an ordinary consumer's "everyday experience," the court reasoned that the emission of fibers from asbestos-containing gaskets and packing in valves did not involve complicated design considerations beyond the experience of an ordinary consumer. (Typed opn., p. 24.)

The Court of Appeal's approach is problematic for several reasons.

First, this case poses the same difficulty noted in *Morson*—reconciling traditional product liability law "with the body of knowledge that deals with medical [] conditions . . . and their genesis." (*Morson*, *supra*, 90 Cal.App.4th at p. 791.) The circumstances of contracting mesothelioma from exposure to asbestos involves extensive technical expertise in such fields as epidemiology, pathology,

pulmonology, materials science, and risk assessment beyond the everyday experience of ordinary consumers. Just as the medical workers who regularly wore latex gloves in *Morson* had no expectations about the gloves' chemical properties with respect to skin reactivity, workers using Crane Co.'s valves would have no expectations about whether the encapsulated gaskets and packing contained within those valves would release asbestos fibers, much less any expectations as to whether any released fibers would be of the type and quantity that could raise the relative risk of asbestos-related illness.

Second, the Court of Appeal's analysis, like that in *Jones*, relies on *Sparks* without acknowledging important critical factual distinctions. *Sparks*, *Morton,* and *Arena* all involved heavy industrial exposure to either insulation or raw asbestos. The plaintiffs were exposed to visible clouds of asbestos-laden dust from defendants' products such that one could say the mode of the product failure was obvious. Here, in contrast, the valves manufactured by Crane Co. contained the less harmful chrysotile asbestos, which was bound up with other materials in the form of encapsulated gaskets or packing. (See typed opn., p. 4.) The amount of dust released by those products, the asbestos content of that dust, and the toxicity of the type of asbestos in that dust is a matter of scientific debate not within the understanding of an ordinary consumer. (See *Rutherford*, *supra*, 16 Cal.4th at p. 972 [acknowledging the crucial fact that asbestos-containing products are not all alike and "'do not create similar risks of harm'"].)

Moreover, as the Court of Appeal's opinion implicitly acknowledges, the asbestos gaskets in Crane Co.'s valves served a critical safety function of their own—they provided strength and heat resistance so that hot steam, gases, or liquids would not escape. (See typed opn., p. 4.) Accordingly, unlike certain types of raw asbestos or asbestos insulation, which some may now argue are unsafe for any purpose due to the high levels of fiber emission, the design of Crane Co.'s valve is one that "calls for a careful assessment of feasibility, practicality, risk and benefit," and "should not be resolved on the basis of ordinary consumer expectations." (*Soule*, *supra*, 8 Cal.4th at p. 562.)

Finally, the Court of Appeal's analysis reduces the consumer expectations test to the simplistic question of whether the person using the product *expected* to be injured—a question to which a jury would almost always answer "no." If liability may attach whenever a consumer reasonably but incorrectly assumes a product is safe, then any product that causes injury would be defective. Such a construction of the consumer expectations test is precisely what this court sought to avoid in *Soule*, when it emphasized that "the jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses" and that, in cases beyond a consumer's everyday experience, "the jury *must* engage in the balancing of risks and benefits required by the second prong of *Barker*." (*Soule*, *supra*, 8 Cal.4th at p. 568, emphasis added.)

III.

REVIEW IS NECESSARY TO ADDRESS WHETHER THE CONSUMER EXPECTATIONS TEST APPLIES TO BYSTANDERS.

By definition, the "consumer expectations" test is based on the expectations of "the product's users." (*Soule*, *supra*, 8 Cal.4th at p. 567.) Accordingly, the test has been criticized as "unworkable for third parties and bystanders who do not have any expectations about product performance." (Schwartz & Behrens, *An Unhappy Return to Confusion in the Common Law of Products Liability—Denny v. Ford Motor Company Should Be Overturned* (1997) 17 Pace L.Rev. 359, 374; see also Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability* (1994) 61 Tenn. L.Rev. 1043, 1088 ["the consumer expectations test leads to confusion in a large number of cases, such as workplace accidents and injuries to bystanders, where the plaintiff who was injured is not the consumer who purchased the product"].)[7/]

7/ Several other jurisdictions have rejected application of the consumer expectation test to bystanders. (See *Ewen v. McLean Trucking Co.* (Or. 1985) 706 P.2d 929, 935 [rejecting consumer expectation test based on expectations of bystander; the word consumer "does not include everyone who might be affected by the product"]; *Gomulka v. Yavapai Mach. & Auto Parts, Inc.* (Ariz.Ct.App. 1987) 745 P.2d 986, 989 ["[t]he consumer expectation test does not apply to bystanders, at least in design defect cases, because a person who . . . is not using the product may be entirely ignorant of its properties and of how safe it

Notwithstanding these criticisms, plaintiff argued below that the consumer expectations test should not be limited to direct users because it is an objective test based on the expectations of an "'ordinary consumer.'" (RB 30-31.) But this approach fails to explain why a consumer's expectations should be relevant when it is not a consumer, but a bystander, who is injured.

To date, no published California decision has expressly addressed whether the consumer expectations test applies to bystanders.[8/] The present case provides an ideal opportunity for the court to resolve this issue. It is undisputed that Mr. Norris was not a product user or consumer, but a passerby who was not involved in any work on a Crane Co. valve, either as a hands-on user or even as an assistant. (See typed opn., pp. 7-9.) There is no evidence to suggest he had any expectations whatsoever concerning whether the products

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could be made"]; *Knitz v. Minister Mach. Co.* (Ohio 1982) 432 N.E.2d 814, 818 [noting difficulty in applying consumer expectations test "where the injured party is an innocent bystander who is ignorant of the product and has no expectation of its safety"]; but see *Batts v. Tow-Motor Forklift Co.* (5th Cir. 1992) 978 F.2d 1386, 1394 [applying consumer expectations test to *deny* recovery for bystander injury caused by an obvious danger even though the bystander's expectations about the product, if any, would not be the same as the consumer's].)

8/ As an example of a case involving bystander injury, plaintiff cited the pre-*Soule* decision of *Akers v. Kelley Co.* (1985) 173 Cal.App.3d 633, in which a component of a loading dock flew apart and injured a "'nearby worker.'" (RB 30.) But even in that case, the injured party was a product *user*; he was the *loading dock supervisor* who was working with and around the defective product. (See *Akers* at pp. 640, 641 643-644.)

would generate asbestos fibers or whether the fibers would increase the risk of asbestos-related injuries. Under such circumstances, the defectiveness of the product should not be assessed under the consumer expectations test, but under the risk-benefit test. (See *Soule*, *supra*, 8 Cal.4th at p. 568.)

The consumer expectations test is particularly inappropriate here because the *actual consumer* of the product, the Navy, was a "sophisticated user." Under the sophisticated user defense, which this court recently adopted in *Johnson v. American Standard, Inc.* (April 13, 2008, S139184) ___Cal.4th ___ [2008 WL 878933],"[a] manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Id*. at p. *8.) The defense "'is a natural outgrowth of the rule that there is no duty to warn of known risks or obvious dangers.'" (*Id*. at p. *6.) As the Court of Appeal's decision recognizes, it is undisputed that the Navy "was aware of the dangers of asbestos." (Typed opn., p. 3.) Despite its awareness of the risks, the Navy *required* the use of asbestos because of its water resistance. (RT 715-718.)

Given the expansion of asbestos litigation in California (see *ante*, pp. 5-6), this issue is one that is likely to arise again in the lower courts. Moreover, the issue is not limited to asbestos or toxic tort cases but could arise in any case where a bystander is injured by an allegedly defective product. This court should grant review to provide guidance to the lower courts on this issue.

CONCLUSION

For the reasons stated above, review should be granted.

Dated: April 21, 2008

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