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May 20, 2008

Via UPS

The Honorable Chief Justice Ronald M. George
and Associate Justices
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-4783

Re: *Norris v. Crane Co.*, Case No. S162878
Amicus curiae letter of Washington Legal Foundation
(Court of Appeal Case No. B196031; Second Appellate District, Division Five)
(Los Angeles Superior Court, Case No. BC340413)

To the Chief Justice and Associate Justices:

The Washington Legal Foundation (WLF) hereby submits this letter as an *amicus curiae*, urging the Court to grant the petition for review filed by Defendant and Appellant Crane Co. While Crane's petition raises several issues worthy of review, WLF is submitting this brief to focus on the Court of Appeal's determination that the "consumer expectations" test can apply even when, as here, the injured party is a mere bystander, not a user of the allegedly defective product. As Crane points out (Pet. 34-36), when a party raises claims alleging strict product liability, whether the product in question was "defectively designed" can in certain cases be decided under the "consumer expectations" test if the product in question "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432. Thus, the "consumer expectations" test presupposes that the plaintiff is a user/consumer of the allegedly defective product and has some expectations about how well the product will perform. But where, as here, the injured party was a mere bystander who was unaware of the product's existence, did not put it to any sort of use, and had no expectations whatsoever regarding how well the product would perform, it makes little sense to decide the case based on "consumer expectations." Accordingly, review is warranted to determine whether the lower courts erred in permitting the jury to employ the "consumer expectations" test in determining that products manufactured by Crane were defective.

WLF does not mean to suggest that Crane is immune from liability for injuries caused by its products if those products were, in fact, defective. Rather, if a plaintiff does not contend that he/she was a consumer/user of the product alleged to have caused him/her injury, then the plaintiff should be required to demonstrate the product's alleged defectiveness based on a careful assessment of design feasibility, practicality, risk, and benefit.

Interests of the Washington Legal Foundation. WLF is a public-interest law and policy center located in Washington, D.C. with supporters in all 50 States, including many in California. WLF devotes a significant portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly appears before California courts and other State and federal courts in support of its view that reasonable limits ought to be placed on a manufacturer's liability for injuries allegedly caused by one of its products, and on the scope of damages awardable in tort actions. *See, e.g.*, *Lockheed Litigation Cases,* No. S132167, *appeal dism'd* (Cal., Nov. 1, 2007); *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159. WLF opposes liability rules that have the practical effect of requiring a manufacturer to serve as an insurer and to indemnify anyone whose injury is in some way related to the manufacturer's product; rather, WLF believes that liability should be limited to instances in which a plaintiff can establish that injury was caused by a defect in the product.

Relevant Facts. Plaintiffs/Respondents seek to recover for injuries incurred by Joseph Norris as a result of his exposure to asbestos. Mr. Norris served in the U.S. Navy on board the U.S.S. Bremerton from 1955 to 1957. The Bremerton was heavily laden with products containing asbestos, the great majority of which had no connection to Defendant/ Appellant Crane Co. ("Crane"). However, the ship's piping system included valves manufactured by Crane; some of those valves contained gaskets and packing made of chrysotile asbestos. Mr. Norris's job responsibilities never required him to use or repair the Crane valves at any time. Although he was in the general vicinity of some of the valves on several occasions while they were being repaired, on none of those occasions were gaskets/packing exposed. Mr. Norris recalled that during periods when the ship was under repair, the air in the ship was heavily laden with asbestos dust.

In April 2005, Mr. Norris was diagnosed with mesothelioma. He died on August 14, 2006. His lawsuit alleged that the valves manufactured by Crane were defective and that his disease was caused at least in part by his exposure to those allegedly defective valves. Over Crane's objection, the jury was instructed to apply the "consumer expectations" test in determining whether the valves were defective. The jury determined that the valves were, indeed, defective, and it held Crane liable to Plaintiffs under a strict product liability theory. The Court of Appeal upheld the judgment, ruling that the consumer expectations test was properly applied to claims based on exposure to asbestos products. The appeals court reasoned that use of asbestos in the Crane 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. The appeals court did not address whether Mr. Norris, who was not a consumer/user of the Crane valves but rather was a mere bystander/passerby, was entitled to invoke the consumer expectations test.

Why Review Is Warranted. This case raises issues of exceptional importance. Asbestos liability cases continue to represent a sizable portion of all lawsuits filed in California. As Crane well demonstrates, guidance from the Court is needed – in cases involving asbestos claimants who have been exposed to asbestos from multiple sources over a period of many years – regarding whether the claimants can establish causation with respect to minor exposures based solely on expert testimony that *every* exposure to asbestos contributes to asbestos-related diseases. WLF also agrees with Crane that review is warranted in order to address widespread confusion among the courts of appeal regarding the applicability of the consumer expectations test to product liability cases involving illnesses developed many years after low-dose exposure to airborne asbestos fibers. WLF writes separately to urge the Court also to address the third issue raised by the petition: whether the consumer expectations test is applicable to an injured plaintiff who was not a consumer/user of the allegedly defective product and, as a mere bystander, had no expectations whatsoever regarding how well the product would perform.

The Court first established in 1963 that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62. The showing necessary to establish a "defect" in the product was a source of considerable confusion in subsequent cases. The Court attempted to eliminate that confusion in *Barker*, by setting forth two methods by which a plaintiff could establish "defect" in product design in a strict liability claim. The Court explained:

> First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that on balance, the benefits of the challenged design outweigh the risks of danger inherent in such a design.

Barker, 20 Cal.3d at 432. The first of these two methods is commonly referred to as the "consumer expectations" test. As the Court subsequently elaborated, the consumer expectations test is applicable where, based on their "ordinary knowledge," "ordinary consumers . . . may and do expect" that a product will perform safely, but the product fails to do so. *Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, 566 & n.3. "For example, the 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.* Thus, the Court's explanations of the consumer expectations test presuppose that the

plaintiff is a user/consumer of the allegedly defective product and has some expectations about how well the product will perform. But here, the court of appeal applied the consumer expectations test in a case in which the plaintiff was not a user/consumer of Crane's valves. The U.S. Navy was the consumer, and the personnel it assigned to maintain/repair the valves did not include Mr. Norris. He was at most an occasional passerby. While Mr. Norris – as would be true of anyone who lived on the U.S.S. Bremerton – was aware that the ship's piping system included valves, he was unaware of the materials contained in those valves or the physical properties required of those materials in order to permit the valves to function properly. Accordingly, he cannot be said to have had "ordinary knowledge" regarding how those materials should perform. Under those circumstances, there is a serious question whether it makes sense to evaluate the strict liability claims of passersby such as Mr. Norris under the "consumer expectations" test. Review is warranted to determine whether the court of appeals acted properly in expanding the consumer expectations test to cover passersby who are not users/consumers.

It is not merely the name of the "consumer expectations" test that suggests that the test was intended to apply only to users/consumers, not to passersby. The Court's rationale in creating the test points in that same direction. For example, *Soule* explained that a consumer's expectations are relevant in determining whether a "defect" exists because "the ordinary users or consumers of a product may have reasonable, widely accepted minimum expectations about the circumstances under which it should perform safely. Consumers govern their own conduct by these expectations, and products on the market should conform to them." *Soule*, 8 Cal.4th at 566. In other words, reasonable consumer expectations are relevant because consumers reasonable rely on those expectations in deciding how to act – they would be unlikely to ride in a car, for example, if they expected the car to explode at any minute. That element of reliance is totally absent when the plaintiff is a passerby who is not using/consuming the product and almost certainly is not acting in reliance on the attributes of a product of whose very existence he/she may well be unaware.

As *Barker* explained, strict product liability and the consumer expectations test have a "warranty heritage" – they derive in substantial part from case law holding that product manufacturers should be deemed to have impliedly warranted the fitness and merchantability of their merchandise. *Barker*, 20 Cal. 3d at 429-430. Such warranties are generally viewed as running to users/consumers of the product in question; the consumer expectations test serves roughly the same function. *Id.* But while it is reasonable to imply that a manufacturer has warranted its product to foreseeable users/consumers, California courts have never suggested that such warranties extend to bystanders whose relationship to the product is largely serendipitous. Indeed, *Barker* explained the need for a second means of establishing that a product is defective (*i.e.*, a means other than the consumer expectations test) by the fact that "in many situations . . . the consumer would not know what to expect." *Id.* at 430. In other

words, the consumer expectations test only applies when the plaintiff has some basis for expecting a particular standard of performance from the product, an expectation that would virtually never exist when the plaintiff is a passerby who is neither a user nor a consumer of the product. *See also Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 127 (to meet the "consumer expectations" prong of *Barker*, "if the product is one within the common experience of ordinary consumers, it is generally sufficient if the plaintiff provides evidence concerning (1) *his or her use of the product*; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety.") (emphasis added).

Limiting the consumer expectations test to cases in which the plaintiff is a user/ consumer will not prevent bystanders from bringing strict liability claims when they are injured by a manufactured product. Rather, they will simply need to utilize the second prong of *Barker* (the risks of danger inherent in the product design outweigh the benefits of that design) to demonstrate that the product is defective. Indeed, *Barker* states explicitly that "bystanders" are entitled to recover in a strict liability action against the manufacturer of a defective product. *Barker*, 20 Cal. 3d at 413.[1] But neither *Barker* nor any subsequent decision of this Court suggests that such bystanders or passersby may establish the product's defectiveness by invoking the consumer expectations test.

As Crane points out, courts in other states have determined that the consumer expectations test does not apply when the plaintiff is a bystander or passerby. *See* Crane Br. 34-35 n.7 (citing *Ewen v. McLean Trucking Co.* (Or. 1985) 706 P.2d 929, 935; *Gomulka v. Yavapai Mach. & Auto Parts, Inc.* (Ariz. App. 1987) 745 P.2d 986, 989; *Knitz v. Minister Mach. Co.* (Ohio 1982) 432 N.E. 2d 814, 818). Review is warranted to determine who – between those courts and the court below – has a better understanding of the consumer expectations test.

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[1] In support of the rights of bystanders to bring a strict liability action, *Barker* cited *Foglio v. Western Auto Supply* (1976) 56 Cal. App. 3d 470. *Id.* In *Foglio*, the plaintiff was a boy who suffered a serious eye injury while standing on a public sidewalk, when a a gas-powered lawnmower being operated 30 feet away on a neighbor's lawn kicked up a stone and shot it in the boy's direction. The appeals court affirmed the plaintiff's right to proceed under a strict liability in tort theory, even though the boy was a mere bystander. But the court never suggested that the plaintiff could establish defectiveness under the consumer expectations test. *See Foglio*, 56 Cal. App. 3d at 475.

The scope of the consumer expectation test should be resolved by the Court, and this case presents the Court with a much-needed opportunity to do so. WLF therefore urges the Court to grant the petition.

Respectfully submitted,

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cc: All counsel