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October 9, 2020

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

**Re: Amicus Curiae Letter in Support of Petition for Review,
Johnson v. Monsanto Company, et al., No. S264158**

Dear Justice Cantil-Sakauye and Associate Justices:

We write on behalf of The Coalition for Litigation Justice, Inc. (the “Coalition”) as amicus curiae in support of Petitioner Monsanto Company’s Petition for Review. The Coalition respectfully suggests that this case provides an opportunity for this Court to clarify the circumstances under which the “consumer expectations test” applies in design defect product liability cases that involve complex expert testimony to establish the nature of the defect.

I. Background

In June 2018, *Johnson v. Monsanto Company* became the first case alleging injury from Monsanto’s herbicide product, Roundup, to reach trial. (See Super. Ct. S.F. County, No. CGC-16-550128.) The plaintiff presented two theories of liability: that Monsanto failed to warn consumers of Roundup’s potential dangers, and that Roundup contained a design defect under the consumer expectations test. After conflicting evidence was presented from a number of experts—including multiple toxicologists, oncologists, and epidemiologists—the trial court submitted both theories to the jury. The trial court acknowledged that the evidence presented in support of the consumer expectations theory was “thin,” but nevertheless asked the jury to determine whether (1) Roundup was a product “about which an ordinary consumer can form reasonable minimum expectations,” and (2) Roundup “did not perform as safely as an ordinary consumer would have expected it to perform.” See *id.* at Jury Instructions, No. 16 (filed Aug. 10, 2018). The jury found for the plaintiff and the verdict was then upheld by the trial court and affirmed by the Court of Appeal. (Aug. 18, 2020, Nos. A155940 & A156706, ___ Cal.App.4th ___.)

II. Reasons for Review

This case highlights a recurring and highly disputed question in product liability cases involving alleged design defects: Can an ordinary consumer develop reasonable expectations regarding a product’s natural hazards and ability to cause injury in situations where ordinary consumers are forced to rely on complex expert testimony to explain the nature of a product’s alleged defect and its ability to cause injury?

Some cases have held that a product's complex medical side effects are not properly the subject of the consumer expectations theory. For example, in *Morson v. Superior Court*, the plaintiffs alleged that their exposure to latex gloves created or exacerbated certain allergies and that such effects were contrary to an ordinary consumer's expectations. (2001) 90 Cal.App.4th 775, 778–779. The appellate court rejected this theory because an ordinary consumer would not hold any “commonly accepted minimum safety assumptions” regarding the gloves' likelihood to cause allergies. *Id.* at 795 (“[t]he alleged creation or exacerbation of allergies by a product, such as by the presence of certain levels of proteins on the surface of latex gloves, to which the user is exposed, are not subjects of commonly accepted minimum safety assumptions of an ordinary consumer.”). Similarly, in *Trejo v. Johnson & Johnson*, the plaintiff suffered a skin disease after taking ibuprofen. (2017) 13 Cal.App.5th 110, 116. The Court of Appeal also rejected application of the consumer expectations test, in part because the plaintiff had “an ‘idiosyncratic’ side effect” that required expert testimony to explain. *Id.* at 117, 160.

On the other hand, certain cases—especially in the context of asbestos injury claims—have applied the reasonable expectations test notwithstanding the need for complex expert testimony. For example, in *Jones v. John Crane, Inc.*, the plaintiff developed lung cancer after being exposed to asbestos-containing seals that were used in valves and pumps. (2005) 132 Cal.App.4th 990, 996. Because the plaintiff would only be exposed to the asbestos in the seals on occasions when a seal needed to be changed, and because there was a dispute as to the amount of asbestos released during such changes, a number of experts were necessary to show whether the seals, in the course of normal handling, would pose a risk to the handler's health. However, in allowing the consumer expectations theory to be submitted to the jury, the Court of Appeal did not focus on expectations around the materials' safety or effect on health in the course of normal handling. Instead, the Court focused on the ordinariness of the product, explaining that there was “nothing complicated or obscure about the design and operation of the products, nor are there any esoteric circumstances surrounding the manner in which [the plaintiff] was exposed to the asbestos fibers.” *Id.* at 1003. But the use of a latex glove or ibuprofen tablet is no more complex than the changing of a seal—indeed, most would consider the latter more complex. There is thus little doubt that this focus on the complexity of a product's design or use, had it been applied to the gloves in *Morson* or ibuprofen in *Trejo*, would have changed the result in each of those cases.

This tension in the law—between focusing on the complexity of the product's defect and ability to cause harm, versus the complexity of the product's use or operation—is further demonstrated by the Court of Appeal's decision below. There, faced with the perhaps impossible task of reconciling the cases, the Court distinguished the cases based on how common the plaintiff's reaction to the product is: *Morson* and *Trejo* involved “idiosyncratic” and “unusual” reactions to latex gloves or ibuprofen, while *Jones* involved a more “usual” reaction to asbestos. See Appellate Ruling at 28. But even accepting plaintiff's theory of causation, there is no evidence that cancer is a “usual” reaction to the use of the product. Moreover, the highly disputed question of *whether* use of Roundup by a consumer could cause cancer at all was the central question the jury was asked to decide. Indeed, while at least nine doctors testified at trial regarding the body's reaction to Roundup exposure, and regarding which such reactions could accompany Roundup's use, the Court of Appeal still determined that expert testimony “was not necessary to explain a cancer diagnosis following the application of [Roundup],” and that Roundup's effects were “something within a layperson's experience.” See Appellate Ruling at 8–12, 28. This tension reveals fundamental concerns about the

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applicability of a test based on reasonable consumer expectations of safety to complex scientific issues about which ordinary consumers have little or no understanding.

III. Interest of Amicus Curiae

The Coalition was formed in 2000 as a nonprofit association to address and improve the litigation environment for asbestos and other toxic tort claims. The Coalition's members are Century Indemnity Company, Great American Insurance Company, Nationwide Indemnity Company, Resolute Management Inc. (a third-party administrator for numerous insurers), Allianz Reinsurance America, Inc., and TIG Insurance Company. The Coalition files amicus briefs in courts across the country in cases that may have a significant impact on toxic tort litigation. To date, the Coalition has filed nearly 200 amicus briefs, including more than 25 briefs in the California courts.

The Coalition respectfully urges the Court to grant review in this matter to resolve these important issues. This issue has a significant impact on numerous toxic tort cases across the state each year, and the parties to those cases and insurers would benefit if this Court were to provide clear standards on the application of the "consumer expectations test."

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Nadel', written in a cursive style.

Evan S. Nadel
Member

PROOF OF SERVICE

Johnson v. Monsanto Company, et al.,
CA Supreme Court Case No. S264158

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Mintz Levin Cohn Ferris Glovsky and Popeo PC, 44 Montgomery Street, 36th Floor, San Francisco, CA 94104. My email address is rdabdulrahim@mintz.com.

On October 9, 2020, I served copies of the following document(s) described as:

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW BY THE COALITION OF LITIGATION JUSTICE, INC.

on the interested parties in this action by sending a true copy addressed to each through TrueFiling, the electronic filing portal of the California Supreme Court, pursuant to Local Rules, which will send notification of such filing to the email addresses denoted on the case’s Electronic Service List. For those addresses indicated, I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

See attached Service List

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document, via first-class mail, postage prepaid, to those participants indicated on the attached service list.

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

Executed at San Francisco, California, on October 9, 2020.



Regina Abdul-Rahim

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SERVICE LIST

Johnson v. Monsanto Company, et al.,
CA Supreme Court Case No. S264158

VIA TRUEFILING ONLY TO:

Clerk of the Court
California Supreme Court
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San Francisco, CA 94102-4797

*(Service satisfied via e-Filing pursuant
to rule 8.212(c)(2).)*

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Johnson v. Monsanto Company, et al.,
CA Supreme Court Case No. S264158

VIA U.S. MAIL TO:

First Appellate District, Division 1
350 McAllister Street
San Francisco, CA 94102
Attn: Clerk of the Court

Re: Johnson v. Monsanto Company
Case No. A156706

San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102
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Johnson v. Monsanto Company
Case No. CGC-16-550128

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