Court of Appeals
OF THE STATE OF NEW YORK

APL-2014-00209
New York County Index № 190196/10

IN THE MATTER OF NEW YORK CITY ASBESTOS LITIGATION

DORIS KAY DUMMITT, Individually and as Executrix of the Estate of RONALD DUMMITT, deceased,

Plaintiff-Respondent,

– against –

A.W. CHESTERTON, *et al.*,

Defendants,

CRANE CO.,

Defendant-Appellant.

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL WORKING GROUP, CITIZEN ACTION OF NEW YORK, CITIZENS' ENVIRONMENTAL COALITION, ASBESTOS DISEASE AWARENESS ORGANIZATION, EMPIRE STATE CONSUMER PROJECT, CANCER ACTION NY, INSTITUTE FOR HEALTH AND THE ENVIRONMENT AT THE UNIVERSITY AT ALBANY, NEW YORK SUSTAINABLE BUSINESS COUNCIL INITIATIVE, NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC., CLEAN AND HEALTHY NEW YORK, INC., CENTER FOR ENVIRONMENTAL HEALTH, FOOD AND WATER WATCH, NEW YORK ENVIRONMENTAL LAW AND JUSTICE PROJECT, TRAUMA FOUNDATION, ARTS, CRAFTS AND THEATER SAFETY, AND HEALTHY SCHOOLS NETWORK, INC. IN SUPPORT OF PLAINTIFF-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae disclose that they are nonprofit corporations or organization with no parents, subsidiaries or affiliates as those terms are used for corporations and unincorporated business entities or organizations under New York law.

STATEMENT OF INTEREST

Amici, 16 nonprofit public health, environmental protection and injury prevention organizations, urge that this Court affirm the lower court decisions herein and hold that manufacturers that know or should know of the extreme occupational, health and environmental dangers posed by their products to the public, including workers such as Mr. Dummitt, are charged with a legal duty to issue effective and adequate warnings. Indeed, in this case the record conclusively proves that continued use of asbestos in conjunction with Crane's products was not simply foreseeable, but inevitable. *Amici* believe that under well-established law and critically important public policy considerations, manufacturers have a duty to warn product users from exposures to extraordinarily toxic hazards intended and meant to be used with products that will result in preventable illness, disease, injury and especially death. That duty is especially warranted where, as

here, there is a factual finding that the manufacturer had a "significant role, interest or influence" over the type of components used with its product after it entered the stream of commerce. A sophisticated manufacturer with such a "significant role, interest and influence" over component parts has a heightened duty to warn of the foreseeable dangers posed by the use of those parts with its product.

ENVIRONMENTAL WORKING GROUP ("EWG") is a nonprofit research organization based in Washington D.C., staffed by scientists, engineers, policy experts, lawyers and computer programmers, and dedicated to protecting human health and the environment. In addition to EWG's groundbreaking investigations and research on toxic substances and environmental health, food and agriculture, and water and energy, EWG has been deeply involved in efforts to protect citizens from ultrahazardous asbestos exposure, and to help seek justice for victims of such exposures. As such, EWG is fully interested in this appeal, and particularly in the need to sustain the Appellate Division's holding that product sellers such as the appellant herein have a duty to warn of the extreme dangers they know will attend the use of their products.

CITIZEN ACTION OF NEW YORK ("Citizen Action") is a nonprofit, grassroots membership organization that advocates for social, racial, economic and

environmental justice with thousands of members in New York State. Among the most prominent concerns of Citizen Action are consumer protection, health care, product safety and workers' rights. Founded in 1983, Citizen Action has chapters in seven regions of New York State: Long Island, New York City, the Hudson Valley, the Capital District, the Southern Tier, the Finger Lakes (Rochester) and Western New York (Buffalo).

CITIZENS' ENVIRONMENTAL COALITION ("CEC"), founded in 1983, along with thousands of individual members, advocates on behalf of community, labor, civic, health and environmental groups to protect New York's environment and to improve public health and our economy. CEC's mission is to: create safe, healthy communities, schools and workplaces by advocating pollution prevention; advance policies that protect public health; promote robust democratic participation and grassroots advocacy; defend social justice values; foster corporate and government accountability; and educate and organize the public for action. CEC acts as a resource for residents and groups across the state, providing technical assistance on toxins, health and public policy issues. In furtherance of these goals, CEC issues reports and presents testimony on proposed regulations and legislation at the local, state and federal levels.

The ASBESTOS DISEASE AWARENESS ORGANIZATION ("ADAO"), a 501(c)(3)

nonprofit, is the largest United States-based independent asbestos victims' organization in existence. ADAO's network includes over 40,000 individuals eager to live in a world without asbestos, a known human carcinogen. ADAO's vision is to eliminate asbestos-related diseases, including mesothelioma. ADAO works with public health organizations and passionate leaders throughout the world to prevent consumer, environmental, and occupational exposure to asbestos. ADAO's efforts focus on public education, including speaking each year at international conferences and events, including the American Public Health Association's (APHA) Annual Meeting and Exposition and the International Mesothelioma Interest Group (iMig) Conference. ADAO also hosts an annual International Asbestos Awareness Conference, where world-renowned experts and asbestos victims present the latest advancements in disease prevention, global advocacy, and treatment for asbestos-caused diseases. ADAO also has worked at uniting patients and families for prevention and community support, resulting in a dramatic shift from isolation to community, as families and professionals offer support and resources to others in need.

EMPIRE STATE CONSUMER PROJECT is a 501(c)(3) registered not-for-profit organization based in Rochester, New York and dedicated to reducing the use of chemicals toxic to human and environmental health. Empire State Consumer

Project accomplishes this by educating consumers and industry, conducting product testing, reporting test results to the public and policymakers, and by advocating for regulation where needed to protect the public interest. In 1984 Empire State Consumer Project helped expose the failure of five Monroe County public schools to comply with a U.S. Environmental Protection Agency rule requiring disclosure of the presence of friable asbestos in the schools, deemed an "imminent health hazard."

CANCER ACTION NY is a nonprofit organization dedicated to eliminating the release of carcinogens to the environment. Cancer Action NY works to prevent cancer by educating the public about ways to avoid the carcinogenic pollutants in our air, water and food, including creating community-based cancer prevention education campaigns. The organization's work emphasizes the connections between environmental toxic exposures and cancer, including via air, water, food and consumer products. Cancer Action NY advocates for all levels of government to take aggressive measures to inform the public about cancer risks and be proactive in efforts to reduce these prevalent risks.

The INSTITUTE FOR HEALTH AND THE ENVIRONMENT AT THE UNIVERSITY AT ALBANY (the "Institute for Health and the Environment") promotes and supports interdisciplinary research and grants in the broad area of environment and public

health among both professional researchers and students. The Institute for Health and the Environment recognizes that changes in the natural environment caused by chemical pollution, rapid industrialization, war, and climate change are dimensions that have been largely overlooked as significant contributors to human health. The Institute for Health and the Environment works to conduct research that sheds light on the impacts of these factors on communities and resident quality of life.

The NEW YORK SUSTAINABLE BUSINESS COUNCIL INITIATIVE is a project of the *American Sustainable Business Council*, a nonprofit alliance of business organizations and businesses from New York and across the nation committed to advancing a vibrant, just, and sustainable economy. The organization promotes strategies and policies designed to build strong local economies, prioritize investment and innovation in clean technologies from green chemistry to renewable energy sources, and advance the development of sustainable communities in New York State.

The NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC. ("NYPIRG") is a nonprofit research and advocacy organization formed and directed by New York State college and university students. NYPIRG provides educational and training opportunities for college studies through its work on environmental quality,

consumer product safety, public health/injury prevention, corporate accountability and social justice issues. NYPIRG was a leader in the successful efforts to change New York's civil practice laws to allow victims of toxic chemical exposures, including exposure to asbestos and Agent Orange, to access the justice system based on the date of discovery of their injuries. NYPIRG has worked to educate the public about dangerous products, including children's toys that contain toxic chemicals, and press for changes in the marketplace and through policy reforms at the local, state and federal levels of government.

CLEAN AND HEALTHY NEW YORK, INC. ("CHNY") is a New York-based nonprofit organization dedicated to protecting public health and the environment by eliminating the use of toxic chemicals and promoting the use of safe alternatives. CHNY educates the public; acts as a resource to community, advocacy and worker safety groups; coordinates product testing studies and reports on toxic chemical presence in consumer products; and advocates for policies that reduce toxic chemical usage. CHNY has been a leader in advancing national, state and local chemical policies and market reforms in response to the widely-acknowledged failure of the federal Toxic Substances Control Act to ensure that public health and the environment are safeguarded from the presence of toxic chemicals in consumer products, in communities, at schools and in the

workplace.

The CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a nonprofit corporation dedicated to protecting people from toxic chemicals and promoting business products and practices that are safe for public health and the environment. CEH is based in Oakland, California, with an East Coast regional office in New York City. In furtherance of its goals, CEH's work includes educating and organizing the public; initiating legal action; and advocating before legislative and regulatory bodies.

FOOD & WATER WATCH is a nonprofit organization that advocates for common-sense policies that will result in healthy, safe food and access to safe and affordable drinking water. With 15 offices in the United States and offices in Latin America and the European Union (where the organization is known as Food & Water Europe), through research and public education Food and Water Watch advances policies to ensure that these shared resources are regulated in the public interest rather than for private gain. Food and Water Watch supports effective regulation of toxic chemicals and believes that consumers deserve to know that they are purchasing and using products that have been demonstrated safe by manufacturers.

The NEW YORK ENVIRONMENTAL LAW AND JUSTICE PROJECT ("NYELJP") is

a nonprofit public interest organization based in Manhattan that counsels and represents groups and individuals concerned with the preservation and improvement of community environmental conditions. NYELJP works to help New Yorkers protect themselves and their communities and workers from dangerous and burdensome environmental hazards through the provision of information, data analysis and facilitating the provision of effective and affordable legal and advocacy resources, regardless of race, gender, age or income. NYELJP has been at the forefront of ensuring that the public has information about toxic chemical exposures, including leading efforts to force disclosure of U.S. EPA, New York State and New York City data measuring the contaminants, including asbestos, lead and benzene, at and near the World Trade Center Ground Zero site after 9/11.

The TRAUMA FOUNDATION was founded in 1981 at San Francisco General Hospital. The organization was established and continues to be directed by Andrew McGuire, a nationally recognized injury prevention expert and advocate. The Trauma Foundation's mission includes the prevention and reduction of all traumatic injuries, including those related to burns, domestic violence, firearms, transportation, the workplace, youth violence and those involving excess alcohol use. The Trauma Foundation's recent work includes helping lead the successful

effort to change California's consumer product testing regulation, which promoted the use of toxic flame retardants, a particular health risk for firefighters and children.

ARTS, CRAFTS AND THEATER SAFETY ("ACTS") is a not-for-profit organization dedicated to providing health, safety, industrial hygiene, technical services, and safety publications for the arts, crafts, museums, and theater communities. Led by founder and President Monona Rossol, a chemist, industrial hygienist and author, ACTS focuses on assisting the arts, crafts, museum and theater communities in creating and maintaining safe environments and using safe materials to protect artists and patrons. ACTS also publishes a monthly newsletter on health and safety regulations and research that affect the arts and theater. ACTS also educates the general public about the prevalence of toxic chemicals in common consumer products creating exposure risks in the home, workplace and studio, and the links between these chemicals and serious health consequences, including cancer, autism and asthma.

The HEALTHY SCHOOLS NETWORK, INC., is a 501(c)(3) not-for-profit environmental health organization and the leading national voice for children's environmental health at school. Healthy Schools Network's policy campaigns address three core facets of environmental health at school: 1) child-safe standards

for school design, construction, and siting; 2) child-safe policies for housekeeping and purchasing—targeting indoor air pollutants, mercury, pesticides and other toxics, and the use of safer substitutes; and 3) environmental public health services for children in harm's way. Keeping schools clean and cleanable, and reducing chemical exposures—which are associated with long-term health problems, including asthma and cancer—are all critical to promoting attendance and learning.

As such, *Amici* are fully interested in this appeal, and also with particular regard to the duty issue.

BACKGROUND

This case arises from Mr. Dummitt's grievous injuries and death caused by his exposures to ultrahazardous asbestos dusts emanating from the industrial products manufactured and supplied by the defendant-appellant Crane Co. [hereinafter "defendant" or "Crane"] while Mr. Dummitt served as a boiler technician in the United States Navy. In this appeal, Crane submits, as its principal claim, that it bears no responsibility for the tragic fate suffered by Mr. Dummitt solely on the ground that it did not directly or personally place the

particular asbestos components to which Mr. Dummitt was exposed "into the stream of commerce" [D/B, at 5].[1]

In dozens upon dozens of decisions in scores of cases, trial and appellate jurists in New York have already flatly rejected Crane's "no-duty" claim. In doing so, they have relied upon this Court's unwavering products liability jurisprudence announced over the course of many decades. The Appellate Division below adhered to this jurisprudence, correctly ruling that "where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product" under a failure-to-warn theory of liability. *In re New York City Asbestos Litig.*, 121 A.D.3d 230, 250 (1st Dep't 2014).

As the Appellate Division emphasized, Crane had an enormous "influence" upon, and interest in, the Navy's choice of asbestos-laden valve components, and indeed was directly involved in formulating the content of Navy specifications directing and requiring the use of asbestos with precisely the sort of Crane products with which Mr. Dummitt worked. *Id.* at 251. Crane provided the Navy with detailed drawings specifying the use of asbestos-containing replacement

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1 Numbers in brackets following "D/B" refer to pages in the Brief For Appellant.

component parts with Crane valves, and indeed extensively sold under its own name massive amounts of asbestos-laden insulation, as well as asbestos-containing equipment and replacement component products prior to and during the period of Mr. Dummitt's exposures. *Id.* It even supplied some of its valves to the Navy with its own brand of asbestos gasket as an internal component. *Id.*

At trial, Crane admitted that it knew asbestos components, like gaskets, packing, and insulation, would be used with its valves in the field, and specifically aboard Naval ships. Crane admitted that it knew these asbestos-filled components required routine replacement by means of scraping or wire-brushing or gouging out the asbestos material. *In re New York City Asbestos Litig.*, 36 Misc.3d 1234(A) at 2 (Sup. Ct., N.Y. County, Aug. 20, 2012). It published manuals showing and specifying the use of asbestos insulation on valves to prevent heat loss, and its valves were tested in its manufacturing plant with asbestos insulation prior to sale. *Id.* Crane further admitted that it was the normal, expected and intended use of its valves, in conjunction with the asbestos-filled components, that caused the release of ultrahazardous asbestos fibers into the worker's respirable zone, thereby endangering the lives and well-being of workers using such products. *Id.*

Crane also had access to and knowledge of the dangers of asbestos dating

back to the 1930s due to its employees' membership in various trade associations where the dangers were discussed and published in journals, including the Illinois Manufacturers' Association, American Association of Industrial Physicians and Surgeons ("AAIPS"), National Safety Council ("NSC"), American Society of Mechanical Engineers ("ASME"), and Industrial Hygiene Foundation ("IHF"). *Id.* at 2, 16. Crane's employees in these associations, which included its President, Medical Director, and other corporate officers, served in committee and executive positions in these associations and even authored articles in certain trade association journals identifying the hazards of asbestos exposure to workers. *Id.* at 16.

Possessed of such knowledge of the extreme occupational and environmental dangers posed by its products to workers such as Mr. Dummitt, and thereby charged with a firm legal and moral duty to issue effective and adequate warnings, Crane wholly failed to do so. Nor was Crane aware of any Navy regulation, specification or publication that would have ever prevented it or any other equipment manufacturer from warning about the dangers of asbestos in their products. *Id.* at 13.

Instead, Crane embarked on the calculated nonfeasance of burying its head in the sand for close to one full century in which it marketed asbestos-containing

products and products intended to be used with extremely dangerous asbestos component parts. Toward this end, although possessed of immense sophistication and state-of-the-art research capabilities, Crane never once sought to test its asbestos products to determine health risks that would attend the use of those products. *Id.* at 16.

As next shown, well-settled law in New York establishes that, by virtue of all of the above circumstances, as well as those more fully marshaled in the plaintiff's main brief, Crane bore a duty to warn end product users such as Mr. Dummitt, and its failure to have issued any sort of warning whatsoever constituted a breach of that duty. For this reason, the trial court and the Appellate Division correctly rejected Crane's no-duty claims, and its efforts at overturning the verdict and the judgment properly rendered against it.

ARGUMENT

CRANE HAD A DUTY TO WARN UNDER NEW YORK LAW

A. The Appellate Division's Ruling Is Based on Well-Established New York Law

The Appellate Division's ruling, like that of the Honorable Joan A. Madden following the trial of this case, upholds the right of New Yorkers to seek a compensatory remedy for grievous harm caused them by a manufacturer's complete failure to provide any warning to product users exposed to extraordinarily toxic environmental hazards intended and certain to be used with the defendant's product. These decisions did not, of course, emerge in a vacuum, but rather flowed logically from a long line of cases in which New York's products liability and toxic tort doctrines developed in a step-by-step manner.

As far back as *MacPherson v. Buick Motor Company*, 111 N.E. 1050 (N.Y. 1916), Judge Cardozo rejected the position that manufacturers have no duty to warn about others' products, noting that the injurious component in that case "was not made by the defendant; it was bought from another manufacturer." *Id.*, at 1051.

Following *MacPherson*, this Court made clear that a product seller would not be immunized from accountability depending merely upon whether the

particular, injurious third-party component was installed pre- or post-sale by third parties. In the analogous design defect context, in *Sage v. Fairchild-Swearingen Corporation*, 70 N.Y.2d 579 (1987), the plaintiff was injured by a replacement hanger or hook installed in defendant's aircraft. *Id.*, at 582. The *Sage* Court analyzed the legal issue as follows:

> That the hanger actually involved in the accident was a replacement and not the original is not dispositive because in fabricating and installing a new part Commuter's employees, as the jury found, did no more than perpetuate defendant's bad design as defendant's representatives foresaw they might.
>
> The burden of plaintiff's accidental injuries should be placed on the manufacturer because it designed the defective product and placed it in the stream of commerce knowing that if the part broke it might be copied and replaced by the purchaser relying on the original design. Inasmuch as the defect was in the design, the manufacturer was the logical party in a position to discover the defect and correct it to avoid injury to the public. Placing the economic burden on the manufacturer under these circumstances does no more than induce it to design quality equipment at the outset and "[discourages] misdesign rather than [encourages] it."

Id., at 587 (quoting *Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 N.Y.2d 376, 384 (1976)); *see also Call v. Banner Metals, Inc.*, 45 A.D.3d 1470, 1471 (4th Dep't 2007) (post-sale "modifications consisted of nothing more than the installation of replacement parts that did no more than perpetuate [defendant's]

bad design as [defendant's] representatives foresaw [it] might").

The logic underlying this Court's reasoning in *Sage*, placing the burden of plaintiff's product-related injuries on the manufacturer that placed the overall product in the stream of commerce knowing that any defective or unreasonably dangerous component part would naturally be "copied and replaced by the purchaser relying on the original design," *Sage*, 70 N.Y.2d at 587, has been adopted by courts in other jurisdictions. *E.g., Brdar v. Cottrell, Inc.*, 867 N.E.2d 1085, 1099 (Ill. App. 2007) ("defendant *expected* that its customers would need to replace chains and anticipated that they would purchase replacement chains from [third parties]. In a products liability case, the manufacturer remains liable if the product is modified in a manner that is foreseeable after it leaves the manufacturer's control") (Court's emphasis).

Liriano v. Hobart Corporation, 92 N.Y.2d 232 (1998), followed in the failure-to-warn setting, explaining that "a manufacturer may have a duty to warn of dangers associated with the use of its product even after it has been sold. Such a duty will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer." 92 N.Y.2d at 240. *Liriano* made clear that failure-to-warn liability was broader than design defect liability. The Court of Appeals' prior ruling in the design defect case *Robinson v. Reed-*

Prentice Div. of Package Mach. Co., 49 N.Y.2d 471 (1980), was that "substantial modifications of a product from its original condition by a third party which render a safe product defective are not the responsibility of the manufacturer." 49 N.Y.2d at 479.

In *Liriano*, this Court announced clearly and unequivocally that, "[w]hile this Court stated [in *Robinson*] that principles of foreseeability are inapplicable where there has been a substantial modification of the product, that discussion was limited to the manufacturer's responsibility for *defective design* where there had been a substantial alteration of a product by a third party." 92 N.Y.2d 232, 238 (Court's emphasis). However, "[t]he factors militating against imposing a duty to design against foreseeable post-sale product modifications are either not present or less cogent with respect to a duty to warn against making such modifications." *Id.*, at 239. This Court continued:

> Unlike design decisions that involve the consideration of many interdependent factors, the inquiry in a duty to warn case is much more limited, focusing principally on the foreseeability of the risk and the adequacy and effectiveness of any warning. The burden of placing a warning on a product is less costly than designing a perfectly safe, tamper-resistant product. Thus, although it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury.

92 N.Y.2d 232, 239-40.

Therefore, it is fully clear that the third-party liability for replacement parts, as announced in *Sage*, does not represent the limit of a manufacturer's accountability for dangers posed by its products as foreseeably modified post-sale by third parties. It is this aspect of New York's product liability jurisprudence that has engendered the many decisions aligning with *Liriano* and involving the foreseeable, and defendant-recommended, post-sale application of ultrahazardous external insulation products.

Consistently, the concept that someone may be responsible for the foreseeable misconduct of a third party has deep, historical roots in other areas of tort law. It is well established, for instance, that "a landlord has a duty to take preventive action which is within its capacity to protect tenants against criminal activities of third parties on its premises." *Jacobs v. Helmsley-Spear, Inc.*, 121 Misc. 2d 910, 911 (Civ. Ct., Queens County, 1983); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519 (1980) ("the history of criminal activities in the Fisk Building gave rise to an obligation on the part of the building's owner"); *see also In re World Trade Center Bombing Litig.*, 17 N.Y.3d 428, 466 (2011) ("If a danger is foreseeable, a landlord has a duty to employ reasonable measures to protect

visitors from such risks, including danger posed by third parties"). The law also imposes a related liability upon a prior premises owner, who has previously sold and released control over the premises. *See* RESTATEMENT (SECOND) OF TORTS § 353 (1965) ("A vendor of land who fails to disclose to his vendee any unreasonably risky condition is subject to liability to the vendee and others upon the land . . ."); *Fisher v. Braun*, 227 A.D.2d 586, 587 (2d Dep't 1996).

But the present case does not rest on a "mere" foreseeability to Crane that its valve products would be used with replacement asbestos components and asbestos insulation materials. Accordingly, Justice Madden emphasized that "[u]nder these circumstances, [Crane's] duty is not based solely on foreseeability, or the possibility that a manufacturer's sound product may be used with a defective product so as to militate against a finding of a duty to warn. Rather, these circumstances show a connection between Crane's product and the use of the defective products, and Crane's knowledge of this connection . . ." 36 Misc.3d at 5.

In the same vein, the Appellate Division similarly stressed that, "where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the

product." 121 A.D.3d at 250. The Court further noted that, "[i]ndeed, considering the substantial interest Crane showed in having asbestos become the standard insulation in the components to be placed in its valves, it was entirely appropriate for the jury to find that Crane had the burden of warning workers such as Dummitt of the hazards of asbestos exposure." *Id.* at 251.

Indeed, the Appellate Division continued: "There is a place for the notion of foreseeability in failure to warn cases where, as here, the manufacturer of an otherwise safe product purposely promotes the use of that product with components manufactured by others that it knows not to be safe. To be sure, mere foreseeability is not sufficient." *Id.* at 252.

Amazingly, as was true in the Appellate Division, Crane does not even mention, let alone grapple with, this Court's Opinion in *Liriano*, or acknowledge that it might have the slightest relevance here. Giving Crane the benefit of any doubt, however amply warranted that doubt may be here, it is conceivable that Crane omits *Liriano* because it views the case as being somehow limited to situations in which a product has been modified by removal of an original part. Drawing a distinction between removing a component and adding a component, however, is an insupportably narrow reading of the rule in *Liriano*, one clearly not intended or stated by this Court.

The most sensible way to interpret *Liriano* is that a duty to warn is owed whether the modification results from eliminating a component part, replacing one, or adding one to the product where the use of the product as modified is known to the seller to present a deadly hazard to product users. That should be especially true where, as here, the modified use is intended, foreseen, endorsed, recommended, or specified by, or otherwise known to, the product seller.

Indeed, prior to the attempts of Crane and similarly-situated asbestos defendants to conjure its no-duty defense, New York law has always routinely followed the *Restatement (Second) of Torts* products liability rule (Section 402A) that, where the seller has reason to anticipate that a serious danger may result from a foreseeable product use, it will have a duty to warn product users of that danger. RESTATEMENT (SECOND) OF TORTS § 402A (1965), cmt. *h*; *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. *p* (1998) ("[p]roduct misuse, modification, and alteration are forms of *post-sale conduct by product users or others* that can be relevant to the determination of the issues of defect, causation, or comparative responsibility. Whether such conduct affects one or more of the issues depends on the nature of the conduct and *whether the manufacturer should have . . . provided a reasonable warning* to protect against such conduct") (emphasis added).

As one example, in this Court's well-known choice-of-law decision in *Cooney v. Osgood Machinery, Inc.*, 81 N.Y.2d 66 (1993), the issue was whether a Missouri statute barring contribution claims against an employer should be applied. The product seller's liability was never in doubt, and was taken as a given. In *Cooney*, the defendant sold a metal-bending machine to plaintiff's employer. The employer "subsequently modified it by adding a foot switch," and that foot switch caused plaintiff's injuries. 81 N.Y.2d 66, 70. The product seller, of course, sought contribution from that employer, but only from the starting point of its own liability. In short, *Liriano* cannot reasonably be construed to apply only narrowly to the post-sale removal of a component from the original product.

Consistently, the product modification decision in *Liriano* relied on this Court's Opinion in *Cover v. Cohen*, 61 N.Y.2d 261 (1984), wherein this Court instructed that, "[a]lthough a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn." *Cover*, 61 N.Y.2d 261, 274-77; *see generally* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10, Reporters' Note to comment *a* (1998) ("A growing number of jurisdictions have taken the position that a post-sale duty to warn is warranted

under appropriate circumstances").

The products at issue in the present action provide an even stronger case for failure-to-warn liability than in *Cover v. Cohen.* That is so because here Crane's products were shipped with original, hazardous asbestos components but no warning. Hence, those products were defective at that time because they already contained "known risks of which warning need be given." *Cover*, 61 N.Y.2d at 275.

Indeed, the Appellate Division addressed that exact circumstance in *Rogers v. Sears, Roebuck & Co.*, 268 A.D.2d 245 (1st Dep't 2000) – a decision strongly relied upon by the Appellate Division below. 121 A.D.3d at 250-51. There, the Appellate Division held that, "even assuming the accident was caused by a defect in a valve incorporated into a propane tank neither of which [defendant] manufactured, we are unpersuaded by [defendant]'s argument that it was under no duty to warn of the dangers presented by such a defect, where [*inter alia*] its grill could not be used without the tank . . ." *Rogers*, 268 A.D.2d 245, 245-46.

The Appellate Division in the Decision below further noted Crane's heavy reliance upon this Court ruling in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289 (1992). However, speaking of *Rastelli*, and the other cases upon which Crane has relied, the Appellate Division stated, "These cases, and others

cited by Crane, together stand for the rather unremarkable proposition that where there is no evidence that a manufacturer had any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce, it has no duty to warn." 121 A.D.3d at 250. But here, by contrast, there is extensive evidence showing Crane's "active role, interest and influence" with regard to the specified and necessary use of hazardous asbestos component parts with its products after it placed such products into the stream of commerce.

Indeed, defendant gains no support from this Court's Opinion in *Rastelli*, which reaffirmed the rule that "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known." *Rastelli*, 79 N.Y.2d 289, 297.

In *Rastelli*, a third party had installed a defective rim on one of defendant Goodyear's tires, that rim representing one of "24 different models of multipiece rims, out of the approximately 200 types of multipiece rims sold in the United States." 79 N.Y.2d at 294 n.1. Nor was there any mention in *Rastelli* of evidence of even a single prior explosion or injury caused by the use of a multipiece rim with a Goodyear tire. This Court concluded that, under the "circumstances of this case," Goodyear did not have a duty to warn about the other manufacturer's

product. *Id.* at 297-98.

Equally significant, in *Rastelli* it could not be said that defendant Goodyear, which had manufactured the truck tire, knew or had reason to know that its product would likely be combined with a dangerously *defective* tire rim. Goodyear's truck tire was merely "compatible" with such a defective multipiece rim, 79 N.Y.2d at 293, and there was nothing about Goodyear's conduct to suggest that it had actual, or even constructive, knowledge that its tire *would*, as in the present case, *routinely* be used with a defective rim, or that it *promoted, expected,* or *specified* the use of such a rim. As the Appellate Division therefore stated in the present case, *Rastelli* stands "for the rather unremarkable proposition" that slight foreseeability will not suffice to charge a product seller with a duty to warn.

The instant *amici curiae* strongly believe that, under circumstances in which, in contrast to *Rastelli*, a product seller indeed vigorously and affirmatively promoted and specified the use of ultrahazardous components, knew with clear certainty that such components would in fact be used, and nevertheless wholly failed to take the obvious steps of testing or issuing any sort of warning or guidance to product users, that seller should be deemed to have breached its duty owed to those users.

In a similar vein, the Appellate Division in *Rogers* likened the facts in that

case to *Liriano*, and expressly contrasted the circumstances in *Liriano* to those in *Rastelli*. *Rogers*, 268 A.D.2d at 246; *see also Baum v. Eco-Tec, Inc.*, 5 A.D.3d 842, 844-45 (3d Dep't 2004) ("regardless of whether Eco-Tec manufactured or supplied the actual air pipe involved in the accident, a question of fact remains as to whether the alleged modification or misuse of air pipes as probe bars when using the crystallizer system was foreseeable giving rise to a duty to warn of potential dangers associated therewith").

The Appellate Division then logically applied the same products liability principles as articulated in *Liriano* and *Rogers* in the asbestos context, in its original decision in *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148 (1st Dep't 2001) ("Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps"). The eight plaintiffs appearing as respondents in the consolidated *Berkowitz* appeal were exposed to new insulation being applied to Worthington pumps. To the extent that such insulation posed an unreasonable danger, and because the manufacturer knew its product would be modified in this way, the *Berkowitz* panel deemed *Liriano* to instruct a duty to warn under such circumstances. *See Berkowitz*, 288 A.D.2d at 149 (expressly contrasting *Rogers* with *Rastelli*).

Additionally, while Crane continues to present a distorted "stream-of-

commerce" interpretation of *Rastelli*, what it continually fails to acknowledge about that case is that this Court emphasized that Goodyear advanced undisputed evidence that it never manufactured or marketed the RH5 rim assembly model or its component parts. *Rastelli*, 79 N.Y.2d 289, 294. Accordingly, the *Rastelli* Court was not principally concerned with whether Goodyear placed the specific and particular RH5 rim that injured plaintiff into the stream of commerce, but rather with Goodyear's *lack of* commercial connection to and awareness of the RH5 rim assembly model generally. *By contrast*, that commercial connection and awareness, hence strong foreseeability, exists when it comes to defendant Crane's relation to the hazardous asbestos-containing components of its products. *See also Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148 (1st Dep't 2001) ("Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps").

B. Policy Considerations Fully Support the Rulings Below

The distinction between the outcomes in *Rastelli* and cases such as *Berkowitz*, *In re Eighth Judicial District Asbestos Litig.: Suttner v. A.W. Chesterton Co.*, 115 A.D.3d 1218 (4th Dep't 2014) ("*Suttner*"), and the instant case (as well as dozens upon dozens of decision that have been issued in accord with *Berkowitz* over the

past several years), also directly implicates critical public policy concerns for economic and societal efficiency. The traditional "Hand formula," for instance, decidedly reveals both the need for a protective standard of care in *Berkowitz*, *Suttner* and *Dummitt*, and for nonliability in *Rastelli*. *See In re City of New York*, 475 F. Supp. 2d 235, 242 (E.D.N.Y. 2007) ("'The cost of prevention is what Hand meant by the burden of taking precautions against the accident . . . If on the other hand, the benefits in accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted'") (quoting Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 38 (1972)).

More specifically, since there were two dozen alternative tire rims in *Rastelli*, the cost to the tire manufacturer of preventing accidents related to the use of every single potential rim far exceeded the benefit in accident avoidance for such a socially important product. Society thus did not benefit from a duty on the part of the tire manufacturer to warn about every danger that could have been presented by the use of any possible rim with its tire. The scenario in the instant case and similar cases is, and was during the relevant product distribution periods, quite a bit different. When it comes to such industrial products as valves, pumps and boilers, the hazardous asbestos components were specified, recommended, and endorsed by the equipment manufacturers for use with their products. The cost

of warning about such conspicuously hazardous components, where their use was a known certainty, was minimal compared to the benefits of avoiding lethal injury to thousands of workers. Under such circumstances, society benefits greatly from imposing a duty to warn on manufacturers.

Also critical with respect to society's efficiency concern is the information factor: the ordinary vehicle purchaser or user is attuned to the need regularly to safety-check the vehicle, its brakes, tires, lights, safety features and so forth. The cost of this routine search for information has long been absorbed into the normally expected cost of ownership. Circumstances are diametrically different when it comes to hidden or otherwise non-obvious product dangers. Here it is the manufacturer that is in the best position to spread the costs of investigation of the risks, whereas saddling such costs upon product users would be prohibitively costly and inefficient.

Imposing a duty in these circumstances actually benefits business by creating a more sustainable and fair marketplace, and a more knowledgeable consumer base. It ensures that one manufacturer does not gain an unfair marketing advantage over its competitors by consciously choosing not to warn so as to avoid a potential decrease in marketability of its product due to an attendant warning. A manufacturer's decision to act reasonably by providing a warning

should not work to its detriment in the marketplace. Nor should a manufacturer be deterred from warning because its competitors are afforded an advantage by not warning. A duty to warn here, therefore, provides clarity and uniformity in the obligations of manufacturers to provide safe products, it promotes good will and public trust, and it permits businesses that purchase such products to better assess the risks and benefits of each particular product, which in turn advances safety in the workplace.

Importantly, this Court has long assumed that liability under the present circumstances, in the asbestos context, is correct and just under New York law. For instance, in its insurance coverage decision in *Appalachian Ins. Co. v. General Electric Co.*, 8 N.Y.3d 162, 170 (2007), this Court recited, just as a matter of fact, that defendant GE had been subject to numerous "asbestos-related personal injury claims . . . in the early 1990's" as a result of exposures to its custom turbines. This Court explained that, "[a]lthough GE did not produce the asbestos-related products, for decades it designed, manufactured and, in some cases, installed custom turbines that were insulated with asbestos-containing products manufactured by others." 8 N.Y.3d 162, 166. Also critically significant, the *Appalachian* decision establishes that defendants have had the opportunity to insure against precisely the sort of risks at issue in this case, and did indeed insure

against those risks and thereby spread the cost.

C. Scores of Asbestos Cases Have Relied Upon and Applied the *Liriano-Berkowitz* Jurisprudence

As partially catalogued below, scores of New York rulings have construed *Liriano* to support the imposition of a duty to warn in instance involving asbestos components that were used with a piece of equipment after it was placed into the stream of commerce, such as in *Berkowitz.* Of special import has been the reasoning of the Honorable Sherry K. Heitler in *Sawyer v. A. C. & S., Inc.*, 32 Misc.3d 1237(A), 2011 WL 3764074 (Sup. Ct., NY County, June 24, 2011). In that opinion, Judge Heitler held that Crane's claim "that it had no duty to warn of the hazards associated with asbestos products that were incorporated into its products, which were manufactured by third parties, to wit, asbestos-containing insulation" was without merit. 2011 WL 3764074, at *2.

In reaching that conclusion, Judge Heitler emphasized New York's foundational jurisprudence cutting directly against Crane's claims:

> A manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano*[, *supra*]; *see also Rogers*[, *supra*]; *Baum*[, *supra*]. Although a product may "be reasonably safe when manufactured and

> sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn." *Cover*[, *supra*].

2011 WL 3764074, at *2.

Justice Heitler further noted Crane's reliance upon *Rastelli*, and concluded that "*Rastelli* and *Berkowitz* are not mutually exclusive nor are they in conflict[, and indeed] rest on consistent applications of the same foreseeability principle. . . . Indeed, *Rastelli* and *Berkowitz* address two different situations. In *Rastelli*, there was no duty to warn because the combination of a manufacturer's own sound product with another defective product somewhere in the stream of commerce was too attenuated to impose such a duty. In *Berkowitz*, however, if that same manufacturer knew or should have known that its product would be or ought to be combined with inherently defective material for its product's intended use, that gives rise to a duty to warn of known dangers attached to such use. *Id.*, at *3 (omitting citations); *accord DeFazio v. A.W. Chesterton*, Index № 127988/2002, 2011 WL 3667717 (Sup. Ct., NY County, Aug. 12, 2011); *Curry v. American Standard*, slip op., № 7:08-cv-10228, 2010 U.S. Dist. LEXIS 142496 (S.D.N.Y. Dec. 6, 2010) (Hon. James S. Gwin) (emphasizing that *Rastelli* and *Berkowitz* rest "on consistent application of the same foreseeability principle"); *Gitto v. A.W.*

Chesterton, slip op., № 7:07-cv-04771, 2010 U.S. Dist. LEXIS 144568 (S.D.N.Y. Dec. 7, 2010) (Hon. James S. Gwin) (same).

More recently, in a post-trial decision denying Crane's motion to set aside the verdict, also alleging that as a matter of law it had no duty to warn, the Honorable Martin Shulman marshaled the facts proffered against Crane in a substantially similar case, albeit in the context of Crane's boiler products rather than valves. *In re New York City Asbestos Litig.: Peraica v. A. O. Smith Water Prods., Inc.*, Index № 190339/2011, 2013 NY Slip Op 32846(U), 2013 N.Y. Misc. LEXIS 5173 (Sup. Ct., N.Y. County, Nov. 7, 2013) ("*Peraica*").

Justice Shulman noted that the trial record revealed, *inter alia*, that Crane "aggressively promoted the sale of asbestos" components to be used with its products, "making the benefits of asbestos insulation an integral part of its marketing scheme," "designed and supplied its products with asbestos containing gaskets, packing, insulation and cement," and "this multi-national company was a dominant player manufacturing and/or distributing equipment (*e.g.*, boilers, pumps, etc.), industrial components (*i.e.*, valves) and associated insulation products (*e.g.*, asbestos-containing pipe covering, block, cement, cement pipe, millboard, gaskets, packing and rope, etc.)." 2013 N.Y. Misc. LEXIS 5173, at *6-8. Accordingly, concluded the *Peraica* court, Crane "had a duty to warn about the

conspicuous hazards of ACMs [asbestos-containing materials] third-parties foreseeably manufactured and/or used therewith subsequent to that sale, and Crane's failure to warn was a basis for liability to Peraica, who was injured and ultimately killed from toxic exposure to ACMs applied to/installed on" its products. *Id.*, at *8.

Scores of additional rulings in numerous New York counties have concluded that a product manufacturer – and in many instances Crane itself – owed a duty to warn of the dangers attendant to the use of asbestos components in connection with the manufacturer's product after it was placed into the stream of commerce, based on facts consistent with a showing of the manufacturer's active role, influence, or interest in the use of such asbestos components with its equipment, including in military, industrial, manufacturing, commercial and residential settings. *E.g.:*

– *Kersten v. A.O. Smith Water Prods.*, Inc., Index № 190129/2010, 2011 WL 1096996 (Sup. Ct. NY County, Mar. 14, 2011) ("in New York where a defendant meant its products to be used with asbestos-containing components or knew that its products would be used with such components, the company remains potentially liable for injuries resulting from those third-party manufactured and installed components");

– *Brinson v. Aurora Pump Co.*, Index № 51789, slip op. (Sup. Ct., Warren County, Sept. 11, 2009) (Hon. Richard T. Aulisi) (relying on *Berkowitz* and *Rogers*, denying defendant's summary judgment motion and noting the dangers associated with changing asbestos-containing gaskets, packing and external insulation "with regard to the customary usage of the defendant's pumps");

– *Tuttle v. A.W. Chesterton Co.*, Index № 5602-2006, slip op. (Sup. Ct., Oswego County, Nov. 15, 2007) (Hon. James W. McCarthy) (applying *Berkowitz* where pumps were used with asbestos components, denying summary judgment);

– *Skindell v. Air & Liquid Sys. Corp.*, Index № 2010-2411, slip op. 2011 WL 12539493 (Sup. Ct., Erie County, Mar. 22, 2011) (Hon. John P. Lane) (noting that it was clear to defendants that their equipment "would be insulated with asbestos-containing insulation . . . New York's product liability law as it applies in asbestos litigation is well established. Citations to decisions in other states on that subject are not helpful");

– *Cobb v. A.O. Smith Water Prods.*, Index № 10-3677, slip op., at 4 (Sup. Ct., Oswego County, Mar. 30, 2011) (Hon. James W. McCarthy) (relying upon *Berkowitz*, reaffirming that "the fact that the alleged exposure was to 'replacement' parts is, standing alone, insufficient to absolve defendant of liability");

– *Cobb v. A.O. Smith Water Prods.*, Index № 10-3677, slip op., at 4 (Sup. Ct., Oswego County, Apr. 13, 2011) (finding that defendant Crane "has failed to distinguish the Appellate Division's decision in *Berkowitz*, as well as trial court decisions from this court and others throughout New York State");

– *Forth v. Crane Co.*, Index № 2008-0491 (Sup. Ct., Schenectady County, Sept. 12, 2011) (Hon. Richard T. Aulisi) (relying upon the Appellate Division rulings in *Rogers* and *Berkowitz*, denying Crane's summary judgment motion based on its "bare metal" defense);

– *Good v. A.O. Smith Water Prods.*, Index № 190263-2010, slip op., 2011 WL 11038775 at 2 (Sup. Ct., NY County, Sept. 23, 2011) (Hon. Sherry K. Heitler) (holding that, as in *Sawyer* and *DeFazio*, "Crane's assertions that its valves did not require asbestos-containing insulation and gaskets to operate properly and that it did not specify the use of asbestos-containing insulation and gaskets on its products are insufficient to shield it from liability");

– *In re Eighth Judicial District Asbestos Litig.: Potter v. A.W. Chesterton*, Index № 138620 (Sup. Ct., Niagara County, Mar. 31, 2011) (Hon. John P. Lane) ("Crane's suggestion this court follow out of state precedents is rejected" on the issue of *Berkowitz* accountability);

– *In re Sixth Judicial District Asbestos Litig.: Schmerder v. A.W. Chesterton Co.*,

Index № CA2010-000927, slip op., at 3 (Sup. Ct., Broome County, Sept. 26, 2011) (Hon. Robert C. Mulvey) ("with respect to the issue of whether Crane had a duty to warn of the hazards associated with asbestos, Crane's motion for summary judgment must be denied since the Court finds that the holding in *Berkowitz* [] is applicable and controlling in this instance. In denying the motion herein, this Court also relies upon the decisions in *Sawyer* and *DeFazio* which cite *Berkowitz, supra*, and denied motions for summary judgment made by Crane in asbestos cases which involved nearly identical issues and facts");

– *Mosher v. A.W. Chesterton Co.*, Index № 2010/7914, slip op. (Sup. Ct., Monroe County, Oct. 4, 2011) (Hon. Ann Marie Taddeo) ("[t]he Court agrees with Plaintiff's counsel that the facts of this case are more analogous to *Rogers* than *Rastelli*");

– *Franck v. 84 Lumber Co.*, Index № 5716/2010, slip op., at 22-23 (Sup. Ct., Orange County, Oct. 20, 2011) (Hon. Robert A. Onofry) (reasserting the rule in *Liriano*, *Cover*, and *Berkowitz*, contrasting *Berkowitz* with *Rastelli*, and ruling that Crane "failed to demonstrate, *prima facie*, that it had no duty to warn the decedent about the use of its valves with asbestos-containing products. Contrary to the contention of Crane, it is not necessarily absolved of the duty to warn merely because its valves did not require such products to function, and it did not direct

its customers to use the same");

– *Gogel v. A.O. Smith Water Prods.*, Index № 190332/2010, slip op. 2011 WL 11048029 (Sup. Ct., NY County, Nov. 2, 2011) (Hon. Sherry K. Heitler) ("As in *Sawyer*, *supra*, and *Defazio, supra,* the submissions on this motion show that Crane designed and supplied its products with asbestos-containing gaskets, packing, and insulation. Accordingly, for the same reasons stated in *Sawyer, supra*, and *Defazio, supra*, this court finds that Crane had a duty to warn Mr. Gogel of the hazards associated with asbestos");

– *Celella v. Crane Co.*, Index № 2009-1158, slip op. (Sup. Ct., Schenectady County, Nov. 7, 2011) (Hon. Richard T. Aulisi) ("this Court finds that the defendant has failed to adequately distinguish *Berkowitz*. Under the facts of this case, the Court finds that the defendant has failed to establish, as a matter of law, that it had no duty to warn plaintiff with respect to the products identified by him");

– *Maringione v. A.O. Smith Water Prods.*, Index № 109016/2001, slip op. 2011 WL 11222014 (Sup. Ct., NY County, Nov. 14, 2011) (Hon. Sherry K. Heitler) ("Here too, . . . Crane had a duty to warn");

– *Michalski v. A.O. Smith Water Prods.*, Index № 100021/2007, slip op. 2011 WL 11221893 (Sup. Ct., NY County, Nov. 18, 2011) (Hon. Sherry K. Heitler) ("Here

too, . . . Crane had a duty to warn");

– *Zoyhofski v. A.C. & S., Inc..O. Smith Water Prods.*, Index № 106242/2002, slip op. 2011 WL 11535875 (Sup. Ct., NY County, Nov. 14, 2011) (Hon. Sherry K. Heitler) ("Crane had a duty to warn");

– *Reals Asbestos Matter*, Index № 2010-1847, slip op. at 3, fn. 2 (Sup. Ct., Oswego County, Aug. 8, 2011) (Hon. James W. McCarthy) (emphasizing that "this court has issued [several] opinions in which summary judgment was denied to defendants arguing that they were not responsible for external insulation or replacement parts");

– *Palazzo v. A.O. Smith Water Prods.*, Index № 123182/2001, slip op. 2012 WL 9570551 (Sup. Ct., NY County, Jan. 10, 2012) (Hon. Sherry K. Heitler) (a post-*Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797 (2011)[2] decision noting, again, that precedents such as *Liriano* and *Berkowitz* impose a duty upon Crane because the evidence "showed that Crane recommended that asbestos-containing materials

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2 *Surre* involved "Pacific" boilers, not Crane boilers, based on exposures occurring shortly after Crane had acquired the National-U.S. Radiator Corp. (Pacific Division). Hence, quite unlike the evidence in most of the Crane cases, it is unlikely that the Pacific boiler purchaser would have acquired this product directly from one of the Crane branch houses, which also promoted and sold, side by side, massive amounts of asbestos-containing products and component parts. Moreover, Crane involved the summary judgment context and a limited amount of exhibits consisting mostly of early catalogues, but no testimony on the part of Mr. Pantaleoni or any other Crane representative. Thus, *Surre* has either not been considered in the subsequent New York actions, or has been deemed fully distinguishable from the subsequent cases litigated against Crane on a fuller record.

be used in conjunction with its [pump] products and in turn had a duty to warn against same");

– *Zachmann v. A.O. Smith Water Prods.*, Index № 190140/2001, slip op. 2012 WL 9436158 (Sup. Ct., NY County, Jan. 26, 2012) (Hon. Sherry K. Heitler) (post-*Surre*, holding that, "[h]ere, too, Crane's assertions that its valves did not require asbestos-containing packing to operate and that it did not specify the use of same on its pumps are insufficient to shield it from liability");

– *Tansosch v. A.O. Smith Water Prods.*, Index № 190382/2010, slip op. 2012 WL 9391737 (Sup. Ct., NY County, Jan. 30, 2012) (Hon. Sherry K. Heitler) (post-*Surre*, holding that, "[h]ere, too, Crane's assertions that its boilers did not require asbestos-containing insulation or that it did not specify the use of same on its boilers are insufficient to shield it from liability");

– *Contento v. A.C.&S., Inc.*, Index № 121539/2001, slip op. 2012 WL 910305 (Sup. Ct., NY County, Mar. 13, 2012) (Hon. Sherry K. Heitler) (post-*Surre*, concluding that "Crane designed and supplied its products with asbestos-containing gaskets, packing, insulation and cement");

– *Erikson v. A.O. Smith Water Prods.*, Index № 190123/2011, slip op. 2012 WL 9436156 (Sup. Ct., NY County, Mar. 9, 2012) (Hon. Sherry K. Heitler) ("Crane had an affirmative duty to warn [because] Crane recommended the use of

asbestos-containing insulation and packing in conjunction with its products, and in particular valves and pumps");

– *Schuerch v. A.O. Smith Water Prods.*, Index № CA2011-000589, slip op. at 3 (Sup. Ct., Broome County, Apr. 12, 2012) (Hon. Robert C. Mulvey) (noting plaintiff's reliance on "evidence in the record from Crane's own supply catalogs and manuals that Crane offered for sale asbestos-containing insulating materials for use in conjunction with its valves and recommended that asbestos-based insulations be used," concluding that "the holding in *Berkowitz* . . . is applicable and controlling in this instance");

– *Pringle v. A.C.&S., Inc.*, Index № 102509/2002, slip op. 2012 WL 9944411 (Sup. Ct., NY County, Apr. 19, 2012) (Hon. Sherry K. Heitler) (holding that Crane had a duty to warn, based on *Liriano*, *Berkowitz*, and the Court's prior decision in *Sawyer*);

– *In re Eighth Judicial District Asbestos Litig.: Zimmerman v. Air & Liquid Sys. Corp.*, Index № 2011-880, slip op., 2012 WL 11963137 at 6 (Sup. Ct., Erie County, Aug. 23, 2012) (Hon. John P. Lane) (same);

– *Romero (McCarthy) v. A.C. & S., Inc.*, Index № 1123260/01, slip op. 2012 WL 1776984 (Sup. Ct., NY County, May 11, 2012) (Hon. Sherry K. Heitler) ("Crane recommended the use of asbestos-containing products in conjunction with its

valves and other equipment");

– *Peraica v. A.O. Smith Water Prods.*, Index № 190339/11, slip op. 2012 WL 9436163 (Sup. Ct., NY County, Nov. 16, 2012) (Hon. Sherry K. Heitler) ("Crane's assertions that its boilers did not require asbestos-containing insulation to operate properly and that it did not specify the use of same on its products are therefore insufficient to shield it from suit");

– *Vespe-Benchimol v. A.O. Smith Water Prods.*, Index № 190320/2010, slip op., 2011 WL 12306673 at 3-4 (Sup. Ct., NY County, Nov. 15, 2011) (plaintiffs "submit multiple undated Crane catalogs in which the company describes the benefits of using asbestos insulation on its boilers. These show that Crane was not only long aware of the fact that asbestos insulation would be used with its boilers, but also that it supplied and endorsed asbestos, making the benefits of asbestos insulation an integral part of its marketing scheme");

– *Battipaglia (Susino) v. A.O. Smith Water Prods.*, Index № 190303/11, slip op. 2012 WL 9515266 (Sup. Ct., NY County, Dec. 21, 2012) (Hon. Sherry K. Heitler) (relying on *Sawyer* and *Benchimol*, as well as *Berkowitz* and *Liriano*, to hold Crane responsible for asbestos-related exposures arising from its pumps, valves and boiler products);

– *Ritucci v. Burnham, LLC*, Index № 190124/2012, slip op. 2012 WL 10096255

(Sup. Ct., NY County, Apr. 24, 2013) (Hon. Sherry K. Heitler) (relying on *Sawyer* and *Benchimol*, as well as *Berkowitz* and *Liriano*, to hold Crane responsible for asbestos-containing pump insulation products);

– *In re Eighth Judicial District Asbestos Litig.: Tucholski v. A. W. Chesterton Co.*, Index № 2012-800161, slip op. 2013 WL 4771727 (Sup. Ct., Erie County, June 17, 2013) (Hon. John P. Lane) (noting that "Crane argues, once again, as it has done unsuccessfully many times, that it is not legally responsible for the insulation, gaskets and packing used with its valves," and relying on *Liriano, Dummitt, Sawyer et al.*, to reject Crane's position); and

– *Crescenzi v. Azrock Indus.*, Index № 190270/2012, slip op. 2013 WL 6638023 (Sup. Ct., NY County, Dec. 9, 2013) (Hon. Sherry K. Heitler) (Crane accountable where nearby workers installed "asbestos, the loose powder stuff" as "external insulation" on Crane valves and pumps).

Nor has this been an exhaustive listing of all the rulings upholding a duty to warn under circumstances paralleling those in the instant case, and rejecting the very sort of no-duty claims Crane raises before this Court. We respectfully submit that, like the Appellate Division's decision below, all of the above-referenced rulings, by these many esteemed New York jurists, accurately and faithfully reflect New York law.

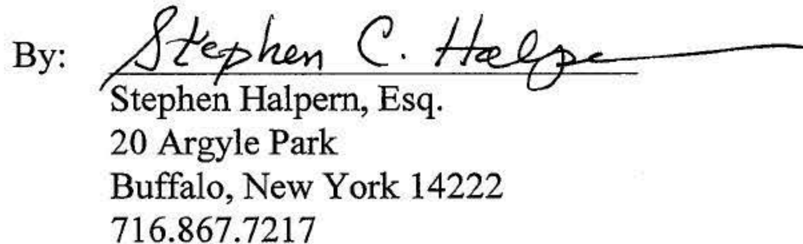
Accordingly, we believe that New York's longstanding solicitude for the welfare of citizens and working people endangered by ultrahazardous toxic substances connected to a manufacturer's product supports affirmance of the Appellate Division's holding that, indeed, Crane had a duty to warn Mr. Dummitt.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court should affirm the Appellate Division's ruling affirming the judgment entered in favor of plaintiff Doris Kay Dummitt.

Dated: New York, New York
September 15, 2015

Respectfully submitted,



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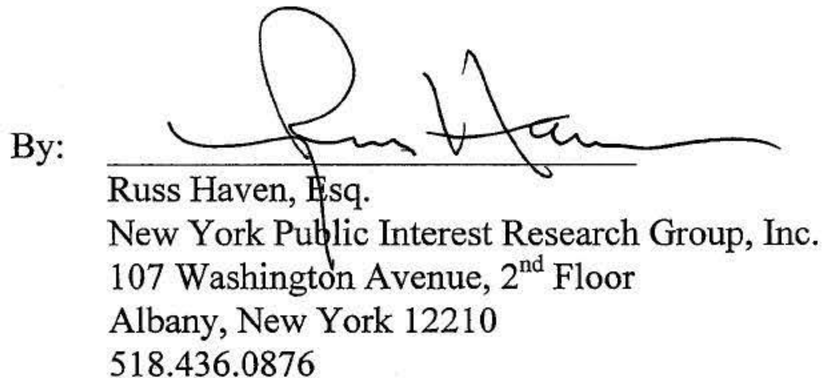

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APPENDIX

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

HOWARD BRINSON, JR.,
and MICHELLE BRINSON,

Plaintiffs,

-vs-

AURORA PUMP COMPANY, et al.,

Defendants.

DECISION
AND ORDER

Index #51789
RJI #56-1-09-0014

The plaintiff, Howard Brinson, Jr., commenced the within action to recover damages for personal injuries allegedly resulting from his exposure to various asbestos containing products. The plaintiff commenced this action on January 16, 2009, by filing a summons and complaint in the Warren County Clerk's Office. Issue was subsequently joined and discovery has been conducted pursuant to an expedited schedule. The trial is scheduled to commence on September 14, 2009.

The defendant, Aurora Pump Company, (the defendant) has now made a motion for summary judgment dismissing the plaintiffs' complaint and all cross-claims asserted against it pursuant to CPLR §3212. The defendant seeks summary judgment on the theory that it is not liable for any gaskets, replacement parts or external insulation which was manufactured, designed or installed by others with Aurora pumps. The defendant claims that it simply manufactured the pumps and different entities manufactured the alleged asbestos containing components which were incorporated into the pumps or the external insulation which surrounded the pumps.

The plaintiff was born on [redacted] 1955, and is currently 55 years of age. The plaintiff asserts that he was exposed to various asbestos containing products while he was serving in the United States Navy (1973 - 1975), while working as a draftsman at American Ship Building (1977 - 1978), and while he was working as a Field Technician and Pipe and Systems Designer for Kamyr, Inc. (1978-1985).

The plaintiff specifically asserts that with respect to Aurora Pump Company, he was exposed to asbestos containing gaskets, packing and external insulation in connection with work he performed on defendant's pumps during his service on the U.S.S. Santa Barbara and the U.S.S. Sellers from 1973 to 1975 and while working at the lab at the Machinist Mate's School in the Great Lakes.

The defendant asserts that its products (Aurora pumps) are not defective. The defendant claims that the alleged defective products (gaskets, packing and insulation) were not marketed, sold or distributed by Aurora Pump Company, thus the defendant does not have a duty to warn of a product that it did not manufacture, supply or specify.

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact, Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). In the context of an asbestos case, the defendant must make a prima facie showing that its product could not have contributed to the causation of plaintiff's injury. Comeau v. W.R. Grace & Co., 216 AD2d 79, 80 (1st Dept. 1995); Reid v. Georgia-Pacific Corp., 212 AD2d 462 (1st Dept. 1995).

The Court also notes that since this is a summary judgment motion, it must view the

evidence in a light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party. Salerno v. Garlock, Inc., 212 AD2d 463, 464 (1st Dept. 1995); Greco v. Boyce, 262 AD2d 734 (3rd Dept. 1999).

The plaintiffs contend that the instant case involves a failure to warn theory which has been asserted against the defendant, Aurora Pump Company. The plaintiffs take the position that the defendant had a duty to warn about the dangers associated with changing gaskets, packing and external insulation with regard to the customary usage of the defendant's pumps. The plaintiff argues that the defendant designed its pumps in a manner which would necessitate continued replacement of the gaskets, packing and external insulation. The plaintiffs assert that the defendant had a duty to warn because of the inherent design features of its pumps. The plaintiff insists that the defendant's pumps could only function properly if the dangerous asbestos containing components were utilized and, thus, the defendant had a duty to warn about the dangers associated with repair and maintenance of its pumps.

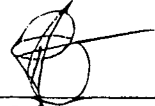
In Berkowitz v. A.C.& S., Inc., 288 AD2d 148 (1st Dept. 2001), the Court denied a pump manufacturer's motion for summary judgment by finding a material issue of fact as to whether the defendant had a duty to warn concerning the dangers of asbestos which it had neither manufactured nor installed on its pumps. The Court also notes that "failure-to-warn liability is very fact specific, including such issues as obviousness of the risk and proximate cause". Rogers v. Sears, Roebuck and Co., 268 AD2d 245 (1st Dept. 2000). In the Rogers case, the Court was not persuaded by the defendant's argument that it had no duty to warn about the hazards of propane where its gas grill could not be used without a propane tank.

As stated in the Rogers case, failure-to-warn cases are very fact specific and will turn upon

the unique factual patterns which are presented in each individual case. In the case at bar, the plaintiffs have raised a sufficient issue of material fact which necessitates the denial of the defendant's motion for summary judgment.

This writing constitutes the Decision and Order of the Court.

Signed this 11th day of September, 2009, at Johnstown, New York.



HON. RICHARD T. AULISI
Justice of the Supreme Court

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Re: *Tuttle et al v. A.W. Chesterton Co., et al*
Index No. 2006-5602

LETTER DECISION

The above-referenced matter is before this court pursuant to defendant, Gardner Denver's motion for summary judgment [New York Civil Practice Law and Rules § 3212]. Opposition to the motion was received by the court on October 11, 2007, a reply affirmation from defendant's counsel was received on October 23, 2007 and sur-reply consented to by defense counsel was received on October 26, 2007 after which decision was reserved without oral argument. Having reviewed the submissions of the parties, for the reasons set forth below, this court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact:

The facts underlying the instant summary judgment motion arise out of the plaintiff's decedent, Paul Tuttle's alleged exposure to asbestos during his service in the United States Navy aboard the USS Wasp, an aircraft carrier from 1963-1965. Mr. Tuttle died prior to providing deposition testimony, and the sole testimony concerning Mr. Tuttle's service and alleged exposure to asbestos aboard the USS Wasp comes from the deposition of a co-worker, Bruce Daigneau. Mr. Daigneau testified that he and the decedent repaired and maintained pumps aboard the USS Wasp, including pumps manufactured by "Warren-Denver"

In support of its motion for summary judgment, counsel for the moving defendant initially argues in sum and substance that plaintiff's co-worker identified Warren Denver rather than Gardner Denver as the manufacturer of the pumps to which the plaintiffs' decedent was allegedly exposed. In essence, conceding the mistaken identity of its product for the purposes of this motion, counsel

for the moving defendant .ther argues:

> However, Gardner Denver, nevertheless refutes the allegations made by Mr. Daigneau with respect to the 'Warren Denver' pumps to which Plaintiff was allegedly exposed.
>
> Mr. Daigneau testified that he was certain that the gaskets Plaintiff touched on the USS Wasp were replacement gaskets made by another defendant manufacturer.
>
> Mr. Daigneau testified that Plaintiff's only exposure to asbestos from 'Warren Denver' pumps would have been from replacement asbestos gaskets.[footnote omitted]. These gaskets replaced the original gaskets that originally came with the pumps.
>
> As set forth in the annexed affidavit of naval expert Tom McCaffery, the Gardner Denver pumps aboard the USS Wasp were water and fire pumps. These pumps were not insulated with external insulation since they were not used for hot applications and the Navy did not, therefore, require that they be insulated. Additionally, as stated by Mr. McCaffery, contrary to Mr. Daigneau's testimony regarding 'Warren Denver' pumps, there were no Gardner Denver pumps in the boiler room of the USS Wasp.
>
> Plaintiff has failed to come forward with admissible evidence to supply a factual basis for his claims against Gardner Denver. On the basis of the evidence, Plaintiff is unable to prove that any product manufactured or sold by Gardner Denver was a proximate cause of Decedent's alleged asbestos-related injury. Gardner Denver is, therefore, entitled to summary judgment as a matter of law.

[Defendant's Counsel's Affirmation in Support of Summary Judgment at ¶¶10-13]. Plaintiff's counsel's opposition to the instant motion primarily consists of citation to the deposition testimony of Bruce Daigneau who observed plaintiffs' decedent: "...maintain[ing] and repair[ing]... the pump, cleaning and brushing the flange gaskets as required[,]" in the "...evaporator space in the number two fire room on the upper level [of the USS Wasp]." [Plaintiffs' Counsel's Affirmation in Opposition to Summary Judgment at ¶ 15]. According to the testimony of Mr. Daigneau:

> Q. Do you associate any asbestos materials with the pump structure?
>
> A Yes, some of the packing was asbestos related and some of the flange gaskets of the internal parts of the pump itself were asbestos flange gaskets.

[Plaintiffs' Counsel's Affirmation in Opposition to Summary Judgment at ¶ 15]. Counsel for the plaintiffs further argues:

> Defendant cannot escape liability by arguing that the gaskets removed and replaced by the decedent were not those originally placed in the pumps by Defendant. Under a failure to warn theory, Defendant may be liable because it placed its product into the market with knowledge that asbestos components would be internally or externally required and utilized for safe and proper operation, yet it failed to warn end-users of the same. Cf. Berkowitz v A.C. & S.. Inc., 288 AD2d 148, 733 NYS2d 410 (1st Dept 2001); Simonetta v Viad Co., 137 Wash App 15, 26 (1st Div 2007); Restatement Second of Torts § 388. Therefore, issues of fact exist as to Defendant's liability.

[Plaintiffs' Counsel's Affirmation in Opposition to Summary Judgment at ¶ 16]. In conclusion, plaintiffs' counsel avers:

> As Defendant concedes, it manufactured Fresh Water Pumps, Fresh Water Booster Pumps, and Fire Pumps aboard the USS Wasp (see Exhibit B hereto [Defendant's production of pumps on various ships]; Exhibit D to Movant Aff, ¶ 5). Moreover, ship records confirm that these pumps were located on the USS Wasp (see

Exhibit C hereto). otably, the Gardner Denver fire pump v. .ocated in the fire room, and Mr. Daigneau testified that he observed the decedent repairing and overhauling pumps in the fire room (Exh A, Page 155:14-17).

Mr Daigneau also stated that he knew these pumps contained asbestos components because it was listed in the instruction manuals. The affidavit of Thomas F. McCaffery only offers competing evidence in a conclusory fashion. See Alexander v Eldred, supra. Indeed, Gardner Denver steam pumps contained asbestos packing (see Exhibit D hereto, Page 10). Thus, issues of fact exist as to whether the decedent was exposed to asbestos from Gardner Denver pumps located on the USS Wasp.

[Plaintiffs' Counsel's Affirmation in Opposition to Summary Judgment at ¶¶ 19-20].

In reply, defendant's counsel argues:[1]

The remaining claim of asbestos exposure from a "Warren Denver" pump, on the basis of the testimony of Mr. Daigneau referenced by plaintiff's counsel in opposition to this motion, asserts that Mr. Tuttle was exposed to asbestos from changing gaskets inside of "Warren Denver" pumps. Importantly, Mr. Daigneau made clear in his testimony that the gaskets inside these pumps were not original with the pump but, rather, were replacement gaskets. He identified another manufacturer, Garlock, as the manufacturer of the gaskets which were used in connection with 'Warren Denver' pumps. Gardner Denver has no corporate affiliation with Garlock. There is no evidence before the Court that Gardner Denver supplied or recommended the use of Garlock Gaskets for its centrifugal water pumps.

Annexed hereto as Exhibit A are specifications for Gardner Denver water pumps which were used aboard the Essex Class of vessel including the USS Wasp. These specifications include the components of the water pumps to which Plaintiff's co-worker referred. As attested to by Thomas McCaffery, naval expert, in the affidavit provided with Gardner Denver's original motion papers, since Gardner Denver's pumps were used to pump water at ambient temperature, the Navy did not require that they be insulated.

Plaintiff's co-worker expressly testified that Plaintiff would not have had occasion to change original gaskets which may have come with the Gardner Denver pump. Rather, the manufacturer of the gasket material utilized by Mr. Tuttle was made by another manufacturer, Garlock. See Exhibit C at 149 annexed to Gardner Denver original motion papers. Mr. Daigneau, Plaintiff's co-worker, made a point of testifying that the gaskets 'wouldn't be the original gasket material that was on that pump when it was installed.' See Exhibit C at 149 annexed to Gardner Denver original motion papers.

The only factually substantiated basis for a claim of asbestos exposure against Gardner Denver, therefore, accepting that Plaintiff's co-worker was referring to Gardner Denver when he named 'Warren Denver' as a pump manufacturer, is the claim that Mr. Tuttle was exposed to internal asbestos-containing gaskets made by another manufacturer.

[Defense Counsel's Reply Memorandum in Support of Summary Judgment at pp.2-3]. Attempting to distinguish the decision of the Appellate Division, First Department in Berkowitz v. A.C.&S., 288

[1] The court agrees with defendant's counsel's assertion that the record before this court is devoid of any evidence that the plaintiffs' decedent was exposed to any lagging or external insulation on Gardner Denver pumps, and accordingly will not consider such exposure in rendering its decision.

A.D.2d 148 (1st Dept. 2001), counsel alleges, in sum and substance that her client owes no duty to the plaintiffs' decedent insofar as:

> ...[I]n the context of product liability law, a manufacturer's duty of care extends to products *it manufactures and sells*. New York case law is consistent with the Restatement of Torts 3d which provides that a manufacturer owes a duty of care with respect to the products it manufacturers. Gardner Denver, a pump manufacturer, owed a duty with respect to its water and fire pumps. No such duty was owed with respect to replacement parts which may have been purchased by the Navy and used in connection with pumps sold by Gardner Denver.
>
> An important distinction between the facts of *Berkowitz* and those before this court is that *Berkowitz* involved a product for which naval specification required the use of asbestos-containing material in connection with the manufacturer's product. The *Berkowitz* Court premised the holding that Worthington owed a duty to warn on the finding that Worthington should have foreseen the use of asbestos insulation in connection with its pumps even though it neither manufactured nor installed the asbestos insulation itself.

[Defense Counsel's Reply Memorandum in Support of Summary Judgment at pp.5-6].
In sur-reply, counsel for the plaintiffs argues that the drawings and specifications attached to defendant's counsel's reply papers indicate that the pumps in question were supplied with two asbestos casing gaskets and that the "Method of Making Joints Hull Piping" also attached to Gardner Denver's reply papers lists asbestos packing for "numerous applications." [Plaintiffs' Counsel's Sur-Reply Affirmation at ¶3]. Counsel concludes: "Thus, Defendant's own submissions establishes that the pumps contained asbestos when sold to the Navy and it was foreseeable to Gardner Denver that they would contain asbestos gaskets when Mr. Tuttle was on the ship." [Plaintiffs' Counsel's Sur-Reply Affirmation at ¶ 3].

Conclusions of Law:

In the instant action, the court, in deciding the motion for summary judgment, has been left with an exercise akin to hitting a moving target, with each submission by the parties setting forth new arguments with respect to their positions. However, distilled to its essence, the court is left with the a single issue, to wit, the duty owed by the moving defendant to plaintiff for asbestos it neither installed or manufactured in its pumps. At the center of each counsel's argument is an interpretation of the Appellate Division, First Department's decision in Berkowitz v. A.C.&S., *et al*, 288 A.D.2d 188 (1st Dept. 2001).

In Berkowitz v. A.C.&S. *et al*, *supra*, the Appellate Division First Department affirmed the denial of summary judgment to Worthington, a pump manufacturer holding:

> ...An issue of fact as to whether these pumps contained asbestos is raised by defendants' admission that Worthington sometimes used gaskets and packing containing asbestos; plaintiff Tancredi's production of a Worthington manual for the power plant where he worked referring to an asbestos component in one of its pumps at the plant; the testimony of defendants' witness that Worthington had 'specifications for sale of product to the government which required asbestos use'; the absence of evidence that Worthington deviated from the government's specifications in the pumps it installed in ships during the relevant time periods; and

> the testimony of certain of plaintiffs that they observed the hand making of asbestos gaskets. Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which Worthington knew would be made out of asbestos (compare, Rogers v Sears. Roebuck & Co., 268 AD2d 245, with Rastelli v Goodyear Tire & Rubber Co., 79 NY2d 289).

Berkowitz v. A.C. and S.. Inc *supra*, at 149-150.

In arguing that the holding in Berkowitz is inapplicable to the instant action, counsel for the defendant posits in her reply memorandum:

> The *Berkowitz* Court made two assumptions critical to its decision. First, it assumed Worthington's pumps could not be operated safely without insulation. Second, it assumed that Worthington should have known that asbestos-containing insulation would be utilized in connection with its pumps. On the basis of both assumptions, the Court concluded Worthington had a duty to warn.
>
> The assumptions which were the basis of the Court' s imposition of a duty to warn make *Berkowitz* factually inapposite. First, Gardner Denver's water pumps did not require asbestos insulation for safe operation as attested to by Mr. McCaffery, naval expert whose affidavit is submitted with Gardner Denver's original motion papers. Second, with respect to the use of another manufacturer's asbestos-containing gaskets, Gardner Denver had no way of knowing such gaskets would be used in connection with its pumps since such replacement gaskets were installed, according to Mr. Tuttle's co-worker, many years after initial installation of the pumps in issue. Further, there is no evidence to suggest that such asbestos-containing gaskets were *required* for use with Gardner Denver water pumps. Thus, the *Berkowitz* Court's imposition of a duty to warn based on the manufacturer's knowledge that asbestos insulation would be used in connection with the product in issue would not be true in this case. Gardner Denver had no control over the selection of the gaskets for the pumps in issue.

[Defense Counsel's Reply Memorandum in Support of Summary Judgment at pp.6-7]. While initially persuasive, the argument with respect to gaskets advanced by defendant, through its counsel are belied by the record before this court[2].

---

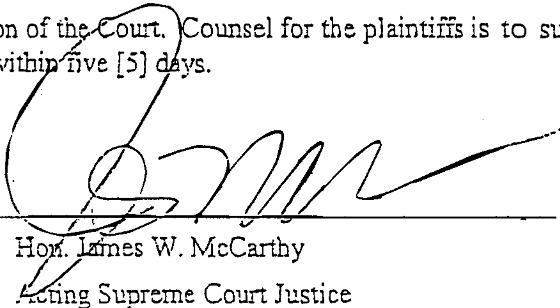
[2]

Defense counsel first alleges that: "First, Gardner Denver's water pumps did not require asbestos insulation for safe operation as attested to by Mr. McCaffery, naval expert whose affidavit is submitted with Gardner Denver's original motion papers"[Defense Counsel's Reply Memorandum in Support of Summary Judgment at p.6]. In his affidavit, Mr. McCaffery identified four pumps manufactured by Gardner Denver aboard the USS Wasp, two freshwater booster pumps and two emergency fire pumps. With respect to these four pumps, "...naval specifications did not require thermal insulation for the exterior of the pumps since they did not pump water exceeding 125

In the instant action, counsel in her Reply Memorandum argues that: "Further, there is no evidence to suggest that such asbestos-containing gaskets were *required* for use with Gardner Denver water pumps." [Defense Counsel's Reply Memorandum in Support of Summary Judgment at pp.6-7]. However, in defendant's expert's affidavit in support of summary judgment, Thomas McCaffery avers: "The US Navy plans for Emergency Fire and Fresh Water Booster Pumps called for casing gaskets composed of compressed asbestos sheet."[Affidavit of Thomas McCaffery at ¶ 8] [emphasis added]. Further, attached to defendant's reply papers are drawings for fresh water booster pumps, which include in the materials' list, asbestos gaskets as part of the original design of the pump, as well as asbestos casing gaskets as part of materials' list entitled "Method of Making Joints Hull Piping." [see, Exhibit A to Defense Counsel's Reply Memorandum in Support of Summary Judgment].

Thus, in light of the foregoing, the court finds, despite defendant's counsel's protestations to the contrary, that there are issues of fact with respect to defendant's liability, precluding entry of summary judgment in favor of the defendant, and accordingly, defendant, Gardner Denver's motion for summary judgment is, in all respects denied.

The foregoing constitutes the Letter Decision of the Court. Counsel for the plaintiffs is to submit an Order consistent herewith for signature within five [5] days.



Hon. James W. McCarthy
Acting Supreme Court Justice

Dated: November 15, 2007
at Oswego, New York.

degrees Fahrenheit." [Affidavit of Thomas McCaffery at ¶ 7]. However, this is not, as defendant's counsel would perhaps urge the end of the court's analysis and inquiry.

James W. McCarthy
Supreme Court Justice

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Re: *Cobb v. A.O. Smith Water Products, et al*
Index No. 10-3677

LETTER DECISION AND ORDER

The above-referenced matter is before this court pursuant to defendant, Crane Co.'s motion for summary judgment [New York Civil Practice Law and Rules § 3212]. Upon receipt of the reply papers, this matter was taken on submission without oral argument. Having reviewed the submissions of the parties, for the reasons set forth below, this court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact:

The facts underlying the instant motion arise out of plaintiff's James Cobb's alleged exposure to asbestos containing products during the course of his employment at the Schoeller Paper Mill in Pulaski, New York where he was employed from 1966 to 2006. Mr. Cobb worked on the cook's crew, coater crew, service lift truck operator, and beginning in 1972 he worked in the warehouse as a forklift driver and raw material coordinator.

In support of its motion for summary judgment, counsel for the defendant concedes, for the purposes of this motion that Mr. Cobb was exposed to asbestos from mechanics removing asbestos containing packing from Crane Co. valves. Counsel for the defendant argues, however, insofar as Crane Co. "...did not manufacture or supply any product that released asbestos fibers to which Mr. Cobb may have been exposed[,]" [Defense Counsel's Affirmation in Support of Summary Judgment at ¶ 8], it is not liable to the plaintiff. More specifically, counsel argues that it did not supply the packing

in the Crane Co. valves, did not design the system into which the valves were integrated, and did not specify that replacement packing for valves be composed of asbestos, that therefore, as a matter of law, it cannot be held responsible for the alleged injuries suffered by Mr. Cobb. Counsel further avers:

> As supplied originally, certain Crane Co. valves may have contained internal seals, such as packing materials, which may have incorporated some asbestos as part of their chemical composition... Nevertheless, those seals would have been changed over time and replaced with seals of the customer's choosing, which, since the valves did not require asbestos containing seals to function properly, could have or could not have contained asbestos, depending on what the customer chose.

[Defense Counsel's Affirmation in Support of Summary Judgment at ¶ 10].

In opposition, counsel for the plaintiff, argues in sum and substance that the record before this court establishes both the existence of the defendant's valves at Schoeller Paper, and also plaintiff's exposure to asbestos containing packing materials in both new and replacement valves manufactured by the moving defendant. Counsel argues that Mr. Cobb specifically identified Crane Co. as the manufacturer of valves to which he was exposed, and that he was in the presence of mechanics when they maintained [tore down], replaced existing valves by installing new valves manufactured by the moving defendant, and that such work exposed him to asbestos. With respect to the argument that defendant owes no duty for exposure to asbestos containing packing materials it neither manufactured or supplied, counsel for the plaintiff relies on the Appellate Division, First Department's decision in Berkowitz v. A.C.& S., 288 A.D.2d 188 (1st Dept. 2001), and several unreported trial court decisions from this state, including this court, establishing moving defendant's responsibility under the circumstances of the instant action.

In reply, counsel for the moving defendant reiterates her position that it bears no responsibility for gaskets and packing materials it neither manufactured, designed supplied or was installed by others in conjunction with its product, and to hold defendant liable under such circumstances would run afoul of well established New York appellate precedent as well as an emerging national trend absolving manufactures from liability for replacement parts.

Conclusions of Law:

It is well settled that on a motion for summary judgment, the defendant bears the initial burden of establishing that its product: "...could not have contributed to the causation of the plaintiff's injuries." Shuman v. Abex Corporation, *et al.*, 267 A.D.2d 1077 (4th Dept. 1999) citing, Shuman v. Abex Corp., 266 A.D.2d 878 (4th Dept. 1999); Matter of Eighth Judicial Dist. Asbestos Litigation [Takacs v. Asbestospray Corporation, *et al*], 255 A.D.2d 1002 (4th Dept. 1998); see also, Root v. Eastern Refractories Co., Inc., 13 A.D.3d 1187(4th Dept. 2004); In re New York City Asbestos Litigation [Comeau v. W.R. Grace & Co., *et al*], 216 A.D.2d 79 (1st Dept. 1994);[1] Reid v.

[1] "To go forward with a motion for summary judgment, the defendant had to make a *prima facie* showing that its product could not have contributed to the causation of plaintiff's injury [citation omitted]" In re New York City Asbestos Litigation [Comeau v. W.R. Grace & Co., *et al*], *supra* at 80.

Georgia-Pacific Corporation, 212 A.D.2d 462 (1st Dept. 1995).

In support of its motion for summary judgment, Crane Co. does not argue that the plaintiff was not exposed to asbestos in the vicinity of its product, nor does it argue that its products to which the plaintiff was exposed did not contain asbestos, rather it argues that the asbestos to which plaintiff was exposed was neither manufactured, or specified by it. In Berkowitz v. A.C. and S., Inc. 288 A.D.2d 148, 150(1st Dept. 2001), the Appellate Division First Department held:

> An issue of fact as to whether these pumps contained asbestos is raised by defendants' admission that Worthington sometimes used gaskets and packing containing asbestos; plaintiff Tancredi's production of a Worthington manual for the power plant where he worked referring to an asbestos component in one of its pumps at the plant; the testimony of defendants' witness that Worthington had "specifications for sale of product to the government which required asbestos use"; the absence of evidence that Worthington deviated from the government's specifications in the pumps it installed in ships during the relevant time periods; and the testimony of certain of plaintiffs that they observed the hand making of asbestos gaskets. Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which Worthington knew would be made out of asbestos (compare, Rogers v Sears, Roebuck & Co., 268 AD2d 245, *with* Rastelli v Goodyear Tire & Rubber Co., 79 NY2d 289).

Id. at150.

In the instant action, counsel for the defendant attempts to distinguish the Berkowitz decision, arguing in part that the decision is distinguishable from the instant action insofar as it did not supply the packing in the Crane Co. valves, did not design the system into which the valves were integrated, and did not specify that replacement packing for valves be composed of asbestos. As more fully set forth above, counsel concedes that certain valves manufactured by the moving defendant may have contained internal seals [packing materials] composed of asbestos, however, she argues that such seals would have been changed over time and replaced by seals of the customer's choosing. However, the assumption that the asbestos containing packing to which the plaintiff was exposed during the maintenance, repair and replacement of valves manufactured by Crane Co. is not based on any evidence in the record, only conjecture and surmise that any original packing must have, through routine maintenance, been replaced prior to Mr. Cobb's exposure[2].

2

On the record before this court there is no evidence as to the frequency with which the valves were replaced at Schoeller Paper, and thus whether the packing to which he was exposed was original to a valve, and thus supplied by the moving defendant. Most recently, the same observation was made concerning the sufficiency of identical evidence by Justice Lane [see, Lawrence J. Potter v. Crane Co., *et al*, —Misc.2d—, Supreme Court, Erie Co. March 31, 2011 [Index No. 138620] [NOR]].

In light of the foregoing, the court finds that plaintiffs have clearly established that the decedent was exposed to asbestos packing materials while working in the vicinity of valves manufactured by the moving defendant. Furthermore, defendant has failed to distinguish the Appellate Division's decision in Berkowitz, as well as trial court decisions from this court and others throughout New York State[3]. Therefore, the defendant has failed to establish as a matter of law that it had no duty to warn plaintiff with respect to its identified products, specifically with respect to packing materials and accordingly denies defendant's motion for summary judgment.

The foregoing constitutes the Letter Decision and Order of the Court. Counsel for the plaintiffs is to file and serve this Letter Decision and Order together with Notice of Entry on remaining defense counsel of record.

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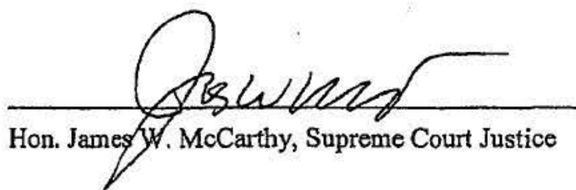

Hon. James W. McCarthy, Supreme Court Justice

Dated: April 13, 2011
at Oswego, New York.

3

This court notes that counsel for the defendant does not attempt to distinguish the instant action from this court's previous decision in McCann Asbestos Matter, — Misc.3d—, (Onondaga County Index No. 2008-7986) January 28, 2010 (N.O.R.), rejecting an almost identical claim, or Justice Lanes' decision in Webb v. A.O. Smith Water Products, et al, —Misc.3d— (Erie County Index No. 2008-9199) January 25, 2010, (N.O.R.). While this court is cognizant of a number of other jurisdictions supporting defendant's argument in the instant action, it finds that Berkowitz, until overruled is still controlling.

James W. McCarthy
Supreme Court Justice

SUPREME COURT CHAMBERS
Oswego, New York

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Oswego, New York 13126
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March 30, 2011

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350 Main Street, Suite 1400
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Re: *Cobb v. A.O. Smith Water Products, et al*
Index No. 10-3677

LETTER DECISION AND ORDER

The above-referenced matter is before this court pursuant to defendant, Clark Reliance Corporation's [hereinafter Clark Reliance] motion for summary judgment [New York Civil Practice Law and Rules § 3212]. Upon receipt of the reply papers, this matter was taken on submission without oral argument. Having reviewed the submissions of the parties, for the reasons set forth below, this court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact:

The facts underlying the instant motion arise out of plaintiff James Cobb's alleged exposure to asbestos containing products during the course of his employment at the Schoeller Paper Mill in Pulaski, New York where he was employed from 1966 to 2006. Mr. Cobb worked on the cook's crew, coater crew, service lift truck operator, and beginning in 1972 he worked in the warehouse as a forklift driver and raw material coordinator.

In support of its motion for summary judgment, counsel for the defendant Clark Reliance argues that:

> Despite comprehensive testimony elicited and the specific identification of several manufacturers and suppliers by name, Mr. Cobb absolutely failed to identify any contact with or exposure to any asbestos containing product manufactured, sold or distributed by this defendant.

[Defendant's Counsel's Affirmation in Support of Summary Judgment at ¶7]. In further support, counsel for the moving defendant argues that Mr. Cobb's testified that he never personally worked

on any equipment in the boiler room, where its product was allegedly located, and that there is no specific testimony with respect to exposure to asbestos from a product it manufactured sold or distributed. Lastly, counsel argues that it is not disputed that the moving defendant was not identified by name by plaintiff in response to interrogatories, thus satisfying the moving defendant's burden on the instant motion.

In opposition, plaintiffs' counsel first citing to the deposition testimony of Mr. Cobb argues that the record before this court establishes his exposure to asbestos in the boiler room at Schoeller Paper. Specifically, counsel alleges that Mr. Cobb received and delivered asbestos containing valves and pumps to various places in the plant. In addition, Mr. Cobb worked two weeks a year of overtime in what he referred to as a shutdown including work in the boiler room. Mr. Cobb further testified that he was exposed to asbestos when he delivered and removed parts from the boiler room during the shutdowns, and that during this time, equipment was shut down, torn apart and overhauled in his presence. This work included work on valves using gaskets and packing, and that this shutdown took place virtually each year during his tenure at Schoeller.

In addition to the foregoing, counsel for the plaintiffs proffers several documents produced by plaintiff's former employer Schoeller Paper, which he alleges establishes the presence of moving defendant's asbestos containing products in the boiler room at the plant. Lastly, counsel proffers the affidavit of Douglas Towles, who specifically identifies Clark Reliance as the manufacturer of asbestos containing valves, regulators and gages utilized on the boilers at Schoeller Paper, as well as affirming Mr. Cobb's presence during the shutdown and his exposure from dust created by maintenance on the moving defendant's product.

Defendant's reply is both procedural and substantive. Counsel first argues that this court should not consider the affidavit of Mr. Cobb's co-worker, insofar as plaintiff's counsel failed to identify him in conformance with this court's scheduling order, or in response to a specific demand in the standard interrogatories. Further, counsel argues that plaintiffs filed the Trial Note of Issue on December 30, 2010, certifying that all discovery was complete. In light of this counsel argues that to allow consideration of the proffered affidavit would allow plaintiffs to ambush the moving defendant. In the alternative, counsel argues that if this court were to consider the affidavit, that Clark Reliance is nevertheless entitled to summary judgment insofar as there is no evidence that the plaintiff was exposed to any asbestos-containing products manufactured by the moving defendant, only replacement asbestos containing packing and gaskets that were not manufactured by it.

Conclusions of Law:

As defense counsel correctly posits, in deciding the motion before it, it is axiomatic that:

> ...[The] failure of plaintiffs to name IDI as a supplier in their response to interrogatories constitutes an admission that IDI was not a source of an asbestos-containing product to which plaintiff was exposed (see Bigelow v. Acands, Inc., 196 A.D.2d 436, 439; see also United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 264; Smith v. Kuhn, 221 A.D.2d 620), and IDI thus established that plaintiffs' action against it has no merit (see generally CPLR 3212 [b]).

Gorzka v. Insulation Distributors, Inc., 28 A.D.3d 1191, 1192 (4th Dept. 2006). In the instant action, it is not disputed by plaintiffs' counsel that the moving defendant was not identified in his client's discovery responses, nor was either identified either during Mr. Cobb's examination before trial or

de bene esse video deposition, thus shifting the burden to the plaintiff to: "'show facts sufficient to require a trial of any issue of fact' (CPLR 3212[b]; see, Zuckerman v. City of New York, 49 N.Y.2d 557, 562)." In re Eighth Judicial Dist. Asbestos Litigation, 269 A.D.2d 749, 750 (4th Dept. 2000). To that end, "...[P]laintiff must allege facts and conditions from which the defendant's liability may reasonably be inferred, **that is, that plaintiff worked in the vicinity where defendant's products were used, and that plaintiff was exposed to defendant's product** (Cawein v. Flintkote Company, 203 A.D.2d 105, 105-106)." In re New York City Asbestos Litigation [Comeau v. W.R. Grace & Co., *et al*], 216 A.D.2d 79, 80 (1st Dept. 1994)[emphasis added].

As more fully set forth above, it cannot be disputed that Mr. Cobb worked in the vicinity of boilers at Schoeller Paper during time periods when the boilers were shut down, torn apart and overhauled, and that in his opinion such work exposed him to asbestos during the replacement of packing and valves. While he was unable to specifically identify the manufacturer of the valves, this court does not find that such failure is fatal to his claim, insofar as documents produced by his former employer identify the moving defendant as the manufacturer of asbestos containing components of the boilers at Schoeller Paper. [see, Lonnen v. A.O. Smith Water Products, et al, — Misc.3d—, [Supreme Court, Erie County May 24, 2007, Index No. 54149[NOR]], Young v. A.O. Smith Water Products, et al., —Misc.3d— [Supreme Court, Chemung Co., February 1, 2005, Index No. 2003-1506]. Thus in light of the foregoing and two well reasoned decisions cited above, on the record before it, this court finds that the plaintiffs' opposition papers raise a reasonable inference that "...plaintiff worked in the vicinity of where the products of defendant[]... were being used, and that he was exposed to defendant's product [citation omitted]." In re New York City Asbestos Litigation [Salerno v. Garlock, Inc.], 212 A.D.2d 463, 464 (1st Dept. 1995); see also, Berkowitz v. A.C. and S., Inc., 288 A.D.2d 148 (1st Dept. 2001); Lloyd v. W.R. Grace & Co.-Conn., 215 A.D.2d 177 (1st Dept. 1995); Petteys v. Georgia Pacific Corp., 214 A.D.2d 363,(1st Dept. 1995).

In the alternative, counsel for the moving defendant argues that summary judgment is appropriate insofar as the record is bereft of any evidence that Mr. Cobb was exposed to any asbestos components that it either manufactured or supplied. In essence, counsel argues that any exposure to packing and gaskets by the plaintiff were to replacement parts, and as such, as a matter of law, it bears no responsibility to the plaintiff. In Berkowitz v. A.C. and S., Inc. 288 A.D.2d 148, 150(1st Dept. 2001), the Appellate Division First Department held:

> An issue of fact as to whether these pumps contained asbestos is raised by defendants' admission that Worthington sometimes used gaskets and packing containing asbestos; plaintiff Tancredi's production of a Worthington manual for the power plant where he worked referring to an asbestos component in one of its pumps at the plant; the testimony of defendants' witness that Worthington had "specifications for sale of product to the government which required asbestos use"; the absence of evidence that Worthington deviated from the government's specifications in the pumps it installed in ships during the relevant time periods; and the testimony of certain of plaintiffs that they observed the hand making of asbestos gaskets. Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain

specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which Worthington knew would be made out of asbestos (compare, Rogers v Sears, Roebuck & Co., 268 AD2d 245, with Rastelli v Goodyear Tire & Rubber Co., 79 NY2d 289).

Id. at150.

In the instant action, there is no citation to or mention of the Berkowitz decision by defendant's counsel in his reply papers, rather counsel relies on three unreported trial court decisions in support of his position. Here, the records produced by plaintiff demonstrate both the existence of defendant's products in the vicinity of Mr. Cobb and that such products contained asbestos. As the court has previously repeatedly ruled in the past, the fact that the alleged exposure was to "replacement" parts is, standing alone, insufficient to absolve the defendant of liability [see, See, Dec v. 84 Lumber Company, et al., — Misc.3d.—, Onondaga County Index No. 2008-7223, June 15, 2010 [NOR]; See, Tuttle v. A.W. Chesterton, et al, — Misc.3d—, Onondaga County Index No. 2006-5602, November 15, 2007 [NOR], Pokorney v. Foster Wheeler, —Misc.3d—, Onondaga County Index No. 2006-3087, December 4, 2008 [NOR]].

In light of the foregoing, the court finds that plaintiffs have clearly established that the decedent was exposed to asbestos packing materials while working on valves manufactured by the moving defendant. Furthermore, defendant has failed to distinguish the Appellate Division's decision in Berkowitz, and to establish, through admissible evidence that it had no duty to warn Mr. Cobb with respect to its identified products, specifically with respect to gaskets and packing materials, and accordingly denies defendant's motion with respect to the two identified components.

Thus, defendant, Clark Reliance Corporation's motion for summary judgment [New York Civil Practice Law and Rules § 3212] is in all respects **DENIED.**

The foregoing constitutes the Letter Decision and Order of the court, to be filed and served by plaintiffs' counsel with Notice of Entry on remaining defense counsel of record.

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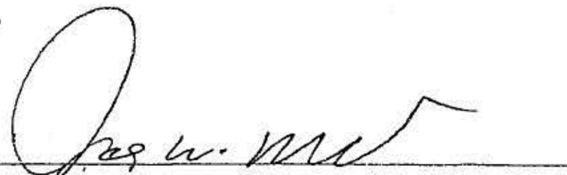

Hon. James W. McCarthy
Supreme Court Justice

Dated: March 30, 2011
at Oswego, New York.

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

ANNE M. FORTH, Individually and
as Executrix of the Estate of MAURICE
P. FORTH, Deceased,

Plaintiffs,

DECISION
AND ORDER

-vs-

Index #2008-0491
RJI #46-1-08-0405

CRANE CO., et al.,

Defendants.

The plaintiff, Maurice P. Forth, commenced the within action to recover damages for personal injuries resulting from his exposure to various asbestos containing products. The plaintiff commenced this action on March 18, 2008, by filing a summons and complaint in the Schenectady County Clerk's Office. Issue was subsequently joined and discovery has been conducted pursuant to an expedited discovery schedule.

The plaintiff, Maurice P. Forth, died on April 13, 2008. Anne M. Forth was substituted as Executrix of the Estate of Maurice P. Forth.

The defendant, Crane Co., has now made a motion for summary judgment dismissing plaintiffs' complaint and all cross claims asserted against it pursuant to CPLR §3212. The defendant seeks summary judgment on the theory that it is not liable for products it did not manufacture, supply or specify for use with its valves. The defendant asserts that it merely manufactured valves and pumps which were made of metal, and different entities manufactured the asbestos containing components which were incorporated into the pumps and valves, or the external insulation which surrounds the pumps and valves.

The plaintiff's decedent, Maurice P. Forth, was born on [redacted] 1939, and was approximately 68 years of age at the time of his death. For the purposes of this motion the plaintiffs have alleged that he was exposed to asbestos containing materials while working at the Knolls Atomic Power Labs in Schenectady, New York.

The defendant, Crane Co., alleges that its products are not defective. The defendant claims that its valves and pumps are made of metal and, as such, could not release any asbestos. The defendant further asserts that the materials described by the plaintiff: exterior insulation; flange gaskets and packing materials, were not manufactured or supplied by the defendant.

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact, Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). In the context of an asbestos case, the defendant must make a prima facie showing that its product could not have contributed to the causation of plaintiff's injury. Comeau v. W.R. Grace & Co., 216 AD2d 79, 80 (1st Dept. 1995); Reid v. Georgia-Pacific Corp., 212 AD2d 462 (1st Dept. 1995).

The Court also notes that since this is a summary judgment motion, it must view the evidence in a light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party. Salerno v. Garlock, Inc., 212 AD2d 463, 464 (1st Dept. 1995); Greco v. Boyce, 262 AD2d 734 (3rd Dept. 1999).

In response to the defendant's motion, the plaintiff relies upon the deposition testimony of Patrick A. Cerqua. Mr. Cerqua testified that he was a co-worker of Mr. Forth and that they worked together from 1960 to 1967 in the Heat Transfer Group at the Knolls Power facility. Mr.

Cerqua described Mr. Forth's work with and around the pumps and valves of the defendant Crane Co.. Mr. Cerqua had specific recollections of the defendant's pumps and valves being in the high temperature systems at Knolls.

The plaintiffs contend that the instant case involves a failure to warn theory which has been asserted against the defendant, Crane Co. The plaintiffs take the position that the defendant had a duty to warn about the dangers associated with changing gaskets, packing and external insulation with regard to the customary usage of the defendant's pumps and valves. The plaintiff argues that the defendant designed its valves in a manner which would necessitate continued replacement of the gaskets, packing and external insulation. The plaintiffs assert that the defendant had a duty to warn because of the inherent design features of its product. The plaintiff insists that the defendant's valves and pumps, which were utilized in high temperature settings, could only function properly if the dangerous asbestos containing components were utilized and, thus, the defendant had a duty to warn about the dangers associated with repair and maintenance of its valves and pumps. The Court notes that the defendant disputes this contention and asserts that the valves and pumps can operate without asbestos.

In Berkowitz v. A.C. & S., Inc., 288 AD2d 148 (1st Dept. 2001), the Court denied a pump manufacturer's motion for summary judgment by finding a material issue of fact as to whether the defendant had a duty to warn concerning the dangers of asbestos which it had neither manufactured nor installed on its pumps. The Court also notes that "failure to warn liability is very fact specific, including such issues as obviousness of the risk and proximate cause". Rogers v. Sears, Roebuck and Co., 268 AD2d 245 (1st Dept. 2000). In the Rogers case, the Court was not persuaded by the defendant's argument that it had no duty to warn about the hazards of

propane where its gas grill could not be used without a propane tank.

As stated in the Rogers case, failure to warn cases are very fact specific and will turn upon the unique factual patterns which are presented in each individual case.

In the case at bar, Crane, for the purpose of this motion, acknowledges the inherent dangers of asbestos products when used in conjunction with its valves and pumps. Although Crane claims that its pumps and valves could work without asbestos containing materials, the defendant has failed to establish that the pumps and valves which Mr. Cirqua described at the Knolls facility, could operate effectively in the high temperature settings without asbestos containing materials. The Court also notes that the defendant does not claim that the original pumps and valves which were described by Mr. Cirqua were free of asbestos containing materials at the time of their original installation at the Knolls facility. In view of the specific facts of this case, the plaintiffs have raised a sufficient issue of material fact which necessitates the denial of the defendant's motion for summary judgment.

This writing constitutes the Decision and Order of the Court.

Signed this 12th day of September, 2011, at Johnstown, New York.

HON. RICHARD T. AULISI
Justice of the Supreme Court

ENTER

SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In the Matter of the Eighth Judicial District Asbestos Litigation

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

LAWRENCE K. POTTER , as Executor of the Estate of
LAWRENCE IRVING POTTER, deceased and
JANELLE RUTH POTTER, Individually,

Plaintiffs

-v-

DECISION AND ORDER
Index No. 138620

A. W. CHESTERTON, et al.,

Defendants

BEFORE: HON. JOHN P. LANE
Judicial Hearing Officer

APPEARANCES: BELLUCK & FOX , LLP
Attorneys for Plaintiffs
By: Seth A. Dymond , Esq.

K & L GATES, LLP
Attorneys for Defendant Crane Co.
By: Eric R.I. Cottle, Esq.

The Court has considered the following papers: notice of motion,dated July 23, 2010, by defendant Crane Co.; supporting affirmation of Eric R.I. Cottle, Esq., dated July 23, 2010 ; affirmation in opposition of Seth A. Dymond, Esq.; dated August 6, 2010; reply affirmation of Eric R.I. Cottle, Esq., dated August 20, 2010.

This is an action for damages arising from Lawrence Irving Potter's exposure to asbestos brought by Lawrence L. Potter, his son and executor and Janelle Ruth Potter ,his widow. Defendant Crane Co. (Crane), a manufacturer of valves, moves for summary judgment.[1] To the extent relevant to this motion, decedent was exposed to asbestos during the course of his employment as a pipefitter helper / insulation helper at the DuPont plant in Niagara Falls, New York during 1954- 1956.

Decedent was deposed for six days days, and his trial testimony was videotaped [2]. As conceded by defendant , decedent testified about his work with Crane valves, and his resultant exposure to asbestos- containing material, including packing, gaskets and external insulation. It is clear from the testimony that decedent worked with asbestos-containing materials on both interior and exterior of the valves.

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[1] On or about March 11, 2011 , it was agreed to submit this motion, which had been held in abeyance, without oral argument.

[2] The EBT took place on November 3, 4, 5, 6, 18and 19, August 18, August 19 and August 20, 2009. Fortunately, the transcripts are numbered consecutively. The video-taped trial testimony took place on October 1, 2009.

For example, he testified to performing maintenance work on valves utilizing asbestos- containing materials, replacing gaskets and repacking valves with new material. He also testified to insulating valves with asbestos "mud".

Defendant Crane again asks this court to rule, as a matter of law, that "it is not liable for packing, gaskets, and/or external insulation, manufactured, designed, supplied, and installed by others and used in conjunction with its valves" asserting that 'it is undisputed that Mr. Potter was never exposed to asbestos fibers emitted from a product that was manufactured or supplied by Crane Co. " (Cottle aff. ¶ 3 ¶4) . However, it concedes that " ..certain of those [Crane] valves may have incorporated components as shipped originally-- primarily gaskets and packing- that may have contained asbestos" (*id.*, ¶ 4.) and that " [a]s supplied originally, certain Crane valves may have contained internal seals , such as gaskets or packing material, that may have incorporated some asbestos " (*id.*,¶ 10).

These arguments have been made to this court several times. In *Matter of Eighth Jud. Dist. Asbestos Litig. [Coon*, (Sup Ct, Erie County , Jan.25, 2009, Index No. I 2008-9199), a near-identical motion for summary judgment made by Crane was denied . In *Matter of Eighth Jud. Dist. Asbestos Litig. [Dickman] (*Sup Ct, Erie County , Sept. 16, 2010, Index No. I 2008-12697), in which Crane again asserted the same argument as made here, concerning exterior insulation (although applied to pumps not valves) , this court assessed the duty to warn, applicable here

and repeated below. Recently, the relief requested here was denied in *Matter of Eighth Jud. Dist. Asbestos Litig. [Klas] (*Sup Ct, Erie County , October 6, 2010, Index No. I 2009-8338) and less exhaustively in *Matter of Eighth Jud. Dist. Asbestos Litig. [Skindell] (*Sup Ct, Erie County, October 6, 2010, Index No. I 2010-2411) . The motion is denied for the same reasons and in similar language.

As this court has noted numerous times, it is well established in asbestos litigation that to go forward with a motion for summary judgment dismissing a complaint, a defendant must present admissible evidence showing that the complaint has no merit (*see Diel v Flintkote Co.,* 204 AD2d 53 [1994]), or affirmatively establish the merit of its defense (*see Higgins v Pope*, 37 AD3d 1086 [2007]; *Refermat v A. C. AND S., Inc.*, 15 AD3d 928 [2005]; *Root v Eastern Refractories Co., Inc.*, 13 AD3d 1187 [2004]; *Matter of Eighth Jud. Dist. Asbestos Litig. [Takacs]*, 255 AD2d 1002 [1998]; *Reid v Georgia-Pacific Corp.,* 212 AD 2d 462 [1995]). A party moving for summary judgment cannot meet its burden by merely noting gaps or weakness in its opponent's proof (*see Allen v General Elec. Co.*, 32 AD3d 1163, 1165 [2006], *citing Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [1995]; *Edwards v Arlington Mall Assocs.*, 6 AD3d 1136 [2004]).

To shift the burden to plaintiff, defendant must make a prima facie showing that its products could not have contributed to the causation of decedent's illness (*see Refermat, Root, Matter of Eighth Jud. Dist. Asbestos Litig. [Takacs]*, 255 AD2d

1002 [1998) Clearly, Crane does not meet these standards. For example it admitted that its valves may have contained asbestos as originally shipped and even if it did, the record is replete with issues of fact requiring resolution by a jury. Further , Crane contends that the original asbestos it supplied in, on or with the valves would have been changed by the time Mr. Potter worked in repairing or maintaining the valves and therefore, he was not replacing Crane's product. There is no evidence in the record to support this theory.

Crane's primary contention on this motion is that it is not responsible for asbestos- containing replacement parts or external insulation. This contention does not comport with New York law or this court's prior decisions.

It is well established in New York law that " [a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY 2d 232,237 [1998] *citing Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992]). 'A manufacturer also has a duty to warn of the danger of unintended uses of a product provided those uses are reasonably foreseeable." (*Liriano at 237 citations omitted*) "A manufacturer or retailer may ... incur liability for failing to warn concerning dangers in the use of a product which come to is attention after manufacture or sale..." *(Cover v Cohen,* 61 NY2d 261, 274 [1984]).

As noted in the *Dickman* decision, "[f]ailure to warn liability is intensely fact-

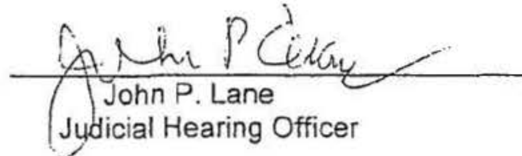
specific" (*Liriano* at 243). Crane's assertions: that its valves did not need packing, gaskets or insulation to operate properly (even though it admits that Crane valves may have been contained asbestos-containing gaskets and packing as supplied); that it did not specify the use of insulation on its valves; and that it did not specify replacement parts are insufficient to relieve it of its obligation to warn on this record.

Crane's suggestion this court follow out of state precedents is rejected. Persuasive authority in this state includes: *Berkowitz v A.C.and S., Inc.* , 288 AD2d 148 (2001); the decision of Justice Richard Aulisi in *Brinson v Aurora Pump*(Sup Ct, Warren County, Sept. 11, 2009, Index No. 21789); Justice Ann Marie Tadddeo's oral ruling in *Stadt v Buffalo Pumps, Inc.*(Sup Ct, Monroe County , November 20, 2008, Index no. 08/3680) and Judge James W. McCarthy's letter decision in *Tuttle v. A.W. Chesterton* (Sup Ct, Oswego County, November 15, 2007, Index No 2006- 5602).

Defendant's motion is denied.

SO ORDERED

Dated: Buffalo, New York
March 31, 2011



John P. Lane
Judicial Hearing Officer

March 31, 2011

STATE OF NEW YORK
SUPREME COURT **COUNTY OF BROOME**

IN RE: SIXTH JUDICIAL DISTRICT
ASBESTOS LITIGATION

EDWARD R. SCHMERDER,

Plaintiff,

vs. **Index No. CA2010-000927**

A.W. CHESTERTON COMPANY, et al.,

Defendants.

BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice

APPEARANCES: WEITZ & LUXENBERG, P.C.
By: Adam Cooper, Esq.
Attorneys for Plaintiffs
700 Broadway
New York, New York 10003

K & L GATES, LLP
By: Eric R.I. Cottle, Esq.
Attorneys for Defendant Crane Co.
599 Lexington Avenue
New York, New York 10022

HISCOCK & BARCLAY
By: Linda J. Clark, Esq.
Liaison Counsel for Defendants
80 State Street
Albany, New York 12207

DECISION & ORDER

Mulvey, Robert C., J.

In this personal injury action arising out of alleged exposure to asbestos, the defendant Crane Co. has moved pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it. The plaintiff has submitted papers in opposition to said motion.

The record reflects that, from 1975 to 1978, the plaintiff, Edward Schmerder, worked as a boiler tender at the Goudey Power Plan for New York State Electric Corporation. His duties included repair and replacement of valves used in connection with the boilers. Mr. Schmerder testified that he believed that he was exposed to asbestos from installing and removing external insulation (cement) and working with packing rope and flange gaskets associated with valves manufactured by Crane Co. and Pacific Valves, a predecessor.

Defendant Crane Co. (hereinafter "Crane") contends it is entitled to summary judgment on the ground that the plaintiff has failed to come forward with any admissible evidence that he was exposed to asbestos fibers released by a Crane product. Crane also argues that it is not liable for flange gaskets, packing and external insulation manufactured, designed or supplied by a third-party and installed or used and handled by the plaintiff in connection with work that he performed on Crane valves that were present at his work site, the Goudey Power Plant.

Crane asserts that there is no evidence that the plaintiff was exposed to asbestos fibers emitted from a product that was manufactured or supplied by Crane or that any other gaskets, packing or external insulation used by the plaintiff in connection with the repair and replacement work he performed on Crane valves actually contained asbestos. Crane points to deposition testimony of the plaintiff where he acknowledged that, during the time he performed work on Crane valves, he did not have any first hand knowledge that the gaskets, packing and insulation materials that he used contained asbestos. Crane argues that any suggestion that the materials identified by the plaintiff exposed him to asbestos is purely speculative and inadequate to support the plaintiff's claim against Crane and that such lack of evidence on a material point warrants that Crane's motion for summary judgment be granted, citing Brisco-Reed v. Silicon Valley Group, 6 A.D.3d 564.

Crane also contends that, even if the plaintiff has established that he worked with asbestos causing materials, Crane is not liable, since it did not manufacture or supply any product that may have released asbestos fibers to which the plaintiff claims he was exposed. Crane makes reference to portions of the plaintiff's deposition testimony where he acknowledged that he did not know the manufacturer of the gaskets, packing and insulation materials that he used in connection with his repair and replacement work on the Crane and/or Pacific valves, that the materials he used were given to him by his employer, that decisions regarding what materials he would use and how to apply them were made by his employer and that he was not aware of the

age, maintenance history or service history of the valves that he worked on at the Goudey Power Plant. Crane asserts that the question of whether one owes a legal duty is a question of law for the courts and argues that it has no liability in this instance since a manufacturer of industrial equipment owes no legal duty with respect to asbestos-containing materials made or supplied by third-parties that are used with the manufacturer's equipment post-sale, relying primarily upon Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289; Braaten v. Saberhagen, 165 Wash.2d 373, 385-388; and Kosowski v. A.O. Smith Water Products, et al., Index No. 000128/2010 [Sup. Ct., Oneida Co., McCarthy, J., Jan. 5. 2011].

Plaintiff opposes Crane's motion for summary judgment and contends that Crane has failed to demonstrate its entitlement to summary judgment as a matter of law. The plaintiff argues that the record contains evidence that is sufficient to raise questions of fact as to whether he was exposed to asbestos from asbestos-containing products manufactured or supplied by Crane and/or from asbestos-containing products that were manufactured or supplied by third-parties that were used in conjunction with Crane valves. The plaintiff points to his deposition testimony that he performed repair and replacement work on valves manufactured by Crane and Pacific and that he believed that the flange gaskets, packing rope and exterior insulation cement all contained asbestos. The plaintiff also points out that the record contains answers to interrogatories given by Crane in another asbestos case (Murphy v. Owens Corning, et al. Texas, March 16, 2000, case No. CC-99-08033-B) which state that "Certain of the valves had enclosed within their metal structure asbestos containing gaskets, packing and discs," as well as documentary evidence that Crane sold asbestos-containing Cranite gaskets, packing and discs until sometime in the 1970's or 1980's.

The plaintiff further points to evidence in the record from Crane's own supply catalogs and manuals that Crane offered for sale asbestos-containing insulating materials for use in conjunction with its valves and recommended that asbestos-based insulations be used to insulate their valves in high temperature applications. Based upon such evidence, the plaintiff argues that the defendant Crane knew or should have known that its valves would be used in conjunction with asbestos-containing materials, that it had a duty to warn of the hazards associated with asbestos and that, accordingly, Crane's motion for summary judgment should be denied, citing Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148.

Summary judgment may be awarded when no issues of fact exist. (see, CPLR 3212 [b]; Andre v. Pomeroy, 35 N.Y.2d 361, 362). In order to be successful on a motion for summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853. Failure on the part of the moving party to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form that is sufficient to establish that material

issues of fact exist which require a trial. Alvarez v. Prospect Hospital, supra, 68 N.Y.2d at p. 324; Zuckerman v. City of New York, 49 N.Y.2d 557, 562.

Upon review and consideration of the papers submitted, the Court has determined that Crane's motion for summary judgment must be denied.

Assuming that Crane made a *prima facie* showing of entitlement to summary judgment, the Court finds that the plaintiff has come forward with evidence through the plaintiff's deposition testimony, Crane's answers to interrogatories from another asbestos case and Crane's own supply catalogs and manuals that is sufficient to raise questions of fact as to whether he was exposed to asbestos from asbestos-containing products manufactured or supplied by Crane and/or asbestos-containing products that were made or supplied by third-parties but were intended by Crane to be used in conjunction with its valves. Plaintiff's papers raise a reasonable inference that he was exposed to asbestos while working on valves manufactured by Crane. (see, Salerno v. Garlok Inc., 212 A.D.2d 463; Lloyd v. W.R. Grace & Co.-Conn., 215 A.D.2d 177; Cobb v. A.O. Smith Water Products, et al., Index No. 10-3677, [Sup. Ct., Oswego Co., McCarthy, J., March 30, 2011]). The Court also finds that Brisco-Reed v. Silicon Valley Group, cited by the defendant is distinguishable on its facts since, in that case, the plaintiff failed to identify the chemical of substance to which she was exposed or the entity from which it was released into her workplace.

Further, with respect to the issue of whether Crane had a duty to warn of the hazards associated with asbestos, Crane's motion for summary judgment must be denied since the Court finds that the holding in Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148, is applicable and controlling in this instance. In denying the motion herein, this Court also relies upon the decisions in Sawyer v. A.C. & S., Inc., 32 Misc.3d 1237(A) and Defazio v. A.W. Chesterton, 32 Misc.3d 1235(A) which cite Berkowitz, supra, and denied motions for summary judgment made by Crane in asbestos cases which involved nearly identical issues and facts. (see also, Cobb v. A.O. Smith Water Products, et al., Index No. 10-3677 [Sup. Ct., Oswego County, McCarthy, J., Letter Decisions dated April 13, 2011 and March 30, 2011]).

Accordingly, for the reasons set forth above, it is

ORDERED, that the motion of the defendant Crane Co. seeking summary judgment and dismissal of the plaintiff's complaint and all cross-claims as against it is hereby denied in its entirety.

This shall constitute the Decision and Order of the Court. No costs are awarded on the motion.

Hon. Robert C. Mulvey

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

GIFFORD R. MOSHER and
MARIE MOSHER, his spouse,
Plaintiffs,

V.

A.W. CHESTERTON COMPANY, et al
Defendants.

Index No. 2010/7914

DECISION & ORDER

ANN MARIE TADDEO, J.

In this asbestos personal injury action, Defendant Crane Co. moved for summary judgment pursuant to CPLR §3212 to dismiss the complaint. Both parties having consented to the Court rendering a decision based on the submission of papers only, and after careful consideration of the attorney affirmation and Memorandum of Law submitted by Defendant's counsel, Nicole M. Kozin, the affirmation and Memorandum of Law of Plaintiff's counsel, Dennis P. Harlow, and a reply affirmation from Defendant's counsel Tara L. Pehush, as well as the transcripts and exhibits attached thereto, the Court renders the following Decision and Order:

The Plaintiff, Gifford R. Mosher, claims that he contracted lung cancer and asbestosis as a result of exposure to asbestos he suffered while working at an Eastman Kodak facility from 1967 until the late 1970's. Specifically, Mr. Mosher claims exposure to asbestos as a result of working on Crane Co. valves at the above facility.

Plaintiff has presented credible evidence that during his time at Kodak, Mr. Mosher worked on Crane valves. Plaintiff has also raised a triable question of fact as to whether Crane, as a major supplier of valves, knew or should have known that asbestos was regularly added to its products by their customers. Viewing the evidence submitted in the light most favorable to Plaintiffs, it was foreseeable that Kodak would apply asbestos insulation and gaskets to the Crane valves used in the Kodak facilities where Mr. Mosher was employed.

Crane, relying on *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289 and its progeny, argues that they are not liable for exposure from asbestos-containing material manufactured and supplied by third parties.

The Court agrees with Plaintiff's counsel that the facts of this case are more analogous to those of *Rogers v Sears, Roebuck and Co.*, 268 A.D.2d 245 than *Rastelli.* In *Rogers*, the plaintiff was killed when a propane barbeque, sold by by defendants, exploded after decedent attempted to replace an empty propane tank with a full one. Defendants argued that they had

no duty to warn of the dangers presented by a possible defect in a third parties' tank. The Court disagreed, holding, in essence, that the grill could not be used without the tank.

This Court further finds that the facts here show that while it may be technically true that Crane's valves could run without insulation, sufficient facts have been raised to suggest that valves such as this regularly employed insulation which Crane knew would be made out of asbestos. See, *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148,149.

The Court has considered defendants' other arguments and find them unpersuasive.

Accordingly, it is hereby

ORDERED, that Defendant Crane Co.'s motion for summary judgment is Denied in all respects.

Dated: October 4, 2011

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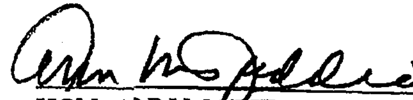

HON. ANN MARIE TADDEO
Supreme Court Justice
Seventh Judicial District

COPY

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

--------------------------------------X

PAMELA FRANCK, Individually and as the Personal Representative of the Estate of John Edward Franck, III,

Plaintiff,

- against -

84 LUMBER CO., INC., et al.,

Defendants.

--------------------------------------X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 5716/2010

Motion Dates: February 3, 11, 14 & 24, 2011

The following papers numbered 1 to 62 were read and considered on motions by each of the following defendants, pursuant to CPLR §3212, for summary judgment dismissing the complaint and all cross claims insofar as asserted against them: (1) BW/IP International Co.; (2) Nash Engineering Company; (3) Courter & Company, Inc.; (4) Yuba Heat Transfer, Division of Connell Limited-Partnership; (5) Eastern Refractories Co., Inc.; (6) Crane Co.; (7) Cleaver Brooks, Inc.; and (8) Howden Buffalo.

Notice of Motion (BW/IP International Co.) - Foster Affirmation- Exhibits A-F --Memorandum of Law.......... 1-4
Affirmation in Opposition- Dymond- Exhibits A-I- Memorandum of Law 5-8
Reply Affirmation- Foster- Exhibits A-D - Memorandum of Law.. 9-11
Sur-Reply Affirmation- Dymond- Exhibit A 12-13
Notice of Motion (Nash Engineering Company)- Sampar Affirmation.. 14
Affirmation in Opposition- Dymond- Exhibits A-I- Memorandum of Law.. 15-18
Reply Affirmation- Sampar- Exhibits A-G 19-20
Notice of Motion (Courter & Company, Inc.)- Fuschetto

Affirmation- Exhibits A-F............................ 21-22
Affirmation in Opposition- Dymond- Exhibits A-D............ 23-24
Affirmation in Reply- Cook- Exhibits A-D 25-26
Notice of Motion (Yuba Heat Transfer, Division of Connell-
Limited Partnership)- Montiglio Affirmation- Exhibits A-G.. 27-28
Affirmation in Opposition- Dymond- Exhibits A-K -
Memorandum of Law 29-31
Affirmation in Reply- Montiglio 32
Notice of Motion (Eastern Refractories Co., Inc.) - Baker
Affirmation- Exhibits A-C 33-34
Affirmation in Opposition- Dymond- Exhibits A-L -
Memorandum of law 35-38
Reply Affirmation- Baker 39
Notice of Motion (Crane Co.)- Oxymendi Affirmation-
Exhibits A-M — Memorandum of Law 40-43
Affirmation in Opposition- Dymond- Exhibits A-P 44-45
Reply Affirmation- Oxymendi- Exhibits A and B. 46-47
Notice of Motion (Cleaver Brooks, Inc.)- Jones Affirmation-
Exhibits A-H 48-50
Affirmation in Opposition- Dymond- Exhibits A-J -
Memorandum of law 51-54
Notice of Motion (Howden Buffalo, Inc.)- Angiolillo
Affirmation - Exhibits A-D 55-56
Affirmation in Opposition- Dymond- Exhibits A-I -
Memorandum of law 57-59
Reply Affirmation- Fegan- Exhibits A-D 60-62

UPON the foregoing papers, it is ordered that each motion is denied.

Factual and Procedural Background

The plaintiff, individually and as personal representative of her husband, now deceased, commenced this action, *inter alia*, to recover damages arising from mesothelioma. The plaintiff alleges that the decedent's mesothelioma was caused by exposure to various sources of asbestos from the 1960s until 1980. Prior to his death, the decedent was deposed at length, during which he identified at least three sources of potential exposure to asbestos. First, that he was exposed to asbestos aboard ships (particularly in the engine

rooms) while serving in United States Navy (Oral Deposition taken 1/19/10 through 2/4/10[hereinafter "T"] at pp. 79-80, 99-101). Second, that he was exposed to asbestos from brake and clutch work performed on vehicles while employed, *inter alia*, at various gas/service stations (T at 139-40, 253-54, 371, 495, 560). Finally, that he was exposed to asbestos from a broad variety of sources (*e.g.*, gaskets, valves, pumps and insulation) after a large industrial boiler imploded at the Roseton Powerhouse in the 1970s (T at 198-201, 430). The implosion resulted in a complete tear down and rebuilding of the boiler. The decedent testified that, after the implosion, he could see visible particles of asbestos floating through the air (T at 199). Further, that he was exposed to asbestos from gaskets, insulation, etc. when he assisted with the rebuilding of the boiler (T at pp. 211-15, 225, 229, 559; Videotaped Deposition taken 2/24/10 at pp. 58-62).

The defendants include parties who allegedly supplied asbestos-containing products, or whose products were used in conjunction with asbestos-containing products. The passage of time has created evidentiary problems for all parties, and many defendants have been dismissed from the action. Eight of the remaining defendants now move for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. In general, the motions share a common argument and a common flaw, to wit: In the main, the movants argue that the plaintiff will not

be able to prove a case as against them at trial because the decedent did not specifically name their product during his examination before trial. However, the decedent's testimony is not the sole source of evidence. Rather, for example, in addition to the potential of other witnesses, the plaintiff appears to have access to thousands of documents concerning the Roseton Powerhouse from this and other actions concerning asbestos.

Moreover, and significantly so, the burden of proof does not shift on a motion for summary judgment unless and until the proponent makes a *prima facie* showing of entitlement to judgment as a matter of law. Stated otherwise, a summary judgment motion is not a device by which a defendant may put the plaintiff to his or her proof for the asking. Applying this standard, all of the motions at bar are denied.

Discussion/Legal Analysis

In general, the parties have not cited, and research has not revealed, any controlling case law from the Court of Appeals or the Second Department expressly relevant to summary judgment motions in asbestos exposure cases. Rather, the parties rely, in the main, on precedent from the First Department. Pursuant to such, a defendant seeking summary judgment in an asbestos case must submit competent evidence, in admissible form, sufficient to demonstrate, *prima facie*, that its product was not a proximate cause of the decedent's

injury. Once shown, the burden then shifts to the plaintiff to demonstrate facts and conditions from which the defendant's liability "may reasonably be inferred," that is, that the injured party worked in the vicinity of where the defendant's asbestos-containing product was used, and that the injured party was exposed to the defendant's product. *In re New York City Asbestos Litigation,* 7 A.D.3d 285, 776 N.Y.S.2d 253 [1st Dept.2004]; *In re New York City Asbestos Litigation,* 216 A.D.2d 79, 628 N.Y.S.2d 72 [1st Dept.1995]); *Reid v Georgia-Pacific, Corp.,* 212 A.D.2d 462, 622 N.Y.S.2d 946 [1st Dept.1995]; *Diel v Flintkote Co.,* 204 A.D.2d 53, 611 N.Y.S.2d 519 [1st Dept.1994]; *Cawein v Flintkote Co.,* 203 A.D.2d 105, 610 N.Y.S.2d 487 [1st Dept.1994]; *In re New York City Asbestos Litigation,* 188 A.D.2d 214, 593 N.Y.S.2d 43 [1st Dept.1993] *aff'd,* 82 N.Y.2d 821, 605 N.Y.S.2d 3 (1993); *see also In re Eighth Judicial Dist. Asbestos Litigation,* 28 A.D.3d 1191, 814 N.Y.S.2d 479 [4th Dept.2006]; *Scheidel v A.C. and S. Inc.,* 258 A.D.2d 751, 685 N.Y.S.2d 829 [3rd Dept.1999].

BW/IP International Co.

The defendant BW/IP International Co. (hereinafter BW/IP)[1]

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[1] In a pleading submitted in another action, BW/IP described its corporate genesis as follows: BW/IP began as Byron Jackson, established in 1872, which was acquired by Borg Warner Corporation and operated as such from 1955 until 1983, at which time it was reorganized into Borg Warner Industrial Products, Inc., a subsidiary of Borg Warner Corporation, until its sale to

moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against them on the ground that the plaintiff had not identified any product manufactured by it as a potential source of the decedent's asbestos exposure.

In opposition, the plaintiff asserts that pumps manufactured by Byron Jackson (a predecessor of BW/IP) and insulated with asbestos were present at the Roseton Powerhouse when the boiler imploded. In support of this contention, the plaintiff submits, *inter alia*, a letter from Burns & Roe Construction Corporation (hereinafter Burns & Roe), a purchasing/construction agent for the Roseton Powerhouse during the time in question, to Johns-Manville Sales Corporation (hereinafter Johns-Manville), dated January 5, 1972. In the letter, Burns & Roe states an intent to enter into a subcontract with Johns-Manville to provide insulation for the boilers and piping at the plant (Exhibit C). Specifications appended to the correspondence indicate that certain "Heater drain pumps" to be insulated were manufactured by Byron Jackson.

In reply, BW/IP argues that the letter *supra* is hearsay not subject to any exception, and is, at best, circumstantial evidence of the presence of a Byron Jackson pump at the Roseton Powerhouse and asbestos thereon. Further, BW/IP asserts, although hearsay evidence may be considered in opposition to a motion for summary

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BW/IP Acquisition Corp. in 1987. (Plaintiff's Exhibit H).

judgment, it cannot be the only evidence. Finally, BW/IP argues, because its pumps did not contain or need asbestos-containing insulation to operate, it had no duty to warn the decedent concerning the danger of insulation containing asbestos being applied to its products by third parties.

In further support of its motion, BW/IP proffers the affidavit of Frank Costanzo, the former director of Engineering, Vernon Operations of Flowserve Corporation [a successor to BW/IP]. (Exhibit C). Costanzo avers that he is the "Person Most Knowledgeable for BW/IP, Inc.," and that he had testified on its behalf on numerous occasions, and was generally familiar with the specifications, design, manufacture and use of Byron Jackson pumps. Costanzo avers that Byron Jackson pumps were comprised of metal and were fully functional without being insulated, and that Byron Jackson never recommended that its pumps be insulated, or that they be insulated with any particular material. Indeed, he asserts, the pumps were built to pump condensate at about 165 degrees Fahrenheit, and were not designed and fitted with "thermal (or any other) insulation and/or lagging at the Byron Jackson factory." Costanzo avers that he searched the records of BW/IP and determined that Byron Jackson did not manufacture, provide or supply insulation for the pumps at issue, and was not told that asbestos insulation would be applied or used after the pumps were sold. Finally, he avers, BW/IP never manufactured asbestos containing

insulation material.

In sur-reply, the plaintiff argues that Costanzo lacks personal knowledge of the pumps at issue. In any event, the plaintiff argues, BW/IP may be held liable for the failure to warn if the use of asbestos-containing insulation on its pumps was reasonably foreseeable.

In support of its motion, BW/IP, through the affidavit of Costanzo, demonstrated, *prima facie*, that its pumps did not contain asbestos during the time in question. However, BW/IP failed to demonstrate, *prima facie*, that it did not have a duty to warn about the use of its products with asbestos-containing products.

In so denying BW/IP's motion, the Court, as a preliminary matter, begins its analysis with the basic proposition that a manufacturer who places a defective product on the market which proximately causes injury may be held liable for the same. *Liriano v Hobart Corp.,* 92 N.Y.2d 232, 677 N.Y.S.2d 764 (1998)*; Rabon-Willimack v Robert Mondavi Corp.,* 73 A.D.3d 1007, 995 N.Y.S.2d 190 [2nd Dept.2010]*; Speller v. Sears, Roebuck & Co.* 100 N.Y.2d 38, 760 N.Y.S.2d 79 (2003). The product may be defective because it has a manufacturing flaw, because of an improper, defective design, or because the manufacturer failed to provide adequate warnings regarding the use of the product. Similarly, a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should

have known. *Liriano v. Hobart Corp., supra; Rabon-Willimack v Robert Mondavi Corp., supra*. The duty to warn focuses principally on the foreseeability of the risk and the adequacy and effectiveness of any warning. *Liriano v Hobart Corp., supra; Rabon-Willimack v Robert Mondavi Corp., supra*. Further, a duty to warn may arise even for a product that was reasonably safe when manufactured and sold, and that involved no known risks about which a warning needed to be given, when defects or dangers are thereafter revealed by a users operation, or through advancements in the state of the art, with which a manufacturer is expected to stay abreast, and brought to the attention of the manufacturer. *Liriano v Hobart Corp., supra; Cover v Cohen*, 61 N.Y.2d 261, 473 N.Y.S.2d 378 (1984). The existence and scope of such a duty is generally fact-specific. The duty to warn has been applied in cases where a non-asbestos-containing product was used with an asbestos-containing product of another. For example, in *Berkowitz v A.C. and S., Inc.* (288 A.D.2d 148, 733 N.Y.S.2d 410 [1st Dept.2001]), the plaintiff was allegedly injured due to exposure to pumps containing asbestos manufactured by the defendant Worthington. The *Berkowitz* court held that there was a question of fact whether the pumps contained asbestos. Further, the *Berkowitz* court held:

> Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. While it may be

> technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which Worthington knew would be made out of asbestos.

Berkowitz v. A.C. and S., Inc., supra, 149.

Further, the plaintiff appends to her motion papers a variety of cases that found a duty to warn in cases involving asbestos used on valves manufactured by the Crane Co. In the recent case of *Defazio v Chesterton* [32 Misc.3d 1235(A), 2011 WL 3667717(2011); *Heitler, J.*], the court held:

> Plaintiff's position is that defendant Crane Co. knew or should have known that asbestos-containing components would indeed be integrated with its valves for their intended use. In this regard, plaintiff submits record evidence of Crane Co.'s admission that certain of its valves contained asbestos gaskets and packing into the 1980's, and its identification of high quality asbestos packing as an original component of some valves. Significantly, Crane Co. rebranded sheet packing and/or gasket material manufactured by other companies as "Cranite," consisting of an asbestos composition "unhesitatingly recommended for a multitude of services" (plaintiff's Exh. H) for its customers' benefit in replacing gaskets, and the like. Crane Co. also sold a myriad of other asbestos-containing products, including insulation, millboard, paper, roll board and cements, many of which were recommended in a Crane Co. catalogue for use in high-temperature applications of its product.

Defazio v Chesterton, 32 Misc.3d 1235. In reaching this conclusion, the *Defazio* court discussed the seminal case of *Ratselli v Goodyear Tire & Rubber Co.* [*79 N.Y.2d 289 (1992)*], and contrasted it with *Berkowitz (supra)*. In *Rastelli*, the decedent (a mechanic) was killed when a multi-piece tire rim exploded while

being mounted with a tire manufactured by the defendant Goodyear. There was no allegation that the tire itself was defective, and Goodyear did not manufacture the tire rim. The Court of Appeals found that no liability could be imposed on Goodyear. In discussing this holding, the *Defazio* court stated:

> *Rastelli* and *Berkowitz* address two different situations. In *Rastelli,* it was found there was no duty to warn because the combination of a manufacturer's own sound product with another defective product somewhere in the stream of commerce not contemplated by the manufacturer was too attenuated to impose such a duty. In upholding the trial court's denial of summary judgment to a pump manufacturer in *Berkowitz,* however, the First Department addressed the situation where a manufacturer knew or should have known that its product would likely be combined with an inherently defective material for its intended use, and opined that in such a case there is a duty to warn. The *Curry* court applied *Berkowitz* and denied Crane Co.'s motion for summary judgment because, among other things: (1) expert testimony suggested that it was normal industry practice for Crane Co. valves to be insulated with asbestos; (2) flange gaskets used to connect Crane Co. valves to other equipment ordinarily contained asbestos; and (3) Crane Co.'s own product catalog listed asbestos-containing insulating materials approved for use with its valves.
>
> Defendant argues that it did not direct its customers to use any type of replacement seal or insulation, that it had no control over whether its valves were insulated with asbestos-containing or non-asbestos-containing products, and that whether or not to insulate its products was a decision made not by it, but by the owner of the valves. But the record here demonstrates that Crane Co. knew or should have known of the hazards associated with asbestos, and that for most high temperature applications its valves would be insulated with same. As set forth above, the submissions on this motion show that Crane Co. designed and supplied its products with asbestos-containing gaskets and packing. It advertised other asbestos products, including cement and insulation. And Crane Co.'s corporate drawings for its valves identify "deep stuffing boxes filled with high quality asbestos packing" as original components. (Plaintiff's Exh. C). It is in this regard that Crane Co. knew or should have known that the

> asbestos-containing components in its valves would be replaced with other asbestos-containing components.

Defazio v Chesterton, 32 Misc.3d 1235.

Here, BW/IP failed to demonstrate, *prima facie*, that it had no duty to warn of the use of its product with the asbestos-containing products of another.

The affidavit of Costanzo (*supra*) does not change this result. Costanzo does not purport to have personal knowledge of whether Byron Jackson pumps were at the Roseton Powerhouse or, if so, whether they were insulated with asbestos-containing material or by whom, or whether Byron Jackson/BW/IP recommended or was aware that its pumps would be insulated with asbestos-containing materials. Rather, Costanzo relies on his general knowledge of Byron Jackson pumps and his review of company records. However, he does not identify or append the records upon which he relied. Further, it is unclear how some of the conclusions he reaches might have been documented, *e.g.*, that Byron Jackson was unaware that its pumps would be insulated. The record appears to suggest that insulation was applied copiously in and around the boiler.

Finally, the court notes, although BW/IP's arguments concern solely pumps, BW/IP identified Borg Warner as one of its predecessor corporations, and the decedent identified Borg Warner clutches as a potential source of asbestos exposure (T at pp. 148-29, 293-94, 399-400); a potential source of asbestos exposure that BW/IP does not expressly address in its motion papers.

Nash Engineering Company

Nash Engineering Company (hereinafter Nash) moves for summary judgment dismissing the complaint and all cross claims as against it on the ground that the plaintiff has not identified a product manufactured by Nash as a potential source of the decedent's asbestos exposure.

In opposition, the plaintiff asserts that Nash manufactured pumps containing asbestos that were used in the boiler at the Roseton Powerhouse and, therefore, were involved in the implosion of the boiler. In support of this contention, the plaintiff submits an information sheet prepared by Nash in an unrelated litigation in which it stated that its pumps may have contained asbestos packing and gaskets for the period from the 1940s to the 1980s (Exhibit I), and a bulletin published by Nash for the installation of a Jennings Heating Pump Manifold, copyrighted in 1952, directing the use of asbestos packing (Exhibit H, p 14). As evidence that Nash pumps were at the Roseton Powerhouse, the plaintiff also submits: (1) several "Contract Status Reports" purportedly prepared by the decedent's employer at Roseton Powerhouse (*i.e.*, Combustion Engineering), dated April 1970 through April 1972, identifying Nash as one of the suppliers of "cond. Pumps, Condrs., Cond. Tubes, Vacuum Pumps, Vacuum Priming System" (Exhibit E); and (2) two invoices from Nash for products sold to

the Roseton Powerhouse, the first dated August 12, 1972, for packing and shims, and the second, dated April 8, 1974, for a gasket for Nash pump size AL-672 and bearings for a Nash pump size CL-152 (Exhibit F).

In reply, Nash notes that there is no testimony from the decedent that a Nash pump was present at the Roseton Powerhouse. Further, it argues, the decedent's testimony that he was exposed to asbestos when he tore "everything apart" on the boiler after the implosion is insufficient. Otherwise, Nash asserts, the Contract Status Reports submitted by the plaintiff are not sworn and, therefore, are hearsay and inadmissible. Thus, it argues, without more, the reports do not form a valid basis to deny summary judgment. In addition, Nash contends, even if the plaintiff presented proof that Nash boilers and gaskets, etc. were present at the Roseton Powerhouse, there is no evidence that the same were involved in the boiler implosion and, therefore, a possible source of the decedent's asbestos exposure. Rather, it argues, that would be mere speculation.

In denying Nash's motion, Nash failed to demonstrate, *prima facie*, that it provided no products to the Roseton Powerhouse boiler, or that any products it did provide were not a potential source of the decedent's exposure to asbestos. Indeed, from the limited record made, it appears that Nash products were in fact present at the Roseton Powerhouse at the time in question. Whether

the products were being used in the boiler that imploded, and, if so, whether they were a potential source of the decedent's exposure to asbestos, are matters for the plaintiff to prove at trial. Thus, Nash's motion is denied without need to consider the plaintiff's opposing papers.

Courter & Company, Inc.

The decedent testified that the people working on the boiler at the Roseton Powerhouse after the implosion included steamfitters from the defendant Courter & Company, Inc. (hereinafter Courter) (T at pp. 464-67). The decedent testified that the workers identified themselves as such (T at pp. 464-67). Further, he testified, he was "right next to" Courter workers removing pumps and valves that had insulation and gaskets containing asbestos "lots of times" (T at pp. 466-69).

Courter asserts that it has no record of performing any work at the Roseton Powerhouse. Further, it notes, Courter is not mentioned on a partial list of contractors that worked on the project.

In opposition, the plaintiff notes that Courter submitted no competent evidence in admissible form, but rather relies on an affirmation of counsel.

In reply, Courter notes that the partial list of contractors (*supra*) was produced by Consolidated Edison in the "NY Powerhouse"

trial in the early 1990s, and had been relied upon by counsel for the plaintiff on several occasions. Thus, it argues, counsel should not be permitted to now disavow the document. Moreover, Courter notes, in response to interrogatories propounded by the plaintiff, it had provided a pamphlet listing the places Courter had performed work, which did not include the Roseton Powerhouse. Finally, Courter argues, although it had produced only an attorney affirmation in support of its motion, the plaintiff has yet to prove that any Courter employees were at the Roseton Powerhouse, and it was not Courter's burden to "prove a negative." Indeed, it notes, Courter was dissolved in 1994, and there were no longer any Courter employees to testify.

In denying Courter's motion, Courter failed to demonstrate, *prima facie*, that it did not perform work at the Roseton Powerhouse during the time in question, or that such work did not provide a potential source of the decedent's exposure to asbestos. Rather, Courter relies on the hearsay and conclusory assertion of its attorney, and a list of contractors that is expressly stated to be partial. Finally, that Courter is now dissolved is not dispositive of whether documentary or other evidence (*e.g.*, the testimony of former employees) is available in support of its contentions. Indeed, it is being represented by counsel in this action. In sum, Courter's motion is denied without need to consider the plaintiff's opposition papers. In any event, even assuming, *arguendo*, that

Courter had demonstrated, *prima facie*, that it was not present at the Roseton Powerhouse during the time in question, the decedent's express testimony to the contrary is sufficient to raise a triable issue of fact.

Yuba Heat Transfer, Division of Connell-Limited Partnership

The defendant Yuba Heat Transfer, Division of Connell-Limited Partnership (hereinafter Yuba) moves for summary judgment dismissing the complaint and all cross claims as against it on the ground that the plaintiff has not identified any product manufactured by Yuba as being present at the Roseton Powerhouse.

In opposition, the plaintiff asserts that Yuba manufactured the boiler feedwater heaters, evaporators, coolers and exchangers for the boiler that imploded, and that such products were insulated with asbestos. As evidence that Yuba products were present at the Roseton Powerhouse, and that the products contained or were insulated with asbestos, the plaintiff submits a letter from the Burns & Roe (*supra*) to the Johns-Manville Sale Corporation, dated January 5, 1972, stating an intent to enter into a subcontract with Johns-Manville to provide insulation for the Roseton Powerhouse (Exh. E). The items to be insulated are identified as including six feedwater heaters, a steam evaporator, a wash heat exchanger and bearing water coolers manufactured by Yuba (Exh. E). The plaintiff also submits the technical specifications from Robert A.

Keasbey Company, another insulation subcontractor for the Roseton Powerhouse, which identifies items to be insulated as including six feedwater heaters, a fuel steam evaporator, bearing water coolers and a mechanical dust collector wash water heater manufactured by Yuba (Exh F, Table 2). The insulation to be used is identified as including that containing asbestos (Exh F, Table 3). Further, the specifications call for the use of finishing cements containing asbestos (Exh F, I & J). In addition, the plaintiff submits two invoices from Yuba, one dated May 31, 1973, and the other dated September 30, 1974, for the sale of gaskets to the Roseton Powerhouse for some of the items identified in the Keasbey specifications *supra* Exh H). The plaintiff asserts that the imploded boiler was being rebuilt in 1974.

In reply, Yuba argues that the plaintiff failed to present any evidence that the Yuba products identified *supra* were part of the boiler that imploded. Further, Yuba asserts, it cannot be held liable for insulation that was applied to its products by others where, as here, there is no proof that its products could not be operated safely without the same, or that Yuba knew or specified that insulation containing asbestos be used on its products. Finally, Yuba argues, there is no evidence that the gaskets it sold to the Roseton Powerhouse contained asbestos. Yuba's motion is denied.

In so denying Yuba's motion, Yuba failed to demonstrate, *prima*

facie, that it provided no products to the Roseton Powerhouse boiler, or that any products it did provide were not a potential source of the decedent's exposure to asbestos. Further, it failed to demonstrate, *prima facie*, that it had no duty to warn of the use of its product with any other asbestos-containing product (*see supra*). Indeed, although Yuba initially argued that there was no proof that any of its products were at the Roseton Powerhouse, its reply papers are, at the least, an implicit admission that they were. There is no evidence of any inquiry by Yuba into whether such products were used in or near the boiler at issue, or whether such products were asbestos-containing or were designed or designated to be used with asbestos-containing insulation and/or gaskets, etc. Thus, Yuba's motion is denied without need to consider the plaintiff's opposing papers.

Eastern Refractories Co., Inc.

The defendant Eastern Refractories Co., Inc. (Eastern)[2] moves for summary judgment dismissing the complaint and all cross claims as against it on the ground that the plaintiff did not identify any product manufactured by Eastern as a potential source of the decedent's asbestos exposure.

In opposition, the plaintiff argues that Eastern in fact

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[2] Refractory material is apparently generally made of clay and designed to withstand high temperature applications (Exh L).

provided and installed insulation containing asbestos at the Roseton Powerhouse. In support of this contention the plaintiff submits:

(1) A letter from Burns & Roe (*supra*), dated August 20, 1971, seeking approval for its award of the refractories contract to Eastern (Exh C);

(2) Various invoices from Combustion Engineering (the decedent's then employer), dated from April 1973 through August 1974, identifying Eastern as "our subcontractor" and providing billing instructions for the work of the same (Exh D);

(3) The refractory specifications for the Roseton Powerhouse's boilers (Exh. E). The specifications identify Central Hudson as the "customer," and "the Customer (through their Refractory Supplier)" as the supplier, and "the Customer (through their Refractory Installer)" as the installer (Exh. E);

(4) A contract status report, dated December 7, 1971, *inter alia*, identifying "Eastern Refrac" as a supplier of refractory materials (Exh F);

(5) Documents indicating that various products identified in the materials list for the refractory specifications *supra* contained asbestos (Exh G-K); and

(6) Eastern's responses to interrogatories in *In re New York City Asbestos Litigation*, which it stated that it sold, installed and distributed insulation materials containing asbestos from the

1950s through the later 1970s (Exh L).

In reply, Eastern argues that none of the documents submitted by the plaintiff proves that Eastern actually agreed to perform the refractory work for the Roseton Powerhouse. Eastern asserts that this is noteworthy because the plaintiff was in possession of over 7,600 pages of documents from the decedent's former employer (Combustion Engineering). In any event, Eastern argues, even if it did perform the work, the plaintiff failed to demonstrate that the decedent was exposed to asbestos due to work performed by Eastern. Particularly, Eastern asserts, the decedent did not testify that he worked around insulators from Eastern. Thus, Eastern argues, there is no evidence that the decedent was in the vicinity of any insulation work performed by Eastern after the boiler implosion. Finally, it asserts, the decedent never identified any products supplied by Eastern as being in the area where he worked.

Eastern's motion is denied. In so denying Eastern's motion, Eastern failed to demonstrate, *prima facie*, that no work it performed for, nor products provided to, the Roseton Powerhouse were a potential source of the decedent's exposure to asbestos. Thus, Eastern's motion is denied without need to consider the plaintiff's opposing papers.

Crane Co.

Crane Co. moves for summary judgment dismissing the complaint

and all cross claims as against it on the ground that it did not manufacture, design, supply or install any gaskets, insulations, etc. containing asbestos on the valves it provided to the Roseton Powerhouse. Further, it argues, its valves did not require asbestos-containing products to function, and it did not direct its customers to use the same. Rather, Crane asserts, that decision was made by the purchaser of the valve.

In opposition, the plaintiff notes that the decedent expressly testified that he saw and was near Crane valves while working on the imploded boiler (T at pp. 237, 433-36). Further, she asserts, Crane completely failed to address the fact that its valves contained asbestos; a finding which had been deemed a sufficient basis to deny summary judgment to Crane in several other asbestos-related cases. (Exhs. A through C).

Crane likewise failed to demonstrate, *prima facie*, that its valves were not a potential source of the decedent's exposure to asbestos. Indeed, it does not appear genuinely disputed that Crane valves were present at the Roseton Powerhouse and in fact contained asbestos (*see* Plaintiff's Exhibits D through I). Further, Crane failed to demonstrate, *prima facie*, that it had no duty to warn the decedent about the use of its valves with asbestos-containing products. Contrary to the contention of Crane, it is not necessarily absolved of the duty to warn merely because its valves did not require such products to function, and it did not direct

its customers to use the same. Rather, as discussed *supra*, the issue turns on various factors, including the foreseeability of such use. *Liriano v Hobart Corp., supra; Cover v Cohen, supra; Rabon-Willimack v Robert Mondavi Corp., supra; Berkowitz v A.C. and S., Inc., supra*. Indeed, what appear to be identical arguments by Crane were rejected in *Defazio v Chesterton (32 Misc.3d 1235 [NY Sup. 2011; Heitler, J.]), supra*. Thus, Crane's motion is denied without need to consider the plaintiff's opposing papers.

Cleaver-Brooks, Inc.

Cleaver-Brooks, Inc. (hereinafter Cleaver-Brooks) moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it on the ground that the plaintiff failed to identify any products manufactured by it as a potential source of the decedent's asbestos exposure.

In opposition, the plaintiff asserts that Cleaver-Brooks supplied various component parts for the boilers at Roseton Powerhouse that were either asbestos-containing or covered with asbestos insulation. Further, she notes, Cleaver-Brooks recommended asbestos-containing insulation be used with its products. In support of these contentions, the plaintiff submits:

(1) Various contract status reports, dated from April 1970 through April 1972, inter alia, identifying Cleaver-Brooks as a contractor for the boilers (Exh E);

(2) Invoices from Aqua-Chem, Inc.[3], dated from December 1971 through February 1972, for parts sold to the Roseton Powerhouse, including gaskets, packing, hoses, valves, etc. (Exh. F);

(3) Literature from Cleaver-Brooks concerning its parts and boilers (Exhs. G & H); and

(4) Literature from Cleaver-Brooks recommending the use of asbestos-containing products when installing its boilers (Exh. I & J).

Cleaver-Brooks likewise failed to demonstrate, *prima facie*, that it provided no products to the Roseton Powerhouse boiler, or that any products it did provide were not a potential source of the decedent's exposure to asbestos. Further, it failed to demonstrate, *prima facie*, that it had no duty to warn of the use of its product with an asbestos-containing product of another. Thus, Cleaver-Brooks motion is denied without need to consider the plaintiff's opposing papers.

Howden Buffalo, Inc.

Howden Buffalo, Inc. (hereinafter Howden Buffalo) moves for summary judgment dismissing the complaint and all cross claims as against it on the ground that plaintiff failed to identify any

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[3] According to the plaintiff, Aqua-Chem was a predecessor corporation to Cleaver-Brooks.

product manufactured by it as a potential source of the decedent's asbestos exposure.

In opposition, the plaintiff asserts that Howden Buffalo supplied forced and induced draft fans for the boilers at Roseton Powerhouse that were either asbestos-containing or insulated with asbestos. In support of these contentions, the plaintiff submits:

(A) Documents from Combustion Engineering (the decedent's former employer), recommending the purchase of fans for the boilers at Roseton Powerhouse from "HOWDEN-AP" (Exh C);

(B) A document from Combustion Engineering describing the purchase of fans "per Howden" quotes, and describing the fans as "Type Howden-Apco" (Exh E);

(C) Answers to interrogatories in an unrelated action in the state of Ohio against Howden Buffalo (Exh G). The answers describe Howden Buffalo as the successor in interest to Buffalo Forge Company, which produced fans and blowers with asbestos-containing component parts;

(D) Documents from Buffalo Forge, dated 1983, directing the removal all asbestos from its products to reduce health risks and production costs (Exh H); and

(E) A sales brochure from Buffalo Forge noting the use of asbestos in its products (Exh I).

In reply, Howden Buffalo argues that the plaintiff's opposition is speculation and conjecture based upon hearsay

documents. Further, it asserts, not only did the decedent not testify that he performed any work near forced or induced draft fans, but also, there is no evidence whatsoever that any product from Howden Buffalo was ever used in the Roseton Powerhouse. Moreover, Howden-Buffalo argues, if the court were to consider the hearsay documents proffered by the plaintiff, it should also consider a document from Combustion Engineering that the plaintiff posted on the Recordtrak website approximately one month after this motion (appended as exhibit C to Howden-Buffalo's motion papers). The document, which lists the items to be insulated on the boilers, does not mention fans.

In further support of its motion, Howden Buffalo submits an affirmation from Richard O'Connell, the Vice President and Chief Administrative Officer of Howden Group America, Inc. O'Connell avers that Howden Buffalo began as the Howden Fan Company in 1993, and changed its name to Howden Buffalo in 1999. He avers that Buffalo Forge Co. existed as separate and apart from Howden Group America, Inc., Howden Buffalo and Howden Fan Company until 1993, when it was purchased by Howden Fan Company. Finally, O'Connell avers, although Buffalo Forge manufactured products containing asbestos, none of the other companies did.

Howden Buffalo likewise failed to demonstrate, *prima facie*, that neither it nor any predecessor provided a product to the Roseton Powerhouse boiler, or that any product it did provide was

not a potential source of the decedent's exposure to asbestos. Indeed, the documents proffered by the plaintiff indicate that Buffalo Forge may have provided products to the Roseton Powerhouse that were asbestos-containing and/or were designed to be used with asbestos-containing products. Further, Howden Buffalo did not demonstrate, *prima facie*, that it is not a successor in interest to Buffalo Forge. Indeed, the answers to the interrogatories *supra* and the affidavit of O'Connell both indicate that it is. Thus, Howden Buffalo's motion is denied without need to consider the plaintiff's opposing papers.

Accordingly, and for the reasons cited herein, it is hereby

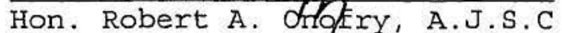
ORDERED that the motions are denied; and it is further,

ORDERED that the parties are directed to appear, through respective counsel, for a Pre-Trial Conference on Thursday, December 8th, 2011, at, 9:00 A.M. at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: October 20, 2011
Goshen, New York

E N T E R



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STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

SUZANNE CELELLA, as Executrix
of the Estate of GEORGE C. SWIFT,

Plaintiff,

DECISION
AND ORDER

-vs-

Index #2009-1158
RJI #46-1-09-0802

CRANE CO., et al.,

Defendants.

The plaintiff, George C. Swift, commenced the within action to recover damages for personal injuries allegedly resulting from his exposure to various asbestos containing products. The plaintiff commenced this action on June 25, 2009, by filing a summons and complaint in the office of the Schenectady County Clerk. Issue was subsequently joined and discovery has been conducted pursuant to an expedited schedule.

The plaintiff, George C. Swift, died on August 27, 2009. Suzanne Celella was substituted as Executrix of the Estate of George C. Swift.

The defendant, Crane Co. (the defendant), has now made a motion for summary judgment dismissing the plaintiff's complaint and all cross claims asserted against it pursuant to CPLR §3212. The defendant seeks summary judgment on the theory that it is not liable for products that Crane Co. did not manufacture, supply or specify for use with its valves or pumps, as identified by the plaintiff.

Mr. Swift was born on [redacted] 1927, and was approximately 81 years of age at the time of his death. The plaintiff alleges that Mr. Swift was exposed to various asbestos-containing materials as a result of his work for Asbestos Workers Union 40, from 1946 until

1989. Mr. Swift was too ill to complete a deposition in this case and the movant, Crane Co., was not identified in the deposition taken.

In lieu of the fact that the plaintiff was unable to be deposed, the plaintiff has offered the testimony of Bruce Markel, a former co-worker of Mr. Swift. Mr. Markel testified that he worked with Mr. Swift, who was an insulator, from 1968 to 1971, and from 1974 to 1979, at the General Electric plant in Selkirk, New York.

The defendant appears to acknowledge that the plaintiff actually worked with various asbestos containing products. The defendant also acknowledges that the plaintiff did identify its valves as being a product which he worked with and around. The defendant seeks summary judgment on the ground that it is not liable to the plaintiff for asbestos exposure from gaskets, packing or external insulation which it did not manufacture, supply, install or specify. The defendant asserts that it has no liability simply because consumers may have chosen to utilize asbestos-containing components with Crane Co. valves. The defendant further asserts that the plaintiff failed to adequately identify it as a source of his asbestos exposure.

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact, Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). In the context of an asbestos case, the defendant must make a prima facie showing that its product could not have contributed to the causation of plaintiff's injury. Comeau v. W.R. Grace & Co., 216 AD2d 79, 80 (1st Dept. 1995); Reid v. Georgia-Pacific Corp., 212 AD2d 462 (1st Dept. 1995).

The Court also notes that since this is a summary judgment motion, it must view the

evidence in a light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party. Salerno v. Garlock, Inc., 212 AD2d 463, 464 (1st Dept. 1995); Greco v. Boyce, 262 AD2d 734 (3rd Dept. 1999).

The plaintiff has opposed the defendant's motion on two grounds. In the first instance, the plaintiff asserts that Crane Co. has acknowledged in its summary judgment motion that various original valves supplied by the defendant may have had internal seals, such as gaskets or packing material, that may have included asbestos-containing materials. The plaintiff then points to Mr. Markel's deposition testimony where he claims to have seen Mr. Swift working around Crane Co. Valves during the new construction project (1968-1971). The plaintiff's second argument involves the defendant's duty to warn about the dangers associated with changing/replacing the original asbestos-containing components which it supplied with its valves and pumps and replacing them with virtually identical components manufactured by entities other than the defendant.

In the case at bar, the plaintiff's co-worker has clearly identified the defendant's valves. Mr. Markel has described Mr. Swift's work with the defendant's original/new valves, as well as his work efforts concerning repairing/replacing the defendant's valves which were already in use. Mr. Markel also described Mr. Swift's bystander exposure during repairs. This information, coupled with the defendant's acknowledging that certain original/new Crane Co. products contained asbestos components, raises a material issue of fact which necessitates the denial of the defendant's motion.

Turning to plaintiff's work efforts regarding repairing and replacing existing Crane Co. valves, this Court finds that the defendant has failed to adequately distinguish Berkowitz v. A.C.

& S., Inc., 288 AD2d 148, 150 (1st Dept. 2001). Under the facts of this case, the Court finds that the defendant has failed to establish, as a matter of law, that it had no duty to warn the plaintiff with respect to the products identified by him.

Defendant's motion for summary judgment is denied, without costs.

This writing shall constitute the Decision and Order of this Court.

Signed this 7th day of November, 2011, at Johnstown, New York.

HON. RICHARD T. AULISI
Justice of the Supreme Court

ENTER

James W. McCarthy
Supreme Court Justice

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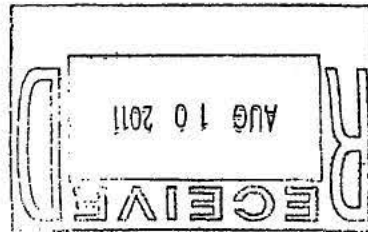

Re: *Reals Asbestos Matter*
Index No. 2010-1847

LETTER DECISION AND ORDER

The above-referenced matter is before this court pursuant to defendant, Nicholson Steam Trap's [hereinafter Nicholson] motion for summary judgment [New York Civil Practice Law and Rules §3212]. Following receipt, the matter was taken on submission without oral argument. Having reviewed the submissions of the parties, for the reasons set forth below, this court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact:

The facts underlying the instant motion are, for the most part, not in dispute and arise out of plaintiff, Russell Reals alleged exposure to asbestos during his tenure at Alpha Portland Cement [1957-1961, 1963-1981], United States Army [1961-1963] and Syracuse University [1983-1991]. With respect to the moving defendant, Mr. Reals alleges that he was exposed to steam traps manufactured by Nicholson. Following completion of discovery, defendant moved for summary judgment dismissing the complaint and any cross claims against it. In support of its motion for summary judgment, Nicholson alleges in sum and substance that while Mr. Reals identified the defendant as the manufacturer of steam traps to which he was exposed, the plaintiffs cannot prove that he was exposed to asbestos from the identified product.

Specifically, counsel for the moving defendant alleges that plaintiff began work at Syracuse University as a steam fitter, initially troubleshooting thermostats and performing maintenance on

steam traps. Thereafter, the plaintiff worked removing steam traps as part of the university's conversion from steam to hot water heat. With respect to plaintiff's alleged exposure to asbestos from steam traps, counsel for the moving defendant alleges in sum and substance that plaintiff testified that his exposure was from asbestos insulation on pipes leading to the traps, and not the traps themselves. While he testified that some of the traps were covered with asbestos to protect students, counsel argues that he "...later clarified this testimony admitting that a steam trap covered in asbestos would not be able to perform its function..." [Counsel's Affirmation in Support of Summary Judgment at ¶ 13].

Counsel further argues that:

> Lastly, Mr. Reals stated 90% of the maintenance he performed on steam traps consisted of replacing the entire trap itself, rather than fixing or repairing it. [Id. at 361-362]. Any gasket or trap would have been entirely encapsulated. Id. Therefore, even assuming that a trap contained an asbestos gasket, the plaintiff would not have been exposed to the asbestos containing part of the trap.
>
> As for NICHOLSON, plaintiff did not testify that he was exposed to asbestos from a NICHOLSON steam trap itself, nor did he see any instructions requiring the application of insulation on the traps or the lines connecting to the traps. Thus the steam trap was the only non-asbestos coated product with which he worked.

[Affirmation of Counsel in Support of Summary Judgment at ¶ 17]. Lastly, counsel provides the deposition testimony of John Artuso, Esq. identified as a corporate representative of the moving defendant from an unrelated action, in which he testified "...that he had no knowledge of NICHOLSON products ever containing asbestos." [Counsel's Affirmation in Support of Summary Judgment at ¶ 18].[1]

Based on the foregoing, counsel concludes:

> It is undisputed that plaintiff's deposition testimony fails to establish that he was exposed to asbestos as a result of any products manufactured by NICHOLSON. Instead, he testified that he was exposed to asbestos on steam pipes leading up to the steam traps. He would disturb this asbestos insulation leading to the traps. The traps themselves would not have been covered in asbestos, otherwise they would not properly function.

[Counsel's Affirmation in Support of Summary Judgment at ¶ 22].

In opposition, counsel for the plaintiffs argues that the plaintiff testified that during the course of his employment with Syracuse University, he regularly worked around steam traps, including products manufactured by the moving defendant and that the steam traps were sometimes covered with asbestos insulation and utilized asbestos containing gaskets, and that the traps were insulated to protect students from being burned.

Plaintiffs' counsel further proffers an unauthenticated copy of a patent issued to W.H. Nicholson and

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[1] The court notes that it was provided with a sixty six page transcript without specific citation to the testimony upon which counsel's sworn statement is based.

Company, and argues "[t]his patent further corroborates Mr. Real's testimony that Nicholson manufactured steam traps that utilized asbestos containing gaskets" [Counsel's Affirmation in Opposition to Summary Judgment at ¶ 10]. Counsel further avers:

> Gaskets were inside the Nicholson Steam Traps and Mr. Reals testified to being exposed to the gaskets. See, Exhibit C at page 103. It is reasonable to assume that over time, the gaskets in the Nicholson Steam Traps would be replaced. This is confirmed by Nicholson's own catalogs that list replacement gaskets for sale.... Furthermore, Nicholson through its catalog, confirms that replacement gaskets [page 4] were available for Nicholson Steam Traps and that Nicholson utilized **asbestos gaskets** in its steam traps...

[Counsel's Affirmation in Opposition to Summary Judgment at ¶ 10 [emphasis original]].

Based on the foregoing, counsel argues that moving defendant has failed to meet its initial burden of proof insofar as it has failed to show that its product could not have contributed to the cause of plaintiff's injury, and that the moving defendant cannot simply point to gaps in plaintiffs' proof to satisfy its burden. Lastly, counsel for the plaintiffs alleges that defendant cannot rely on the deposition of its "corporate representative" which is not based on personal knowledge.

In reply, counsel argues in sum and substance that plaintiff's opposition is based upon speculation insofar as only one in four steam traps depicted in the catalog proffered by plaintiff specified asbestos gaskets, and avers: "Plaintiff would have your honor believe that Mr. Reals only worked with 25% of the steam traps that may have contained asbestos." [Reply Affirmation at ¶ 4]. With respect to the patent provided by plaintiffs' counsel, counsel for the defendant correctly asserts that the patent only mentions gaskets, not their composition. Next counsel argues, for the first time in reply, citing to this court's unreported decision in Kosowski[2], that Nicholson is not responsible for external insulation used in conjunction with its product. Lastly, again for the first time in reply counsel argues that any exposure to its product, assuming that such exposure took place was de minimus in light of Mr. Reals' work and exposure history.

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Citing to this court's decision in Kosowski, counsel for the moving defendant specifically avers: "As recently as January 5, 2011, Your Honor specifically found that a defendant is not responsible for external insulation manufactured, supplied and installed by another and used in conjunction with the defendant's product." [Reply Affirmation at ¶ 6]. However, counsel reads the decision too broadly to apply to any and all cases in which external insulation is at issue. In Kosowski, this court specifically limited its decision to: "the limited factual circumstances of [the] case..." not a blanket ruling with respect to all external insulation or replacement parts cases as defendant's counsel argues. Since that decision, this court has issued other opinions in which summary judgment was denied to defendants arguing that they were not responsible for external insulation or replacement parts. [See, James Cobb, [Clark Reliance] [Crane Co.], Supreme Court, Onondaga County, 2011 [NOR]. In addition, this court has, with the exception of the unique facts presented in Kosowski, consistently followed the Appellate Division, First Departments' decision in Berkowitz v. A.C. and S., Inc. 288 A.D.2d 148 (1st Dept. 2001), see, e.g. McCann Asbestos Matter, — Misc.3d—, (Onondaga County Index No. 2008-7986) January 28, 2010 (N.O.R.), see also, Justice Lanes' decision in Webb v. A.O. Smith Water Products, et al, —Misc.3d— (Erie County Index No. 2008-9199) January 25, 2010, (N.O.R.).

Conclusions of Law:

In support of its motion for summary judgment, Nicholson, citing to Mr. Reals' testimony, and the well worn decision of the Appellate Division First Department in Cawein v. Flintkote, Co., 203 A.D.2d 105 (1st Dept. 1994) and Diel v. Flintkote Co., 204 A.D.2d 53 (1st Dept. 1994), counsel argues that, on the record before this court that the **plaintiffs** cannot prove that Mr. Reals was exposed to asbestos from products produced by it.

It is well settled that on a motion for summary judgment, the defendant bears the initial burden of establishing that its product: "...could not have contributed to the causation of the plaintiff's injuries." Shuman v. Abex Corporation, *et al.*, 267 A.D.2d 1077 (4th Dept. 1999) citing, Shuman v. Abex Corp., 266 A.D.2d 878 (4th Dept. 1999); Matter of Eighth Judicial Dist. Asbestos Litigation [Takacs v. Asbestospray Corporation, *et al*], 255 A.D.2d 1002 (4th Dept. 1998); see also, Root v. Eastern Refractories Co., Inc., 13 A.D.3d 1187(4th Dept. 2004); In re New York City Asbestos Litigation [Comeau v. W.R. Grace & Co., *et al*], 216 A.D.2d 79 (1st Dept. 1994);[3] Reid v. Georgia-Pacific Corporation, 212 A.D.2d 462 (1st Dept. 1995).

In the instant action, rather than affirmatively demonstrating that its product could not have contributed to the causation of the plaintiffs' injuries, defendant's voluminous submissions do little more that attempt to poke holes in and discredit Mr. Reals' testimony, which as plaintiffs' counsel correctly points out, is clearly insufficient to meet its burden of proof. In, Turnmire v. Concrete Applied Technologies Corp., 56 A.D.3d 1125 (4th Dept. 2008) the Appellate Division, Fourth Department held:

> As we have repeatedly stated, a party cannot meet its burden on a summary judgment motion by noting gaps in its opponent's proof (see e.g. Higgins v. Pope, 37 A.D.3d 1086, 1087; Orcutt v. American Linen Supply Co., 212 A.D.2d 979, 980). Inasmuch as each defendant failed to meet its initial burden of establishing its entitlement to judgment as a matter of law, the burden never shifted to plaintiff to raise a triable issue of fact (see generally Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853).

Id. at 1128 (4th Dept. 2008); see also, Tully v. Anderson's Frozen Custard, Inc., 77 A.D.3d 1474 (4th Dept. 2010); DiBartolomeo v. St. Peter's Hospital of City of Albany, 73 A.D.3d 1326 (3rd Dept. 2010); Atkins v. United Refining Holding, Inc., 71 A.D.3d 1459 (4th Dept. 2010). Furthermore, as the Appellate Division, Second Department observed in Flynn v. Fedcap Rehabilitation Services, Inc. 31 A.D.3d 602 (2nd Dept. 2006):

> 'A party moving for summary judgment must first make out a *prima facie* case showing its entitlement to summary judgment. Absent such a showing, the motion must be denied irrespective of the sufficiency of the opposing papers ... If its own papers are insufficient, a party cannot establish entitlement to summary judgment

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[3] "To go forward with a motion for summary judgment, the defendant had to make a *prima facie* showing that its product could not have contributed to the causation of plaintiff's injury [citation omitted]" In re New York City Asbestos Litigation [Comeau v. W.R. Grace & Co., *et al*], *supra* at 80.

merely by pointing to gaps in the opponent's proof' (McArthur v. Muhammad, 27 A.D.3d 532 [citations omitted]).

Id. at 603.

Further, even if this court were to find that the moving defendant had met its initial burden, as more fully set forth above, defendant's counsel avers that Mr. Reals testified that his exposure was from asbestos insulation on pipes leading to the traps, and not the traps themselves. However, Mr. Reals testified to exposure from asbestos insulation on the outside of the steam trap,[4] as well as asbestos containing gaskets while performing maintenance on the traps.[5] With respect to the testimony of deposition testimony of John Artuso, Esq. identified as a corporate representative of the moving defendant from an unrelated action, Mr. Artuso specifically testified:

Q. Do you have any knowledge that Nicholson Steam Traps had or manufactured asbestos containing products?

A. I have no knowledge that they had any asbestos containing products or manufactured any asbestos.

Q. Is there anyone that you ever worked with at Datron who would have knowledge of this information?

A. **I have never–as I said, I been with Datron since 1998. I have never met anyone to the best of my knowledge that ever knew that Nicholson Division existed, nor to the best of my knowledge have I have talked [to] or met anyone who ever worked in the Nicholson Division.**

[Examination Before Trial of John Artuso at p. 13]. Mr. Artso goes on to testify:

Q. ...[D]o you have any knowledge with respect to the corporate history of the Nicholson Division?

A. My understanding was that it was not a corporation. It was, I believe a

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Q. Okay. The trap itself was not covered?
A. No.
Q. That's correct?
A. **In most incidents, yes.**
Q. Because if you cover the trap, then you would affect the efficiency of the trap?
A. Right, the heat, yes.

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While counsel for the moving defendant is correct in his assertion that "90% of the time" the steam traps would be replaced and that such replacement would not have exposed plaintiff to gaskets, plaintiff testified:

Q. And of that ten percent that was repaired, on how many occasions, or what percentage of time did you replace a gasket?

A. I have no idea percentage wise. If it needed it, we replaced it.

[De Benne Esse Video at p. 364].

wholly owned subsidiary....

Q. So you have no information or anything to provide today with respect to Nicholson Steam Traps, Incorporated?

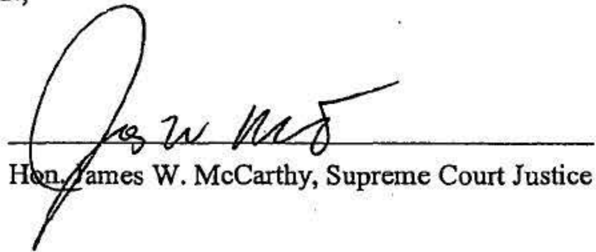
A. Correct.

[Examination Before Trial of John Artuso at p. 26-27]. Such testimony does not appear to be based on any personal knowledge and the attempt by defense counsel to bootstrap Mr. Artuso' statement that: "[He has] no knowledge that [Nicholson] had any asbestos containing products or manufactured any asbestos[,]" to an affirmative statement that Nicholson's products never contained asbestos a statement belied by its own catalog submitted by plaintiffs in opposition to the instant motion.

Thus in light of the foregoing, this court finds that insofar as the defendant has failed to meet its initial burden of proof, defendant, Nicholson Steam Trap's motion for summary judgment [New York Civil Practice Law and Rules § 3212] is, in all respects **DENIED**.[6]

The foregoing constitutes the Letter Decision and Order of this Court, for entry and service with Notice of Entry with remaining counsel of record.

ENTER,



Hon. James W. McCarthy, Supreme Court Justice

Dated: August 8, 2011
at Oswego, New York.

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However, this court is further mindful that upon trial in this matter, plaintiffs will bear the initial burden of proof.

STATE OF NEW YORK
SUPREME COURT COUNTY OF BROOME

RICHARD W. SCHUERCH, JR. and
MARYANN SCHUERCH,

Plaintiffs,

vs. Index No. CA2011000589

A.O. SMITH WATER PRODUCTS, et al.,

Defendants.

BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice

APPEARANCES: BELLUCK & FOX, LLP
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DECISION & ORDER

Mulvey, Robert C., J.

In this personal injury action arising out of alleged exposure to asbestos, the defendant Crane Co. has moved pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it. The plaintiff has submitted papers in opposition to said motion and the moving defendant has submitted reply papers.

The record reflects that, between 1979 and 1983, the plaintiff, Richard Schuerch, served in the United States Navy as a boiler technician on the U.S.S. Saratoga. He worked on high temperature, high pressure valves which were manufactured by Crane Co. and were located in the machinery room of the ship. His work involved removing and replacing internal asbestos packing as well as lagging pads that were used as external insulation on said valves. Mr. Schuerch testified that he was exposed to asbestos in connection with his work on the valves manufactured by Crane Co. and that the new packing he installed while performing his work for the Navy was manufactured by Garlock.

Defendant Crane Co. (hereinafter "Crane") contends it is entitled to summary judgment on the ground that the plaintiff has failed to come forward with any admissible evidence that Crane manufactured, supplied, designed or specified the use of insulation and packing that allegedly released asbestos fibers to which Mr. Schuerch claims he was exposed. Crane also argues that it is not liable for packing and external insulation manufactured, designed or supplied by Garlock or any other third-party that was installed, used or handled by the plaintiff in connection with work that he performed on Crane valves which were present on the U.S.S. Saratoga.

Crane contends that it is not liable, since there is no evidence that Crane (1) had control over the production of the external asbestos-containing insulation and packing to which the plaintiff claims he was exposed, (2) had any role in placing those materials into the stream of commerce, or (3) derived any benefit from the sale of those materials. Crane asserts that Mr. Schuerch failed to testify that the asbestos-containing materials that he worked with in connection with the Crane valves were manufactured or supplied by Crane. Crane further asserts that there is no evidence that Crane manufactured or sold any product that required the use of any asbestos-containing materials. The moving defendant also makes reference to portions of the plaintiff's deposition testimony where he acknowledged that he did not know the manufacturer of the packing that he removed from any valve and he testified that the new packing he installed was manufactured by

Garlock and the lagging pads he associated with the valves and other equipment was made and supplied by the United States Navy. Crane further points out that Mr. Schuerch acknowledged in his deposition testimony that he did not know when any Crane valve was installed on the U.S.S. Saratoga and did not know the maintenance history of any of the valves. Crane asserts that the question of whether one owes a legal duty is a question of law for the courts and argues that it has no liability in this instance since a manufacturer of industrial equipment owes no legal duty with respect to asbestos-containing materials made or supplied by third-parties that are used with the manufacturer's equipment post-sale, relying primarily upon Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289; Braaten v. Saberhagen, 165 Wash.2d 373, 385-388; O'Neil v. Crane Co., 266 P.3d 987; Taylor v. Elliott Turbomachinery Co., Inc., 171 Cal. App. 4th 564; and Kosowski v. A.O. Smith Water Products, et al., Index No. 000128/2010 [Sup. Ct., Oneida Co., McCarthy, J., Jan. 5, 2011].

The plaintiff opposes Crane's motion for summary judgment on grounds that Crane has failed to meet its initial burden as the moving party arguing that it has not proffered competent evidence in admissible form to support its motion. The plaintiff also argues that, even if Crane has made a *prima facie* showing of entitlement to summary judgment, the record contains evidence that is sufficient to raise questions of fact as to whether he was exposed to asbestos from asbestos-containing products manufactured or supplied by Crane and/or from asbestos-containing products that were manufactured or supplied by third-parties that were used in conjunction with Crane valves.

As to its claim that Crane has not made a *prima facie* showing of entitlement to summary judgment, the plaintiff contends that deposition testimony of Crane witnesses from unrelated actions to which the plaintiff was not a party is not admissible in connection with this motion pursuant to the provisions of CPLR 3117 and that an affidavit given by a Crane representative and an unsworn expert report submitted in connection with unrelated actions are likewise not admissible in connection with this motion.

With respect to the merits of Crane's motion, the plaintiff points to his deposition testimony that he performed repair and replacement work on valves manufactured by Crane and that the packing material he removed and replaced in the Crane valves all contained asbestos. The plaintiff also points out that the record contains answers to interrogatories given by Crane in another asbestos case (Kuczynski v. A.W. Chesterton, Inc., et al. Supreme Court, All Counties Within New York City - Asbestos Litigation, Attachment I, pages 100-101, Index No. 106967-06) which state that "Certain of the valves had enclosed within their metal structure asbestos containing gaskets, packing and discs", as well as documentary evidence that Crane's corporate drawings for its globe

valves identified asbestos packing as original, specified components and that the Navy's Qualified Products List for gaskets and packing required that such components contain asbestos for use in valves in boiler systems on Navy ships.

The plaintiff further points to evidence in the record from Crane's own supply catalogs and manuals that Crane offered for sale asbestos-containing insulating materials for use in conjunction with its valves and recommended that asbestos-based insulations be used to insulate their valves in high temperature applications. Based upon such evidence, the plaintiff argues that the defendant Crane knew or should have known that its valves would be used in conjunction with asbestos-containing materials, that it had a duty to warn of the hazards associated with asbestos and that, accordingly, Crane's motion for summary judgment should be denied, citing Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148.

Summary judgment may be awarded when no issues of fact exist. (see, CPLR 3212 [b]; Andre v. Pomeroy, 35 N.Y.2d 361, 362). In order to be successful on a motion for summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853. Failure on the part of the moving party to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form that is sufficient to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, supra, 68 N.Y.2d at p. 324; Zuckerman v. City of New York, 49 N.Y.2d 557, 562.

Upon review and consideration of the papers submitted, the Court has determined that Crane's motion for summary judgment must be denied.

First, with respect to the plaintiff's claim that Crane has failed to meet its initial burden of making a *prima facie* showing of entitlement to summary judgment, the Court finds that Crane has adequately met that burden. Although an unsworn expert report, such as the one prepared by Frederick Boelter and submitted by Crane in support of its motion, generally should not be considered on a motion for summary judgment (see Frees v. Frank & Walter Eberhart L.P. No.1, 71 A.D.3d 491, 492; Bendik v. Dybowski, 227 A.D.2d 228, 229; Pagano v. Kingsbury, 182 A.D.2d 268, 270), the deposition testimony given by Crane witnesses in unrelated asbestos cases that has also been submitted by Crane in support of its motion herein, may, in this Court's view, be considered by the Court in connection with this motion. (see State of New York v. Metz, 241 A.D.2d 192;

CPLR 3212 [b]). Upon reviewing the deposition testimony proffered by Crane in support of its motion, including excerpts from the plaintiff's deposition and portions of testimony given by Anthony Pantaleoni and Richard Hatfield in unrelated asbestos cases, as well as the affidavit given by Mr. Pantaleoni in an unrelated case, the Court finds that Crane submitted sufficient evidence to meet its initial burden.

Although the Court has determined that Crane made a *prima facie* showing of entitlement to summary judgment, the Court finds that the plaintiff has come forward with evidence through other portions of the plaintiff's deposition testimony, Crane's answers to interrogatories and testimony of Crane witnesses from other asbestos cases, Crane's own drawings, supply catalogs and manuals and Qualified Product Lists prepared by the Navy that is sufficient to raise questions of fact as to whether he was exposed to asbestos from asbestos-containing products manufactured or supplied by Crane and/or asbestos-containing products that were made or supplied by third-parties but were intended by Crane and/or the Navy to be used in conjunction with the Crane valves. Plaintiff's papers raise a reasonable inference that he was exposed to asbestos while working on valves manufactured by Crane which initially had asbestos-containing components and were intended to have asbestos-containing replacement components in connection with their use. (see, Salerno v. Garlok Inc., 212 A.D.2d 463; Lloyd v. W.R. Grace & Co.-Conn., 215 A.D.2d 177; Cobb v. A.O. Smith Water Products, et al., Index No. 10-3677, [Sup. Ct., Oswego Co., McCarthy, J., March 30, 2011]). The plaintiff need not show the precise causes of his damages but only show facts and conditions from which the defendant's liability can be reasonably inferred. Reid v. Georgia Pacific Corp., 212 A.D.2d 462, 463; Matter of New York City Asbestos Ligation, [Brooklyn Navy Shipyard Cases], 188 A.D.2d 214, 225, affd 82 N.Y.2d 821.

Further, with respect to the issue of whether Crane had a duty to warn of the hazards associated with asbestos, Crane's motion for summary judgment must be denied since the Court finds that the holding in Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148, is applicable and controlling in this instance. In denying the motion herein, this Court also relies upon the decisions in Sawyer v. A.C. & S., Inc., 32 Misc.3d 1237(A) and Defazio v. A.W. Chesterton, 32 Misc.3d 1235(A) which cite Berkowitz, supra, and denied motions for summary judgment made by Crane in asbestos cases which involved nearly identical issues and facts. (see also, Celella v. Crane, Co., et al., Index No. 2009-1158 [Sup.Ct., Schenectady County, Aulisi, J., Decision and Order dated November 7, 2011]; Cobb v. A.O. Smith Water Products, et al., Index No. 10-3677 [Sup. Ct., Oswego County, McCarthy, J., Letter Decisions dated April 13, 2011 and March 30, 2011]).

Accordingly, for the reasons set forth above, it is

ORDERED, that the motion of the defendant Crane Co. seeking summary judgment and dismissal of the plaintiff's complaint and all cross-claims as against it is hereby denied in its entirety.

This shall constitute the Decision and Order of the Court. No costs are awarded on the motion.

Dated this 12th day of April, 2012 at Ithaca, New York.

Hon. Robert C. Mulvey

Digitally signed by Hon. Robert C. Mulvey
DN: cn=Hon. Robert C. Mulvey, o=New York State Supreme Court, ou=Justice, email=tpkmulvey_chambers@nycourts.gov, c=US
Date: 2012.04.12 09:57:56 -04'00'