APL-2014-00209
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Court of Appeals

STATE OF NEW YORK

IN RE: 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 FOR *AMICI CURIAE* UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, NATIONAL COUNCIL FOR OCCUPATIONAL SAFETY & HEALTH, NEW YORK COMMITTEE FOR OCCUPATIONAL SAFETY & HEALTH, NORTHEAST NEW YORK COMMITTEE FOR OCCUPATIONAL SAFETY AND HEALTH, MIDSTATE COUNCIL FOR OCCUPATIONAL SAFETY AND HEALTH, WESTERN NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH, BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREATER NEW YORK, ENTERPRISE ASSOCIATION OF STEAMFITTERS LOCAL 638, INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ALLIED WORKERS, LOCAL 12, UNITED ASSOCIATION LOCAL 1 PLUMBERS OF NEW YORK CITY AND TRANSPORTATION WORKERS UNION LOCAL 100 IN SUPPORT OF PLAINTIFF-RESPONDENT

September 10, 2015

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DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. 500.1(f):

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") states that it has no parents, subsidiaries, or affiliates.

National Council for Occupational Safety and Health states that it has no parents, subsidiaries, or affiliates.

New York Committee for Occupational Safety and Health states that is has no parents, subsidiaries, or affiliates.

NorthEast New York Committee for Occupational Safety and Health states that it has no parents, subsidiaries, or affiliates.

Midstate Council for Occupational Safety and Health states that its parent organization is the Midstate Education and Service Foundation. It has no other affiliates or subsidiaries.

Western New York Council on Occupational Safety and Health states that it has no parents, subsidiaries, or affiliates.

Building and Construction Trades Council of Greater New York states that it is affiliated with the Building and Construction Trades Department of the AFL-CIO.

Enterprise Association of Steamfitters Local 638 states that it has no parents, subsidiaries, or affiliates.

International Association of Heat and Frost Insulators, Local 12 states that it has no parents, subsidiaries, or affiliates.

United Association Local 1 Plumbers of New York City states that it has no parents, subsidiaries, or affiliates.

Transportation Workers Union Local 100 states that it is a chapter of the Transportation Workers Union of America but has no other parents, subsidiaries, or affiliates.

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QUESTION PRESENTED

Does a product manufacturer owe a duty to warn a normal end user for dangers connected to the interdependent use of its product with aftermarket components in circumstances where the interdependent use was normal and intended but the aftermarket components happened to be obtained from third parties rather than the product manufacturer itself?

INTEREST OF *AMICI CURIAE* IN THIS APPEAL

Amici consist of labor unions and affiliated organizations that represent and fight for the rights of workers and retirees in various vocational trades, with a particular emphasis on safe working conditions. Some of *Amici's* constituent members worked with consumable asbestos components on a regular basis in their trades, and to this day, *Amici's* constituent members routinely work with equipment and products that integrate consumable, breakable, replaceable, and/or aftermarket components into their design and functional operation, including asbestos components. Accordingly, *Amici* have a substantial interest in the outcome of this case, as a finding in favor of Appellant Crane Co. would create such a far-reaching rule that it would automatically foreclose all equipment manufacturer failure-to-warn liability

for interdependent product use injuries in all industrial and occupational settings.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") is the largest industrial union in the United States and Canada, with 1.2 million members and retirees. The USW represents workers in nearly every industry, with hundreds of thousands of workers that routinely handle dangerous components of and related to various types of equipment, and including the majority of unionized chemical workers in the United States who work with solvents and thousands of organic and inorganic chemicals such as plastics, fertilizers, pesticides, synthetic rubber, pharmaceuticals, paints, and pigments. USW has a significant stake in ensuring safety in the use of hazardous components with industrial equipment and the handling of toxic chemicals in industrial settings where workers suffer higher exposures than other segments of the population.

The *National Council for Occupational Safety and Health* ("National COSH") is an umbrella organization for 20 local, non-profit Coalitions/Committees on Occupational Safety and Health, known as "COSH groups," located around the country. The COSH network has a combined experience of hundreds of years promoting safe and healthy workplaces, products, and environments through education, training, and advocacy.

The *New York Committee for Occupational Safety and Health* ("NYCOSH") is a membership organization of workers, unions, community-based organizations, workers' rights activists, and health and safety professionals. With offices in New York City and on Long Island, NYCOSH uses training, education, and advocacy to improve health and safety conditions in our workplaces, our communities, and our environment. Founded 35 years ago on the principle that workplace injuries, illnesses and deaths are preventable, NYCOSH works to extend and defend every person's right to a safe and healthy workplace.

The *NorthEast New York Committee for Occupational Safety and Health* ("NENYCOSH") is a non-profit membership organization of workers, unions, community-based organizations, and health and safety professionals. NENYCOSH uses training, education, advocacy, and organizing to improve health and safety conditions in our workplaces and communities throughout the Capital District. We believe that most workplace injuries, illnesses and deaths are preventable. Every person has a right to a safe and healthful work environment!

Midstate Council for Occupational Safety and Health ("Midstate COSH") is dedicated to promoting safe and healthy working conditions through organizing, advocacy and training. Midstate COSH's belief that almost all work-related deaths and serious injuries and illnesses are preventable motivates us to

encourage workers to take action to protect their safety and health and to provide quality information and training about hazards on the job and worker rights.

The *Western New York Council on Occupational Safety and Health* ("WNYCOSH") is a non-profit organization dedicated to defending workers' rights to a safe and healthy work environment through outreach, advocacy and education, and to improve the working conditions of all workers. WNYCOSH provides worker safety and health training to thousands of workers in the Western New York area each year, covering a wide range of topics on how to identify, evaluate and control hazards they are exposed to on the job, including chemical hazards, such as asbestos, lead and pesticides. Preventing workplace injuries, such as toxic chemical exposure, is an organizational priority.

The *Building and Construction Trades Council of Greater New York* is an umbrella organization consisting of local affiliates of 15 national and international unions representing 100,000 working men and women in New York City. It is affiliated with the Building and Construction Trades Department of the AFL-CIO. The members of the local affiliates work in trades that place them in proximity to asbestos, toxic chemicals and other hazardous conditions on a daily basis. The members of the Building and Construction Trades Council of Greater New York are: International Brotherhood of Boilermakers, Iron Ship

Builders, Blacksmiths, Forgers & Helpers, Local Lodge No. 5; The New York City District Council of Carpenters; International Brotherhood of Electrical Workers, Electrical Workers Local Union #3; International Union of Elevator Constructors, Elevator Constructors Local Union #1; International Association of Heat and Frost Insulators and Allied Workers Local Union #12 and 12A; International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, New York State Iron Workers District Council, Locals 40, 46, 197, 361 and 580; Laborers' International Union of North America, Local 29, Local 731, and Local 1010, as well as Mason Tenders District Council, and Cement and Concrete Workers District Council 16; International Union of Operating Engineers, Locals 14, 15, 30 and 94; District Council 9, International Union of Painters and Allied Trades; Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Locals 262, and 780; United Association of Journeyman & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada; United Union of Roofers, Locals 1 and 638, Waterproofers and Allied Workers, Roofers and Waterproofers, Local 8; International Brotherhood of Teamsters, Locals 282, 813, and 814; International Union of Bricklayers and Allied Craftworkers, Local 7; and Sheet Metal Workers International Association, Local 28 and Local 137.

Enterprise Association of Steamfitters Local 638 ("Steamfitters Local 638") represents the steamfitters, pipefitters, and HVAC (heating, ventilating and air conditioning) service technicians that install, maintain and repair pipes that carry liquids or gases to and in businesses, homes, government buildings and factories. Members also install, test and maintain commercial and residential sprinkler systems. Steamfitters Local 638 maintains jurisdiction over all general pipe fitting in New York City, including all five boroughs and all of Long Island, Nassau and Suffolk Counties and is a combination of local unions representing the Construction Branch and the Metal Trades Service Branch. The work performed by Steamfitters Local 638 members is dangerous and regularly places workers in proximity to asbestos and other risks to their health and safety.

The *International Association of Heat and Frost Insulators, Local 12* ("IAHFI Local 12"), based in Queens, New York, is a local union affiliate of the International Association of Heat and Frost Insulators and Allied Workers, representing the interests of workers and providing apprentice and journeyman training in the insulation trades—including temperature, sound and fire insulation installation, maintenance and removal—as well as abatement and remediation of lead and asbestos hazards.

The health and safety of IAHFI Local 12's workers, its customers and the general public are of paramount interest and concern.

United Association Local 1 Plumbers of New York City, ("Local 1 Plumbers of NYC") represents the interests of plumbers serving the industrial, commercial and residential construction industry in New York City. Local 1 Plumbers of NYC members construct, maintain and repair plumbing for military and civilian, private and governmental facilities. In the course of their work, members encounter asbestos and other public health hazards. For more than 150 years, Local 1 Plumbers of NYC has operated a vigorous apprentice and journeyman training program that protects trades workers and the public health.

Transportation Workers Union Local 100 ("TWU Local 100") represents 38,000 members who are actively working at jobs covered by the union and 26,000 retirees. TWU Local 100 is the New York City based chapter of the Transport Workers Union of America, a union that represents transportation workers in bus and subway lines, and several airlines nationwide. TWU Local 100 represents virtually all employees, including those who operate New York City's subway cars, maintain the trains and tracks, staff the token booths, clean platforms and subway cars, and service and repair mechanical equipment, such as elevators and escalators. TWU's members also include most of the men and women who drive and maintain public buses in New York City, as

well workers in private transportation firms serving the New York City Metropolitan area. Advocating for the health, safety and well-being of its working and retired members and their families is a primary focus of TWU Local 100's work.

PRELIMINARY STATEMENT

Gross sales of industrial machinery manufactured in the United States is approximately half a trillion dollars a year.[1] The use of this equipment permeates our economy, forming the backbone of everything from agricultural to energy.[2] To do so, however, this equipment requires constant maintenance and repair to prevent degradation during its operational life.[3] Active trades that ensure this equipment continues to function are wide-ranging, including mechanics, millwrights, pipefitters, steamfitters, plumbers, sheet metal workers, iron workers, machinists, heating and ventilating technicians, electricians, masons, and welders.[4] Day in and day out, these trades work with equipment that, by design, integrates consumable and breakable component parts, or that requires post-sale component additions,

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[1] U.S. Department of Commerce, SelectUSA, *The U.S. Machinery and Equipment Manufacturing Industry*, located at http://selectusa.commerce.gov/industry-snapshots/machinery-and-equipment-industry-united-states (last viewed September 1, 2015).

[2] *Id.*

[3] Federal Energy Management Program, U.S. Department of Energy, *Release 3.0, O&M Best Practice, Section 9.2.12* (August 2010) (boiler check list discussing the routine replacement of gaskets and packing), located at http://www1.eere.energy.gov/femp/pdfs/omguide_complete.pdf (last viewed September 1, 2015).

[4] New York State Department of Labor, *List of Active Trades*, located at http://labor.ny.gov/apprenticeship/general/occupations.shtm (last viewed September 1, 2015)

to operate properly. The failure of these consumable components can result in, among other injuries, death to trade workers.[5]

New York courts have been asked multiple times to decide whether a product manufacturer owed a duty to warn for dangers posed by its product's interdependent use with a third-party component part. In some circumstances, the facts warranted the imposition of a duty to warn. *See, e.g., Penn v. Jaros, Baum & Bolles*, 25 A.D.3d 402 (1st Dep't, 2006); *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148 (1st Dep't, 2001); *Rogers v. Sears, Roebuck & Co.*, 268 A.D.2d 245 (1st Dep't, 2000). In other circumstances, the facts warranted a finding of no duty to warn. *See, e.g., Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289 (N.Y. 1992); *Tortoriello v. Bally Case, Inc.*, 200 A.D.2d 475 (1st Dep't, 1994).

In the instant case, the First Department correctly interpreted this caselaw to impose a balancing test for determining duty, which is dependent on the facts of each case. To hold otherwise would divorce the facts of each case from a duty analysis and ultimately lead to unjust results, such that industrial workers will be automatically denied redress in many circumstances where redress from the product manufacturer would be warranted. To hold otherwise would also require this Court

[5] *Release 3.0, O&M Best Practice, supra at Section 9.3.9* (discussing the death of two steamfitters from the failure of a gasket in a valve).

to conclude that each of the cases that distinguished *Rastelli* over the past 22 years was incorrectly decided. Such a drastic shift in New York common law is unwarranted and would be antithetical to public policy.

ARGUMENT

Under New York law, a product manufacturer can owe a duty to warn for dangers posed by the known or intended use of its product synergistically or interdependently with a component added after sale. This is not to say that a duty to warn should exist in every circumstance where a worker is injured from his use of a product with a component added after sale, but neither should the rule be that a duty could *never* exist in such a circumstance. A balancing rule that provides our courts with the discretion to fix the duty point in complex and fact-intensive circumstances is one that provides a much greater chance of serving the ends of justice. This is how duty has traditionally been fixed under New York law. *See Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585 (N.Y. 1994) (courts traditionally fix the duty point by balancing factors). In interdependent-use cases, no justification exists to warrant an extreme departure from the traditional approach to duty. Accordingly, *Amici* respectfully submit that the order of the First Department should be affirmed.

I. CRANE'S ROBOTIC RULE FOR DUTY TO WARN IN INTERDEPENDENT PRODUCT-COMPONENT USE CASES IS INCOMPATIBLE WITH THIS COURT'S DECISIONS INVOLVING PRODUCTS LIABILITY FOR INDUSTRIAL EQUIPMENT

Considering the pervasive nature that industrial equipment plays in our society, it comes as no surprise that this Court has weighed in on industrial equipment products liability cases multiple times. *See, e.g., Hoover v. New Holland North America, Inc.*, 23 N.Y.3d 41 (N.Y. 2014) (tractor-driven post hole digger); *Liriano v. Hobart Corp.*, 92 N.Y.2d 232 (N.Y. 1998) (meat grinder); *Lopez v. Precision Papers*, 67 N.Y.2d 871 (N.Y. 1986) (forklift); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102 (N.Y. 1983) (circular power saw); *Micallef v. Miehle Co.*, 39 N.Y.2d 376 (N.Y. 1976) (printing press). In various contexts, this Court has addressed the issue of duty in both warnings and design defect cases. *See, e.g., Liriano v. Hobart Corp., supra* (addressing post-sale duty to warn for substantial modifications); *Rastelli v. Goodyear Tire & Rubber Co., supra* (addressing interdependent use duty to warn); *Sage v. Fairchild-Swearingen Corp*, 70 N.Y.2d 579 (N.Y. 1987) (addressing interdependent use design duty); *Cover v. Cohen*, 61 N.Y.2d 261 (N.Y. 1984) (addressing post-sale duty to warn).

A review of this Court's precedents, however, has revealed only a single instance where a robotic rule was adopted in a products liability context. In *Campo v Scofield*, 301 N.Y. 468

(N.Y. 1950), the plaintiff was injured on a farm while feeding onions into an "onion topping" machine. This Court concluded that a claim could be maintained only for latent dangers. In other words, *Campo* was an automatic no-liability rule for all patent dangers associated with a product.

In *Micallef, supra*, however, this Court departed from that automatic rule set forth in *Campo*. The critical policy reason for this departure was that:

> *Campo* suffers from its rigidity in precluding recovery whenever it is demonstrated that the defect was patent. Its unwavering view produces harsh results in view of the difficulties in our mechanized way of life to fully perceive the scope of danger, which may ultimately be found by a court to be apparent in manufactured goods as a matter of law.

Id. at 385. Therefore, the single instance where this Court adopted a robotic rule was later found to be unjust due to its rigidity.

It is important that this Court could not even accept a robotic rule for a *patent* danger, because the issue before the Court in the instant case involves a *latent* danger. It should follow that a robotic rule here would lead to even harsher results than perceived by this Court in a patent danger circumstance.

Without a doubt, the industrial machines of today are extremely complex and sophisticated. *See Codling v. Paglia*, 32 N.Y.2d 330, 340-341 (N.Y. 1973). The complexity of modern day

equipment enhances the potential for latent dangers from the normal and intended use of equipment interdependently with components replaced or added after sale. The equipment manufacturer is certainly in a position to know and learn of these dangers from the use of its equipment as intended, and thus must exercise reasonable care by warning of such dangers created by that intended, interdependent use. *See Micallef*, 39 N.Y.2d 376, 385, *supra* ("manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended"). In the case at hand, it was the design and intended operation of Crane's valves that placed Mr. Dummitt in an "unreasonably risky setting." *Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 587, *supra*. This is true of various types of equipment used by trade workers.

Accordingly, the unwavering rule Crane seeks to impose in interdependent-use failure to warn cases is not compatible with either New York law or the inherent nature of complex and sophisticated industrial equipment. If this Court were to accept Crane's robotic rule, the "harsh results" identified by the *Micallef* Court would undoubtedly come to pass.

II. THE IMPLICATIONS OF AN AUTOMATIC DUTY TO WARN RULE WOULD BE DELETERIOUS TO INDUSTRIAL WORKERS

The consequences of the robotic rule suggested by Crane would be far-reaching and manifestly inequitable to trade workers. For example, a nail gun manufacturer would escape liability for failing to warn about the dangers of using its nail gun where the worker's injury resulted from an aftermarket nail rather than one supplied in the original box of nails that was sold with the nail gun. Or an electric sander manufacturer would escape liability for failing to warn about the dangers of using its sander where the worker's injury was caused by replacement sandpaper rather than the perishable piece of sandpaper supplied with the machine originally. Or a manufacturer would escape liability even where it directed or recommended or mandated its customers to use a particular component with its valves, simply because it did not expressly supplying that component. Or, worse, a manufacturer would escape liability even where it unequivocally *knew* that the interdependent use of its product with a component added after sale was likely to cause the ultimate injury of death - facts consistent with the instant case. Public policy cannot countenance these unjust implications.

The reach of a bright-line rule as proposed by Crane would extend even to the realm of everyday consumers. A coffee

machine manufacturer, for instance, would have no duty to warn for the dangers of scalding water because it did not place the water into the stream of commerce. Or a grill manufacturer would have no duty to warn for the dangers of a gas explosion because it did not place the replacement propane tank into the stream of commerce. *See Rogers v. Sears, Roebuck & Co.*, 268 A.D.2d 245, *supra* (imposing a duty to warn in that scenario in contrast to the attenuated circumstances in *Rastelli*).

These examples demonstrate the intractability of Appellant's robotic duty test. A more equitable test, as identified by the First Department, would be one that balances various factors under the circumstances of each case.

Without a doubt, this Court need only look to the two jurisdictions that have adopted a robotic rule to observe how its inflexibility leads to inequitable and widely inconsistent results. In two sister cases (with strenuous dissents), Washington adopted a robotic rule that no duty exists in any circumstance where the harm-causing substance was not placed into the stream of commerce directly by the product manufacturer. *See Braaten v. Saberhagen Holdings*, 165 Wash.2d 373 (2008); *Simonetta v Viad Corp.*, 165 Wash.2d 341 (Wash. 2008). It took only a few years for the unfair implications of this mechanical rule to be placed again before the Washington Supreme Court.

In *Macias v. Saberhagen Holdings, Inc.*, 175 Wash.2d 402 (Wash. 2012), a tool keeper in a shipyard, whose duties were to maintain respirators that other workers used, developed a fatal asbestos disease from that work and sued the respirator manufacturers. The respirator manufacturers moved for summary judgment under Washington's robotic duty rule. The trial court denied the motion but was reversed by the intermediate appellate court.

Finally recognizing that its prior robotic rule would create patently unjust results, the majority of the Washington Supreme Court disregarded its prior decisions by imposing a duty to warn on the mask manufacturer. It held that "[i]t does not matter that the respirator manufacturers were not in the chain of distribution of products containing asbestos when manufactured." *Id.* at 415. To reach this result, the majority confusingly sought to distinguish between foreseeability as having no part of a duty analysis and that "the use to which the product will be put is always a part of this determination." *Id.* at 419.

As pointed out by the dissent in *Macias*, the majority's decision was irreconcilable with its prior decisions in *Simonetta* and *Braaten*, and could only be explained "by subtly recasting the holdings of both cases while echoing the reasoning of the *Simonetta/Braaten* dissents." *Id.* at 422.

Washington's retreat from its absolute rule in *Simonetta* and *Braaten* suggests that a robotic rule should not have been adopted in the first place due to its unjust consequences. California - the other jurisdiction that adopted a robotic rule - has also recognized the unfair implications of such a rule by subsequently finding that a product manufacturer owed a duty even where it did not place the asbestos into the stream of commerce. *Compare O'Neil v. Crane Co.*, 53 Cal. 4th 335 (Cal. 2012) (strict stream of commerce rule of no duty), *with Shields v. Hennessy Indus., Inc.*, 205 Cal. App. 4th 782 (Cal. App. 1st Dist. 2012) (brake grinder manufacturer owed a duty to warn for asbestos exposure from brakes it did not place in the stream of commerce).

The better approach to avoid deleterious consequences for industrial workers is a balancing rule focusing on each particular case, which is what the First Department compellingly set forth in this case.

A recent decision nationally on this issue is from the District Court of South Carolina, which expressly rejected the argument that there is no duty to warn in these types of cases and opined that "the South Carolina Supreme Court would likely reject the bare metal defense and find that a manufacturer is subject to a duty to warn about potential dangers from exposure to parts of its product which it did not manufacture or

otherwise supply." *Sparkman v Goulds Pumps, Inc.*, 2015 WL 727937, at *3 (D.S.C., Feb. 19, 2015). In doing so, the District Court quoted from the decision in *Garvin v. Agco Corp.*, No.2012-CP-40-6675 (Richland, S.C., Ct. Common Pleas, Dec. 10, 2014), which denied Crane Co.'s motion for summary judgment on this exact issue:

> The term "bare metal" is misleading and, as used here, is semantic advocacy rather than a useful doctrinal description. There is no evidence Crane sold "bare metal" valves or pumps; in fact, the evidence is to the contrary.... Crane contends that when its original asbestos parts wore out, the pump or valve somehow disappeared from the stream of commerce, even though it remained as an integral, working part of a massive industrial plant. Crane argues its legal responsibility ceased when the asbestos it supplied no longer accompanied the product....
>
> [However] ... it was undisputed Crane placed into the stream of commerce products that not only contained asbestos, but specified they be replaced by asbestos parts. Such a scenario was explicitly mentioned by *O'Neil* as a problem its ruling did not address. Viewed objectively, the manufacturer's product—defective when it left Crane's hands because it contained asbestos and specified asbestos for future use—remained defective and unreasonably dangerous when its specifications were heeded not only by its owner/user, but by another manufacturer....
>
> There was no evidence the replacement gaskets and packing manufactured by others were different in material or design from Crane's original supplied products or specifications. The evidence showed Crane long knew of the risk asbestos posed, and it occupied the best position in the chain of distribution to warn consumers of those risks. Crane knew asbestos gaskets and packing would not last as long as its bare metal valves or pumps;

> consequently it knew those parts would have to be replaced, and replaced with similar if not identical parts whose manufacture was guided by Crane's design and specifications. To say Crane was no longer part of the "chain of distribution" when the original gaskets and packing wore out on its still-functioning product would be artificial, if not silly....

Id. at *2.

III. THE SOCIAL BENEFITS OF IMPOSING A DUTY TO WARN ON PRODUCT MANUFACTURERS IN INTERDEPENDENT USE CASES FAR OUTWEIGH THE COST AND BURDEN OF WARNING

A duty should be owed by a product manufacturer that knows a danger exists, or contemplates a danger, from the use of its product interdependently with a component added after sale because the social benefits of protecting workers from severe injuries during the mere operation of the manufacturer's product significantly outweigh the minimal cost and burden to the manufacturer from having to warn.

A product manufacturer knows better than anyone else how its product will be used. *See Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 240-41, *supra* (manufacturer is in a superior position to know the use of its product). That is why, under New York law, a duty is imposed for both foreseeable uses and even foreseeable misuses. *See id.* at 240. A product user, on the other hand, has little opportunity to detect latent dangers regarding the normal use of the product. *See Codling v. Paglia,*

32 N.Y.2d 330, 341, *supra*. There is a significantly greater incentive toward safety when both the product manufacturer and component part manufacturer are held to owe a duty to warn for dangers posed by the interdependent use of those products. *Cf. id.* In a latent danger situation especially, added incentive toward safety should be encouraged, not deterred. To hold otherwise would induce continued negligence in failing to warn with no regard for protecting product end users. The product manufacturer can also absorb the loss for "postdistribution liability" and pass it along to the purchasers, which should be acceptable to the purchasers in light of the added assurances to their workers' protection. *See id.* The burden of accidental injuries is simply a cost of business associated with knowingly designing products to be used interdependently with components after sale. *See Sprung v MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 473 (N.Y. 2003) (burden of injuries from defective products "should be treated as a cost of business against which insurance can be obtained").

The social benefits from imposing a duty to warn on the product manufacturer and protecting users of that manufacturer's product far outweigh the minimal cost or burden of warning. Unlike making changes to the design of a product, issuing a warning is inexpensive and uncomplicated. *See Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 239-40, *supra* ("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…"). It is troubling that, in the instant case, Crane did not even take the minimal steps of warning although it knew of the lethal propensities of its valves' normal function. Therefore, the social benefits weigh significantly in favor of a duty to warn.

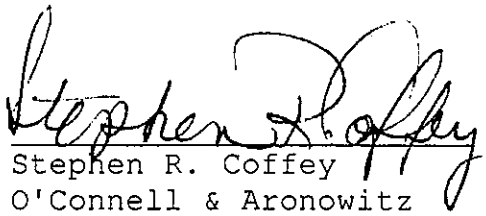
CONCLUSION

In complex and fact-specific cases involving interdependent product-component uses, the rights of industrial workers and the potential liability of product manufacturers can only be balanced by implementing a flexible test for fixing a duty to warn. Adopting a robotic rule, conversely, is contrary to public policy and will lead to harsh results whereby many innocent workers injured from the intended use of a product interdependently with a third-party component would be unable to seek redress from the product manufacturer.

For the foregoing reasons, *Amici* respectfully submit that the order of the First Department should be affirmed.

Dated: New York, New York
September 4, 2015

Respectfully submitted,



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