*To be Argued by:*
CAITLIN J. HALLIGAN
*(Time Requested: 30 Minutes)*

APL-2014-00209
New York County Clerk's Index No. 190196/10

# Court of Appeals
## of the
# State of New York

IN THE MATTER OF NEW YORK CITY ASBESTOS LITIGATION

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

*Respondent,*

– against –

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

*Defendants,*

CRANE CO.,

*Appellant.*

## BRIEF FOR APPELLANT


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Date Completed: September 29, 2014

## CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f), Crane Co. states that it is a Delaware Corporation that has no corporate parent or affiliate. The following entities are the direct and indirect subsidiaries of Crane Co.:

ARDAC Inc., Armature d.o.o., Automatic Products (UK) Ltd., B. Rhodes & Son Ltd., Barksdale GmbH, Barksdale, Inc., CA-MC Acquisition UK Ltd., Coin Controls International Ltd., Coin Holdings Ltd., Coin Industries Ltd., Coin Overseas Holdings Ltd., Coin Pension Trustees Ltd., Conlux Matsumoto Co. Ltd., CR Holdings C.V., Crane (Asia Pacific) Pte. Ltd., Crane (Ningbo) Yongxiang Valve Company Ltd., Crane Aerospace, Inc., Crane Australia Pty. Ltd., Crane Canada Co., Crane Composites Ltd., Crane Composites, Inc., Crane Controls, Inc., Crane Electronics Corporation, Crane Electronics, Inc., Crane Environmental Inc., Crane Fengqiu Zhejiang Pump Co. Ltd., Crane Fluid & Gas Systems (Suzhou) Co. Ltd., Crane Global Holdings S.L., Crane GmbH, Crane Holdings (Germany) GmbH, Crane International Capital S.a.r.l., Crane International Holdings, Inc., Crane International Trading (Beijing) Co. Ltd., Crane Ltd., Crane Merchandising Systems Ltd., Crane Merchandising Systems, Inc., Crane Merger Co. LLC, Crane Middle East & Africa FZE, Crane Ningjin Valve Co., Ltd., Crane North America Funding LLC, Crane Nuclear, Inc., Crane Overseas, LLC, Crane Payment Solutions GmbH, Crane Payment Solutions Ltd., Crane Payment Solutions Pty

Ltd., Crane Payment Solutions Srl, Crane Payment Solutions Inc., Crane Pension Trustee Company (UK) Limited, Crane Process Flow Technologies (India) Ltd., Crane Process Flow Technologies GmbH, Crane Process Flow Technologies Ltd., Crane Process Flow Technologies S.P.R.L., Crane Process Flow Technologies S.r.l., Crane Pumps and Systems, Inc., Crane Resistoflex GmbH, Crane SC Holdings Ltd., Crane Stockham Valve. Ltd., Croning Livarna d.o.o., Delta Fluid Products Ltd., Donald Brown (Brownall) Ltd., ELDEC Corporation, ELDEC Electronics Ltd., ELDEC France S.A.R.L, Flow Technology Inc., Friedrich Krombach GmbH Armaturenwerke, Hattersly Newman Hender Ltd., Hydro-Aire, Inc., Inta-Lok Ltd., Interpoint S.A.R.L., Interpoint U.K. Limited, Kessel (Thailand) Pte. Ltd., Krombach International GmbH, MCC Holdings, Inc., MEI Australia LLC, MEI Auto Payment System (Shanghai) Ltd., MEI Conlux Holdings (Japan), Inc., MEI Conlux Holdings (US), Inc., MEI de Mexico LLC, MEI, Inc., MEI International Ltd., MEI Payment Systems Hong Kong Ltd., MEI Queretaro S. de R.L. de CV, MEI Sarl, Merrimac Industries, Inc., Mondais Holdings B.V., Money Controls Argentina SA, Money Controls Holdings Ltd., Multi-Mix Microtechnology SRL, NABIC Valve Safety Products Ltd., Nippon Conlux Co. Ltd., Noble Composites, Inc., Nominal Engineering, LLC, P.T. Crane Indonesia, Pegler Hattersly Ltd., Sperryn & Company Ltd., Terminal Manufacturing Co., Triangle Valve Co. Ltd., Unidynamics / Phoenix, Inc., Viking Johnson Ltd., W.T.

Armatur GmbH, Wade Couplings Ltd., Wask Ltd., Xomox A.G., Xomox Chihuahua S.A. de C.V., Xomox Corporation, Xomox Corporation de Venezuela C.A., Xomox France S.A.S., Xomox Hungary Kft., Xomox International GmbH & Co. OHG, Xomox Japan Ltd., Xomox Korea Ltd., Xomox Sanmar Ltd., and Xomox Southeast Asia Pte. Ltd.

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## PRELIMINARY STATEMENT

Two significant legal issues lie at the heart of this appeal: first, the proper test for determining a manufacturer's responsibility for injuries caused entirely by the product of another, and second, the proper test for establishing causation in a product liability action based upon a failure-to-warn theory.

In *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S.2d 373 (1992), this Court articulated the fundamental principle that a manufacturer bears no responsibility for injuries caused entirely by the product of another, which is a rule that the Supreme Court of Washington (relying, in part, on *Rastelli*) recently labeled the "majority rule nationwide." *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 385, 198 P.3d 493, 498 (2008).

At trial, the parties stipulated that there was no evidence that Crane Co., a manufacturer of industrial valves that complied with Navy requirements, manufactured, supplied, or otherwise placed into the stream of commerce any of the allegedly defective asbestos-containing materials that Plaintiff's decedent, Ronald Dummitt, encountered. The trial court, however, in charging the jury, used not *Rastelli* but a different "foreseeability" test, instructing the jury that it could find Crane Co. had a duty to warn of products of others if it was "foreseeable" (in hindsight) to Crane Co. that the Navy would use such products with certain of its valves. (R. 2031.) Concluding unanimously that the trial court's charge was

erroneous, the otherwise divided First Department applied yet a third, different test for legal responsibility -- the "significant role" test, which is, again, too vague and too broad to stand. This Court should maintain the rule of *Rastelli*, reverse the First Department and direct that judgment be entered for Crane Co.

If, however, the Court were to determine that the First Department's "significant role" test -- as opposed to the "foreseeability" test on which the jury was charged -- is a correct statement of New York law in a combined-use scenario like this one, then, at the very minimum, a new trial is required so that a jury can determine whether Plaintiff has met the applicable factual burden under the new legal test articulated by the First Department, after the jury receives (1) evidentiary presentations from both sides tailored to the "new" test and (2) jury instructions that accurately state the test for legal responsibility. The jury received neither.

Instead, after rejecting the trial court's foreseeability-based definition of Crane Co.'s legal duty (as noted, the trial court permitted the jury to hold Crane Co. responsible for any asbestos-containing materials used with its valves, regardless of the source of those materials, if that use was "foreseeable" in hindsight), the First Department did not reject the verdict that was based on it, but rather, it made factual findings to assess Crane Co.'s potential liability under a duty different in scope from the one on which the jury was charged. By proceeding in this manner, the First Department usurped the role of the jury, made its own

independent "findings" of fact that were not supported by the trial record, and improperly deprived Crane Co. of an opportunity to offer evidence and present arguments at trial, as well as its right to a decision by a jury under a test that is both correct under New York law and known to the parties during the trial.

Crane Co. is also entitled to judgment because Plaintiff failed to create a jury issue regarding whether any alleged lack of warning was a proximate cause of Mr. Dummitt's injury. Plaintiff's sole "evidence" on this point was speculative testimony -- which Crane Co. was denied an opportunity to rebut with opposing testimony from its Navy expert -- regarding what Mr. Dummitt might have done, had he seen various hypothetical warnings. This evidence was not sufficient to present the issue to the jury, since, as the First Department appeared to recognize, New York does not provide for a presumption of causation in failure-to-warn claims. Accordingly, the result here should have been judgment in Crane Co.'s favor, or, at a minimum, a new trial in which Crane Co. could submit its rebuttal evidence and an appropriately instructed jury could decide any issues of fact. There is simply no way to know how the jury would have decided the question of proximate cause if it (1) had received Crane Co.'s evidence and (2) had not been instructed erroneously that it was to presume proximate cause. For these reasons, as cogently explained by the First Department dissent, the trial court's errors in this respect were not harmless.

A new trial is also warranted because the First Department upheld the imposition of joint-and-several liability upon Crane Co. even though (1) the jury reached findings that were completely unsupported by the evidence -- holding Crane Co. 99% at fault for causing Mr. Dummitt's injury, when it was *undisputed* that Mr. Dummitt worked with at least 20 other manufacturers' equipment which had no less of a relationship to asbestos than did Crane Co.'s valves, and Crane Co. did not supply a single asbestos fiber to which Mr. Dummitt was exposed -- and (2) the trial court permitted the jury to consider whether Crane Co. acted "recklessly" pursuant to CPLR § 1602 under instructions that undercut the clear purpose of the statute and contradicted this Court's holding in *Maltese v. Westinghouse Electric Corp.*, 89 N.Y.2d 955, 655 N.Y.S.2d 855 (1997).

Finally, although Plaintiff stipulated to a remitted verdict of $8 million, that amount continues to be clearly excessive under the First Department's own precedents. Accordingly, at the very minimum, the Court should direct the entry of a judgment at a lower, reasonable amount of compensation.

## QUESTIONS PRESENTED FOR REVIEW

1. Did the Appellate Division err in holding that Crane Co. was not entitled to judgment as a matter of law when Plaintiff produced no evidence that Crane Co. manufactured, supplied, or otherwise placed into the stream of commerce any of the asbestos-containing materials to which Mr. Dummitt was exposed?

*Or, alternatively*, did the Appellate Division err in refusing to grant Crane Co. a new trial so that a jury could resolve any disputed issue(s) of fact necessary to determine whether Crane Co. could be liable to Plaintiff under an appropriate legal test?

*Appellate Division's Answer: No.*

*Correct Answer: Yes.*

2. Is Crane Co. entitled to judgment as a matter of law, or at a minimum a new trial, because Plaintiff did not create a triable issue of fact regarding whether any alleged failure to warn on Crane Co.'s part caused Mr. Dummitt's injury?

*Or, alternatively*, is Crane Co. entitled to a new trial in light of the trial court's charge that the jury could presume causation, and the trial court's preclusion of Crane Co.'s evidence that disproved Plaintiff's theory of causation?

*Appellate Division's Answer: No.*

*Correct Answer: Yes.*

3. Did the Appellate Division err in upholding the trial court's decision to impose joint and several liability upon Crane Co. when (1) the jury's fault allocation and "recklessness" finding under CPLR § 1601 were unsupported by the evidence, (2) the trial court never should have provided the jury with a "recklessness" instruction pursuant to CPLR § 1601, and (3) the instruction the court provided did not comport with controlling law?

*Appellate Division's Answer: No.*

*Correct Answer: Yes.*

4. Did the Appellate Division err in upholding the trial court's "remitted" verdict of $8 million in this matter, although that amount far exceeded the amounts of verdicts in similar cases found to be consistent with awards of "reasonable compensation" within the meaning of CPLR § 5501(c)?

*Appellate Division's Answer: No.*

*Correct Answer: Yes.*

## JURISDICTIONAL STATEMENT

Crane Co. seeks relief from a final order of the First Department which affirmed a judgment awarding Plaintiff money damages upon a jury verdict. The Court has jurisdiction over this appeal because (1) the action originated in the Supreme Court of the County of New York, and (2) the First Department issued a final order that included a dissent by two Justices on a question of law in Crane Co.'s favor. *See* CPLR § 5601(a). Crane Co. appealed that decision within 30 days of Plaintiff's service of it with notice of entry. (COA 7-9, 67.[1])

Crane Co. preserved the issues presented here by, *inter alia*, moving for judgment pursuant to CPLR § 4401 on the theory that Plaintiff presented no evidence that Crane Co. made or sold any of the asbestos-containing materials that Mr. Dummitt encountered, and such evidence was necessary to sustain Plaintiff's claim. (R. 1678–79, 1690.) Crane Co. likewise objected to the trial court's instructions to the jury on the issues of causation and legal responsibility for the products of others, as well as the "recklessness" exception to CPLR § 1601. (R. 1769, 1774, 1848-50, 2044-45.) Finally, Crane Co. offered evidence, that the trial court excluded, rebutting Plaintiff's case for proximate cause and

[1] Pursuant to 22 NYCRR 500.14(a)(3), Crane Co. submits herewith a new and full record, which includes the complete record filed with the First Department (cited herein as "R."), Plaintiff's supplemental record filed with the First Department (cited as "SR."), and the additional materials required by section 500.14(a)(3) (cited as "COA").

demonstrating that the Navy chose the types of materials to use with its shipboard equipment regardless of any "wishes" of its equipment suppliers. (R. 1510-11, 1519-21.)

Crane Co. filed a post-trial motion under CPLR § 4404(a) moving the court for judgment, a new trial, and remittitur of the verdict on, *inter alia*, all of the bases argued here. (R. 50–51.) Crane Co. subsequently presented each of the issues presented here to the First Department. (COA 35, 37-38, 45, 50.)

## STATEMENT OF THE CASE

### I. Statement of Procedural History

This lawsuit arises from occupational exposures to asbestos that Plaintiff's decedent, Ronald Dummitt, allegedly sustained while serving on various ships of the United States Navy from 1961 to 1979. (R. 172–73.) Plaintiff, Doris Dummitt, and Ronald Dummitt initiated this action through a complaint filed on April 23, 2010, in the Supreme Court of the County of New York, alleging that Crane Co., along with sixty-seven (67) other named defendants, caused Mr. Dummitt to be exposed to asbestos-containing materials and ultimately to contract mesothelioma, a cancer of the lining of the lung. (R. 119–74.) Plaintiff proceeded to trial against Crane Co., with opening statements taking place on July 5, 2011. Plaintiff limited

her theories of liability against Crane Co. to failure-to-warn claims, sounding in negligence and strict liability. (R. 52, 255.)

During trial, Plaintiff produced no evidence that Crane Co. made, supplied, or otherwise placed into the stream of commerce any asbestos-containing material to which Mr. Dummitt may have been exposed; indeed, Plaintiff *stipulated* that no such exposure occurred. (R. 52–53, 78, 1163, 1351, 1365.) Accordingly, Crane Co. moved for judgment under CPLR § 4401, arguing, *inter alia*, that it was not legally responsible under *Rastelli* and other New York precedents for asbestos-containing materials that it did not make, sell, or otherwise place into the stream of commerce. (R. 1678–79.) The trial court denied Crane Co.'s motion. (R. 1688-89.)

On August 17, 2011, the jury returned a verdict for Plaintiff, awarding a total of $32,000,000 (all in noneconomic damages), finding Crane Co. 99% liable, Defendant Elliott Turbomachinery Co., Inc. (which entity resolved this case after the verdict) 1% liable, and both defendants "reckless" under CPLR § 1602. (R. 50.) On September 1, 2011, Crane Co. filed its post-trial motion, moving the trial court to set aside the verdict, grant a new trial, and remit the verdict on a number of grounds. (*Ibid.*) The trial court remitted the verdict to $8 million, but otherwise denied Crane Co.'s motion. (R. 50–92.) On October 24, 2012, the trial

court entered a final judgment, reduced for setoffs, in the amount of $4,916,863.55. (R. 29–34.)

Crane Co. appealed to the First Department on November 7, 2012, arguing it was entitled to judgment as a matter of law, a new trial, or a remittitur of the damages award on each of the grounds Crane Co. now presents to this Court. (R. 9–10.) The First Department affirmed the judgment in a three-two opinion, and Crane Co. filed the instant appeal on August 1, 2014. (COA 7-9.)

## II. Statement of Facts

### A. The Evidence Presented at Trial

#### 1. Background: Navy Ships of the World War II Era

From the beginning to the end of World War II, the Navy's fleet grew from approximately 500 ships to 5,000 ships. (R. 1505.) The ships constructed during this massive shipbuilding effort were "complex floating communit[ies]" that needed to house a crew, carry weaponry, and move through the water at 35 to 40 miles per hour. (*Ibid.*) Since the Navy did not have its own manufacturing facility, it relied upon private sector manufacturers like Crane Co. to produce the equipment necessary to operate its ships. *See Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153-54 (2007) (noting that the essence of a government contractor is an entity that assists the government to produce an item that it needs and, but for the contractor, would have to produce itself). Mr. Dummitt served on a number of

ships constructed during this effort, and on several ships constructed in the years following World War II.

Steam turned the turbines on these ships, and thus propelled them through the water and powered their shipboard systems. (R. 1506, 5650.) Large boilers, contained in boiler or "fire" rooms, generated this steam, and a complex system of piping, pumps, valves, blowers, and other pieces of equipment -- all manufactured by private sector entities -- carried it throughout the ship. (R. 1506, 5650–51, 5653.) Given the heat of the steam flowing through the pipes, the Navy -- at its choosing -- insulated much of the piping and its attached components, using asbestos-containing insulation frequently, but not exclusively. (R. 1274, 1492.)

### 2. Ronald Dummitt's Exposure Allegations

Ronald Dummitt served in the Navy from 1960 to 1988, spending the vast majority of his career as a boiler technician. (R. 5648–49.) Mr. Dummitt served on a variety of warships, where he worked in boiler rooms. (R. 5650.) These rooms contained boilers, pumps, blowers, and valves, among other equipment. (R. 5650–51, 5653.) While working in these spaces, Mr. Dummitt allegedly sustained exposures to asbestos-containing insulation (or "lagging"), gasket, and

packing materials that the Navy used with the noted equipment and piping.[2] (R. 872.)

### 3. The Nature of the Crane Co. Equipment at Issue

Crane Co. valves of the type at issue here are used to control the flow of materials through piping systems. (R. 5653.) They were one component of shipboard systems of piping and equipment that generated steam and allowed ships to function. (R. 1425, 5650–51, 5653.) These valves were "critical" to the Navy's operations of its ships. (R. 266); *see also Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564, 596, 90 Cal. Rptr. 3d 414, 440 (Cal. Ct. App. 2009) (noting that Crane Co. "provided parts essential to powering" Navy warships "used to defend the United States during the greatest armed conflict of the 20th century"). Rear Admiral David P. Sargent, U.S.N. (ret.), Crane Co.'s expert witness in Navy procurement practices, explained that Crane Co. supplied these valves to the Navy pursuant to "military specifications" that the Navy created in order "to define in excruciating detail every aspect of a piece of equipment . . . that the Navy is buying." (R. 1506.) There was no evidence that Crane Co. had anything to do with the creation of these military specifications, or that it did anything other than comply with them when it sold equipment to the Navy.

[2] Packing is a rope-like material that is wrapped around the stem of a valve to prevent leakage. (R. 5657.) Gaskets are, likewise, sealing devices used to create seals at connection points inside of valves and other equipment, as well as between sections of piping. (R. 1514.)

Crane Co. was one of several private-sector brands of valves that Mr. Dummitt recalled encountering during his Naval service. (R. 1946, 5654.) Mr. Dummitt testified that he was exposed to asbestos when he removed "bonnet" gaskets and stem packing used to seal the internal workings of Crane Co. valves, "flange" gaskets that the Navy used to seal connection points between valves and adjacent piping, and external insulation materials the Navy used to insulate the exterior of the valves, to the extent they were installed in insulated piping systems, and other piping system components. (R. 5654–55.)

Crane Co. did not manufacture any of these insulating or sealing materials; indeed, it did not make any materials that contained asbestos fibers. (R. 1618.) Plaintiff presented no evidence that Crane Co. supplied any of the asbestos-containing materials to which Mr. Dummitt was exposed (R. 52–53, 78, 1163, 1351, 1365), and never suggested to the contrary. Pursuant to Navy specifications that called for the use of such materials in new valves, among other available alternatives, certain Crane Co. valves may have incorporated an internal "bonnet" gasket and internal stem packing at the time of sale. Those products may or may not have contained asbestos -- as noted below, the valves functioned with asbestos or non-asbestos-containing materials, and the Navy had alternatives available to it. (*See* R. 78, 1617); *see also Braaten*, *supra*, 165 Wash.2d at 394-95, 198 P.3d at 502-03 (noting the availability of non-asbestos-containing gaskets and packing, as

well as the Navy's approval of 60 different types of packing for use aboard its ships).

Gasket and packing materials were "wear items" that were replaced on a regular basis. (R. 1500.) Plaintiff stipulated that, given the age of the ships on which Mr. Dummitt served, there was no evidence that he ever encountered the original gasket and packing seals shipped with a valve, and no evidence that Crane Co. supplied any of the replacement seals. (R. 52–53, 78, 1163, 1351, 1365; *see also* COA 56, Friedman, J., dissenting ["It is undisputed that Crane, which manufactured and sold the valves to the Navy many years before the start of Mr. Dummitt's service (the ships on which he served were of World War II vintage), has not been shown to have been the manufacturer, seller, or distributor of any of the asbestos-containing material that was the source of plaintiff's exposure."].)

Mr. Dummitt testified that the asbestos-containing gasket and packing seals he encountered were made and sold by Garlock, John Crane,[3] and other entities. (R. 1170, 1173, 5655, 5657.) Johns-Manville and the Union Asbestos & Rubber Company supplied certain of the insulation materials with and around which Mr. Dummitt worked during his career. (R. 2169–70.)

It was undisputed that the Crane Co. valves at issue did not require asbestos-containing gaskets, packing, or insulation to function. (R. 984, 986, 1491–92.)

[3] This is a separate entity, wholly unrelated to Crane Co.

For operational reasons, however, the Navy used asbestos-containing materials, and non-asbestos-containing materials, manufactured by others with certain of Crane Co.'s valves. (R. 267.) It was undisputed that the Navy had available to it, and used, non-asbestos-containing gasket and packing materials (including, *inter alia*, vegetable fiber, rubber, and metal) during the period of Mr. Dummitt's service. (R. 870, 1265, 1274–76, 1491–92, 3860-65.) Indeed, a number of the Crane Co. valves at issue incorporated metal (not asbestos) gaskets when originally supplied to the Navy. (R. 1491–92; SR. 4, 6, 11, 14, 29, 35, 38, 40-42.) Non-asbestos insulation materials were likewise available to, and used by, the Navy. (R. 785, 1274-75, 3857-60.)

Plaintiff presented no evidence that Crane Co. in any way directed the Navy to use its valves in any particular way, or with any particular form of other product or component. (R. 1510–11.)

### B. The Trial Court's Exclusion of Crane Co.'s Evidence

At trial, the jury received testimony from Mr. Dummitt's deposition indicating that he never saw a warning associated with *any* of the asbestos-containing materials that he encountered during his Navy service. (R. 5677–78.) Thereafter, over defense counsel's objection, Mr. Dummitt was permitted to answer a series of hypothetical questions regarding what he and others may have done had they received various types of warnings that were, apparently, never

given. Nevertheless, Plaintiff presented no evidence that any of these alternative actions would have even been possible, much less plausible, given that Mr. Dummitt was serving in the military, which was completely in charge of his working conditions. Moreover, Plaintiff did not present any evidence that Mr. Dummitt's supposed actions in response to the hypothetical warnings would have prevented his injury. In addition, Plaintiff presented no evidence that the Navy would have permitted any hypothetical warnings offered by a private-sector / civilian contractor to reach Mr. Dummitt in the first instance, nor was there any evidence that Mr. Dummitt made a practice of reading warnings and instructions before servicing equipment in the Navy.

In response to Plaintiff's evidence, Crane Co. offered testimony from retired Rear Admiral David P. Sargent. Admiral Sargent spent 36 years in the Navy. (R. 1503, 1514.) During the last 12 years of his service in the Navy, Admiral Sargent focused on managing programs relating to the Navy's contracting and procurement. (R. 1504.)

In a manner similar to the examination of Mr. Dummitt, Admiral Sargent was asked, based on his thirty-six years of Naval service experience, whether a civilian valve manufacturer/supplier would have been able to place a hypothetical warning on a valve when Navy specifications did not call for such a warning. (R. 1511.) Unlike Mr. Dummitt, however, Admiral Sargent was not permitted to

testify as to what his fellow Navy officers would have done had Crane Co. attempted to give hypothetical warnings. (*Ibid.*) Had he been permitted, Admiral Sargent would have testified that (1) the Navy would have forbidden warnings that were not contained in the Navy equipment specification, and (2) the Navy would not have permitted a supplier to provide material other than asbestos if the Navy specification called for asbestos. (R. 1519-20.) This testimony possessed the same foundational premise as Mr. Dummitt's responses to the hypotheticals that were posed to him regarding warnings that were never given, and it would have rebutted Mr. Dummitt's testimony because it would have tended to show that the hypothetical warnings, even if given, would never have reached Mr. Dummitt. Because it never heard this evidence, the jury was deprived of the information necessary to assess whether the alleged lack of a warning had any causal role in Mr. Dummitt's disease process.

As described below, Admiral Sargent was also prepared to provide the jury with a specific example of an interaction between the Navy and an equipment supplier situated similarly to Crane Co. in which the equipment supplier sought to include in its equipment at the time of shipment a non-asbestos-containing gasket when the applicable military specification called for an asbestos-containing gasket, and the Navy rejected the substitution. The trial court excluded this testimony as well. (R. 1510, 1519-20.)

### C. The Decisions Below

The trial court submitted the question of Crane Co.'s liability to the jury, instructing the jury that it could find that Crane Co. had a duty to warn of the asbestos-containing products of others if it was "foreseeable" (in hindsight) to Crane Co. that the Navy would use such products with certain of its valves. (R. 2031.) The First Department acknowledged the error in this instruction (COA 44), but held the error harmless after (1) adopting a more-restrictive "test" defining Crane Co.'s legal duty than the "foreseeability" test employed by the trial court, and (2) making its own factual findings on the factual issues raised by that new test, although the jury was not asked to consider any of these issues, and the parties' evidence did not attempt to address them. (*See*, *e.g.*, R. 2008.) As discussed in detail below, Crane Co. vigorously disputes the accuracy of the First Department's "findings" of fact in this respect.

On the question of causation, over Defendants' objection, the trial court's charge provided the jury with a presumption of proximate cause in essentially the same form requested by Plaintiff:

> Mr. Dummitt is entitled to the presumption that had proper and adequate warnings been given regarding the use of the product, the warnings would have been heeded and injury avoided.

(R. 2033.) The First Department majority, once again, refused to hold that this charge was legally correct and, instead, avoided that question by determining that

Plaintiff did not "rely on" this charge, but instead relied on Mr. Dummitt's speculation that he would have heeded a warning (and, presumably, ceased performing the work the Navy ordered him to perform) had he seen one on a valve. (COA 45-46.) The First Department majority likewise determined that the trial court's potential error in excluding the evidence that Crane Co. offered that the Navy would not have accepted an asbestos-related health warning from Crane Co. was harmless because, for reasons that are not entirely clear, this evidence allegedly would not have made a difference to the jury's decision-making (COA 48), a point with which the dissent vigorously disagreed (COA 62-63, Friedman, J., dissenting).

The First Department also upheld the application of joint-and-several liability, finding the jury's 99% apportionment of fault to Crane Co. in accord with the weight of the evidence, despite the fact that Plaintiff's own evidence established that numerous entities allegedly contributed to cause Mr. Dummitt's injury. The court likewise upheld the trial court's decision to charge the jury on the "recklessness" exception to CPLR § 1601, the instructions the trial court utilized to do so, and the jury's finding in that respect.

Lastly, the First Department upheld the trial court's "remitted" verdict of $8 million, although that verdict exceeded any verdict previously determined by the First Department to be "reasonable" in a case like this one. (COA 50.)

## ARGUMENT

### I. The Court Should Confirm the Control-Based Analysis of *Rastelli* or, at a Minimum, Remit the Case for a New Trial Consistent With the First Department's "Significant Role" Test for Legal Responsibility.

Over 20 years ago, this Court articulated the stream-of-commerce test to define when one entity may be legally responsible for another's defective product. That test is grounded in one of the most basic policies of modern product liability law -- that the burden of a defective product is best placed on those entities responsible for bringing it to market, because those are the entities that profit from the product and control its characteristics. *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389 (1916) ("If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."); *Sindell v. Abbott Labs*, 26 Cal.3d 588, 597, 607 P.2d 924, 928 (1980) ("[A]s a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control."). As described below, that control-based test is consistent with New York product liability decisions that pre-date

*Rastelli*, and it comports with general concepts of tort law. *See MacPherson*; Restatement (Second) of Torts § 402A (1965); *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944); *O'Neil v. Crane Co.*, 53 Cal.4th 335, 266 P.3d 987 (2012). During the intervening decades, courts across the United States have looked to *Rastelli* to define the "majority rule nationwide." *See Braaten*, *supra*, 165 Wash.2d at 385–87, 198 P.3d at 498–99. The Court should maintain its leading role in establishing this important legal doctrine.

In determining whether one entity may bear legal responsibility for the product of another entity, New York precedents, which are aligned with the prevailing majority view, focus on the question whether the defendant had "control over the production of the" allegedly defective product at issue or a "role in placing [it] in the stream of commerce." *Rastelli*, *supra*, 79 N.Y.2d at 298, 582 N.Y.S.2d at 377. This control-based approach to the question of duty is consistent with the long line of precedents in which this Court has held that the entities that normally bear product liability "duties" are those entities that place the harm-causing product into the stream of commerce. These are the entities that control the characteristics of the harm-causing product and profit from its sale and, thus, these are the entities that should, as a matter of policy, bear responsibility for the product when it causes injury. *MacPherson*, *supra*, 217 N.Y. at 389 (1916) ("[T]he manufacturer of this thing of danger is under a duty to make it carefully.")

In this case, the First Department departed from this Court's precedents and expanded the potential scope of product liability in cases like the one *sub judice* by adopting an amorphous "test" for duty that, instead of focusing on the defendant's control over the harm-causing product or its use, focuses on seemingly more vague concepts like the defendant's "interest" in or "influence" over the post-sale use of its product. The Court should not adopt this test because it does not provide clear standards for imposing a duty, and it is not motivated by any discernible policy beyond ensuring compensation for the Plaintiff. Indeed, the First Department's opinion is devoid of any discussion of the policies underlying product liability law or how those policies would be served by recognizing, or refusing to recognize, the novel duty the First Department adopted here.

This approach to duty is inconsistent with the approach of *Rastelli* and other New York authorities, and the Court should reject it. Instead, the Court should affirm the control-based approach of *Rastelli*, hold that those entities that bear legal responsibility for a harm-causing product are the ones that place it into the stream of commerce or control its use, and direct that judgment enter for Crane Co., because there was no evidence that Crane Co. did either of these things.

If, however, the Court adopts some form of the "significant role" test endorsed by the First Department here, it should, at a minimum, remit this case for a new trial, a new set of jury instructions reflecting the correct legal standards, an

opportunity for the parties to tailor their evidence accordingly, and a new set of jury findings applying the correct legal standards to the evidence. None of this happened here. If the Appellate Division determines that a jury's findings of fact were insufficient to support the verdict, it must order a new trial with new factual findings, and not make those findings on its own. *See Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498, 410 N.Y.S.2d 282, 285 (1978).

### A. The Court Should Affirm the Control-Based Test for Legal Responsibility Applied in *Rastelli* and Reject the Vague "Significant Role" Test Applied by the First Department Here.

The question of whether a particular entity may bear a legal "duty" in a product liability action, whether asserted under a strict liability or a negligence theory, is a policy-based inquiry. *See Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 236, 727 N.Y.S.2d 7, 15 (2001) ("[A]ny judicial recognition of a duty of care must be based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens."); *Sukljian v. Charles Ross & Son Co., Inc.*, 69 N.Y.2d 89, 94-95, 511 N.Y.S.2d 821, 823 (1986) (noting that the imposition of strict liability "rests largely on considerations of public policy"). This Court has defined the policies underlying New York's product liability theories on a number of occasions, and those policies militate strongly against the imposition of a duty here.

As this Court has described, New York takes a "stream-of-commerce" approach in product liability actions. *See Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 532, 569 N.Y.S.2d 337, 340 (1991) (holding that "[a] manufacturer who places into the stream of commerce a defective product which causes injury may be liable for such injury"). New York is not alone in so doing. *See*, *e.g.*, *O'Neil*, *supra*, 53 Cal.4th at 350–53, 266 P.3d at 996–99, and cases cited therein.

The Court has historically taken this approach because the entities that have control over (and derive a profit from) the harm-causing product by placing it into the stream of commerce are the entities that "can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose." *Codling v. Paglia*, 32 N.Y.2d 330, 340, 345 N.Y.S.2d 461, 468 (1973). Imposing legal responsibility on all members of the "chain" of a harm-causing product's distribution applies pressure to the product's maker, "who alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products."[4] *Id.*, 32 N.Y.2d at 341, 345 N.Y.S.2d at 468; *Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 473, 758 N.Y.S.2d 271, 274 (2003)

[4] Other jurisdictions that have adopted strict liability in tort have defined the doctrine based on the same policy analysis. For instance, in first developing the ideas that would ultimately establish California's strict liability cause of action, Justice Roger Traynor explained that the purpose of strict liability is to advance consumer safety by fixing tort liability on those entities that profit from bringing a defective product to market, regardless of their lack of "fault." *See Escola*, *supra*, 24 Cal.2d at 462, 150 P.2d at 441 (Traynor, J., concurring). The Restatement

("[T]he burden of accidental injuries caused by defective products is better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained."); *Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 N.Y.2d 376, 386-87, 384 N.Y.S.2d 115, 121-22 (1976) (noting that a manufacturer should bear "legal responsibility" for its injury-causing product because the manufacturer is "in the best position to have eliminated . . . dangers").

Extending product liability theories to those that *sell* defective products, in addition to those that manufacture them, may be justified as a policy matter because sellers have "continuing relationships with manufacturers" (and, thus, can exert pressure on them), and adopt a "special responsibility to the public" by marketing goods as a regular part of their business.[5] *Sukljian*, *supra*, 69 N.Y.2d at 95, 511 N.Y.S.2d at 823.

Importantly, in extending New York's product liability theories to encompass injuries to individuals not in privity with the manufacturer, *see* *MacPherson*, *supra*, individuals who were bystanders to a product's use, *see*

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(Second) of Torts § 402A reflects the same policy considerations, limiting the scope of strict liability to those entities "engaged in the business of selling" the defective product at issue.

[5] Where, however, these factors are not present, as in the case of a casual seller of a product, then the policy supporting liability is no longer present, and product liability will not lie. *Sukljian*, 69 N.Y.2d at 95-96, 511 N.Y.S.2d at 823-24.

*Codling*, *supra*, and ultimately, to the sellers and distributors in the "chain" of a product's distribution, *see Sukljian, supra*, this Court has never suggested, let alone held, that New York's product liability theories are broad enough to hold a manufacturer legally responsible for products that it did not make, sell, profit from, or control. In *Rastelli*, the Court confirmed that New York's product liability "duty" simply does not go so far for good reason -- imposing legal responsibility for defective products on entities that do not profit from or control them does not serve any discernible safety-enhancing function. Instead, it creates a form of social insurance or "absolute liability" that is fundamentally at odds with this Court's product liability jurisprudence. Although the First Department adopted precisely such a novel and overly expansive approach to product liability here, it did not cite one policy consideration supporting that approach, and none exists.

### 1. *Rastelli* Adopts a Control-Based, Stream-of-Commerce Test for Legal Responsibility and Rejects a "Foreseeability" Test.

The trial court in this matter instructed the jury that the legal duty of a manufacturer extends to any product, sold by any other entity, at any point in time, so long as it was "foreseeable," in hindsight, that the product could be used with or near its own. (R. 2031.) That holding is fundamentally inconsistent with New York law. *See Hamilton*, *supra*, 96 N.Y.2d at 232, 727 N.Y.S.2d at 12 ("Foreseeability, alone, does not define duty – it merely determines the scope of

the duty once it is determined to exist."); *Pulka v. Edelman*, 40 N.Y.2d 781, 785, 390 N.YS.2d 393, 396 (1976) ("One should not be held legally responsible for the conduct of others merely because they are within our sight or environs."). And, as a policy matter, it imposes no meaningful limit on the tort "duty" of a manufacturer, because, as a number of courts have noted, "everything is foreseeable" in hindsight. *Gross v. Empire State Bldg. Assocs.*, 4 A.D.3d 45, 47, 773 N.Y.S.2d 354, 356 (1st Dep't 2004); *Thing v. La Chusa*, 48 Cal.3d 644, 668, 771 P.2d 814, 830 (1989) ("[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury.").

No party to this appeal defended the trial court's holding in this respect, and both the First Department majority and dissent recognized that it was error. (COA 44 [in the words of the majority, "To be sure, mere foreseeability is not sufficient."];COA 57, Friedman, J., dissenting [in the words of the dissent, "The foregoing instruction was erroneous, as the majority appears to recognize, but I think we should say so more forthrightly. Under precedent of this Court, a firm's duty to warn about dangers arising from products that it neither manufactured nor sold nor distributed, but which could be used in conjunction with products that the firm did manufacture, sell, or distribute, does not extend to all such uses of other

products that might be 'reasonably foreseeable.'"].) *Rastelli* compels this conclusion, and also compels the conclusion that, contrary to the First Department majority's suggestion, foreseeability has *no role* in analyzing the question of legal responsibility in a case like this one.

In *Rastelli*, this Court applied the same control-based, stream-of-commerce approach adopted in the decisions noted above in a factual setting in which a plaintiff attempted to hold one manufacturer legally responsible for the product of another. The plaintiff in *Rastelli* proceeded on precisely the same foreseeability-based theory of duty that the plaintiff proceeded on here at trial, and which the trial court adopted, arguing Goodyear could be liable because it knew that its tires could be used with defective multi-piece rims supplied by others, but it did not warn of this potential use. *Rastelli*, *supra*, 79 N.Y.2d at 297, 582 N.Y.S.2d at 376. Although it was clearly "foreseeable" that certain of Goodyear's tires would be used with defective rims, this Court rejected entirely the plaintiff's foreseeability-based approach, and established clear lines defining the boundaries of legal responsibility in a case like this one, focusing on the defendant's control over, and profit from, the harm-causing product. *See id*.,79 N.Y.2d at 297–98, 582 N.Y.S.2d at 376–77 ("Goodyear had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale.")

A decision the First Department issued shortly after this Court decided *Rastelli* -- *Tortoriello v. Bally Case, Inc.*, 200 A.D.2d 475, 606 N.Y.S.2d 625 (1st Dep't 1994) -- likewise illustrates that foreseeability has no role in the analysis of legal responsibility in a case like this one. In *Tortoriello*, plaintiffs argued that the manufacturer of a walk-in freezer could be liable for injuries caused by a quarry tile floor that was used in the freezer post-sale. The evidence showed that the flooring material at issue was one of only three available types that could be used with the freezer, as explained in the manufacturer's "own literature," and, thus, its use was inarguably "foreseeable." *Id*., 200 A.D.2d at 477, 606 N.Y.S.2d at 627. However, because the freezer manufacturer "did not manufacture, deliver or install the quarry tile" or have "anything to do with the actual choice of flooring made by" those who erected the freezer, the manufacturer could not be held liable as a matter of law under *Rastelli*. *Id*.

The facts here are analogous to those presented in *Rastelli* and *Tortoriello*[6]: Crane Co. "had no control over the production" of the allegedly injurious asbestos-containing materials to which Mr. Dummitt was exposed, "had no role in placing

[6] Nothing in the evidentiary record substantiates the notion that the prospect of using an asbestos-containing material with a Crane Co. valve was any greater than the prospect of using a defective two-piece rim with a Goodyear tire or a particular flooring material with the *Tortoriello* defendant's freezer, particularly where, as noted above, it was undisputed that the Navy used both asbestos-containing and non-asbestos-containing materials with its valves, including the valves at issue here, some of which contained asbestos-containing gaskets, and some of which contained metal gaskets.

[those products] in the stream of commerce, and derived no benefit from [their] sale." *See Rastelli*, *supra*, 79 N.Y.2d at 297–98, 582 N.Y.S.2d at 376–77. It was undisputed that the Crane Co. valves at issue did not require asbestos-containing gaskets, packing, or insulation to function. (R. 984, 986, 1491–92.) Likewise, there is no suggestion that Crane Co.'s valves "create[d] the alleged defect in the" asbestos-containing materials at issue -- indeed, Plaintiff contends those materials were *inherently dangerous*. (R. 262.) Finally, Plaintiff does not, and cannot, dispute that the Navy could have used non-asbestos-containing materials with Crane Co. valves. In sum, the considerations that controlled the *Rastelli* analysis are all present here.

Although this is an "asbestos" case, and *Rastelli* was not, there is no principled reason for distinguishing them along these lines. New York has never recognized a separate body of "asbestos law," and the Court should not do so here. Indeed, that this is an "asbestos" case (one of literally tens of thousands of such cases currently pending in New York[7]), makes it all the more imperative that the Court establish clear lines to guide the duty inquiry. Without such guidance, as the

[7] Many of these cases involve equipment manufacturer defendants like Crane Co. because, as one court recently explained, *see In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 82-84 (Bankr. W.D.N.C. 2014), as the manufacturers of asbestos-containing materials have increasingly entered bankruptcy and commenced paying claimants like the Plaintiff here through a series of personal injury trusts, asbestos claims in the tort system have turned their focus to ever-more "peripheral" defendants.

Plaintiff's brief in the First Department demonstrates, the trial courts of New York have held hundreds, if not thousands of times, that Crane Co. and similarly situated defendants may bear potential legal responsibility for the products of others on the basis of a "foreseeability" test that the First Department rejected. (COA 44.)

As noted below, however, the First Department's test, while clearly more well-defined than the "foreseeability" standard previously employed by a number of New York's trial courts, features enough vague and ambiguous language to encourage results-driven analyses. The Court should foreclose that possibility by affirming the control-based approach of *Rastelli* here and directing that judgment be entered in Crane Co.'s favor pursuant to it.

### 2. A Number of Recent Decisions Have Properly Applied the Rule of *Rastelli* in Cases Like the One *Sub Judice.*

The United States District Court for the Southern District of New York recently applied the control-based, stream-of-commerce approach of *Rastelli* and granted Crane Co. summary judgment in two cases closely analogous to this one. The analysis of those decisions was correct, and the Court should affirm that point and reject the ambiguous test for legal responsibility adopted by the First Department here.

In *Surre v. Foster Wheeler LLC*, Judge Denny Chin, of the United States Court of Appeals for the Second Circuit, sitting by designation on the United States District Court for the Southern District of New York, applied *Rastelli* and

*Tortoriello*, *supra*, to hold that, under New York law, a manufacturer generally "has no duty to warn against defects in . . . third-party products so long as the manufacturer had no control over the production of the defective product and did not place it into the stream of commerce." *Surre v. Foster Wheeler LLC*, 831 F.Supp.2d 797, 801 (citing *Rastelli*). Judge Chin wrote that the same conclusion holds "[e]ven if the defective product is one of a limited number of third-party products that the manufacturer knows will be used in conjunction with its own," clearly illustrating that a manufacturer's duty is properly delimited by its control over, and benefit derived from, the product at issue, and not a "foreseeability" analysis. *Id*.

Because the *Surre* plaintiff produced no evidence that Crane Co. placed into the stream of commerce or otherwise exercised control over the asbestos-containing materials that others used with its equipment post-sale, the court granted Crane Co. summary judgment. The same court, per the Honorable Katherine B. Forrest, reached the same holding pursuant to the same essential legal analysis in a later case that, like this one, focused on Crane Co. valves. *See Kiefer v. Crane Co.*, No. 12 Civ. 7613 (KBF), at p. 12 (S.D.N.Y. Feb. 3, 2014) ("Under

New York law it is clear that one manufacturer cannot be held liable for the products of another.").[8]

The *Surre* court identified only two circumstances in which New York authorities suggest that the general rule that one entity is not legally responsible for the products of another *may* cease to apply -- if the defendant-manufacturer's product cannot function without the defective product of another and, thus, is necessarily used with it, or if the defendant-manufacturer directs the relevant purchaser of its product to use a defective product of some other manufacturer with its own. *Surre*, 831 F.Supp.2d at 801; *accord Kiefer*, at p. 12. In such instances, *control* over the allegedly dangerous product, the factor upon which the *Rastelli* court focused and modern product liability law rests, may be present, and legal responsibility may lie.

This is, as the *Surre* court correctly noted, precisely the rationale underlying the First Department's decision in *Rogers v. Sears, Roebuck and Co.*, 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dep't 2000). In *Rogers*, the First Department recognized that there is a legally significant difference between a situation in which two products *could* be used together and a situation in which two products *had to* be used together by necessity. The *Rogers* court based defendant's liability for injuries that were caused by the product of another (a propane tank used with

[8] The *Kiefer* Court rendered its ruling granting Crane Co. summary judgment beginning at page 9 of the reporters' transcript included in the attached Addendum.

the defendant-manufacturer's gas grill) on the consideration that defendant's product "could not be used without" the injury-causing product at issue. *See id*., 268 A.D.2d at 246, 701 N.Y.S.2d at 360; *see also Surre*, 831 F.Supp.2d at 801 (explaining that *Rogers* held that "a manufacturer has a duty to warn against the dangers of a third-party product if the third-party product is necessary for the manufacturer's product to function"). The use of the propane tank was a necessary incident to the use of the defendant's product, and the control necessary to impose a legal duty was, therefore, present.

The First Department's memorandum decision in *Berkowitz v. A.C. and S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dep't 2001), upon which Plaintiff placed heavy reliance here, is nothing more than a (very terse) application of the same principle. By concluding its opinion with a comparison between *Rastelli* and *Rogers*, the *Berkowitz* court found that, while the facts of that particular case were not sufficiently developed at the summary judgment stage, liability could lie under the facts of *Rogers* (i.e., if the defendant's pumps required asbestos-containing materials to function), but liability could not lie if the defendant's equipment did not require the allegedly defective product, as in *Rastelli*.

Here, it was undisputed that Crane Co.'s valves did not require asbestos-containing materials, of any kind, to function (R. 984, 986, 1491–92), and there was no evidence that Crane Co. directed the Navy to use its equipment with

asbestos-containing materials, instead of the numerous non-asbestos-containing sealing and insulating materials the Navy had available to it and, at times, used (R. 785, 870, 1265, 1274–76, 1491–92, 3857-65). In the absence of such evidence, judgment in Crane Co.'s favor is appropriate.

In sum, the First Department took *Rastelli*, *Tortoriello*, *Surre*, *Rogers*, and *Berkowitz* too far by substituting for the control-based analysis of these decisions a more ambiguous test for legal responsibility focusing on somewhat vague concepts like a defendant's "interest" in or "influence" over the products of another entity. Although the First Department majority cited the *Surre* decision with approval twice in its opinion (COA 39, 44), it erred when it departed from the test stated in *Surre*, which was a faithful application of all of these prior New York appellate precedents, and particularly this Court's decision in *Rastelli*. The Court should affirm as much in this appeal and reject the alternative analysis of the First Department.

### 3. Courts Across the Country Have Looked to *Rastelli* in Cases Like This One and Held That the Control-Based, Stream-of-Commerce Rule Supports Judgment as a Matter of Law in a Defendant's Favor.

#### a. *Rastelli's* Stream-of-Commerce Rule Is the Majority Rule Nationwide in Cases Like This One.

In cases that are virtually indistinguishable from the one *sub judice*, the highest courts of two states have explicitly relied on *Rastelli* to be a leading

authority for the rule that a manufacturer of equipment does not bear a legal duty for the asbestos-containing materials of others that may have been used with the equipment post-sale. *O'Neil*, *supra*, 53 Cal.4th at 353, 266 P.3d at 998; *Braaten*, *supra*, 165 Wash.2d at 387, 198 P.3d at 499. New York law remains consistent with these decisions. Neither the Plaintiff nor the First Department identified any policy in the product liability area that New York recognizes that these other jurisdictions do not that could possibly support the result here -- i.e., recognizing in New York a claim that is not recognized elsewhere since it is inconsistent with the policies underlying modern product liability law and the well-accepted premise that a manufacturer is not an insurer of its own product's safety, let alone some other manufacturer's product's safety.

In *O'Neil*, *supra*, the Supreme Court of the State of California relied, in part, on *Rastelli* to hold that manufacturers of metal pumps and valves are not liable, under either a strict liability or negligence theory, for injuries allegedly caused by asbestos-containing materials that they did not make or supply, but that were used with the equipment post-sale. The *O'Neil* court recognized *Rastelli*'s control-based rule as articulating the same stream-of-commerce approach that California's courts have embraced for decades. *O'Neil*, 53 Cal.4th at 353, 266 P.3d at 998.

The *O'Neil* court discussed that, under *Rastelli*, an entity may be held strictly liable only if it played some significant role in placing the alleged harm-

causing product into the stream of commerce. *Id*. The factual circumstances in *O'Neil* were largely identical to the ones here. In *O'Neil*, plaintiffs alleged that their decedent was exposed to asbestos-containing gaskets, packing, and insulation manufactured and supplied entirely by others and used by the Navy with defendants' equipment (valves and pumps) post-sale; the circumstances regarding Crane Co.'s historical relationship with the Navy were the same in *O'Neil* as in the matter *sub judice*. The court held that this evidence simply did not establish a claim for strict liability because "a product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product" even where the combined use is foreseeable. *Id*., 53 Cal.4th at 362, 266 P.3d at 1005. The court applied the same holding to plaintiffs' negligence claim. *Id*., 53 Cal.4th at 365–66, 266 P.3d at 1007.

In so doing, the *O'Neil* court rejected any suggestion (which, as noted below, was seemingly embraced by the First Department majority here) that Crane Co. "directed" the Navy to use its equipment in certain ways, specifically finding that the "Navy's Bureau of Ships oversaw the design and construction of warships" and that "Naval engineers created specifications that provided detailed design, material, and performance requirements for equipment to be used on board. . . . Crane produced valves for Navy ships according to these strict military

specifications." *Id*., 53 Cal.4th at 343, 266 P.3d at 992. Crane Co.'s decades-old relationship with the Navy has not changed since *O'Neil* was decided.

Similarly, on December 11, 2008, in companion opinions, the Supreme Court of the State of Washington held that equipment manufacturers are not legally responsible for third-parties' insulation, gasket, or packing materials used with or near the equipment. *See Simonetta v. Viad Corp*., 165 Wash.2d 341, 197 P.3d 127 (2008); *Braaten*, *supra*. Although *Simonetta* focused on external insulation and *Braaten* focused on replacement gaskets and packing, both opinions applied the same control-based rule -- that an equipment manufacturer is not legally responsible for asbestos-containing products controlled entirely by others even if the manufacturer could "foresee" the asbestos-containing materials being used with its equipment. Like the *O'Neil* court, the Supreme Court of Washington relied on *Rastelli* as support for this stream-of-commerce, control-based approach, which it described as the "majority rule nationwide." *See Braaten*, 165 Wash.2d at 385–87, 198 P.3d at 498–99.

Over the past several years, numerous intermediate state appellate courts, federal district courts, and even a federal circuit court of appeals, have decided cases like the one *sub judice* and reached the same holdings reached by the Supreme Courts of California and Washington on the basis of the same fundamental legal analysis. *See*, *e.g*., *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d

488 (6th Cir. 2005); *Hughes v. A.W. Chesterton Co.*, 435 N.J. Super. 326, 89 A.3d 179 (N.J. Sup. Ct. App. Div. 2014); *Whiting v. CBS Corp.*, 83 Mass.App.Ct. 1113, 982 N.E.2d 1224 (Mass. App. Ct. 2013); *Ford Motor Co. v. Wood*, 119 Md.App. 1, 703 A.2d 1315 (Md. Ct. Spec. App. 1998), *abrogated on other grounds in John Crane, Inc. v. Scribner*, 369 Md. 369, 800 A.2d 727 (2002); *Conner v. Alfa Laval, Inc.*, 842 F.Supp.2d 791 (E.D.Pa. 2012); *Faddish v. Buffalo Pumps*, 881 F.Supp.2d 1361 (S.D. Fla. 2012); *see also* Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting this Form of Guilt by Association*, 37 Am. J. Trial Advoc. 489 (2014).

Outside of the asbestos context, courts across the country have held *Rastelli's* control-based, stream-of-commerce approach to stand for the well-accepted proposition that a manufacturer ordinarily should not bear legal responsibility for injuries caused by another's defective "replacement" parts or any other defective product used with or near the manufacturer's product after the sale. *See*, *e.g.*, *Braaten*, *supra*, 165 Wash.2d at 385-88, 198 P.3d at 498-99 (collecting cases reflecting the rule that "[t]he law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products"); *see also Dreyer v. Exel Indus., S.A.*, 326 Fed.Appx. 353 (6th Cir. May 4, 2009); *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986);

*Acoba v. General Tire, Inc.*, 92 Hawai'i 1, 18, 986 P.2d 288, 305 (1999); *Toth v. Economy Forms Corp.*, 391 Pa.Super. 383, 388–89, 571 A.2d 420, 423 (Pa. Super. Ct. 1990).

**b. The Stream-of-Commerce Approach Taken in *Rastelli* Is Likewise in Accord With the "Component Parts" Doctrine of the Restatement (Third) of Torts.**

Like the precedents noted above, the "component parts" doctrine reflected in the Restatement (Third) of Torts: Products Liability § 5 (1998) embodies the rule that one manufacturer is not legally responsible for defective products that may be used with its own following the sale, and it likewise supports judgment in Crane Co.'s favor here.

Numerous precedents, which are collected and synthesized through the Restatement (Third), provide that the supplier of a component part (such as a valve) that can be used in numerous environments is not liable for every application in which the customer will use the component, even if the use was "foreseeable." *See*, *e.g.*, *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050 (8th Cir. 1996); *Artiglio v. General Electric Co.*, 61 Cal.App.4th 830, 71 Cal.Rptr.2d 817 (Cal. Ct. App. 1998). Under the "component parts" provision of the Restatement (Third), the seller of a component part can potentially be responsible for injuries caused by the finished assembly incorporating its component only if (1) the component itself is defective, and the

defect causes the harm, or (2) the component seller substantially participates in the integration of the component into the design of the final assembly, the integration of the component renders the assembly defective, and the defect causes the harm.[9] *See* Rest.3d Torts: Products Liability § 5; *accord Taylor*, *supra*, 171 Cal. App. 4th at 585, 90 Cal. Rptr. 3d at 430-31. This rule applies to product liability claims asserted in both strict liability and negligence. *TMJ*, 97 F.3d at 1058-59.

A number of New York decisions have recognized and applied the same "component parts" rule, *see*, *e.g.*, *Gray v. R.L. Best Co.*, 78 A.D.3d 1346, 1349, 910 N.Y.S.2D 307, 309 (3d Dep't 2010); *Leahy v. Mid-West Conveyor Co., Inc.*, 120 A.D.2d 16, 18-19, 507 N.Y.S.2d 514, 515-16 (3d Dep't 1986); *Munger v. Heider Mfg. Corp.*, 90 A.D.2d 645, 456 N.Y.S.2d 271 (3d Dep't 1982), summarizing the policy underlying the rule as follows:

> While a manufacturer ordinarily is in the best position to know the dangers inherent in its product and determine which safety features should be employed, this principle does not apply when potential dangers vary according to the use of a product.

*See Leahy*, 120 A.D.2d at 18, 507 N.Y.S.2d at 516; *accord* Rest.3d Torts: Products Liability § 5, cmt. a (recognizing that holding makers of multi-use component products like "valves" and "switches" responsible for injuries caused by the final

[9] The comments to the Restatement (Second) of Torts § 402A recognize precisely the same basic rule of law. *See id.*, cmts. p-q; *see also Haase v. Badger Mining Corp.*, 266 Wis.2d 970, 990, 669 N.W.2d 737, 747 (Wis. Ct. App. 2003) (noting that the legal principles set forth in Section 5 of the Restatement (Third) complement the principles of the Restatement (Second) of Torts § 402A).

assembly incorporating the component would "require the component seller to scrutinize another's product which the component seller has no role in developing").

The undisputed evidence here was that Crane Co.'s valves were components of the piping systems on the Navy ships on which Mr. Dummitt served, and the Navy was in the best position to appreciate any dangers that the operation of those systems may have posed to Navy sailors. The evidence further demonstrated that Crane Co.'s valves could be used without any asbestos-containing materials at all. (R. 984, 986, 1491-92.) Plaintiff produced no evidence that Crane Co. had any role, let alone a substantial participatory role, in designing the piping systems into which its valves were incorporated. In the absence of such evidence, judgment in Crane Co.'s favor would be appropriate, applying the approach of the Restatement (Third). This Court should affirm that New York takes the same approach, because it is entirely consistent with the analysis and holding of *Rastelli*.

### B. Even Assuming, *Arguendo*, That the First Department Correctly Stated New York Law, the Proper Outcome Is a New Trial With Instructions to the Jury That Comport With the First Department's Holding.

The First Department held that a manufacturer may be legally responsible for third-parties' asbestos-containing materials where it has "a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce . . . if that component causes injury

to an end user of the product." (COA 41.) For the reasons outlined above, the Court should reject that vague standard in light of the control-based approach to duty reflected in *Rastelli*, *Surre*, *Tortoriello*, *Rogers*, and the other decisions discussed above, and enter judgment for Crane Co.

If, however, the Court determines that the First Department's test is appropriate in a case such as this one, then Crane Co. is entitled to (1) have an opportunity to introduce evidence showing that, as a private-sector contractor, it had no role, let alone a "significant" one, in the decision-making process of the United States Navy, and (2) have a jury decide, after receiving proper instructions on the law, the factual matter of whether Crane Co. had "a sufficiently significant role, interest, or influence in the type of component used with its product." *See Tagle v. Jakob*, 97 N.Y.2d 165, 168, 737 N.Y.S.2d 331, 333 (2001) (holding that although the court defines the legal duty, it is solely for the jury to resolve any factual issues surrounding its alleged breach). Neither of those things happened here, and a new trial is the minimum appropriate relief, even if this Court upholds the legal analysis of the First Department majority.

### 1. There Is No Question That the Trial Court Improperly Instructed the Jury on the Standards It Was to Apply in Determining Crane Co.'s Legal Responsibility for the Asbestos-Containing Materials of Others.

Over Crane Co.'s objection, the trial court charged the jury that Crane Co. had a duty to warn of dangers allegedly inherent in asbestos-containing materials it neither made nor sold, providing the jury with the following instruction:

> [A] manufacturer's duty to warn extends to known dangers or dangers which should have been known in the exercise of reasonable care of the uses of the manufacturer's product with the product of another manufacturer if such use was reasonably foreseeable.

(R. 2031.) The trial court elaborated that "Crane's duties to warn hinges [sic], in part, on whether it was foreseeable that asbestos containing gaskets, lagging and/or insulation and packing would be used with Crane's valves and whether it was foreseeable that routine maintenance and repair of the valves would create a dangerous condition by exposing a worker to asbestos in the dust created during such work." (*Ibid*.) Accordingly, the jury could conclude Crane Co.'s legal duty was breached if it simply foresaw (in hindsight) that the Navy could potentially use asbestos-containing materials with or near its valves and did not warn of that use.

No one defended this instruction before the First Department, and both the majority and dissent recognized that it was clear error. (COA 44, 57.) For all of the reasons outlined above, the First Department's determination that foreseeability does not determine a defendant's tort duty was clearly correct.

### 2. Upon Determining That the Trial Court Improperly Instructed the Jury, the First Department Was Obligated to Order a New Trial So That a Jury Could Make New Findings of Fact Pursuant to the Correct Legal Standard and the Parties Could Submit Evidence Tailored to That Standard.

Crane Co. was, in effect, denied its right to a jury trial. The factual conclusions in a case tried before a jury must come from a jury. *Cohen*, *supra*, 45 N.Y.2d at 498, 410 N.Y.S.2d at 285; *accord Sumner v. Extebank*, 58 N.Y.2d 1087, 1089, 462 N.Y.S.2d 810, 810 (1983) (holding Appellate Division may order a new trial when the verdict is against the weight of the evidence, but may not "ma[k]e new factual findings and thereby substitute[] itself for the jury"); *Middleton v. Whitridge*, 213 N.Y. 499, 506 (1915) (holding, in a jury trial, "the ultimate decision of all disputed questions of fact must be by a jury, unless the parties have consented to a decision of them by the court. . . ."); *Candela v. New York City Sch. Constr. Auth.*, 111 A.D.3d 522, 975 N.Y.S.2d 346 (1st Dep't 2013) ("[A]ppellate courts do not have the power to make factual findings in weight of the evidence analysis in a jury case."). This is a fundamental principle of appellate review, *see*, *e.g.*, 5 C.J.S. *Appeal and Error* § 911 (2014), that is rooted in a defendant's constitutional right to a jury trial, *Cohen*, 45 N.Y.2d at 498, 410 N.Y.S.2d at 285 (noting that the rule is "different in cases not involving the right to a jury trial"). Accordingly, once it found that the jury was improperly instructed on the scope of Crane Co.'s duty, it was error for the Appellate Division to have made new

findings of fact on a different legal test, and used those findings to support the entry of judgment for Plaintiff. *Id*.

Rather, upon (1) holding that a manufacturer may be liable for third parties' asbestos-containing materials where the manufacturer had a significant role, interest, or influence in the components used with its equipment post-sale and (2) recognizing that the trial court did not provide the jury with this standard to guide its decision (and the parties had no ability to tailor their evidence to it), the First Department should have ordered a new trial with new evidentiary presentations tailored to the appropriate legal standard, and new findings of fact made pursuant to the correct legal standard.

#### a. The First Department's Own Analysis of the Factual Record Demonstrates That the Trial Court's Error Was Far From Harmless.

Instead of reversing the judgment, as it should have, the First Department majority engaged in an analysis of the evidence (none of which was offered in an effort to prove or disprove the First Department's "significant role" standard) and found as a factual matter that its newly crafted test for legal responsibility was passed on the record here.

This method of analysis is exactly the method that this Court has held the Appellate Division *may not* employ when considering the impact of an error in jury instructions. In such circumstances, the Appellate Division may not proceed as it

did here and render new factual findings after viewing the record in light of the correct instructions on the law, because doing so would usurp the role of the jury. Rather, the Appellate Division must determine whether there is any view of the evidence that could support a verdict in favor of the appellant under the correct legal instructions and, if so, order a new trial. *Marine Midland Bank v. John E. Russo Produce Co., Inc.*, 50 N.Y.2d 31, 43, 427 N.Y.S.2d 961, 968 (1980) ("The test for determining whether [an] erroneous instruction was harmless is not whether the jury might possibly have adopted a view of the facts that rendered it legally irrelevant. . . . The correct rule is that an error is only deemed harmless when there is no view of the evidence under which appellant could have prevailed.")

In *Marine Midland Bank*, a trial court erroneously instructed the jury that it could not draw an inference against two of the defendants who invoked the privilege against self-incrimination. Although the Appellate Division held that this instruction was error, it held the error harmless on the theory that the jury could have found for the defendants for reasons unrelated to the questions they refused to answer. *Id*. The *Marine Midland Bank* Court reversed, holding the Appellate Division erred in searching the record for a rationale to support the verdict, instead of searching for any theory upon which a different verdict could have rested, had the jury received proper instructions. *Id*.

Applying the rule of *Marine Midland Bank* here, even if the First Department majority's analysis of the facts establishes that Plaintiff had sufficient evidence to *present* her case to the jury (a point Crane Co. disputes, because there is no evidence that it had any role, let alone a "significant" one, in the Navy's decision-making), it was for the jury, and not for the First Department, to decide whether Plaintiff would ultimately prevail on that evidence. This is because there is clearly a view of the evidence on which a reasonable jury could have found in Crane Co.'s favor on the test for legal responsibility the First Department enunciated, based on the evidence introduced at trial (which, as noted below, is far from the *only* evidence Crane Co. would have submitted had it had an opportunity to understand the legal standard it was facing, which is a fact that justifies a new trial standing alone).

With respect to Crane Co.'s alleged "role" in the Navy's selection of products, there was no evidence that the United States Navy, one of the most-sophisticated engineering and military organizations in history, took direction from any private-sector supplier. Despite the absence of any such evidence, the First Department majority appears to have reached a different conclusion, and based its holding entirely on it. However, the conclusions the First Department majority drew from the factual record here are not supported by the evidence.

For instance, focusing on the factors that the majority described as "strengthen[ing] the connection" between Crane Co.'s valves and the Navy's asbestos-containing materials (COA 43), a jury could reasonably disagree with the majority's conclusion that Crane Co. "helped write" a publication of the U.S. Naval Academy that the majority considered pertinent in its analysis (*ibid*.). Far from co-authoring this text, Crane Co. was simply one of 38 private-sector manufacturers that the Naval Academy thanked for contributing illustrations, descriptive matter, and/or suggestions. (R. 3851-52.) Crane Co.'s contribution is noted nowhere in the document. Although the majority wrote that this publication directed the use of asbestos in insulation materials, it described a number of different insulation materials as suitable for Navy service, including a number of non-asbestos ones (R. 3857-60), and it did not "direct" anyone to use any particular type of insulation for anything. Rather, the document states, "It is the purpose of this article to present briefly the forms of insulating materials used in naval service in cases where the temperature encountered is not above 1500°F." (R. 3857.) In other words, this document appears to be an attempt by the Naval Academy to describe what the Navy was doing at the time in its ship construction, not what it should have (or must have) been doing.

A jury could also reasonably find that there was no evidence here that Crane Co. played any role, let alone a "leading role," in "creating the culture and

regulations that encouraged and eventually mandated the use of asbestos for insulation." (COA 43.) The majority did not cite any evidence of record supporting this conclusion, and none exists. This conclusion is contradicted by, among other things, the conclusions of the unanimous Supreme Court of California upon reviewing the same essential historical record of the relationship between the Navy and its equipment suppliers. *See O'Neil*, *supra*, 53 Cal.4th at 343-44, 266 P.3d at 991-92. As in *O'Neil*, *see ibid.*, there was ample evidence at trial here that, as a civilian contractor, Crane Co. was bound by the Navy's "military specifications" (R. 78 [trial court finding "Navy specifications required asbestos containing gaskets and packing" to be supplied in certain Crane Co. valves]), and Plaintiff conceded this point (R. 267 [Plaintiff's counsel stating, "Now, they are going to tell you that the navy specified the use of asbestos. And that's true, but it was their duty to warn and to protect Mr. Dummitt. . . ."]). There was no evidence, however, that Crane Co. -- a private contractor that supplied valves -- had any role in designing the Navy's fleet, creating the "military specifications" that governed the construction of that fleet, or telling the United States Navy how to best operate its fleet and defend the nation.

A jury could likewise reasonably question the accuracy of the majority's conclusion that "Crane influenced the Navy's choice of valve components following the initial shipment." (COA 43.) The majority based this conclusion on

its erroneous finding that the valve schematics that the Navy required Crane Co. to submit with its valves were a type of "recommendation" from Crane Co. to the Navy regarding the replacement parts to be used with the valves. (*Ibid*. [the majority writing that "Crane provided the Navy with detailed drawings specifying the components to use with each valve . . . so that the Navy would know which replacement component parts would be used with each valve"].) A jury easily could reject any such suggestion in light of the fact that these drawings do not say anything about replacement parts. (R. 1509.)

Indeed, the evidence demonstrated that Crane Co. was required to supply these documents to the Navy pursuant to the applicable military specifications. (*Ibid*.) The valve drawings merely reflected that the valves included all of the components and materials called for by those specifications.[10] (*Ibid*. [Admiral Sargent explaining that the valve schematics listed the different parts of the valve and the exact "Navy specifications" with which each of those parts complied].) The valve schematics say nothing about replacement parts, and the record was

[10] The Navy assigned some of these materials and components unique numbers for use as "shorthand" references. For instance, some of the valve schematics show that "symbol 1108," which was an asbestos-containing packing, was installed in the valves at the time of shipment pursuant to the Navy's specifications. Although the majority suggests in its opinion that Crane Co. "created" these shorthand symbols that the Navy used (COA 16), there was no evidence supporting such a finding anywhere in the record. Rather, the evidence was very clear that these were "Navy symbol numbers" that were created by the Navy and had nothing to do with Crane Co. (R. 3861.)

clear that Navy sailors determined the appropriate replacement parts to use with shipboard equipment by consulting entirely different internal Navy manuals.[11] (*See* R. 3861 [a Naval Academy publication noting that "[t]he correct type packing for a specific service can be determined by reference to the packing and gasket table in Chapter 95 of the *Bureau of Ships Manual*"].)

The misstatements and/or overstatements of the record evidence noted above are but a few of numerous such instances appearing in the majority's flawed review of the trial evidence. The points set forth immediately below include several additional examples, all making clear that the majority's characterization of the significance of Crane Co.'s "role" in the post-sale use of the valves at issue was highly overstated, at best, and clearly a factual matter for a jury to determine.

- *Over time, Crane successfully lobbied the Navy to replace components made by other manufacturers with Cranite*. (COA 16.) Several valve drawings introduced into evidence noted that, when Crane Co. supplied the valves to the Navy, "Cranite" had been substituted for the

[11] Of course, even if a sailor had consulted these valve schematics to choose a replacement part, that sailor merely would have observed the type of material that the Navy directed Crane Co. to install in the valve at the time of shipment. Thus, to the extent these drawings could possibly reflect a "recommendation," any such recommendation was the Navy's, not Crane Co.'s.

gasket otherwise dictated by military specification.[12] (*See*, *e.g.*, R. 1163; SR. 47-49.) There was no evidence suggesting that these substitutions were the product of some form of "lobbying" effort.

- *The Navy required Crane to test [asbestos lagging] pads prior to Naval use*. (COA 17.) This conclusion appears based on approximately two pages of testimony regarding an unadmitted document. (R. 1515-16.) The document apparently was a military specification for a type of gate valve, and it appeared to require the valve manufacturer to make the equipment available at its facility for a Navy "inspection test." (R. 1516.) The document was not specific to Crane Co., and there is no suggestion that Crane Co. ever even supplied a valve subject to this testing protocol. Moreover, the "testing" here was done by a Navy inspector, not the valve maker. Finally, contrary to the majority's characterization, the "testing" was of the valve, and not the lagging pad applied to it.

- *Indeed, the record is replete with examples of Crane, in its catalogs, extolling the virtues of Cranite and, by extension, asbestos-laden insulation products as the industry standard, from 1938 to at least 1962.* (COA 43.) This appears to be a vast overstatement of the content of Crane

[12] Cranite was a gasket material that Crane Co. sold during certain years, but did not manufacture. As the First Department dissent noted, the parties stipulated that Mr. Dummitt did not allege he was exposed to this product. (COA 45.) Thus, its relevance was far from clear.

Co.'s plumbing supply catalogs, a few pages of which concerned Cranite and insulation, and which overwhelmingly focused on valves, fittings, pipe, and fabricated piping. (R. 3654.) Although certain Crane Co. catalogs offered for sale asbestos-containing insulation and gasket and packing products, they also offered non-asbestos-containing varieties of these same products. (R. 3659-65, 3745-52, 3892-3900, 3910-16, 3924-27, 3951-54.) Further, there was no evidence that the Navy consulted any of Crane Co.'s plumbing supply catalogs at any time, for any reason. Finally, contrary to the majority's suggestion here, "Cranite" was a gasket material (with which Mr. Dummitt never worked, *see* COA 45), not an insulation product.

- *While not every Crane valve used components such as gaskets, packing, and lagging pads made of asbestos, those that did were typically identified in the drawings*. (COA 16.) The majority is correct that the Navy did not use asbestos-containing materials with all of the valves it purchased from Crane Co. However, the majority's characterization of the valve schematics introduced into evidence is incorrect -- although these drawings generally identify the type of gasket and/or packing supplied with the valve (SR. 1-50), they do not reference insulation materials or so-called "lagging pads," and the evidence was clear that Crane Co. did not supply any such materials with its valves (R. 265).

If reasonable minds can differ on the "role" that Crane Co. played in the Navy's decision-making, and that is clearly the case, then a finding of harmless error is precluded, and a new trial is necessary. *Marine Midland Bank*, *supra*.

**b. An Error Is Not Harmless if It Effectively Prevents a Defendant From Submitting Relevant Evidence in Its Defense.**

As explained above, because a jury could find that Crane Co. did not have a significant role, interest, or influence in the Navy's use of asbestos-containing materials with its valves *on the record created in this case*, the trial court's error in instructing the jury with a "foreseeability" test for duty clearly was not a harmless one.

However, even if the record here could not possibly support any finding other than that Crane Co. had a significant role in the Navy's use of asbestos-containing materials with its valves, a new trial is still appropriate because Crane Co. did not have an opportunity to submit evidence in its defense that was tailored to the appropriate legal standard. By analyzing an evidentiary record that was developed pursuant to an entirely different legal test for duty (the "foreseeability" test the First Department rejected), instead of ordering a new trial, the First Department improperly deprived Crane Co. of an opportunity to submit evidence relevant to its defense.

It is a fundamental rule of appellate review that an error that "has probably injuriously affected the substantial rights of the" appealing party is not a "harmless error." 5 C.J.S. *Appeal and Error* § 965 (2014). Crane Co. was indisputably "injured" by not having an opportunity, prior to trial, to (1) understand the test for legal responsibility that would apply in this case and (2) in light of that knowledge, submit evidence in its defense tailored to the legally applicable test. *See Roundpoint v. V.N.A. Inc.*, 207 A.D.2d 123, 125, 621 N.Y.S.2d 161, 162–63 (3d Dep't 1995) (recognizing a party's fundamental right to submit evidence in its defense); *Tiborsky v. Martorella*, 188 A.D.2d 795, 797, 591 N.Y.S.2d 547, 549 (3d Dep't 1992) (same).

Indeed, the record at trial demonstrates that the trial court excluded as "irrelevant" certain evidence that Crane Co. offered that would have clearly been relevant to the question of the "significance" of Crane Co.'s role in the Navy's post-sale use of its equipment. For example, Crane Co. sought to introduce testimony from its expert witness in Navy procurement practices, Admiral David Sargent, along with supporting documentation, indicating that as late as the 1980s, the Navy rejected a request from an equipment manufacturer situated similarly to Crane Co. to substitute a non-asbestos-containing gasket for the asbestos-containing gasket that the applicable military specification required to be installed in the relevant equipment at the time of shipment to the Navy. (R. 1510.) The trial

court sustained the Plaintiff's objection to the introduction of this evidence on "relevance grounds" and excluded the evidence (*ibid.*), later explaining outside of the jury's presence that this evidence "does not impact on the defendants' duty to warn in this particular case" (R. 1520).

Although, as the trial court suggested, this evidence may not have had a bearing on the question of whether it was "foreseeable" to Crane Co. that the Navy would likely use asbestos-containing materials with certain valves, it certainly tends to show that equipment manufacturers like Crane Co. had no "influence" over the Navy's decisions regarding what types of sealing products to use with equipment. It is impossible to determine how the receipt of this evidence, or other similar evidence, would have affected the jury's factual findings on the significance of Crane Co.'s "role" in the Navy's use of asbestos-containing materials, which is precisely why a retrial is necessary here, to the extent the Court adopts the First Department's analysis of the law.

Crane Co. could have, and would have, marshaled far more evidence than this at trial, but it had no way of knowing the legal standard that the First Department would articulate until it issued its opinion. This fact takes what every reviewing Appellate Division Justice agreed was an error in the jury instructions well beyond the realm of "harmless," and the Court should grant a new trial, even if it adopts the First Department's standard for legal responsibility.

## II. The Appellate Division Erred in Holding Crane Co. Was Not Entitled to Judgment, or at a Minimum a New Trial, Where Plaintiff Failed to Create a Triable Issue of Fact Regarding Proximate Cause, and the Trial Court Both Charged the Jury With a Presumption of Causation and Precluded Crane Co.'s Evidence Disproving Causation.

### A. Plaintiff Failed to Establish the Element of Proximate Cause.

This Court's precedents establish that "[i]n order to prevail at trial in a negligence case, a plaintiff must establish by a preponderance of the evidence that the defendant's negligence was a proximate cause of plaintiff's injuries." *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 550, 684 N.Y.S.2d 139, 141 (1998). In a line of decisions, the First Department has explained exactly how a plaintiff asserting a negligence or strict liability claim based upon, specifically, a failure-to-warn theory must go about proving proximate cause.

In such a context, the First Department precedents hold that a plaintiff must establish that (1) the product did not contain adequate warnings, and (2) the inadequacy of the warnings was the proximate cause of the injuries. *Mulhall v. Hannafin*, 45 A.D.3d 55, 60-61, 841 N.Y.S.2d 282, 287 (1st Dep't 2007); *Sosna v. American Home Prods.*, 298 A.D.2d 158, 748 N.Y.S.2d 548 (1st Dep't 2002); *Banks v. Makita, U.S.A., Inc.*, 226 A.D.2d 659, 660, 641 N.Y.S.2d 875, 877 (2d Dep't 1996) (citing *Johnson v. Johnson Chem. Co., Inc.*, 183 A.D.2d 64, 588 N.Y.S.2d 607 (2d Dep't 1992)); *Glucksman v. Halsey Drug Co., Inc.*, 160 A.D.2d 305, 307, 553 N.Y.S.2d 724, 726 (lst Dep't 1990); *Upfold v. Generac Corp.*, 224

A.D.2d 1021, 638 N.Y.S.2d 264 (4th Dep't 1996); *Alston v. Caraco Pharm., Inc.*, 670 F.Supp.2d 279, 285 (S.D.N.Y. 2009). With respect to the second element of this test, the burden lies with plaintiff to prove that his injury would not have occurred had a proper warning been given. *Mulhall*, 45 A.D.3d at 60, 841 N.Y.S.2d at 287; *Sosna*, 748 N.Y.S.2d at 548 (citing *Glucksman*, *supra*). The plaintiff's burden in this regard "includes adducing proof that the user of a product would have read and heeded a warning had one been given." *Sosna*, 748 N.Y.S.2d at 549 (citing *Guadalupe v. Drackett Prods. Co.*, 253 A.D.2d 378, 676 N.Y.S.2d 177 (1st Dep't 1998); *Rodriguez v. Davis Equip. Corp.*, 235 A.D.2d 222, 651 N.Y.S.2d 528 (1st Dep't 1997); *Rochester Refrigerating Corp. v. Easy Heat, Inc.*, 222 A.D.2d 1013, 635 N.Y.S.2d 890 (4th Dep't 1995)).

The First Department's decision in *Guadalupe* is particularly instructive in this respect in that it defines the type of evidence that may, and that will not, satisfy a plaintiff's burden of proving proximate cause in a failure-to-warn claim. In that case, the plaintiff was injured when she used Crystal Drano in conjunction with "very hot water," which led to a violent eruption of caustic chemicals. *Guadalupe*, 253 A.D.2d at 378, 676 N.Y.S.2d at 178. Nevertheless, because plaintiff testified that she did not attempt to read the label before using the product, and it was not her custom to do so, the defendants were granted judgment as a matter of law because plaintiff could not create an issue of fact regarding the

causal link between the absence of warnings and her injuries. *Id*. Here, in the absence of any testimony that, *inter alia*, Mr. Dummitt sought out labels and user instructions for the products he encountered in the Navy, or that the Navy would have permitted non-approved user instructions to reach him, the same logic should control, and Crane Co. is entitled to judgment as a matter of law on Plaintiff's claims, each of which was premised on a failure-to-warn theory. (R. 52, 2167–68.)

Nevertheless, as opposed to granting a directed verdict or, at a minimum, instructing the jury to decide whether Plaintiff presented evidence sufficient to prove this critical element of the claim, the trial court's "heeding presumption" charge (i.e., the charge that the jury had to *presume* that Mr. Dummitt would have heeded a warning, had one been given, and avoided injury) excused Plaintiff from proving the fundamental causation element of a failure-to-warn claim. Thus, the trial court took away from the jury what was, in the most-positive light for Plaintiff, a disputed issue of fact. (R. 2033.) Accordingly, the jury was prevented from considering the fundamental question under New York law of whether a hypothetical warning from Crane Co. would have prevented Mr. Dummitt's injury, and the Appellate Division erred in failing to reverse on this basis.

The manner in which the trial court took the causation issue away from the jury and thereby shifted the burden on this issue to Crane Co. finds absolutely no support in New York law, which the First Department dissent pointed out; indeed,

it runs contrary to at least five First Department decisions (*Munhall*, *Sosna*, *Glucksman*, *Guadalupe*, and *Rodriguez*, *supra*) and at least one federal appellate precedent, *Raney v. Owens-Illinois, Inc.*, 897 F.2d 94, 96 (2d Cir. 1990) (holding, in the asbestos context, that a "plaintiff is not entitled to a presumption" regarding "the necessary element of causation" under New York law). All of these precedents provide that the plaintiff bears the burden of establishing causation in a failure-to-warn claim. Strikingly, the charge conference transcript, Plaintiff's opposition to Crane Co.'s post-trial motion, and the trial court's decision on that motion do not contain a single citation to any authority that provides for an evidentiary presumption of the type charged by the trial court.

In its own review of the authorities, Crane Co. (as well as the dissenting Justices of the First Department) identified no controlling authority that would excuse Plaintiff of the evidentiary burden of proving causation, only a series of federal district court decisions all arising from the same erroneous reading of a New York trial court opinion that does not provide for an evidentiary presumption regarding the causation element in a failure-to-warn claim. *See Anderson v. Hedstrom Corp.*, 76 F.Supp.2d 422, 441–42 (S.D.N.Y. 1999) (citing *Power v. Crown Controls Corp.*, 149 Misc.2d 967, 969, 568 N.Y.S.2d 674 (N.Y. Sup. Ct. 1990), which holds that a plaintiff must "prove at trial that the failure to warn was a proximate cause").

In sum, the Court could properly enter judgment for Crane Co. because the evidence Plaintiff offered to support her case for proximate cause was speculative, at best. The Court could likewise properly order a new trial in light of the trial court's decision to instruct the jury with a "heeding presumption" contrary to all of the longstanding New York law described above. (*See* COA 61, Friedman, J., dissenting ["Whether rebuttable or not, the presumption charge had the effect of shifting the burden of proof on the causation issue and was contrary to precedent of this Court by which the trial court was bound."].) As explained below, this was error, and it clearly was not harmless, as the dissent discussed at length.

### B. The Multiple Errors Underlying the Trial Court's Treatment of the Issue of Proximate Cause Were Not Harmless.

#### 1. A New Trial Is Necessary Because There Is a View of the Evidence Under Which Crane Co. Could Have Prevailed Had the Trial Court Instructed the Jury Properly.

In refusing Crane Co. a new trial, the First Department in no way indicated that its prior precedents rejecting any sort of "heeding presumption" were incorrectly decided or inapplicable here. And thus, it is clear that the trial court erred in (1) charging the jury with such a presumption and (2) excluding Crane Co.'s evidence rebutting it. Instead of reversing for a new trial in light of these errors, however, the First Department majority held there was "a line of reasoning sufficient for the jury to conclude that Crane's failure to warn was a proximate

cause of Dummitt's injuries," and thus, "whether the court erroneously charged a presumption on the matter is irrelevant. . . ." (COA 45.)

However, in determining whether an error in jury instructions was harmless, or whether it warrants reversal, the question is not whether there was any line of reasoning that would support the verdict in spite of the erroneous instruction. Rather, the question is the opposite -- was there any line of reasoning that would support *a different verdict* if the erroneous instruction had not been given? *See Marine Midland Bank*, *supra*, 50 N.Y.2d at 43, 427 N.Y.S.2d at 968 ("The correct rule is that an error is only deemed harmless when there is *no view of the evidence* under which appellant could have prevailed.") (emphasis added).

Here, there is clearly a line of reasoning pursuant to which Crane Co. could have prevailed had the trial court not instructed as it did -- the jury could have rejected Mr. Dummitt's testimony that he would have followed various types of asbestos-related warnings many years ago, had he received them. (R. 5678.) The jury could have reasonably determined that Plaintiff's failure to present any testimony that the Navy would have permitted Mr. Dummitt to engage in alternative work practices had hypothetical warnings been given constituted a dispositive failure of proof on this essential element of Plaintiff's claims. Further, as explained below, had the trial court not improperly excluded Crane Co.'s

evidence, the jury could have reasonably questioned whether the Navy even would have permitted Crane Co. to supply asbestos-related warnings with its valves.

### 2. A New Trial Is Necessary in Light of the Trial Court's Exclusion of Crane Co.'s Rebuttal Evidence.

As the First Department dissent noted, Crane Co. presented testimony at trial from a retired Navy Admiral who spent 12 years of his service focused on managing programs relating to Navy contracting and procurement. (R. 1504.) "This witness was prepared to testify that the Navy would have forbidden Crane to place asbestos warnings on its valves because they were not contained in the Navy equipment specifications. Although this testimony would have tended to show that the hypothetical warnings, even if given, would not have reached Mr. Dummitt, the court refused to allow the jury to hear it." (COA 62, Friedman, J., dissenting.)

As the dissent correctly noted, "[t]he jury might well have rejected Admiral Sargent's testimony on this point, but Crane had a right to present it to them." (COA 65, Friedman, J., dissenting.) The First Department dissent likewise correctly observed that the majority offered no rationale supporting the exclusion of Admiral Sargent's testimony, which focused on what his fellow Navy officers would have done had Crane Co. attempted to give hypothetical warnings, while admitting Mr. Dummitt's substantially similar testimony regarding what he and his fellow servicemen would have done had they received hypothetical warnings.

Indeed, the First Department majority stated that it was "not persuaded that it would have made a difference had the Admiral been permitted to testify that the nameplate requirements for valves was exhaustive." (COA 48.) The question of whether this evidence "would have made a difference," however, was clearly one for the jury, insofar as reasonable minds could differ on the subject. *See Ernest v. Red Creek Central Sch. Dist.*, 93 N.Y.2d 664, 674, 695 N.Y.S.2d 531, 535 (1999) ("Proximate cause is a question of fact for the jury where varying inferences are possible.") (quoting *Mirand v. City of New York*, 84 N.Y.2d 44, 51, 614 N.Y.S.2d 372, 376 (1994)); *see also* COA 63-64, Friedman, J., dissenting (noting that the majority's "inappropriate and groundless speculation" that Admiral Sargent's testimony would not have "made a difference" was based entirely on a federal court decision that neither party to this appeal cited and that was, in all respects, irrelevant to the question before the court).

On the whole, the First Department erred in finding no reversible error where the trial court instructed the jury to incorrectly apply a presumption in Plaintiff's favor that excused Plaintiff from her burden of proof on the issue of proximate cause. Plaintiff's claim should be dismissed on the basis that she did not present evidence necessary to sustain her burden of creating a jury issue on that point. Nevertheless, even if the claim is not dismissed, a new trial is appropriate so that the jurors may consider this issue of fact, without being instructed to presume

the issue one way or the other, and have an opportunity to hear and consider both sides' evidence.

## III. The First Department Erred When it Upheld the Trial Court's Decision to Impose Joint-and-Several Liability on Crane Co.

### A. The Jury's Fault Allocation Was Against the Weight of the Evidence.

The evidence at trial demonstrated that Mr. Dummitt was exposed to numerous asbestos-containing products associated with numerous entities during his years of service in the Navy. (R. 1170, 1173, 2169–70, 5673–76.) Plaintiff did not contend at trial that Crane Co. made or supplied any of the asbestos-containing materials that allegedly injured Mr. Dummitt. (R. 52–53, 1163, 1351, 1365.) Nevertheless, the jury held Crane Co. 99% at fault for causing Mr. Dummitt's injuries. There is simply no logical basis for such a result.

A jury's allocation of fault under CPLR § 1601 should be set aside if it cannot be sustained "under any fair interpretation of the evidence." *Pouso v. City of New York*, 22 A.D.3d 395, 396, 804 N.Y.S.2d 24, 26 (1st Dep't 2005). The First Department's own precedents establish that that standard is met where, like here, a jury allocates a lesser share (or no share) of fault to a person who directly and indisputably caused an injury and a greater share to a more indirectly involved trial defendant. *See*, *e.g.*, *Roseboro v. New York City Transit Auth.*, 10 A.D.3d 524, 782 N.Y.S.2d 23 (1st Dep't 2004) (setting aside 20/80 fault allocation between

plaintiff's criminal assailants and defendant clerk who slept through attack); *Nares v. M&W Waterproofing*, 5 A.D.3d 155, 772 N.Y.S.2d 523 (1st Dep't 2004) (setting aside 50/50 allocation between contractor whose carelessness ignited artwork and passive premises owner with general supervisory duties); *Schildkraut v. Eagle Lines, Inc.*, 126 A.D.2d 480, 511 N.Y.S.2d 13 (1st Dep't 1987) (setting aside 40/60 allocation between owner/operator of negligently driven tractor-trailer with defective brakes and City for posting of inadequate signs).

Here, the actual makers and suppliers of the asbestos-containing materials to which Mr. Dummitt was exposed (Garlock, Johns-Manville, and the Union Asbestos & Rubber Company, among others) were indisputably "in the best position to have eliminated" the dangers associated with their products. *Micallef*, *supra*, 39 N.Y.2d at 386–87, 384 N.Y.S.2d at 122. There is no rationale supporting the jury's failure to recognize this and its decision to find Crane Co. almost entirely to blame for Mr. Dummitt's injury. Nor is there any rationale for the jury's decision to hold Crane Co. blameworthy, but to assess no fault at all to the large number of similarly situated equipment manufacturers that appeared on the verdict form. (R. 2169–70.)

In fashioning the verdict sheet, the trial court ruled that the evidence supported a finding that Mr. Dummitt sustained exposure to asbestos-containing materials associated with no less than 30 different entities. (*Ibid*.) Plaintiff's own

expert medical witness testified that every single one of these entities contributed to cause Mr. Dummitt's disease. (R. 872.) And Mr. Dummitt testified that none of these 30 entities ever warned him of the hazards of asbestos (R. 5677–78), although there was evidence that all of them had access to similar information regarding those hazards before Mr. Dummitt began his service in the Navy[13] (R. 793).

If this evidence was sufficient to establish a *prima facie* case as to Crane Co., then it was likewise sufficient to establish a *prima facie* case against all of the other entities listed on the verdict sheet, and the jury was not entitled to ignore this evidence in reaching its verdict. Accordingly, this Court should, as the First Department dissent suggested, order a new trial in which "the issue of Crane's percentage of fault for the harm suffered by the plaintiff and her decedent [will] be determined afresh. . . ." (COA 66, Friedman, J., dissenting.)

### B. The Trial Court Erred in Charging the Jury on "Recklessness," and the Jury's Finding to That Effect Was Against the Weight of the Evidence.

The clear purpose of "Article 16" is to ensure that defendants in tort actions bear only their appropriate share of the judgment, and not more. *See Frank v. Meadowlakes Dev. Corp.*, 6 N.Y.3d 687, 692, 816 N.Y.S.2d 715, 718 (2006) ("The

[13] There is no basis in the record or anywhere else for the premise that Crane Co. had "unique" information regarding the hazards of asbestos-containing materials not shared by other entities, including the very markers and sellers of the materials to which Mr. Dummitt was exposed.

purpose of article 16 was to place the risk of a principally-at-fault but impecunious defendant on those seeking recovery and not on a low-fault, deep pocket defendant."); *Rangolan v. County of Nassau*, 96 N.Y.2d 42, 46, 725 N.Y.S.2d 611, 615 (2001) (noting that Article 16 "was intended to remedy the inequities created by joint and several liability on low-fault, 'deep pocket' defendants").

In this case, however, the decision of the trial court to permit the jury to find Crane Co.'s conduct "reckless," coupled with the trial court's failure to provide the jury with any meaningful guidance on what "reckless" conduct is, imposed on Crane Co. the "inequities created by joint and several liability" and the full weight of the jury's already excessive verdict. This result runs directly counter to the clear purpose of Article 16, and the Court should reverse and order a new trial for this additional reason.

### 1. The Trial Court Should Not Have Charged the Jury on the "Recklessness" Exception to CPLR § 1601.

Article 16 is a "remedial" statute which was, as noted above, enacted to "remedy the inequities created by joint and several liability on low-fault, 'deep pocket' defendants." *Rangolan*, *supra*, 96 N.Y.2d at 46, 725 N.Y.S.2d at 615. As such, Article 16 should be liberally construed to achieve the statutory goal of providing for several liability, only, in cases like this one. *See* N.Y. Statutes Law § 321 ("Generally, remedial statutes are liberally construed to carry out the reforms intended and to promote justice."). Because the "exceptions" to the rule of Article

16 laid out in CPLR § 1602 undercut the overarching remedial purpose of the statute -- ensuring that defendants in tort actions bear only their appropriate share of the judgment, and not more -- trial courts should construe them narrowly and apply them only when the case evidence clearly supports their application. The evidence here did not support the application of the "recklessness" exception to Article 16, the trial court never should have permitted the jury to consider making such a finding, and the jury's finding to that effect is against the substantial weight of the evidence.

A finding that Crane Co.'s conduct was "reckless" is simply untenable in light of the fact that numerous courts throughout the country, including at least one applying New York law, have determined that the same conduct at issue here *does not even give rise to a cognizable legal claim*. *See Surre, O'Neil, Simonetta, Braaten, Whiting, Lindstrom, Conner, supra*.

In *Maltese v. Westinghouse Electric Corp.*, 89 N.Y.2d 955, 956-57, 655 N.Y.S.2d 855, 856 (1997), this Court held that proving recklessness for purposes of CPLR § 1602 in an "asbestos case" requires, at a minimum, evidence of an intentional act, done with conscious indifference and in disregard of a "known or obvious risk" that was so great as to make it "highly probable" that harm would follow. *Id*. Here, no "act" of Crane Co.'s caused Mr. Dummitt to be exposed to asbestos, and no one disputed this point. (COA 56, Friedman, J., dissenting

["Again, it is undisputed that Crane neither manufactured nor sold nor distributed the particular materials that gave rise to Mr. Dummitt's asbestos exposure."].)

Moreover, the Plaintiff did not even plead a "recklessness" theory; as the First Department majority acknowledged, the word "recklessness" does not appear in Plaintiff's complaint (COA 38). Yet, this Court has made it clear that a plaintiff seeking to get the benefit of one of the "exceptions" to CPLR § 1601 set forth in CPLR § 1602 has the burden of both pleading and proving that exception. *Cole v. Mandell Food Stores, Inc.*, 93 N.Y.2d 34, 39-40, 687 N.Y.S.2d 598, 600 (1999).

In sum, even if this Court were to adopt the approach of the First Department and hold that an equipment manufacturer like Crane Co. may bear legal responsibility for injuries traceable entirely to the products of other companies, it should, at the very least, hold that a theory of "recklessness" has no place in a claim based on such an attenuated theory of tort liability (particularly where Plaintiff did not even plead the theory), and that the trial court erred in charging the jury on "recklessness" here.

### 2. The Trial Court's "Recklessness" Instruction Did Not Conform to the Language Adopted in *Maltese*.

Even if the Court were to determine that the trial court, which stands as a gate-keeper to enforce the legislative intent of Article 16, did not err in permitting the jury to consider making a "recklessness" finding, a new trial is necessary because the instruction that the trial court provided the jury to guide the

"recklessness" inquiry was erroneous for two reasons. First, the court's instruction did not comport at all with the language adopted in *Maltese* to govern exactly the same type of inquiry in an asbestos case. Second, it improperly equated the concept of recklessness with the concept of negligence.

In *Maltese*, the court held that "recklessness" in the context of CPLR § 1602(7) means "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome." *Maltese*, *supra*, 89 N.Y.2d at 956-57, 655 N.Y.S.2d at 856 (internal quotation marks omitted). Although this case, like *Maltese*, is a tort action focusing on alleged exposures to asbestos, and the issue before the trial court was how to instruct the jury on "recklessness" under CPLR § 1602(7), which was exactly the question, and exactly the context, of the *Maltese* decision, the trial court's instruction to the jury did not utilize the definition of "recklessness" that the *Maltese* court explicitly set forth in its opinion for use in cases like this one.[14] Rather, the trial court charged the jury that "a company acts with reckless disregard for the safety of others, when it intentionally, or with gross indifference to the

[14] The definition of "recklessness" utilized in *Maltese* was simply a restatement of the "well-established tort concept of recklessness, which we defined as the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome." *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 557, 664 N.Y.S.2d 252, 255 (1997).

rights or safety of others, engages in conduct which makes it probable that injury will occur." (R. 2033.)

The charge thus altered the *Maltese* standard, which demands a high probability of harm flowing from an act, to merely a probability, and omitted several of the concepts described in *Maltese* as necessary for establishing a "recklessness" theory for purposes of CPLR § 1602 in an asbestos-related action like this one -- specifically, that Crane Co.'s act be one of "an unreasonable character" done in disregard of a "known or obvious risk." The latter element, that a risk be known or obvious, is a hallmark of the mental state of "recklessness" and a key distinction between the concept of recklessness and the concept of negligence. *See*, *e.g., People v. Asaro*, 21 N.Y.3d 677, 684, 976 N.Y.S.2d 10, 13 (2013) (noting the key distinction between a mental state sufficient to give rise to a finding of recklessness and one only constituting negligence "is that recklessness requires that the defendant be 'aware of' and 'consciously disregard' the risk" while negligence involves the unreasonable failure to perceive a risk).

The trial court's charge, however, did not direct the jury to focus on Crane Co.'s mental state at all. Instead, the jury was merely instructed to find that Crane Co.'s selling of valves was conduct that it "intentionally" engaged in (as opposed to, seemingly, conduct that it unconsciously engaged in) and that certain products used by others with its valves had a probability of causing harm (which the jury

clearly determined in finding "substantial factor" causation). Unlike the standard adopted by this Court in *Maltese*, the "standard" utilized by the trial court here did not even require a finding rising to the level of negligence, which requires proof that a defendant *should* have known of the risks posed by its conduct, let alone "recklessness."

Whenever jury instructions "incompletely convey[] the germane legal principles to be applied in a case," a new trial is "require[d]." *J.R. Loftus, Inc. v. White*, 85 N.Y.2d 874, 876, 626 N.Y.S.2d 52, 53 (1995). Here, the instruction on recklessness "incompletely convey[ed]" the standard for such a finding set forth in *Maltese* by essentially conflating "recklessness" with negligence and imposing a lesser burden of proof on Plaintiff than that dictated by *Maltese*. The Court should grant a new trial on this basis.

### 3. The Jury's Finding of "Recklessness" Was Against the Weight of the Evidence.

*Maltese* establishes that evidence that a defendant had "general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury" is insufficient to support a finding of recklessness. *Maltese*, 89 N.Y.2d at 956–57, 655 N.Y.S.2d at 856–57. Instead, this Court required evidence of an intentional act, done with conscious indifference and in disregard of a "known or obvious risk" that was so great as to make it "highly probable" that harm would follow. *Id*.

At best, the evidence in this trial established that, at certain points in time that may or may not have been relevant to this case, employees of Crane Co. may have had a general awareness that harm could result from long-term exposures to certain asbestos materials in certain work settings. Of course, there was no evidence that that information was actually relevant to the specific asbestos materials and work settings involved in this case. Such generalized evidence is not sufficient to establish recklessness, particularly since the undisputed evidence was that (1) Crane Co. did not manufacture any of the asbestos-containing gaskets or packing that may have been used with its valves (R. 1618), and (2) any asbestos-containing gasket or packing in a Crane Co. valve shipped to the Navy was incorporated into the valve precisely because military specifications dictated as much (R. 1509–10). The trial evidence also established that, during the period of Mr. Dummitt's alleged exposures, there were no published studies warning of the potential hazards of asbestos-containing gaskets or packing. (R. 782, 784.)

Likewise, there was no evidence, of any kind, that it was "known or obvious" to Crane Co. that the Navy would use the valves at issue with asbestos-containing materials years, and even decades, after their sale when alternatives were available. (R. 785, 984, 986, 1265, 1274–76, 1491–92, 3857-65.) There was no evidence that it was "known or obvious" to Crane Co. that the Navy would direct its sailors to work with asbestos-containing materials in an uncontrolled

manner, when the evidence showed the Navy was aware of the potential health hazards associated with asbestos, and methods to address those hazards, years prior to when Mr. Dummitt began his service. (R. 790.) Plaintiff presented no evidence that Crane Co. controlled the manner in which the Navy used its valves, or even knew how the Navy would ultimately use those valves. (R. 1510–11.)

Finally, there was no evidence that the Navy even would have accepted an asbestos-related health warning from Crane Co., and Crane Co. was prepared to present evidence rebutting any such notion. (R. 1511, 1520-21.) When the trial court improperly excluded this evidence, it undermined Crane Co.'s defense *both* to Plaintiff's case for proximate cause *and* to Plaintiff's case for recklessness.

Indeed, the undisputed evidence at trial was that Mr. Dummitt never saw a warning associated with any of the asbestos-containing materials he encountered. (R. 5677–78.) Thus, the jury found Crane Co. "reckless" for failing to do what no Navy product supplier seemingly was doing at the time. This finding is inconsistent with New York's treatment of the negligence cause of action, let alone a claim for recklessness. *See Landon v. Kroll Lab. Specialists, Inc.*, 91 A.D.3d 79, 84, 934 N.Y.S.2d 183, 189 (2d Dep't 2011) (holding the degree of care that a reasonable person would use may be established through evidence of "general customs and practices of others who are in the same business or trade as that of the alleged tortfeasor").

The trial court accepted the jury's finding of recklessness upon finding that Crane Co. had "access" to certain information on asbestos-related health hazards, because some of its employees were involved in business associations that published on these topics. (R. 79.) The First Department upheld the jury's finding based on similar considerations. (COA 37-38.) But, at best, such evidence only establishes a basis for an inference that Crane Co. may have had a "general awareness" that certain high asbestos exposures could lead to injury. Such evidence is insufficient to support a finding of recklessness under *Maltese*. Accordingly, the trial court should not have submitted this question to the jury, and the jury's answer to it was decidedly against the weight of the evidence.

## IV. The First Department Erred in Upholding the Trial Court's "Remitted" Verdict.

To the extent the Court does not overturn the judgment, it should reverse the First Department's decision not to remit the judgment to a reasonable amount. The Appellate Division must set aside an award "if it deviates materially from what would be reasonable compensation." CPLR § 5501(c). The trial court's remitted verdict of $8 million, which the First Department upheld, deviates materially from reasonable compensation, just as the original jury verdict did.

In refusing to remit further the verdict of $8 million, the First Department broke sharply from its past precedents. This Court should affirm that the First Department's prior treatment of awards in similar cases was correct, and represents

a "ceiling" for awards in cases like this one, and not a "floor." For instance, in *Penn v. Amchem Prods.*, 85 A.D.3d 475, 925 N.Y.S.2d 28 (1st Dep't 2011), the First Department found a jury's pain-and-suffering damages award to a living mesothelioma plaintiff deviated from what would be "reasonable compensation," and reduced the jury's $16.22 million award to $3.5 million. Mr. Penn was diagnosed with mesothelioma at age 73 and suffered "extreme" pain for 41 months. (R. 5021–23.)

The First Department applied similar reductions to two other recent mesothelioma verdicts. *See In re New York Asbestos Litig.* (*Marshall)*, 28 A.D.3d 255, 812 N.Y.S.2d 514 (1st Dep't 2006). For a deceased mesothelioma plaintiff, the court reduced the jury's past pain-and-suffering award to $3 million (from $8 million). For a living mesothelioma plaintiff, the court reduced the pain-and-suffering award to $4.5 million (from $7 million). Similarly, in *Lustenring v. AC&S, Inc.*, 13 A.D.3d 69, 786 N.Y.S.2d 20 (1st Dep't 2004), the court approved a remitted verdict of $4.5 million for 17 months of pain and suffering.

Historically, the First Department trial division, per the Honorable Justice Helen Freedman "applied a remittitur formula of permitting approximately $100,000 per month of pain and suffering." *In re Joint Eastern and Southern Dist. Asbestos Litig. (Consorti)*, 9 F.Supp.2d 307, 313 (S.D.N.Y. 1998). The approach of Justice Freedman is consistent with the one recently taken by the First

Department in *Penn*, and it provides an indication of the historical "outer limit" for remitted pain-and-suffering awards in similar cases in New York County.

The evidence showed that Mr. Dummitt experienced 27 months of past pain and suffering and had an estimated six months of future pain and suffering. (R. 90.) Although Justice Freedman's approach may represent the outer boundaries of "reasonable compensation," pursuant to it, Plaintiff would be entitled to a maximum award of no more than $3.3 million, and certainly not the $8 million the First Department upheld.

Moreover, it is not at all clear that Plaintiff even disputes this point. In arguing that the First Department properly upheld a remitted verdict of $8 million in the *Konstantin* matter (New York County Index No. 190134/2010), a separate case with which the *Dummitt* matter was tried, plaintiffs, who were represented by the same counsel representing Plaintiff here, opposed reargument in the First Department by stating, "[T]he decedent had 51 months of excruciating . . . pain and suffering from two mesotheliomas, which is markedly longer than any plaintiff this Court (or any other in this State) has previously considered for just one mesothelioma." Plaintiff's Affirmation in Opposition to Defendant-Appellant Tishman Liquidating Corporation's Motion for Leave to Reargue or, in the Alternative, Leave to Appeal to the Court of Appeals, p. 40, ¶ 73. Accepting this

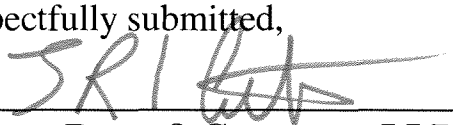
contention, the $8 million award in this matter is clearly excessive, and should not stand.

## CONCLUSION

For all of the foregoing reasons, Crane Co. respectfully requests that this Court reverse the decision of the Appellate Division, and direct entry of judgment for Crane Co.

September 29, 2014

Respectfully submitted,



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# ADDENDUM

True and Correct Copy of Unpublished Decision of the Court in *Kiefer v. Crane Co.*, No. 12 Civ. 7613 (KBF) (S.D.N.Y. Feb. 3, 2014)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FRANK L. KIEFER and
MYRTLE KIEFER,

Plaintiffs,

v. 12 Civ. 7613 (KBF)

CRANE CO., et al.,

Defendants. Telephone Conference and Decision

----------x

New York, N.Y.
February 3, 2014
10:40 a.m.

Before:

HON. KATHERINE B. FORREST

District Judge

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(Case called)

THE COURT: Let me tell everyone that we've got a court reporter here who is making a transcript of this. To the extent that people speak, they should identify themselves so that he can be sure to have the transcript accurately reflect everyone.

Originally, you folks had asked to have a conference to discuss submissions for the trial. I want to use this time instead to announce and recite the Court's decisions on several pending motions.

First, the motion to quash the subpoena is granted. That is at ECF number 251. There are two reasons for that. One, even if this trial were to proceed, the party who has been subpoenaed is beyond the subpoena power of this Court. In any event, as will soon become apparent, as to Crane and Cleaver Brooks, the Court is going to grant their pending motions for summary judgment.

Let me now recite those decisions. I will say that I've got my notes here, having gone through the record, but I don't have a written opinion, nor does the Court intend to write an opinion. This transcript will constitute the opinion of the Court. A separate short order, just one line as to each, will issue that will reflect the grant of summary judgment.

First, I wanted to note that as to both Crane

Company's motion for summary judgment and Cleaver Brooks' motion for summary judgment, the plaintiffs did not file a responsive 56.1 statement. That is not the sole basis for my denial, but it is in and of itself a sufficient basis for a grant of summary judgment. It is a sufficient basis for a grant of summary judgment because it renders the statements in the defendant's 56.1 unopposed. I'll talk about the affirmation that plaintiffs submitted in a moment.

The Court notes in this regard various Second Circuit and district court opinions, finding that failure to comply with the Local Rule 56.1 renders the facts unopposed and therefore admitted for purposes of summary judgment. That is, for instance, the Millus case, 224 F.3d 137; also the Holtz case, 258 F.3d 62. There is also the Gubitosi case, 154 F.3d 30. There are numerous district court cases, but I'll just recite the cites for two: The American National Fire Insurance Co. case, 265 F.Supp.2d 240, and also the Sommer case, which is a citation of 2003 Westlaw 21692816.

With that said, the Court does note that in this instance there were with respect to each of the motions affirmations submitted by counsel for plaintiffs, attached to which were materials which the plaintiffs then proceeded to rely upon in the form of an attorney affirmation for the propositions of fact which he wanted to put forward. That is not a sufficient manner for opposing 56.1.

The point of a 56.1 statement is that the movant has to set forth specific factual propositions supported by evidentiary material, and the opponent of the motion has to respond specifically to those assertions, putting forward specific evidence as to those particular assertions as to why they are insufficient, as opposed to, for instance, only putting forward evidence which is supportive of the opponents' assertions.

There is, of course, an ability to put forward additional facts, but that is an additional ability. The Court was placed in a position of hunting and pecking through the record to try to find out which specific facts are unopposed or undisputed and which are not, and that is not the purpose of 56.1. 56.1 is to eliminate that.

With that said, the Court does find that the failure to put in an opposition to 56.1 is a sufficient basis upon which, as I mentioned, to grant both motions for summary judgment, but it is not the sole basis. Let me now recite some common factual predicates as to both motions. Then I will separate the motions and go through them one by one.

First, the plaintiff Mr. Frank Kiefer died of mesothelioma, which is asserted to be the result of asbestos exposure. It is undisputed -- and all of these facts are undisputed unless I state otherwise -- that he worked for the Navy from 1952 to 1956, he did renovations from the '50s to

about 1980, he worked as an electrician during the 1960s to 1974, he was a bystander while others worked on tile and insulation from 1972 to 1974, he worked at the Burroughs Corporation from 1981 to 1983 or '85, and he worked for the Stony Brook Museums from the late 1980's to the mid 1990s.

He also passed away prior to the completion of his deposition. That becomes important because, as will be described in a moment, the Court does not find that his deposition in its partial form is admissible. The Court finds that it is not admissible.

It does it not fit within one of the types of exceptions which the Court could find for certain depositions where the plaintiff has not survived to completion. Here the deposition does not meet those factual requirements, and the Court finds that there is an insufficient basis upon which to admit it.

Now let's turn for a moment to the Cleaver Brooks motion for summary judgment in particular. Mr. Kiefer worked, as I said, at Cleaver Brooks. He worked there with a fellow named Lorenzo Galante. Mr. Galante was his co-worker from 1980 to about '83 or '85. Although Galante, I note, held different positions at the Burroughs facility, he was working in different areas, but he was a maintenance mechanic for at least a year or so, so a year plus, at Burroughs, and during that time he worked with Mr. Kiefer, who was the director of

maintenance facilities at Burroughs.

Mr. Galante was deposed in this matter on November 27 and December 18, 2012. His deposition the Court has reviewed. There were instances in which maintenance was performed on a boiler at the facility. Plaintiffs assert that there is a triable issue as to whether Mr. Kiefer was exposed to asbestos in connection with that boiler maintenance.

The plaintiffs have proffered various written materials, including service manuals, parts order instructions, which plaintiffs believe support their contention that the boiler and the parts that Mr. Kiefer was working with at least inferentially contained asbestos and that he was inferentially then exposed to the asbestos therefrom.

Plaintiffs acknowledge that the exposure was necessarily circumstantial -- again, we are talking about the Cleaver Brooks motion -- but plaintiffs argue that those circumstances do support Cleaver Brooks defectively designing products and the products being inherently dangerous and that there was a failure to warn.

In support of their motion, the defendant asserts that Kiefer has not put forward sufficient evidence to raise a triable issue as to whether or not he was exposed to asbestos sold or supplied by Cleaver Brooks. This Court does agree with that and therefore grants Cleaver Brooks' motion.

The Court notes that defendant at one point argued

that plaintiffs have not proved this fact, but of course that is not the standard, and the bulk of the motion is not written to that standard. The standard is whether there is a triable issue. But there is not a triable issue.

The only evidence in the record relating to Cleaver Brooks does come from Mr. Galante. As the Court noted, he worked on the production floor at one point and was only a maintenance mechanic for about a year and a half prior to the time the facility was closed, so it was during that time that he could have worked with Mr. Kiefer.

Mr. Galante testified that he recalled two Cleaver Brooks boilers that were located in the northeast corner of a building, in a separate room, and also that each boiler would be opened up two times per year. However, Mr. Galante did not describe the type of work performed on the boiler. He did state that Mr. Kiefer would be present 90 percent of the time that the boiler was being opened for maintenance, although it is unclear as to whether that was the initial opening or throughout the time of the opening.

It is undisputed that an outside company performed the actual maintenance work. Galante only has firsthand knowledge of seeing Mr. Kiefer help loosen the bolts on a boiler once, and he did not notice any asbestos exposure then, and he himself did not perform any maintenance work on the boilers.

Mr. Galante speculates that Kiefer may have been

exposed to asbestos from the gaskets when the doors were open, but that is not admissible, because it is simply speculation. Of course, the Court can only rely upon admissible evidence in the context of summary judgment.

Here, for summary judgment the defendant with respect to the Crane case has to make a prima facie showing that its product could not have contributed to the causation of plaintiff's injury. That is the Comeau case that defendants cite. Plaintiff, of course, has the burden to identify the product which injured him and must prove or at least raise a triable issue as to whether the injured person was in the vicinity of defendant's asbestos-containing products, including times and locations.

In the Comeau case the plaintiffs submitted invoices for fireproofing material. But there, as defendants noted, the Court found there was not a sufficient evidentiary showing to allow a reasonable inference of whose products plaintiffs inhaled fibers from.

Here the only admissible evidence as to Cleaver Brooks is that Kiefer was present when boilers were opened. There is no tie between that and inhaling asbestos from the defendant's products. As a result, summary judgment is required for Cleaver Brooks. There is just an insufficient nexus. So, that motion is granted.

The Crane motion is a bit more involved. Here the

defendant Crane argues, and it is Crane Company the Court is referring to, that summary judgment is appropriate because there is again no admissible evidence that raises a triable issue that Kiefer was exposed to asbestos from a Crane Company product.

While there is testimony that Mr. Kiefer removed Crane Company valves from boilers in an apartment house in D.C., that testimony comes from Crane itself, and that testimony is not admissible. There is no other testimony that a Crane Company valve as to which he was exposed contained asbestos. We will get to Mr. Galante's testimony in a moment.

The Court does agree with the rationale in Young v. U.S. Postal Service, 1988 Westlaw 126906, at *4, regarding the admissibility, or here the inadmissibility, of a decedent's deposition testimony prior to the conclusion of a deposition. The Court accordingly does not believe Kiefer's deposition would be admissible and would not allow it in.

In the Crane Company case Mr. Kiefer's co-worker Galante also testified. Mr. Galante only had knowledge that starts in 1980, so the prior periods of time are eliminated at the outset. Mr. Galante worked with Kiefer sometime during the period from 1980 to '83 or '85, but he was only in maintenance for about a year or so during that time. There is no evidence in the record that he ever saw the residential apartment building in which Mr. Kiefer worked and replaced valves or that

he had any firsthand knowledge of that.

Galante, during his testimony, did, in response to questioning from plaintiffs' counsel, vaguely identify Crane Company with valves because the name was stamped, he said, on the side of the valve. But his testimony in terms of knowledge was really geared towards the packing material because it was the packing material that his testimony referred to most. As to the valves, he doesn't recall the material that it was made out of, but he does recall that there were packings that were internal to the valve.

The question becomes whether or not the packing material inside the valves is sufficiently tied to Crane Company. The defendants argue that the Galante deposition should not be admissible, because Galante was led by plaintiffs' counsel. However, Galante, once shown the name Crane, does testify as to his recollection of Crane packing, and therefore the Court finds that he likely would be found to have a sufficiently refreshed recollection that the testimony, if relevant, would be allowed.

Here there is not a sufficient showing of relevance, because Galante is not able to say whether or not Crane was in fact Crane or Crane Company or Crane Packing Company. It is undisputed that Crane Company is not related to Crane Packing. The material reflective of that is contained in footnote 4 of the Crane Company brief.

Under New York law it is clear that one manufacturer cannot be held liable for the products of another. That is Judge Chin's decision in the Surre v. Foster Wheeler case, 831 F.Supp.2d, pin cite at 798. That is true even if it is known that the asbestos-containing product would be used in conjunction with the defendant manufacturer's own product unless it was necessary that only that particular product could be used or there was involvement in the selection of the asbestos-containing product. Neither of those facts are present here.

Here the Court does find analogous the Lindstrom v. A-C Products Liability Trust case, 264 F.Supp.2d 583, pin at 594, a Northern District of Ohio case in 2003. While in no way binding on this Court, the facts are sufficiently similar and the rationale is sufficiently helpful that the Court does find it useful to refer to that court. There the district court held that Crane Company could not be held liable for Crane packing, with a lower case p, when evidence does not raise a triable issue that the packing material was made by Crane Company. Here that is the case.

Galante states that he is not able to say that the packing material even contained asbestos. The Court does note that defendant's answers to the interrogatories at page 6 do state that certain Crane valves had packing enclosed, but the plaintiffs failed to raise a triable issue to connect the Crane

valves here at issue in the 1980's time frame to Crane Company asbestos packing. The interrogatory answer is only suggestive of certain valves, and there needs to be a triable issue as to the particular valves as to which Mr. Galante saw Mr. Kiefer handling.

For instance, there could have been a demonstration by plaintiffs that no other packing material was acquired apart from Crane Company packing material that may have come with the valves, and it would have needed to have been within the time frame that Mr. Galante was working with Mr. Kiefer. There is none of that. It is just speculation that the particular Crane Company valves used in the 1980 time frame had Crane Company packing number 1, then a second level of speculation that that Crane Company packing had asbestos, and that's too many leaps.

The Court does accept for purposes of this decision that it is possible that Crane Company sold certain valves with asbestos and that the asbestos contained packing, but there is no evidence in the record before the Court that that's all that Crane sold in terms of valves, in other words, that the only valves which Crane sold contained Crane Company asbestos packing or, more particularly, that in the 1980s the valves which Mr. Kiefer was working with from Crane contained Crane Company packing that had asbestos.

The plaintiffs have put forward a variety of materials from defendants dating back to 1925, 1945, 1953, 1957, and

1972, all of which are written materials that discuss Crane Company valves and the utilization of asbestos with certain Crane Company valves either around them or in them.

However, all of those materials predate the time frame that is relevant here and as to which Mr. Galante has the firsthand knowledge, and that is 1980. None of them get to that time period, and none of the evidence is shown to actually still be applicable during the 1980 time frame as to all Crane valves with the particular Crane packing material which Mr. Galante said he saw.

This evidence, therefore, falls short of what is required to raise a triable issue of fact as to whether this particular defendant put into the stream of commerce the asbestos to which Kiefer was exposed.

Under the Surre case, at 801 to 802, there is a similar basis for granting the motion for summary judgment. The Court agrees with the Surre case that under prevailing case law the correct rationale is that the stream of commerce test applies, not the foreseeability test, thereby requiring the grant of summary judgment.

As a result, as I mentioned before, of those two decisions on summary judgment, that does moot in all events the subpoena at ECF number 251 insofar as it relates to Cleaver and Crane. The Court further, however, quashes the subpoena as being outside the subpoena power of the Court. As to Gould and

the other remaining defendant, that is also quashed.

There are two remaining defendants in this case, Gould and Eaton. The Court notes that they did not appear at a conference back in October. However, they are not dismissed from the case, and therefore the case is not yet fully completed. The motion to amend at ECF number 254, which is just to change the caption, is granted as not substantively changing a claim or how this action would be prosecuted. So, as to Gould and Eaton, the case will proceed to trial on the schedule previously noted.

That disposes of summary judgment and leaves us with Gould and with Eaton. Let me ask if there is a status report as to either of those two defendants or if people would like just to talk about the submissions for the jury trial as to those defendants. In other words, if there is a pending settlement, let me know, and I won't waste my breath. But I'm happy to go into what needs to be prepared for the trial.

MR. COOPER: Adam Cooper on behalf of the plaintiffs. There is certainly no pending settlement, at least as of today. I know we are speaking with both of the remaining defendants, but as of today there is no settlement pending.

THE COURT: There being no settlement, we do have a trial date scheduled. The Court does have the time to proceed on that date and expects to do so. We do have a final pretrial conference scheduled in this case, and there are materials set

forth in my individual rules which outline what gets submitted for purposes of a jury trial, which is what we have here.

Those materials, in short, are a list of trial exhibits with an indication as to which are objected to and a response to any objections. That would be on like an Excel spreadsheet with a blank column for the Court to rule. An example of that is going to go up on my website, on the website associated with my individual rules, today so you will be able to see exactly what I am talking about in terms of the format for that chart.

That will mean that, for instance, if there are 75 exhibits and only 5 are objected to, I need to have copies of those 5 and an indication on the chart as to the nature of objection, for instance, hearsay; a response, for instance, business record; and then I will make a ruling, for instance, overruled.

Also, for instance, for the entity that is located outside of the 100 miles, any deposition designations need to go in beforehand as part of the pretrial order. The Court asks the parties to do those in color and to color code them so that I can see where the designations are, the counterdesignations in a different color, and then objected-to testimony in the red.

The red testimony goes onto a similar chart with the objection noted, for instance, hearsay; the response, for

instance, not offered for the truth; and then the Court would have a blank space for a ruling, which might be, for instance, objection overruled. An example of that is also going up on my website. It happens that I completed the examples just today and I am updating my rules just today to reflect that so you will have the benefit of that.

I also require joint proposed jury instructions. You don't need to do the basic jury instructions, such as how to assess credibility, what circumstantial evidence means. What I really need are the jury instructions as to the substantive causes of action.

If you folks agree, include both of your instructions on a particular page or on pages one after the other. I will then look at any citations that you offer in support of your instruction, and then I will rule. You will get a copy, obviously, of the jury instructions. We will go through them at least once fully, and you will be heard on them fully before the jury is instructed.

The Court also asks for proposed voir dire. Because you folks, I know, have a lot of these types of cases in state court, just a reminder, which you probably don't need, that voir dire in the federal system is done by the judge. It is discretionary. I do it myself. I will use certain questions that you have, but I do not do the kind of voir dire that you folks might be used to in state court, where it probes a

prospective juror's willingness to grant damages in particular amounts or something of that nature.

For me, I'm looking to unearth bias, prejudice of some kind, or other factors which could lead to an unfair trial, not to get their dispositions towards a particular result other than whether or not there is a negative bias towards a party or towards a type of claim where they are unlikely to give somebody a fair trial.

In addition, if you want to use technology, you need to get a technology order in. That's on the SDNY website. There is a provision for technology orders where you can bring in laptops or projectors so you can have whatever support you would like in front of the jury.

I do allow jury books if there are documents which you think are easier to have in a single book for the jury. They need to be clearly tabbed so that the jury can be clearly instructed only to turn to a particular tab once that document has been admitted and is otherwise available to be published to the jury.

Those were some of the logistics. What other questions do you folks have?

MR. STATMAN: This is Eric Statman from Darger Arrante for Gould Electronics. Before I actually get started, I want to say that we last week filed a motion for substitution of counsel. That has not yet been ordered by the Court. Prior

counsel was the O'Toole firm from New Jersey.

THE COURT: If you are the substitution that I'm thinking of, and maybe you are not, there was one that I received recently for this case which stated that you would be able to meet the trial date.

MR. STATMAN: Yes.

THE COURT: Therefore, I so ordered the substitution. If that's not gone up, could you resubmit your letter? It is possible it got lost down in docketing someplace.

MR. STATMAN: OK. I just wanted to let the Court know that I was chary of speaking when I wasn't aware that the substitution had been granted. With the Court's permission, I would like to raise a point or two.

THE COURT: Absolutely. So long as you are able to meet the trial schedule, I have no problem with the substitution.

MR. STATMAN: We will be able to meet the trial schedule, your Honor.

THE COURT: All right.

MR. STATMAN: My question actually goes to motions in limine. I wanted, if I could, to get some clarification about the timing and also what the Court really wants in terms of motions in limine. I know that they are supposed to be included in the pretrial order, but there is also a statement from the Court that if no date is set for motions in limine,

they have to be made and submitted a certain time before the trial.

The pretrial order is due on the 14th. I was wondering if the date of the pretrial order is the date when we are supposed to make our motions in limine or if the Court prefers to have them fully briefed at some other date.

THE COURT: On motions in limine, I need them by the Friday before the final pretrial conference. The final pretrial conference is the 14th?

MR. STATMAN: The 19th, I believe.

THE COURT: I'm sorry, you're right. I need them by the 14th. The way that I do them is I don't have replies on motions in limine. I ask you to include all of your motions in a single brief. I don't really care how long it is. If you have three points to raise, include them all in the same motion in limine so I don't have a lot of different papers floating around. If you have 15, then there will be 15. It does not need to go over your objections to documents, as to random routine document objections. But I need them by the 14th so I can take them home, read them, and then I will rule on them either on the 17th or at the final pretrial conference itself.

MR. STATMAN: Understood.

MR. COOPER: Your Honor, Adam Cooper again. The issue we are facing is if the motions in limine have to be served and submitted on the 14th, which is a Friday, we are going to need

to put --

THE COURT: No. I'm sorry. They will have to be fully briefed by the 14th. I have to have them by the 14th. That means motions in limine would have to go in on the 7th and then they would be opposed on the 14th.

MR. COOPER: Submitted by the 7th, opposed by the 14th?

THE COURT: Yes.

MR. STATMAN: Your Honor, this is Eric Statman again. When it comes to length, certain courts have different preferences as far as that goes for each individual motion. Some of our motions that have been submitted in state court, for example, to certain judges have been made with affidavits and a full set of documents and fairly lengthy briefs, sometimes exceeding 10 pages or so. Other judges have required a single paragraph or two. Either way, we will accommodate whatever the Court wants to do. One way is more fulsome than the other.

THE COURT: We are still on the topic of motions in limine?

MR. STATMAN: Yes, your Honor.

THE COURT: Let me say a couple of things in that regard. One, I do want a single brief for all motions in limine from the moving party and then a single opposition that will track that brief. For instance, let's say you've got five

different motions in limine. This is what I was trying to say before, but perhaps I wasn't clear.

If you've got five, they should all be contained in a single brief. I don't care if that brief is 30 pages long, but I want all five in one. The reason for that is it prevents me from having too much paper, where I lose track of things, and also rereading your introductory pieces over and over again.

The opposition to the motions in limine should track the order in the opening motion in limine brief. For instance, Roman numeral I is to exclude testimony from Dr. X. If it's a motion in limine versus a Daubert, then the opposition would be also numbered opposition to motion number 1 and would refer to the same one.

Are any Dauberts included in this?

MR. STATMAN: Possibly, your Honor.

THE COURT: Then use the same schedule. Dauberts can have a slightly different schedule. Use the same schedule. But they take additional briefing. I need to see the expert reports, any expert deposition that might be relevant to if it's a qualification issue or whether they have the relevant opinions. Give me whatever you think I need.

In terms of whether it is just a paragraph or affidavits, I want you to put in what you believe is necessary to provide the Court with the information to make an appropriate ruling. Motions in limine are necessarily

tentative in the sense that they occur prior to trial, when the Court is dealing with the record that the Court understands that is before it.

If, for instance, there is a motion in limine that certain evidence is irrelevant and the Court agrees, it may turn out, as the evidence comes in at trial, that what was once thought irrelevant is now suddenly relevant, and a party having been ruled against in a motion in limine should protect itself by raising it again if there is an appropriate application to be made during the trial.

In the meantime, give me what you think you have and need to give me to have me rule. I'm not going to arbitrarily limit you to a paragraph.

MR. STATMAN: Thank you, your Honor.

THE COURT: One other thing. If a prior court has made a ruling on that same topic, please do submit the Court's prior rulings on that topic. If you have already briefed this and you have won it twice and lost it twice, I want all four opinions or orders.

MR. STATMAN: Will do, your Honor.

THE COURT: Is there anything else?

MR. COOPER: Yes, Judge. Eric Cooper again. I have one point of clarification on your individual rules.

THE COURT: Yes.

MR. COOPER: I had read section 3 the pretrial

procedures (a) Roman numeral (v) to mean that a live witness is only going to be called once. It is our intention to call a corporate representative from both Eaton as well as Gould Electronics. However, based on some of your language quashing Cleaver Brooks's subpoena, I'm not now quite sure how that issue is going to be handled by the Court.

THE COURT: Here is the issue, a couple of things. One, if the defendant is intending to call a person, then you have the ability to also call that same person. But I don't have the power to get that person into this jurisdiction for you if they are outside of 100 miles. I just don't have the power to do that. My rule is that if there is a trial witness as to whom one party is going to call, I don't allow the other side to call that party also.

For instance, if Eaton is going to call John Doe but you planned on calling John Doe and you go first, I will allow John Doe to be called in the plaintiffs' case. However, I will allow Eaton to go beyond the scope of whatever, quote, direct you put on from that hostile witness in order to bring out whatever the story is. They will prospectively interrupt their case with your testimony as well.

Each witness goes on the stand once. You folks need to exchange your trial witness lists, figure out where the overlap is. If the defendants do not intend to call somebody, they should so state. They should give you a real list, and

you likewise, so people have a clear and reasonable understanding of who is going to be called.

If you have deposition testimony of somebody outside of 100 miles or that is otherwise admissible under the rules as deposition testimony properly designated, then you can certainly designate that, and that could be read to the jury.

MR. COOPER: Judge, I will wait for the response to our joint pretrial order to see whether or not Gould and Eaton are calling a corporate witness, so to speak. Then we can take it from there.

THE COURT: Great. Anything else?

MR. COOPER: That's it for me, for us.

MR. WEILL: Jackson Weill from Eaton Corporation. You mentioned the possibility of a settlement conference. I note that we have a pretrial conference on the 19th of February. I think it might be beneficial to have a settlement conference.

THE COURT: What I can do is give you folks a reference to a magistrate judge, but we won't set aside the time we have for the final pretrial conference for that. I don't conduct settlement conferences myself. I don't find it a particularly good use of my time, because you spend a lot of time doing it often and it doesn't result in anything. Also, the magistrates are far more skilled than I am at doing this. They are much more efficient at it and they are actually able to get it done.

I will give you a reference. But you should know that you are on a very tight time frame because I will not adjourn the trial unless there is a settlement in principle.

MR. WEILL: Understood, your Honor.

THE COURT: I'll give a reference today. It is whoever the magistrate is who is randomly assigned to the case. You should try to get on his or her calendar right away. We will put in a reference today.

MR. WEILL: Thank you, your Honor.

THE COURT: Anything further? All right. I look forward to receiving the final pretrial order materials from you folks. I do encourage you to come up with real witness lists with real indications of the time that will be spent so that we don't have a situation where we've got the real witnesses buried in the witness list, because I will just have people go back and put in a real witness list.

If you have problems with each other coming up with those kinds of real witness lists, let me know in advance of the final pretrial and we can get that sorted out. Don't wait until the final pretrial, because we will have so little time between then and trial. So if you run into issues, let me know.

There is a transcript of this proceeding, which includes the Court's decision as I stated on the two motions for summary judgment. If you want the written decision, you

will need to get it from the transcript. The Court will put an order simply granting those motions.

Thank you. We are adjourned.

(Adjourned)