To be Argued by:
JOHN N. LIPSITZ, ESQ.
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Court of Appeals
of the
State of New York

JOANNE H. SUTTNER, Executrix of the Estate of GERALD W. SUTTNER, Deceased, and Individually as the Surviving Spouse of GERALD W. SUTTNER,

Plaintiff-Respondent,

– against –

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

Defendants,

and

CRANE CO.,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Cases from Other Jurisdictions:

Unpublished New York Authorities:

Statutes:

Other Authorities:

PRELIMINARY STATEMENT

The Defendant-Appellant in this case, Crane Co., manufactured large industrial valves designed to facilitate the transportation and retention of steam. At the time of sale, these valves were composed of a number of component parts, including asbestos gaskets and asbestos packing.

The gaskets and packing that Crane incorporated into its valves during manufacture were composed of asbestos fibers and a binding matrix which held the asbestos together. Over time, the high temperatures at which the valves operated caused the matrix to disintegrate, leaving only the asbestos fibers. In order to keep the valves in working order, it was necessary for workers to regularly open the valves, scrape off the old gasket and packing material, and install fresh gaskets and packing. Maintenance of the valves caused carcinogenic asbestos fibers to be released into the breathing zones of workers, such as the decedent.

Crane knew that proper maintenance of its valves would require workers to change the gaskets and packing on a regular basis, just as proper maintenance of an automobile requires changing the oil on a regular basis. Crane knew that, unless workers took special precautions, the act of performing routine maintenance on the valves would expose them to carcinogenic asbestos fibers. Yet Crane did not provide any warnings of these latent hazards.

Plaintiff's decedent, Gerald Suttner, was a laborer whose job duties included servicing numerous Crane steam valves over a period of decades. He developed mesothelioma as a result of his occupational exposure to asbestos. Mr. Suttner brought suit against a number of defendants. A jury found that Crane was 4% at fault for his injuries, and allocated fault to sixteen other entities.

The consumable replacement parts that Mr. Suttner installed in and removed from Crane's valves were not obtained from Crane, but rather from a third party supplier. Crane contends that it may not be held liable for injuries resulting from its failure to warn about the dangers of performing routine maintenance on its valves unless it supplied (or "controlled") the asbestos-containing components.

Crane's contention is based on its erroneous reading of the decision in Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289 (1992). Crane reads Rastelli to create a bright-line rule by which a manufacturer is absolved of its duty to warn of the known hazards of its products where that manufacturer did not distribute (or "control") the exact fungible components that happened to be in its product on the day or days that the plaintiff occasioned to use it.

Crane's Rule[1] is not found anywhere within the text of Rastelli and, indeed, is inconsistent with a straightforward reading of that case. This Court has specifically held that Crane's proposed rule is contrary to public policy. *See*, Sage v. Fairchild-Swearingen Corp., 70 N.Y.2d 579, 587 (1987) ("to insulate a manufacturer under such circumstances would allow it to escape liability for designing flimsy parts secure in the knowledge that once the part breaks and is replaced, it will no longer be liable."). Furthermore, to embrace Crane's Rule would require this Court to disregard numerous post-Rastelli appellate court decisions fundamentally inconsistent with Crane's reading of that case.

As a product manufacturer, Crane had a duty to warn of the latent dangers associated with the use of its products. By this Appeal, it has sought to carve out an unprecedented, categorical exception to that duty, in defiance of both precedent and public policy.

The thesis statement of Crane's Rule is that, "In Rastelli [*citation omitted*] this Court held that the imposition of legal responsibility in the product liability

[1] Crane uses a number of different expressions for the novel test that it seeks to persuade this Court to adopt. For example, it refers to its proposed rule as: the "control-based stream-of-commerce analysis articulated in *Rastelli*" (Brief for Appellant at 3); the "Control- Based Analysis of *Rastelli*" (Id.. *at* 15, Point I); "The rule of *Rastelli*" (Id.); "the majority rule nationwide" (Id. at 16); "the Control-Based Approach To Legal Responsibility Taken in *Rastelli*" (Id. at 17) and the "control-based approach articulated in *Rastelli*" (Id. at 27). Since Crane's proposed rule is extremely inconsistent with Rastelli and is not "the majority rule nationwide", Plaintiff will refer to it, for the sake of clarity, as Crane's Rule. Crane's Rule and its potential interpretations are discussed in detail at Point I.E.

context depends on a showing that the defendant had control over the production or use of the allegedly defective product or played a role in placing them in the stream of commerce." *See*, Brief for Appellant at 15. This statement is demonstrably untrue. Rastelli explicitly recognized that there were circumstances where the imposition of legal fault in the product liability context *does not* depend on a showing that the defendant had control over the production or use of the allegedly defective product. Sage explicitly found that a manufacturer could be liable for injuries arising from a defect associated with a replacement part that it did not control, distribute or otherwise directly interact with. Numerous decisions written by the Appellate Division over the course of nearly a quarter century have also interpreted Rastelli as recognizing that circumstances do occur wherein there exists a duty to warn about the use of dangerous components supplied by third parties in and with one's product.

Crane manufactured a product and placed it in the stream of commerce. The act of performing routine maintenance on that product in the manner recommended by Crane exposed the plaintiff to a carcinogen. Crane knew of this latent danger but did not issue a warning.

Crane has suggested that any ruling that holds that a jury may find that it breached its duty to warn must be "outcome-driven," or inscrutably complex, but

the opposite is true. If the normal and intended use of one's product poses a hazard of terminal cancer then, under a plain reading of Liriano v. Hobart Corp., 92 N.Y.2d 232 (1998), a jury could find that the manufacturer breached a duty to warn. Creating an exception whereby the duty to warn ceases to exist if a third party wear item replaces the defendant's original wear item would lead to an exceedingly peculiar and harsh result, akin to the rules governing the privity-based approach to product liability that this Court rightly disposed of decades ago.

Outside of the politically-loaded context of asbestos litigation, it is doubtful that a company would seriously suggest that the manufacturer of a product which regularly exposed its users to carcinogenic dust should have only a transitory duty to warn of that fact, regardless of who supplied the consumable components.

It is, in fact, Crane that is seeking an outcome-driven result. Its paraphrase of Rastelli is contradicted by Rastelli itself as well as by numerous decisions by this and other New York State Appellate Courts. Even the Federal District Court decisions that Appellant has cited in purported support of Crane's Rule contradict Appellant's illogical and extreme position. Although Appellant has never obtained a New York Appellate decision, or even a published New York trial court decision, endorsing Crane's Rule and, although it is presently appealing verdicts against it upheld by two departments of the Appellate Division, Appellant continues to insist

that Crane's Rule is the majority view, instead of being a bald attempt to carve out an exception that would exempt it from the ordinary jury-based fact-finding process for assessing the scope of the duty to warn. If this Court permits Appellant to carve out a bright-line exception to the ordinary rules of the product liability system, Crane and similarly-situated companies (and their insurers) will be able to write off millions of dollars worth of inchoate costs. These costs are associated with liability that it accrued by voluntarily selling industrial equipment that it knew to be potentially defective in a state without a Statute of Repose. If Appellant eliminates its liability, the cost of its windfall will be borne by other litigants: co-tortfeasors who pay more than their equitable share, bankruptcy trusts that exhaust their resources more quickly, and injured victims who go uncompensated.

Public policy imposes a duty to warn on Crane in this case. It imposes that same duty on several other tortfeasors who also contributed to Mr. Suttner's injury and death. The state has a legitimate interest in seeing that the Estate of Suttner has a fair opportunity to be made whole as well as a legitimate interest in seeing that Crane has a fair opportunity to prove to a jury what its equitable share of the damages should be. There are legislative and common law safeguards in place that balance these interests and act to protect both plaintiffs and manufacturers. Crane, believing itself to be insufficiently protected by such safeguards, has attempted to

turn this lawsuit into a public policy referendum by inserting irrelevant and misleading claims about asbestos litigation in general into the briefs in both this case and Dummitt and by taking the position that the only possible public policy rationale for decisions rejecting the (universally-rejected) Crane Rule is a judicial desire to unjustly compensate one litigant at the expense of another. These claims distract from the real point of this lawsuit: whether or not a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known.

It is respectfully submitted that this Court should not treat Crane's appeal as a referendum on the victims of mesothelioma or the lawyers who represent them. And neither should it treat this appeal as a referendum on the manufacturers of equipment dependent on the use of asbestos components. Rather, this appeal presents a legal duty question that should be resolved on the basis of New York's time-tested law of product liability, and not on the basis of a proposed "rule" which would require a fundamental alteration of our State's negligence doctrine.

QUESTIONS PRESENTED

1. Does a product manufacturer have a duty to warn of the latent hazards associated with the routine maintenance of its products when its product acts synergistically with a component manufactured by a third party to create a cancer hazard to end users?

   The Court Below Answered: Yes

   Proposed Answer: Yes.

2. Does a product manufacturer's duty to warn of the latent dangers of foreseeable uses of its product include a duty to warn of the hazards associated with installing third party replacement parts into its products, when the manufacturer knows that such replacement parts will be necessary?

   The Court Below Answered: Yes

   Proposed Answer: Yes.

COUNTER-STATEMENT OF FACTS

Because the facts of this case turn on the mechanics of how Crane's products were used, it is useful to examine the structural makeup of Crane's valves before turning to Mr. Suttner's specific use of the valves. At trial, design schematics for Crane steam valves from the 1950s through the late 1970s were introduced into evidence as Plaintiff's Exhibit 35. (*See*, Plaintiff's Exhibit 35, reproduced at R. 5287-5296.). For ease of reference, a copy of one of these schematics is reproduced as Addendum A to this Brief.

A. The Structure of Crane's Valves

A valve is a device designed to modulate the flow of fluids (liquids and gasses) through a piping system. (R. 1052-1053.).

Crane Co. manufactured industrial valves. These were finished products which weighed up to several hundred pounds each and which were constructed out of numerous component parts. The Crane schematic attached as Addendum A, for example, lists seventeen individual component parts and specifies the composition of those parts. For example, the "body" is to be made of bronze, the "hand wheel," is to be composed of malleable iron, and so forth.

The components that are relevant to the present Appeal are the "packing," which is identified with the number "12" on the diagram, and the "bonnet gasket," which is marked "24."

A gasket is a shaped ring which seals the junction between two surfaces in order to prevent leakage. In industrial valves, the bonnet gasket seals the space between the body of the valve, through which the fluid flows, and the rest of the machinery of the valve. (*See*, Addendum A, Part No. 24.).

Industrial valves are attached to pipes, which connect to the remainder of the fluid transportation system, by flange gaskets, which prevent fluid from leaking out from between the space where the valve meets the pipes.

"Packing" is used to describe rope-like material which is wound around the stem of the valves in order to prevent leakage. (*See*, Addendum A, Parts No. 8 and 12.).

The term "packing" is also used to refer to sheet packing, which is a flat sheet or roll of material from which gaskets can be cut. (*See*, Crane advertisement at R. 4278.).

Historically, gaskets and packing have been made out of a variety of materials, depending on the temperature and the pressure of the fluid that the

valves are intended to transport. For example, rubber gaskets were often used on lower pressure, lower temperature lines. (R. 501.).

B. The Crane Co. Valves Mr. Suttner Serviced Contained Asbestos-Containing Components at the Time of Sale

During the decades leading up to Mr. Suttner's exposure, it was industry custom to use asbestos-containing gaskets and packing in high pressure steam lines. Crane supplied those valves which it intended for use in transporting high pressure steam with internal asbestos-containing gasket and packing components.

In evidence as Plaintiff's Exhibit 33 is a Crane catalog from 1936, the approximate date when the GM facility where Mr. Suttner worked was constructed. (The catalog is reproduced at R. 4387-5187. Testimony that plaintiff's workplace was constructed in the 1930s is found at R. 1054.). The catalog contains a description of Crane's proprietary asbestos-containing packing and gaskets, which were sold under the trade name "Cranite." (R. 4784. *See also,* Cranite Purchasing Specifications, R. 5397-5401, dictating asbestos-content of Cranite in 1957 and 1972.). According to Crane, "Cranite gaskets are used on **all** Crane valves for high pressure or superheated steam." (R. 4784, emphasis added.). A jury could, therefore, properly conclude that defendants' products were sold with original Cranite asbestos-containing parts.

Crane continued to sell its valves with original asbestos-containing gaskets and packing components into the mid-1980s. This is confirmed by the previously cited product specifications, which date from 1955, 1963, 1965, 1968 and 1977, all of which specify the use of original asbestos parts. (R. 5287-5296.). It is also confirmed by Crane's Answers to Interrogatories, where it states that it did not begin to explore the prospect of replacing the asbestos components in its valves until the late 1970s and early 1980s, and that it encountered difficulty finding suitable replacement material during that time. (*See,* R. 5415. "Subject to and without waiving the foregoing objections, in the late 1970s and early 1980s, as a result of changes in customer preferences, Crane Co. began to explore the prospect of replacing the asbestos-containing components in its industrial products. At the time, Crane Co. encountered difficulty locating suitable substitute components. Nevertheless, Crane Co. modified its engineering specifications in 1985 to phase out asbestos-containing components from all valves manufactured in the United States other than one specific valve designed for petroleum industry applications."). Expert testimony confirms Crane's sworn statement that viable alternatives to asbestos gaskets and packing were not available during Mr. Suttner's employment history. (R. 616-617.).

Crane Co. has repeatedly asserted that Crane Co.'s valves did not require asbestos-containing gaskets to function. (*See*, Brief for Appellant at 12, 22.). However, much of the record contradicts this assertion.

In support of its contention that General Motors could have elected to use non-asbestos-containing valves, Crane cites the existence of flexible metallic specialty gaskets (discussed in Point C, *infra*.) However, the record contains no evidence to suggest that these specialty items were fungible with asbestos gaskets, and Crane's own Answers to Interrogatories strongly suggest the contrary. In the Interrogatory Answers, Crane Co. objected to the interrogatory because it "implies that there was a product that 'could be substituted for' asbestos-containing components that may have been associated with any Crane Co. product." (R. 5415). It went on to explain that it "began to explore the prospect of replacing the asbestos-containing components in its industrial products" "in the late 1970s and early 1980s," but that it "encountered difficulty locating suitable substitute components" and was unable to do so until approximately 1985. (Id.). By its own admission, it took Crane, a company that had been manufacturing valves with asbestos components since the 1850s, over half a decade of concerted effort to find materials that could replace asbestos gaskets and packing, despite the fact that it was motivated to do so by "changes in customer pressure." (R. 5415.).

However, it blithely suggests that General Motors, a non-expert in the area of valves, could have solved the same problem at any time during the 1930s through the 1970s. Crane may be entitled to make this argument to a jury, but not to have it treated as an undisputed matter of fact.

C. Crane's Speculation That the Valves at Issue May Have Been Supplied Without Original Asbestos-Containing Parts Should Be Disregarded

Crane has attempted to muddy the waters by speculating that the valves that Mr. Suttner serviced might not have been asbestos-containing products at the time that Crane sold them. The valves might, Crane implies, have contained non-asbestos gaskets and packing at the time of sale, which the decedent's employer subsequently replaced with asbestos material. This line of speculation is wholly unsupported by the record and should be disregarded. At a minimum, there is sufficient basis in the record to permit the jury to conclude that the Crane valves Mr. Suttner serviced were asbestos-containing products at the time of their original sale.

Crane bases its speculative argument on the several catalog pages dealing with metal gaskets and on the equivocal nature of its self-serving interrogatory answers.

Corrugated metallic gaskets are specialty items which were used on valves that operated at temperatures too hot even for asbestos gaskets to survive. Crane's

1955 catalog discusses them at R. 3806. In that excerpt, Crane recommends Cranite gaskets for temperatures of up to 750 degrees, and metallic gaskets for extraordinary temperatures exceeding 750 degrees. Crane's instruction manual on valve maintenance, in evidence as Plaintiff's Exhibit 46, confirms metallic gaskets' status as a specialty item. Under the heading, "Facts About Gaskets," it states that, "This type gasket is used only in very high pressure-temperature services." (R. 5374.).

Crane has speculated, without any apparent basis, that the decedent's employer purchased a number of specialty valves designed to be used on applications of greater than 750 degrees, used their valves for applications of less than 750 degrees, and switched out the alleged original metal bonnet gaskets for asbestos gaskets. Assuming, *arguendo*, that this odd hypothetical had some basis in reality, the valves in question were still sold with original, asbestos-containing packing, and so Mr. Suttner would still have been exposed to asbestos-containing replacement parts that were substantially identical to an original component supplied by Crane Co. The totality of the evidence suggests, however, that the valves in question were intended for use on high pressure steam-lines that operated at less than 750 degrees Fahrenheit, and that Crane, therefore, at all times supplied asbestos-containing bonnet gaskets as components of the original valves.

Crane has also attempted to rely on its Answers to Interrogatories, which were read into the Record at R. 433, in support of its speculation that its valves might have been supplied without asbestos-containing parts. (*See*, Brief for Appellant at page 11.). The Answers to Interrogatories use equivocal language and state: "Crane Company placed on the market industrial valves that may have contained asbestos-containing materials within their metal structure as early as 1858. Asbestos was included as a component from certain Crane Company's industrial valves throughout the late 1970s.[sic]" (R.433.). Crane cites this passage for the proposition that, "Certain of Crane Co.'s Valves may have been supplied with an internal 'bonnet' gasket and a piece of internal stem packing at the time of sale; however, those products may or may not have contained asbestos at the time of sale." *See*, Brief for Defendant-Appellant at page 11.

Crane may not leverage the equivocal, self-serving phrasing of its interrogatory answer into some sort of proof that it supplied decedent's employer with high-pressure, high-temperature valves without asbestos components. The totality of the evidence clearly suggests that the valves that Mr. Suttner worked with contained asbestos bonnet gaskets and asbestos stem packing at the time of sale. A jury could, in theory, and did, in fact, conclude that this was the case.

D. Mr. Suttner's Exposure to Crane's Valves

Mr. Suttner worked in the General Motors plant in Tonawanda, New York, from 1961 until his retirement in 1997. (*See*, Plaintiff's Videotaped Trial Testimony, in the Record as Court Exhibit 4, R. 6452-6453). Between the years 1964 and the late 1970s, he worked as a pipefitter. (R. 6462.). One of his job duties as a pipefitter was to service Crane's steam valves. (R. 6462-6463.).

Mr. Suttner testified that his maintenance work on Crane's valves caused him to become exposed to asbestos in three ways: through stem packing, bonnet gaskets and flange gaskets.

Mr. Suttner was exposed to asbestos-containing stem packing, which he replaced in the stuffing boxes of the valves. (*See*, component labeled "12" in the schematic at Addendum A). He had to remove the old packing with a hook, blow out the stuffing box with an air hose, and cut and install the new packing, all of which exposed him to asbestos fibers. (R. 6472-6473.).

Mr. Suttner was also exposed to asbestos when he replaced the bonnet gaskets in the Crane valves. (*See*, component labeled "24" in the schematic at Addendum A.). These gaskets were, at the time of sale, non-friable, with the asbestos fibers sealed in a matrix material such as rubber. (*See*, Testimony of Crane's expert Charles Blake at R. 1017-1018.). After the superheated valves had

been in use for a period of time, the matrix would disintegrate, leaving the asbestos material baked onto the valve in a friable state. (*See*, Testimony of Richard Hatfield at R. 496-497; Videotaped Trial Testimony of Gerald Suttner at R. 6466.). The plaintiff had to remove this baked-on, friable product with a wire brush, a scraper and a grinder. (R. 6466-6469.). This process released respirable asbestos fibers. The plaintiff categorized the state of the air, when he performed these operations, as "full of debris." (R. 6468.).

The gaskets, in other words, were changed from a non-hazardous state into a hazardous one by the ordinary operation of Crane's valves.

For purposes of this Appeal, Crane has attempted to downplay the interaction between its valves and their asbestos-containing components, implying that the latter is the product that injured the decedent, and that their valves did not contribute to rendering them dangerous. However, Crane's Answers to Interrogatories confirm that gaskets were encapsulated asbestos products at the time they were initially installed in and on its valves. ("Furthermore, any asbestos contained in the components themselves was chemically and physically bound within the component by a rubber-like compound." R. 5409.).

Crane admits that, during the period of over a century when it sold valves containing asbestos wear components, it never performed any tests to ascertain

whether it was dangerous for workers to change those components in the fashion directed by Crane. (R. 5315, Testimony of Corporate Representative Anthony Pantaleoni; R. 5429, Answers to Interrogatories.). Crane also admits that although it manufactured products containing asbestos wear components from approximately 1858 (R. 433) until the late 1980s or early 1990s (R. 5414), it did not place any warning about the dangers of servicing these components on its valves until the mid-1980s. (R. 5422.).

It is indisputable that Crane anticipated that mechanical grinding would be used to remove baked-on gaskets from its valves. Crane published an instruction manual, in evidence as Plaintiff's 46, which specifically advocated the practice. (R. 5376.).

Finally, Mr. Suttner was exposed to asbestos-containing gaskets that were used to connect the flanges of the valves to the adjoining pipes which transported the steam. (R. 6468). These gaskets became baked onto the valve in the same fashion as the bonnet gaskets and were removed in the same fashion. (R. 6466-6469.).

THE APPLICABLE STANDARD OF REVIEW

In determining whether a litigant is entitled to summary judgment, the Court of Appeals must – like the trial court and Appellate Division – "[v]iew[] the facts in the light most favorable to" the non-moving party. Ortiz v. Varsity Holdings, LLC, 18 N.Y.3d 335, 340 (2011); *Accord*, Vega v. Restani Const. Corp., 18 N.Y.3d 499, 503 (2012). Summary judgment is appropriate only if the movant "tender[s] sufficient evidence to demonstrate the absence of any material issues of fact" and the opposing party "fails to establish the existence of material issues of fact which require a trial of the action." Id. (internal quotation marks and citation omitted).

A similar standard applies upon review of motions to dismiss a plaintiff's complaint at the close of proof, pursuant to CPLR 4401, post verdict, pursuant to CPLR 4404(a), and on appeal. As the Court held in Szczerbiak v. Pilat, 90 N.Y.2d 553 (1997):

> In considering [a] motion for judgment as a matter of law [pursuant to CPLR 4401], the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant.

90 N.Y.2d at 556 (citation omitted). The motion can be granted, the Court further held, only if "there is no rational process by which the fact trier could base a

finding in favor of the nonmoving party." Id. (citation omitted); *See also*, Dinardo v. City of New York, 13 N.Y.3d 872, 873-875 (2009) (applying that standard upon review of orders denying defendant's motions under CPLR 4401 and 4404[a]'); and Campbell v. City of Elmira, 84 N.Y.2d 505, 511 (1994) (in reviewing a jury verdict, the Court "respects the jury's deliberations in weighing and resolving disputed fact and credibility questions.").

ARGUMENT

I. NEW YORK'S LAW OF PRODUCT LIABILITY

A. New York's Law of Product Liability Is a Logical Analytical Framework Composed of Doctrines Which the Courts Use Collectively To Examine Individual Circumstances; It is Not a Series of Facile Single-Factor, Contradictory "Tests," as Crane Would Have This Court Believe

New York's product liability case law presents an orderly, logical, well-settled analytical framework, which has evolved organically over the course of approximately the past century. The collective canon of decisions embodies a consistent set of public policy goals and represents a measured and considered attempt to balance the legitimate and conflicting interests of plaintiffs and defendants in an equitable fashion.

In order to hold a defendant to account for negligence, the defendant must have breached a duty.[2] As soon as a company manufactures a product and places it in the stream of commerce, it assumes a duty to manufacture and sell that product in a non-negligent fashion.[3] Manufacturing a product in a non-negligent fashion necessitates designing the product so that it is reasonably safe for its intended uses and for foreseeable misuses.[4] Manufacturing a product in a non-negligent fashion also requires issuing adequate warnings regarding foreseeable latent dangers about

[2] Palsgraf v. Long Island R. R. Co., 248 N.Y. 339 (1928).
[3] Liriano v. Hobart Corp., 92 N.Y 2d 232 (1998).
[4] Robinson v. Reed-Prentice Div., 49 N.Y.2d 471, 479 (1980).

which the manufacturer knew or should have known.[5] The adequacy of a warning is nearly always a jury issue.[6] The duty to adequately warn extends to buyers, end-users and others foreseeably exposed to harm by the product.[7] A company may have a duty to issue post-sale warnings.[8] Whether or not a post-sale duty to warn falls into the scope of the manufacturer's duty in a given circumstance requires evaluating a number of case-specific factors.[9] When a product is modified after sale, the court must evaluate case specific-factors to determine whether subsequent injuries can still be said to have been a result of the defective design.[10] Even when a modification, such as the disabling of a safety feature, occurs and a design defect cause of action does not lie, a manufacturer who failed to issue warnings against such a modification may have breached a duty to warn, depending on the circumstances of the case.[11] If an accident victim has personal knowledge of specific danger presented by the product, the manufacturer will not be held liable for failure to warn because the failure was not a proximate cause of the injury.[12] Sometimes a victim is injured by a replacement part that has been incorporated into

[5] Liriano, *supra*, 92 N.Y.2d at 237.
[6] Id.
[7] McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 68 (1962).
[8] Cover v. Cohen, 61 N.Y.2d 261, 268 (1984).
[9] Id.
[10] Robinson, *supra*; Hoover v. New Holland North America, 23 N.Y.3d 41 (2014).
[11] Liriano, *supra*, 92 N.Y.2d at 237.
[12] Id. at 242.

the original manufacturer's design; in such cases, the original manufacturer may still be held liable.[13] Sometimes, the interaction between products or components made by two different manufacturers foreseeably creates a hazard. In such cases, the court must make a case-specific evaluation of whether the danger presented by the interaction between the products fell within the scope of either or both manufacturers' duties to warn.[14]

The above paragraph represents a non-exhaustive list of some of the principles which make up the analytical framework of New York's product liability law. Although it is not intended to be comprehensive, the vast majority of product liability issues that arise in most day-to-day tort cases can be addressed using one or more of these legal principles. Most courts will only need to make determinations on a handful of these issues in any given case – a company usually does not dispute that it manufactured its products or that it manufactured them for sale, for instance. The above rules represent a coherent analytical framework,

[13] Sage v. Fairchild-Swearingen Corp., *supra*, 70 N.Y.2d 579 (1987).

[14] Rastelli v. Goodyear Tire and Rubber Co., *supra*, 79 N.Y.2d 289 (1992); *See also*, Rogers v. Sears, Roebuck & Co., 268 A.D.2d 245 (1st Dept 2000); Berkowitz v. A.C. & S., Inc., 288 AD.2d 148 (1st Dept, 2001); Penn v. Jaros, Baum & Bolles, 25 A.D.3d 402 (1st Dept, 2006); Village of Groton v. Tokheim Corp., 202 AD2d 728 (3d Dept 1994); Baum v. Eco-Tec, Inc, 5 A.D.3d 842 (3d Dep't 2004) (case-specific relationship between products dictated that the scope of manufacturer's duty to warn encompassed dangers of use with injury causing agents supplied by third party); compare, Tortoriello v. Bally Case, Inc., 200 A.D.2d 475 (1st Dept, 1994); Surre v. Foster Wheeler, 831 F.Supp. 2d 797 (SDNY, 2011) (case-specific relationship between products dictated that the scope of manufacturer's duty to warn did not encompass dangers of use with injury-causing agents supplied by third party).

developed by the state judiciary over time, that is neither contradictory nor confusing.

Part of Crane's rhetorical strategy has been to take individual concepts out of this analytical framework, selectively quote them to remove all nuance and qualification, and assert that whichever case it has selectively quoted establishes a rigid, formalistic rule that it refers to as a "test."

For instance, Crane states that Rastelli "held that the imposition of legal responsibility in the product liability context depends on a showing that the defendant had control over the production or use of the allegedly defective product or played a role in placing it in the stream of commerce." Brief for Appellant at 15. It calls this paraphrase, "the rule of Rastelli," and goes on to argue that anything that contradicts this paraphrase must be wrong. (This Brief will refer to the proposition in question as "Crane's Rule", since it contradicts the actual Rastelli decision.)

As Point I.C.4., *infra*, discusses, the Rastelli decision, although finding that the situation was not within the scope of the defendant's duty to warn, describes several situations where a manufacturer can be held liable for components it did not "control the production of" or place in the stream of commerce. Furthermore,

numerous Appellate decisions *citing* Rastelli have held that manufacturers may be held liable in circumstances that violate Crane's Rule.

Crane does not discuss how its interpretation of Rastelli would interact with Liriano, or any of the other cases that suggest that foreseeability defines the scope of duty.

It does not even cite Penn v. Jaros, Baum & Bolles, *supra*, 25 A.D.3d 402 (1st Dept, 2006), Berkowitz v. A. C. & S., *supra*, (1st Dept, 2001), or Village of Groton v. Tokheim Corp., *supra*, 202 A.D.2d 728 (3rd Dept, 1994), all Rastelli progeny, cited by the trial court, that contradict the *soi disant* "rule of Rastelli," and Crane has to misleadingly quote other cases to make them seem in accord. (*See*, Point I.E., *infra*.). But by calling its position a "rule" and naming it after a case, Crane lends an air of doctrinal legitimacy to a legal interpretation that has been universally rejected by every New York Court to consider it.

Appellant also takes judicial statements out of context, declaring them to be "rules" or "tests," as a means to dismiss legal opinions which do not accept Crane's proposed reading of Rastelli. By reducing the well-reasoned and carefully phrased cases which puncture its position to a series of contradictory "tests" which can be expressed in brief, catchy nicknames, Crane paints the New York courts as hopelessly confused and in need of the illusion of clarity offered by Crane's Rule.

This is demonstrated by Crane's treatment of the trial court's post-trial decision in this case. Justice Lane wrote an eleven page decision, virtually all of which focused on Crane's argument that it did not have a duty to warn. (R. 13-24.). In the course of that decision, Justice Lane explained the fact pattern, analyzed what the Liriano and Rastelli precedents dictated under the fact pattern, and cited seven other appellate cases that contradict Crane's Rule. Justice Lane also carefully analyzed Appellant's misinterpretation of the Drabczyk[15] and Surre[16] cases, which Appellant contended support Crane's Rule. Justice Lane even quoted Surre, observing that, in situations such as this one, the Surre court acknowledged that a duty to warn about parts one did not supply may arise where "circumstances strengthen the connection" between the defendant's equipment and the third party components. (R. 22.). Justice Lane's is a thoughtful and well-reasoned decision which analyzes all of the factors that it should and concludes that a jury may properly find that Crane breached a duty to warn about exposure to asbestos during maintenance of its valves. The Fourth Department, satisfied with Justice Lane's detailed legal analysis, affirmed his decision, for the reasons stated therein. (COA 7102.).

[15] In Re: Eighth Judicial Dist. Asbestos Litig. [Drabczyk], 92 A.D.3d 1259 (4th Dept, 2012), cited at R. 21-22.
[16] Surre v. Foster Wheeler, 831 F.Supp. 2d 797 (SDNY, 2011), cited at R. 21-22.

One of the observations that Justice Lane's decision makes in its analysis of the law was that, "A manufacturer may be held liable where a plaintiff is injured by replacement parts that it neither supplied nor specified, which are substantially similar to the original parts." (R. 6.). Instead of addressing Justice Lane's reasoning, Crane responded by declaring the decision to rest entirely on this one line and declaring that Suttner had been decided under what it refers to as, "the replacement part rule." *See*, e.g., Brief for Appellant at page 28.

Crane has submitted a brief which does not even bother to cite Liriano, nor to analyze how the Liriano Court's explanation of the duty to warn interacts with Crane's Rule. It makes a token effort to distinguish Rogers and Sage, but does not even acknowledge the five other appellate cases that Justice Lane used to explain the legal inaccuracy of Crane's Rule or address the trial court's patient critique of Crane's arguments regarding Rastelli, Drabczyk, Tortoriello[17], and Surre. Crane has attacked the court's decision not by analyzing its decision as a whole, but by picking out a single phrase, assigning it a pithy nickname, and then pretending that the decision turned on a single factor, which Crane then compares to its own proposed single factor test.

[17] Tortoriello v. Bally Case, Inc., 200 A.D.2d 475 (1st Dept, 1994).

Appellant has used the same technique to attack every New York Court that has declined to embrace Crane's Rule.

In response to the Dummitt post-trial motions, Justice Madden wrote a 79 page decision which exhaustively examined the dozens of cases briefed therein. Matter of New York City Asbestos Litig. [Dummitt I], 36 Misc. 32 1234(A); 2012 N.Y.Misc LEXIS 4057 (N.Y. Sup. Ct. 2012) *aff'd*, Matter of New York City Asbestos Litig. [Dummitt II], 121 A.D.3d 230 (1st Dept, 2014). Approximately 20 of those pages dealt directly with the scope of a manufacturer's duty to warn. In the decision, the court analyzed all of the relevant New York case law, including Liriano, Rastelli, and every case that cited Rastelli on the issue of synergistic product use, including those cases where the court found that an issue of fact existed as to the manufacturer's breach of its duty to warn (such as Penn, Rogers and Berkowitz) and those cases which found that no valid question of fact existed (such as Tortoriello and Surre).

Justice Madden extensively described the relationship between Crane's valves and the third party asbestos parts used in their maintenance. One of the factors she discussed was the foreseeability (the inevitability, really) of such asbestos components being used in maintenance of Crane's valves. Dummit I at *13. Such foreseeability does not create a duty to warn, of course – manufacturing

a product does that – but helps define the scope of such a duty. One cannot have a legal duty to warn of the unforeseeable, but foreseeability is one of the key factors that defines the scope of a fixed duty. "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk to another or to others within the range of apprehension." Palsgraf v. Long Island R. R. Co., 248 N.Y. 339, 344 (1928).

The Dummitt I decision also explained, in elaborate detail, how Crane's bright-line reading of Rastelli was impossible to reconcile with the same large body of New York cases cited by Justice Lane in Suttner.

Rather than addressing the Court's explanation of how Crane's theory was inconsistent with multiple precedents, Crane simply took an aspect of the decision out of context, assigned it a memorable catchphrase ("the foreseeability test"), and used it to misrepresent the Court's reasoning. When Justice Madden discussed foreseeability in the context of the scope of Crane's duty to warn, Crane charged her with claiming that foreseeability *creates* duty.[18] Justice Madden did not make any such claim and (perhaps anticipating that her decision was likely to be misleadingly summarized) explicitly stated the opposite twice. ("Under these circumstances, the duty is not based solely on foreseeability, or the possibility that

[18] *See*, e.g. Reply Brief for Appellant In re: New York City Asbestos Litig. [Dummitt], APL-2014-00209, p. 9, "Plaintiff does not attempt to defend the trial court's use of a "foreseeability-based" test for duty…"

a manufacturer's sound product may be used with a defective product so as to militate against a finding of a duty to warn." Dummitt I at *15. "Moreover, for the reasons stated above, Crane's duty is not based on foreseeability alone, but rather on circumstances which strengthen the connection between Crane's valves and the defective gaskets, packing and insulation." Dummitt I at *24.).

The First Department unanimously agreed with Justice Madden's reasoning regarding the scope of Crane's duty in Dummitt and rejected Crane's interpretation of Rastelli. Even the two dissenting Justices rejected Crane's claim that it did not have a duty to warn. *See*, Dummitt II at 260, Friedman, J. dissenting ("…I believe that the Dummitt plaintiff is entitled, on this record, to prevail on the issue of duty…").

One would never know that from Crane's Brief, however, which calls Justice Madden's analysis a "forseeability test" which "all five First Department Justices rejected." Reply Brief for Appellant In re: New York City Asbestos Litig. [Dummitt], APL-2014-00209 at p. 6. Crane then goes on to quote the Dummitt II majority and dissent stating that foreseeability alone is insufficient to give rise to duty, as though the First Department was criticizing Justice Madden. In fact, the First Department explicitly acknowledged that, "The [trial] court noted that … Crane's liability was not based solely on whether it was foreseeable to Crane that

asbestos-containing components would be used with its products, but rather on 'circumstances which strengthen the connection between Crane's valves and the defective gaskets, packing, and insulation.'" Dummitt II, 121 A.D.3d at 239, *quoting* Dummitt I at *24.

Having dismissed Justice Lane and the Fourth Department's rejection of the Crane Rule as the "replacement parts test," and dismissed Justice Madden's similar analysis as the "foreseeability test," Crane used the same rhetorical tactic to attack the First Department's affirmance of Dummitt.

In Dummitt II, the First Department cited virtually all of the same cases as the trial court, and came to the same conclusions about their implications, applying the same nuanced analyses. The First Department also used the same language that Justices Madden and Lane did to explain the nexus of connection between the valves and their asbestos components, stating that the factual circumstances "collectively strengthen the connection between Crane's valves and the asbestos-containing components that made Dummitt sick." 121 A.D. at 251, *quoting* Surre v. Foster Wheeler, 831 F.Supp.2d 797 (SDNY, 2011), *citing* Rogers.

Instead of addressing the First Department's analysis of Rastelli and its progeny, Crane reduced approximately ten pages of the Court's analysis to a single sentence, which it dubbed the "significant role test." *See*, Brief for Appellant at

page 28; Brief for [Dummitt] Appellant at 20. (*See* Discussion at Point I.E.1. *infra*.).

The trial court in Suttner, the Fourth Department (which explicitly endorsed Justice Lane's reasoning), the trial court in Dummitt and the First Department all reached the same legal conclusions by analyzing virtually all of the same cases and reaching identical interpretations of the way holdings in those cases should be interpreted. The Courts' conclusions are in harmony with one another and in harmony with the unanimous conclusions of numerous trial court judges that have written opinions on this issue over the past decade. (*See*, Point I.E.3., *infra*.)[19]

Crane uses selective quotation to suggest that the Courts reached their positions through incompatible lines of reasoning, assigns each court's supposed "test" a memorable nickname, and then creates the illusion of discord by suggesting that the decisions rejecting its theory are hopelessly irreconcilable.

This Court should look to the lower courts' unanimous agreement on the proper interpretation of the controlling case law, and not to Crane's simplistic "tests." The trial court's decision in Suttner correctly applied Liriano and Rastelli,

[19] The concordance of judicial reasoning is demonstrated by the fact that all three decisions adopt the same passage from Surre, a federal trial court case, to illustrate their view of the scope of duty analysis: "Where additional circumstances strengthen the connection between the manufacturer's product and the third party's defective one, a duty to warn may arise." Surre, *supra* 831 F.Supp.2d at 801 *quoted at* Dummitt II, *supra*, 121 A.D.3d at 239; Dummitt I, *supra* 2012 N.Y. Misc. LEXIS 4057 *22; Suttner Decision and Order, Erie County Index No. 2010-12499 (Lane, J., March 15, 2013) (R. 22).

as numerous other New York courts have done before, and determined that a question of fact exists as to whether Crane's conduct constitutes a breach of its duty to warn. New York's law of product liability is fact-intensive because it disfavors bright-line rules as a matter of policy, but it is not arbitrary. Consideration of all of the relevant doctrines inevitably supports upholding a jury finding of liability against Crane Co. for its asbestos-containing products.

This Court should reject Crane's invitation to replace New York's nuanced, logical and equitable approach to product liability with an unprecedented, bright-line rule that will inevitably produce harsh and inequitable results.

B. New York's Law of Product Liability, Generally: The Current Standard

This Court summarized New York's well-established and currently controlling law of products liability in Liriano, where it wrote:

> A manufacturer who places a defective product on the market that causes injury may be liable for the ensuing injuries. A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product. A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known. A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable.

Liriano v. Hobart Corp., *supra*, 92 N.Y.2d 232, 237 (1998) (internal citations omitted).

Actions seeking compensation for injuries caused by defective products can be brought under theories of negligence or strict products liability, or both. Traditionally, the difference between an action sounding in strict liability and one sounding in negligence is that a tortfeasor subject to strict liability may be held to account for damages without any proof of fault. The law of New York has developed in such a fashion that manufacturing defects give rise to true strict liability, but design defect and failure to warn claims require proof of fault, whether the complaint styles the claim as "negligence," "strict liability" or both. [20]

In analyzing the scope and nature of a defendant's duties, this Court has long favored balancing the interests of all parties and weighing the facts and circumstances of the given case, rather than creating and adhering to the sort of

[20] *See*, Denny v. Ford Motor Co., 87 N.Y.2d 248 at FN3 (1995), *citing* Birnbaum *Unmasking the Test of Design Defect: From Negligence to Strict Liability to Negligncе*, 33 Vand. L. Rev. 593, 599-600) ("In [cases alleging manufacturing defects] the flaw alone is a sufficient basis to hold the manufacturer liable without regard to fault."); Id. at 258 *quoting* Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 NYU Law Rev. 796, 803 ("[i]n general, … the strict liability concept of 'defective design' [is] functionally synonymous with the earlier negligence concept of unreasonable designing."); Denny at 258, *quoting* Enright v. Lilly & Co., 77 N.Y.2d 377, 387 ("[A] failure to warn claim 'though … couches in terms of strict liability, is indistinguishable from a negligence claim.'"); *See also*, Opera v. Hyva, Inc., 86 A.D.2d 373, 377, *internal citations omitted* (4th Dept, 1982) ("Defective design cases are thus similar to negligence cases and the standards for imposing liability for design defects are general negligence principles. … So, too, in the case of failure to give adequate warning or instruction, the test is a subjective one of what is reasonable and feasible under the circumstances. Where the theory of liability is failure to warn or adequately instruct, negligence and strict products liability are equivalent causes of action."); PJI 2:120 vol. 1A at 718 (2015 edition): "[T]he 'strict products liability' is actually a misnomer when applied to claims based on design defect and inadequate warning, both of which require scrutiny of the manufacturer's conduct and analysis of factual issues involving the manufacturer's fault," *citing* Denny, *supra;* Enright, *supra.*

single factor tests which predominated prior to the development of tort law. This Court has referred to the balancing approach as, "the traditional, complex and particularized analytical path…" Palka v. Servicemaster Management Servs. Corp., 83 N.Y.2d 579, 588 (1994), and a survey of the case law dating back to the time of Cardozo shows that this path has served as the guiding principle behind this Court's analysis of products liability law for nearly one hundred years. The experience of the twentieth century bears out the need for such nuance. As Justice Bellacosa, writing for this Court in Palka, explained:

> Common law experience teaches that duty is not something derived or discerned from an algebraic formula**.** Rather, it coalesces from vectored forces including logic, science, weighty competing socio-economic policies and sometimes contractual assumptions of responsibility. These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis.

Id. at 585, *emphasis added*.

According to Palka, "a duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence." Id. at 584. The analysis of such a duty requires a balancing of factors. "What constitutes 'reasonable care' will, of course, vary with the surrounding circumstances and will involve 'a balancing of the likelihood of harm and the gravity of harm, if it happens, against

the burden of precaution which would be effective to avoid the harm." Micallef v. Miehle Co., 39 N.Y.2d 376, 385 (1976), *quoting* 2 Harper & James, Torts, § 28.3.

C. A Manufacturer's Duties, Generally

An entity that manufactures and sells a product assumes certain duties by doing so. As Liriano's summary of the forms of defects implies, a manufacturer has a duty to make certain that its products are free of manufacturing defects, that they are not defectively designed, and that they are sold with adequate warnings associated with their latent dangers.[21]

A manufacturer has a duty to design products that are reasonably safe for their intended uses, or foreseeable unintended uses. In Robinson v. Reed-Prentice Div., *supra*, 49 N.Y.2d 471, 480 (1980), this court explained, by way of example, that "[T]he manufacturer of a screwdriver must foresee that a consumer will use his product to pry open the lid of a can and is thus under a corresponding duty to design the shank of the product with sufficient strength to accomplish that task." Similarly, Lugo v. LJN Toys, Ltd., 75 N.Y.2d 850 (1990), in which the defendant manufactured a toy depicting "Voltron," a children's cartoon character who carried

[21] This Court articulated a limited exception to this otherwise iron-clad rule in Gebo v. Black Clawson Co., 92 N.Y.2d 387 (1998), wherein it was held that "casual manufacturers" (such as a defendant that manufactures a product solely for its own use) are held to a lesser standard than manufacturers that manufacture a product to sell in the ordinary course of their business. However, even a casual manufacturer may be "held to answer for failure to provide adequate warnings to the product's user, and is under a duty to warn of known defects in its product which are not obvious or readily discernable…" Gebo at 394-395.

a shield which he sometimes threw at his opponents. The toy was supplied with a detachable shield component which, perhaps unsurprisingly, ended up being used as a projectile during play and injured a child. This Court held that the plaintiff could proceed with causes of action based on design defect and failure to warn because such a use of the toy constituted foreseeable misuse.

In addition to the duty to furnish a properly designed product with adequate warnings, a manufacturer also has a duty to test and inspect its finished products, to test and inspect any components manufactured by third parties that it incorporates into its finished products, and to maintain an expert level of knowledge on the subject of its products.

The duty to test and inspect is naturally implied by the duty to furnish a safe product. In a manufacturing context, "Reasonable care consists, among other things, in making such inspections and tests during the course of manufacture and after the article is completed as the manufacturer should recognize as reasonably necessary to secure production of a safe article." Kross v. Kelsey Hayes Co., 29 A.D.2d 901, 927 (3rd Dept, 1968), *citing* Smith v. Peerless Glass Co., 259 N.Y. 292 (1932). The duty to test and inspect requires a manufacturer to inspect component parts manufactured by third parties and incorporated by its finished products. *See*, Smith, *supra* ("There emerges, we think, a broad rule of liability applicable to the

manufacturer of any chattel, whether it be a component part or an assembled entity.").

As the Fourth Department explained in Markel v. Spencer, "One who puts out a complete product, as being of his manufacture, is liable for any defect in a component part as if he had manufactured it, even though, in fact, he had purchased the part from others." 5 A.D.2d 400, 409 (4th Dept, 1958). This doctrine stems from Justice Cardozo's seminal opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916), which held an automobile manufacturer liable for injuries resulting from a defect in a wheel manufactured by a third party that it had incorporated into one of its cars.

A defendant's negligent failure to test its products often arises in the context of design defect liability, as in Kross, Smith, Markel and MacPherson, but it is equally applicable in the failure to warn context. *See*, Penn v. Amchem, 85 A.D.3d 475 (1st Dept, 2011) ("On the issue of the duty to warn, evidence that Kern did not test or investigate the safety of its asbestos liners permitted the jury to conclude that [defendant-manufacturer] failed to adequately warn [plaintiff] of a potential danger that it knew or should have known about,") *internal citation omitted*. A manufacturer must, after all, identify those dangers which can be remedied by a warning in addition to those that can be remedied by an improvement in design.

A manufacturer's duty to exercise reasonable care includes a duty to keep abreast of recent scientific developments. Micallef v. Miehle Co. Dev. of Miehle-Goss Dexter, 39 N.Y.2d 376, 386 (1976); *See also*, George v. Celotex, 914 F.2d 26, 28 (2nd Cir., 1990), *internal citations omitted*, ("[a manufacturer] is held to the knowledge of an expert in its field and therefore has a duty to keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.").

1. A Manufacturer's Duty to Warn

The duty to warn extends to known or knowable latent dangers associated with a product. Liriano, *supra*. "The duty to warn of latent dangers extends to the original or ultimate purchasers of the product, to employees of those purchasers and to third parties exposed to a foreseeable and unreasonable risk of harm by the failure to warn." McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, *supra* (1962).

"Unlike design decisions that involve the consideration of many interdependent factors, the inquiry in a duty to warn case is much more limited, focusing principally on the foreseeability of the risk and the adequacy and effectiveness of any warning." Liriano, *supra*, 92 N.Y.2d at 239.

The existence of duty is sometimes purely legal and sometimes a mixed question of fact and law. "The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury." Palsgraf v. Long Island R. R. Co., *supra*, 248 N.Y. 339, 345 (1928); *See also*, Liriano, *supra*, 92 N.Y.2d at 240, *internal citation omitted*, ("[T]he scope and existence of such a duty [to warn] are generally fact specific"); Cooley v. Carter Wallace, 102 A.D.2d 642, 644 (4th Dept, 1984) ("Unlike the often highly technical design or manufacturing defect case, warning cases usually center on a factual determination of whether an adequate warning was given. These factual determinations are often interwoven with the question of whether the defendant manufacturer has a duty to warn, and if so, to whom that duty is owed."). The duty to warn is a continuing one, and the scope of that duty is defined by the weighing of case-specific factors; they are almost always properly decided by a jury. Cover v. Cohen, *supra*, 61 N.Y.2d 261 (1984).

Public policy tends to favor a broad duty to warn of non-obvious hazards associated with products specifically because warning ordinarily presents a relatively minimal burden. "Since the cost of providing warnings is often minimal, the balance usually weighs in favor of an obligation to warn." Cooley v. Carter Wallace, *supra*, 102 A.D.2d at 644; *See also*, Liriano, *supra*, 92 N.Y.2d at 239-240

("it is neither infeasible nor onerous" to warn of the hazards associated with foreseeable post-sale modifications); Gebo v. Black Clawson Co., *supra*, 92 N.Y.2d at 394-395 (casual manufacturer lacks the ordinary duty to provide a safe product, but is still obligated to warn of latent defects).

As with other aspects of negligence, the question of whether a warning was necessary and, if given, was sufficient, is ordinarily a particularized, fact specific question. "The adequacy of the warning in a product liability case based on failure to warn is, in all but the most unusual of circumstances, a question of fact to be determined at trial." Cooley, *supra*, 102 A.D.2d at 644.

2. How Post-Sale Modifications to a Product Affect a Manufacturer's Liability

Many of the cases that have come before this Court over the years pertain to when a manufacturer may properly be held liable for injuries arising from products that were somehow changed between the time of their sale and the time of the plaintiff's injury. This Court has applied Palka's "traditional, complex and particularized analytical path," in answering such questions.

A number of cases have arisen where a manufacturer furnishes a product which is safe for its intended use but where end-users, often months or years later, subsequently disable the product's safety features, leading to an accident.

This Court has recognized that, "While the manufacturer is under a nondelegable duty to design and produce a product that is not defective, that responsibility is gauged at the time the product leaves the manufacturer's hands." Robinson v. Reed-Prentice Div., *supra* 49 N.Y.2d 471, 479. It therefore follows that a "manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of the plaintiff's injuries." Id. at 475.

Of course, not all subsequent changes to a product cut off a manufacturer's liability. As a corollary to Robinson, if a subsequent modification does not substantially alter the product, or the substantial alteration is not the proximate cause of the plaintiff's injuries, then the manufacturer may still be held liable for the defect. In Hoover v. New Holland, Inc., 23 N.Y.3d 41 (2014), the plaintiff was injured by a post hole digger. The post hole digger was originally supplied with a safety shield component which had been removed by the purchaser after it became damaged and worn out with use. If the shield, or a substantially similar replacement shield, had been in place, the plaintiff would not have been injured, and an adequate warning made it clear that it was not safe to operate the device

without a shield. Nevertheless, a fact question existed as to whether the safety shield had, itself, been defective. The Court explained, "[W]here the plaintiff raises questions of fact whether the machine incorporated a defective safety device, the manufacturer or others in the distribution chain cannot *automatically* avoid liability on the basis that the safety device was removed post sale and not replaced. Such a broad rule would lessen the manufacturer's duty to design effective safety devices that make products safe for their intended purpose and 'unintended yet reasonably foreseeable use.'" Id. at 59, *quoting* Micallef, *supra*, 39 N.Y.2d at 385-386, *emphasis in original*.

Because the costs involved in warning are substantially less than the costs involved in redesigning a product, it is possible for a manufacturer to have a duty to warn about the dangers associated with post-sale modifications, even when those modifications are sufficiently severe to preclude recovery in a design defect cause of action. Liriano, *supra*. (Purchaser's removal of safety-guard from meat grinder constituted a post-sale modification that proximately caused plaintiff's injury, precluding design defect liability, but constituted a foreseeable misuse of a product about which a jury could properly find a duty to warn.).

3. How the Incorporation of Replacement Parts into a Product Affects a Manufacturer's Liability

From time to time (including in this Appeal), the question has arisen whether a manufacturer may be held liable in negligence for injuries caused by its product when the injury-causing component consists of a replacement part that the manufacturer did not, itself, manufacture or distribute.

A common sense reading of Liriano would seem to answer the question: surely, if a jury may properly find that a meat grinder is defective if it fails to inform the user that the safety-devices should not be removed, then a jury may properly find that a valve is defective for failing to inform the user that using it as directed may release carcinogenic dust. If the unintended subtraction of a safety device can constitute a hazard within the scope of the duty to warn, in Liriano, then it stands to reason that the intended addition of a carcinogenic wear item would also warrant a warning.

However, any ambiguity in this view can be addressed by the issue in Sage v. Fairchild-Swearingen Corp., *supra*, 70 N.Y.2d 579 (1987). In Sage, the defendant corporation manufactured and sold an aircraft. One of the component parts of the aircraft was a hook (intended to support a detachable ladder) attached to the doorway of the plane's lower cargo hold. One of the hooks that had originally been supplied with the plane had broken and been replaced with a

substantially identical replacement hook fabricated by plaintiff's coworkers. One night, the plaintiff caught her finger on the hook while lowering herself into the cargo hold (without benefit of the ladder). Her finger was so severely damaged that it had to be amputated. "Employees of the defendant testified that they assumed the ladder would not be used at all times and that the hangers would break and be replaced." Id. at 584.

The hook in question was a replacement part that defendant manufacturer did not manufacture, sell or otherwise place into the stream of commerce. Like Crane, defendant Fairchild-Swearingen argued that it could not be held liable because the injury-causing component was a replacement part. The Appellate Division agreed, holding that the incorporation of a replacement part constituted a substantial modification under Robinson, *supra*, and vacated the jury verdict. On appeal, this Court rejected the manufacturer's proposed control-based approach, in favor of the customary case-specific balancing of factors test, and explained:

> That the hanger actually involved in the accident was a replacement and not the original is not dispositive because in fabricating and installing a new part, Commuter's employees, as the jury found, did no more than perpetuate defendant's bad design as defendant's representatives foresaw they might.

Sage, 70 N.Y.2d at 587.

Public policy considerations favor the imposition of liability against the original manufacturer because:

> Placing the economic burden on the manufacturer under these circumstances does no more than induce it to design quality equipment at the outset and discourages misdesign rather than encourages it. Conversely, to insulate a manufacturer under such circumstances would allow it to escape liability for designing flimsy parts secure in the knowledge that once the part breaks and is replaced, it will no longer be liable.

Sage, 70 N.Y.2d at 587 (internal citations omitted).

The defendant in Call v. Banner Metals, Inc., 45 A.D.3d 1470 (4th Dept, 2007), made the same argument. In that case, the manufacturer of a defective bakery truck ramp argued that the plaintiff's injuries arose from failure of replacement parts provided by a third party. The defendant contended that the use of replacement parts that it did not place in the stream of commerce constituted a material alteration under Robinson, entitling it to summary judgment. The Fourth Department held that defendant was not entitled to summary judgment, as "plaintiffs submitted evidence establishing that the modifications consisted of nothing more than the installation of replacement parts that 'did no more than perpetuate [Banner's] bad design as [Banner's] representatives foresaw [it] might'." Call, 45 A.D.3d at 1471, *citing* Sage.

Justice Lane cited these cases in the Decision and Order that gave rise to this Appeal, writing, "A manufacturer may be held liable where a plaintiff is injured by replacement parts which it neither supplied nor specified, which are substantially similar to the original parts." (R. 18.).

Sage and Call are entirely consistent with the rest of the law governing negligence-based product liability. Robinson holds that a manufacturer is responsible for injuries resulting from defects that were present at the time that the product left its hands; if the manufacturer sells a product in a non-defective state, which a user subsequently modifies, rendering the product defective, the manufacturer will not be held liable for injuries resulting from the defect that the user introduced. However, not all post-sale changes to the product fall into that category, as the alteration to the product may result from a defect that existed at the time of sale. *See*, Hoover, *supra*. "Control of the instrumentality at the time of the accident in such a case is irrelevant since the defect arose while the product was in the possession of the manufacturer." Robinson, *supra*, 49 N.Y.2d at 480.

The replacement of a worn out or broken part with a substantially identical replacement part may be the clearest example of a post-sale modification that does not entitle a manufacturer to the protection of Robinson. Robinson insulates manufacturers when a user "substantially alters the product" and when such

alteration "is the proximate cause of the plaintiff's injuries." 49 N.Y.2d at 475. By definition, restoring a product to the state it was in at the time it was distributed is, perhaps, the least substantial alteration that one could make to a product; it is, in effect, undoing other post-sale alterations to the product created by time and usage. Similarly, the alteration cannot be said to be the proximate cause of the resultant injuries, since the same injuries would have occurred had the plaintiff encountered the product in its original state. In such a case, the product was defective at the time of sale and the customer merely perpetuated the manufacturer's defect by maintaining the product.

4. How the Synergistic Use of Two Products Affects a Manufacturer's Liability

The question has also sometimes arisen as to whether a manufacturer may be held liable when an injury occurs as a result of two products being used in conjunction. The seminal case addressing this point is, of course, Rastelli v. Goodyear Tire and Rubber Co., *supra*, 79 N.Y.2d 289 (1992). In the present appeal, Crane argues, as it has many times before, that Rastelli established a bright-line rule which shields it from liability. (Crane's legal argument is addressed in detail at Point 1.D.). In contrast to the picture painted by the defendant, however, Rastelli is a nuanced, well thought-out decision which held that a manufacturer sometimes has a duty to warn of the hazards of the foreseeable

combination of its products with products manufactured by a third party, and sometimes has no such duty, depending on the weight of the factors. Rastelli, in other words, represents another application of Palka's "traditional, complex and particularized analytical path."

a) Rastelli Mandates a Case-Specific Analysis of the Relationship Between the Products In Question

In the Rastelli case, the plaintiff's decedent was killed when a multi-piece tire rim, manufactured by an unknown third party, exploded during tire inflation. The plaintiff sued the tire manufacturer, Goodyear, for failure to warn of the hazards of using the rim in combination with its tires.

This Court held that Goodyear could not be held liable for the decedent's injuries, writing:

> Under the circumstances of this case, we decline to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer. 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. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode. Plaintiff does not dispute that if Goodyear's tire had been used with a sound rim, no accident would have occurred. This is not a case where the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn. Nothing in the record suggests that Goodyear created the dangerous condition in this case. Thus, we conclude that Goodyear had no duty to warn about the use of its tire with potentially

> dangerous multipiece rims produced by another where Goodyear did not contribute to the alleged defect in a product, had no control over it, and did not produce it.

Id. at 297-298 [Internal citations omitted, emphasis added.].

If this Court's intention were to establish a single factor test, then the holding is needlessly verbose and so confusing that the Appellate Division has consistently misapplied it for over twenty years. Alternatively, if this Court's intention were to explain why the scope of Goodyear's duty, in the particular case, did not include a duty to warn about the rim in question, then the decision makes perfect sense.

The first line of the holding indicates that the decision is based on an analysis of "the circumstances of this case," as Micallef, Hoover, Liriano, and Cooley, *supra*, as well as numerous other precedents, require.

The rest of the ruling indicates that this Court weighed the following factors in determining whether Goodyear had a duty to warn:

(1) whether Goodyear's product was "sound" (lacking and defects relevant to the injury at the time of sale); (It was);

(2) whether the rim-manufacturer's product was sound; (It was not);

(3) whether the relationship between the products was one of mere compatibility; (It was);

(4) whether Goodyear had control over the production of the rim; (It did not);

(5) whether Goodyear had a role in placing the rim in the stream of commerce; (It did not);

(6) whether Goodyear derived benefit from the sale of the rim; (It did not);

(7) whether Goodyear's tire created the defect that caused the rim to explode; (It did not);

(8) whether the explosion would have occurred if Goodyear's tire had been used with a sound rim; (It would not);

The Court also clearly indicated that, if both Goodyear's product and the rim manufacturer's products had been sound at the time of sale, but their combination had foreseeably resulted in a latent danger, then both parties would have had a duty to warn.[22]

[22] It is anticipated that Crane will argue that any assessment of Rastelli that acknowledges that the Court considered more than one (or possibly two) factors is incomprehensible or too complex to be useful. In its Reply Brief in the Dummitt matter, Crane refers to the Court's technique of analyzing the circumstances of the individual case as "the orbit test" (in response to plaintiff's suggestion that some cases fell "within Rastelli's orbit."). It also condemns Rastelli's actual holding as "a non-exclusive, eight-factor test for legal responsibility," and suggests that public policy favors imposing the bright-line test that Crane calls "the rule of Rastelli". Dummitt Reply Brief at 12. Plaintiff notes that many significant matters of public policy involve elaborate weighing of factors. Cover v. Cohen, *supra*, lists nine factors that juries should consider. The traditional test to pierce the corporate veil requires weighing ten factors in assessing the scope of the post-sale duty to warn. *See,* Gateway I Group v. Park Ave. Physicians, P.C., 62 A.D.3d 141.

In the twenty-three years since Rastelli was decided, New York's appellate courts have universally interpreted it as mandating a fact-specific inquiry when the synergistic use of two products allegedly results in injury. Specifically, the decisions make it clear that where a plaintiff is exposed to a hazardous agent during the normal and intended use of defendant's product, the third party's distribution of the particular hazardous component is not outcome-determinative on the duty issue. Each case applying Rastelli, whether the court ultimately found that the manufacturer had a duty to warn or not, has involved a fact-specific inquiry.

See, Rogers v. Sears, Roebuck & Co., 268 A.D.2d 245 (1st Dept, 2000) (grill manufacturer had a duty to warn of the hazards of using its product in combination with injury-causing propane tank that it did not put in the stream of commerce); Berkowitz v. A.C. & S., Inc., 288 AD.2d 148 (1st Dept, 2001) (industrial pump manufacturers may have a duty to warn of the hazards of using its pumps with asbestos-containing replacement gaskets and packing that it did not put in the stream of commerce); Penn v. Jaros, Baum & Bolles, 25 A.D.3d 402 (1st Dept,

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(2nd Dept, 2009). New York favors complex, case-specific, multi-factor tests precisely because this Court has often had to step in to correct the unjust consequences of bright-line rules. *See*, e.g., Greenberg v. Lorenz, 9 N.Y.2d 195 (1961) (abolishing bright-line privity requirement that held that retailer had no duty to child whose father had bought injury-causing, debris-laced canned fish).

2006) (alarm manufacturer had a duty to warn of the hazards of using its product in combination with CO2 fire suppression system that it did not put in the stream of commerce); Village of Groton v. Tokheim Corp., 202 AD2d 728 (3rd Dept, 1994) (manufacturer of regulator device had a duty to warn of using it in combination with a fuel tank that it did not place in the stream of commerce); Baum v. Eco-Tec, Inc, 5 A.D.3d 842 (3rd Dept, 2004) (manufacturer of aluminum refining machine had duty to warn of hazards of using it with "probe bars" that it did not place in the stream of commerce); *compare,* Tortoriello v. Bally Case, Inc., 200 A.D.2d 475 (1st Dept, 1994) (manufacturer of freezer had no duty to warn of dangers of installing particular tile in freezer when tile was merely potentially compatible); In Re: Eighth Judicial Dist. Asbestos Litig. [Drabczyk], 92 A.D.3d 1259 (4th Dept, 2012) (manufacturer had no duty to warn of the hazards associated with applying exterior asbestos-containing insulation to defendant's pumps where insulation was merely compatible with said pumps).

It is worth noting that, fifteen years after Rastelli was decided, this Court observed that the "typical asbestos suit" was against a manufacturer based on its failure to warn of the dangers of asbestos insulation manufactured by others and used in conjunction with its turbines. *See,* Appalachian Ins. Co. v General Electric Co., 8 N.Y.3d 162, 166-67, 863 N.E.2d 994 (2007).

To the extent that Crane implies that its interpretation of Rastelli is widely accepted, it is mistaken.

5. The Significance of Foreseeability within the Context of a Manufacturer's Duty to Warn

A layman reading Crane's briefing might be forgiven for concluding that "foreseeability" was a concept without legal relevance, or perhaps an archaic concept that has long been banished from the realm of product liability. Negligence is, of course, an essential element of proving a product liability claim.

The mere fact that an injury was foreseeable does not give rise to a duty to prevent it in negligence. The classic Anglo-American common law example is, of course, the lack of a general duty to rescue. As the Restatement (Second) of Torts describes it:

> A sees B, a blind man, about to step in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.

Restatement (Second) Torts, § 134, Illustration 1.

The fact that foreseeability does not, in and of itself, establish the existence of a duty is well-known and frequently mentioned. "Foreseeability, alone, does not define duty--it merely determines the scope of the duty once it is determined to

exist." Hamilton v Beretta U.S.A. Corp., 96 N.Y.2d 222, 233 (2001), *citing* Palka, *supra*, 83 N.Y.2d 579 at 588.

It is axiomatic that Crane had a duty to warn of the known hazards of its products. ("A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." Liriano, *supra*, 92 N.Y.2d at 237, *quoting* Rastelli, *supra*, 79 N.Y.2d at 297.).

Analysis must next turn to the scope of the duty. Not every foreseeable use of a product necessarily gives rise to a duty to warn. So, for instance, in Rastelli, Goodyear manufactured a non-defective tire that was used with a defectively designed rim, resulting in an explosion. This did not fall within the scope of Goodyear's duty to warn, because Goodyear had no meaningful connection with the rim, and Goodyear's tire did not create or contribute to the danger. It is difficult to imagine what a meaningful warning in Rastelli would have consisted of – a tag reading, "Caution: Some manufacturers of rims may not have designed them safely. Ascertain whether or not your rim has been negligently designed before using with this tire," perhaps. Crane's valves, in contrast, could easily have incorporated a plate advising workers to use adequate respiratory protection when servicing the valves, to avoid exposure to carcinogens.

Similarly, in Hanson v. Honda Motor Co., 104 A.D.2d 850 (2nd Dept, 1984), the plaintiff purchased a motorcycle and replaced the manufacturer's original wheel with a dangerously oversized wheel, intended to make the vehicle more aesthetically pleasing. After the plaintiff was injured, he brought suit for design defect, and for failure to warn of the hazards of modifying the motorcycle. While the scope of the duty to warn requires warning of the risks associated with certain foreseeable modifications in certain cases (*see*, Liriano), the Court found that the scope of Honda's duty did not involve a duty to warn of every conceivable artistic modification to its vehicles.

On the other hand, this Court and others have held that a manufacturer may be held liable for injuries related to its distribution of products, even when the injury causing agent was manufactured and controlled by a third party. This is particularly true in the case of substantially similar replacement parts. *See*, Sage and Call, *supra* Point I.C.3.; *See also*, Gitto v. Chesterton, 2010 U.S. Dist LEXIS 144568 (S.D.N.Y., 2010) (holding that industrial equipment manufacturers can have a duty to warn of the risks of asbestos-containing replacement gaskets and packing); Curry v. American Standard, 2010 U.S. Dist. LEXIS 142496 (S.D.N.Y., 2010) (same).

This section Respondent's Brief responds to Crane's frequent use of rhetorical sleight-of-hand in discussing the issue of foreseeability. In analyzing the scope of Crane's duty, plaintiffs and judges ordinarily make reference to the fact that it was foreseeable (intended, in fact) that Crane's asbestos-containing valves would continue to be used in combination with asbestos-containing wear items. They do this because "foreseeability" is one of the elements described in Liriano, Rastelli, and every other modern Court of Appeals case pertaining to the scope of the duty to warn.

Crane invariably argues that, by explaining the applicability of foreseeability to the scope of Crane's duty, plaintiffs' counsel or the presiding justice is inventing a "foreseeability test," whereby the limits of the plaintiffs' imagination dictate the scope of the manufacturer's duty. This is not the case.

Crane manufactured and sold an asbestos-containing product which contained "wear items" in the form of gaskets and packing. These wear items were rendered dusty and dangerous by the normal and intended operation of the valves in question. Users of the valves had to replace those wear items. The process of doing so exposed those workers to carcinogenic dust. Crane did not issue any

warning of the latent danger in question.[23] The trial court's analysis of the foreseeability, like the analysis of foreseeability in Sage and Liriano, correctly evaluated whether these facts gave rise to a duty to warn.

D. The Application of New York's Law of Product Liability to the Present Case

1. Legally Significant Facts

Crane manufactured and sold large industrial valves in the regular course of its business. At the time of sale, Crane's valves contained carcinogenic asbestos components, in the form of packing and gaskets. These components were "wear items," which were expected to wear out and require replacement regularly over the lifetime of the valve. After they wore out, the original asbestos-containing components were replaced with asbestos-containing replacement components, manufactured and supplied by a third party. Both original and replacement components were encapsulated in a binding matrix at the time of sale. During the

[23] Crane's Brief repeatedly uses the rhetorical tactic of referring to servicing the valves as though that were not a use of the valves. (*See*, e.g., Brief for Appellant at page 19, FN 7, "The question here is not whether Crane Co. is liable for the use of the valves, since it is uncontested that Crane Co. valves – nor any other Crane Co. product – did not emit a single asbestos fiber to which Mr. Suttner was exposed. Rather, the issue here is the extent, if any, to which Crane Co. could be held liable for the use of someone else's product, regardless of whether that use may have been 'foreseeable.'") Changing a baked-on gasket or removing worn out packing constitutes use or maintenance of a valve in the same way that draining and replacing oil in an automobile constitutes use or maintenance of a car. If a defective engine caused oil to become uniquely toxic and an injured plaintiff brought suit against the car manufacturer, surely nobody would argue that the plaintiff was merely "using the oil manufacturer's product."

normal and intended operation of the valves, the valves became intensely hot. This heat caused the binding matrix to disintegrate. Because of this, when the wear items had to be replaced, they were in a friable state, which released asbestos dust into workers' breathing zones.

Mr. Suttner's job duties required him to periodically replace the gaskets and packing. This was an intended use of the product, and one which was necessary to keep the valves operating. Performing this work without respiratory protection exposed Mr. Suttner to a latent, deadly danger, in the form of carcinogenic dust.

Crane neither tested the safety of performing upkeep on its valves, nor provided any warning about the hazards of changing its carcinogenic components.

2. Crane Had a Duty to Warn Mr. Suttner Under the General Negligence Principles which Govern Product Liability

By manufacturing a product in the regular course of its business, Crane assumed a duty to warn end-users, such as Mr. Suttner, of all non-obvious latent dangers associated with the use of its product. *See*, Liriano; McLaughlin; Point 1.A., *supra*. Crane's failure to test its valves to determine whether maintaining them presented a cancer hazard was negligent. *See*, Kross, Smith, Markel, MacPherson and Penn; Point 1.B., *supra*. Crane's valves were defective at the time of sale, by virtue of the fact that they were sold without any warning that maintaining them as directed could cause terminal cancer. *See*, Liriano, *supra*, 92

N.Y.2d at 237 ("A product may be defective when it … is not accompanied by adequate warnings for the use of the product"); Rastelli, 79 N.Y.2d at 297 ("We have held that a plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product. A manufacturer has a duty to warn against latent dangers resulting from the foreseeable uses of its products of which it knew or should have known.").

According to Micallef, *supra*, one must balance the likelihood of harm, the gravity of harm if it happens, and the burden of taking reasonable precautions. In this case, the likelihood of harm was high, as it is far from intuitively obvious that worn-out gaskets and packing are carcinogenic. Terminal cancer is, of course, among the very gravest harms that a human being can suffer. The burden involved in warning would have been minimal, as Liriano and Cooley, *supra*, have both noted.

Even if New York did not have a robust body of controlling law addressing issues such as liability for replacement parts, foreseeable modifications, and the synergistic use of products, Mr. Suttner would have fallen well within the ambit of Crane's duty to warn about its carcinogenic components. Crane created a product which, when used as intended, exposed Mr. Suttner to a carcinogen, and did not provide any warning.

3. Crane Had a Duty to Warn Mr. Suttner of Hazards Associated with Replacement Parts

Even if reliance on general principles were to leave any room for doubt about the scope of Crane's duty, this Court's decision in Sage would provide sufficient guidance.

As previously mentioned, the defendant in Sage supplied its product (an airplane) with a component part consisting of a hook, located in the mouth of a cargo hold, from which a ladder was intended to hang. Workers routinely lowered themselves into the cargo hold without the aid of a ladder. Evidence in the record indicated that the manufacturer intended and expected that workers would lower themselves into the cargo hold without the use of a ladder, and also that the manufacturer expected that the hooks would wear out and be replaced. The hook wore out over time and was replaced by a substantially identical hook fabricated by a third party (plaintiff's co-worker), as the defendant intended. The defendant did not have any role in placing the replacement part in the stream of commerce and did not exercise any control over the hook. Despite the fact that the defendant did not place the hook in the stream of commerce or otherwise "control" it, this Court found that it was still liable for the plaintiff's injuries.[24]

[24] Sage, *supra*, at 582-584. Crane's Brief erroneously describes the injurious component at issue as a "ladder," instead of a hook. Plaintiff respectfully submits that the hook, as a small, fungible

Under Crane Co.'s interpretation of the law, the Sage defendant should not have been liable for any injuries resulting from the replacement hook. While it would have been liable for injuries associated with the original hook, its liability, according to Crane, should have evaporated as soon as its original component was replaced. This was precisely the position taken by the Sage defendant. This Court declined to embrace such a harsh rule, explaining that it was contrary to public policy.

Crane's Brief addresses Sage at pages 29-31, where it argues that Sage is inapplicable to the present case because the fact pattern in question dealt with a design defect cause of action, rather than failure to warn, as in this case.[25]

Crane provides three rationales for disregarding this Court's holding in Sage.

It first argues, "the replacement ladder [sic] was fabricated by employees of the aircraft's purchaser; it was not acquired from a third party." Id. at 30. This statement is true, but irrelevant. Ms. Sage's co-workers were third parties to the

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component that the defendant admittedly expected to be replaced, is far more analogous to the gaskets at issue in this case than a ladder would have been.

[25] Through Crane's concession that, under Sage, a manufacturer may be subject to a cause of action for defective design when a plaintiff is injured by a replacement part that the defendant did not manufacture, Crane admits that California and Washington product liability law is at least partially out of step with New York regarding the stream of commerce. In O'Neil v Crane Co., 53 Cal.4th 335 (2012), the California court made it clear that its "bright-line rule" precluded design defect liability as well as failure to warn liability for injuries arising from replacement parts. Simonetta v. Viad Corp., 165 Wn.2d 341, 197 P.3d 127 (2008), also exempts manufacturers of industrial equipment for design defect liability arising from the intended use of asbestos replacement parts.

lawsuit. Whether they fabricated the hook in house, acquired it from an airplane supply house or purchased it from a hook emporium, this Court in Sage still held that a manufacturer was responsible, in a product liability context, for injuries arising from a component that it did not control the production or use of, nor place in the stream of commerce.

Crane next argues, "in fabricating the ladder [sic], the aircraft purchaser's employees duplicated the defective design of the original ladder [sic] originally supplied by the aircraft's manufacturer." Id. at 30. This argument cuts in favor of Crane's duty to warn. By engaging in the thoroughly foreseeable action of replacing original asbestos wear items with fresh asbestos wear items, Mr. Suttner and his fellow employees merely perpetuated the warning defect of the valves originally supplied by Crane. Plaintiff has proven that Crane's valves were sold in a defective condition. Their defect was a lack of warnings about the latent danger of their intended use. The valves remained defective when Crane's carcinogenic components were replaced by carcinogenic replacement components made by Garlock.

Crane finally argues, "thus, the aircraft manufacturer was the designer of the replacement part that caused the plaintiff's injury." Id. at 30. Perhaps so. And yet, imposing liability under that circumstance is clearly contrary to the thesis

statement of Crane's Brief: "the imposition of legal responsibility in the product liability context depends on a showing that the defendant had control over the production or use of the allegedly defective product or played a role in placing them in the stream of commerce." Id. Crane admits that Fairchild-Swearingen Corp. did not have control over the production of the replacement hook. Crane admits that Fairchild-Swearingen Corp. did not place the hook in the stream of commerce. Therefore, Crane's thesis is wrong, and a product manufacturer may sometimes be held responsible for injuries arising from replacement parts that it neither controlled nor placed in the stream of commerce.

Crane's analysis completely neglects to address Sage's public policy rationale, which is clear, specific, and equally applicable to product defect cases arising out of failure to warn.

Crane's valves contained asbestos components without adequate warnings at the time of sale. Those parts wore out and were subsequently replaced, as the manufacturer intended. The subsequent users in this case "did no more than perpetuate defendant's [failure to warn] as defendant's representatives foresaw they might," just as the subsequent product users in Sage "did no more than perpetuate the defendant's bad design as defendant's representatives foresaw they might." Sage, *supra*, 70 N.Y.2d at 587. Whether a product is defective because of

misdesign or inadequate warnings, the foreseeable replacement of a part with a like part merely perpetuates the defendant's original act of negligence.

Even Crane does not argue that it did not have a duty to warn of the hazards associated with the use of the asbestos components that it originally supplied. In Sage, this Court wrote that, "[T]o insulate a manufacturer under such circumstances would allow it to escape liability for designing flimsy parts, secure in the knowledge that once the part breaks and is replaced, it will no longer be liable." Sage, *supra*, 70 N.Y.2d at 587. To insulate Crane under the present circumstances would allow it to escape liability for selling a product with consumable, carcinogenic components, without a warning, secure in the assumption that once the parts wore out and were replaced, Crane was no longer liable. Because the defect (absence of a warning) existed at the time of sale, "Control of the instrumentality at the time of the accident … is irrelevant …" Robinson, *supra*, 49 N.Y.2d at 480.

Crane's Rule holds that control of the instrumentality at the time of the accident is vital to determining whether or not there is a duty, regardless of its intended use. *See*, Brief for Appellant at 15. This is, of course, entirely incompatible with Sage and Robinson.

According to Crane's Rule, since Mr. Suttner's employer could, hypothetically, in some imaginary world, have replaced Crane's asbestos-containing components with non-asbestos alternatives, thereby rendering Crane's previously defective product non-defective, Crane's duty to warn Mr. Suttner ceased to exist the first time Crane's original asbestos-components were replaced with a non-Crane replacement part. Because Crane did not compel Mr. Suttner's employer to replace asbestos with asbestos, Crane's duty to warn was cut off. This analysis is, essentially, the exact opposite of the public policy position expressed by the Court in Sage.

Applying the same logic to Sage, Fairchilde-Swearingen Corporation did not have control of the airplane at the time that its defective hook broke off. Ms. Sage's employer had complete discretion in choosing to replace the dangerous hook with a similarly dangerous hook. For all Fairchilde-Swearingen Corporation knew or cared, Ms. Sage's employer could have removed the hooks entirely, or replaced them with clearly-marked, foam-padded hooks. Nonetheless, since the product was in a defective condition at the time of sale, control of the instrumentality at the time of the accident was irrelevant.

In the asbestos context, two Federal District Court decisions have held that, when an industrial valve is supplied with asbestos-containing component parts, and

those parts are foreseeably replaced with like parts, the manufacturer may be held liable for failure to warn, even it did not supply the injury-causing component. *See*, Gitto v. Chesterton, 2010 U.S. Dist LEXIS 144568 (S.D.N.Y., 2010); Curry v. American Standard, 2010 U.S. Dist. LEXIS 142496 (S.D.N.Y., 2010).

Crane's primary argument that it cannot be held liable for injuries arising from replacement parts consists of citations to the law of foreign jurisdictions, and is addressed below. It does, however, cite Hanson v. Honda Motor Co., *supra*, 104 A.D.2d 850, which it describes as, "applying the 'stream of commerce' rule in the context of replacement parts and holding that the original manufacturer of a motorcycle had no duty to warn of the use of defective replacement wheel and spoke assembly." Brief for Appellant at 32. In Hanson, the plaintiff replaced a normal-sized wheel with a decorative, oversized wheel in hopes of making his motorcycle look more appealing to fans of large wheels. 104 A.D.2d at 851. This would be akin to the defendant in Sage providing a brightly colored, gently-rounded hook that the purchaser intentionally removed and replaced with a concealed, jagged hook. Hanson does not deal with the foreseeable use of like replacement parts, but rather with dangerous modifications to a previously safe product.

4. Crane Had a Duty to Warn Mr. Suttner of Hazards Associated with the Synergistic Use of its Products

The question of whether the scope of a manufacturer's duty to warn includes a duty to warn of the hazards associated with the combination of its products and the products of a third party depends on a fact-specific inquiry into the nature of the relationship between those products.

In cases where the defendant's product is merely compatible with an injury-causing component supplied by a third party, the defendant may not be held liable for failing to warn of the hazards associated with using the products together. *See*, Rastelli, Tortoriello, Drabczyk, *supra*.

However, in cases where two products combine to create a danger, or the defendant's product creates the danger in the third party's product, Rastelli recognizes that both manufacturers have a duty to warn. (*See*, Point I.C.4., *supra*, Point I.E.2., *infra*.); *See also,* Rogers; Berkowitz; Penn v. Jaros, Baum & Bolles; Village of Groton; and Baum, *supra*.

The Supreme Court of Erie County, the Appellate Division of the Fourth Department (adopting the reasoning of the court below), the Supreme Court of New York County and the First Department of the Appellate Division have all held that, when determining whether Crane had a duty to warn about the hazards of

components it did not supply, one must look at the relationships between the products and see if "circumstances strengthen the connection" between the two products. Surre, 831 F.Supp.2d at 801, *quoted at* Dummitt II, *supra*, 121 A.D.3d at 239; Dummitt I, *supra*, 2012 N.Y. Misc. LEXIS 4057 *22; Suttner Decision and Order, Erie County Index No. 2010-12499 (Lane, J., March 15, 2013) (R. 22). Each of these courts ruled that a jury could properly find that Crane breached a duty to warn about the hazards of carcinogenic, third-party components.

While Appellant's Brief strains to reinvent Crane as a manufacturer of generic metal goods subsequently modified, without its knowledge or consent, to include carcinogenic components, the record does not support such an interpretation. According to Crane's Answers to Interrogatories, Crane got into the business of selling asbestos-containing valves before the U.S. Civil War and did not stop until the late 20th century. The use of these components in hot valves acted to release the encapsulated material, changing the latent danger of encapsulated fibers into the imminent danger of free-floating, carcinogenic dust. Crane's valves did, in fact, contribute to the defective condition that caused the fibers to become airborne.

The relationship between Crane's valves and their asbestos-containing components is closely akin to the relationship between the products described in Rogers, Berkowitz, Penn v. Jaros, Baum & Bolles,; and Village of Groton.

E. The Crane Rule, as Crane Expresses it in its Brief

The Brief for the Appellant contains two statements of the Crane Rule. In the first paragraph of its argument section Crane states:

> In *Rastelli v. Goodyear Tire & Rubber Co*. [citation omitted], this Court held that the imposition of a legal responsibility in the product liability context depends on a showing that the defendant had control over the production or use of the alleged defective product or played a role in placing it in the stream of commerce.

Appellant's Brief at page 15. In its heading, it refers to this as "the Control-Based Analysis of *Rastelli*". Id. at Point I. It elaborates on it bright-line rule at page 19:

> Whether the facts of a given case involve "replacement parts" or some other type of third-party product, the *legal* question of responsibility is the same – did the defendant have "control over the production" or use of the allegedly defective product at issue or a "role in placing [it] in the stream of commerce." [*citation to* Rastelli *omitted*] If the answer to these questions is "no," then legal responsibility should not lie, regardless of the exact type of third party product involved.

Brief for Appellant at 19-20.

As Point I.C.4.a. discusses, the Rastelli Court described seven factors that it considered in determining that the scope of Goodyear's duty to warn did not extend to the tire rim at issue in that case. One of those was whether Goodyear had

"control over the production of the subject multipiece rim," and another was that Goodyear "had no role in placing that rim in the stream of commerce." Rastelli, *supra*, at 279-280. Crane's Rule appears to have been created by fusing together two out of the seven Rastelli factors and appending the vague term, "or use," to the end of this Court's phrase, "control over the production."[26]

In the course of the rest of its Brief, Appellant recognizes two exceptions to Crane's Rule. At page 29-31, it concedes that Sage departs from the "control based approach," although it appears to argue that Sage is, at a minimum, limited to design defect cases and may be limited to its facts.

Interestingly, at page 22 of its Brief, Crane states that Rogers "is wholly inapposite because … the defendant's product 'could not be used without the injury-causing product at issue.'" The Rogers exception is notable in that it seems to concede that, if Crane's valves are shown to have required asbestos gaskets to perform their intended functions, Crane may be held liable under Rogers. Contrary

[26] It is unclear what would fall under the "control over the … use of the alleged defective" provision of Crane's Rule. Since the phrase is not drawn form any case and appears to be entirely original to Crane's Brief, there is no case law that explains the phrase. Crane does not give any affirmative examples of conduct that would fall into this exception, but we can infer that it must be a very narrow exception from the rest of Crane's Brief. Crane has argued that a manufacturer never has a duty to warn about the use of third party replacement parts, even if those parts were required for the product's use. Brief for Appellant at 32-33, *citing* Ford Motor Co. v. Wood, 119 Md.App. 1 (Md. Ct. Spec. App 1998). It has also argued that a manufacturer does not ever have a duty to warn of such products when it, "had a significant role, interest or influence in the type of component used with the product after it entered the stream of commerce." Brief for Appellant at 27-28 (explaining that it is not "legally correct" to hold that a manufacturer has a duty to warn in such a circumstance).

to Crane's insistence, the Record clearly supports a finding that Crane's valves did, in fact, require asbestos gaskets in order to function properly. *See,* Statement of Facts, *supra*.

In Crane's Reply Brief in the pending Dummitt matter, it complains that, "Contrary to Plaintiff's repeated assertion, Crane Co. is not arguing that liability extends only to those who actually made or sold the allegedly injurious product. This incorrect assertion fails to appreciate the nuance of the stream-of-commerce test of *Rastelli*, and the careful balance it strikes in framing tort liabilities." *See,* Reply Brief for Appellant In re: New York City Asbestos Litig. [Dummitt], APL-2014-00209 at p. 6, FN 3. Compared to the careful balancing of factors described in Rastelli, Liriano and their progeny, however, Crane's Rule seems extremely lacking in nuance. It appears that Crane recognizes one circumstance when it can ordinarily be held liable (when it placed the injury causing product in the stream of commerce), one exception to the rule (when it controlled the production of the product but did not, for some reason, have a role in placing it in the stream of commerce) and one vague exception of which it does not provide any examples (controlling the "use" of the product). It also concedes limited exceptions to the rule based on Sage and Rogers. Compared to the elaborate set of factors described

in Rastelli, Liriano, and their progeny, however, Crane's Rule seems utterly lacking in nuance and, to borrow Crane's expression, "outcome driven."

Notably absent from Crane's Brief is any citation to, much less analysis of, Liriano v. Hobart, 92 N.Y2d 232 (1998). The omission seems peculiar, both because Justice Lane cited Liriano twice in his decision (R. 5, 6) and because Lirano is probably the most prominent decision that this Court has issued regarding a manufacturer's duty to warn since Rastelli was decided.

Rastelli was clearly on the Lirano Court's mind, as Liriano quoted it for the essential proposition that "A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." Liriano at 237, *quoting* Rastelli at 297. The Liriano Court made a point to recite circumstances that were not within the scope of the duty to warn, such as risks actually known to the injured party and patently dangerous hazards. Liriano at 241-242. It did not include the circumstance "when the injury-causing component was placed in the stream of commerce by another." Rather, Liriano held that the scope of the duty to warn could potentially encompass a duty to inform users not to disable safety features, since warning "…is neither infeasible nor onerous..." Id. at 239.

It is conceptually difficult to reconcile a bright-line test like Crane's Rule with a public policy that gives as much deference to juries as New York's does. In Liriano, this Court held that a jury could properly find that a meat-grinder manufacturer's breach of its post-sale duty to warn of the dangers of disabling a safety feature was a contributing cause of a plaintiff's injury when the meat-grinder was sold in 1961 and injured the plaintiff in 1990. In Hoover, this Court held that a jury could properly find that a digging tool's design defect was a contributing factor to the plaintiff's injury when the design defect consisted of having a breakable safety device and the manufacturer issued warnings not to operate the tool if the safety device was not in place.

These fact patterns may have presented Mr. Liriano and Ms. Hoover with uphill battles in front of juries, but they were entitled to their respective days in court. New York's rejection of rules which allow a manufacturer to "*automatically* avoid liability" for an alleged act of negligence is inconsistent with the Crane Rule. Hoover, *supra,* 23 N.Y.3d at 59.

1. Crane's Rule Cannot be Reconciled with New York Law

Crane's Rule is inconsistent with how trial and appellate courts have interpreted Rastelli since it was decided.

As Point I.C.4., *supra*, discusses, Rastelli observes that, if the combination of two products acts to create a defect, then the manufacturers of both products have a duty to warn. It does not state that one manufacturer must have control over the other's product in order to trigger this duty. Thus, the newly-formulated "control-based" approach of Crane's Rule cannot even account for the scenarios described within the text of the decision that Crane purports to have drawn its rule from.

Crane's Rule cannot be logically reconciled with Rogers v Sears, Roebuck & Co., 268 A.D.2d 245 (1st Dept, 2000). In Rogers, the plaintiff was injured by a replacement propane tank on a grill. The grill manufacturer moved for summary judgment, arguing that it did not supply the injury-causing component, and thus had no duty to warn under Rastelli. Although the grill manufacturer did not place the replacement tank into the stream of commerce, the First Department averred that:

> …even assuming the accident was caused by a defect in a valve incorporated into a propane tank neither of which appellant manufactured, we are unpersuaded by appellant's argument that it was under no duty to warn of the dangers presented by such a defect, where its grill could not be used without the tank, and where its own warning to use the grill only outdoors was itself recognition of the danger of gas emission inherent in the use of the grill regardless of any defects.

Id. In so doing, this Court contrasted Rastelli by using the "compare" signal.

As noted in Point I.E., *supra*, Crane admits that Rogers was correctly decided and does not fall into its "rule," but attempts to distinguish it by arguing that the propane tank was necessary for the grill to function.

According to Crane, if an alternate, non-explosive gas was also theoretically compatible with the grill in Rogers, the grill manufacturer would not have had a duty to warn. Crane is mistaken, however, according to Penn v. Jaros, Baum& Bolles, 25 A.D.3d 403 (1st Dept, 2006).

Crane's argument is essentially identical to the argument made by the defendant Kidde-Fenwall in Penn. The decedent in Penn was a bank employee. She became trapped in the bank's vault after hours and was unable to call for help by phone. The decedent pulled a fire alarm inside the vault, hoping to attract attention, and the fire alarm system flooded the vault with carbon dioxide, which suffocated the decedent. The plaintiff sued several defendants, including Kidde-Fenwall. Kidde-Fenwall manufactured several components of the system, including the alarm box and the discharge cylinders. It neither designed the system nor specified that its alarm should be used in conjunction with carbon dioxide. Kidde-Fenwall argued that, under Rastelli, it did not have a duty to place a warning label on the alarm. The First Department denied it summary judgment, writing

that, "Kidde was aware, at a minimum, that the alarm could be used in conjunction with a CO2 suppression system." Id. at 204.

Just as Crane argues that it valves could have, hypothetically, been combined with non-asbestos gaskets and packing, Kidde argued that its components could have been combined with non-CO2 systems. (*See*, Trial Order in Penn v. Jaros, Baum & Bolles, 2005 WL 6035846 (N.Y. Sup.) ("Kidde's expert also stated that none of these three components was designed to be used solely in a carbon dioxide fire suppression system, but that they were generic, and could be used in any type of fire suppression system.").

Like Rogers, Penn is a case where two manufacturers' products combined synergistically to cause the decedent's injury, and where a third party placed the injury-causing agent in the stream of commerce. Unlike Rogers, the record in Penn indicates that Kidde-Fenwall's alarm could have functioned in the absence of the injury causing agent. Nonetheless, the latent danger created by the foreseeable synergistic use of the products triggered a duty to warn. It stands to reason, therefore, that either Crane's Rule is incorrect, even when it includes the necessity exception that the Appellant reads into Rogers, or Rogers and Penn were both wrongly decided.

Village of Groton v. Tokheim Corp., 202 A.D.2d 728 (3rd Dept, 1994) lv denied 84 N.Y.2d 801, is also incompatible with Crane's reading of Rastelli. In that case, the plaintiff municipality brought suit against Tokheim, the manufacturer of a regulator, which was used in conjunction with an above-ground fuel dispensing system manufactured by a third party. The latter system failed, causing a fuel spill; Tokheim Corp.'s regulator could not be safely used when exposed to sunlight, because of the excess thermal energy, and this caused the other manufacturer's system to fail and cause the damages.

Tokheim, citing Rastelli, argued that the plaintiff was seeking to hold it responsible for the failure of a fuel tank that it had not placed in the stream of commerce. The Court observed that neither manufacturers' product was defectively manufactured or designed, but that the use of these two products together created a hazard that gave rise to a duty to warn, and cited Rastelli's synergistic use exception. 202 A.D.2d at 730.

As in Penn and Rogers, the injury-causing agent (the fuel or the fuel tank, or both) was supplied by a third party. The injury-causing component was the fuel tank, which was rendered dangerous by the failure of the regulator, just like the gaskets in the present case were rendered dangerous by the hot valves disintegrating the binding matrix. The court in Village of Groton, however,

categorized it as a dangerous condition created by the combination of two products, rather than as a failure of Tokheim's product. Again, the Court's fact-specific inquiry demonstrates that Crane's proposed bright-line rule is alien to New York law.

Berkowitz v. A.C. & S., Inc., 288 AD.2d 148 (1st Dept, 2001), is also illustrative. In Berkowitz, the First Department upheld the denial of various summary judgment motions by manufacturers of pumps used on Navy vessels. The defendant manufacturers were being sued for injuries resulting from exposure to asbestos-containing components sustained during the maintenance of their products. Berkowitz is a brief decision addressing a consolidation of eight appeals involving manufacturers of asbestos-containing naval equipment. Because it dealt, summarily, with eight fact patterns, it reached its result through several lines of reasoning. In one case, "an issue of fact as to whether these pumps contained asbestos is raised by the defendants' admission that Worthington sometimes used gaskets and packing containing asbestos [and by] plaintiff Tancredi's production of a Worthington manual for the power plant where he worked referring to an asbestos component in one of its pumps at the plant," for instance. 288 AD.2d at 149. This is, of course, analogous to the present case.

The court in Berkowitz wrote, "Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which Worthington knew would be made out of asbestos." 288 AD.2d at 149. The Court supported this view with a citation comparing Rogers and Rastelli.

The Berkowitz court, in other words, like the courts in Rogers, Penn, and Village of Groton, interpreted Rastelli as requiring a fact-specific analysis of the actual relationship between the defendant's product and the injury-causing agents, favoring jury resolution of such factual disputes.

In Re: New York City Asbestos Litig. [Dummitt], 121 A.D.3d 230 (1st Dept, 2014) (currently on appeal), dealt with a fact pattern similar to the present case, in that the plaintiff was exposed to asbestos-containing components, including replacement parts, manufactured and supplied by third parties, while performing maintenance on asbestos-containing industrial valves manufactured by Crane Co., as well as to asbestos parts, including exterior insulation, specified by Crane. As

with all of the other appellate cases interpreting Rastelli, the Court followed the traditional, and particularized analytical path dictated by our State's public policy, and evaluated the relationship between Crane's product and the components utilized in its maintenance.

Although two justices dissented regarding proximate cause issues pertaining to the preclusion of a defense expert, all five justices on the panel rejected Crane's Rule.

The majority spent approximately five pages of its decision explaining why Crane's Rule was incompatible with New York law. Dummitt II, *supra*, 121 A.D.3d at 248-252. In the course of that discussion, the Court analyzed most of the same cases analyzed by Justice Lane in the present case: including Rastelli, Surre, Drabczyk, Tortoriello, Berkowitz, and Rogers, and concluded that Crane's Rule was not an accurate statement of law. In the course of that analysis, the court wrote:

> These cases, and others cited by Crane, together stand for the rather unremarkable proposition that where there is no evidence that a manufacturer had any active role, interest or influence in the types of products to be used in connection with its own product after it placed its product in the stream of commerce, it had no duty to warn. The cases cited by the Dummitt plaintiff, however, demonstrate that where a manufacturer does have a sufficiently significant role, interest or influence in the type of component used with its product, after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product.

121 A.D.3d at 250.

Just as it has done with the Suttner decision, which it asserts applied "the replacement parts test," and the Dummitt I decision, which it asserts applied, "the foreseeability test," the defendant has taken the above passage out of context and dubbed it, "the substantial interest test." *See*, Brief for Appellant at 28. The defendant has gone on to suggest that the Dummitt decisions are inconsistent with the Suttner decision, despite the fact that they analyzed the same law and reached the same conclusion, because Crane has deliberately chosen to interpret the phrase, "significant role," in a fashion which would conflict with Suttner.

The Dummitt II Court does not explicitly address whether or not substantially similar third party replacement wear items fall into the category of products over which a jury may decide that Crane had "any active role, interest or influence in." However, in the context of the decision as a whole, it is clear that they do.

The Dummitt II majority *cited* Surre for the proposition that the Court must determine whether the "facts collectively 'strengthen the connection' between Crane's valves and the asbestos-containing components that made Dummitt sick." Dummitt II at 251, *quoting* Surre at 801. (Dummitt I and Suttner both cite the same passage. *See*, Dummitt I at *24, Suttner Decision and Order at R. 24). It

context, it is clear that the "significant role, interest or influence" analysis is not some new test made up by the First Department, but rather another way of phrasing the well-established position that the strength of the connection between the products determines whether a jury can properly find that a duty existed to warn of that hazard.

Surre favorably cited Gitto and Curry as examples of situations where the facts "collectively strengthened the connections," between Crane's valves and third party replacement wear items in the form of gaskets and packing.

Crane's bald assertion that the Suttner verdict would not survive the so-called "test" in Dummitt II is simply based on Appellant's *ipse dixit* assertion that its role was not "significant." There is currently no case law analyzing the passage that Crane has chosen to call "the significant role test," but all of the case law interpreting the strength-of-connection analysis holds that a jury may permissibly find that failing to warn of the hazards of substantially similar replacement parts is a breach of a manufacturer's duty to warn.

Crane made the decision to sell its valves with asbestos-containing parts, which it knew would wear out and require replacement. Crane has argued that, instead of replacing like parts with like parts, the end user could have substantially modified the valve in order to make it non-carcinogenic. (There is conflicting

evidence in the record as to whether such a thing was even possible while maintaining the valve's functionality.). Crane did not recommend that end users do such a thing and does not appear to have communicated to end users that such a modification was possible or desirable (if indeed it was). To say that selling a product that contained asbestos parts, which the seller knew would regularly be replaced, does not constitute having a "significant role" in the use of asbestos in its products is absurd. Contrary to Crane's assertion, the Suttner case would readily survive under the Dummitt II analysis.

Mr. Suttner's case, like Dummitt II, "…is not even close to Rastelli, because of Crane's demonstrated interest in the use of asbestos components with its valves."121 A.D.3d at 252.

Appellant cites two post-Rastelli, New York appellate cases that it contends support Crane's Rule. Tortoriello v. Bally Case, Inc., *supra*, 200 A.D.2d 475 (1st Dept, 1994); In Re: Eighth Judicial Dist. Asbestos Litig. [Drabczyk], *supra*, 92 A.D.3d 1259 (4th Dept, 2012).

Tortoriello, like Rastelli, is an explicitly fact-specific case. In Tortoriello, the plaintiff was injured when she slipped on ice which had accumulated on the floor of a walk-in freezer. The manufacturer of the non-floor components of the walk-in freezer successfully moved for summary judgment under Rastelli, on the

grounds that the defective floor tiles were merely compatible with its products. The court agreed that mere compatibility was an insufficient basis to place a product within the scope of the manufacturer's duty to warn. Like this Court in Rastelli, the First Department used case-specific language in its holding, writing, "Under the circumstances of this case, we decline to hold that a question exists as to whether Bally Case, Inc. had a duty to warn the prospective purchasers herein about the use of quarry tile flooring with its components for walk-in freezers." 200 A.D.2d at 477.[27]

The First Department, which decided Tortoriello, is the same Court which decided Penn v. Jaros, Baum & Bolles, *supra*, wherein the manufacturer of the non-injury-causing portions of an alarm system was held to have a duty to warn, despite the fact that the alarm system did not require the injury-causing

[27] Although the court in Tortoriello granted summary judgment to the moving defendant, it is still impossible to harmonize with Crane's Rule. The Court granted summary judgment to the manufacturer of the freezer but denied summary judgment to the manufacturer of the floor tile, writing, "We reject Taylor-Mitchell's claim that it could not be held liable for a possible latent defect in the flooring material, as it was in an optimal position to eliminate the latent dangers attendant to such a defect." Tortoriello, *supra*, 200 A.D.2d at 471, *citing* Micallef, *supra*. By holding that the manufacturer of the tile may have had a duty to warn about the risk of combining it with a third party's freezer, the Court held that a defendant can, when circumstances dictate, have a duty to warn about the dangers of third party products that it neither placed within the stream of commerce nor controlled the production of. The proper inquiry is not into who distributed the harm causing agent, but rather into who could logically have remedied the defect. Crane Co. manufactured a permanent piece of industrial equipment which could easily accommodate a warning plate. Like the tile manufacturer in Tortoriello, it was "in an optimal position to eliminate the latent dangers," compared to the manufacturers of short-lived wear items such as gaskets and packing.

components in order to function. Under the plaintiff's interpretation of Rastelli and its progeny, this makes perfect sense. The courts, in each case, analyzed the relationship between the two products and determined whether the connections between the two products were sufficient to trigger a duty to warn of the hazards of their synergistic use. Under Crane's interpretation of the case law, however, the First Department correctly apprehended the bright-line rule in 1994, when Tortoriello was decided, but had forgotten how to correctly interpret Rastelli by 2006, when it decided Penn.

Finally, the defendant attempts to rely on the Fourth Department's ruling in Drabczyk, *supra*, 92 A.D.3d 1259 (4th Dept, 2012). In Drabczyk, the decedent was injuriously exposed to asbestos packing, gaskets and insulation while performing repair work on valves manufactured by defendant Fischer. The jury found the defendant 5% liable for plaintiff's injuries, and reckless. The defendant appealed, arguing that, under Rastelli, it could not be held liable for exterior insulation, which that record showed, in that case, was merely compatible.[28]

[28] An excerpt from the Appellant's Brief on Appeal in Drabczyk is found in the Record at page 7024. The Appellant, notably, did not contest that it was liable for injuries arising from replacement gaskets and packing used in conjunction with its valves, writing only that, "The trial court erred when it instructed the jury that the defendant was responsible for the plaintiff's exposure to asbestos from *external insulation* that the defendant did not manufacture, sell, require, recommend or otherwise place in the stream of commerce." (R. 7026.). The issue of whether or not a defendant could be held responsible for the foreseeable, intended use of replacement parts was not before the Court in Drabczyk, and the issue of whether a manufacturer

The Fourth Department upheld the verdict and the finding of recklessness, but noted that the trial court erred in instructing the jury. The passage in question reads: "Although we agree with defendant that Supreme Court erred in charging the jury that defendant could be liable for decedent's exposure to asbestos contained in products used in conjunction with defendant's valves (*see generally*, Rastelli v. Goodyear Tire & Rubber Co., 79 NY2d 297-298), we nevertheless conclude that the error was harmless." Drabczyk, 92 A.D.3d at 1260.

Crane has interpreted this passage to indicate that the Fourth Department Court embraced its bright-line rule, and that a manufacturer may not be held responsible for the synergistic use of its product with an injury causing component under any circumstances. As the Crane views the case, the Fourth Department decided to answer a question that was not before it in a fashion that substantially altered the scope of a product manufacturers' duty to warn, regardless of circumstances, and then inexplicably disregarded its own paradigm-shifting precedent in Suttner.

Respondent respectfully submits that the more sensible interpretation is that the Fourth Department saw Drabczyk, like Rastelli, Rogers, Village of Groton,

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could be held liable for the combination of its product with insulation was decided on a fact-specific record.

Penn, Berkowitz, and Tortoriello as being limited to the specific circumstances of its record. This Court seemingly agreed with the narrower reading of Drabczyk, as it declined an invitation to review the case as allegedly in conflict with the First Department's decision in Berkowitz. *See*, In re: Eighth Judicial District Asbestos Litigation, 19 N.Y.3d 803 (2012), *denying leave to appeal*.

The clearest evidence that Drabczyk was not intended to replace case-specific analysis with a bright-line rule is, of course, the fact that the Fourth Department upheld the verdict for Suttner. Crane expresses bafflement that "In Drabczyk the appellate division relied explicitly on Rastelli, but here, the same court inexplicably disregarded Rastelli completely." *See,* Brief for Appellant at 21. However, this outcome is only confusing if one disregards the decades-old body of case law that reads Rastelli as requiring a case-specific inquiry into the relationship between the products in question, and that the mere compatibility situation described in Drabczyk gives rise to a lesser duty than the replacement part situation at issue in Suttner or the specification at issue in Dummitt.

In addition to Tortoriello and Drabczyk, Crane attempts to rely on two U.S. District Court decisions: Surre v. Foster Wheeler, 831 F.Supp. 2d 797 (SDNY, 2011) and Kiefer v. Crane Co., 2014 WL 6778704 (SDNY, 2014).

Surre was a lengthy decision and order by Federal District Court Judge Denny Chin granting Crane Co. summary judgment in an action where the plaintiff sought to hold it liable for injuries arising from his exposure to exterior insulation that had been applied to boilers that the defendant's predecessor-in-interest had manufactured. Unlike the present case, Surre was not a replacement parts case where Crane supplied a product which contained asbestos at the time of the sale. (*See*, 831 F.Supp. 2d at 799, "Surre was not exposed to any asbestos from products or components internal to Pacific Boilers."). Rather, it dealt solely with whether the defendant had a duty to warn about the hazards of adding third party insulation to the exterior of a boiler under circumstances when the Record contained no evidence that the defendant had any reason to believe that such a thing would occur. (Presumably, had Surre been sued as a design defect case, Crane would have been entitled to the protection of the substantial modification doctrine.).

Crane's decision to cite Surre is interesting because Justice Chin rejects Crane's Rule and demonstrates an extremely detailed application of the balancing of factors test. Appellant quotes the passage in Surre that states, "Generally, a manufacturer has no duty to warn against defects in such 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." 831 F.Supp.2d at 801.

However, Appellant's Brief omits the passage from Surre that states, "Where additional circumstances strengthen the connection between the manufacturer's product and the third party's defective one, a duty to warn may arise." Id. at 801, *citing* Rogers and Berkowitz, *supra*. Crane also omits the passage that states:

> I acknowledge that two New York district court opinions and several New York state trial court opinions have denied summary judgment in cases similar to this one. See, e.g., Gitto v. Cherterton, No. 07-04771 (S.D.N.Y. Dec. 7, 2010); Curry v. Am. Standard, No. 08-10228, 2010 U.S. Dist. LEXIS 142496 (S.D.N.Y. Dec. 6, 2010); DeFazio v. Chesterton, 32 Misc. 3d 1235[A], 938 N.Y.S.2d 226, 2011 NY Slip Op 51588[U] [N.Y. Sup. Ct. 2011]; Sawyer v. A.C. & S., Inc., 32 Misc. 3d 1237[A], 938 N.Y.S.2d 230, 2011 NY Slip Op 51612[U] [N.Y. Sup. Ct. 2011]. In this case, however, on this record, there are not sufficient factual grounds to support a finding that Crane had a duty to warn.

Id. at 804.[29] Far from embracing a bright-line test, such as Crane's Rule, Surre explicitly acknowledged that a case by case, factual analysis of the record will sometimes establish that a manufacturer has a duty to warn about components that it did not place into the stream of commerce or otherwise exercise "control" over.

Surre is inconsistent with Crane's position in this appeal. Under Crane's Rule, there would be no fact pattern sufficient to "strengthen the connection"

[29] The Gitto and Curry decisions, *supra*, both denied summary judgment to Crane Co., both cited Rastelli, and both explicitly held that Crane Co.'s liability was partially premised on the fact that its valves were sold with asbestos-containing original parts that would require periodic repair or replacement. Id. at 2.

between two products, and Gitto, Curry, DeFazio and Sawyer were, therefore, all wrongly decided.

Finally, the Appellant cites Kiefer v. Crane Co., 2014 WL 6778704 (SDNY, 2014), 2014 U.S. Dist. LEXIS 169941 (SDNY, 2014). The Kiefer decision is labeled "Telephone Conference and Decision," and it appears to consist of a transcript of a bench decision from Federal District Court Judge Katherine B. Forrest, delivered during a conference call. The judge indicates that she is delivering her decision extemporaneously, based on notes, rather than reading a written decision aloud. ("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.") Kiefer, 2014 WL 6778704 at *1.[30]

Judge Forrest granted Crane summary judgment, relying partially on Surre. In the course of her oral decision she at one point stated, "Under New York law it is clear that one manufacturer cannot be held liable for the products of another." Id. at *5. Appellant, at page 21 of its Brief on Appeal, quotes that line, but omits

[30] Citations herein refer to the Westlaw document only. LexisNexis, in keeping with the Judge's wishes as expressed in the transcript, includes only a single sentence statement explaining the content of each Order the court issued.

the sentence that follows, "That is Judge Chin's decision in the Surre v. Foster Wheeler case." Id. at *5.

The tenuous nature of Crane's argument is demonstrated by the fact that it has been unable to locate a single Court of Appeals decision endorsing its single factor test; it has been unable to locate a single decision from the Appellate Division that endorses a single factor test; it has been unable, even, to locate a published trial court decision that endorses a single factor test. Surre, the published federal trial court decision upon which Crane attempts to rely, explicitly rejects a single factor test. In order to find a case based on New York law which appears to endorse a single factor test, Crane can only point to the transcript of an extemporaneous bench decision based on a set of notes and not intended for publication. And even in that case, Crane had to selectively quote Kiefer and make it appear as though the statement, "it is clear that one manufacturer cannot be held liable for the products of another," was an original conclusion of Judge Forrest's, based on a full analysis of the case law, rather than a casual summary of the nuanced, seven page long Surre decision.

It is striking that a brief on the subject of product liability in New York does not find any cause to discuss the implications of Liriano to its position. It is equally striking that a brief that takes the position that one manufacturer never has

a duty to warn about components it did not control chooses not to cite, much less attempt to distinguish, Berkowitz, Penn v. Jaros, Baum & Bolles or Village of Groton, *supra*. All of those cases are New York Appellate Decisions, which held that, under the circumstances of the case, one manufacturer had a duty to warn about products that it did not place in the stream of commerce. Each of those cases was cited by Justice Lane in the decision appealed from, and although Appellant dismisses Justice Lane's analysis as "amorphous," it makes no attempt to address his reasoning, or the reasoning of the authorities he cited.

It is equally striking that, in looking to the federal courts for authority, Crane addressed only Surre, a case where an asbestos-free product was modified by the post-sale addition of exterior asbestos, but neglected to discuss or distinguish Curry and Gitto – both of which held that Crane can be liable for injuries arising from its failure to warn of the hazards of using asbestos-containing replacement parts. Crane was, of course, aware of Curry and Gitto, which are cited approvingly in Surre.

2. Virtually Every New York State Jurist to Have Examined the Issue of Crane's Liability has Found that It Had a Duty to Warn Under Circumstances Similar to the Present

Throughout its Brief, Appellant implies that Crane's Rule, its idiosyncratic reading of Rastelli, is widely accepted and that the rulings by Justice Lane and the

Fourth Department (and the rulings by Justice Madden and the First Department) are outliers. This is not the case.

Rastelli was decided twenty three years ago. Berkowitz was decided fourteen years ago. In the time since then, manufacturers of asbestos-containing equipment have attempted to persuade numerous courts from across the state to accept their "no duty" rule. New York's Supreme Court Justices have, without exception, declined to embrace Crane's extra-textual interpretation of Rastelli and its progeny.

For examples of such cases, s*ee*, e.g., Cobb v. A.O. Smith Water Prods., Index No. 10-3677 (Sup. Ct., Oswego County, Mar. 30, 2011) (Hon. James W. McCarthy); Sawyer v. Crane Co. 32 Misc.3d 1237(A), 938 N.Y.S.2d 230 (Sup. Ct., N.Y. Co., June 24, 2011) (Hon. Sherry K. Heitler); Forth v. Crane Co., Index No. 2008-0491 (Sup. Ct., Schenectady County, Sept. 12, 2011) (Hon. Richard T. Aulisi); In re Sixth Judicial District Asbestos Litig.: [Schmerder], Index No. CA2010-000927 (Sup. Ct., Broome County, Sept. 26, 2011) (Hon. Robert C. Mulvey); Mosher v. A.W. Chesterton Co., Index No. 2010/7914 (Sup. Ct., Monroe County, Oct. 4, 2011) (Hon. Ann Marie Taddeo); Franck v. 84 Lumber Co., Index No. 5716/2010 (Sup. Ct., Orange County, Oct. 20, 2011) (Hon. Robert A. Onofry); Pienta v. A.W. Chesterton Co., Index No. 2012-1161, (Sup. Ct., Erie County Jul 2,

2014)(Hon. Jeremiah J. Moriarty III); Major v. A.O. Smith Water Products Co., Index No. 800805/2013 (Sup. Ct. Erie County, January 22, 2015) (Hon. Deborah A. Chimes). [31]

The examples cited were chosen not for their comprehensiveness, but because they demonstrate that the disinclination of New York Courts to embrace Crane's Rule is not the product of one judge, one judicial district, one region of the state or one political party. Rather, it is the universal consensus of every New York jurist who has heard such a motion. In addition to Justices Lane and Madden, at least eight other New York state judges have, in the past few years alone, applied this Court's traditional duty analysis, rather than adopting Crane's bright-line rule.

[31] In the interest of thoroughness, Plaintiff notes that Justice McCarthy, formerly of the Fifth Judicial District asbestos docket, issued two decisions finding that Crane had no duty to warn of the hazards of asbestos-exposure associated with its products in July, 2011. See Jones v. Air & Liquid Systems, Index No, 2010-3265 (Sup. Ct., Oswego Cty. July 11, 2011) (R. 6764-R.6771.) and Egelston v. Air & Liquid Systems Corp., Index No, 2010-1038 (Sup. Ct., Onondaga Cty., July 11, 2011) (R.6756-R.6763.) These decisions were in conflict with several of Judge McCarthy's prior decision, and were explicitly premised on the judge's conclusion that the Fourth Department had adopted a strict stream of commerce test in Drabczyk. Since the Fourth Department's affirmance of Suttner makes it clear that such interpretation of Drabczyk was incorrect, presumably they would not be decided the same way if they were heard today.

3. The Weight of the Case Law Demonstrates that Crane's Rule is an Attempt to Replace Settled New York Law with an Outcome-Driven Test

The plaintiff is mindful that this Court is not bound by the longstanding consensus of the Appellate Division (and trial courts) and could properly hold Rogers, Village of Groton, Penn, Berkowitz, and Dummitt (as well as Curry, Gitto and Surre and the dozens of State Supreme Court Orders rejecting Crane's proposed rule) to have been wrongly decided.

It nevertheless seems worth pointing out that, while Crane has couched its Brief in the modest and conservative rhetoric of a litigant seeking the protection of a straightforward precedent, it is not merely asking this Court to conclude that the Fourth Department misapplied Rastelli in the present case. It is asking this Court to conclude that, in the nearly quarter century since Rastelli has been decided, every New York State appellate judge to have interpreted Rastelli has failed to understand that it really mandates the imposition of the bright-line rule described in Crane's test. It is asking this Court to conclude that a panoply of judges from a wide range of backgrounds, geographic origins and political orientations have all misunderstood Rastelli to Crane's detriment.

There is nothing improper in Crane requesting that this Court radically alter the rules that govern product liability, but Crane should be forthright about the fact

that it is seeking an extreme remedy, and that every New York jurist to have considered the merits of Crane's Law has interpreted Rastelli as counseling it to follow Palka's "traditional, complex and particularized analytical path," rather than establishing a bright-line "no duty" rule.

F. The Decisions of the Court Below Are Consistent with the Express Public Policy of the State

Crane's discussion of the public policy incorrectly frames both the relevant legal issues and Crane's treatment by the courts. Legally, the question before this Court is not whether or not to impose a new duty on Crane. The question is whether or not a jury may permissibly find that failing to warn the plaintiff of the latent dangers of using its valves constituted a breach of Crane's duty to warn.

Underlying Crane's discussion of the public policy is the implication that it is a harmless actor that has been victimized by the court system. Crane's Brief even goes so far to suggest that the courts' only conceivable public policy motive in not adopting Crane's Rule must be to enrich plaintiffs. *See*, Appellant's Brief at page at 23. However, Crane is not being treated any differently than any other manufacturer whose actions in the market led it to accrue a certain amount of inchoate liability.

Both injured product users and the manufacturers of products have legitimate interests that the Courts should and do act to protect. The civil justice system has a number of rules and safeguards in place to protect the interests of defendants like Crane, just as it has rules and safeguards in place to protect people like Mr. Suttner and his widow.

Crane is not asking to be protected from the imposition of a new duty. Crane is asking that this Court carve out an exception to the ordinary rule in order to protect it. There is no blanket rule that says that a manufacturer may stay mute about the latent dangers of the intended use of its product, so long as a third party placed the injury-causing component in the market, nor should there be.

1. Crane Misframes the Relevant Legal Issue in its Public Policy Discussion

Crane begins its discussion of public policy by attempting to extrapolate a broad legal rule from a single, out of context phrase that it has quoted from an irrelevant case.

Citing Hamilton v. Baretta, 96 N.Y.2d 222 (2001), Crane argues that the court must weigh the public policy implications issue of imposing a duty. Crane frames the public policy question as one of "judicial recognition of a duty of care," and suggests that the trial court and Appellate Division, "recognize[d] a broad, and novel, form of legal responsibility…" Appellant's Brief at 22, 26. However, this

Court has already recognized that, as a product manufacturer, Crane assumed a duty of care by selling its valves. The question is not about whether Crane owed Mr. Suttner a duty of care, but whether Crane's admitted failure to warn about the carcinogenic hazards of maintaining its equipment falls within the scope of that duty.[32]

Under the ordinary rule, if Mr. Suttner was foreseeably exposed to a deadly latent danger as a result of an intended use of Crane's valves, then Crane had a duty to warn him of that danger. *See*, Point I.D., *supra*.

When a plaintiff improperly seeks compensation from the manufacturer of a non-defective product that, by happenstance, was used with a defective product, the court should dismiss the plaintiff's claim. For example, the application of the defective rim to the tire in Rastelli did not, as a matter of law, fall into the category of, "latent dangers resulting from foreseeable uses of the product of which it knew or should have known," or the category of, "unintended uses of a product … [which are] … reasonably foreseeable." Liriano at 243. However, a product

[32] The Court in Hamilton was asked to determine if gun manufacturers owed victims of gun violence a heretofore unrecognized duty to prevent firearms from being used criminally. It is necessary to weigh the public policy implications of imposing previously unrecognized duties. This Court has already evaluated the public policy implications of imposing a broad duty on manufacturers to warn end-users of latent dangers associated with the use of their products, and has found that it is meritorious to do so for the reasons discussed at length in such cases as Liriano, *supra*, Codling v. Paglia, 32 N.Y.2d 330 (1973) and Sukljian v. Charles Ross & Son Co., Inc., 69 N.Y.89 (1986).

manufacturer's liability for breaching its duty of care is not cut off if the injury-causing component happens to be replacement part. *See*, Sage, *supra*. Rastelli is not to the contrary for the reasons cited in Point I.C.4. and I.E.1., *supra*.

Determining whether failing to warn about a given use or misuse of a product breaches a duty of care is a fact-specific inquiry that should ordinarily be made by a jury. Liriano v. Hobart Corp., *supra*, 92 N.Y.2d at 243; Cooley v. Carter Wallace, *supra*, 102 A.D.2d 642 at 644; Cover v. Cohen, 61 N.Y.2d 261 (1984); Point I.C., generally, *supra*.

2. Public Policy Favors a Broad Scope of the Manufacturer's Duty to Warn

At Point I.A.2., Crane makes the rather extraordinary assertion that the only possible motive it can discern for finding that an issue of fact exists regarding the scope of its duty to warn about the cancer hazard associated with its valves is a desire to enrich plaintiffs:

> The only discernable policy that will be served by adopting the sort of vague, open-ended rule of "replacement part" responsibility described by the trial court is ensuring that plaintiffs will have a broader range of potential defendants to sue in "asbestos" cases like this one –i.e., *both* the entities that made, sold and distributed the allegedly defective part *and* the entities that made, sold and distributed the equipment with which it was used at some time years, or even decades, later.

Appellant's Brief at 22.

Given that, to date, panels from at least two Departments of the Appellate Division have unanimously rejected Crane's interpretation of Rastelli and at least 10 trial judges have done so, it seems uncharitable to suggest that such a diverse array of jurists could only have been motivated by sympathy or a desire to unjustly enrich one litigant at the expense of another.

By Crane's logic, it would seem that the only discernable policy that was served by finding that a jury could permissibly assess the scope of the manufacturers' duties in Rogers, Penn, Village of Groton and Sage was to unfairly benefit people allegedly injured by propane tanks, carbon monoxide, leaky fuel and improvidently placed hooks at the expense of grill sellers, makers of security equipment, fluid regulators and airplanes, respectively. In reality, the courts, weighing the facts of the situation found that, in those cases, the relationship between the defendant's product and the injury-causing agent was such that, even though the defendant did not distribute the injury-causing agent, a jury could properly find that it breached a duty of care by not warning about the use of its product that brought about the plaintiff's injury.

One reason that the public policy in New York explicitly favors a broad duty to warn is cost. Warning is relatively inexpensive and undemanding, particularly compared to redesigning a product. *See*, Liriano, *supra*, 92 N.Y.2d at 239-240

("although it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury"); Cooley v. Carter Wallace, *supra*, 102 A.D.2d at 644 ("Since the cost of providing warnings is often minimal, the balance usually weighs in favor of an obligation to warn.").

The broad scope of the duty to warn also increases the safety of products by shifting the financial risk of failing to learn about a product's latent danger away from the injured victims (and the taxpayer, as insurer of last resort) and toward the natural riskbearers: the manufacturers of dangerous articles. Manufacturers of dangerous industrial equipment are able to account for and minimize the risk of fatal injury associated with their products and to mitigate those risks, when they fail, by insuring themselves against those costs and spreading the cost of that risk out through the chain of distribution. *See*, Sprung v. MTR Ravensburg, Inc., 99 N.Y.2d 468, 473 (2003) ("the 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.").

This Court discussed the practical economics of allocating the cost of accident risk in Codling v. Paglia, 32 N.Y.2d 330 (1973), which abolished the last

remnants of the privity requirement and held that product manufacturers could be held liable in negligence for injuries to third party non-users who were foreseeably injured by the manufacturer's breach of its duty of care. This Court held that public policy was served by adopting a broad scope of duty because:

> Pressures will converge on the manufacturer, however, who alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products. To impose this economic burden on the manufacturer should encourage safety in design and production; and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if thereby he is given added assurance of his own protection.

Id. at 341.

Crane attacks this logic by arguing that, "Imposing a legal responsibility on complete strangers to the distributive chain that produced a harm-causing product may enhance the *compensation* opportunities of injured consumers, but it would not lead to any clear enhancement of product, and thus, consumer safety." Brief for Appellant at 24. However, broad warning requirements have a clear link to consumer safety. Had Crane's valves contained a warning about the hazards of their asbestos components on their nameplate, at the time of sale, that warning would have served to caution Mr. Suttner about the hazards of replacement gaskets just as surely.

Crane stresses the fact that the carcinogenic exposure occurred, "years, or even decades," after it sold the products. Brief for Appellant at 23. However, the public policy inquiry in Liriano focused on the macro-scale question of whether imposing a broad continuing duty to warn helped consumer safety, as a general rule. It did not on focus on the micro-scale question of whether meat-grinders would be made safer by permitting a jury to find that the continuing duty to warn about a meat grinder distributed in 1961 potentially applied in 1993. The public policy implications of permitting juries to find a broad scope of the duty to warn are the same in Suttner as they were in Liriano.

Crane Co.'s own corporate history provides an excellent illustration of the utility of broad duties to warn in promoting public safety. Crane Co. was a major company which, by its own admission, used carcinogenic components in its valves until the 1980s, decades after they were widely known by industry to be carcinogenic. Crane Co. admits that it never once conducted any tests to ascertain whether these valves presented a hazard to workers. (R. 5315; R. 5429.).

The reason that it ultimately stopped supplying valves with carcinogenic parts, according to its Answers to Interrogatories, is that "…in the late 1970s and early 1980s, as a result of changes in customer preferences, Crane Co. began to explore the prospect of replacing the asbestos-containing components in its

industrial products." (R. 5415) In other words, increasingly widespread concern about the health hazards of asbestos, brought about by increasingly widespread warnings, caused "Pressures [to] converge on the manufacturer," just as Codling anticipated. If Crane had conducted safety tests, and issued warnings, about the intended uses of its valves, those warnings may have influenced customer preferences sooner, and thus motivated industry to arrive at safer alternatives sooner. Conversely, if the duties of product manufacturers were less stringent, the civil justice system may have provided a less effective check on industry, and asbestos components might remain relatively common.

Crane criticizes the courts below for failing to spell out the public policy rationale behind their denial of Crane's motion. However, Crane's objections only make sense if the Courts were finding a new duty. Justice Lane painstakingly cited the decisions upon which he relied in enforcing the ordinary rule: most relevantly, Liriano, Rastelli and Sage. Judges are not under an obligation to make a recital of the public policy behind well-settled cases every time they write a decision.

3. New York's Public Policy Disfavors Bright-Line Tests of the Scope of Duty

Bright-line tests for duty have the advantage of being simple to apply and lowering the costs associated with litigation of disputed facts. On the other hand, such tests do not permit the court to account for the contextual facts and

circumstances surrounding an alleged act of negligence and, thus, frequently compel harsh or unjust outcomes.

This Court has explicitly stated that, "the 'policy-laden' nature of the existence and scope of a duty generally precludes any bright-line rules..." Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 139 (2002), *citing* Palka v. Servicemaster Mgt. Servs. Corp., *supra*, 83 N.Y.2d 579.[33]

Instead, New York has traditionally favored case-specific tests. *See, generally*, Point I.B., *supra*; Palka, *supra*, 83 N.Y.2d 579, 585 ("Common law experience teaches that duty is not something derived or discerned from an algebraic formula."); Id. 83 N.Y.2d at 586 (courts traditionally, "fix the duty point by balancing factors"); Id. at 589 (courts ascertain scope of duty by applying the "the traditional, complex and particularized analytical path…").

Numerous New York cases stress the merits of balancing tests over bright-line tests. *See*, e.g., Cover v. Cohen, 61 N.Y.2d 261 (1984) (determining scope and existence of post-sale duty to warn involves weighing a number of factors); Denny v. Ford Motor Co., 87 N.Y.2d 248, 257 (1995) (design defect causes of action require a "risk/utility balancing test" instead of bright-line strict liability); Micallef

[33] Other states have made different public policy decisions, and embraced the simplicity of bright-line rules. (*See*, e.g., O'Neil v Crane Co., 53 Cal.4th 335 (2012), "our strict products liability precedents have recognized 'a bright-line legal distinction' imposing liability only on those entities responsible for placing an injury-producing product into the stream of commerce.")

v. Miehle Co., 39 N.Y.2d 376, 385 (1976) ("What constitutes 'reasonable care' will, of course, vary with the surrounding circumstances and will involve 'a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of precaution which would be effective to avoid the harm.'); Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, 586 (1994) (Courts traditionally "fix the duty point by balancing factors"); Robinson v. Reed-Prentice Div., 49 N.Y.2d 471, 479 (1980) (determining if designer breached duty of care requires "balancing of the likelihood of harm against the burden of taking precaution against that harm."); Sage v. Fairchild-Swearingen Corp., 70 N.Y.2d 579, 586 (1987) ("The determination of whether a product is defectively designed requires a balancing of the likelihood of harm against the burden of taking a precaution against that harm" *citing* Robinson at 479); Cooley v. Carter-Wallace, 102 A.D.2d 642, 664 (4th Dept, 1984) ("The imposition of the duty to give a warning of some kind involves a balancing test that weighs the seriousness of potential harm to the customer against the costs to the manufacturer.").

Indeed, numerous seminal New York product liability cases have arisen in out of circumstances where this Court has replaced a bright-line rule with a case-specific weighing of factors in the interest of justice or equity. *See*, *e.g.* MacPherson v. Buick Motor Co., *supra*, 217 N.Y. 382 (1916) (rejecting bright-line

rule requiring manufacturer to be the original source of defective component in order to stand liable); Greenberg v. Lorenz, 9 N.Y.2d 195 (1961) (rejecting bright-line privity rule to hold food seller liable for injuries resulting from non-purchaser child's ingestion of metal debris packed in salmon); Codling v. Paglia, *supra*, 32 N.Y.2d 330 (1973) (abolishing remaining privity requirements in negligence; abolishing bright-line test for comparative negligence); Cover v. Cohen, *supra*, 61 N.Y.2d 261 (1984) (bright-line rule limiting duty to warn to time of sale replaced with balancing of factors); Sage v. Fairchilde-Swearengin Corp., *supra*, 70 N.Y.2d 579 (1987) (rejecting bright-line stream of commerce rule in favor of balancing of factors); Liriano v. Hobart, *supra*, 92 N.Y2d 232 (1998) (rejecting bright-line rule that substantial modification falls outside of scope of duty to warn); Hoover v. New Holland, *supra*, 23 N.Y.3d 41, 59 (2014) (*internal citation omitted*) (rejecting bright-line rule that would hold that removal of a safety device automatically constituted substantial modification.).

One should not mistake this Court's embrace of situational nuance for an outcome-driven approach which serves only to maximize plaintiffs' compensation. In Palsgraf, *supra*, this Court recognized that the duty of reasonable care was a highly situational concept, but nevertheless, did not find the scope of the defendant's duty sufficiently broad to permit the defendant to be held liable. In

Gebo v. Black Clawson Co., 92 N.Y.2d 387 (1998), this Court held that an entity that fabricated a machine for personal use and subsequently sold it for scrap could not be held to the responsibilities of a manufacturer in strict products liability or ordinary negligence. The bright-line rule would dictate that the defendant was strictly liable, regardless of whether that would lead to an inequitable outcome. In Rastelli, this Court recognized that there were several circumstances in which a manufacturer could have a duty to warn about hazards associated with components that it did not place in the stream of commerce, but nevertheless held that, under the circumstances of that particular case, the defendant had no duty to warn.

This Court has historically rejected bright-line tests because they are both over and under-inclusive. While they offer more predictable outcomes, such outcomes are often predictably inequitable. Crane's proposed bright-line rule would carve out an incongruous exception to New York's organically-developed, fact-specific law of product liability by stating that the duty to warn never requires a manufacturer to warn of non-obvious, potentially fatal harm that is nearly certain to occur when the product is used as directed, as long as the injury-causing component originated with a third party.

4. Crane's Self-Serving Portrayal of Itself as a Victim of Judicial Injustice Should Not Sway this Court

A persistent theme of Appellant's Brief has been the intimation that applying the ordinary rules dictated by the CPLR to Crane Co. is fundamentally unfair and, therefore, against public policy.

Crane Co. is a large manufacturing concern with a long history – it was founded prior to the American Civil War. Over the decades, Crane has manufactured numerous product lines with numerous purposes for numerous markets. Some of its product lines have consisted of specialized industrial equipment.

Manufacturing industrial equipment can be an extremely lucrative endeavor. There are high barriers to entry, which minimize competition and permit higher prices to be charged than in markets with more participants. Like any commercial venture, it also entails certain costs and risks. Specialized industrial equipment often poses latent dangers, and often results in calamitous and expensive bodily injuries. By placing a product on the market with a potentially flawed design or potentially inadequate warning, a manufacturer assumes a finite, but uncertain, amount of inchoate liability, which may take years or decades to vest.[34]

[34] The fact pattern in many significant cases reflects the reality that liability for negligent design or failure to warn regarding industrial equipment often vests long after the initial act of negligence. The plaintiff in Liriano was injured in 1993 by a meat grinder manufactured over

By choosing to do business in a state without a statute of repose, Crane voluntarily assumed the economic risk associated with taking on an unpredictable amount of potential future liability that would remain inchoate for several decades. Crane made the decision that access to New York's markets was worth being subject to New York's laws. Now that the costs associated with those choices are coming due, Crane is protesting that it is unfair that it must pay them, and is asking this Court to exempt it from the ordinary rules associated with the allocation of liability in New York State.

Mr. Suttner had a good faith claim that Crane Co. was partially liable for his injuries. His estate had every right to hale Crane into court to answer his allegations and, if settlement could not be reached, his estate had the right to prove Crane's liability to a jury, by a preponderance of evidence, which it did.

Because of Crane's choices and actions in the marketplace, there are a number of people who, like Mr. Suttner, are capable of raising a legally valid question of fact as to whether Crane's failure to warn about intended use of its

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three decades earlier. The plaintiff in Gebo v. Black Clawson, 92 N.Y. 387 (1998), was injured in 1990 by a device constructed in 1966. The plaintiff in Gray v. R. L. Best Co., 78 A.D.3d 1346 (3rd Dept, 2010), was injured in 2005 by a press manufactured in 1974. These are just three examples of published cases which note, in passing, when the product happened to have been manufactured. Cases pertaining to accidents involving long-lived durable goods rarely bother to make reference to the age of the product in question at the time of the injury, presumably because no New York court has ever held that the date of manufacture is a relevant factor which should be considered.

valve contributed to their terminal cancer. One of the costs associated with its business is that Crane will have to settle or defend those claims. This may be inconvenient or expensive, but it is an inconvenience and an expense to which every manufacturer that chooses to take advantage of New York's markets must agree. To reject the traditional, analytical approach in favor of a bright-line rule immunizing Crane would permit a company to remove a set of inchoate liabilities it accrued as a result of its conduct off of its balance sheet and shift those costs on to the general public.

The system has a number of protections in place to aid Crane. Crane is very rarely the only source of asbestos to which a plaintiff was exposed, and so its actions are virtually never alleged to have been the sole proximate cause of a plaintiff's injuries. Article 16 of the CPLR permits Crane to prove the liability of its co-tortfeasors, including that of bankrupt entities, and entitles it to an offset based on the total settlements from co-tortfeasors and the amount of liability assigned to the other entities.[35] Article 14 of the CPLR protects Crane's right to seek contribution or indemnification from its co-tortfeasors. *See*, CPLR 1401.

[35] In its Statement of Facts, Crane gratuitously notes that Plaintiff's initial complaint named thirty-seven defendants. *See*, Brief for Appellant at 6. The complaint, of course, named every defendant the plaintiff and his counsel had a good faith belief might share in the liability for his injury. Those against whom there turned out to be no admissible evidence were released by stipulation and the remainder settled. At trial, the jury asked to consider the liability of nineteen entities and attributed fault to seventeen. Defendant likely cites the number of named defendants

In the present case, despite the fact that Crane was the sole defendant at trial, Crane was able to present a compelling liability case against its fellow tortfeasors, leading the jury to find it liable for less than 1/20 of Mr. Suttner's damages. (R. 34.). (For comparison's sake, Crane was found 4% liable, as were two other manufacturers of industrial valves. Manufacturers and sellers of thermal insulation were found 45% liable, and the manufacturer of the gaskets and packing that were installed in, and rendered friable by, Crane's valves, was assigned 15% liability.). Id.

Crane protests in a footnote that the protections afforded it by Article 16 are insufficient because it might be held jointly and severally liable under the recklessness exception to Article 16 or a jury might award punitive damages. Brief for Appellant at 7, FN 3. However, the recklessness exception and the concept of punitive damages exist for a reason. If Crane's misconduct rose to the level that, legally speaking, a jury can properly find it reckless, or award punitive damages against it, then it needs to account for that potential liability as part of its business liabilities. If its conduct did not rise to the minimum legal threshold necessary to

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in an attempt to suggest that the plaintiff must have cast an unreasonably wide net. However, in a situation where a large number of entities have some potential liability, such as a dozen vehicle pileup or a toxic exposure case involving a number of common products, there is nothing remotely improper about suing a large number of defendants. Far from showing that Crane is a victim of litigative overreach, it shows that Crane had a full and fair opportunity to make the case that its co-tortfeasors were the primary parties responsible for the injury. R. 34.

sustain such a finding, then the trial judge or an appellate court will provide a remedy. In either case, it is a matter of the rules operating as they were written and intended.

5. This Court Should Decline Crane's Invitation to Substitute Foreign Law for Controlling New York Precedent

The high courts of Washington State and California have both issued decisions that embraced a single factor test which holds that a manufacturer virtually never has a duty to warn regarding the foreseeable hazards cause by components that it did not place in the stream of commerce. The California case specifically dealt with Crane valves. See Braaten v. Saberhagen Holdings, 165 Wash.2d 373 (2008) and O'Neil v. Crane Co., *supra*, 53 Cal.4th 335 (Cal. 2012). Both of these cases contain brief citations to Rastelli.

Crane, unable as it is to locate a single New York Appellate case that supports its proposed rule, has made extensive attempts to rely on these, and other foreign cases, at every stage of this proceeding. Indeed, Crane's Brief cites more cases form other jurisdictions than it does from New York State courts, and briefs O'Neil at greater length than any other case other than (debatably) Rastelli.

O'Neil and Braaten both endorse a narrow approach to stream of commerce and apply it to protect manufacturers from liability related to replacement parts in

both design defect and failure to warn cases. These decisions are incompatible with New York law for the reasons stated in Points I.C.3. and I.D.3., *supra*.

Even Crane has admitted that New York recognizes circumstances where a manufacturer which did not place the injury causing agent in the stream of commerce may still be held liable for foreseeable injuries caused by that agent's use in its product.[36] The out-of-state cases, in contrast, represent exactly the kind of bright-line rule Enright warned against. *See*, O'Neil, 54 Cal.4th at 335 (recognizing "'a bright-line legal distinction' imposing liability only on those entities responsible for placing an injury-producing product into the stream of commerce." *internal citation omitted*); Braaten, *supra*, 165 Wash.2d at 392 (2008) (holding duty to warn evaporated when original parts were replaced with substantially similar replacement parts).[37]

[36] Crane admits that the manufacturer in Sage was properly held liable because the third party replacement part did no more than further the initial negligent design. Brief for Appellant at 29-31. Crane further admits that a manufacturer may have a duty to warn about products that it did not place in the stream of commerce (or control the production of) if those products were necessary to operation of the manufacturer's product. Brief for Appellant at 22, *citing* Rogers, *supra*. *Compare*, O'Neil, *supra*, 53 Cal.4th 335 at 350, FN 6. (California strict stream of commerce rule would apply even if the consumable product was necessary for the item's function.).

[37] Washington's experience with the inequitable nature of bright-line rules has mirrored that of New York. In Marcias v. Saberhagen Holdings, Inc., 175 Wash.2d 402 (2012), the plaintiff alleged that defects in his respirator caused him to become exposed to asbestos, despite his attempts to use respiratory protection. The Supreme Court of Washington permitted his cause of action to go forward, despite the fact that the respirator did not supply the injury-causing agent, in the face of a strong dissent arguing that the majority was betraying the bright-line rule.

This Court has previously recognized that Washington's approach to product liability is inconsistent with New York's, and declined to adopt the alien law. *See*, Denny v. Ford Motor Co., *supra*, 87 N.Y.2d at 260 (declining to adopt Washington's "single analytical test."); *Similarly*, Braaten, *supra*, 165 Wash.2d at 285, FN 6 (contrasted Washington's strict stream of commerce approach which conflicts with jurisdictions, "that apply a more negligent-like approach to product claims.").

Despite the large body of contrary precedent, Crane has criticized the courts below for not taking sufficient interest in their sister states' law, and for failing to discuss Braaten and O'Neil's citation of Rastelli:

> Notably, both the supreme courts of California and Washington supported their holdings by citing this Court's decision in *Rastelli*. Yet, neither the trial court nor the Appellate Division ever referenced the decisions rendered by these courts, let alone attempted to argue that these courts misinterpreted this Court's holding in *Rastelli*.

Brief for Appellant at 32.

The entirety of the Braaten Court's interpretation of Rastelli consists of a parenthetical summary in a string cite, which reads, "tire manufacturer who produced a sound product had no duty to warn of danger associated with a defective rim manufactured by another because the tire manufacturer had no role in placing the rim into the stream of commerce, derived no benefit from its sale, did

not contribute to the alleged defect, had no control over it, and did not produce it," Braaten, *supra*, 165 Wash.2d at 387 and a footnote reading, "In addition, there are some cases where the combination of two sound products creates a dangerous condition and both manufacturers have a duty to warn." Id. at 385 FN 7 *citation to* Rastelli *omitted.*

The summary of Rastelli in Braaten appears tenth in a string of fifteen cases which are cited for the general proposition that a previous Washington case was "in accord with the majority rule nationwide." Braaten at 386. Crane has used this passage to argue that, "courts across the United States have looked to *Rastelli* to define 'the majority rule nationwide' in cases like this one." Brief for Appellant at 16.

O'Neil's discussion of Rastelli comes in the context of a passage reading, "[N]o case law … supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer." O'Neil, 53 Cal.4th at 352 *internal citation omitted*. The California Court of Appeals' entire discussion of Rastelli consists of the following passage and a footnote:

> Decisions from other jurisdictions are in accord. … In Rastelli, the plaintiff sued the tire manufacturer, arguing that Goodyear should

> have warned about the inherent dangers of multipiece rims because its tires were compatible for use with such rims. [*Citation omitted*.] New York's highest court refused to impose such a duty based solely on foreseeability. The court stressed that Goodyear had no control over the defective rim's production or marketing, it derived no benefit from the rim's sale, and Goodyear's own product did not create the defect or combine with the rim to create a hazardous condition that did not previously exist. [*Citation omitted*.]

O'Neil, 53 Cal.4th at 353. The subsequent footnote also compares a California "case where the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn" and cites Rastelli for the proposition. O'Neil, 53 Cal.4th at 361.

Plaintiff respectfully submits that neither O'Neil nor Braaten has any proper bearing on the Suttner case. Unlike Justice Lane's decision (and the decisions of the courts in Dummitt and Dummitt II), neither O'Neil nor Braaten addresses New York product liability law as a whole. Neither Court appeared to be aware that there are numerous decisions by New York appellate courts inconsistent with bright-line reading of Rastelli. (*See, generally*, Points I.E.2. and I.E.3., *supra*). Neither Court even cites Berkowitz, one of Rastelli's progeny that was, at the time, the only New York Appellate case to address the use of third party asbestos components.

Plaintiff respectfully submits that the voluminous opinions of the many New York State trial court and appellate judges that have interpreted Rastelli within the

context of briefing which focused on New York precedent are, individually and collectively, more applicable to the analysis of New York's law than are passing citations by the courts of sister states, however learned and august their justices may be.[38]

Justice Lane addressed Crane's foreign authority by writing, "Finally, I am unpersuaded by out-of-state precedent. The law in New York on the issue is clear." (R. 23.). This is a more than sufficient analysis of Crane's extra-jurisdictional red herring.

[38] Both the California and Washington decisions recognize exceptions in the case where the products, working together, create a risk. *See also*, Shields v. Hennessy Industries, Inc., 205 Cal.App.4th 782 (Cal.App.1st Dist. 2012) (brake grinder manufacturer had a duty to warn of the hazards associated with using third party asbestos-containing components in its grinder). The present case, where the evidence shows that the operation of the valves contributed to the gasket and packing's dangerous state, would seem to fall into those states narrow exceptions to the bright-line rule. C*ompare* O'Neil 53 Cal.4th at 361 ("Nothing about defendant's pumps and valves caused or combined to release this dust."). In the present case, Crane appears to concede that, but for the operation of the valves, the gaskets would not have become friable. (R. 1017-1018.). While Crane is likely to object that the valves at issue in that case and the valves at issue in this case were the same, and that if they did not contribute to the gaskets' dustiness in O'Neil, then they must not have done so in Suttner, such argument would be specious. Every case alleging that Crane's valves have caused an injury have to address numerous complexities involving engineering, corporate history and the civil discovery process. The vicissitudes of litigation, including trial strategy, jurisdictional rules pertaining to the admissibility of evidence and discretionary interpretations thereof, and even the availability of expert witnesses can result in products involving similar time periods and products looking quite different. In the present case, for instance, Mr. Suttner did not have evidence of a relationship showing more than mere compatibility between Crane's valves and the insulation he encountered, while in Dummitt, the plaintiff produced extensive evidence that Crane specified and controlled the lagging on its valves. The plaintiff raises this not in hopes of persuading this Court that she would have prevailed if this Appeal were heard in California, but rather to point out that the factually unique nature of each case invariably leads to complexities that make New York's case-specific analytical approach is better able to address than the blunt tool of California's bright-line rule.

Pages 5-6 of Justice Lane's decision and order cite ten New York State Appellate cases which are inconsistent with Crane's proposed reading of Rastelli. (R. 17-18.). Crane has submitted a brief which halfheartedly distinguishes two of those cases (Sage and Call) and says nothing regarding the other eight, five of which cite Rastelli.

Crane's use of foreign cases seems to rely on an implicit *argumentum ad populum*. Despite the fact that its reading of Rastelli has been soundly rejected by the New York judiciary, Crane insists on referring to its interpretation as "the majority rule nationwide," and seems to regard its universal adoption as an inevitable matter of manifest destiny. However, rulings from two jurisdictions with a pre-existing bright-line rule do not a majority make, and the other non-New York cases cited by the defendant are similarly unpersuasive.

In addition to the California and Washington cases Crane cites two cases decided under Maritime Law and two cases decided under Maryland law, all of which declined to hold that a product manufacturer had a duty to warn about third party asbestos components. *See*, Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir., 2005) (turbine manufacturer not responsible for injuries arising from third party insulation under Maritime Law); Conner v. Alfa Laval Inc., 842 F.Supp.2d 91 (E.D.Pa. 2012) (equipment manufacturers not responsible for injuries arising

from third party components under Maritime Law); Ford Motor Co. v. Wood, 119 Md.App 1 (Md. Ct. Spec. App., 1998) (scope of car manufacturer's duty to warn did not include third party replacement brakes); and May v. Air and Liquid Systems Corp., 219 Md.App. 424 (Md. Ct. Spec. App. 2014) (pump manufacturer had no duty to warn of hazards of third party components; court acknowledging it is adopting a "bright line in the law" and contrasting New York law).

However, Maritime Law does not necessarily follow a variation of Crane's bright-line rule. *See*, Salisbury v. Asbestos Corp., 2014 U.S. Dist. LEXIS 11295 (E.D.P.A) at *8 (recognizing a narrower general duty than New York, but holding shipbuilder's duty to warn of asbestos-insulation hazard is not cut off when original asbestos materials are replaced by third party's asbestos materials); Quirin v. Lorillard Tobacco Company, 17 F.Supp.3d 750 (N.D. Ill., 2014) (concluding that, "a reasonable jury could find facts that imposed upon Crane Co. a duty to warn Mr. Quirin about asbestos exposure resulting from gaskets and packing used with its valves, even if it did not supply the gaskets and packing actually encountered by Mr. Quirin.").

Appellate courts in New Jersey and Kentucky have held that a jury may find that a manufacturer breached a duty in similar circumstances. *See*, Hughes v. A.W. Chesterton Co., 435 N.J.Super. 326, 340-341 (N.J. A.D., 2014) (finding a

duty to warn of third party asbestos-containing replacement parts); Branon v. Gen. Elec. Co., 2005 WL 1792122, at *2, n.6 (Ky.App.Ct., 2005) (holding that turbine manufacturer may be liable for injuries arising from third party insulation).

Other jurisdictions that fall outside the scope of Crane's purported "majority rule nationwide" include Pennsylvania, Rhode Island, Virginia, Illinois and South Carolina. *See*, e.g. In re Asbestos Products Liability Litigation (No. VI) [Hoffeditz], 2011 WL 5881008 (E.D.Pa., 2011) (vehicle manufacturer duty to warn for replacement asbestos brakes); Chicano v. GE, 2004 U.S. Dist. LEXIS 20330 (E.D.Pa. 2004) (turbine manufacturer's duty to warn of third party insulation); Sweredoski v Alfa Laval, Inc., 2013 R.I. Super. LEXIS 185(R.I. Super. Ct, Oct. 21, 2013) (Crane Co.'s duty to warn of asbestos-containing replacement parts); Phillips v. Hoffman/New Yorker, Inc., 2013 Del.Super. LEXIS 378 (Del.Sur.Ct., Aug. 30, 2013) (applying Virginia law) (duty to warn of asbestos-containing replacement parts in industrial equipment); Sether v. Agco Corp., 2008 WL 1701172 at *3 (S.D.Ill. 2008); (duty to warn of insulation on turbines); Lindquist v. Buffalo Pumps, Inc., 2006 WL 3456346 at *2 (R.I.Super.Ct., 2006) (duty to warn of third party asbestos-containing replacement parts in pumps); Sparkman v. Goulds Pumps, Inc., 2015 U.S. Dist. LEXIS 19579 (D.S.C., Feb. 19, 2015) (rejecting Crane Rule in the contest of replacement gaskets and packing).

Surveying the full national landscape makes it look less like there is a majority rule nationwide, mandating a narrow duty to warn, and more like a diverse range of states have reached a wide range of conclusions for varying reasons of precedent and policy. (The court that wrote, "the weight of jurisprudence across the country, including in Rhode Island, suggests that a defendant cannot categorically avoid liability for a plaintiff's injuries for the sole reason that those injuries were directly caused by exposure to a third party's replacement parts," may have painted a more accurate picture of the landscape than the court that suggested that a single factor test represented, "a majority rule nationwide". *See*, Sweredoski, *supra*, 2013 R.I. Super. LEXIS 185 at *23; Braaten, *supra*, respectively.)

Uniformity of custom between sister states is not automatically a virtue. New York and California have adopted contrary rules about the scope of the duty to warn because they differ in their carefully considered opinions about the best public policy. Such differences are common. Different states have made a wide variety of choices about such weighty policy matters as the workers' compensation bar, the role of punitive damages, the appropriate approach to indemnification, and the appropriate length of statutes of limitations. Our State should not abandon its long-standing principles in order to adopt the law of California or Washington.

II. CRANE IS NOT ENTITLED TO JUDGMENT UNDER THE COMPONENT PART DOCTRINE

As a backup argument to its Rastelli-based assertions, Crane contends that it had no duty to warn under the component parts doctrine. This doctrine provides that a supplier of a component used in larger mechanical system is liable only for injuries caused by the defects in the component itself, rather than defects in the larger system which may cause the component to become dangerous. It is inapplicable to the present case, as the plaintiff has alleged that Crane's valves were, themselves, dangerous when used as intended.

According to the Restatement, component-part suppliers are generally shielded from liability because "it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective." Restatement (Third) of Torts: Products Liability ("Restatement") § 5cmt. The fact that the valves were integrated into a larger system is irrelevant to whether or not Crane breached a duty to adequately warn, and the valves' latent dangers were not created by General Motors's integration of the products into a larger system. The valves were what one of the cases cited by Crane refers to as a "product with a specific purpose and use", In re TMJ Implants Products Liability Litigation, 872

F.Supp.1019, 1026 (D.Minn., 1995), and therefore outside of the scope of the doctrine.[39]

According to the Third Department, the component part doctrine is applicable "where a component part manufacturer produces a product in accordance with the design, plans and specifications of the buyer and such design, plans and specifications do not reveal any inherent danger in either the component part or the assembled unit, the component part manufacturer will be held blameless for an injury to the buyer's employee in a strict products liability action." Leahy v. Mid-West Conveyor Co., 120 A.D.2d 16, 18 (3rdDept, 1986).

In the present case, the buyer purchased finished products from Crane Co. Those products created a latent danger of cancer about which Crane did not issue any warning. If Crane's apparent interpretation of the doctrine were embraced, then manufacturers who create products that are intended to be used as part of larger systems would be almost completely absolved of their duty to warn. The

[39] It is anticipated that, in reply, the defendant may raise the fact that, in the Restatement (Third) of Torts "valves" are given as an example of a component to which the doctrine may apply under certain circumstances. This should not be dispositive. The term "valve" can describe anything from a relatively simple device to a large piece of industrial equipment composed of two dozen or more individual components. *See*, e.g., Addendum A. If the component parts doctrine had any applicability to the current action, and it does not, it would protect the gasket manufacturer, which sold its parts in a non-friable condition, rather than Crane, whose products cause the asbestos in the gaskets to become friable.

narrow, carefully formulated doctrine described by the Restatement does not contemplate any such blanket immunity from a manufacturer's ordinary duties.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court affirm the order of the Appellate Division affirming the judgment of the Supreme Court, Erie County.

Dated: Buffalo, New York
March 6, 2015

Respectfully submitted,

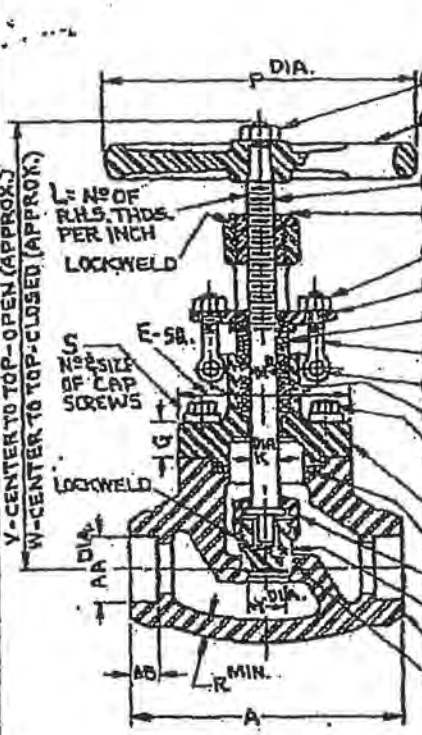
LIPSITZ & PONTERIO, LLC

Dennis P. Harlow, Esq.

ADDENDUM A

B-97825

LETTER CHANGE	
D EP-4225 4-25-74	
C ER-4548 YOKE BUSHMAT'L WAS NOT RE-RESET 12-3-70 NRP	
3-10-64 B CAP SCREW WAS 12 PT.	
No R/P	
F A EP-711,285 VX-3986-E REF. B-91956	



Nº	NAME OF PART	MATERIAL
1	BODY	CAST CARBON STEEL INTEGRAL STELLITE SEAT
2	BONNET	CAST CARBON STEEL
4	DISC	CARBON STEEL STELLITE FACED
8	STEM	EXELLOY
9	YOKE BUSHING	ALUMINUM BRONZE
12	PACKING	BRAIDED ASBESTOS
13	GLAND	STEEL-SILICONIZED
14	GLAND FLANGE	CAST CARBON STEEL
15	HANDWHEEL	MALLEABLE IRON
17	DISC STEM RING	CHROME MOLY. STEEL
20	DISC WASHER	HARDENED STEEL
21	GLAND EYE BOLTS	EXELLOY
22	GLAND BOLT NUTS	STAINLESS STEEL
23	GROOV-PIN	STEEL-ZINC PLATED
24	BONNET GASKET	SPIRAL WOUND S.S. WITH ASBESTOS FILLER
25	WHEEL NUT	STEEL ⊗
26	HEX. HEAD CAP SCREW	TRIPLEX STEEL

MANUFACTURE DISCONTINUED AS REGULAR PRODUCT IN

ALL SIZES PER VX-4375

⊗ PHOSPHATE COATED.

SIZE	A	E	G	K	L	M	P	R	S	V	W	Y	AA	AB
1/2	4 1/8	3 9/16	3/4	5/8	8	1.14	4	3/8	4 1/2	10	9 1/2	1/2	.86	5/8
3/4	5 3/8	3 3/4	7/8	5/8	8	1.14	5	7/16	4 9/16	9 5/8	9	11/16	1.07	11/16
1	6 1/8	4 5/16	1	3/4	7	1.27	7	1/2	5 5/8	11 1/8	10 5/8	13/16	1.34	3/4
1 1/4	7 1/8	5 5/8	1 1/8	7/8	6	1.39	8	9/16	6 5/8	13 1/4	12 1/4	1 1/16	1.68	13/16
1 1/2	7 3/8	5 5/8	1 1/8	7/8	6	1.39	9	12/32	6 5/8	14 1/4	13	1 5/16	1.92	1 5/8
2	9 3/8	7 3/8	1 3/8	1 1/8	6	1.77	14	3/4	6 7/8	17 1/8	15 3/4	1 3/4	2.41	1

DIMENSIONS ARE IN INCHES UNLESS OTHERWISE SPECIFIED

DRAWN	CHECKED	EXAMINED	NOTED	APPROVED
3-5. D.L. BRYANT				GIAUQUE

1500 LB. CAST STEEL GLOBE VALVES
1/2" TO 2" SIZES - BOLTED BONNET - O.S.&Y. - SOCKET WELDING ENDS
GLAND EYE BOLT DESIGN — 1963 DESIGN
GENERAL DIMENSIONS — CAT. 3852-U
SCALE — DATE 6-10-63

CRANE C
No B-97825
ALWAYS GIVE LAST LETTER GROUP

CRBBTX00062338

UNPUBLISHED CASES

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

LETTER DECISION AND ORDER

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

Findings of Fact:

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

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

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

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

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

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

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

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

Conclusions of Law:

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

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

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

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

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

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

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

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

Id. at150.

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

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

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

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

ENTER,

Hon. James W. McCarthy
Supreme Court Justice

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

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

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

Plaintiffs,

-vs-

CRANE CO., et al.,

Defendants.

DECISION
AND ORDER

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

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

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

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

The plaintiff's decedent, Maurice P. Forth, was born on November 3, 1939, and was approximately 68 years of age at the time of his death. For the purposes of this motion the plaintiffs have alleged that he was exposed to asbestos containing materials while working at the Knolls Atomic Power Labs in Schenectady, New York.

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

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

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

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

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

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

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

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

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

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

This writing constitutes the Decision and Order of the Court.

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

HON. RICHARD T. AULISI
Justice of the Supreme Court

ENTER

[*1] **Carol E. Sawyer, Individually and as Executrix for the Estate of DONALD F. SAWYER, Plaintiffs, against A.C. & S., Inc., et al., Defendants.**

111152/99

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 NY Slip Op 51612U; 32 Misc. 3d 1237A; 2011 N.Y. Misc. LEXIS 4162

June 24, 2011, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HEADNOTES

[**1237A] Products--Liability--Failure to Warn of Danger--Duty to warn attaches where manufacturer knew or should have known that its product would or should be combined with inherently defective material for its product's intended use.

COUNSEL: [***1] For Plaintiff: Michael Fanelli, Esq., Weitz & Luxenberg.

For Defendant: Eric R. L. Cottle, Esq., David Oxamendi, Esq., K & L Gates.

JUDGES: SHERRY KLEIN HEITLER, J.S.C.

OPINION BY: SHERRY KLEIN HEITLER

OPINION

Sherry Klein Heitler, J.

In this asbestos personal injury and wrongful death action, defendant Crane Co. moves pursuant to *CPLR § 3212* for summary judgment dismissing the complaint and all other claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced by Carol E. Sawyer, individually and as executrix of the estate of Donald F. Sawyer, to recover for personal injuries allegedly caused by Mr. Sawyer's exposure to asbestos-containing products while working as a plumber at the State University of New York at Oswego. Mr. Sawyer was not deposed prior to his death. On March 31, 2010, plaintiffs produced Mr. Sawyer's former co-worker, Mr. Robert Culeton, to provide testimony concerning Mr. Sawyer's work history and alleged exposure. Mr. Culeton testified that Mr. Sawyer worked as a pipefitter and plumber at SUNY Oswego during the 1960's and 1970's. He testified that Mr. Sawyer was exposed to asbestos from insulation used in conjunction with Crane Co. valves, [***2] but not from the valves themselves. According to Mr. Culeton, Crane Co. did not specify that its valves should be insulated with asbestos. He testified that the decision to insulate the valves would be made by an architect or engineer at the facility. He further testified that the insulation did not come packaged with Crane Co. valves.

Crane Co. does not dispute that Mr. Sawyer worked with its valves over the course of his career or that he was exposed to asbestos in connection

with same. Instead, Crane Co. argues that it did not manufacture or supply any product that would release any asbestos fibers to which [*2] Mr. Sawyer may have been exposed. In this regard, Crane Co. contends that it had no duty to warn of the hazards associated with asbestos products that were incorporated into its products, which were manufactured by third parties, to wit, asbestos-containing insulation. In opposition, plaintiffs assert that Crane Co. had a duty to warn of the hazards associated with asbestos because it knew, recommended, endorsed, and specified that its valves should integrate and be insulated with asbestos-containing materials.

DISCUSSION

Summary judgment is a drastic remedy that must not be granted [***3] if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Aminate du Quebec, Ltee, 297 A.D.2d 528, 528-29, 747 N.Y.S.2d 79 [1st Dept 2002]*; *Reid v Georgia Pacific Corp., 212 A.D.2d 462, 462, 622 N.Y.S.2d 946 [1st Dept 1995]*. To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]*; *CPLR § 3212[b]*.

A plaintiff "may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product." *Rastelli v Goodyear Tire & Rubber Co.,79 NY2d 289, 297, 591 N.E.2d 222, 582 N.Y.S.2d 373 [1992]*; *see also Voss v Black & Decker Mfg. Co., 59 NY2d 102, 106, 450 N.E.2d 204, 463 N.Y.S.2d 398 [1983]*. A manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp., 92 NY2d 232, 237, 700 N.E.2d 303, 677 N.Y.S.2d 764 [1998]*; *see also Rogers v Sears, Roebuck & Co., 268 AD2d 245, 701 N.Y.S.2d 359 [1st Dept 2000]*; *Baum v Eco-Tec, Inc., 5 AD3d 842, 773 N.Y.S.2d 161 [3d Dept 2004]*. Although a product may "be reasonably safe when manufactured and sold and [***4] involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn." *Cover v Cohen, 61 NY2d 261, 275, 461 N.E.2d 864, 473 N.Y.S.2d 378 [1984]*. The existence and scope of an alleged tortfeasor's duty is a legal question to be determined by the trial court. *Di Ponzio v Riordan, 89 NY2d 578, 583, 679 N.E.2d 616, 657 N.Y.S.2d 377 [1997]*; *Lynfatt v Escobar,71 AD3d 743, 744, 896 N.Y.S.2d 450 [2d Dept 2010]*.

Defendant argues that it is not legally responsible for any gaskets, packing, or insulation applied by third parties to Crane Co. valves post-sale and urges this court to apply the holding in *Rastelli, supra, 79 NY2d 289*, to relieve it from liability for those asbestos-containing parts introduced into its product which it neither manufactured nor supplied for commercial use. In *Rastelli, supra*, the Court of Appeals declined to hold a tire manufacturer liable for injuries that resulted from a defective rim manufactured and installed on its tires by third parties. The Court held that the tire manufacturer "had no duty to warn about the use of its tire with potentially dangerous multipiece rims produced by another" where it "did not contribute [***5] to the alleged defect in a product, had no control over it, and did not produce it." The Court reasoned that the tire manufacturer "had no role in placing that rim in the stream of commerce, and derived no benefit from its sale." *Id. at 298*.

Conversely, in *Berkowitz v A.C. & S., Inc., 288 AD2d 148, 148, 733 N.Y.S.2d 410 [1st Dept 2001]*, the Appellate Division, First Department held that a pump manufacturer could be held liable for asbestos-containing insulation manufactured and installed by third parties post-sale where the manufacturer knew that asbestos-containing insulation ought to be or would be used with its [*3] pumps. The *Berkowitz* court opined that while the defendant's pumps might be able to run without insulation, it was at the very least questionable whether pumps used to transport steam and hot liquids could be operated safely on board ships without insulation, which the defendant knew would be made from asbestos, giving rise to the question whether there was a duty to warn. *Cf. Penn*

v Jaros, Baum & Bolles, et al., 25 AD3d 402, 809 N.Y.S.2d 6 [1st Dept 2006].

This court finds that *Rastelli* and *Berkowitz* are not mutually exclusive nor are they in conflict. As one New York court recently found, "these divergent [***6] holdings [rest] on consistent application[s] of the same forseeability principle." *Curry v American Standard, et al., 2010 U.S. Dist LEXIS 142496, at *2 [SDNY Dec. 6, 2010, Gwin J]*. Judge Gwin's analysis is instructive (*Id. at 3*):

The Court thus finds that a manufacturer's liability for third-party component parts must be determined by the degree to which injury from the component parts is foreseeable to the manufacturer. Accordingly, the issue of Crane's liability for third-party component products rests in the degree to which Crane could or did foresee that its own products would be used with asbestos-containing components. Where Crane's products merely could have been used with asbestos-containing components, the New York Court of Appeals holding in *Rastelli* cautions against imposing liability. Yet where, as in *Berkowitz*, Crane meant its products to be used with asbestos-containing components or knew that its products would be used with such components, the company remains potentially liable for injuries resulting from those third-party manufactured and installed components.

Indeed, *Rastelli* and *Berkowitz* address two different situations. In *Rastelli*, there was no duty to warn because [***7] the combination of a manufacturer's own sound product with another defective product somewhere in the stream of commerce was too attenuated to impose such a duty. In *Berkowitz*, however, if that same manufacturer knew or should have known that its product would be or ought to be combined with inherently defective material for its product's intended use, that gives rise to a duty to warn of known dangers attached to such use. In *Curry, supra*, the court applied *Berkowitz* and denied Crane Co.'s motion for summary judgment because, among other things: (1) expert testimony suggested that it was normal industry practice for Crane Co. valves to be insulated with asbestos; (2) flange gaskets used to connect Crane Co. valves to other equipment ordinarily contained asbestos; and (3) Crane Co.'s own product catalog lists asbestos-containing insulating materials approved for use with its valves.

Nevertheless, in reliance on the recent decision in *Kosowski v A.O. Smith Water Products, et al.*, Index No. 000128/2010 [Sup. Ct., Oneida Co., McCarthy, J., Jan. 5, 2011, n.o.r.], defendant contends that summary judgment should be granted in its favor. The *Kosowski* court declined to hold Crane Co. liable [***8] for injuries which resulted from the plaintiff's alleged exposure to asbestos. Distinguishing *Berkowitz* and limiting its decision to the facts of its case, the court held that the plaintiff failed to produce any proof that the valves at issue "could not be operated safely without insulation, or that the moving defendant knew that such insulation would necessarily be made from asbestos, other than by inference." *Id*. at 4; *cf. Berkowitz, supra.* The court observed that the only proof offered by that plaintiff was the deposition testimony of Crane Co.'s corporate representative in an unrelated action, who testified that "some form of insulation would be required, and that [] some of Crane Co.'s valves were designed to be insulated." *Kosowski, supra*,at 4. On authority of *Kosowski, supra*, defendant argues in this case that the [*4] evidence produced by plaintiffs is not sufficient to impose liability on Crane Co. for any asbestos-containing insulation, gaskets, or components used with its valves to which Mr. Sawyer claims he was exposed.

To the contrary, the evidence presented by plaintiffs in this case is a far cry from that set forth in *Kosowski, supra*. Here, there is abundant evidence which [***9] in total indicates that Crane Co. at the very least knew or should have known about the hazards associated with asbestos and that its valves would be insulated with same for their intended use. Crane Co.'s answers to interrogatories, submitted in an unrelated action, concede that certain Crane Co. valves "had enclosed within their metal structure asbestos-containing gaskets, packing, or discs" until sometime in the 1970's or 1980's, well into the relevant time period. (*See* Opposition to Defendant's Motion for Summary Judgement, dated March 15, 2011 ("Opposition"), Exhibit 2, p. 6). Plaintiffs further submit excerpts from a 1925 study manual compiled by Crane Co. for its employees

(Opposition, Exhibit 3), which describes how asbestos-containing coverings and asbestos-containing cements should be used on Crane Co. products in order to prevent heat loss/dissipation (pp. 157-59):

Insulation to prevent the loss of heat has been in use in connection with power heating and refrigeration installations for a number of years, and is today recognized as *one of the necessities for economical operation of a plant* (emphasis added).

* * * *

The real object of insulation is to prevent the flow of heat [***10] to outside surrounding air from the boiler, apparatus or pipe in which the heat may be generated, stored or conveyed, or, as in refrigerating systems, to prevent the flow of heat from the outside to fluids or solids which should be kept cool or at low temperatures.

* * * *

No type of covering suits all conditions, and as a consequence the several materials on the market are used for different services. *The bases for the usual commercial coverings are asbestos* . . . . Covering material is usually furnished in molded lengths in three-foot sections, split lengthwise, so that it may be applied readily to pipe. *The joints are filled in with asbestos cement, which is also used to cover irregular surfaces, valves, etc., and the whole covered with canvas, which, when painted, presents a neat appearance* (emphasis added).

Plaintiffs also submit an undated product catalog which further confirms Crane Co.'s recommendation that asbestos-containing materials be used in conjunction with its valves. This catalog shows pictures of "asbestos-sheet millboard", "asbestocel blocks", "finishing and insulating cements", and Cranite[1] all of which were recommended for use by Crane Co. The catalog provides in [***11] relevant part (Opposition, Exhibit 4, pp. 9-10): [*5]

> 1 Cranite was the name of Crane Co.'s standard asbestos sheet gasket material. (Opposition, Exhibit 4).

Asbestos Sheet Millboard is recommended for general uses requiring sheet or board for protection against fire, heat, acid fumes, etc. It is frequently used as a fireproof lining for floors, partitions, ceilings, elevator shafts, ranges, stoves, grates, etc. Millboard can be cut with shears to any size desired and fastened with nails or screws. Standard sheet size is 42 x 48 inches; cut pieces can also be furnished. Thicknesses of 1/32 to 1/2 inch are available.

* * * *

[Describing Asbestocel Blocks] An economical insulation for temperatures up to 300°F. Ideal for boilers, warm air ducts, etc. The blocks are made of built-up asbestos felt layers, alternately plain and corrugated. Available in widths from 6 to 36-inch and in lengths from 36 to 96-inch. Coarse Blocks are furnished in thicknesses of 1 to 8 plies with four plies per inch of thickness. Fine blocks are furnished in thicknesses of 1 to 16 plies with six or eight plies per inch of thickness.

* * * *

Johns-Manville cements[2] are unexcelled for insulation of irregular surfaces such [***12] as on valves, flanges, pipe fittings, etc., or as a surface finish over block or sheet insulations in order to seal joints and to provide a smooth durable finish.

> 2 It is undisputed that Johns-Manville products contained asbestos.

* * * *

Cranite Sheet Packing: Cranite Sheet Packing is made of an asbestos composition, using only selected long fiber asbestos, cross laminated to provide unusual tensile strength. It offers a very uniform and high resistance to compression, is exceptionally strong and rugged, and will not deteriorate with age. This packing is *unhesitatingly recommended* for multitude of services, such as steam, water, oil, dry air, acids, ammonia, alkali, gases, etc., and for temperatures up to 750°F. (emphasis added).

There is evidence that Crane Co. knew that asbestos insulation actually would be used in high temperature applications. Plaintiffs submit a 1952 Naval Machinery Manual (Opposition, Exhibit 5)

which credits Crane Co. with providing suggestions and materials. The Manual specifies that asbestos-based insulation should be used to insulate valves when they are utilized for high temperature applications:

Cements also find a ready use for surface finish over block or [***13] sheet forms of insulation, to seal all joints between the blocks and to provide a smooth, attractive finish over which asbestos or glass cloth lagging may be applied []. They are especially suitable, also, for insulating irregular surfaces such as valves, flanges, and pipe fittings . . . . *The use of asbestos pads and blankets is important in the insulation of large irregular surfaces such as turbine casings and for insulating flanges or valves which must be taken down fairly often*. (Emphasis Added).

Defendant argues that it did not direct its customers to use any type of replacement seal or insulation, that it had no control over whether its valves were insulated with asbestos-containing [*6] or non-asbestos-containing products, and that whether or not to insulate its products was a decision made not by it but by the owner of the valves. In support, Crane Co. submits the March 5, 2009 deposition testimony (Opposition, Exhibit D) and July 27, 2010 affidavit (Opposition, Exhibit E) of Anthony Pantaleoni. Mr. Pantaleoni, who served as Crane Co.'s Vice President of Environment, Health, and Safety, testified in an unrelated case that Crane Co. neither made recommendations regarding the use [***14] of insulation on its valves, nor specified that consumers should use asbestos-containing products on same. He averred that Crane Co. could not control whether its valves would have been insulated once they reached the buyer. He also affirmed that Crane Co. valves did not require asbestos-containing insulation to operate properly. In addition to the Pantaleoni testimony, Crane Co. submits the November 19, 2009 trial testimony of Dr. Richard Hatfield, an industrial hygienist who is said to have testified on behalf of a plaintiff in an unrelated asbestos personal injury action (Opposition, Exhibit G). According to defendant, Dr. Hatfield testified that Crane Co. valves do not require the use of asbestos-containing materials to operate properly.

Notwithstanding defendants' purported proofs, the documentary evidence submitted by plaintiffs indicates Crane Co.'s position that the use of Crane Co. valves without asbestos insulation in high-heat settings would have been incredibly inefficient. In fact, this is why Crane Co. "unhesitatingly recommended" its asbestos-based products to its customers. (Opposition, Exhibit 4, p. 7). Conversely, the Pantaleoni affidavit is deficient because there [***15] is no support for the conclusory assertions made therein. While Mr. Pantaleoni attests that the information provided in his affidavit is based upon his personal knowledge, a review of company records, and interviews with current Crane Co. employees, neither company records nor the names or titles of the purported individuals interviewed by Mr. Pantaleoni have been provided. Such unsupported, uncross-examined testimony is insufficient to form the basis of a motion for summary judgment. *See Republic Nat. Bank of New York v Luis Winston, Inc., 107 AD2d 581, 582, 483 N.Y.S.2d 311 [1st Dept 1985]*.

Similarly, the court does not agree with defendant's characterization of Dr. Hatfield's testimony. Dr. Hatfield indicated that while thermal asbestos insulation may not have been necessary for Crane Co. valves to open and close, it was required for other reasons (Defendant's Exhibit G, p. 1136):

Q: When a valve is sent by a manufacturer to a workplace like a shipyard, you wouldn't expect that valve to have asbestos insulation or any other type of insulation on it, would you, sir?

A: When it came there, I wouldn't expect it to have thermal insulation on it.

Q: In fact, valves don't need asbestos insulation to operate, [***16] do they?

A: Well, to open and close, but they need insulation for other reasons.

Q: For the ordinary purpose and function of a valve, they don't need asbestos or any other form of insulation, do they, sir?

A: For their function to allow liquids or steam to go through, they don't have to have thermal insulation on there, but it is put on there for other reasons. [*7]

No amount of artful profiling of Dr. Hatfield's

testimony or plaintiffs' other proofs can mask that Crane Co. valves required insulation.

Apart from whether or not the valves required asbestos insulation to operate efficiently, defendant argues that it is nevertheless shielded from liability pursuant to the *Restatement (Third) of Torts: Products Liability* ("*Restatement*") *§ 5*, which is known as the component-part supplier doctrine. This doctrine in general provides that a supplier of a component[3] to a larger mechanical system is liable only for injuries caused by the component-part itself or the component-part supplier who contributes to the design of the injury-causing system.[4] According to the Restatement, component-part suppliers are generally shielded from liability because "it would be unjust and inefficient to impose liability [***17] solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective."[5] *Restatement § 5, cmt. a*. In addition, multi-use component and raw material suppliers should not have to "assure the safety of their materials as used in other companies' finished products." This would require suppliers to retain experts "in order to determine the possible risks associated with each potential use." *Springmeyer v Ford Motor Co., 60 Cal. App. 4th 1541, 1554, 71 Cal. Rptr. 2d 190 [1st Dist. 1998]*.

3 "Components" include "raw materials, bulk products, and other constituent products sold for integration into other products." *Restatement § 5, cmt. a*.

4 *Section 5 of the Restatement* provides in pertinent part: "One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if: (a) the component is defective in itself and the defect causes the harm; or [¶] (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design [***18] of the product; and [¶] [(b)](2) the integration of the component causes the product to be defective and [¶] [(b)](3) the defect in the product causes the harm.

5 As an example, a manufacturer of a hydraulic valve would not be liable for the product's incorporation into a defective log splitter. *See Childress v Gresen Mfg. Co., 888 F.2d 45, 49 [6th Cir. 1989]*.

This court finds that the component-part supplier doctrine does not relieve Crane Co. from liability. In general, under the component-part supplier doctrine, component part manufacturers are exempt from liability because they manufacture products that are designed to be incorporated into a larger mechanical system. The component is then substantially altered by the customer or integrated into a larger, more complex product over whose design the manufacturer of the component has no control. *See Restatement, § 5, cmt. a*. Here, the evidence shows that while Crane Co. valves are integrated into large piping systems, they are not altered in any way by customers or combined with other "components" to create a new product. Indeed, the Crane Co. valves at issue were used as they were designed to be used, to wit, with asbestos insulation, [***19] asbestos packing, and asbestos cement, all of which were necessary to prevent heat/loss dissipation, and all of which would had to have been disturbed during routine repair and maintenance. (Opposition, Exhibits 3-5); *see also Penn v Jaros, supra, 25 AD3d at 403*; *Rogers* [*8] *v Sears, supra, 268 AD2d at 246*.

Defendant asks the court to rely on that portion of the Restatement which provides that "[s]ome components, such as raw materials, valves, or switches, have no functional capabilities unless integrated into other products." *Id. § 5, cmt. a* But defendant has offered this out of context. The component-part supplier doctrine is a "general rule," the purpose of which is to prevent a component seller from having to "scrutinize another's product which the component seller has no role in developing" and from having to "review the decisions of the business entity that is already charged with responsibility for the integrated product." *Restatement § 5, cmt. a*. In this regard, the Restatement provides the following illustration (*§ 5, cmt. a*):

ABC Chain Co. manufactures chains for a wide

range of uses in industrial equipment. XYZ Mach. Co. purchases chains from ABC for use in conveyor-belt systems [***20] and informs ABC that the chains will be used for that purpose. In the design of a conveyor system by XYZ, part of the chain is exposed. The conveyor system as designed and manufactured by XYZ is defective in that it should include a safety guard . . . . XYZ sells a conveyor system to LMN Co. LMN's employee, E, while working near the conveyor, is injured when her shirt sleeve becomes entangled in the unguarded chain in the conveyor. ABC is not subject to liability to E.

Not all cases fall neatly into the above-quoted archetype. In *Tellez-Cordova v Campbell-Hausfeld/Scott Fetzger Co., 129 Cal App 4th 577, 28 Cal. Rptr. 3d 744[2nd Dist 2004]*, the Court of Appeal of California for the Second Appellate District found that a manufacturer was not entitled to a component-part doctrine defense even though it produced only non-defective grinders, sanders, and saws because they were purportedly designed to be used with defective wheels and disks.[6] These wheels and disks released toxic substances into the air to which the plaintiff was exposed. The court found that the component-part doctrine did not apply because the defendant did not manufacture "component parts to be used in a variety of finished products, outside [***21] their control, but instead . . . manufactured tools which were specifically designed to be used with the abrasive wheels or discs they were used with . . . ." *Id. at 582*. The court noted that the defendants were "not asked to warn of defects in a final product over which they had no control, but of defects which occur when their products are used as intended . . . ." *Id. at 583*.

> 6 The issue of whether a manufacturer can be held liable for products used in conjunction with its own product and the applicability of the component-part supplier doctrine thereto is currently on appeal before the California Supreme Court. *See O'Neil v Crane Co., 177 Cal. App. 4th 1019, 99 Cal. Rptr. 3d 533 [2d Dist. 2009]*, petition for review granted, *223 P.3d 1 [Cal. 2009]*; *but see Walton v The William Powell Co., 183 Cal. App. 4th 1470, 108 Cal. Rptr. 3d 412 [2d Dist. 2010]*, petition for review granted, *111 Cal. Rptr. 3d 18, 232 P.3d 1201 (Cal. 2010)*; *Taylor v Elliott Turbomachinery Co. Inc., 171 Cal. App. 4th 564, 586, 90 Cal. Rptr. 3d 414 [1st Dist. 2009]*.

As in *Tellez-Cordova, supra*, and whether or not the component-part supplier doctrine is recognized in New York, this case does not fit within its precepts. Here, there is no dispute that Crane Co. integrated asbestos into its Cranite gaskets [***22] and actively recommended that its customers use asbestos cement, asbestos gaskets, asbestos packing, and asbestos insulation with its valves because such add-ons were necessary for their efficient operation. Unlike the chain [*9] manufacturer in the Restatement illustration, Crane Co. knew exactly where and how its products were being used and was familiar with asbestos and asbestos-containing products as they were integral to its marketing program and product lines.

It has long been the law in New York that "[t]he risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v Long Is. R.R. Co., 248 NY 339, 344, 162 N.E. 99 [1928]*. In this regard, and based upon all of the foregoing, this court finds that Crane Co. had a duty to warn of the hazards associated with asbestos because it knew or should have known that its valves would be used in conjunction with asbestos-containing materials. *Berkowitz, supra.*

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied

DATED: June , 2011

SHERRY KLEIN HEITLER

J.S.C.

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

IN RE: SIXTH JUDICIAL DISTRICT ASBESTOS LITIGATION

EDWARD R. SCHMERDER,

Plaintiff,

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

A.W. CHESTERTON COMPANY, et al.,

Defendants.

BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice

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D E C I S I O N & O R D E R

Mulvey, Robert C., J.

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

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

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

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

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

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

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

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

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

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

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

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

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

Accordingly, for the reasons set forth above, it is

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

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

Hon. Robert C. Mulvey

Digitally signed by Hon. Robert C. Mulvey
DN: cn=Hon. Robert C. Mulvey, o=New York State Supreme Court, ou=Justice, email=rcmulvey_chambers@nycourts.gov, c=US
Date: 2011.09.22 13:12:11 -04'00'

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

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

Index No. 2010/7914

V.

A.W. CHESTERTON COMPANY, et al
Defendants.

DECISION & ORDER

ANN MARIE TADDEO, J.

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

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

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

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

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

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

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

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

Accordingly, it is hereby

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

Dated: October 4, 2011

ENTER:

HON. ANN MARIE TADDEO
Supreme Court Justice
Seventh Judicial District

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

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

SUPREME COURT : ORANGE COUNTY

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

Plaintiff,

- against -

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

Defendants.

----------X

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

Index No. 5716/2010

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

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

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

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

Factual and Procedural Background

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

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

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

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

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

Discussion/Legal Analysis

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

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

BW/IP International Co.

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

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

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

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

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

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

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

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

insulation material.

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

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

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

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

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

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

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

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

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

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

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

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

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

Defazio v Chesterton, 32 Misc.3d 1235.

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

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

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

Nash Engineering Company

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

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

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

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

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

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

Courter & Company, Inc.

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

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

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

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

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

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

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

Yuba Heat Transfer, Division of Connell-Limited Partnership

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

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

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

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

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

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

Eastern Refractories Co., Inc.

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

In opposition, the plaintiff argues that Eastern in fact

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

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

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

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

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

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

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

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

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

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

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

Crane Co.

Crane Co. moves for summary judgment dismissing the complaint

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

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

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

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

Cleaver-Brooks, Inc.

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

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

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

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

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

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

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

Howden Buffalo, Inc.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The foregoing constitutes the decision and order of the court.

Dated: October 20, 2011
Goshen, New York

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At a Civil Special Term, Part 33, of the Supreme Court, held in and for the Counties of Niagara and Erie, State of New York, on the 22nd day of January, 2015

PRESIDING: HON. DEBORAH A. CHIMES

SUPREME COURT : STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In Re: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SHARON MAJOR, as Executrix of the Estate of DAVID MAJOR, and SHARON MAJOR, Individually,

Plaintiff

vs.

DECISION AND ORDER
Index No. 800805/2013

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

Defendants

Defendant Viking Pump, Inc. (Viking), a pump manufacturer, moves for summary judgment pursuant to CPLR §3212.

In support of its motion, defendant submitted its Notice of Motion dated November 26, 2014, the Affidavit in Support of Jonathan H. Dominik, , Esq. , with attached exhibits, sworn to on November 26, 2014 and the Reply Affidavit of Mark S. Nemeth, Esq., with attached exhibits, sworn to on December 22, 2014.

In opposition to the motion, plaintiff submitted the Affirmation of Ambre J. Brandes, Esq, with attached exhibits, dated December 12, 2014.

Plaintiff's decedent, David Major, died on March 5, 2014 of mesothelioma at age 74. Prior to his death Mr. Major had brought a personal injury action. After his death, his wife and Executrix, Sharon Major, was substituted as plaintiff and filed amended complaints, adding causes of action for wrongful death.

Mr. Major worked as a boilermaker and welder from 1958 through approximately 1977 at a variety of work sites including factories, commercial buildings, municipal buildings and ships. Plaintiff alleges that her decedent was exposed to asbestos when he and others in his presence worked on pumps, including pumps manufactured by Viking. Pplaintiff claims the exposure, from removal and installation of asbestos-containing gaskets and packing in and on pumps caused decedent's mesothelioma.

Viking moves for summary judgment on the ground that plaintiff has failed to prove that her decedent was exposed to asbestos from a Viking product. Defendant

maintains that decedent's deposition testimony is insufficient [1]to do so. In support of its motion, Viking also submits the affidavit of John Peterson, its former employee. The affidavit recites: that Viking manufactured only positive displacement pumps, not centrifugal pumps; that not all its pumps manufactured before 1968 used asbestos-containing packing or gaskets; that it did not manufacture asbestos-containing material which were "components" of its pumps; that its pumps were not used to pump steam, that Viking never specified the use of exterior insulation with its pumps; and that without the serial number, it is impossible to determine if a Viking Pump used asbestos - containing gaskets or packing.

In opposition, plaintiff points out that decedent in his deposition testimony explained how he was exposed to and inhaled dust from his work, and similar work performed by others in his presence, with asbestos -containing gaskets, packing and insulation material used in and on pumps. Further, plaintiff notes that decedent specifically identified Viking pumps as a source of his exposure to asbestos several times during his deposition. Plaintiff maintains that decedent's exposure to asbestos from Viking pumps was established by this testimony. In addition, plaintiff submits Vikings' answers to interrogatories filed in the New York City Asbestos Litigation which "concedes" that between 1911 and 1986, asbestos-containing gaskets and packing were

[1] Mr. Major was deposed over 15 days in the fall of 2013.

used in some of their pumps and that Viking provided pump repair kits to its customers which "may have included" those asbestos-containing components. She also includes a deposition of John Peterson taken in another case in 2009 which contains the same information. Finally, plaintiff submits Viking documents concerning its knowledge of the hazards of asbestos and its phase-out in 1986.

Plaintiff maintains that the Peterson affidavit is self-serving, lacks any evidentiary support for Viking's motion and is "clearly untrue". Further, she alleges that the affidavit is made without revealing the source of Mr. Peterson's knowledge or how he arrived at his opinion.

In reply, Viking reiterates its position that plaintiff has not proven through her decedent's testimony that he was exposed to asbestos from a Viking product, defends the Peterson affidavit and argues that it is not responsible for asbestos- containing products it did not manufacture.

As an initial matter, it is noted that there is no *Gorzka* problem, defendant Viking is identified in plaintiff's answers to interrogatories[2].

As this court has observed numerous times, it is well established in asbestos litigation that to go forward with a motion for summary judgment dismissing a complaint,

[2] " [T]he failure of plaintiffs to name [defendant] as a supplier in their response to interrogatories constitutes an admission that [defendant] was not a source of an asbestos-containing product to which plaintiff was exposed and [defendant] thus established that plaintiffs' action against it has no merit." (*Matter of Eighth Jud. Dist. Asbestos Litig. [Gorzka]*, 28 AD3d 1191, 1192 [2006] [internal citations omitted]).

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

Here, defendant Viking has not met its burden of establishing that its products could not have contributed to plaintiff's disease. Even if Viking had met its burden, plaintiffs have succeeded in raising issues of fact requiring resolution by a jury.

As has been held time and again : "The function of a court entertaining a motion for summary judgment is one of issue finding, not issue determination" *Sillman v Twentieth Century -Fox Film Corp.*, 3 NY2d 395, 404 [1957]. Here, whether the burden has shifted or not, the deposition testimony and discovery responses submitted on this motion reveal triable issues of fact. Even at trial, plaintiffs are not required to show the

precise causes of the damages sought, but are only required to show facts and conditions from which defendant's liability can be reasonably inferred (*see Matter of Eighth Jud. Dist. Asbestos Litig.* [*Reynolds*], 32 AD3d 1268 [2006]).

Any inconsistencies in the testimony or issues of credibility are to be resolved by the trier of fact, not the court on a motion for summary judgment *(see Dollas v W.R. Grace and Co.,* 225 AD2d 319 [1996]*; Matter of Eighth Jud. Dist. Asbestos Litig. [Heckel]*, 269 AD2d 749 [2000]) . Moreover, in deciding a motion for summary judgment, "the court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" *Assaf v Ropog,* 153 AD2d 520, 521-522 [1989] [internal citations omitted].

Finally, Viking's contention that it is not responsible for asbestos- containing components it did not manufacture does not comport with New York law and does not establish the merits of its defense. These arguments have been rejected in both *Matter of New York City Asbestos Litig. [Konstantin/Dummitt]*, 121 AD3d 230 (1st Dept, 2014) and *Matter of Eighth Jud. Dist. Asbestos Litig. [Suttner]* , (Sup Ct, Erie County, March 15, 2013, Lane, J., Index No. 2010-12499) *aff'd for reasons stated below* 118 AD3d 1369 (4th Dept 2014) *lv granted* 24 NY3d 907 (2014) . There is no reason presented here to depart from precedent.

For the reasons stated, Viking has failed to show that plaintiff's complaint is without merit and its motion is denied.

Based on the foregoing, it is hereby

ORDERED, that defendant Viking's motion for summary judgment is denied.

SO ORDERED:

DATED: Buffalo, New York
February 26, 2015

HON. DEBORAH A. CHIMES
Justice of the Supreme Court

GRANTED

FEB 26 2015

BY _____
MARY PAZIK
COURT CLERK