Submitted by:
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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 IN RESPONSE TO BRIEF OF AMICUS CURIAE

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STATEMENT OF THE CASE

Gerald Suttner alleged that he was exposed to carcinogenic asbestos dust released by the defendant's valves during cleaning and maintenance. Defendant's valves contained asbestos components at the time of sale. Said components were "wear items," which required regular replacement in order to keep the valve in working order. Defendant knew that asbestos wear items would be used in its steam valves, but did not distribute the individual replacement wear items to which Mr. Suttner was exposed. (*See*, Brief of Plaintiff-Respondent pages 7-19.)

Gerald Suttner alleged that Crane's failure to warn him of the hazards of the valves' intended use was a proximate cause of his injury. He also alleged failure to warn claims against various other companies. After his death, his estate settled with most of the tortfeasors and proceeded to trial against Crane Co. *Id*.

At trial, Mrs. Suttner proved all of the elements of a personal injury claim sounding in a manufacturer's failure to warn, as articulated in Liriano v. Hobart Corp., 92 N.Y.2d 232 (1998).

Crane has appealed, arguing that it did not have a duty to warn users about the cancer hazard of servicing its products unless Crane Co. was in the chain of custody of the carcinogenic agent.

Crane's position, if adopted, would mark a significant departure from longstanding appellate precedents.

INTRODUCTION

The Brief *Amici Curiae* filed by the American Insurance Association *et al* contains a great deal of improper innuendo about attorneys who represent plaintiffs and very little new legal argument.

Plaintiff-Respondent has already burdened this Court with a 127 page long brief, and will refrain from revisiting the arguments pertaining to the proper interpretation of Rastelli v. Goodyear Tire and Rubber Co., *supra*, 79 N.Y.2d 289 (1992) and its progeny. This response will seek to briefly address the Amici's novel arguments.

When one ignores the redundant legal discussion, the Amicus Brief appears to be less of a legal pleading and more of a policy paper about the poor character of plaintiffs' attorneys and the potential benefits of overturning Liriano and adopting a California-style chain-of-distribution analysis.

At no point does the Amicus Brief make reference to Justice Lane's 11 page decision, which anticipates and addresses the Amici's arguments. (R. 13-24).

At no point does the Amicus Brief cite the record in this case. Indeed, it does not even correctly state the plaintiff's contentions.

The unifying theme of the Amici's brief is that the defendants in asbestos-related product liability litigation have been persistently wronged by the judiciary of New York State.

The Amici single out the New York City Asbestos Litigation (NYCAL) justices for particular criticism. We are told that they have wronged industry by permitting the consideration of punitive damages (Amicus Brief at 40); by interpreting the NYCAL case management orders in a fashion that they purport encourages dishonesty (*Id.*) and by the consideration of the foreseeability element in negligence cases (*Id*. at 12). We are told that the First Department has compounded these harms by unjustly permitting the consolidation of dissimilar cases for trial (*Id*. at 40).

Mrs. Suttner's case was not consolidated. It did not involve punitive damages. It was not tried under the NYCAL CMO. The defendant appears to have mentioned these irrelevancies in a bid to gain sympathy for its client. Justice Lane considered the issue of foreseeability because it was an element of the tort alleged by the plaintiff, as was his obligation under the controlling case law. (*see* Decision and Order of John P. Lane at R. 13-24).

State Court Judges are not the only rogues in the Amici's interpretation of the history of asbestos litigation. Plaintiffs' attorneys, as a class, are also heavily criticized. The Amici claim that such attorneys endlessly search for "bystanders" to sue (Amicus Brief at 3); it is intimated that they engage in mass spoliation (*id.* at 3-4); we are told that they want to open the door to suing manufacturers of paint or

hardware just used *near* asbestos (*id.* at 6); and they improperly manipulate the asbestos bankruptcy trust system (44-46).

Crane is not a bystander; it manufactured an asbestos-containing product, and the plaintiff directly worked with that product for many years. There has been no suggestion in this case that Plaintiff's counsel has engaged in any form of spoliation or concealment of evidence. Plaintiff's counsel did not advise Mr. Suttner to sue hardware or paint manufacturers for failing to warn him about the hazards of the asbestos in Crane's valves. (*See*, Plaintiff's Supplemental Summons and Amended Complaint, R. 114-128.) There has been no allegation that any manipulation of the asbestos bankruptcy trust system has occurred in this case.

By bringing up supposed wrongs that judges and plaintiff's counsel have inflicted on defendants in other cases, the Amici improperly seek to create sympathy for one litigant at the expense of another. They imply that Crane, and the manufacturing industry as a whole, is the victim of years of misconduct at the hands of the bench and the plaintiff's bar. Mrs. Suttner, they imply, is represented by a disreputable sort of people, and has many other potential avenues of recovery.

ARGUMENT

I. THE AMICI'S INTERPRETATION OF THE LAW IS INCORRECT FOR THE SAME REASONS AS THE DEFENDANT'S AND SHOULD BE DISREGARDED FOR THE SAME REASONS

Pages 7 through 38 of the Amicus Brief are given over to discussion of legal precedent.

The Amici's argument is largely identical to that made by the Defendant-Appellant: the Amici contend that, under Rastelli, a manufacturer may not be held liable for a product defect unless it was in the chain of distribution of the injury-causing agent. The plaintiff contends that Liriano mandates a case-specific inquiry into the intended and foreseeable uses of a product and that, in some circumstances, a duty to warn arises (*see*, Dummitt,[1] Berkowitz,[2] Holdsworth,[3] Rogers[4]) while in others, it does not (*see* Surre,[5] or Drabczyk[6]). The Plaintiff will rely on her prior briefing of the question in Plaintiff-Respondent's Brief on Appeal.

Two recent decisions, one from the Federal Asbestos Multi-District Litigation and the other from the Fourth Department are relevant to the Amici's arguments, however.

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[1] Matter of New York City Asbestos Litig. [Dummitt], 121 A.D.3d 230 (1st Dept, 2014)
[2] Berkowitz v. A.C. & S., Inc., 288 AD.2d 148 (1st Dept, 2001)
[3] Matter of Eighth Jud. Dist. Asbestos Litig. [Holdsworth], 129 A.D.3d 1502 (4th Dept, 2015)
[4] Rogers v. Sears, Roebuck & Co., 268 A.D.2d 245 (1st Dept, 2000)
[5] Surre v. Foster Wheeler, 831 F.Supp. 2d 797 (SDNY, 2011)
[6] In Re: Eighth Judicial Dist. Asbestos Litig. [Drabczyk], 92 A.D.3d 1259 (4th Dept, 2012)

A. Judge Robreno's Decision in Schwartz Demonstrates that New York's Duty Calculus is Not an Outlier

Judge Eduardo C. Robreno has overseen the Federal Asbestos Multi-District Litigation since 2008. Between 2008 and 2013, Judge Robreno has disposed of 178,581 cases and determined 528 summary judgment motions originating in 32 jurisdictions.[7]

In May of this year, Judge Robreno issued a decision in Schwartz v. Abex Corp., 2015 U.S. Dis. LEXIS 68074.

The Schwartz decision probably represents the most comprehensive review of the law pertaining to the use of third party asbestos components written by a disinterested party. Schwartz contains a thorough discussion of the ways that various states have approached component part liability, written by a jurist with an unparalleled knowledge of state-by-state laws governing manufacturer liability for asbestos and asbestos-containing products. Judge Robreno's decision is important because it demonstrates that not all failure to warn lawsuits brought against companies like Crane involve interchangeable fact patterns or theories of liability.

Judge Robreno outlines seven, non-exhaustive legal scenarios in which plaintiffs have alleged asbestos-related failure to warn liability. Schwartz, 2015 U.S. Dis. LEXIS 68074 at 93-103. Mrs. Suttner alleged what Robreno terms,

[7] Robreno, Eduardo, "The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875); Black Hole or New Paradigm?" 23 Widener L.J. 97 (2013). Amici also cite this article at page 2 of their brief.

"Product Manufacturer Scenario No. 1": that her husband was injuriously exposed to third-party asbestos gaskets and packing used to replace Crane's original asbestos-containing gaskets and packing. Many of the Amici's arguments, in contrast, are directed toward the hypothetical Judge Robreno calls, "Product Manufacturer Scenario No. 5" in which a plaintiff seeks to hold a defendant liable for insulation that it did not supply or specify and where the defendant did not know that the insulation would be used. Schwartz, *supra*, at 94-99.

Judge Robreno's seven scenarios illustrate that the range of potential outcomes is more complex than, "Crane always has a duty to warn about the use of third-party asbestos with its products," or "Crane never has a duty to warn of the use of third-party asbestos with its products." Under Amici's proposed rule, the plaintiffs in Surre, Drabczyk, Holdsworth and Dummitt, *supra*, would all have experienced identical outcomes, despite the fact that those cases involved very different allegations and proof.

Judge Robreno also asserts, "In short, having reviewed the appellate authority nationwide on this issue, it appears there is no clear majority rule - and that courts permitting some liability on the part of product manufacturers for injury from other entities' component parts utilize different rules and rationales for doing so." Schwartz at 59.

This gives lie to the Amici's assertions that, "It is black-letter product liability law that manufacturers are not liable for harms caused by others' products except in very limited circumstances not present here," (Amicus Brief at 5) and that, "In cases virtually identical to this one, courts have almost uniformly rejected asbestos third-party duty to warn claims, including many courts perceived to be favorable to plaintiffs." (*Id*. at 15).

B. The Holdsworth Decision Explicitly Repudiates the Amici's Interpretation of Drabczyk

The Amici, like the Defendant-Appellant, contend that the Fourth Department's 2012 decision, In Re: Eighth Judicial Dist. Asbestos Litig. [Drabczyk], *supra* 92 A.D.3d 1259 (4th Dept, 2012), embraced its interpretation of Rastelli.

In its recent decision in Matter of Eighth Jud. Dist. Asbestos Litig. [Holdsworth], 129 A.D.3d 1502 (4th Dept, 2015), published this past June, the Fourth Department clarified that this interpretation was wrong, writing:

> Defendant's reliance on our decision in [Drabczyk] is misplaced, because in that case there was no evidence that the valves required external insulation or that defendant knew that external insulation would be used (*see*, [Dummit] 121 AD3d at 249; cf. [Berkowitz].)

Holdsworth at 1503, *internal citations abbreviated*.

The Fourth Department has made it clear that Drabczyk stands for the proposition that a defendant does not have a duty to warn under Judge Robreno's

"Scenario No. 5," (defendant's product is unforeseeably insulated after sale) but does have a duty to warn under Robreno's "Scenario No. 1" (intended maintenance of defendant's product exposes plaintiff to carcinogenic dust).

II. THIS COURT SHOULD DISREGARD AMICI'S RESULTS-DRIVEN, SELF-SERVING "PUBLIC POLICY" ARGUMENTS

In addition to reiterating Crane's legal arguments, the Amici make a number of naked bids for sympathy, disguised as discussions of "public policy."

A. This Court Should Disregard the Unreliable History of the Asbestos Litigation Presented in Amici's Brief

Pages 1-7 of the Amicus Brief, along with various subsequent asides, are given over to a self-serving history of the litigation of asbestos-related personal injury actions, in which industry is depicted as the victim of rapacious tort lawyers who seek to recover from "bystander" companies who were "far removed from the scene of any putative wrongdoing." (Amicus Brief at 3, 2).

The Amicus Brief cobbled together its history of asbestos litigation from a wide variety of sources. Many of those sources are opinion or advocacy pieces. At least five were authored or co-authored by signatories to the Amicus Brief. A *Wall Street Journal* Editorial titled, "Lawyers Torch the Economy" is cited for the truth of the matter contained at one point. (*Id*. at 2.)

At page 1, the Amici purport to adopt the Appellant's Statement of the Case. However, at page 4, the Amici erroneously allege that Mr. Suttner sought to hold

Crane liable for failing to warn about the hazards of thermal insulation used with its product. The proof offered at this trial concerns asbestos-containing replacement parts.[8]

The Amici never cited the Record, Brief of the Plaintiff-Respondent, or even the Decision and Order appealed from. Rather than explaining why Crane did not have a duty to warn in Mr. Suttner's situation, the Amici appear to direct their brief at a generic, hypothetical trial, the facts of which they offer without citation. Mrs. Suttner's counsel should not be placed in the position of having to brief the issue of how New York deals with all seven of Judge Robreno's Scenarios when she alleged and proved only Scenario No. 1.

B. The Rule Followed by the Fourth Department Has Been In Force Since 2001, at the Latest

In 1987, This Court held that the manufacturer of a product could be held liable for injuries caused by substantially identical replacement parts that it did not specify or place in the stream of commerce. Sage v. Fairchild-Swearingen Corp., *supra*, 70 N.Y.2d 579 (1987). Therefore, Mr. Suttner's case has been cognizable since at least 1987.

[8] There are certainly circumstances where a company has a duty to warn about the hazards of using its product in combination with thermal insulation – even the Surre trial court case (*supra*), to which the Amici accord such weight, acknowledges that, as do Dummitt, Holdworth, and Berkowitz (*all cited supra*). Mrs. Suttner, who proved a case based on Judge Robreno's "manufacturer Scenario No. 1" should not have to address the implication of every possible theory of liability other plaintiffs have raised against Crane.

In 1991, This Court held that, when two products used together combine to create a hazard, both manufacturers have a duty to warn. Rastelli v. Goodyear Tire and Rubber Co., *supra*, 79 N.Y.2d 289 (1992).

According to Amici's self-serving timeline, the plaintiffs began suing equipment manufacturers like Crane no later than "the late 1990s." (Amicus Brief at 2.)

In 2001, the First Department held that manufacturers of pumps and valves could be held liable for failing to warn of the risk associated with asbestos-containing replacement parts, among other components. Berkowitz v. A.C. & S., Inc., 288 AD.2d 148 (1st Dept, 2001). Despite numerous summary judgment motions brought by Crane and other equipment defendants over the years, Berkowitz remains good law and has been consistently applied throughout the state for the past fourteen years. (*See, generally*, Brief of Plaintiff-Respondent at pages 94-96.)

The Amici have every right to petition this Court to change the way the law is interpreted, but it is unquestionably the Amici, not the Plaintiff, who are asking the Court to alter a longstanding rule.

This is important, because it shows that the Amici's slippery slope arguments are hollow. The Amici claim that, if this Court does not reverse the Fourth Department, then plaintiffs will bring suit against companies that "made products that arguably were used in the vicinity of some asbestos insulation"

(Amicus Brief at 6); it twice warns that "makers of nuts, bolts, washers, wire and other fasteners," and "paint manufacturers" would be exposed to liability (*id.* at 6, 36); it argues that syringe manufacturers and makers of cigarette lighters will be exposed to massive liability (*id.* at 35-36) and that orange juice manufacturers will be held liable for failing to warn of the dangers of using vodka as a mixer (*id.* at 36).

However, the rule that the defendant seeks to change has been uniformly applied across New York State since 2001, at the absolute latest. While manufactures of asbestos-containing industrial equipment (such as Crane Co.) are still being sued, no flood of litigation against the manufacturers of wire, paint, syringes and orange juice has arisen. The tort system, while no doubt frustrating to industries with large amounts of pending liability, has continued to function as intended.

C. Public Policy Does Not Support Absolving Crane of the Duty to Warn

a. The Alleged Mistreatment of Crane by the Judiciary Does Not Support Absolving Crane of Its Duty to Warn

The Amici argue that if the ordinary rule of Liriano is not replaced with a chain-of-possession-based rule, then the "asbestos litigation will worsen." (Amicus Brief at page 38.) (The Amici apparently take for granted that anything which benefits injured plaintiffs at the expense of manufacturers and insurers is, by definition, a change for the worse.)

The Amici argue that their constituent industries should be absolved of their duty to warn because upholding the Fourth Department "would magnify other recent changes in NYCAL that have tilted the balance to heavily favor plaintiffs." (Amicus Brief at 40.) The Amici specifically object to orders ending the longstanding practice of deferring punitive damages in NYCAL and interpreting the provision of the CMO pertaining to disclosure of bankruptcy trust claim forms. (*Id*.) Finally, the Amici suggest that the First Department's decision permitting the consolidation of two asbestos claims will be very costly.

If any or all of these decisions were unfair, then the wronged parties have the option of appealing them, where a full record is available, and the courts' reasoning is available. The defendant should not, however, be able to use the fact that litigation in other courts is costly in order to divest Mrs. Suttner of her right to prove a negligence suit based on the Liriano factors. Mrs. Suttner's case did not originate in NYCAL, nor was it consolidated.

The Amici also argue that the NYCAL judges have wronged the manufacturing and insurance industries by broadly construing Berkowitz in Sawyer v. A.C.&S. Inc.[9] and Defazio v. A.W. Chesterton[10]. *See*, Amicus Brief at 12. If that is the case, then Crane should appeal those orders, and allow the appellate courts to determine whether or not the trial court erred.

[9] 32 Misc.2d 1237(A)(N.Y. Sup. Ct. New York Cnty, July 21, 2011)
[10] 32 Misc.3d 1235(A) (N.Y. Sup. Ct. New York Cnty, July 21, 2011)

Mrs. Suttner's verdict should not be reversed on the basis of whether or not some other plaintiff's case was incorrectly decided, and the only conceivable reason for the Amici to bring up a parade of alleged injustices suffered by manufacturers is to attempt to generate sympathy for one party at the expense of the other.

b. The Alleged Misconduct of Plaintiffs' Attorneys Does Not Support Absolving Crane of Its Duty to Warn

The Amicus Brief paints an extremely unflattering picture of attorneys who represent plaintiffs, alleging that, as a class, they target "bystander" companies, conceal evidence, and dishonestly manipulate the bankruptcy trust process. (Amicus Brief at 3-4, 44-46).

However, the Amicus Brief does not make any specific allegations of misconduct in Mrs. Suttner's case. Even if the amici's narrative were entirely fair, the remedy for that situation should not be the elimination of Crane's duty to warn about the cancer hazards of servicing its products.

c. The Existence of Asbestos Bankruptcy Trusts Does Not Support Absolving Crane of Its Duty to Warn

The Amici close their brief with a five page article about asbestos bankruptcy trusts. The Amici believe that people who allege that they developed cancer as a result of exposure to asbestos products should not have recourse to the trial court system, and should instead be compensated entirely out of these trusts.

The Amici do not contend that the law presently holds that plaintiffs may only be compensated out of the trust claims; they merely appear to believe that this would be a good law. The Amici also believe that some plaintiffs' attorneys have used the bankruptcy trusts in improper fashions.

Neither the Appellant nor the Amici have suggested that there is any impropriety involving plaintiff's conduct with regard to the bankruptcy trusts in this case. The discussion appears to be a wholly irrelevant aside calculated to generate sympathy for the insurance industry's financial woes and to persuade this Court that, if it reverses the Fourth Department's decision, widows such as Mrs. Suttner will still have an appropriate source of compensation.

Under Tancredi v. A.C.&S., Inc., 6 A.D.3d 352 (1st Dept, 2004), *appeal dismissed*, 5 N.Y.3d 849 (2005), a defendant is permitted to offer proof of a bankrupt co-tortfeasor's liability in order to reduce its relative share for Article 16 purposes.

If Crane were truly a "bystander" or a "peripheral" defendant with little or no responsibility for a plaintiff's injuries, it has the option of proving that at trial by offering evidence against other entities, including any third parties which may have supplied gaskets and packing for use in its valves.

Indeed, in Mrs. Suttner's case, the jury apportioned fault to several bankrupt entities. (*See* R. 25-35, Jury Verdict Sheet in Suttner, apportioning liability to

several bankrupt entities.) The bankruptcy trust claim system is, thus, not so much a parallel system which should replace the tort system, but rather an element which is taken into account by the courts in the interest of fairness.

d. Absolving Crane of Its Duty to Warn Would Subvert the Express Public Policy Aims of New York

The Amici argue that finding that Crane had a duty to warn about the cancer risk of replacing its valve gaskets "would not serve the policy of preventing future harm," because the injurious exposures took place decades ago. (Amicus Brief at 28). However, this argument fundamentally misunderstands New York's public policy, which looks at the larger picture.

If John Smith's pet leopard bites someone, the correct public policy analysis is to ask, "Does holding owners of exotic pets strictly liable for attacks improve the public safety?" not "Does holding the Estate of John Smith strictly liable for this bite improve public safety?"

In Liriano v. Hobart, *supra*, this Court did not ask, "Would finding that Hobart breached its continuing duty to warn in 1963, proximately causing an injury decades later prevent Hobart from selling defective meat grinders in the future?" Rather, it asked if a broad duty to warn served the public policy of encouraging product safety.

This Court should not ask, "Will holding Crane Co. liable in this case discourage Crane Co. from failing to warn about asbestos in the future?" It should

ask, "Will holding Crane Co. liable for its failure to warn encourage manufacturers to err on the side of selling safe products?" And the Record shows that the answer to that question is clearly, "Yes."

The evidence in the Record shows that Crane Co. did not stop using asbestos components in its valves until 1985, well after it knew the components were hazardous. Defendant only stopped when it was threatened with significant financial loss. (*See,* Brief for Plaintiff-Respondent at 105-106 and Record citations therein). Requiring Crane to pay those portions of the damages which resulted from its failure to warn is very costly for Crane, and will require a great deal of time and effort on the part of courts and attorneys. However, it will also show present day manufacturers that if they commit a large scale wrong, like producing a product that harmed many thousands of people, they will be held accountable according to the same, well-settled standards that govern products that only harmed a small handful of people.

On the contrary, to reverse the Fourth Department in this case and thereby overturn the 2001 Berkowitz precedent would have the effect of assuring manufacturers that they do not need to be particularly careful about warning about cancer risks because if the costs of ones' tort liabilities become high enough to alarm commentators, the court may decide that it is good public policy to curtail the litigation.

This Court should not limit Crane's duty to warn simply because Crane may face a great deal of future liability, or because fairly litigating the claims will require considerable time and effort on the part of attorneys and the courts.

It is a long standing matter of public policy in New York to permit large-scale litigation to run its course, even when it is costly or time-consuming. In 1882, this Court decided Story v. N.Y. Elevated R.R.Co., 90 N.Y. 122. In that case, former U.S. Attorney General William M. Evarts was able to persuade the Court that property owners' whose land had diminished in value as the result of the construction of the New York Elevated Rail Road were entitled to consequential damages.

Story, and the other elevated railroad decisions which subsequently followed were criticized for burdening the court system with purportedly excessive litigation, much as cases involving asbestos are criticized today. A law review article written about a decade after Story described the ongoing litigation as, "probably, qualitatively speaking, the greatest which the world has ever witnessed."[11]

One contemporary judge complained that elevated railroad property damage litigation, "for immensity of volume and variety and difficulty of questions

[11] Frank H. Mackintosh, *Elevated Railroad Land-Damage Litigation*, 2 YALE L.J. 106 (1893).

involved has no parallel in our jurisprudence."[12] Another commentator complained that the litigation cost the railroad companies a quarter of a million dollars annually, wholly apart from settlements and judgments. The cost of judgments ran into the seven figures, in 1893 dollars. Attorneys came to specialize in the prosecution or defense of these particular sorts of suits.[13] Attorney George Theron Strong noted in 1914, when the litigation was in its fourth decade, that it had declined, but had at one time required "the exclusive attention of at least one branch of the court."[14] Using the same metaphor favored by the Amici for the asbestos litigation, the railway cases were said to have "flooded the lower courts."[15] One author observed that, "The vast number of cases blocking the calendars of all the courts is of course a temptation to judges to dispose of them in a summary manner, but whether to the injury of the plaintiffs or defendants it is hard to predict."[16]

The Courts did resist this temptation, and the numerous injured plaintiffs were permitted to pursue their individual claims in Court until their cases reached a natural resolution.

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[12] *Valuation of Easements in Condemnation of Elevated Railroads*, 40 YALE L.J. 780 (1930), *quoting* Bly v. Edison Electric Illuminating Co., 172 N.Y. 1 (1902).
[13] Mackintosh, *supra note 11*, at 115.
[14] THERON GEORGE STRONG, LANDMARKS OF A LAWYER'S LIFE, 368 (1914).
[15] Elizabeth Arens, *The Elevated Railroad Cases: Private Property and Mass Transit in Gilded Age New York*, 61 N.Y.U. ANN. SURV. AM. L. 629 (2006).
[16] Mackintosh, *supra note 11*, at 115.

Although the litigation was controversial at the time, Chief Justice Charles S. Desmond, writing in 1949, expressed that it was, "hard to believe that a lower court once held that its building caused no damage for which property owners could get compensation from the elevated railway company."[17]

New York's legal tradition is to permit every plaintiff with a cognizable grievance to litigate his or her case, even when there are so many wronged parties as to create a "flood" of litigation and even when the potential losses to business are vast. To find that Crane Co. did not have a duty to warn users about something so fundamental as risks associated with routine maintenance of its valves would violate longstanding public policy by allowing Crane to avail itself of the right to profit from New York's lucrative markets without holding it to its contingent obligation to pay for any damages caused by its negligence toward New Yorkers.

e. This Court Should Not Be Swayed By Amici's Special Pleading

The Amici's frequent reference to the size and cost of asbestos-related litigation as a whole, the alleged injustices that it has suffered in other cases, the alleged poor character of plaintiffs' counsel, the extreme expense of the litigation or the total amount of money available in asbestos bankruptcy trusts are all a form

[17] CHARLES S. DESMOND, SHARP QUILLS OF THE LAW FROM THE NEW YORK COURT OF APPEALS, 52 (1949).

of special pleading intended to suggest that it is desirable to treat asbestos defendants differently from other product manufacturers.

The Amici refer to the asbestos litigation as an "elephantine mass," and a "crisis" that will "worsen" if Crane is found to have owed Mr. Suttner a duty. (Amicus Brief at 2, 38). The defendant cites a number of documents purporting to estimate the future cost of asbestos litigation. (Amicus Brief at 39). The clear suggestion is that all asbestos-related failure to warn litigation against their clients is without merit, and must be curtailed.

Amici's apparent intention in attempting to persuade the Court that manufacturers have been mistreated at every turn is to move This Court to sympathize with the financial plight of Crane and other former manufacturers of asbestos-containing industrial equipment.

This is particularly inappropriate because it has long been an axiom of New York law that financial sympathy for a party cannot be permitted to dictate liability, or the lack thereof. The foundational case on this point is Laidlaw v. Sage, 158 N.Y. 73 (1899). In 1891, plaintiff William Laidlaw, a clerk, was in the office of Russell Sage, a tycoon and notorious miser, when a deranged man entered and threatened them with dynamite. According to Laidlaw, Sage used him as a human shield when the dynamite went off. Laidlaw, who had been crippled, sued Sage, who was uninjured. Laidlaw was awarded a large verdict, but this Court

reversed the decision of the trial court because Laidlaw's counsel had been permitted to introduce evidence of Sage's vast wealth, and thus enlist the sympathies of the jury against the miser. The Court wrote:

> It has ever been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice, and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law. Evidence of the wealth of a party is never admissible, directly or otherwise, unless in those exceptional cases where position or wealth is necessarily involved in determining the damages sustained.

Laidlaw at 103.

Manufacturers such as Crane frequently cite Laidlaw in motions *in limine* to preclude plaintiffs from mentioning the companies' good financial health or insurance policies.

The Amici intimate that it would be desirable to replace the ordinary Liriano factors with a rule which shields Crane from liability because asbestos litigation is very expensive to companies like Crane.

An attorney representing an injured plaintiff is placed under many other restrictions, in the effort to make certain that the jury is not moved to sympathy. In the interest of fairness to a defendant, he may not mention if a defendant is wealthy. The jury is not permitted to know whether a large damages award will be covered by liability insurance or will destroy the defendant's livelihood.

The plaintiff is not permitted to offer evidence that many, many previous plaintiffs have made similar allegations about a manufacturer's product, because it would be prejudicial to permit the jury to draw conclusions from other cases. Although it may be relevant to a disputed issue, such as a plaintiff's credibility, it would be prejudicial to place defense counsel in the position of attempting to explain the context of the testimony in numerous previous cases, just as it is improper for the Amici to attempt to obtain sympathy by insinuating that defendant has been the victim of unfair treatment by plaintiffs' lawyers and judges in other various situations not discussed in this record.

Mrs. Suttner proved to a jury of her peers that Crane Co.'s failure to warn her husband about the latent dangers of servicing its valves contributed to his injury and death. Under Liriano, Crane is liable for her damages. It is not legally relevant whether Crane's failure to warn contributed to two deaths or two thousand deaths, and it is not legally relevant whether Crane is earning over two billion dollars in annual profits or if it is on the verge of bankruptcy. Mrs. Suttner has met her burden of proof as determined by a duly summoned jury and Crane should pay its share of her damages.

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
September 11, 2015

Respectfully submitted,

LIPSITZ & PONTERIO, LLC

Dennis P. Harlow, Esq.