To Be Argued By:
SETH A. DYMOND
Time Requested: 30 Minutes

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Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF NEW YORK CITY ASBESTOS LITIGATION

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

Respondent,

—against—

A.W. CHESTERTON, et al.,

Defendants,

CRANE CO.,

Appellant.

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

In an effort to escape any and all liability for its conscious failure to warn any end user against the latent and unavoidable dangers of asbestos exposure attendant to the normal and intended use of its products, despite its admitted actual knowledge of such lethal hazards and its rampant sale of both asbestos-containing products and aftermarket asbestos components for 135 years without *ever* testing, inspecting, or warning, Defendant-Appellant Crane Co. (hereinafter "Appellant" or "Crane") seeks a radical departure from the deeply-rooted and equitable common-law of this State. In so doing, Appellant misreads this Court's precedents, appears to ignore the facts of this case, and advances arguments never raised before. Despite doggedly advancing a bright-line, single-factor test for duty throughout this case, Appellant now proffers a newly-formulated "control-based" approach. This, however, is simply an attempt to present a more palatable variation of its bright-line rule. Appellant's automatic rule, under any pretext, cannot be reconciled with New York law.

New York employs a negligence-based approach to failure-to-warn claims. See Enright v. Eli Lilly & Co., 77 N.Y.2d 377, 385-87, 568 N.Y.S.2d 550 (1991), rearg. denied 77 N.Y.2d 990. Consequently, this Court has consistently rejected bright-line rules in the context of our products liability jurisprudence. See, e.g., Hoover v. New Holland North America, Inc., 23 N.Y.3d 41, 59, 11 N.E.3d 693

(2014); Liriano v. Hobart Corp., 92 N.Y.2d 232, 242-43, 677 N.Y.S.2d 764 (1998). More to the point, this Court has expressly avowed 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, 746 N.Y.S.2d 120 (2002). A duty to warn inquiry is thus "intensely fact-specific." Liriano, supra at 240, 243.

Indeed, in negligence-based design defect cases, this Court has rejected the very bright-line rule that Appellant seeks to impose in failure-to-warn cases. See Sage v. Fairchild-Swearingen Corp, 70 N.Y.2d 579, 587, 517 N.E.2d 1304 (1987) (that the injurious replacement component was placed into the stream of commerce by a third-party is "not dispositive" of the equipment manufacturer's duty where it was anticipated that the original component would break and need replacement). And in a failure-to-warn context, this Court has implicitly rejected such a single-factor test by espousing a "weighing of factors" approach for a post-sale duty to warn inquiry. See Liriano, supra at 240 n.3 (citing Cover v. Cohen, 61 N.Y.2d 261, 275-76, 473 N.Y.S.2d 378 (1984)). Against these clear precedents, it would be wholly incongruous to adopt an automatic, single-factor test for a duty to warn inquiry in the species of failure-to-warn cases presented here. It is not surprising, then, that no New York court has ever done so.

In Rastelli v. Goodyear Tire & Rubber Co. (79 N.Y.2d 289, 297, 591 N.E.2d 222 (1992)), this Court considered, "*under the circumstances of th[at] case*,"

whether a tire manufacturer owed a duty to warn for a danger from a third-party's defective rim component that was randomly used at some point post-sale with the manufacturer's tire on some arbitrary vehicle. Far from embracing an absolute strict liability approach, whereby the sole determinative factor as to duty would have been whether the tire manufacturer placed the injury-producing rim into the stream of commerce, this Court additionally considered whether (1) the defendant's product was "sound," (2) the component at issue was merely compatible for use with the product or something more than compatible, (3) the defendant's product created or contributed to the defect at issue, (4) the defendant exercised control over the production of the component or ever marketed it, and (5) the defendant derived a benefit from the sale of the component. Thus, Rastelli plainly does not stand for a "control-based" or automatic rule as to duty.

Indeed, here, all five Appellate Division Justices agreed that a duty to warn could be imposed where the manufacturer's "role, interest, or influence" in the synergistic use of its product with third-party components was sufficiently significant to distinguish the case from Rastelli (COA 38-45, 55-59).[1] A review of Rastelli's progeny makes clear that all such decisions rested on a weighing of fact-

[1] Five additional Appellate Division Justices and dozens of New York Supreme Court Justices have similarly concluded that Crane, specifically, owed a duty to warn in similar circumstances under New York's negligence-based approach to failure-to-warn claims. See, e.g., In re Eighth Jud. Dist. Asbestos Litig. [Suttner v Crane Co.], 115 A.D.3d 1218 (4th Dept., 2014), aff'ing 2013 WL 9816609 (Sup. Ct., Erie Co., 2013); see also (R. 5332-5429).

specific, policy-laden considerations that either did or did not place the case within Rastelli's orbit. Compare, e.g., Penn v. Jaros, Baum & Bolles, 25 A.D.3d 402, 809 N.Y.S.2d 6 (1st Dept., 2006) (distinguishing Rastelli); Rogers v. Sears, Roebuck & Co., 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dept., 2000) (same), with Tortoriello v. Bally Case, Inc., 200 A.D.2d 475, 477, 606 N.Y.S.2d 625 (1st Dept., 1994) (finding Rastelli apposite); Surre v. Foster Wheeler LLC, 831 F.Supp.2d 797, 804 (S.D.N.Y., 2011) (same).

Therefore, the proper approach for determining whether to impose a duty to warn on a product manufacturer in synergistic component-use scenarios should be a weighing of the policy-laden considerations. Importantly, here, the Appellate Division did not create new considerations; it merely provided a reasonable interpretation of the existing ones by expressing the overarching inquiry as whether the defendant had a "sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce" (COA 41). In fact, the Appellate Division made plain that its framework was nothing more than what Rastelli and its progeny "together st[oo]d for." (COA 41).

A weighing of these considerations unequivocally demonstrates that a duty was properly imposed on Appellant in this case, which is perhaps why Appellant addresses the facts in only the most conclusory fashion. First, Appellant's valves were not sound products; they were supplied with original consumable asbestos

gaskets and packing – including Cranite, Appellant's own brand of asbestos gaskets – that, upon their inevitable deterioration, mandated routine replacement with identical components by design and specification to ensure functionality (R. 1160-61[2081-82], 1509[2893-94], 5443, 5449-50; SR. 1-50).[2]

Thus, *a duty to warn indisputably existed at the time these asbestos-containing valves were sold*, but Appellant still chose not to warn despite its actual knowledge of the dangers. The notion that this preexisting duty dissolved once those original components were removed, especially where they were purposefully intended to be removed and replaced, is patently absurd. Appellant seeks to draw an inequitable, hairsplitting distinction between a duty owed to the first valve user – who would have worked on original components – and all subsequent *normal* users, who by happenstance in this setting worked with third-party aftermarket components instead of ones supplied directly by Appellant. In either instance, exposure to asbestos from the normal use of Crane's valves was unavoidable. See McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 68, 181 N.E.2d 430 (1962) ("duty to warn of latent dangers extends to" all normal product users).

To permit Appellant to avoid liability here would significantly devalue core products liability duties by incentivizing manufacturers to disregard their

[2] "R. __ []" refers to the record page followed by the miniscript trial transcript page in brackets.

fundamental duties to inspect, test, stay abreast of scientific knowledge and advancements, and warn post-sale in *every* circumstance involving perishable or breakable components. See Sage, 70 N.Y.2d 579, supra at 587 ("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"). Nor should Appellant's indefensible failure to warn for the original asbestos components it actually placed into the stream of commerce be condoned, particularly where an original warning would have sufficiently apprised the decedent of the exact dangers at issue here.

Second, the asbestos gaskets, packing, and lagging pads were not merely compatible for use with Crane's high pressure, high temperature Navy boiler room valves; they were *specified* by prescription for use in these particular valves (R. 1163-1166[2090-2102], 1505-06[2878-79], 1509[2891-92], 1519[2931], 3425-83, 3876; SR. 1-50), and were deemed "essential to [the] economic operation" of the valves in these particular services (R. 3869; 984[1680], 1501[2859-60], 3616, 3876-78). As noted by the Appellate Division dissenters (who did not dissent on this issue), their use was a "known certainty" to Crane (COA 58).

Third, Crane's valves certainly contributed to the dangerous condition since it was only the use of these asbestos components in combination with these particular Crane valves that created the release of asbestos-laden dust. The gasket,

packing, and lagging pad components posed no risk of asbestos dust release unless deteriorated or manipulated (R. 330[261], 929[1574], 986[1685-86], 1605[3114-15], 5444-45, 5494). Crane was fully aware that it was these components' specific use with its high pressure, high temperature valves that compromised these components, thereby creating a danger of asbestos exposure to normal valve users like the decedent (R. 929[1574], 980[1663], 984[1677-78], 1003[1756], 1169[2116], 1172[2126-27], 1178[2152], 1336[2475], 3875, 3879, 5488, 5490, 5492). By contrast, the use of these components in certain applications did not disturb the asbestos (R. 1500[2856-57], 1627[3200]), so no danger was created.

Fourth, Crane marketed these asbestos components for use in its valves and substantially participated in the decision to use asbestos components with its valves in this specific setting. Crane provided the Navy with "valuable assistance" in standardizing what type of components should be specified for use with valves placed in Naval systems (R. 3867, 3876), the purpose of which was to ensure that the Navy knew exactly what replacement components to use with each particular valve (R. 1509[2891-92]). Since Appellant was the "world's foremost manufacturer of valves" (R. 3885), and had a century-old business practice of selling, marketing, endorsing, specifying, and recommending asbestos components for use with its high pressure, high temperature valves in both marine and land-

based settings (R. 5432; 3590-92, 3603, 3608-09, 3654, 3718-23, 3907, 3958-77), it is no surprise that the Navy took its cues from Crane.

Fifth, Appellant derived a benefit from the use of asbestos components with its high pressure, high temperature valves, since only valves sealed and insulated with the "correct" material could function as intended in the "specific services" that Crane knew they would be used in (R. 3876; 984[1680], 1501[2859-60], 3616, 3878). In fact, Crane's benefit was so high that it purposefully "substituted" Cranite as an original component in these valves (R. 1163-1166[2090-2102]).

Sure enough, Appellant advocates for a single-factor test since the *only* factor weighing in its favor is that it, by chance, did not supply the exact asbestos components that the decedent was exposed to at the time he happened to be using Appellant's valves as they were purposefully intended to be used in this setting. Simply put, the facts here are "not even close to Rastelli because of Crane's demonstrated interest in the use of asbestos components with its valves" (COA 44).

To that end, Appellant raises an alternative argument seeking a new trial. Since this issue is unpreserved, it is nonreviewable. But even if considered, Appellant improperly conflates the roles of the court and jury. A determination as to legal duty is, in the first instance, one for the court, whereas the issue of foreseeability is left to the fact-finder. See Palka v Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, 585, 611 N.Y.S.2d 817 (1994). Thus, a new trial is not

warranted to permit a jury to determine legal duty, because it is not the jury's role to do so. Here, Supreme Court properly determined that a duty existed, and the jury was then properly charged with determining foreseeability in the context of a breach of that duty (R. 1769, 2031). See Eiseman v State, 70 N.Y.2d 175,187, 518 N.Y.S.2d 608 (1987) (foreseeability is a "factual issue to be resolved on a case-by-case basis by the fact finder").

Accordingly, a duty to warn was properly imposed on Appellant, and neither judgment in Appellant's favor nor a new trial is warranted on this issue.

As to Appellant's causation argument, a rebuttable heeding presumption finds firm support in this Court's precedents and in the same policy considerations supporting established rebuttable presumptions in our jurisprudence. A heeding presumption does not shift the burden of proof; it merely shifts the burden of *production*. See Liriano v. Hobart Corp.[Liriano II], 170 F.3d 264, 271-72 (2d Cir., 1999). It is an aid to plaintiffs in circumstances like here, which involve latent injury and inexorable death, since it may be difficult or impossible for a plaintiff to establish that a warning, if given, would have been heeded. Cf. Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280, 289 n.8, 803 N.E.2d 757 (2003) (a rebuttable presumption is just an "aid" to the plaintiff).

Importantly, Appellant takes the untenable position that a plaintiff must meet her causation burden without the benefit of either direct testimony that a warning

would have been heeded, because it is purportedly speculative, or a rebuttable heeding presumption. This would create an impossible burden. Cf. Murdza v Zimmerman, 99 N.Y.2d 375, 379-80, 756 N.Y.S.2d 505 (2003) (purpose of a rebuttable presumption is to remove the hardship visited upon the innocent plaintiff). Thus, a heeding presumption was properly charged here.

Nor was Supreme Court's preclusion of Admiral David Sargent's opinion testimony an abuse of discretion. Appellant sought to have Admiral Sargent opine that if Crane "would have" attempted to give a warning at any time between 1940 and 1980, the Navy "would have" rejected it. Contrary to the Appellate Division dissenters, who mistakenly believed this testimony was precluded on relevancy grounds (COA 62-65), it was actually precluded because it was predicated on sheer speculation (R. 75-76, 1520-21[2938-40]). See Cassano v Hagstrom, 5 N.Y.2d 643, 645-46 (1959), rearg. denied 6 N.Y.2d 882. Admiral Sargent has no personal knowledge of the Navy's procurement practices between 1940 and 1980, and the evidence in the record not only failed to support this opinion, but it affirmatively contradicted it, which Admiral Sargent conceded (R. 1486-88, 1499, 1516-18).

Appellant's remaining "weight of the evidence" contentions – addressed to apportionment, recklessness, and the quantum of damages – are nonreviewable and should be automatically affirmed.

Accordingly, the order of the Appellate Division should be affirmed.

COUNTER-STATEMENT OF THE CASE

A. FACTUAL HISTORY

Appellant cites the factual record in only the most conclusory fashion, largely without any citation whatsoever, to give the illusion that it was indifferent to the use of asbestos components with its Naval valves. As recognized by the Appellate Division (COA 42-44), the record could not be more to the contrary.

i. Asbestos components of valves

Naval valves restrict or admit the flow of steam or fluid (R. 5487). Asbestos gaskets were consumable, ring-like components used to seal, inter alia, the internal valve bonnet (R. 5449, 5488-89). Asbestos packing was a fungible, rope-like material used to seal the valve stem (R. 5449, 5491-95). Asbestos lagging pads were wrapped on valves to prevent heat loss (R. 3869, 3875). Vigilant replacement of these perishable components was a fundamental design feature of these valves (R. 1169-84[2116-77], 1500-05[2856-57, 2878], 5498), such that asbestos exposure was unavoidable to any person maintaining these valves in their normal course (R. 5490).

ii. Crane's total immersion in the asbestos industry

Since 1850, Crane was the "world's foremost manufacturer of valves" (R. 3590, 3885). Far from being a peripheral entity to the asbestos industry, Crane's

immersion therein was staggering. Dating back almost a century before selling a single valve to the Navy, Crane was a seller, user, and marketer of scores of different asbestos products, including gaskets, packing, insulation, pipe covering, paper, millboard, wick, and felt, which it placed originally in its equipment and which it sold separately as aftermarket products (R. 3659-65, 3745-52, 3892-99, 3910-16, 3924, 3936-37, 3951, 5432). It had its own brand of asbestos gaskets – "Cranite" – which it sold for 50 years (R. 3661, 5441-42). The use of asbestos components with its valves was, thus, a standard business practice.

iii. Crane's substantial participation in the decision to standardize the use of asbestos components in its Naval valves

In the private sector, Crane dictated the use of asbestos components by valve service type (R. at 3661-62, 3746, 3892-93, 3896-97, 3910-54). It placed Cranite into "*all* CRANE valves for high pressure, saturated or superheated steam" (R. 3603) (emphasis added), and instructed on the necessary "repacking" of these consumable components (R. 3743-44). Crane also sold and marketed asbestos insulation as unexcelled for insulating valves (R. at 3606, 3616, 3665, 3745, 3894-95, 3915), advertised that its marine valves were "easier to insulate" based on their design (R. at 1277 [2411], 3945, 5443, 5563), and its catalogs depict insulated Crane valves in high temperature systems (R. at 3739-40).

Crane operated as a "one source of supply," and underscored "standardization" that was "backed by single responsibility" (R. 3843, 3847). Clearly knowing that these asbestos components were perishable, Crane emphasized that its valve nameplates were "extremely important" for the proper "ordering of replacement parts" (R. 3939), and that purchasing of Cranite should be made in bulk (R. 3661, 3912, 3924).

In light of this century-old business practice, and Crane's status as the leading seller of valves to the Navy (R. 5488), the Navy sought Crane's help in determining standardization of valve component parts (R. 3866-80). Crane offered the Navy "valuable assistance" in creating Naval Machinery, the manifesto on standardization that specified the "correct" use of asbestos components with high pressure, high temperature valves as "essential to economic operation" (R. 3867, 3869, 3876). Crane was one of a few valve manufacturers that helped the Navy create standardization for valves (R. 3867), and the others were merely specialty regulator or gage manufacturers (R. 1179[2154], 3867). The standardized use of asbestos components in high pressure, high temperature Naval valves was, thus, derived from and shaped by Crane's expertise and uniform business practices. This "standardization" dictated what technical requirements went into the military specifications issued by the Navy to its equipment vendors (R. 1506[2879]).

iv. The specified and essential use of asbestos components with Crane's Naval valves

The typical Naval Destroyer had two boiler (a/k/a fire) rooms, each containing approximately 600 valves (R. 1169-84, 5486-87). On the seven ships of Ronald Dummitt's service, the vast majority of such valves were manufactured by Crane (R. 1166-82[2104-05, 2117, 2132, 2144-45, 2154, 2167-69], 5488]).

For each type of valve, Crane created detailed drawings that identified, inter alia, the specified components, the pressure rating, and the exact system in which the valve would be used (R. 1163-1166[2090-2102], 1505-06[2878-79], 1509[2891-92], 1519[2931], 3425-83, 3876; SR. 1-50).[3] Asbestos components were specified on Crane's drawings for high pressure, high temperature valves because different services required different materials for the valves to function properly (R. 326-29[247-48, 253, 256], 3425-83, 3616; SR 1-50). Asbestos components were thus deemed the "correct" components for "specific services" (R. 3876-80). The purpose of these drawings was to create "standardization," so the Navy knew exactly what replacement components were required for each particular valve in each system (R. 1509[2891-92]). Indeed, Crane admitted that it knew the perishable asbestos components in these valves would be replaced with identical components (R. 5450).

[3] The system is identified under the "Valve Data" table.

For those valves that did specify internal asbestos components, Crane supplied them with original asbestos gaskets and packing (R. 5431, 5443, 5450). Crane's influence and benefit from this use was so high that instead of just supplying these valves with standard asbestos gaskets, Crane purposefully "substituted" its own brand of asbestos gasket, Cranite, as an original component (R. 1163-1166[2090-2102]; SR. 12-13, 15-20, 23-27, 45-49).

Crane also knew that its high temperature valves would be insulated with asbestos lagging pads deemed "essential to economic operation" (R. 1484[2792-93], 3869, 3875, 5496). Prior to sale, Crane tested its valves in its own factory using asbestos lagging pads to attain "satisfactory" status for Naval use (R. 1515-16[2918-21]). Crane knew specifically that asbestos lagging pads would be used because, unlike other insulation, the ease of removing and replacing the pads accommodated the valves' functional need for routine maintenance (R. 3875; 1169-72[2116-17, 2126-27], 1178[2152], 1336[2475], 5488, 5490, 5497, 5663).

As highlighted by the Appellate Division dissenters, it was a "known certainty" to Crane that these asbestos components would be used with these particular valves in this setting (COA 58).

v. The danger of asbestos exposure resulted only from the use of the asbestos components in synergy with Crane's high pressure, high temperature valves

The asbestos gaskets and packing were generally comprised of 85% asbestos and 15% rubber (R. 3879-80, 5443-44). In their natural state, these components posed no danger of asbestos dust release (R. 929[1574], 986[1685-86], 1605[3114-15]). Nor did a risk of exposure exist from all usages, as some gaskets in certain applications "just fell out" when being replaced, meaning the component was never compromised (R. 1627[3200]; 980[1662-63]).

Conversely, the particular use of these components in Crane's high pressure, high temperature valves is what caused them to deteriorate, thereby making the asbestos friable and compromising the seal (R. 980[1663], 984[1677-78], 1003[1756]). That, in turn, necessitated their vigilant replacement so the valves could continue to function (R. 1169[2115], 1172[2127], 1501[2859-60], 5488-89). The replacement process required that the friable gaskets be scraped and wire-brushed, and the friable packing be pulled with a hook and blasted with compressed air (R. 1172[2127-29], 1178-80[2150-60], 1355[2252-54], 5488-92).[4]

Based on its own drawings, Crane knew precisely which valves would be used in high pressure, high temperature applications (R. 1163-1166[2090-2102], 1505-06[2878-79], 1509[2891-92], 1519[2931], 3425-83, 3876; SR. 1-50), and it

[4] The bonnet faces and valve stems had to be completely free of the deteriorated material to ensure the new component created a proper seal (R. 1501[2859-60], 5488-92).

admitted to knowing that if the component was compromised, a hazard of asbestos dust release existed (R. 5444-45).

Similarly, asbestos lagging pads posed no danger of asbestos dust release unless disturbed. This is because the asbestos was internal to the lagging pad:

> the dust is created not from the outside of the lagging pad . . . because they're painted. When you take that lagging pad off and you hold it up like this, the inside of that is not painted, and that's where all the dust and the particles come from, from the inside of the jacket, not, not the outside where it's painted

(R. 5494). These lagging pads were only disturbed, and thus asbestos dust released, when a worker was required to access the inside of the valve to perform requisite maintenance (R. 5494; 1169[2116], 1172[2126-27], 1178[2152], 1336[2475], 3875, 5488, 5490). By contrast, other types of insulation remained stationary as one-time installations, and therefore were not disturbed (R. 1484[2793], 1500[2856-57], 5663).

Significantly, it was "almost impossible" not to be exposed to asbestos from the normal use of Crane's valves in this setting (R. 5490).

vi. Mr. Dummitt's normal use of Crane valves

Between 1960 and 1977, the decedent served on seven ships as a boiler technician (R. 5482-85). Importantly, Mr. Dummitt testified that his exposure to asbestos came from having to maintain valves "all the time" (R. 1354[2547-48], 5491, 5498). He was a normal and intended user of Crane's asbestos-containing

valves during their useful lives, although he was, by chance, not the very first user (R. 1166-82[2104-05, 2117, 2132, 2144-45, 2154, 2167-69], 5488). Thus, although Crane sold aftermarket asbestos components for its high pressure, high temperature valves, including its own brand of asbestos gasket, and although it was Crane's standard business policy to encourage customers to purchase such components directly from Crane, the replacement asbestos gaskets and packing, and the aftermarket insulation for its Naval valves at issue were fortuitously supplied by other entities (R. 1351[2536]). The lagging pad manufacturer, however, was unknown (R. 1169[2116], 1353[2545]).

vii. Crane's conscious choice not to warn for known asbestos hazards

Beginning in the 1930s, Crane had dozens of officers and managerial employees, who, as members of various trade associations, received information about asbestos hazards, including that asbestos disease could kill and had a long latency (R. 756[1180], 1267-74[2372-97], 1412-15[2651-64], 5432-40), and it admitted to having a broad knowledge that asbestos insulation was hazardous at all times during the decedent's exposure period (R. 323[232]). Crane did nothing with this information, except reap massive profits from its sale of millions of asbestos products without ever expending resources to test, inspect, or warn. It even sold Cranite for 50 years without ever testing for asbestos hazards, despite acknowledging that a hazard existed if the component was disturbed (R. 5433,

5441-45). It had every resource and opportunity to test for asbestos hazards, including a massive research and development department and direct access to the exact asbestos components at issue (R. R. 1515-16[2918-21], 3656-58, 3721-22, 3754, 3901-08, 3918, 3940-57), but it nonetheless never even tested (R. 5433).

Crane *never* warned, in either a Naval or private sector setting, about the dangers of asbestos associated with the normal and intended use of its valves, *including for the original and aftermarket asbestos components it actually placed into the stream of commerce* (R. 5440-43). It admitted that it had actual knowledge of the lethal hazards of asbestos associated with its valves in the early 1970s, but incredibly it still did not warn (R. 5435, 5440-43). It did not provide any asbestos labeling with its valves until 1986 – and that was not even a warning, it was merely a notice that the product contained asbestos (R. 5440-41). It is hard to imagine any circumstance that would have compelled Crane to warn.

viii. The evidence that a warning from Crane would have reached Mr. Dummitt and that he would have heeded it

Mr. Dummitt rose to the rank of Master Chief Petty Officer – the highest rank an enlisted seaman can obtain (R. 1168[2110], 5483, 5512). No one had more hands-on experience with boiler room equipment (R. 5483). Based on his personal knowledge and experience, he testified that he would have heeded a warning about the dangers of asbestos had Crane provided one, including by taking protective

measures like wearing a mask and using wetting-down methods to control dust release, neither of which would have interfered with his duties (R. 5512).

As staff liaison, Mr. Dummitt routinely received communications on safety issues from manufacturers that he unwaveringly passed along to his subordinate boiler technicians (R. 5514). In fact, he stated that it was not simply his "responsibility" to communicate those safety hazards, but his "responsibility to follow up on it and make sure that they did what they were supposed to do." (R. 5514). He stated that safety precautions were posted on each piece of equipment, and in his keen observance of those warnings, he noted that the bottom of the safety plaques referred the user to the instruction manual for additional precautions (R. 5512-13), which he routinely referenced (R. 1352[2539], 5513).

Crane's valves had nameplates, and were provided with instruction pamphlets that could be updated (R. 1162[2089], 5475), so it had direct and continuing channels to warn end users. Despite the Navy's "excruciating detail" in prescribing technical requirements (R. 1506[2879]), not a single document was presented at trial showing that the Navy ever proscribed or prescribed asbestos warnings in any fashion, as admitted by Appellant (R. 5446). To the contrary, the Navy actually expected manufacturers to provide warnings for equipment operations "which [would] result in personal injury or loss of life if not correctly followed" (R. 1486-88[2800-07], 1499[2852], 5447).

B. PERTINENT PROCEDURAL HISTORY

i. The provident preclusion of speculative expert opinion

Appellant attempted to elicit opinion testimony from its expert, Admiral Sargent, that if Crane hypothetically would have attempted to give a warning at any time between 1940 and 1980, the Navy would not have accepted it under any circumstance. Supreme Court properly precluded this as speculative (R. 75-76, 1520-21[2938-40]). The Appellant Division dissenters mistakenly believed this opinion was precluded on relevancy grounds (COA 62-63), likely on account that this issue was not actually briefed by the parties. The extent that Appellant raised this issue in its Appellate Division Opening Brief was one passing reference in its "Statement of Facts" section (see App. First Dept. Brief at 11-12, 42-47)

The one question posed to Admiral Sargent that was providently precluded on relevancy grounds, however, addressed a single correspondence from the Navy to an unrelated manufacturer about *product design*, not warnings, which in any event post-dated the decedent's last date of exposure by *seven years* (R. 1519-20).

ii. Supreme Court's charge

Supreme Court instructed the jury to determine foreseeability (R. 2031), *not* to determine whether a legal duty existed in the first instance, since Supreme Court had already properly made that determination as an issue of law (R. 1769[3490]). The jury charge actually mirrored the law as set forth by this Court in Rastelli (79

N.Y.2d 289, supra at 297) (R. 2031[4068]). The ensuing instruction directed the jury to adjudicate the issues of foreseeable use and foreseeable harm (R. 2031[4068-69]), both bedrock precepts for determining breach of a duty to warn.

As to causation, Supreme Court repeatedly charged the jury that Plaintiff had the burden of proof at all times (R. 2032-34[4073-81], 2043[4114]). Appellant objected to the *form* of the heeding presumption charge, and expressly requested that it be charged as a rebuttable heeding presumption (R. 2045[4122], 2046[4127-28]). Supreme Court agreed, underscoring the rebuttable nature of the heeding presumption, while making sure to reiterate that the burden still remained with Plaintiff (2048[4135-36]). Appellant has, therefore, forfeited appellate review of this issue, since the charge it requested was given.

iii. Supreme Court's duty determination

Supreme Court determined that "Crane's duty is not based on foreseeability alone," but on the considerations that "strengthen the connection" between Appellant's valves and the asbestos components (R. 57-58, 62). Clearly, the duty test employed was not, as Appellant asserts, a foreseeability test; it was based on the interpretation of the Rastelli factors adopted in Surre v. Foster Wheeler LLC (831 F.Supp.2d 797, supra at 801) – Appellant's own seminal case (COA 43-44).

iv. The Appellate Division decision

In a 3-2 split, the Appellate Division, First Department affirmed the judgment awarding Plaintiff money damages upon the jury verdict (COA 10-11).[5] The two-Justice dissent was limited to the issue of causation, specifically taking issue with the rebuttable heeding presumption charge and the (unbriefed) preclusion of Admiral Sargent's opinion testimony (COA 52-66). All five Justices agreed that a duty to warn could be imposed under New York law in synergistic component-use cases and that one was properly imposed under the facts of this case. Far from creating a new rule, the Appellate Division merely blended the Rastelli considerations into a cogent framework of whether the manufacturer had a "sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce" (COA 41). The Appellate Division was clear that this expression was nothing more than what Rastelli and its progeny "together stand for" (COA 41).

This appeal ensued as of right (COA 7-9).

[5] The decision also addresses the appeal in Konstantin v 630 Third Avenue Assoc., et al., which was an in extremis case joined for trial with, among others, this case. Much of the decision, therefore, is irrelevant to this appeal.

ARGUMENT

I. IN THIS NEGLIGENCE-BASED FAILURE-TO-WARN CASE, A DUTY TO WARN WAS PROPERLY IMPOSED ON CRANE UNDER AN ANALYSIS OF THE FACT-SPECIFIC, POLICY-LADEN CONSIDERATIONS ESPOUSED BY THIS COURT'S PRECEDENTS AND COGENTLY SYNTHESIZED BY THE APPELLATE DIVISION

A. The Appropriate Test To Determine Whether A Manufacturer Owes Its Product User A Duty To Warn In Synergistic Component-Use Cases Is To Weigh Certain Policy-Laden Considerations On A Fact-Specific Basis

Under our jurisdiction's negligence-based approach to failure-to-warn claims, whether a manufacturer owes a duty to warn for the dangers attendant to the synergistic use of its product with a component supplied by a third-party should be determined, in the first instance, by weighing various policy-driven considerations under the circumstances of each case, rather than by an absolute "stream of commerce" test focused solely on who supplied the component part. Appellant advocates for this bright-line, single factor test because it is the only scenario that would entitle it to escape liability for its egregious failure to warn. In so doing, however, Appellant disregards the law by first attempting to hide its bright-line approach under the guise of a newborn "control-based" approach, and second, by misreading New York precedents as conforming to that approach.

i. Appellant's newly-articulated "control-based" test is patently baseless and nothing more than a bright-line, single-factor test in disguise

Despite holding steadfast throughout this case to an argument that the sole factor in determining whether it owed a duty to warn was whether it placed into the stream of commerce the specific asbestos components of its valves that, by chance, were the ones to which the decedent was exposed, Appellant has now recognized the tenuous nature of that approach and has chosen, instead, to advance a newly-formulated "control-based approach" (App. Brief at 20-40). Appellant's new argument, however, is nothing more than a thinly-veiled attempt to present a more palatable variant of its bright-line approach. This new proffer suffers from the same – and actually additional – flaws.

Appellant fails to cite a single New York precedent adopting a "control-based" approach for determining duty in any products liability context. To the contrary, liability is imposed on parties downstream of a manufacturer (i.e., wholesalers, retailers) *despite* their lack of control over, possession of, or access to the product. See Brumbauch v CEJJ, Inc., 152 A.D.2d 69, 71-72, 547 N.Y.S.2d 699 (3d Dept., 1989) (mere marketer of product, not within distributive chain, can be liable even though it did "*not take actual possession, title or control of the*" product) (emphasis added); Mead v Warner Pruyn Division, 57 A.D.2d 340, 340-41, 394 N.Y.S.2d 483 (3d Dept., 1977) (retailer liable even for goods "over which

he has no control as to hidden or latent defects").[6] Such liability rests on considerations of policy, including that it acts as an added incentive for safety. See Codling v. Paglia, 32 N.Y.2d 330, 341, 298 N.E.2d 622 (1973); Mead, supra. Thus, since products liability is rooted in policy rather than control, there is no basis to adopt Appellant's newborn "control-based" approach for a duty inquiry in synergistic component-use cases. This becomes even more apparent when viewed against this Court's precedents regarding (1) duty generally, (2) products liability as a whole, (3) how "defective products" in warnings cases are defined, and (4) the duty to warn specifically in synergistic component-use cases.

ii. The inherently fact-specific nature of a duty analysis in negligence-based products liability claims supports a "weighing of factors" test rather than a bright-line test to determine whether to impose a duty to warn in synergistic component-use cases

Appellant's bright-line rule – cloaked as a control test – is discordant with this Court's treatment of both duty generally and products liability law as a whole.

Duty is "a legal term by which we express our conclusion that there can be liability." DeAngelis v. Lutheran Med. Center, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626 (1983). It requires a person "to conform to a certain standard of conduct, for the protection of others against unreasonable risks." Prosser and

[6] Appellant relied on Brumbauch before the Appellate Division but conveniently omits it in its Opening Brief here, likely on account of its incompatibility with Appellant's newfound "control" theory.

Keeton, Torts §§ 30 & 53, at 164, 356 (5th ed.). It is a "policy-laden" analysis (Espinal v Melville Snow Contrs., 98 N.Y.2d 136, supra at 139), requiring the balancing of interests, including the wrongfulness of the defendant's actions and the reasonable expectation of care owed. Palka v Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, supra at 585; Turcotte v. Fell, 68 N.Y.2d 432, 437, 502 N.E.2d 964 (1986). It is "not something derived or discerned from an algebraic formula, [but is] coalesce[d] from vectored forces including logic, science, [and] weighty competing socioeconomic policies…" Palka, supra at 585. As such, rigid formalisms have little, if any, place in a duty analysis.

Buttressing this precept is that unlike some jurisdictions that subscribe to a pure strict liability approach to failure-to-warn cases, failure-to-warn in New York is a negligence-based claim. See Enright v. Eli Lilly & Co., 77 N.Y.2d 377, supra at 385-87 (failure to warn claim, "though . . . couched in terms of strict liability, is indistinguishable from a negligence claim," such that "[c]oncepts of reasonable care and foreseeability are not divorced from this theory of liability…"); see also Denny v. Ford Motor Co., 87 N.Y.2d 248, 258, 662 N.E.2d 730 (1995) (defective design "is a 'negligence-inspired' approach"), rearg. denied 87 N.Y.2d 969; P.J.I. 2:120, vol. 1A at p.709 (2014 ed.) ("'strict products liability' label is actually a misnomer when applied to claims based on design defect and inadequate warning,…"); cf. Braaten v. Saberhagen Holdings, 165 Wash.2d 373, 385 n.6, 198

P.3d 493 (Wash., 2008) (contrasting Washington's true strict liability rule with other jurisdictions "that apply a more negligent-like approach to failure-to-warn claims").[7]

Consequently, a duty to warn inquiry is "intensely fact-specific." Liriano, supra at 240, 243; Di Ponzio v. Riordan, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377 (1997) ("[t]he nature of the inquiry depends, of course, on the particular facts and circumstances in which the duty question arises"). This, in turn, renders a bright-line approach to duty flatly inconsistent with our jurisprudence. See Espinal, supra at 139 ("'policy-laden' nature of the existence and scope of a duty generally precludes any bright-line rules…").

Indeed, this Court has consistently declined to make bright-line pronouncements in the context of our negligence-based products liability law, since doing so would inexorably lead to harsh results. See, e.g., Hoover v. New Holland North America, Inc., 23 N.Y.3d 41, 59, 11 N.E.3d 693 (2014) (permitting manufacturers to "*automatically* avoid liability" in design defect cases where a safety device is removed post-sale but not replaced would create "[s]uch a broad rule" that it "would lessen the manufacturer's duty to design effective safety devices that make products safe for their intended purpose and 'unintended yet

[7] The Braaten Court also rejected the Restatement (Third) of Torts (Id at 384, n.5), whereas this Court has averred that "New York law is consistent with the Restatement [Third]". Speller v. Sears, Roebuck and Co., 100 N.Y.2d 38, 41-42, 790 N.E.2d 252 (2003).

reasonably foreseeable use'") (emphasis in original); Liriano, supra at 242 ("[t]he fact-specific nature of the inquiry into whether a particular risk is obvious renders bright-line pronouncements difficult"); Cover v. Cohen, 61 N.Y.2d 261, 270, 473 N.Y.S.2d 378 (1984) ("[w]e decline the single standard invitation [regarding the admission of subsequent remedial measures] because of the different inquiries involved in the different types of cases"); Micallef v. Miehle Co., 39 N.Y.2d 376, 385, 348 N.E.2d 571 (1976) (abrogating a bright-line patent-danger rule because "[i]ts unwavering view produces harsh results…").

Therefore, Appellant's proffered bright-line approach is wholly incompatible with how both duty and products liability law have been treated by this Court. Against this backdrop, Appellant's bright-line rule is flawed at its core because it rests erroneously on an absolute strict liability definition of a "defective product" rather than a negligence-based one.

iii. In a negligence-based failure-to-warn case, the stream of commerce inquiry asks simply whether a manufacturer distributed a product without an adequate warning for a danger attendant to its *use*, not necessarily whether it distributed the specific harmful agent that was released upon its product's synergistic use with a component

Appellant distorts the stream of commerce inquiry by conflating a "defective product" with a "harm-causing" agent or toxin (App. Brief at 24). In a warnings context, these concepts are not universally equivalent.

Appellant acknowledges the well-settled precept that a manufacturer who places into the stream of commerce a defective product which causes injury may be liable for such injury (App. Brief at 24). See Liriano, 92 N.Y.2d 232, supra at 237; Codling v. Paglia, 32 N.Y.2d 330, 340-41, 298 N.E.2d 622 (1973). Yet Appellant disregards the ensuing principle, which is that in a warnings case, a "defective product" is defined as one that fails to contain an adequate warning regarding a danger incident to its *use*. Liriano, supra at 237; Rastelli, supra at 297.

As a result, it is "not essential" that the defendant's product itself contain a specific defect or harmful agent for it to be deemed a "defective product" based on its lack of warning for a danger incident to its use. Alfieri v. Cabot Corp., 17 A.D.2d 455, 460, 235 N.Y.S.2d 753 (1st Dept., 1962), aff'd 13 N.Y.2d 1027; cf. Restatement (Second) of Torts, Section 402A, cmt. h (1965). Indeed, in a negligence-inspired design defect context, this Court has avowed that under the "traditional test" of a defective product, that the injurious component "was a replacement and not the original is *not dispositive*…" Sage v. Fairchild-Swearingen Corp, 70 N.Y.2d 579, supra at 587 (emphasis added); see also Denny v. Ford Motor Co., 87 N.Y.2d 248, supra at 258-59 (distinguishing a "defect" in "true 'strict' liability" from a "defect" in negligence).

Here, Appellant's entire "stream of commerce" argument is inappropriately predicated on a pure strict liability approach that would narrowly restrict the

"defective products" at issue to only the exact asbestos components to which the decedent was exposed, notwithstanding that his exposure came only as a direct result of his *use* of Appellant's valves in their normal, intended, and required fashion. Simply put, Appellant's valves were "defective" under New York law because they were placed into the stream of commerce without a warning for the unavoidable dangers of asbestos exposure associated with their normal use, i.e., the required replacement of the perishable components to maintain utility, which also mandated removal of essential asbestos lagging pads (R. 3875, 5449-50).[8]

This provides a key perspective to the New York precedents establishing that a duty to warn can exist under the genus of failure-to-warn cases at issue.

iv. This Court's precedents and their progeny clearly establish that a duty to warn in synergistic component-use cases turns on a weighing of fact-specific, policy-laden considerations

In Rastelli v. Goodyear Tire & Rubber Co. (79 N.Y.2d 289, supra at 297), this Court unanimously declared that "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known." Accord Liriano, 92 N.Y.2d 232, supra at 237. Far from setting forth a bright-line "stream of commerce" rule, the Rastelli Court considered

[8] As discussed infra, Appellant's valves were supplied with original asbestos components, so under any interpretation of a stream of commerce rule, these valves were defective when sold.

multiple factors in determining whether to impose a duty to warn on a manufacturer for the post-sale use of its product with a third-party component, including whether (1) the manufacturer's product was "sound," (2) the component at issue was merely "compatible for use" with the manufacturer's product or something more than compatible, (3) its product created or contributed to the defect at issue, (4) it exercised control over the production of the component or ever marketed it, (5) it placed the component into the stream of commerce, and (6) it derived a benefit from the sale of the component. Contrary to Appellant's newly-formulated assertion, had this Court intended Rastelli to stand for a "control-based" rule, it would not have considered additional factors.

Strikingly, despite Appellant's exaltation of the "rule of Rastelli" (App. Brief at 31), not once in its 81-page Opening Brief is the actual holding of Rastelli even mentioned:

> [u]nder 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.

Id. at 297-98. By correlation, where, as here, the "circumstances of th[e] case" establish that the defendant's product was *not* sound and that the third-party components were both "essential" and "specified" for use with the defendant's

product, Rastelli compels the imposition of a duty to warn. Appellant's conspicuous omission of the Rastelli holding is telling.

Moreover, the two courts that sought to unite the Rastelli considerations into a synthesized framework did not espouse anything resembling a control-based approach. In Surre, a case heavily relied upon by Appellant, the Southern District of New York acknowledged that a duty to warn could exist in these species of failure-to-warn cases and expressed the weighing of the Rastelli considerations as whether "additional circumstances strengthen the connection between the manufacturer's product and the third party's defective one." Surre v. Foster Wheeler LLC, 831 F.Supp.2d 797, supra at 801.[9] The examples of "additional circumstances" noted therein that warranted the imposition of a duty included, like here, where the components were necessary or specified for use with the defendant's products. See id. at 801. Incredibly, Appellant seeks to rely on the fact-specific result in Surre without acknowledging either that it was a fact-specific result (see id. at 804 ("*on this record*, there are not sufficient *factual grounds*" for a duty) (emphasis added)), or that, here, Supreme Court applied Surre's "strengthen

[9] There, where the record established that the insulation was nothing more than compatible for use with the equipment, the issue was phrased as "the extent to which a manufacturer has a duty to warn against the dangers of a third party's product that *might be* used in conjunction with its own." Id. at 801 (emphasis added). Here, conversely, the use was a "known certainty" (COA 58).

the connection" framework to determine that Appellant owed a duty to warn (R. 57, 62); see App. Brief at 31-33.

The Appellate Division chose to express the fact-specific weighing of the Rastelli factors as whether the manufacturer has a "sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce" (COA 41). Contrary to Appellant's contention, the Appellate Division did not create a novel or "amorphous" test (App. Brief at 22); it merely set forth a composite of the factors identified by the Rastelli Court. Indeed, the Appellate Division was quite clear that it was simply synthesizing the existing precedents into a proposition that "*[t]hese cases…together st[oo]d for*…" (COA 41) (emphasis added).

In short, irrespective of how this analysis is framed, multiple considerations must be weighed in a duty inquiry involving this genus of failure-to-warn cases – considerations that embody the policy-driven goals of fixing duty. See Prosser and Keeton, Torts § 53, at 358 (5th ed.) (duty is not sacrosanct but is "only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection").

Significantly, a "weighing of factors" test is entirely consistent with the test for determining a continuing duty to warn. See Liriano, supra at 240 n.3 ("post-sale duty of a manufacturer to warn involves the *weighing of a number of factors* …")

(emphasis added) (citing Cover v Cohen, 61 N.Y.2d 261, supra at 275-76); see also Cooley v. Carter-Wallace Inc., 102 A.D.2d 642, 644, 478 N.Y.S.2d 375 (4th Dept., 1984) ("imposition of the duty to give a warning of some kind involves a balancing test…"). It would be wholly incongruous to treat a post-sale duty to warn inquiry as a weighing test but a post-sale component-use duty inquiry as a bright-line test.

To this end, this Court has addressed or referenced this species of failure-to-warn claims twice since deciding Rastelli. See Appalachian Ins. Co. v. General Electric Co., 8 N.Y.3d 162, 166-67, 863 N.E.2d 994 (2007) (noting, in an insurance dispute action, that the typical asbestos suit was based on manufacturer's failure to warn about the use of its turbines with asbestos insulation manufactured by others), rearg. denied 8 N.Y.3d 954; Sprung v MTR Ravensburg, Inc., 99 N.Y.2d 468, 475, 758 N.Y.S.2d 271 (2003). In Sprung, this Court concluded that a lathe manufacturer had no duty to warn for the defect in a retractable floor component. Although not citing to Rastelli, this Court weighed the aforementioned considerations, including the factors unaffiliated with the "stream of commerce" principle. See Sprung, supra ("[n]or can it be said on this record that the retractable floor is a necessary component part of the lathe"). Thus, this Court's most recent decisions support a "weighing of factors" approach.

Similarly, in addressing fact patterns that could fall within the ambit of Rastelli, the intermediate appellate courts have been consistent in interpreting

Rastelli as requiring a fact-specific, "weighing of factors" test, rather than an automatic, bright-line test. See, e.g., In re Eighth Judicial Dist. Asbestos Litig. [Suttner v Crane Co.], 115 A.D.3d 1218 (4th Dept., 2014), aff'ing 2013 WL 9816609 (Sup. Ct., Erie Co., 2013) (finding, per the adopted Supreme Court decision, that Crane owed a duty to warn for recommended asbestos gaskets and packing used with its steam valves); In re Eighth Judicial Dist. Asbestos Litig. [Drabczyk], 92 A.D.3d 1259, 938 N.Y.S.2d 715 (4th Dept., 2012), lv denied 19 N.Y.3d 803 (citing Rastelli when noting, in dictum, that it was error to have charged the jury on a duty to warn where commercial plant valves were merely compatible for use with asbestos insulation) (SR. 74-75, 82); Penn v. Jaros, Baum & Bolles, 25 A.D.3d 402, 809 N.Y.S.2d 6 (1st Dept., 2006) (expressly distinguishing Rastelli in finding that alarm manufacturer had a duty to warn where alarm used in conjunction with a third-party carbon dioxide component); Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dept., 2001) (expressly distinguishing Rastelli in finding an issue of fact as to a Naval pump manufacturer's duty to warn where defendant knew asbestos insulation would be used as a specified component of its pumps, and the pumps could not be operated safely without it); Rogers v. Sears, Roebuck & Co., 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dept., 2000) (expressly distinguishing Rastelli using the "compare" signal in finding that a grill manufacturer had a duty to warn where plaintiff was injured

by third-party replacement propane tank); Village of Groton v. Tokheim Corp., 202 A.D.2d 728, 608 N.Y.S.2d 565 (3d Dept., 1994), lv. denied 84 N.Y.2d 801 ("[w]e are of the view that the case at bar falls within the category of cases distinguished by the Rastelli court" where defendant's valve was used in combination with a valve supplied by a third-party); Tortoriello v. Bally Case, Inc., 200 A.D.2d 475, 477, 606 N.Y.S.2d 625 (1st Dept., 1994) (citing Rastelli using the "cf." signal in finding, "[u]nder the circumstances of th[at] case," no duty to warn where the only evidence in the record was that a third-party flooring component was merely compatible for use with the defendant-manufacturer's freezer); see also Surre v. Foster Wheeler LLC, 831 F.Supp.2d 797, supra (finding, "*on this record*, there are not sufficient *factual grounds*" to show that Crane owed a duty where its Pacific brand boilers were not supplied with asbestos insulation, it was not specified or required, and there was no other evidence showing the boilers' "connection" to the components) (emphasis added); Gitto v. A.W. Chesterton, 2010 U.S. Dist. LEXIS 144568 (S.D.N.Y., 2010) (finding that Crane owed a duty to warn in a Naval valve case and Rastelli was merely factually inapposite). Even decisions decided before Rastelli have concluded that distribution of the specific injurious component – or control over it – is not dispositive of a duty to warn. See, e.g., Hess v. Mack Trucks, 159 A.D.2d 557, 552 N.Y.S.2d 423 (2d Dept., 1990); Young v. Robertshaw Controls Co., 101 A.D.2d 670, 476 N.Y.S.2d 24 (3d Dept.,

1984); Baleno v. Jacuzzi Research, Inc., 93 A.D.2d 982, 461 N.Y.S.2d 659 (4th Dept., 1983). The fact-specific nature of these precedents wholly undermines Appellant's interpretation of New York law.

Indeed, where Appellant's bright-line approach manifestly falters is in its attempt to wedge Rogers (supra) and Berkowitz (supra) into its pretextual "control-based" scheme (see App. Brief at 33-34). In Rogers, a duty to warn was imposed on a manufacturer for the use of its grill in conjunction with a replacement propane tank that the manufacturer did not place into the stream of commerce. The case fell outside of Rastelli's orbit because the grill was not sound– it was sold originally with a dangerous, perishable propane tank but no warning – and the like-kind replacement tank was not merely compatible for use with the grill – it was necessary. Notably, consistent with how a "defective product" is defined in a warnings case (see Section I(A)(iii), supra at 29-31), the First Department avowed that the manufacturer owed a duty to warn for the dangers inherent in the "*use of the grill regardless of any defects*." Id. at 246 (emphasis added).

More strikingly, the only possible way for Appellant to explain the factually apposite Berkowitz is to acknowledge that a duty to warn can exist under New York law even in instances where the defendant did not supply the injury-producing component (see App. Brief at 34-35, admitting that "liability could lie…"). And, indeed, what happened here is precisely what Appellant

contemplates in its discussion of Berkowitz, namely, Supreme Court concluded that a duty to warn existed under "the facts of th[is] particular case" on the full trial record (App. Brief at 34) (R. 52-62). Thus, Appellant's treatment of Rogers and Berkowitz is, at a bare minimum, a tacit admission that New York does not adhere to a bright-line, single-factor approach.

Further significant is that this Court has expressly rejected an absolute "stream of commerce" approach in negligence-based design defect claims where the plaintiff was injured as a result of a third-party replacement component. See Sage, 70 N.Y.2d 579, supra. Since the considerations for imposing a duty are more cogent in a warnings case than in a design case, as it is easier and less costly to warn (see Liriano, supra at 239-40), the same result is instructed here.

Thus, the appreciable weight of – if not all – appellate authority firmly supports a case-specific, "weighing of factors" test to determine whether to impose a duty to warn in synergistic component-use cases.

Appellant has not cited a single warnings case from this Court (or an intermediate appellate court) supporting a bright-line approach. Instead, Appellant's Opening Brief is replete with citation to California and Washington caselaw – two jurisdictions that have markedly different failure-to-warn jurisprudence. See, e.g., O'Neil v. Crane Co., 53 Cal.4th 335, 350 n.6, 351-52, 354, 266 P.3d 987 (Cal. 2012) (relying on a "line of Court of Appeals cases" to

recognize, under a pure strict liability approach, "a bright-line legal distinction" imposing failure-to-warn liability only on the entity that distributes the particular hazardous agent);[10] Braaten v. Saberhagen Holdings, 165 Wash.2d 373, 385 n.6, 198 P.3d 493 (2008) (contrasting Washington's strict approach with other jurisdictions "that apply a more negligent-like approach to failure-to-warn claims").[11] Informatively, this Court has previously rejected Washington's approach to products liability. See Denny v. Ford Motor Co., 87 N.Y.2d 248, supra at 260 (rejecting "what other jurisdictions have done," like Washington, to create a "single analytical test" for design defect and breach of warranty claims). To this end, Appellant's reference to a purported "majority rule nationwide" is a

[10]Appellant seems to acknowledge that a duty could exist under New York law where the component is necessary (App. Brief at 33-34), but still asserts that California law is similar to New York notwithstanding California's unwillingness to accept that very proposition. See O'Neil, 53 Cal.4th 335, supra at 350, n.6. (rationale against imposing a duty to warn under California law would exist even where the consumable component was necessary).

[11] Notably, even these two jurisdictions have recognized the inequitable consequences stemming from the bright-line rules they adopted. See Macias v. Saberhagen Holdings, Inc., 175 Wash.2d 402, 282 P.3d 1069 (Wash. 2012) (majority struggled to rationalize its conclusion that respirator manufacturer owed a duty to warn for exposure to asbestos when the worker cleaned masks, although the manufacturer did not place the asbestos into the stream of commerce, which prompted the dissent to aver that "this was *exactly* the issue we confronted in Simonetta and Braaten") (emphasis in original); Shields v. Hennessy Industries, Inc., 205 Cal.App.4th 782, 140 Cal.Rptr.3d 268 (Cal.App. 1st Dist., 2012) (endeavoring to distinguish O'Neil in finding brake grinder manufacturer potentially liable even though it did not place the asbestos brakes into the stream of commerce).

grave overstatement – two jurisdictions rooted in pure strict liability rather than negligence is scarcely evidence of a majority rule (App. Brief at 21).[12]

In any event, this Court's precedents and their New York progeny plainly support a "weighing of factors" approach to a duty to warn analysis in synergistic component-use scenarios. Cf. Palka, supra at 588 (a balancing test is "the

[12] The other non-New York cases cited by Appellant cannot comprise a "majority rule" because they either do not address the question of duty at all (see, e.g., Whiting v. CBS Corp., 83 Mass.App.Ct 1113 (Mass. App. Ct., 2013) (decided on causation); Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir., 2005) (same)), or actually conclude that a duty *does* exist in these circumstances (see, e.g., Hughes v. A.W. Chesterton Co., 435 N.J.Super. 326, 89 A.3d 179 (N.J. A.D., 2014) (finding a duty but decided on causation grounds)), or are improperly predicated on causation principles and in any case contrasted by decisions from the same court. See, e.g., Conner v Alfa Laval, Inc., 842 F.Supp.2d 791 (E.D.Pa., 2012) (relying on Lindstrom's causation decision); but see Dalton v 3M Co., 2011 WL 5881011 (E.D.Pa., 2011) (R. 5470) (recognizing that duty is a peculiar issue of state law); 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. General Electric Company, 2004 WL 2250990 (E.D.Pa., 2004). Recently, a Maryland intermediate appellate court concluded that no duty existed in a similar context. But that determination was made – in sharp contrast to New York's negligence-based approach – pursuant to "a bright line in the law of strict liability," and it even acknowledged that specification or recommendation of the component, like here, could lead to a duty. May v Air and Liquid Systems Corp., __ A.3d __, 2014 WL 4958163 at *2, 4 (Md. Ct. Sp. App., 2014). Indeed, in so doing, the Maryland court contrasted New York law. See id. at *5. Thus, a few decisions, all rooted in pure strict liability, do not constitute a majority view nationwide. Courts in other jurisdictions have concluded, like New York, that a duty can exist in these circumstances under negligence principles. See, e.g., Quirin v. Lorillard Tobacco Company, __ F.Supp.2d __, 2014 WL 585090 (N.D. Ill., 2014); Sweredoski v Alfa Laval, Inc., 2013 R.I. Super. LEXIS 185 at *23 (R.I. Super. Ct., 2013) ("weight of jurisprudence across the country, including in Rhode Island, suggests that [Crane] 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"); Phillips v. Hoffman/New Yorker, Inc., 2013 WL 4715263 (Del.Sur.Ct., 2013); Sether v. Agco Corp., 2008 WL 1701172 at *3 (S.D.Ill., 2008); Lindquist v. Buffalo Pumps, Inc., 2006 WL 3456346 at *2 (R.I.Super.Ct., 2006); Branon v. Gen. Elec. Co., 2005 WL 1792122, at *2, n.6 (Ky.App.Ct., 2005). The Amici Brief from Business Council of New York State, et al. – which is filed on behalf of organizations that seek to erode tort law – cites numerous jurisdictions where mere splits exist on this issue (see Amici Brief at 17-19, citing Pennsylvania, Connecticut, Delaware, and Federal Maritime Law). That certainly does not support a majority rule nationwide.

traditional, complex and particularized analytical path" for fixing duty). Although Appellant's bright-line rule would admittedly provide simple guidance on this issue, the role of our courts to decide difficult but equitable elements of law should not be negated on the mere basis of ease. Cf. Liriano, 92 N.Y.2d 232, supra at 240 n.2 (although the elements of a failure-to-warn claim may be difficult to apply, that does not "negate the duty to warn against foreseeable product misuse which is well established in this Court's precedents as well as contemporary products liability jurisprudence"). This is especially true where a bright-line rule would create a greater injustice by automatically cutting off many deserving plaintiffs with valid claims, while concomitantly permitting manufacturers to escape liability even where, like here, they never even tested, inspected, or attempted to warn. Fairness should not be sacrificed for simplicity.

v. A "weighing of factors" test provides a provident limit to a product manufacturer's liability

Importantly, a weighing test denotes an appropriate limit to a product manufacturer's liability. Appellant's spurious attempt to make this appear as a limitless liability scenario goes so far as to assert that Supreme Court extended a manufacturer's duty to "any product, sold by any other entity, at any point in time, so long as it was 'foreseeable,' in hindsight, that the product could be used with or

near its own" (App. Brief at 26).[13] That is not even remotely what happened here, as Supreme Court relied on Surre – Appellant's own seminal case – to conclude that "Crane's duty is not based on foreseeability alone," but on the factors that "strengthen the connection" between Appellant's valves and the asbestos components (R. 57, 62). Since a pure foreseeability test was not applied here, any concomitant fear of limitless liability is a nullity.

Furthermore, the Appellate Division used the qualifying phrase "sufficiently significant" to limit the instances where a manufacturer's "role, interest, [or] influence" in the use of the component with its product could potentially rise to the level of warranting a duty (COA 41). This qualification limits a manufacturer's duty to a controllable degree and provides an appropriate balance between manufacturers' liability exposure and the rights of unassuming plaintiffs injured from latent dangers resulting from synergistic component-use scenarios.

Indeed, as recognized by the Appellate Division (COA 38-44), the limits on liability from this approach are already exemplified by Rastelli and its progeny. Compare Suttner, Penn, Berkowitz, Rogers, Gitto (all finding a duty), with

[13] Amici Business Council, et al. expands this assertion to a level of absurdity, notwithstanding their previous acknowledgment of an inherent limit on liability provided by Plaintiff's actual approach. Compare Amici Brief at 11-12 (distinguishing necessary or specified components from those that merely "could be" used), with Amici Brief at 36-38 (misrepresenting Plaintiff's approach as a rule that would create an automatic duty to warn for any product used in the mere vicinity of any other product in any context).

Rastelli, Drabczyk, Tortoriello, Surre (all finding no duty). Therefore, Appellant's fear of limitless liability is wholly unfounded.

B. An Analysis Of The Policy-Laden Factors Unequivocally Demonstrates That A Duty To Warn Was Properly Imposed On Crane Under The Circumstances Of This Case

Under the overwhelming facts of this case and the attendant public policy justifications, this Court should affirm the imposition of a duty to warn.

i. The considerations, and their policy-driven underpinnings, overwhelmingly support a duty to warn in this case

The pertinent duty considerations include whether (1) the manufacturer's product was "sound," (2) the component at issue was merely compatible for use with the manufacturer's product or something more, (3) the manufacturer's product created or contributed to the defect at issue, (4) the manufacturer exercised control over the production of the component or ever marketed it, (5) the manufacturer placed the component into the stream of commerce, and (6) the manufacturer derived a benefit from the sale of the component. Additionally, as in all negligence-based duty inquiries, the wrongfulness of Appellant's actions and the decedent's reasonable expectation of care should be considered. See Palka, 83 N.Y.2d 579, supra at 585.

1. Crane's valves were indisputably not sound products, and a clear duty to warn existed at the time of sale

There is no dispute that hundreds of Crane's valves to which the decedent maintained were supplied to the Navy with original asbestos components, including Cranite (R. 1160-64[2081-82, 2091-96], 1509[2893-94], 5443; SR. 12-13, 15-20, 23-27, 45-49). Crane admitted that these specified consumable components needed to be vigilantly replaced with like-kind components just so the valves could continue to function (R. 5442-45, 5449-50); (App. Brief at 14), and it agreed that the removal process posed a hazard of asbestos exposure (R. 5445). But Crane never even attempted to warn against the dangers of replacing the components it actually distributed.

Unlike the sound tire in Rastelli that was supplied with a *nondefective* rim which was randomly replaced with a defective rim, it cannot be disputed that Crane's asbestos-containing valves were not sound products. See Rogers, 268 A.D.2d 245, supra (duty imposed where grill supplied originally with dangerous, consumable propane tank but no warning, and injury resulted from like-kind replacement tank). This is perhaps why Appellant does not even attempt to argue that its valves were "sound" under Rastelli. Id. at 297-98

Nor can Appellant dispute that a duty *existed when these valves were sold* to warn the first user of the dangers of removing the original asbestos components. It is patently absurd to assert, as Appellant does, that this existing duty vanished once

the original components were removed and replaced with identical components – particularly where that replacement process was mandated by the very function and design of the valve. Public policy cannot permit an unsound product to be rendered sound due to its normal function. See Sage, 70 N.Y.2d 579, supra at 587 ("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").

In instances involving a product's incorporation by design of consumable components, the manufacturer's duty should conform to the useful life of the product. To hold otherwise would (1) incentivize manufacturers to disregard their common law duties merely by incorporating consumable components into their product design, (2) condone their decision to forgo testing or warning with their products or components, even where, as here, they had actual knowledge of the hazards, (3) permit them to completely ignore advancements in scientific knowledge after the original component is removed, which would eviscerate any continuing duty to warn, and (4) force unassuming end users to shoulder the brunt of consumable component-related injuries, particularly where, as here, the

manufacturer of the perishable component may not even be discernable (R. 1169[2116], 1353[2545]).[14]

Had an adequate warning – either on the valve itself or in the instruction pamphlet – been issued originally with a Crane valve, that warning would have apprised all subsequent users, like the decedent, of the dangers of asbestos exposure associated with the normal and intended use of replacing asbestos components throughout the valve's useful life. This Court should not endorse Crane's conscious failure to originally warn by absolving it of liability on the mere happenstance that it did not supply the replacement parts in this particular setting, especially where it supplied them in other settings.

Thus, this factor weighs strongly in favor of a duty to warn.

2. Asbestos components were "essential" components that were "specified" for use with Crane's valves in this setting

The use of asbestos components with Crane's valves was synergistic, such that in order to retain their utility, the valves continued to be dangerous. As a result, exposure to asbestos from Crane's valves was unavoidable (R. 5490).

[14] It is easy to imagine, in this modern day and age, that the duty to warn could be rendered a complete nullity if Appellant's approach is adopted. A 3-D printer, for example, could fashion replacement parts for an infinite number of products, which, under Appellant's approach, would relieve all product manufacturers of a duty to warn and would place the full onus of the latent injury on the innocent plaintiffs.

Pursuant to the very drawings Crane created and to Naval Machinery, which Crane helped create, asbestos gaskets, packing, and lagging pads were specified as the "correct" components for Crane's high pressure, high temperature Navy boiler room valves, and were deemed "essential" to the valves' function (R. 3869, 3875-76; 327[248], 329[256], 1163-1166[2090-2102], 1484[2792-93], 1505-19[2878-79, 2891-92, 2918-21], 3425-83; SR. 1-50). Although Crane admitted to having actual knowledge of this use (R. 5443, 5449-50), it disingenuously asserts that its drawings do not directly address replacement parts (App. Brief at 51). It was Crane's own Naval expert, however, who testified that the exact purpose of these drawings was to create standardization of replacement parts (R. 1509[2891-92]).[15] Clearly, Crane "purposefully manufactured" these specific valves for use with these exact asbestos components. Cf. Liriano, 92 N.Y.2d 232, supra at 238 (duty where product "purposefully manufactured to permit its use" as adapted post-sale).

Appellant baldly asserts that any number of other materials were available for use in these valves (App. Brief at 15, 35). It conceded at trial, however, that the use of asbestos components was "dictated by the service that…the equipment was in" (R. 328[253]). And according to Crane's own Naval expert, standardization of these components was "absolutely essential" to the logistics of

[15] Admiral Sargent also testified that these replacement parts were required to be stocked on the ship because, logistically, when a ship was out to sea no consumable parts could be acquired (R. 1505[2878]) ("Remember, a ship at sea, there is no telephone, there is no service station, you have to have aboard everything you need to operate and maintain that ship").

running a ship out at sea (R. 1505[2878]). Thus, it was a "known certainty" to Crane that asbestos components would be used in its valves (COA 58). In Rastelli, by contrast, the tire was manufactured to be used with *any* standard-sized rim on the market (Id. at 294, n.1), thereby demonstrating only that the particular rim "could have" or "might have" been used.

To this end, there is no dispute between the parties that a necessary component implicates a duty (see App. Brief at 33).[16] Crane appears to ignore the facts here, however, since the word "essential" is synonymous with necessary. In any event, use by necessity cannot be the *only* type that rises above merely "compatible for use." Rastelli, supra. Specified components should certainly fall within the ambit of a potential duty, as recognized by Appellant's seminal case. See Surre, 831 F.Supp.2d 797, supra at 803 (specification by prescription constituted "more than a mere possibility that asbestos might be used"). Indeed, any difference between a specified component and a necessary component is mere semantics. See Berkowitz, 288 A.D.2d 148, supra (although "technically true that its pumps could run without insulation," potential duty where, inter alia, component was specified).

[16] Crane's current position arguably is subject to the doctrine against inconsistent positions, since at all times in this case until now it had argued that no duty can exist in any circumstance where it did not place the asbestos into the stream of commerce. See Maas v. Cornell University, 253 A.D.2d 1, 683 N.Y.S.2d 634 (3d Dept., 1999), aff'd 94 N.Y.2d 87, 92-93.

Accordingly, this factor weighs heavily in favor of a duty.

3. Crane's valves contributed to the release of asbestos dust from its component parts

Asbestos gaskets and packing posed no danger of asbestos dust release unless deteriorated (R. 929[1574], 986[1685-86], 1605[3114-15]). As conceded by Crane, the release of asbestos dust resulted only from those uses that compromised the component, thereby making the asbestos friable (R. 5444-45). To be sure, in some applications the gaskets "just fell out," meaning the asbestos was not disturbed (R. 1627[3200]). Deterioration was a factor of pressure, temperature, and length in service (R. 980[1662-63]).

Here, it was the particular use of these components in Crane's high pressure, high temperature valves that caused the components to deteriorate (R. 980[1662-63], 984[1677-78], 1003[1756]), thereby releasing the asbestos and necessitating replacement (R. 1501[2859-60], 5488-91). Crane knew precisely which valves this included because Crane's drawings identified the valve system (SR. 1-50). Thus, Crane's valves created the danger of asbestos dust release from the gaskets and packing. Compare Rastelli, supra at 298 ("[n]othing in the record suggest[ed] that Goodyear created the dangerous condition" or "contribute[d] to the alleged defect in a product"), with Penn v Jaros, 25 A.D.3d 402, supra (pulling of the defendant's alarm, i.e., its normal use, created the danger of exposure to the hazardous gas

component). This presents yet another distinction to Rastelli, where the defective rim was dangerous when used with *any* tire.

Similarly, since the asbestos was internal to the lagging pads, no danger of exposure was presented unless the pads were disturbed (R. 5494). These lagging pads were only disturbed because the valves required routine internal maintenance (R. 5494; 1169-78[2116, 2126-27, 2152], 1336[2475], 3875, 5488-90). Indeed, asbestos lagging pads were mandated for use on valves due to the ease with which they could "be taken down fairly often." (R. 3875, 5663). This is in contrast to other types of insulation, like pipe covering, that were permanent installations, and thus were not disturbed (R. 1484[2793], 1500[2856-57], 5663). Therefore, unlike Rastelli, Crane's valves, by their very design and operation, created the danger of asbestos dust release from the lagging pads.

This factor weighs in favor of a duty to warn.

4. Crane marketed asbestos components for this exact use and exercised control over the Navy's use of the same asbestos components with its high pressure, high temperature valves

It is befuddling that Appellant advances a "control-based" test when the record is clear that Appellant substantially participated in the underlying decision to use asbestos components with its Navy boiler room valves, as recognized by the Appellate Division (COA 43). Appellant baldly asserts that it had nothing to do

with this decision, as if to intimate that the Navy knew more about valve operation than Crane did (see App. Brief at 12).

Appellant, however, was the world's largest valve manufacturer (R. 3885), and had been selling, specifying, recommending, and marketing asbestos gaskets, packing, and insulation for use as components of its high pressure, high temperature valves, and as aftermarket replacement parts, for almost a century before selling a single valve to the Navy (R. 5432; 3589-3619, 3654-65, 3674-79, 3716-54, 3881-3957). In the private sector, Crane dictated the use of asbestos by valve service type (R. at 3661-62, 3746, 3892, 3895-97, 3910-54), and placed Cranite into "all" of its high pressure, high temperature valves (R. 3603). It marketed asbestos as unexcelled for insulating valves (R. at 3606-07, 3616, 3664-65, 3745, 3894-95, 3915), and advertised that its marine valves were "easier to insulate" based on their design (R. at 1277 [2411], 3945, 5443, 5563). Thus, Crane designed its private sector high pressure, high temperature valves to be used with these exact asbestos components as a standard business practice.

To this end, Crane offered the Navy "valuable assistance" in standardizing the use of specified and "essential" asbestos components with high pressure, high temperature valves (R. 3867, 3869, 3876). Crane was one of a few valve manufacturers that did this (R. 3867), and the others were merely specialty regulator or gage manufacturers (R. 1496[2842], 1179[2154]). It is no surprise,

then, that the Navy looked to Crane's world-leading valve expertise and century-old practice of using asbestos components in these exact services to implement an identical standardization system. This "standardization" dictated what technical requirements were contained in the military specifications issued by the Navy to its vendors (R. 1506[2879]). Crane's control was, in fact, so high that it affirmatively "substituted" Cranite in place of the standard gaskets in its valves (R. 1163-64).

By comparison, in Rastelli, the tire manufacturer never sold or marketed the defective replacement rim that was arbitrarily used with its tire post-sale. Id. at 294. It was "indifferent" to the use of that component with its tire (COA 42).

Therefore, this factor weighs in favor of a duty to warn.[17]

5. Crane derived a benefit from the use of asbestos gaskets, packing, and lagging pads with its high pressure, high temperature valves

Appellant derived at least an indirect benefit from the use of asbestos components with its Naval valves, since they could not function as intended during their useful lives without "essential" insulation and the replacement of the "correct" sealing components (R. 326-28[248, 253], 1484[2792-93], 3869, 3875, 5496). Indeed, the wrong component would not seal the valve properly, and a leaking valve was not a functional one (R. 5489-90). An uninsulated valve would

[17] Notably, even assuming arguendo that Appellant's newfound "control-based" approach is the appropriate one, that test is satisfied here.

permit the dissipation of heat, and a valve that could not maintain the temperature for steam was not a functional one (R. 1484[2792-93], 3869). Appellant even effectively represented that these components were its own by "substituting" Cranite for the standard asbestos gaskets (R. 1163-64[2091-96]). Cf. Baughman v. General Motors Corp., 780 F.2d 1131 (4th Cir., 1986) (no duty where, inter alia, defendant "has not represented to the public that the component part is its own").

Therefore, Crane derived at least an indirect benefit from this use. By comparison, in Rastelli, the replacement rim was just one of 24 standard-sized rims that could have permitted the tire to function as intended, and the manufacturer derived no benefit, direct or indirect, from the post-sale use of that particular rim.

Thus, this factor weighs in favor of a duty.

6. Appellant's egregious conduct in consciously choosing to never warn weighs in favor of imposing a duty to warn

Appellant's conduct in failing to warn was abhorrent. See Palka, 83 N.Y.2d 579, supra at 585 (duty analysis involves wrongfulness of defendant's actions). Crane sold dozens of asbestos products for 135 years without ever testing, inspecting, or warning (R. 3589-3957, 5432-33, 5441-42). Crane actually stayed abreast of the scientific knowledge regarding the dangers of asbestos dating back to the 1930s (R. 756[1180], 1268-74[2374-97], 1412-15[2651-64], 5432-40), and admitted to a broad knowledge that asbestos insulation was hazardous during the

pertinent time period (R. 323[232]), but it nonetheless chose to disregard its duties. Since Crane knew that asbestos disease had a latency period of decades, it understood that its profits would be unfettered by immediate liability. Indeed, it is difficult to otherwise explain Crane's choice to never test for dangers despite its massive resources and century-old access to the exact asbestos components at issue (R. 5432; 1515-16[2918-21], 3589-3957).

What is more, Crane never warned about the dangers of asbestos associated with its valves in any setting, including for *the asbestos components it actually placed into the stream of commerce* (R. 5440-43). It admitted to having actual knowledge of the lethal hazards of asbestos associated with its valves in the early 1970s, but incredibly it still did not warn (R. 5435, 5440-43). See MacPherson v. Buick Motor Co., 217 N.Y. 382, 390, 111 N.E. 1050 (1916) ("the presence of a known danger, attendant upon a known use, makes vigilance a duty"). And while reaping massive profits from its use of asbestos, it waited another 16 years before even placing a *notice* on its valves, which was not even a warning (R. 5440-41).

Instead of acting decently by warning, the world's preeminent valve manufacturer enhanced the lethal danger of asbestos exposure to its valve users by consciously choosing to place profits over the possibility of a decrease in marketability of its valves due to an attendant warning – a decision that resulted in thousands of deaths, including to the decedent here. Simply put, Crane

consciously disregarded its standard of care, and the flagrant recklessness of Appellant's conduct weighs strongly in favor of imposing a duty in this case.

7. Mr. Dummitt, as a normal valve user, clearly had a reasonable expectation of care

It cannot be seriously disputed that the decedent had a reasonable expectation of care from Appellant. See Palka, supra (duty analysis involves the reasonable expectation of care owed). It is well-established that a manufacturer's duty to warn against latent dangers extends to all normal product users. See McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 68, 181 N.E.2d 430 (1962); see also Codling v. Paglia, 32 N.Y.2d 330, supra at 342.

Here, it is uncontroverted that the decedent was exposed to asbestos as a normal user of Crane's valves (R. 1166-82[2104-05, 2117, 2132, 2144-45, 2154, 2167-69], 5488). The decedent's "normal user" status implicates a class of persons marked by a definable limit, which eliminates any fear of an indeterminate class of plaintiffs. See Denny, 87 N.Y.2d 248, supra at 262 n.6 (remarking, in a design defect context, on the unfounded fear of limitless liability were a duty is simply "attendant to the normal use of the product"); cf. Hamilton v Beretta U.S.A. Corp., 96 N.Y.2d 222, 233, 727 N.Y.S.2d 7 (2001) ("specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship"); Palka, supra at 589 (duty imposed for

"reasonably interconnected and anticipated relationships"). Therefore, the decedent unquestionably had a reasonable expectation that Appellant would warn him against the unavoidable, lethal, and latent dangers of asbestos exposure attendant to its valves' normal use.

Accordingly, the pertinent considerations unequivocally weigh in favor of a duty to warn. It is no shock that Appellant advocates for a bright-line, single-factor test, since the only consideration weighing in its favor is that it did not supply the particular components that, by chance, were the direct source of the decedent's asbestos exposure. Crane's duty to warn is further augmented by its status as the joint tortfeasor in a superior position to warn.

ii. Crane was the manufacturer in the best position to warn

Under these facts, Appellant was actually in a unique position to warn. See Micallef v. Miehle Co., 39 N.Y.2d 376, supra at 387 ("legal responsibility, if any, for injury caused by machinery which has possible *dangers incident to its use* should be shouldered by the one in the best position to have eliminated those dangers") (emphasis added).

Since gaskets, packing, and lagging pads were consumable, fungible products (R. 1163[2090], 1500[2856-57], 5450), whereas valves were long-lived, stationary fixtures (R. 1518[2927]), Crane was in the best position to warn. Unlike the perishable components, Crane's valves came with nameplates and instruction

pamphlets where warnings could have been placed and would have remained throughout the valves' lives (R. 1518[2930], 3939, 5513-14). Appellant even had the ability to comply with its post-sale duty to warn by updating its instruction pamphlets (R. 5475). To have warned through these permanent conduits would have been undemanding and inexpensive. See Liriano, 92 N.Y.2d 232, supra at 239-40 (warning post-sale "is neither infeasible nor onerous…"); Cooley, 102 A.D.2d 642, supra at 644 ("[s]ince the cost of providing warnings is often minimal, the balance usually weighs in favor of an obligation to warn"). Moreover, recognizing that the equipment manufacturers were in the best position to warn, the Navy underscored that manufacturers should comply with their duty to warn for equipment operations that could injure or kill (R. 1487-88[2804-07], 5447-48).[18]

In this regard, it is noteworthy that the manufacturer of the lagging pads was unknown (R. 1169[2116], 1353[2545]).[19] As such, Appellant is the only joint tortfeasor "reasonably available" to Plaintiff. See Mead v Warner Pruyn Division,

[18] Despite being the world's preeminent valve expert, and having a nondelegable duty to warn, Appellant blames the Navy for being in "the best position to appreciate the dangers" (App. Brief at 42). Appellant's attempt to escape liability unjustly shifts the blame to a governmental entity that is not only immune from liability (see 28 U.S.C. § 1346(b)(1); Feres v U.S., 340 U.S. 135 (1950); Wake v United States, 89 F.3d 53, 57 (2d Cir., 1996)), but has been held to have no impact on asbestos manufacturers' nondelegable duty to warn. See, e.g., In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 838-39 (2d Cir., 1992) ("there is nothing unjust in holding Defendants liable for their own negligence, notwithstanding the Navy's additional lapse.")

[19] Appellant wrongly attempts to invoke insulation sellers like Johns-Manville and Union Asbestos & Rubber (App. Brief at 14). These companies had nothing whatsoever to do with any asbestos component used with Appellant's valves in this case.

57 A.D.2d 340, supra at 341. Certainly, from a policy standpoint, Appellant as a culpable manufacturer rather than the unsuspecting decedent is in a superior position to bear the loss associated with a terminal injury created by the synergistic use of "essential" lagging pads with Appellant's valves (R. 3869). See Liriano, supra at 240 ("post-sale duty to warn arises from a manufacturer's unique (and superior) position to follow the use and adaptation of its product by consumers"). This is simply a cost of business associated with designing its products to be used with aftermarket components. See Sprung, 99 N.Y.2d 468, supra at 473.[20]

Appellant also had every opportunity to seek indemnification or contribution from the known component part manufacturers (see C.P.L.R. § 1401), and to the extent that any such manufacturers are bankrupt or defunct, Appellant still had the ability to reduce its own share of liability by establishing the liability of those nonparty tortfeasors. See C.P.L.R. §§ 1601, 1603; In re New York City Asbestos Litig. [Tancredi], 6 A.D.3d 352, 775 N.Y.S.2d 520 (1st Dept., 2004) (bankrupt entities may be placed on the verdict sheet), lv. dismissed 5 N.Y.3d 849.

Thus, public policy militates strongly in favor of a duty.

[20] Amici Business Council, et al. attempt to raise a fear of "over-warning." (Amici Brief at 39-40). But there can be no such fear where, as here, no entity warned at all, the asbestos component manufacturers had no permanent channels to warn, and the injury at stake is death.

iii. The component parts doctrine actually heightens Crane's duty to warn under the facts of this case

The component parts doctrine may shield manufacturers of generic or nondescript components from liability for dangers associated with the integrated system as a whole. See Restatement (Third) of Torts: Products Liability § 5 (1998). It does not apply to particularized products, or if the component itself was defective and that defect caused the harm, or if the manufacturer substantially participated in the integration of the component into the system, that integration rendered the system defective, and that defect caused the harm. Id.

Here, unlike some basic valves, Crane's valves were not generic components; they were sophisticated, large pieces of equipment that were purposefully manufactured for particular uses (R. 1163-1166[2090-2102], 1509[2891-92], 1519[2931], SR. 1-50). Appellant's own caselaw provides that this doctrine is inapplicable to a "'product with a specific purpose and use.'" In re TMJ Implants Products Liability Litig., 872 F.Supp.1019, 1026 (D.Minn., 1995).

Further, these sophisticated valves, which were supplied with asbestos components that required routine replacement, were defective when sold, and it was their lack of warning that caused the decedent to be exposed. See Restatement (Third) of Torts: Products Liability § 2 (1998). The decedent's injury was from the valves, not the final assembly of the piping system.

Also, Appellant offered the Navy "valuable assistance" in determining how its valves should be integrated into Naval boiler systems, including the standardization of specified asbestos components (R. at 3866-75). Thus, even assuming that Crane's valves, themselves, were not defective, and further assuming that it was the boiler system as a whole that caused the injury, the component parts doctrine would still be inapplicable because Crane substantially participated in the integration of its valves into the boiler system. See Restatement (Third) of Torts: Products Liability § 5, cmt. e (where seller plays a "substantial role in deciding which component best serves the requirements of the integrated product, …it is fair and reasonable to hold the component seller responsible for harm caused by the defective, integrated product"). Notably, the Restatement's Comment is similar to the framework of the Appellate Division here (COA 41).

To this end, this doctrine actually heightens Appellant's duty to warn under the facts of this case. It was the asbestos components at issue, not the valves, that were generic components sold in bulk to the Navy (R. 1169[2116], 1353[2545], 1505[2878]), and that were not dangerous unless used in particular applications (R. 980[1662-63], 1627[3200]). Since the component parts doctrine arguably relieved these component manufacturers of a duty to warn, Appellant was the *only* manufacturer that was obligated to warn.

Accordingly, a duty to warn was properly imposed on Crane.

C. Even Assuming That Appellant's Request For A New Trial On The Issue Of Duty Is Reviewable, A New Trial Is Unwarranted Where A Duty Was Properly Imposed By Supreme Court And The Jury Did Nothing More Than Serve Its Function By Adjudicating Foreseeability

Appellant's request for a new trial is unpreserved. In any event, since it is the court's role to determine duty in the first instance, Appellant's request for a new trial so the jury can determine duty is a non-sequitor.

i. Appellant's request for a new trial on the issue of duty is unpreserved and thus nonreviewable

Appellant asserts that if the Appellate Division's statement of the law is correct, a new trial is warranted so the jury can determine whether the applicable duty test is satisfied (see App. Brief at 42-57). This argument is unpreserved.

It is well-settled that issues that are not raised at the trial level fall outside of this Court's scope of review. See Bingham v. New York City Transit Authority, 99 N.Y.2d 355, 359, 786 N.E.2d 28 (2003); Merrill v. Albany Medical Center Hosp., 71 N.Y.2d 990, 524 N.E.2d 873 (1988).

Here, at no time during the trial did Appellant assert, in the alternative, that the jury should be required to answer factual interrogatories regarding Appellant's duty to warn. Instead, Appellant held steadfast to its bright-line argument that no duty existed as a matter of law (R. 1679[3239-40], 2031[4066]). It was not, in fact, until Appellant submitted its Appellate Division Reply Brief that the instant

argument seeking a new trial was first raised.[21] Thus, it is nonreviewable. See Grzesiak v. General Elec. Co., 68 N.Y.2d 937, 502 N.E.2d 994 (1986). Yet even if considered, the argument is wholly meritless.

ii. Since it is the court's role to determine whether a duty exists in the first instance, a new trial is not warranted to permit the jury to determine duty

Appellant conflates the role of the court with the role of the jury. Legal duty is, in the first instance, a question for the court, whereas issues of "foreseeability and causation" are "entrusted to fact finder adjudication." Palka, 83 N.Y.2d 579, supra at 585; see also Di Ponzio v. Riordan, 89 N.Y.2d 578, supra at 583. But considering the shimmering nature of duty, and the reality that the factual and legal questions of duty and foreseeability are often interwoven, Appellant's confusion is not surprising. See Cooley v. Carter-Wallace Inc., 102 A.D.2d 642, supra at 644 ("factual determinations are often interwoven with the question of whether the defendant manufacturer has a duty to warn").

Here, a duty was determined to exist "prior to submitting anything to fact-finding or jury consideration" (Palka, supra) (R. 1769[3490]), and the jury was then charged with determining foreseeability in the context of a breach of that duty (R. 2030-31). This charge adequately conveyed the proper standard, and was

[21] Indeed, the "Questions Presented" in Crane's Appellate Division Opening Brief posed whether Appellant was "entitled to judgment as a matter of law, or at a minimum a new trial…" on the causation issue, but as to duty, only whether it was "entitled to judgment as a matter of law" (First Dept. App. Brief at 3-4).

tailored specifically to the facts, contentions, and legal issue of this case. See Jorgensen v. N.Y. Foundation for Sr. Citizen Guardian Services, Inc., 61 A.D.3d 612, 876 N.Y.S.2d 870 (1st Dept., 2009) (citing Green v. Downs, 27 N.Y.2d 205, 208-09, 265 N.E.2d 68 (1970)).

Notably, the Appellate Division dissenters failed to recognize that the charge at issue was taken *verbatim* from Rastelli. (R. 2031[4068]) ("[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which the manufacturer knew or should have known"). The instruction that followed addressed, quite simply, the issues of foreseeability of the use and harm (R. 2031[4068-69), which are precisely what the jury is supposed to adjudicate in a negligence-based failure-to-warn case. See Enright v. Eli Lilly & Co., 77 N.Y.2d 377, supra at 385-87 ("[c]oncepts of reasonable care and foreseeability are not divorced from [a failure-to-warn] theory"); Eiseman v State, 70 N.Y.2d 175, supra at187 (foreseeability is a "factual issue to be resolved on a case-by-case basis by the fact finder"); Alfieri v. Cabot Corp., 17 A.D.2d 455, supra ("[t]he jury's [failure to warn] verdict was a finding of foreseeability"), aff'd 13 N.Y.2d 1027; McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, supra at 68-69; P.J.I. 2:120, vol. 1A, p. 742 (2014 ed.) (manufacturer's liability based on its product's "use in a way that the manufacturer should reasonably foresee"). It is contradictory for Appellant to attempt to rely categorically on Rastelli but reject a

charge taken letter-perfect from Rastelli and otherwise predicated on the failure-to-warn underpinnings of foreseeability that Rastelli embraces.

Indeed, as acknowledged by the Appellate Division dissenters, the jury was charged with determining "whether Crane had *breached* a duty to warn," not whether a duty existed in the first instance (COA 56) (emphasis added); Darby v. Compagnie National Air France, 96 N.Y.2d 343, 347, 753 N.E.2d 160 (2001) ("[a]lthough juries determine whether and to what extent a particular duty was breached, it is for the courts first to determine whether any duty exists"). This is made plain by the verdict sheet, which only asked the jury to determine (1) exposure, (2) whether Crane failed to exercise reasonable care by not warning, i.e., breach, and (3) proximate cause (R. 2167). Thus, contrary to Appellant's assertion, the jury instruction adequately conveyed the appropriate legal standard.[22]

Consequently, a new trial is not warranted to permit the jury to make factual findings as to legal duty because it is not the jury's role to do so.

Moreover, Appellant spuriously asserts that the Appellate Division adopted a new test and then made new factual findings to support that test. As noted supra, the Appellate Division did not create new considerations, it merely framed the

[22] Further contrary to Appellant's assertion, the Appellate Division majority did not agree that this charge was erroneous (see App. Brief at 44). Rather, it concluded that the charge had no potential to communicate the wrong standard to the jury (COA 44), which is a marker for an adequate charge. Cf. Roshwalb v. Regency Maritime Corp., 182 A.D.2d 401, 582 N.Y.S.2d 140 (1st Dept., 1992) ([a] jury charge is sufficient when it adequately conveys the applicable law), lv denied 80 N.Y.2d 756.

existing ones (COA 41). As a result, Appellant not only could have tailored its evidence to the Rastelli considerations, but it flatly argued at trial that it had done so (R. 1679[3240-41]). Appellant's assertion that it was somehow prevented from presenting evidence addressing these established considerations is sophistry (see App. Brief at 55-57). By eliciting extensive testimony from two different Naval experts (R. 1503-22, 1581-1602), by cross-examining its codefendant's Naval expert (R. 1488-96), and by presenting a thousand pages of Navy-related exhibits (R. 4015-4991), Appellant made every attempt to prove that the factors were not met. In fact, the only evidence Appellant asserts it would have introduced had it purportedly been aware of the considerations was precluded on relevancy grounds because it post-dated the decedent's exposure period (R. 1519-20) (see App. Brief at 56-57). Appellant was hardly deprived of a right to present evidence.

Nor did the Appellate Division make new factual findings or conclude that the jury made erroneous findings, as all the facts it identified were clearly discussed by Supreme Court (R. 53). See Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 498, 410 N.Y.S.2d 282 (1978) (new trial required only where "the Appellate Division concludes that the jury has made erroneous factual findings").

Even assuming, however, that Appellant had preserved its argument for a new trial, and further assuming that the jury charge did not adequately convey the proper legal standard as to breach of duty, the Appellate Division dissent is correct

that, on these facts, there is simply no view under which Appellant could have prevailed (COA 58). See Marine Midland Bank v Russo Produce Co., 50 N.Y.2d 31, 43, 427 N.Y.S.2d 961 (1980); O'Connor v. Eggleston, 31 A.D.2d 735, 297 N.Y.S.2d 29 (4th Dept., 1968) (despite an erroneous charge, "[t]here is no justification in requiring these plaintiffs to be subjected to a new trial in order to get the same result as in the trial we are here reviewing"), lv. denied 23 N.Y.2d 646 (1969). Therefore, even if this Court considers Appellant's unpreserved argument addressed to breach rather than duty, a new trial is not warranted.

Accordingly, a duty to warn was properly imposed on Appellant, and the order of the Appellate Division should be affirmed.

II. A REBUTTABLE HEEDING PRESUMPTION EXISTS UNDER NEW YORK LAW AND WAS PROPERLY CHARGED TO AID MRS. DUMMITT IN OVERCOMING HER BURDEN OF PROOF

A. Presumptions, Which Are Common In Our Jurisprudence, Act In Specific Circumstances To Aid The Plaintiff In Overcoming Her Burden Of Persuasion

Appellant's assertion that a rebuttable heeding presumption improperly relieves a plaintiff of her burden of proof runs completely contrary to this Court's precedents regard the nature of presumptions. See Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280, 289 n.8, 803 N.E.2d 757 (2003) (rebuttable presumption is merely an "aid" to the plaintiff); Prosser and Keeton, Torts § 38, at 240 (5th ed.) ("[t]he party having the burden of proof may

be aided by the procedural devices known as presumptions"). The burden of proof remains with the plaintiff and a rebuttable presumption does nothing more than serve as a "guide for the fact finder." Green v. William Penn Life Ins. Co. of New York, 12 N.Y.3d 342, 345, 907 N.E.2d 700 (2009); cf. Schechter v. Klanfer, 28 N.Y.2d 228, 233, 269 N.E.2d 812 (1971) (res ispa loquitur "does not, however, shift the burden of proof…").

To this end, in specific instances where it may be difficult for a plaintiff to establish an element of her burden, presumptions that aid the plaintiff are prevalent. In automobile cases, for example, the plaintiff is aided by a rebuttable presumption that the vehicle that caused the collision was operated with the defendant owner's consent (see Murdza v Zimmerman, 99 N.Y.2d 375, 379-80, 756 N.Y.S.2d 505 (2003)), and a rebuttable presumption of negligence exists both where the defendant driver fell asleep at the wheel (see Spivak v Heyward, 248 A.D.2d 58, 679 N.Y.S.2d 156 (2d Dept., 1998)), and where the defendant's vehicle rear-ended the plaintiff's vehicle. See Bender v. Rodriguez, 302 A.D.2d 882, 754 N.Y.S.2d 475 (4th Dept., 2003). In Scaffolding Law actions, the plaintiff is entitled to a rebuttable presumption that a scaffold or ladder that collapses for no apparent reason was not good enough to afford proper protection. See Blake, supra at 285-86. In actions to recover life insurance proceeds, a rebuttable presumption

against suicide exists. See Schelberger v. Eastern Sav. Bank, 60 N.Y.2d 506, 509-12, 458 N.E.2d 1225 (1983).

In analogous circumstances, equitable doctrines exist that actually lessen the burden of proof. See, e.g., Noseworthy v. City of New York, 298 N.Y. 76, 80-81, 80 N.E.2d 744 (1948) (in cases where there are no eyewitnesses to an occurrence other than the plaintiff's decedent, the "plaintiff is not held to as high a degree of proof of the cause of action"); see also Schechter v. Klanfer, 28 N.Y.2d 228, 230-33, 269 N.E.2d 812 (1971) (plaintiff with amnesia due to his injury is entitled to a lesser degree of proof"). In yet other circumstances, a burden-aiding inference exists, rather than a presumption, although such lines are often blurred. See, e.g., Morejon v. Rais Const. Co., 7 N.Y.3d 203, 208-11, 851 N.E.2d 1143 (2006) (res ipsa loquitur creates an inference of negligence, rather than presumption of negligence); Martin v. Herzog, 228 N.Y. 164, 170, 126 N.E. 814, 816 (1920) (rebuttable inference of negligence when defendant driving without headlights).

Thus, this Court's precedents are replete with examples of long-established presumptions, inferences, and burden-reducers, which, instead of relieving the plaintiff's burden of proof, merely aid the plaintiff while ultimately "leaving the issue [] to the jury." Green, supra at 346.

B. New York Precedents Support A Heeding Presumption In Certain Failure-To-Warn Actions To Aid The Plaintiff In Overcoming Her Burden Of Proof As To Causation

The heeding presumption derives from the Restatement (Second) of Torts, Section 402A, Comment j (1965), which provides that "[w]here warning is given, the seller may reasonably assume that it will be read and heeded." Where no warning is given, the end user should be entitled to the corollary presumption, that is, had a warning been given, it is presumed it would have been heeded.

Although this Court has not directly addressed whether a heeding presumption exists under New York law, it has noted in dicta that such a presumption exists. See Applebee v. State, 308 N.Y. 502, 507-08 (1955) ("[h]ad the stop sign been in place, we presume that Miss Steinmiller would have observed its injunction"). It has identified similar assumptions as that set forth in the Restatement (Second). See, e.g., O'Brien v. Erie R. Co., 210 N.Y. 96, 100-01, 103 N.E. 895 (1913) (train conductor has the right to assume that a living object on the train tracks will leave the track in time to escape injury). It has also recognized a presumption predicated on the basic notion that a person will follow instructions when given. See People v. Morris, 21 N.Y.3d 588, 598, 999 N.E.2d 160 (2013) (it is presumed that a jury will follow a court's limiting instructions).

Further instructive is that this Court has relied on Section 402A. See, e.g., Sprung v. MTR Ravensburg Inc., 99 N.Y.2d 468, supra at 473; Robinson v Reed-

Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 479, 426 N.Y.S.2d 717 (1980). Thus, although this Court has not directly addressed the existence of a heeding presumption, its precedents support such a presumption as a corollary to that set forth in Section 402A. Cf. Coffman v. Keene Corp., 133 N.J. 581, 595-601, 628 A.2d 710 (N.J., 1993) (a heeding presumption is "a logical corollary of Comment j"); accord Butz v. Werner, 438 N.W.2d 509 (N.D., 1989).

And, importantly, this Court has never stated that to meet her proximate cause burden in a failure-to-warn action, a plaintiff must, in all circumstances, provide direct evidence that a warning, had one been given, would have been heeded. That is perhaps why Appellant relies on intermediate appellate cases to support such a faulty assertion. Strikingly, however, Appellant's cases actually support a heeding presumption since they uniformly involved circumstances where the product manufacturer actually provided an adequate warning and the plaintiff completely ignored it. See, e.g., Mullhall v Hannafin, 45 A.D.3d 55, 841 N.Y.S.2d 282 (1st Dept., 2007); Guadalupe v. Drackett Prods. Co., 253 A.D.2d 378, 676 N.Y.S.2d 177 (1st Dept., 1998); Sosna v American Home Products, 298 A.D.2d 158, 748 N.Y.S.2d 548 (1st Dept., 2002); Upfold v Generac Corp., 224 A.D.2d 1021, 638 N.Y.S.2d 264 (4th Dept., 1996); Rochester Refrigerating Corp v Easy Heat, Inc., 222 A.D.2d 1013, 635 N.Y.S.2d 89 (4th Dept., 1995), lv dismissed 87 N.Y.2d 1056. These cases implicitly adopt the proposition in Section 402A that

when a warning *is actually given*, the manufacturer can presume it will be heeded. By relying on such cases, Appellant is inherently accepting the corollary proposition that where no adequate warning is given, it is presumed that the user would have heeded one.

Indeed, the considerations that warrant a heeding presumption in asbestos failure-to-warn cases – including the long latency of disease and the inexorable death of the plaintiff – are conspicuously absent from the foregoing cases. This also highlights the error of the Appellate Division dissent in concluding that a heeding presumption was contrary to the foregoing caselaw (COA 60).

The First Department has, in fact, endorsed the heeding presumption. See Union Carbide Corp. v. Affiliated FM Ins. Co., 101 A.D.3d 434, 434, 955 N.Y.S.2d 572 (1st Dept., 2012) (citing Santoro v. Donnelly, 340 F.Supp. 2d 464, 486 (S.D.N.Y., 2004)). Here, the Appellate Division dissent sought to disregard its prior endorsement on the basis that it was dicta (COA 61, n.6). The Union Carbide Corp. insurance dispute, however, was predicated on underlying asbestos failure-to-warn actions filed against the insured product manufacturer. This decision certainly alludes to, if not recognizes, a heeding presumption. See also P.J.I. Companion Handbook, §8.2, p. 387; § 8.2, p. 392 (2014 ed.) (heeding presumptions charged in sample asbestos cases tried in 2002 and 2003).

Multiple jurists have otherwise concluded that New York recognizes a heeding presumption. See, e.g., Reis v. Volvo Cars of North America, Inc., 73 A.D.3d 420, 426-27, 901 N.Y.S.2d 10 (1st Dept., 2010) (Manzanet-Daniels, J., dissenting); Power v. Crown Controls Corp., 149 Misc.2d 967, 969, 568 N.Y.S.2d 674 (Sup. Ct., N.Y. Co., 1990); see also Adesina v. Aladan Corp., 438 F.Supp.2d 329, 338 (S.D.N.Y., 2006); Henry v Rehab Plus Inc., 404 F.Supp.2d 435, 442 (E.D.N.Y., 2005); Santoro v. Donnelly, supra; G.E. Capital Corp v. A.O. Smith Corp., 2003 WL 21498901 at *5 (S.D.N.Y., 2003); Anderson v. Hedstrom Corp, 76 F.Supp.2d 422, 441 (S.D.N.Y., 1999). Other intermediate appellate courts have indirectly framed an averment in such a light. See, e.g., Wood v. State, 112 A.D.2d 612, 615, 492 N.Y.S.2d 481 (3d Dept., 1985) ("[w]e consider it most unlikely that [the plaintiff's decedent], under ordinary circumstances, would fail to observe and fail to heed a light directly over his lane of traffic"); Van Tuyl v State, 6 A.D.2d 209, 213, 175 N.Y.S.2d 951 (4th Dept., 1958), aff'd 6 N.Y.2d 912 (1959). Thus, a heeding presumption finds direct support in our jurisprudence.

Also significant is that a heeding presumption is implicitly incorporated into the basic test for determining whether a warning is adequate. See Lancaster Silo & Block Co v. Northern Propane Gas Co., 75 A.D.2d 55, 64, 427 N.Y.S.2d 1009 (4th Dept., 1980) (adequacy addresses not just the language of the warning, but also its location, conspicuousness, and method of communication). Tellingly, since even a

product user that ignores warnings of one type can still establish that he would have heeded a more conspicuous warning, a heeding presumption implicitly exists because it is fundamentally presumed that an "adequate" warning, if given, would have been heeded. See, e.g., German v. Morales, 24 A.D.3d 246, 806 N.Y.S.2d 493 (1st Dept., 2005) (issue of fact as to whether a more conspicuous warning would have been heeded even though plaintiff did not read the warnings that were given); Johnson v. Johnson Chemical Co., Inc., 183 A.D.2d 64, 588 N.Y.S.2d 607 (2d Dept., 1992) ("[a] consumer such as Ms. Kono who, by her own admission, tends to ignore one sort of label, might pay heed to a different, more prominent or more dramatic label"); Humphrey v. Diamant Boart, Inc., 556 F.Supp.2d 167 (E.D.N.Y., 2008); Derienzo v. Trek Bicycle Corp., 376 F.Supp.2d 537, 568 (S.D.N.Y., 2005). Thus, a heeding presumption accords with a manufacturer's duty to provide adequate warnings.

Appellant relies on the Second Circuit decision in Raney v. Owens-Illinois, Inc. (897 F.2d 94, 95 (2d Cir., 1990)) for the proposition that New York does not recognize a heeding presumption. But the Raney Court simply identified this device as a rebuttable inference. See id. The Second Circuit later discussed a "strong" heeding inference as shifting the burden of *production* – not proof – to the defendant manufacturer to rebut but-for causation. See Liriano v. Hobart Corp.[Liriano II], 170 F.3d 264, 271-72 (1999) (citing Martin v. Herzog, 228 N.Y.

164, supra for the proposition that "shifting of the onus procedendi has long been established in New York"). The Liriano II decision has been discussed in terms of "confirm[ing] the operation of [a heeding] presumption." Anderson v. Hedstrom Corp, 76 F.Supp .2d 422, supra at 442.

To this end, this Court has avowed that in light of the "dizzying array of formulations" amongst the various types of presumptions and inferences, "it would be far less complicated" to view the issue "without undue emphasis on labels and pigeonholes." Morejon v. Rais Const. Co., 7 N.Y.3d 203, supra at 211. Indeed, even the Second Circuit recognized the "false premise," similarly advanced by Appellant here, of requiring a plaintiff to present direct evidence that a warning would have been heeded in every single instance where no warnings had been given. Liriano II, supra at 271-72. Thus, essentially all New York precedents, including those relied upon by Appellant, support the existence of a heeding presumption under New York law. Cf. Coffman v. Keene Corp., 133 N.J. 581, supra at 595-601 (adopting a rebuttable heeding presumption and citing the numerous jurisdictions that have similarly done so).

C. A Heeding Presumption In Failure-To-Warn Actions Finds Support In The Exact Same Public Policy Considerations That Support Other Established Presumptions In Our Jurisprudence

The overarching policy consideration for permitting the presumptions, inferences, and burden-reducers already recognized by this Court is to prevent

defendants from escaping liability where a plaintiff's difficulty in meeting her burden resulted from defendant's actions. See Murdza v. Zimmerman, 99 N.Y.2d 375, supra at 379-80 (the purposes of a rebuttable presumption of consent is to "remove the hardship which the common-law rule visited upon innocent persons by preventing 'an owner from escaping liability by saying that his car was being used without authority or not in his business'"); Schechter v. Klanfer, 28 N.Y.2d 228, supra at 232 (the rationale for the Noseworthy doctrine is "not merely plaintiff's inability to present proof, but the unfairness of allowing the defendant, who has knowledge of the facts, to benefit by standing mute when plaintiff's inability results from defendant's acts"). An additional strong policy consideration supporting certain presumptions involves the natural laws in favor of self-preservation. See Schelberger v. Eastern Sav. Bank, 60 N.Y.2d 506, supra at 509-10 ("[t]he presumption [against suicide] springs from strong policy considerations as well as embodying natural probability," including that "self-destruction is contrary to the general conduct of mankind"); Eagle-Picher Industries, Inc. v. Balbos, 326 Md. 179, 228, 604 A.2d 445 (Md., 1992) (finding a heeding presumption in asbestos failure-to-warn actions predicated on "the natural instinct of human beings to guard against danger").

Significantly, these same policy considerations support a rebuttable heeding presumption in asbestos actions. Asbestos disease has a long latency period of

typically 20 to 60 years between exposure and manifestation of disease (R. 403[408-09]). This factor may present a plaintiff with difficulty in testifying that had a warning been given decades ago, it would have been heeded. cf. In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 837 (2d Cir., 1992) ("[b]ecause the events happened years ago, and many of those exposed to the asbestos are deceased, to require precision of proof would impose an insurmountable burden"). To be sure, the Legislature has rectified the unfairness of permitting the latency of toxic tort injuries to result in an automatic dismissal. See C.P.L.R. § 214-c; Matter of New York County DES Litigation [Wetherill], 89 N.Y.2d 506, 513, 655 N.Y.S.2d 862 (1997) ("[t]he goal of the Legislature in adopting CPLR 214-c was to 'provide relief to injured New Yorkers whose claims would otherwise be dismissed for untimeliness simply because they were unaware of the latent injuries until after the limitations period had expired'"). Thus, the long latency of asbestos disease supports a heeding presumption.

Further, asbestos disease typically results in the plaintiff's death (R. 751[1162], 760[1196]). Mesothelioma, for example, is not just terminal, but is terminal in a rapid and debilitating fashion (R. 410[436-37], 418[467], 541[736]). The average person diagnosed with mesothelioma lives just 13 months from the date of diagnosis (R. 411[442]), and many plaintiffs do not even survive long enough to provide deposition testimony. In such instances, a plaintiff may be able

to establish through coworker testimony what products the decedent was exposed to decades ago, but would be unable to provide any evidence that a warning, if one had been given, would have been heeded. Other jurisdictions have found this equitable consideration germane in adopting a heeding presumption. See, e.g., Eagle-Picher Industries, Inc. v. Balbos, 326 Md. 179, 227, 604 A.2d 445 (Md., 1992) ("where the relevant inquiry concerns the reactions of persons now deceased to hypothetical warnings, the proof of causation becomes more difficult or, depending on one's point of view, more unreal"); Technical Chemical Co. v. Jacobs, 480 S.W.2d 602 (Tex., 1972) ("[i]f the user of a product dies from its use, testimony whether he did or did not read the label may be impossible"). Thus, the lethal consequence of asbestos disease supports a heeding presumption.

And since an adequate warning would have had to apprise the plaintiff that a failure to protect himself could result in his death (see Lancaster Silo, 75 A.D.2d 55, supra at 65 ("[t]he degree of danger is a crucial factor in determining the specificity required in a warning")), a heeding presumption is further supported by the policy considerations addressed to self-preservation. See Schelberger v. Eastern Sav. Bank, supra.

In this regard, it is telling that defendant manufacturers like Appellant not only object to rebuttable heeding presumptions, but they also uniformly object to any testimony from a plaintiff regarding whether he would have heeded a warning

had one been provided at the time of his exposure, on the purported basis that it is speculative (R. 472-73[549-54], 5512); (see App. Brief at 62). This testimony is predicated on the decedent's own personal experience and knowledge, and therefore is not speculation, but if a trial court sustained such an objection, a rebuttable heeding presumption would likely be the only possible way for a plaintiff to meet her burden as to causation. Such an equitable precept has, in fact, been part of our jurisprudence for over a century. See Schafer v. Mayor of City of N. Y., 154 N.Y. 466, 472 (1897) (burden should be lessened where only the plaintiff's decedent could have testified that he sought to avoid the danger).

In essence, Appellant takes the untenable position that an asbestos plaintiff's causation burden must be met without the benefit of either direct testimony, since it is purportedly speculative, or a rebuttable presumption. Accepting this would create an impossible burden. See Payne v. Soft Sheen Products, Inc., 486 A.2d 712 (D.C. Cir., 1985) (a rule requiring a plaintiff to prove with direct evidence that had a warning been given, it would have been heeded, "would impose an impossible burden on the plaintiff…").

Therefore, a heeding presumption is supported by clear public policy.

D. The Heeding Presumption Was Properly Charged In This Case, And The Proximate Cause Charge Was Otherwise Adequate To Convey The Proper Standards

Here, Supreme Court charged that:

> …Mr. Dummitt contends that he would have heeded warnings and not have been injured.
>
> Mr. Dummitt is entitled to the presumption that had proper and adequate warnings been given regarding the use of the product, the warnings would have been heeded and injury avoided.

(R 2033[4075]).[23] Upon a request from Appellant to charge that the presumption was rebuttable (R. 2045[4122], 2046[4127-28]), Supreme Court clarified:

> …if you recall, as to Mr. Dummitt, I charged you that he contends that had warnings been given, he would have heeded the warnings and not been injured. *This is part of Mr. Dummitt's burden of proving that the failure to warn was a substantial factor in causing his mesothelioma*.
>
> Mr. Dummitt on this issue is entitled, as I've previously instructed you, to a presumption that had proper and adequate warnings been given regarding the use of the product, he would have heeded the -- the warnings would have been heeded and injury would have been avoided.
>
> *This, however, is a rebuttable presumption. In other words, you can consider other evidence in the case to see if that other evidence rebuts this presumption to which Mr. Dummitt is entitled.*

(R 2048[4135-36]) (emphasis added). Thus, Appellant got the charge it requested, which is a forfeiture of appellate review. See People v. Lewis, 5 N.Y.3d 546, 551,

[23] Plaintiff asserted, from the beginning of the trial, that the heeding presumption even in this form was a rebuttable one (R. 472[549-50]).

840 N.E.2d 1014 (2005) (appellate review forfeited where "defense counsel expressly asked the court to" instruct the jury on the challenged charge); Schaefer v. N.Y.C. Transit Authority, 96 A.D.3d 485, 946 N.Y.S.2d 154 (1st Dept., 2012).

In any event, this stand-alone clarification was actually the last instruction the jury heard before deliberating. Cf. People v. Morris, 21 N.Y.3d 588, supra at 598 (it is presumed that a jury will follow a court's instructions). As such, the charge as given could not possibly have indicated to the jury that the heeding presumption was conclusive or that it shifted the burden. Cf. People v. Williams, 301 A.D.2d 794, 754 N.Y.S.2d 401 (3d Dept., 2003) ("the charge, as a whole, adequately conveyed that the People bear the burden of proof during all stages and that the jury can accept or reject the presumption based upon its evaluation of the facts"). Contrary to the Appellate Division dissenters, the charge did not "shift the burden of proof" (COA 61), it merely shifted the burden of production. See Liriano II, supra at 271-72.

Furthermore, the jury charge otherwise tracked the P.J.I. as to proximate cause and the burdens of proof (R. 2032-34[4073-81]). See P.J.I. 1:60, 2:70, 2:275.1, vol. 1A, pp. 70, 394; vol. 1B, p. 779 (2014 ed.). And the jury was instructed three times in addition to the presumption clarification that it was Plaintiff's burden to prove causation (R. 2030[4065], 2031[4067], 2034[4081]).

Accordingly, the heeding presumption was properly charged and the charge as a whole conveyed the proper standards as to the burdens of proof and causation.

E. Even Assuming Arguendo That A Rebuttable Heeding Presumption Does Not Exist, Plaintiff Did Not Rely Upon It To Establish A Prima Facie Case

Since Plaintiff presented evidence that the decedent would have heeded an adequate warning had one been given, and the charge clearly conveyed that the burden remained with Plaintiff, any purported error in the charge did not prejudice Appellant to a substantial right. See C.P.L.R. § 2002.[24]

The decedent testified that he would have heeded a warning had one been given, which would not have interfered with his duties (R. 5512).[25] Since this testimony was based on the decedent's personal knowledge, it was not speculative. Cf. Andersen v. Delaney, 269 A.D.2d 193, 703 N.Y.S.2d 714 (1st Dept., 2000) (plaintiff's testimony about what she would have done had she been informed of the risks of surgery was competent evidence); Kirschhoffer v. Van Dyke, 173 A.D.2d 7, 577 N.Y.S.2d 512 (3d Dept., 1991). Nor was this testimony the "sole" evidence presented on this issue (see App. Brief at 3).

[24] Even if no heeding presumption exists, a heeding inference should exist (see Raney v Owens-Illinois, Inc., 897 F.2d 94, supra at 95), which in this case would lead to the same result.

[25] Appellant twists the facts by asserting that the only way Mr. Dummitt could have protected himself was by ceasing to perform the work he was directed to perform (see App. Brief at 19). That disregards safe work practices like masks and wetting down methods as testified to by Mr. Dummitt (R. 5512).

Mr. Dummitt protected his subordinates by making sure they heeded warnings (R. 5514). Certainly, the jury could have reasonably inferred that where the decedent took unconditional efforts to warn and protect his subordinates from product hazards to which he was made aware, he would have heeded warnings himself. Further, he keenly read safety plaques on equipment and actively referred to the instruction manuals for further precautions (R. 1352[2539], 5512-13).

Plaintiff, therefore, did not rely upon the heeding presumption to establish her prima facie case, as the Appellate Division majority noted and the dissent effectively conceded (COA 62) ("I do not take issue with the majority's statement that the Dummitt plaintiff presented evidence that Mr. Dummitt would have received '[a]ny warning ... and ... clearly testified that he would have heeded those warnings and taken steps to protect himself'").

It is also noteworthy that Appellant presented evidence that the decedent, as a smoker, ignored warnings on cigarettes "730,000" times (R. 1864-65[3728-29]), and Supreme Court expressly noted that Appellant could argue this to the jury (R. 1775[3513-14]). Thus, Appellant was permitted to rebut the foregoing evidence, and the issue was properly left to the jury. Nor is there any indication of jury confusion in the verdict as a result of this charge. Cf. Reis v. Volvo Cars of North America, 24 N.Y.3d 35, 43, 993 N.Y.S.2d 672 (2014) (where "charge as a whole

adequately explains general negligence principles, a reviewing court may feel confident in concluding" that an isolated mistake did not affect the verdict).

Accordingly, the heeding presumption was properly charged, but error, if any, was in all events harmless.

III. THE SPECULATIVE OPINION TESTIMONY OF APPELLANT'S NAVAL EXPERT WAS PROVIDENTLY EXCLUDED

A distinct causation element from whether the decedent would have heeded a warning is whether a warning would have reached him.[26] To disprove this element, Appellant attempted to elicit speculative opinion testimony from its expert, Admiral Sargent, that if Crane would have attempted to give a warning at any time between 1940 and 1980, the Navy would have rejected it. It is submitted that this issue should not be considered since Appellant failed to raise it before the Appellate Division, but even if considered, Supreme Court's preclusionary ruling was not an abuse of discretion.

[26] Appellant's argument that the testimony of Admiral Sargent was intended to rebut Mr. Dummitt's heeding testimony confuses these distinct elements (see App. Brief at 64). Evidence going to rebut Mr. Dummitt's testimony that he would have heeded a warning would have been evidence that he would not have heeded a warning, whereas Admiral Sargent's improper opinion testimony was intended to disprove that a warning would have reached the decedent.

A. This Court Should Decline To Consider Whether The Exclusion Of Admiral Sargent's Opinion Testimony Constituted Reversible Error

Although the Appellate Division addressed this issue, Appellant did not argue before the Appellate Division that this ruling constituted reversible error warranting a new trial. Appellant's only reference to this ruling was a passing one in the "Statement of Facts" section of its First Department Opening Brief (see App. First Dept. Brief at 11-12). In its argument section, however, Appellant addressed only the heeding presumption and Plaintiff's purported lack of causation evidence (see App. First Dep. Brief at 42-47).[27] As such, this argument was not actually briefed before the Appellate Division.

It is not surprising, then, that the Appellate Division dissenters went astray when they concluded that this speculative opinion testimony was precluded on mere relevancy grounds (COA 62-65). See Bingham v. New York City Transit Authority, 99 N.Y.2d 355, 359, 786 N.E.2d 28 (2003) ("[h]ad defendants' new argument been presented below, plaintiff would have had the opportunity to make a factual showing or legal argument that might have undermined defendants' position"). Thus, this Court should decline to review this issue. See id.

[27] This is precisely why, as the Appellate Division dissenters noted, Plaintiff did not address this issue in the causation section of her Appellate Division Respondent's Brief (COA 65). Appellant raised it for the first time in its Reply Brief.

In any event, Supreme Court did not abuse its discretion in precluding this expert opinion testimony. See People v. Miller, 91 N.Y.2d 372, 379, 694 N.E.2d 61 (1998) (review of the admission of expert testimony is "'generally unwarranted' in the absence of an abuse of discretion").

B. Admiral Sargent's Opinion Testimony Addressed To Whether The Navy Would Have Accepted A Warning From Crane If Crane Would Have Attempted To Provide One Was Providently Precluded As Supposition Predicated On Speculation

Supreme Court providently precluded Admiral Sargent's opinion testimony as an assumption rested on speculative assumption. The Appellate Division dissenters concluded that it was reversible error to preclude this opinion testimony since it was *relevant* to the issue of causation (COA 62-65). But, significantly, Supreme Court precluded this opinion on the grounds that it was based on improper speculation, not relevancy:

> [APPELLANT'S TRIAL COUNSEL]: I would ask the additional question if Crane had added a warning at any time from the '40s to the '70s would the Navy have accepted the warning. My understanding from an off-the-record discussion[] I would not be permitted to ask that question. I'm just making an offer of proof through this 40-year window, the answer would be no.
>
> [colloquy omitted]
>
> THE COURT: …I find that would be speculation, the answer to that question.

(R. 1520-21[2938-40]. The post-verdict decision reiterated the basis for Supreme Court's ruling (R. 75-76) ("…the opinion of the Navy witness was based on pure speculation…"). Thus, the Appellate Division dissenters' mistaken belief that this opinion was precluded on relevancy grounds, and their conclusion that reversible error was committed as a result, is of no moment (COA 62-63).

To this end, it is well-settled that "the admission of expert testimony lies within the sound discretion of the trial court" (People v. Miller, supra), and "opinion evidence must be based on facts in the record or personally known to the witness." Cassano v. Hagstrom, 5 N.Y.2d 643, 646, 159 N.E.2d 348 (1959). An expert opinion predicated on speculation is "worthless as evidence." Id.

Here, Admiral Sargent did not begin working for the Naval Sea Systems Command ("NAVSEA") – the Navy organization that dealt with procurement of equipment – until 1988 (R. 1504[2872]). Therefore, he has no personal knowledge to support an opinion about what the Navy would have done if Crane would have attempted to warn at any time between 1940 and 1980.[28]

Nor were there any facts presented to Admiral Sargent, let alone in the record, upon which he could base an inferential opinion. There is not a shred of

[28] Indeed, NAVSEA did not arise until the 1970s, when the "bureau system was renamed" to create "today's version of what occurred during World War II on new ships" (R 1508[2888]). Admiral Sargent even admitted that the process of ship building and acquisition of equipment "changed somewhat more recently" from the time when Mr. Dummitt's ships were built (R. 1508[2889]). He, therefore, has no personal knowledge of what the NAVSEA's predecessor "would have done" in a hypothetical situation.

evidence showing that Crane, or any other manufacturer, ever attempted to warn the Navy of the dangers of asbestos, which was admitted by Appellant (R. 5446). There is not a shred of evidence that the Navy ever rejected a warning *of any type* from a manufacturer, let alone an asbestos warning. In fact, despite the "excruciating detail" of the military specifications (R. 1506[2879]), they were utterly silent as to a prescription or proscription of asbestos warnings.

To the contrary, the Navy actually emphasized that manufacturers should comply with their duty to warn (R. 1486[2800], 5447-48), and the decedent testified that some manufacturers did warn (R. 5512-14). Admiral Sargent acknowledged that Specification 15071, which was for instruction manuals, was incorporated into certain valve specifications (R. 1516-17[2922-25]). Specification 15071 provides that warnings should be provided by the manufacturer for "operation procedures, practices, etc., which will result in personal injury and loss of life if not correctly followed" (R. 1487-88[2805-07]). Other specifications directed manufacturers to warn about "special hazards" (R. 1487[2803-04]). And others promoted the Navy's intent to "accept the manufacturer's commercial type of manual…" (R. 1487[2805-06]), in which Crane certainly should have warned.

Admiral Sargent acknowledged that specifications permitted additional space on equipment nameplates to provide information for "safe handling,

operation and maintenance of the major unit or set" (R. 1518[2928-29]), and he expressly testified that whether additional space was available for safety information would depend upon the specification invoked pursuant to the particular contract at issue (R. 1518[2930]; see also R. 1497[2843]).[29] But Admiral Sargent never reviewed any Crane contracts for the sale of valves to the Navy, so he could not say what specifications were invoked for any given Crane valve to which the decedent was exposed (R. 1522[2945-46]). Thus, not only was the proposed opinion testimony unsupported, it was expressly contradicted by evidence in the record that Admiral Sargent acknowledged. See Guzman v. 4030 Bronx Blvd. Associates L.L.C., 54 A.D.3d 42, 861 N.Y.S.2d 298 (1st Dept., 2008) (expert "failed to offer or identify any objective medical evidence to support his conclusion" and "when faced with objective medical evidence [to the contrary], plaintiffs' expert dismissed it without sufficient explanation"). Thus, Admiral Sargent's speculative opinion is "worthless as evidence." Cassano, supra. To have admitted this opinion testimony would have constituted an abuse of discretion. See Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 22 (2d Cir., 1996) ("[a]dmission of expert testimony based on speculative assumptions is an abuse of discretion").

[29] Even crediting Admiral Sargent's testimony that a nameplate on one type of valve did not permit information beyond what was specified (R. 1511-12[2901-03]), this has no bearing on Appellant's ability to have warned in its instruction pamphlets. Therefore, this testimony could not support an opinion that the Navy would not have, in any instance, permitted a warning.

Appellant was further providently precluded from eliciting testimony from Admiral Sargent that in 1985 – well after the decedent's exposure period – he was aware of one instance where another manufacturer attempted to use a nonasbestos gaskets and the Navy rejected that substitution of material (R. 1510[2896-97], 1519-20[2934-35]). Supreme Court correctly precluded this post-exposure, design-specific evidence on relevancy grounds (R. 1520[2935-37]). Indeed, since a manufacturer's ability to have warned differs both practically and theoretically from its ability to have altered technical designs, the Appellate Division majority appropriately found support in caselaw regarding the government contractor defense. See Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 1003 (7th Cir., 1996) (quoting Tate v. Boeing Helicopters, Inc, 55 F.3d 1150, 1156 (6th Cir., 1995)) ("[s]imply because the government exercises discretion in approving a design does not mean that the government considered the appropriate warnings, if any, that should accompany the product"), cert. denied 520 U.S. 1116; In re Hawaii Federal Asbestos Cases, 960 F.2d 806, 812-13 (9th Cir., 1992); In re Joint E. & S. Dist. N.Y. Asbestos Litig. [Grispo], 897 F.2d 626, 630-32 (2d Cir., 1990).

But even assuming there was some basis to support this testimony, preclusion did not rise to the level of an abuse of discretion sufficient to warrant a new trial. The Appellate Division majority was correct in noting that this opinion

testimony, even if admitted, would have made no difference. See Oboler v. City of New York, 8 N.Y.3d 888, 864 N.E.2d 1270 (2007).

Accordingly, Admiral Sargent's speculative opinion testimony was providently precluded, and a new trial is not warranted.

IV. APPELLANT'S REMAINING CONTENTIONS SHOULD BE AUTOMATICALLY AFFIRMED AS NONREVIEWABLE, BUT EVEN IF CONSIDERED, THEY ARE MERITLESS

A. Appellant's Challenge To The Apportionment Of Fault Is Nonreviewable And, In Any Event, Baseless

Appellant's argument that the "jury's fault allocation was against the weight of the evidence" (App. Brief at 66-68) is outside this Court's scope of review, and thus should result in an automatic affirmance on this issue. See Vadala v. Carroll, 59 N.Y.2d 751, 752-53, 463 N.Y.S.2d 432 (1983); see also Lucas v. New York City Tr. Auth., 163 A.D.2d 21, 557 N.Y.S.2d 919 (1st Dept., 1990), appeal dismissed 76 N.Y.2d 933, 563 N.Y.S.2d 58 (1990).

In any event, Appellant's argument is baseless. Appellant failed to prove, and in fact did not even attempt to prove, that any nonparty was negligent in failing to warn or that such negligence was a proximate cause of the decedent's injury (R. 2169-74). See C.P.L.R. § 1603; In re New York Asbestos Litig. [Marshall], 28 A.D.3d 255, 256, 812 N.Y.S.2d 514 (1st Dept., 2006); Lustenring v. AC&S, Inc., 13 A.D.3d 69, 786 N.Y.S.2d 20 (1st Dept., 2004), lv denied 4 N.Y.3d 708 (2005). The allocation of fault, therefore, was based on the decedent's exposure to asbestos

from Crane valves, *thousands* of times, on all seven ships of his service, compared to his exposure just 23 times to one Elliott tank on one ship (R. 875[1483-84], 5509-10), and further based on Crane's actual knowledge of the dangers of asbestos (R. 1267-77[2372-2411], 1414-15[2657-64], 5432-40), compared to Elliott's mere constructive knowledge (R. 1412-16[2650-66]). Thus, even if reviewable, the fault allocation should not be disturbed.

B. Appellant's Challenge To The Recklessness Finding Is Nonreviewable And Is Otherwise Subject To The Mootness Doctrine, But Even If Considered, It Is Baseless

Appellant's claim that the recklessness finding was against the weight of the evidence is nonreviewable. See Vadala, supra. Nor does Appellant challenge the legal sufficiency of the recklessness finding, which in any event is unpreserved and thus also nonreviewable. See Merrill, 71 N.Y.2d 990, supra. But even if reviewable, this issue is nonetheless subject to the mootness doctrine. See Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714, 431 N.Y.S.2d 400 (1980).

C.P.L.R. § 1601 provides that a tortfeasor that is less than 50% at fault is only severally liable for its percentage of fault, whereas a tortfeasor that is more than 50% at fault is jointly and severally liable. When the tortfeasor is apportioned less than 50% fault, C.P.L.R. § 1602 provides exceptions that, if established, preserve the rule of joint and several liability. Recklessness is one such exception.

See C.P.L.R. § 1602(7). Thus, the recklessness exception is only triggered when a tortfeasor is *less* than 50% at fault.

Here, since the apportionment of 99% fault to Crane must be automatically affirmed, Appellant is jointly and severally liable irrespective of whether the recklessness finding was properly made. See C.P.L.R. § 1601. Thus, the recklessness issue is moot because it will not change the outcome of this appeal. See Matter of Barbara C., 64 N.Y.2d 866, 487 N.Y.S.2d 549 (1985).

Nor are any exceptions to the mootness doctrine satisfied. This Court has noted that "exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and novel issues." Hearst Corp. v. Clyne, supra at 714-15.

The law on recklessness is well-settled (see Maltese v. Westinghouse Electric Corp., 89 N.Y.2d 955, 655 N.Y.S.2d 855 (1997)), and this Court recently declined to revisit it. See In re Eighth Judicial District Asbestos Litig. [Drabczyk], 92 A.D.3d 1259, 938 N.Y.S.2d 715 (4th Dept., 2012), lv denied 19 N.Y.3d 803 (2012). Thus, this is not a novel issue, and it is not one that typically evades review. Nor is there a likelihood of repetition, as it has only been addressed a handful of times since the Maltese decision 17 years ago. See, e.g., In re New

York City Asbestos Litig. [D'Ulisse], 16 Misc.3d 945, 842 N.Y.S.2d 333 (Sup. Ct., N.Y. Co., 2007), appeal withdrawn 874 N.Y.S.2d 912 (1st Dept., 2009). In any case, any claimed repetition would be guided by the settled Maltese standard. Since no exceptions to the mootness doctrine apply here, the result should be an automatic affirmance on this issue. See Hearst Corp., supra.

But even if considered, Appellant's argument is wholly meritless.[30] Contrary to Appellant's unsupported assertion that recklessness should be narrowly construed (see App. Brief at 70), it is C.P.L.R. § 1601 that should be narrowly construed because it is in derogation of the common law rule of joint and several liability. See McKinney's Statutes § 301(a) ("statutes in derogation of the common law receive a strict construction"). By correlation, an exception to C.P.L.R. § 1601 like recklessness, which "preserve[s] the common law rule," should be broadly construed. Rangolan v. County of Nassau, 96 N.Y.2d 42, 46, 749 N.E.2d 178 (2001).

Here, the broadly construed Maltese standard is satisfied based on the same facts as discussed supra in Section I(B)(i)(6) at 54-56. These facts show Crane's

[30] Appellant's assertion that recklessness was not properly pleaded is unpreserved and nonreviewable where it was raised for the first time in Appellant's post-verdict motion. See Grzesiak v. General Elec. Co., 68 N.Y.2d 937, supra at 938-39. And even if it had been preserved, Appellant forfeited appellate review by conceding at trial that recklessness had been pleaded (R. 787[1305], 1690[3286], 1850[3669-70]). See People v. Lewis, 5 N.Y.3d 546, supra at 551. In any event, the complaint not only used the word "reckless" multiple times, it also tracked the language of C.P.L.R. § 1602(7), pleading that Appellant acted with a "reckless disregard for his/her safety and well-being" (R. 140-142). Appellant clearly had notice.

admitted awareness of the risks associated with the exact components at issue, running to the exact class of workers at issue, and Crane's conscious indifference in failing to warn despite its actual knowledge, with a high probability of death therefrom.

Additionally, the recklessness charge adequately conveyed the proper standard. Supreme Court mirrored P.J.I. 2:275.2 (formerly numbered 2:275.4 (2011 ed.)) in charging recklessness (R. 1850[3672], 2033[4075-76]). See Spensieri v. Lasky, 94 N.Y.2d 231, 239-40, 723 N.E.2d 544 (1999) (charge is adequate where it "substantially conforms" to the P.J.I.). In essence, Crane asserts that the recklessness charge approved by the P.J.I. committee does not conform to the Maltese standard, despite the first sentence in the commentary providing that the charge is based on Maltese. See P.J.I. 2:275.2, vol. 1B, p.784 (2014 ed.).

Accordingly, even assuming this issue is reviewable and an exception to the mootness doctrine is satisfied, the recklessness finding should be affirmed.

C. Appellant's Challenge To The Quantum Of Damages Is Nonreviewable And, In Any Event, Baseless

Whether the remitted damages of $8 million – $5.5 million and $2.5 million for past and future pain and suffering, respectively – constitutes reasonable compensation is nonreviewable. See Rios v. Smith, 95 N.Y.2d 647, 654, 722 N.Y.S.2d 220 (2001); Tate v. Colabello, 58 N.Y.2d 84, 86 n.1, 459 N.Y.S.2d 422

(1983). This should result in an automatic affirmance on this issue. In any event, the damages are reasonable considering the decedent's 33 months of excruciating and escalating pain and suffering (R. 399-400[392-96], 414-22[453-54, 458, 469, 473-75, 483], 5516-17).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Appellate Division should be affirmed in its entirety, with costs awarded to Respondent.

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Respectfully submitted,
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