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

APL-2014-00209
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Court of Appeals
of the
State of New York

IN THE MATTER OF NEW YORK CITY ASBESTOS LITIGATION

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

Respondent,

– against –

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

Defendants,

CRANE CO.,

Appellant.

REPLY BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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

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

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

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

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PRELIMINARY STATEMENT

At trial, Plaintiff-Appellee ("Plaintiff") *stipulated* that Mr. Dummitt was not exposed to a single asbestos fiber that was released by a product made or sold by Crane Co. Nevertheless, Plaintiff bypasses this undisputed fact, and, instead, offers a staccato recitation of disjointed and fundamentally unsupportable interpretations of the factual record,[1] which collectively lead to the unwarranted conclusion that Crane Co.—a civilian manufacturer of industrial valves—directed or otherwise controlled the United States Navy's use of asbestos on its ships. Plaintiff was not called upon to prove such a far-reaching proposition at trial, nor could Plaintiff have done so, because it is beyond reasonable dispute that *no* private sector, civilian supplier of commodity items like Crane Co. would have possibly dictated ship design or operational procedures to the United States Navy. Such a premise is self-refuting. And since the issue was never presented to any

[1] While one can argue about the *legal* relevance of the Supreme Court of California's *O'Neil* decision and the Supreme Court of Washington's *Braaten* decision, one cannot argue that the *facts* underlying Crane Co.'s decades-old relationship with the Navy were the same in those cases as in this case. (*See* discussion *infra*, pp. 20-21, 29-30.) The startling difference between the factual analysis proffered by Plaintiff in this case and the facts recited by the *O'Neil* and *Braaten* courts illustrate the inferential leaps that Plaintiff is asking the Court to make. After all, each of these three cases involved the same general time periods, the same Crane Co., and the same Navy. There is no basis for such a disparate treatment of these facts here.

finder of fact in this case or any other case, no finding of liability in this case could rest upon such a far-fetched assertion.

In nearly 100 pages of briefing, Plaintiff never once endeavors to articulate any rule of law that should be applied to determine when one entity may have a legal duty with respect to allegedly injurious products made and sold by another. And Plaintiff makes no meaningful effort to argue that the trial court's instruction in the matter *sub judice* was a correct statement of New York law. Instead, Plaintiff incessantly repeats the same unsupported inferences of "fact" with which Plaintiff led off Plaintiff's brief, and states repeatedly that Crane Co. is liable. But Plaintiff fails to link the conclusion of liability with any controlling rule of law. Instead Plaintiff merely rebuts Plaintiff's own mischaracterization of the legal standard offered by Crane Co.

Plaintiff's analysis inverts the analytical process by starting with a conclusion (i.e., that Crane Co. is liable) and, then, working backwards. And Plaintiff supports this end-justifies-the-means approach with often inflammatory rhetoric as opposed to logic or precedent. At bottom, there is no way to defend the trial court's jury charge regarding the scope of Crane Co.'s duty. All five First Department Justices agreed on that. (COA 44, 57.) Accordingly, there is no support in this record for the conclusion that a properly charged jury held that Crane Co. breached any properly described legal duty. At a minimum, Crane Co.

is entitled to a new trial so that a jury can decide whether it breached a correctly defined legal duty.[2]

Plaintiff's inability to articulate a legal standard defining a defendant's legal duty in this instance is telling. Plaintiff's I-know-it-when-I-see-it duty "test" and concomitant jury-style argument offer no guidance to future courts. Indeed, Plaintiff's analysis starts with the outcome (i.e., Crane Co. loses), and then heads down myriad tangential paths to convince the Court that it is the correct outcome. Nevertheless, when one starts with a controlling rule of law, and applies the legitimately offered facts in this case to that rule, Plaintiff's argument loses steam. This was the analytical path taken by the Supreme Courts of California and Washington, and, besides criticizing those courts based solely upon where they sit, Plaintiff says little that would compel this Court to pursue a different analytical path. Importantly, Plaintiff fails to articulate how the "stream of commerce" approach articulated in *Rastelli* is any different from the "stream of commerce" approach articulated in *O'Neil* and *Braaten*. It is not, and the Court should reverse the First Department's decision on that basis.

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[2] Plaintiff's contention that an error that occurred in the Appellate Division cannot be raised here has no legal relevance or logical support. *See, e.g., In the Matter of OnBank & Trust Co.*, 90 N.Y.2d 725, 730 n.2, 665 N.Y.S.2d 389, 391 (1997) ("New questions of law, which could not have been raised below, may be presented for the first time on appeal.") One cannot raise a legal error in the trial court if it is first made in an appellate court.

Although Plaintiff offers the Court various cases using various types of presumptions and inferences, Plaintiff does not identify a single New York authority that used the type of "heeding presumption" jury instruction that the trial court used here. For all of the reasons explained in Crane Co.'s opening brief, and in the First Department dissent, that error justifies a new trial, at the very least, particularly in light of the trial court's improper exclusion of the central piece of evidence that Crane Co. offered to rebut the trial court's "presumption" of proximate cause.

With respect to the remaining issues Crane Co. presents on appeal, the imposition of joint and several liability and the First Department's failure to address whether the excessive award here comported with its own precedents, Plaintiff hardly addresses the merits at all, instead urging the Court that these issues are "moot" and/or "non-reviewable." The Court should reject these arguments and reach the merits of all of these questions. Upon so doing, it will find no justification for, among other things, the jury's decision to allocate Crane Co. 99% of the fault for causing Mr. Dummitt's injury when it was *stipulated* that Crane Co. did not make or sell any of the asbestos-containing materials that exposed Mr. Dummitt, or the trial court's decision to permit the jury to find Crane Co. "reckless" for purposes of CPLR § 1602 for allegedly failing to warn of dangers inherent in products over which it had not the slightest degree of control.

REPLY

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

A. The Court Should Apply the Control-Based Test of *Rastelli*, and Not the Vague and Undeveloped Alternative Offered by Plaintiff.

The approach to the question of duty that this Court took in *Rastelli* focused on whether the defendant had "control over the production of the" allegedly defective product at issue or a "role in placing [it] in the stream of commerce." *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 298, 582 N.Y.S.2d 373, 377 (1992). This remains an appropriate test to apply in a case like this one. And Crane Co. has argued for the application of that test at every stage of this matter.

Rastelli is consistent with the long line of precedents in which this Court has held that product liability "duties" extend to those entities that place the harm-causing product into the stream of commerce. These are the entities that control the characteristics of the harm-causing product and profit from its sale and, thus, these are the entities that should, as a matter of policy, bear responsibility for the product when it causes injury. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389 (1916) ("[T]he manufacturer of this thing of danger is under a duty to make it carefully."); *accord* Restatement (Second) of Torts § 402A (1965); *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring); *O'Neil v. Crane Co.*, 53 Cal.4th 335, 266 P.3d 987 (2012).

Plaintiff *stipulated* that Crane Co. was not one of those entities here, and there was no evidence that Crane Co.'s valves required asbestos-containing materials to function or that Crane Co. in any way controlled the Navy's use of any shipboard equipment.[3] The trial court and First Department, applying vastly different "theories" of duty, held that Crane Co. could be liable (indeed, 99% liable) to Plaintiff nonetheless. In attempting to support these decisions, Plaintiff urges that the fact that Crane Co. exercised no control over the products that injured Mr. Dummitt has no relevance at all. (RB 3.) Contrary to Plaintiff's contention, control over the conditions or instrumentality giving rise to the harm is not just "relevant" to the duty inquiry; it is the lynchpin of a duty in tort. *See*, *e.g.*, *Rastelli*, 79 N.Y.2d at 298, 582 N.Y.S.2d at 377 (twice noting the defendant's lack of "control" over the production or use of the harm-causing product); *Sindell v. Abbott Labs*, 26 Cal.3d 588, 597, 607 P.2d 924, 928 (1980) ("[A]s a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control.").

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[3] Contrary to Plaintiff's repeated assertion, Crane Co. is not arguing that liability extends only to those who actually made or sold the allegedly injurious product. (Brief of Plaintiff-Respondent, hereinafter "RB," 8.) This incorrect assertion fails to appreciate the nuance of the stream-of-commerce test of *Rastelli*, and the careful balance it strikes in framing tort liabilities.

The broad, and far more expansive, approach of the First Department focuses on concepts such as the "significance" of a defendant's "interest" in a harm-causing product, but, as opposed to the carefully balanced *Rastelli* test, the First Department's approach does not appear to serve any particular policy goal at all, and the First Department did not articulate one, beyond ensuring the broadest possible scope of potential liability in cases like this one. That is not a legitimate policy goal, but, rather, is an outcome-based approach for which Plaintiff strongly advocates before this Court.

Plaintiff goes so far as to argue that a holding in Crane Co.'s favor would "automatically cut[] off many deserving plaintiffs with valid claims." (RB 42.) This suggestion is nothing short of extraordinary in a case in which the record reveals that Plaintiff had received $3,561,681.13 in settlement proceeds from entities other than Crane Co. at the time judgment was entered. (R. 34.) Moreover, in addition to recovering settlement funds from solvent entities, plaintiffs in "asbestos" cases, like the Plaintiff here, have a unique ability to recover additional settlement funds from dozens of former manufacturers and sellers of asbestos-containing materials that have entered bankruptcy proceedings and established personal injury trusts to compensate plaintiffs. *See, e.g.*, U.S. Government Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, 3 (Sept. 2011), available at

http://www.gao.gov/assets/590/585380.pdf (noting that, between the years 2000 and 2011, the number of asbestos personal injury trusts increased from 16 to 60, and the assets held by such trusts increased from $4.2 billion to over $36.8 billion); *see also* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011). The evidence before the trial court in this case demonstrated that, in addition to the settlement funds noted above, Plaintiff was entitled to recover *a minimum* of $290,000 (and likely much more) in additional funds from such asbestos personal injury trusts upon the submission of a few simple forms.[4] (R. 12-13, 5053-61.)

Simply put, no plaintiff will be "cut off" from a substantial recovery if this Court confirms a longstanding limitation on the product liability cause of action that it has historically recognized for sound policy reasons—i.e., limiting that cause of action to those entities who actually exercise control over the allegedly defective product by making it, selling it, or dictating the manner in which it is used. *See Rastelli*, 79 N.Y.2d at 298, 582 N.Y.S.2d at 377 ("Goodyear did not contribute to the alleged defect in a product, had no control over it, and did not

[4] Crane Co. produced to the trial court a report of an expert in economics who has extensive experience consulting in Chapter 11 bankruptcy proceedings, including those involving former makers and sellers of asbestos-containing materials. This expert, Marc Scarcella, explained in his report that the information regarding Mr. Dummitt's alleged exposures developed in discovery in this case entitled Plaintiff to recover funds from *at least* 20 personal injury trusts upon submitting simple applications. (R. 5053-61.)

produce it. . . ."). On the other hand, the "test" for legal responsibility that Plaintiff proposes on page 44 of Plaintiff's brief would, if adopted by this Court, expand the scope of product liability in New York well beyond its traditional bounds for no legitimate policy reason. The Court should reject that "test" and affirm the continuing validity of *Rastelli*.

1. There Is No Support for the "Foreseeability" Test for Legal Responsibility Used by the Trial Court or the "Significant Role" Test Adopted By the First Department.

At the outset, the Plaintiff's brief is notable for what it *does not* argue. Plaintiff does not attempt to defend the trial court's use of a "foreseeability-based" test for duty, which all five First Department Justices rejected. (COA 44 [in the words of the majority, "To be sure, mere foreseeability is not sufficient."];COA 57, Friedman, J., dissenting [in the words of the dissent, "The foregoing instruction was erroneous, as the majority appears to recognize, but I think we should say so more forthrightly. Under precedent of this Court, a firm's duty to warn about dangers arising from products that it neither manufactured nor sold nor distributed, but which could be used in conjunction with products that the firm did manufacture, sell, or distribute, does not extend to all such uses of other products that might be 'reasonably foreseeable.'"].)

Likewise, Plaintiff does not suggest that this Court adopt the "significant role" test of the First Department. (*See* COA 41 ["[W]here a manufacturer does

have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product."].) Rather, Plaintiff proposes an entirely different non-exclusive, eight-factor "test" for duty that is not guided by any identifiable legal principle or policy, is not the standard adopted by the trial court or First Department in this case, and is not the standard articulated by this Court in *Rastelli*. (*See* RB 44.) The "tests" for duty that Plaintiff has advanced throughout this matter have no consistency or defined legal standards because they begin with a result (i.e., Crane Co. is liable) and work backwards to identify alleged "facts" that support that result.

Accordingly, although, at trial, in Plaintiff's words, "the issue as to a duty to warn in this case [was] a factual one of foreseeability" (R. 5248), and although Plaintiff secured an excessive jury verdict on the basis of that "foreseeability" test, before this Court, Plaintiff reverses course and argues that the question of duty is purely a legal one answered by an analysis of at least eight factors, *not one of which* concerns the "foreseeability" of a product's use. (RB 44.) Thus, what Plaintiff previously described as a one-factor test, Plaintiff now describes as an open-ended, eight-factor test that appears to have been developed in order to support Plaintiff's desired result in this case, and not because it has any basis in law or policy.

The eight-factor test for duty Plaintiff now advances is correct only in so far as it represents a concession that foreseeability is legally irrelevant in the analysis of duty in a case like this one. *See also May v. Air & Liquid Sys. Corp.*, __ A.3d __, No. 2670, 2014 WL 4958163, at *6 (Md. Ct. Spec. App. Oct. 3, 2014) (holding that "foreseeability of harm is neither dispositive nor even material to the existence of a duty" in a case like this one, and rejecting the conclusion of the First Department here—that a Navy equipment manufacturer may bear a legal responsibility for asbestos-containing materials the Navy determined to use with the equipment post-sale). Nevertheless, because "foreseeability" was the defining (indeed, the sole) consideration upon which the jury was instructed to base its assessment of Crane Co.'s duty and the alleged breach thereof, a new trial, with new jury instructions and an opportunity for both sides to tailor their evidence to the appropriate legal "test" for duty, is the *minimum* relief necessary here.

It is also notable that Plaintiff does not ask this Court to adopt the test for legal responsibility articulated by the First Department in this matter. (*See* COA 41.) Although Plaintiff argues that this test is a correct one under New York law on page 43 of Plaintiff's brief, on the very next page, Plaintiff asks the Court to adopt a far different, and even more amorphous, eight-factor "test" for legal responsibility and presents in its support arguments that the First Department

already received from Plaintiff and rejected.[5] (RB 44.) As explained below, the Court should decline to do so because Plaintiff's proposed "test" for legal responsibility is inconsistent with New York law, is supported by no policy beyond sustaining the judgment, and if adopted, would clearly lead to indefensible results.

2. Plaintiff's Non-Exclusive, Eight-Factor Test for Legal Responsibility Is Inconsistent With New York Law and Motivated by No Discernible Policy Beyond Sustaining the Judgment.

Plaintiff asks the Court to adopt a "weighing of factors" test (RB 42), which Plaintiff defines on page 44 of her brief. Plaintiff's use of the term "weighing of factors" test suggests some type of structured or principled inquiry into the question of duty, but Plaintiff's "test" does not appear to derive from any identifiable legal principle at all. Plaintiff explains that the goal of this "test" is to determine whether a case is within "Rastelli's orbit" (RB 4), though Plaintiff does not explain what that means or how a court or jury is to make such a determination.

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[5] For example, Plaintiff re-asserts the argument that asbestos-containing materials became dangerous only when used with shipboard equipment. This observation, at base, is nothing more than the observation that most dangerous products do not become dangerous until someone uses them. It applies—without effect— in virtually any case involving multiple products (i.e., the defective rim in *Rastelli* was completely harmless until used with a wheel, and the quarry tile flooring in *Tortoriello* posed no threat until installed in a freezer). No New York precedent suggests that this observation alone could support the imposition of a duty. *See also O'Neil*, *supra*, 53 Cal.4th at 350-51, 266 P.3d at 996-97 (rejecting the same argument); *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 392, 198 P.3d 493, 501 (2008) (same).

Notably, Plaintiff's "weighing of factors" test does not even appear to include a finite "universe" of factors. Rather, Plaintiff claims, "The pertinent duty considerations *include*" (RB 44, emphasis added) eight factors, but are not limited to those factors. The "considerations" that follow seem to combine incomplete portions of statements from the *Rastelli* opinion with other statements that are nowhere stated or implied in the *Rastelli* decision, or any other New York precedent. The entire "orbit"/weighing-of-factors approach appears to have been crafted for no reason other than to support the judgment in this case, and to craft a "duty" test for use in other product liability matters that could never be resolved as a matter of law.[6]

For example, Plaintiff claims that one of the duty "factors" a court must or should consider (Plaintiff does not indicate which of the eight "factors" is mandatory, which is discretionary, or how a court is to weigh them when applying this weighing-of-factors test) is whether "the manufacturer exercised control over the production of the component or ever marketed it." (RB 44.) The language

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[6] While Plaintiff often attempts to distinguish *Rastelli* from this case, it is reasonably clear that, under Plaintiff's "orbit"/weighing-of-factors test, the facts of *Rastelli* could not have decided the duty question in *that* case as a matter of law. Under Plaintiff's "orbit" approach, the facts of *Rastelli*, themselves, would have created a jury question regarding, among other things, the "benefit" Goodyear received from the sale/use of rims with its tires, the "wrongfulness" of Goodyear's actions, whether Goodyear "ever marketed" a similar rim itself, and the plaintiff's "reasonable expectation" of care. (RB 44.)

preceding the word "or" is clearly drawn from *Rastelli*. *See id.*, 79 N.Y.2d at 298, 582 N.Y.S.2d at 377 ("Goodyear had no control over the production of the subject multipiece rim. . . .").

However, the language following "or" does not appear anywhere in the *Rastelli* opinion, the First Department's decision here, or any other New York authority of which Crane Co. is aware. Although Plaintiff claims that the test for which Plaintiff advocates is not an expansive or novel one, Plaintiff offers no precedent supporting the notion that a court could properly impose a duty upon a defendant manufacturer because it "ever," at some time in its history, marketed the same type of product as the harm-causing product at issue, even when the defendant did not market or, indeed, have anything to do with, the harm-causing product involved in the case. Applying such a test would lead to results that are absurd on their face—for instance, holding that an automobile manufacturer has a legal duty for injuries caused by a defective replacement tire on a ten-year-old car, because the automobile manufacturer sold tires at some point in its history.

Although Plaintiff argues that Crane Co. should have "warned" Mr. Dummitt of dangers associated with products with which Crane Co. never had any contact, Plaintiff glosses over the practical difficulties associated with imposing such a novel and broad form of tort duty in the context of commercial sales, let alone in the context of sales to the United States Armed Forces. The provision of

such a "warning," the content of which Plaintiff never defines, is not the "simple" matter that Plaintiff indicates it would be. Rather, formulating an effective warning of dangers posed by third-party products in the context of a case like this one would require an equipment maker like Crane Co. to, among other things, (1) understand the characteristics of the "ancillary" products the Navy was using with Crane Co. valves at the time of the valves' acquisition and for years thereafter (thus ensuring that the original warnings did not become "outdated" as the characteristics of the ancillary products changed), (2) gain access to Navy work settings, including operating American warships, to determine how the Navy was having its sailors use these ancillary products, what dangers that use could pose, and how to best post warnings, (3) determine how to "post" a warning so that it would remain in place for several decades in a steam system on an operating Navy ship, and (4) gain the Navy's permission—and perhaps challenge Navy practices in the process—to post these warnings with or near the valves, some of which the Navy may have covered entirely in insulation, thus obscuring any warnings originally supplied with the valves. The expansive duty to warn that Plaintiff asks the Court to impose is one that would likely be impossible to discharge in an intelligent and effective manner, but Plaintiff bypasses this point completely in the search for a "rule" of duty broad enough to support the judgment.

This Court has never suggested, however, that the legal principles and policies underlying product liability law give way to a unique body of "asbestos law" in "asbestos" cases. This is, however, precisely what the Plaintiff asks this Court to create in this case. On the other hand, Crane Co. argues not for a test for legal responsibility that is "wooden" or "inflexible" as Plaintiff contends, but rather for a test that is based on legal principles that this Court has adopted to give effect to specific policy goals arising in the product liability context.

These principles, and particularly the rule that a manufacturer "has no duty to warn against defects in . . . third-party products so long as the manufacturer had no control over the production of the defective product and did not place it into the stream of commerce," *see Surre v. Foster Wheeler LLC*, 831 F.Supp.2d 797, 801 (S.D.N.Y. 2011), further the policy that this Court has identified for decades as being a guiding one in the product liability context—that advancing consumer safety and fairly distributing the "costs" associated with defective products means placing legal responsibility for such products "on those who produce and market them," *see Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 473, 758 N.Y.S.2d 271, 274 (2003) ("[T]he burden of accidental injuries caused by defective products is better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained.") (citing Restatement (Second) of Torts § 402A, cmt. c); *Codling v. Paglia*, 32 N.Y.2d 330, 340, 345

N.Y.S.2d 461, 468 (1973) (explaining that entities who make products are the ones that "can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose"). The Court should not vary from that approach here in favor of the "test" Plaintiff proposes, which features many "factors" but does not embody any identifiable legal principle or further any policy goal beyond expanding the scope of liability in "asbestos" cases specifically and product liability actions generally.

3. New York Law Is Not at Odds With the Law of Other American Jurisdictions.

Plaintiff states repeatedly in her brief that New York follows a "negligence-based approach" in failure-to-warn claims (RB 24) and, thus, the argument appears to go, the well-reasoned holdings of non-New York courts in similar cases are entitled to no weight here.

The premise on which Plaintiff's argument rests is simply incorrect. When the California Supreme Court decided a case that was virtually identical to this one in *O'Neil*, *supra*, it applied a body of law that, like most American jurisdictions, takes a "negligence-based approach" in failure-to-warn claims.[7] *See* Restatement (Third) of Torts: Products Liability § 2 (1998), Reporters' Note, cmt. m ("An

[7] In addition, the *O'Neil* court analyzed separately the standards for liability in negligence claims, and its duty finding extended specifically to both types of claims. *See O'Neil*, *supra*, 53 Cal.4th at 364-65, 266 P.3d at 1006-07.

overwhelming majority of jurisdictions supports the proposition that a manufacturer has a duty to warn only of risks that were known or should have been known to a reasonable person."); *see also Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal.3d 987, 995 n.8, 810 P.2d 549, 553 (1991) (holding a product seller should have a duty to warn only when it "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence" of the alleged danger of its product).

If, as Plaintiff appears to argue, the product liability law in California and Washington were fundamentally different from that which exists in New York, it is difficult to understand why both the Supreme Court of California and the Supreme Court of Washington drew upon this Court's decision in *Rastelli* to support their analyses in cases that were virtually indistinguishable from this one. *O'Neil*, *supra*, 53 Cal.4th at 353, 266 P.3d at 998; *Braaten*, *supra*, 165 Wash.2d at 387, 198 P.3d at 499. Those courts correctly interpreted New York law, and this Court should reject Plaintiff's unsupported assertion to the contrary.

Plaintiff's incorrect characterization of New York law as vastly different from that which exists in other American jurisdictions only serves to highlight the fact that *no other* American jurisdiction has recognized the expansive and novel duty for which Plaintiff advocates here. Indeed, mere weeks ago, the Maryland Court of Special Appeals affirmed the continuing validity of its earlier decision in

Ford Motor Co. v. Wood, 119 Md.App. 1, 703 A.2d 1315 (Md. Ct. Spec. App. 1998) and held, as it did in *Wood*, that one manufacturer generally has no legal responsibility for products made and sold entirely by others even in "asbestos" cases. *See May*, *supra*, 2014 WL 4958163, at *4 ("[I]n the 16 years since this Court decided *Wood*, numerous courts around the country have either followed *Wood* or have applied the same line of reasoning to hold that a manufacturer generally has no liability for defective replacement or component parts that it did not manufacture or place in the stream of commerce."). Like this case, *May* involved plaintiffs' claims that equipment suppliers to the U.S. Navy should be responsible for the Navy's decision to use asbestos-containing materials with the defendants' equipment in circumstances entirely beyond the defendants' control. The *May* court rejected any such theory as inconsistent with the "principles underpinning strict products liability," *id.* at *6, and those same principles apply in New York.

Indeed, the numerous decisions from around the country that reject Plaintiff's position are not based on some unique legal theories that are foreign to New York precedents, a point made indisputable by the explicit reliance that the *O'Neil* and *Braaten* courts placed on *Rastelli*. To the contrary, these decisions flow from exactly the same legal principles and considerations of policy on which this Court has based its product liability doctrine for decades. *Compare Faddish v.*

Buffalo Pumps, 881 F.Supp.2d 1361, 1369 (S.D. Fla. 2012) (rejecting precisely the types of claims asserted by Plaintiff here for the following policy reasons: "The rationale underpinning the general rule of strict liability is that it logically and fairly places the loss caused by a defective product on those who create the risk and reap the profit by placing such a product in the stream of commerce, with the expectation that these entities have the greatest incentive and resources to control and spread the risk of harm posed by the product") *with Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 N.Y.2d 376, 386-87, 384 N.Y.S.2d 115, 121-22 (1976) (noting that a manufacturer should bear "legal responsibility" for its injury-causing product because the manufacturer is "in the best position to have eliminated . . . dangers").

Finally, even if Plaintiff were somehow correct that New York law in the product liability area is wholly different than that existing elsewhere (which is not the case), Plaintiff does not even suggest that the Supreme Courts of California and Washington misapprehended *the facts* surrounding Crane Co.'s relationship to the Navy, which facts are decades old and, thus, are precisely the same facts underlying Plaintiff's claims here. Those courts found undisputed the seemingly self-evident proposition that the United States Navy, and not Crane Co., dictated exactly what products the Navy used on the ships in its fleet and why it did so. *See, e.g., O'Neil, supra*, 53 Cal.4th at 343-44, 266 P.3d at 992 (describing the

Navy's design of warships and the product specifications for the equipment and materials the Navy used aboard them, as well as the operational reasons for the Navy's use of asbestos-containing materials).

The First Department, on the other hand, seemingly identified a dispute of fact on this point, and went on to resolve the dispute against Crane Co. There was no justification for such an approach—as explained below, if the First Department believed that, contrary to the conclusion of these other courts, there are disputed issues regarding whether Crane Co., and not the Navy, controlled the Navy's use of asbestos-containing materials on Navy ships, then the proper course was to submit those disputes to a jury, and not to resolve those disputes on appeal, after reviewing a trial record never meant to address those questions.

4. Neither the *Sage* nor *Suttner* Decision Supports the Judgment Here.

Plaintiff asks the Court to disregard completely a growing body of decisions from other jurisdictions that are virtually indistinguishable from the case *sub judice* and that reject the same claims Plaintiff presents here, and points the Court, instead, to decisions such as *In the Matter of Eighth Judicial Dist. Asbestos Litig. (Suttner)*, 115 A.D.3d 1218, 982 N.Y.S.2d 421 (4th Dep't 2014) and the Court's earlier decision in *Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579, 523 N.Y.S.2d 418 (1987), a design defect case that bears no similarity to this one.

Neither of these decisions, however, and no other decision Plaintiff cites,[8] offers any support for the judgment here.

a. *Sage* Is Inapplicable.

Sage involved a strict liability claim for design defect, and the analysis of the *Sage* court turned on the nature of the particular claim at issue. Here, Plaintiff's claim was based solely on a failure-to-warn theory, which was not at issue in *Sage*. In *Sage*, the court held that the manufacturer of an aircraft could be liable on a design defect theory for an injury caused by a replacement aft ladder used with the aircraft where (1) the replacement ladder was fabricated by the employees of the aircraft's purchaser; it was not acquired from a third party, (2) in fabricating the ladder, the aircraft purchaser's employees duplicated the defective design of the ladder originally supplied by the aircraft manufacturer, and (3) thus, the aircraft manufacturer was the designer of the replacement part that caused the plaintiff's injury. *See id.*, 70 N.Y.2d at 586-87, 523 N.Y.S.2d. at 421-22.

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[8] In addition to discussing *Sage*, *Suttner*, and many of the decisions Crane Co. discussed in its opening brief, like the *Tortoriello* and *Rogers* decisions, Plaintiff points the Court to numerous decisions like *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 677 N.Y.S.2d 764 (1998) and *Baleno v. Jacuzzi Research, Inc.*, 93 A.D.2d 982, 461 N.Y.S.2d 659 (4th Dep't 1983), in which, unlike here, the product the defendant placed into the stream of commerce was the product that caused the harm. Those decisions did not need to consider, and thus did not consider, the question of legal responsibility presented in *Rastelli* and presented here—is one manufacturer potentially responsible for injuries caused by products that it did not make, sell, or in any sense control?

Sage is, accordingly, not inconsistent with a "stream-of-commerce" approach to the question of product liability duties. Rather, it merely recognizes what seems to be an indisputable point—that an entity that designs a harm-causing product exercises sufficient control over the product to bear a legal responsibility for it. *See Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019, 1030 (S.D. Ill. 1989) (declining to apply *Sage* to hold an original equipment manufacturer liable for defective replacement parts in the absence of evidence that the original equipment manufacturer made, sold, or designed the replacement parts). Here, there is no argument, let alone evidence, that Crane Co. designed any of the asbestos-containing materials that Mr. Dummitt encountered, and Plaintiff did not assert any design defect theory. *Sage* is, for these reasons, wholly inapplicable.

b. The Precise Legal "Rule" Underlying the *Suttner* Decision Is Difficult, If Not Impossible, to Determine, and That Decision Is Currently on Appeal.

Although Plaintiff fails to point this out, this Court currently has under review the Fourth Department's decision in the *Suttner* matter. *See* Court of Appeals Docket No. APL-2014-00261. The Court granted Crane Co.'s motion for leave to appeal in that matter by Order dated October 21, 2014, and thus the Fourth Department's *Suttner* decision will be reviewed by this Court. Nevertheless, even if it was not under review, the Fourth Department's *Suttner* decision offers no support for the judgment here.

The Fourth Department's order and opinion affirming the judgment in *Suttner* is three sentences long, and sets forth no legal analysis. *See Suttner*, *supra*, 115 A.D.3d 1218, 982 N.Y.S.2d 421. The trial court opinion the Fourth Department referenced in its own opinion (*see In the Matter of Eighth Judicial Dist. Asbestos Litig. (Suttner)*, No. 2010-12499, 2013 WL 9816609 (N.Y. Sup. Ct. Mar. 15, 2013)) is, itself, confusing as to the "rule" of duty applied in that case, to the extent any rule was applied at all. Whatever the basis for the *Suttner* decision, it clearly was not the "significant role" test utilized by the First Department here, or the pure "foreseeability" test adopted by the trial court.

To the extent the Court wishes to look to a Fourth Department precedent in this area, Crane Co. respectfully submits that the decision of that court in *In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk)*, 92 A.D.3d 1259, 938 N.Y.S.2d 715 (4th Dep't 2012) correctly relied on *Rastelli* to hold that a valve manufacturer has no legal responsibility for asbestos-containing materials that it did not manufacture or supply, but that were used in conjunction with the valves post-sale. Simply put, the Fourth Department erred when it departed from its prior holding and, without any explanation, reached a different result in *Suttner*.

B. If the Court Were to Adopt the "Test" for Legal Responsibility Adopted by the First Department or the Different "Test" Offered by Plaintiff, a New Trial Would Be the Minimum Relief Necessary.

Plaintiff is correct that the existence of a legal "duty" is a policy-based question of law. But, Plaintiff fails to acknowledge that the question of whether a duty was *breached* under a particular set of facts, in a particular case, is a distinct question, and it is a question of fact. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263, 652 N.Y.S.2d 715, 718 (1996) ("Liability for negligence may result only from the breach of a duty running between a tortfeasor and the injured party. Although the existence of a duty is an issue of law for the courts, once the nature of the duty has been determined as a matter of law, whether a particular defendant owes a duty to a particular plaintiff is a question of fact.") (internal citation omitted); *Tagle v. Jakob*, 97 N.Y.2d 165, 168, 737 N.Y.S.2d 331, 333 (2001) (holding that although the court defines the legal duty, it is solely for the jury to resolve any factual issues surrounding its alleged breach).

The trial court instructed the jury that Crane Co.'s legal responsibility extended to all asbestos-containing materials that may have been foreseeably used by the Navy. (R. 2031.) Thus, the question of fact submitted to the jury was whether the use of asbestos-containing materials was "foreseeable" to Crane Co. (*Ibid.*) The First Department rejected this foreseeability-based definition of duty, and instead held that Crane Co. could bear a legal duty in this case if it had a

"significant role, interest, or influence" in the Navy's use of asbestos-containing materials with the Crane Co. valves with which Mr. Dummitt worked. (COA 41.) This is an entirely different "test" from the one the trial court utilized, and it required an entirely different factual finding from a jury (and not a reviewing appellate court), relating to the "significance" of Crane Co.'s "role" in the Navy's use of certain materials. *See Middleton v. Whitridge*, 213 N.Y. 499, 506 (1915) ("[T]he ultimate decision of all disputed questions of fact must be by a jury, unless the parties have consented to a decision of them by the court. . . ."). Yet, no one asked the jury in this case if Crane Co. had a "significant role, interest, or influence" in the Navy's use of asbestos.

Here, as discussed further below, there is inarguably a dispute of fact on this question—i.e, the nature of Crane Co.'s "role" in the Navy's use of asbestos. Crane Co. contends that "role" was nonexistent. (*See* Brief of Defendant-Appellant, "AB," 48-55 [detailing the lack of evidentiary support for the First Department's factual "findings" regarding Crane Co.'s "role" in the Navy's operations].) Plaintiff, largely on the basis of one Naval Academy publication that "thanked" Crane Co., along with several dozen other companies, for some undefined contribution, argues that Crane Co. largely controlled the United States

Navy's use of asbestos-containing materials on its ships.[9] (RB 8 ["[I]t is no surprise that the Navy took its cues from Crane."].) It is Plaintiff's burden to prove that seemingly self-refuting contention to a fact-finder, *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565, 576, 934 N.Y.S.2d 43, 48 (2011) ("To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages."), but the fact-finder was never presented with the "proper" legal question here, even assuming, *arguendo*, that the First Department did, in fact, correctly define the question of legal responsibility.

1. Plaintiff's Argumentative Recitation of the "Evidence" Serves Only to Demonstrate the Necessity of a New Trial.

Plaintiff contends that Crane Co. addresses the facts of this case in "only the most conclusory fashion." (RB 4.) To the contrary, Crane Co. devoted seven pages of the argument section of its opening brief to addressing, point-by-point, every "fact" that the First Department cited in determining the issue of legal responsibility against Crane Co. and demonstrating that, at very best for the

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[9] This argument is based entirely on an attempt by Plaintiff to "re-characterize" a few pieces of evidence that were presented at trial for reasons unrelated to the First Department's subsequently adopted "test" for duty. Indeed, although Plaintiff now focuses her argument for duty on the United States Navy's interactions with Crane Co., Plaintiff did not even call at trial an expert witness (or any other type of witness) on Navy acquisition practices or operations to testify to Crane Co.'s alleged "role" in those operations.

Plaintiff, reasonable minds could differ regarding the accuracy of the First Department's conclusions in light of the underlying record (which was not even developed to address the First Department's "significant role" test, because that test did not exist at the time of the verdict). (*See* AB 48-55.) Thus, a new trial is the minimum relief necessary here. Plaintiff does not respond to this analysis, instead simply repeating the same unsupported conclusions that Plaintiff argued to the First Department, some of which that Court accepted even in the absence of any jury question on the issue. (*See, e.g.*, RB 15 [Plaintiff arguing that Crane Co. "tested its valves in its own factory using asbestos lagging pads" although Crane Co. explained in its opening brief exactly why that "finding" of the First Department is unsupported by the record, *see* AB 53].)

Before addressing the facts that are disputed here, it is notable what Plaintiff's brief again confirms is *not* in dispute. First, Plaintiff *stipulated* that Plaintiff had no evidence that Crane Co. made, sold, or otherwise placed into the stream of commerce any of the asbestos-containing materials that Mr. Dummitt encountered during his service in the Navy. (R. 1163, 1365; COA 56, Friedman, J., dissenting ["[I]t is undisputed that Crane neither manufactured nor sold nor distributed the particular materials that gave rise to Mr. Dummitt's asbestos exposure."].) Second, Crane Co.'s valves did not require asbestos-containing materials of any type to function, though the Navy may have, itself, called for the

use of such materials, among other available alternatives, with the valves on Navy ships pursuant to "military specifications."[10] (R. 870, 1265, 1274-76, 1491-92, 1617, 3860-65.) Indeed, although Plaintiff points out that certain Crane Co. valves contained asbestos-containing gaskets or packing, the same documents upon which Plaintiff relies demonstrate that others did not. (RB 12.)

Crane Co. submits that, pursuant to *Rastelli*, these are the facts that are pertinent to any duty inquiry and, taken together, they should lead to judgment in its favor as a matter of law. However, even if the First Department's far more expansive and amorphous "test" for legal responsibility is a correct one, Plaintiff's recitation of the evidence allegedly bearing on that test does nothing more than demonstrate a substantial dispute on whether the facts of this case meet that test.

After reviewing the evidence bearing on the historical relationship of the Navy and its equipment suppliers, including Crane Co., the unanimous Supreme

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[10] Plaintiff consistently obscures the distinction between the concept of a design requirement and a customer preference, but it is a critical one. *See O'Neil*, *supra*, 53 Cal.4th at 350, 266 P.3d at 996 (finding the notion that Crane Co.'s valves "required" asbestos to function "belied by evidence that defendants made some pumps and valves without asbestos-containing parts"). Although some decisions (including the *Shields* decision Plaintiff cites) suggest a manufacturer may have a legal responsibility for materials that were *necessarily* used with its product by virtue of the product's design, *see Rogers v. Sears, Roebuck and Co.*, 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dep't 2000), no authority suggests, let alone holds, that a manufacturer assumes a legal responsibility for a third-party product simply because, as here, a consumer decides to use that third-party product with or near the manufacturer's product.

Court of California observed that "Crane produced valves for Navy ships according to . . . strict military specifications" which were created by naval engineers working with the Navy's Bureau of Ships. *O'Neil*, 53 Cal.4th at 343, 266 P.3d at 992. Although these specifications, at times, mandated the use of asbestos-containing gasket or packing materials in the valves, the valves did not need such materials to operate, and it was entirely the decision of the Navy to use such materials with its shipboard equipment. *Id.*, 53 Cal.4th at 344, 266 P.3d at 992.

In this case, nothing about Crane Co.'s decades-old relationship with the Navy has changed, and thus the "record" that was before the court in *O'Neil* and *Braaten* is fundamentally the same record here. Crane Co. detailed at length in its opening brief how the conclusions that the First Department majority reached regarding Crane Co.'s alleged "role" in the Navy's use of asbestos-containing materials with its valves are in no way supported by that record. (AB 48-55.) Precisely the same is true of the substantially similar conclusions Plaintiff asks this Court to draw.

Strikingly, the central piece of evidence cited in Plaintiff's argument, and in the First Department majority's analysis, is a short, incomplete excerpt of a publication of the U.S. Naval Academy that (1) has nothing to do with Mr. Dummitt and (2) references Crane Co. only in thanking Crane Co., along with 37

other private-sector manufacturers, for contributing illustrations, descriptive matter, and/or suggestions to the text. (R. 3851-52.) Without any explanation or supporting citation, Plaintiff refers to this document as a "manifesto on standardization." (RB 13.) It is not clear what that means, and there is nothing in the record characterizing this Naval Academy publication as anything other than a publication of the Naval Academy. The contribution that Crane Co. made to this publication is stated nowhere in the document, which otherwise does not discuss Crane Co. or any "role" it may have played in anything. This excerpt of a Naval Academy publication hardly supports the sweeping conclusions that Plaintiff and the First Department majority apparently reach—that one of the most sophisticated engineering entities in the history of the world, the United States Navy, "sought Crane's help" (RB 13) and "took its cues from Crane" (RB 8).

The other "key" piece of evidence on which Plaintiff and the First Department majority focused their analysis is a series of valve drawings Crane Co. was required to submit to the Navy pursuant to the military specifications that governed the valves Crane Co. supplied. (R. 1509.) Plaintiff claims that the purpose of these drawings was to "ensure that the Navy knew exactly what replacement components to use with each particular valve." (RB 7.) To support this claim, Plaintiff does not cite to the drawings themselves (perhaps because those drawings say nothing at all about any "replacement" parts, *see* SR 1-50), but

rather to the testimony of Crane Co.'s expert witness in Navy procurement practices. (R. 1509.) That testimony does not support the conclusion Plaintiff asks the Court to draw from it; indeed, the witness does not even use the word "replacement" in the testimony Plaintiff cites or in any way indicate that Crane Co. somehow directed the actions of the Navy by submitting to the Navy valve drawings that the Navy itself mandated. (*Ibid.*) Although Plaintiff argues throughout her brief that asbestos-containing materials were "specified"[11] for use with certain Crane Co. valves, Plaintiff consistently avoids any mention of who "specified" the use of those materials. The answer, of course, is the Navy, and not Crane Co., as Plaintiff admitted during the trial. (R. 267 [Plaintiff's counsel stating, "Now, they are going to tell you that the navy specified the use of asbestos. And that's true, but it was their duty to warn and to protect Mr. Dummitt. . . ."].)

In addition to presenting a highly argumentative account of the "facts" relevant to the First Department's test for legal responsibility, Plaintiff presents a similarly argumentative recitation of "facts" that have no obvious bearing on the First Department's test for legal responsibility, and seem to have been included in Plaintiff's brief for no purpose other than convincing the Court that Crane Co. is a "bad" company that should pay Plaintiff millions of dollars beyond the $3.5

[11] "Specified" is an inherently vague term that has no clear meaning in this context. Its meaning can range from "required" or "recommended" to "suggested." Thus, its use places no real definition on the conduct that could give rise to a legal duty.

million Plaintiff has already received. These "facts" tend to be vastly overstated and/or completely unsupported by the record. For example, Plaintiff argues, without any citation to the record, that "[s]ince Crane knew that asbestos disease had a latency period of decades, it understood that its profits would be unfettered by immediate liability." (RB 55.) This appears to make the incendiary accusation that Crane Co. intentionally sold products that it knew to be dangerous because the dangers would not manifest themselves until years later. That accusation (which is quite characteristic of Plaintiff's account of the "facts" here) is completely false, as evidenced by the fact that Plaintiff does not even attempt to support this hollow rhetoric with any evidence of record.

Crane Co. points out the complete lack of support underlying Plaintiff's factual claims not because it is the role of this Court to resolve factual disputes, but rather to demonstrate that there is, at the very best for Plaintiff, a significant dispute in this case regarding the proper interpretation of the evidence bearing on the First Department's "test" for duty, even if that test is legally correct. The First Department should not have attempted to resolve that dispute under the guise of a "harmless error" analysis, and its decision to do so runs contrary to this Court's decision in *Marine Midland Bank v. John E. Russo Produce Co., Inc.*, 50 N.Y.2d 31, 427 N.Y.S.2d 961 (1980). Instead, the First Department should have remanded the case for a new trial, even if its "significant role" test is, indeed, the legally

controlling one. The highly argumentative and conclusory recitation of the "facts" presented in Plaintiff's brief only serves to prove this point.

2. Crane Co. Had No Meaningful Opportunity to Submit Relevant Evidence and Argument on the Factual Issues Implicated by the First Department's Test for Duty.

There is a substantial debate regarding the proper interpretation of certain of the evidence presented here, as noted above. However, there is no debate that Crane Co. had no meaningful opportunity to submit evidence going to the First Department's "test" for duty, and this fact alone justifies a new trial, should the Court affirm the First Department's test.

Plaintiff's suggestion that Crane Co. "made every attempt to prove that the factors were not met," seemingly referring to the "duty factors" that Plaintiff offers the Court in the never-before-articulated eight-factor test stated on page 44 of her brief, is baseless. (RB 66.) Crane Co. could not divine the content of the First Department's decision (or predict the "test" that Plaintiff would offer on appeal from that decision) at the time of trial and tailor its trial evidence accordingly. Plaintiff claims that Crane Co. was not deprived of its right to present evidence (RB 66) without noting that Crane Co. had no way of knowing at the time of trial the contours of the fact-intensive test for legal responsibility that the First Department would ultimately adopt and retroactively apply to the trial record in order to sustain the judgment.

Thus, Plaintiff's claims that the "only evidence" that Crane Co. would have introduced had it known the governing legal standards at the time of trial was one particular document it discussed in its opening brief (*see* AB 56-57) is simply untrue. Crane Co. discussed in its brief a document that the trial court excluded as irrelevant because, in the trial court's view, it did not "impact on the defendants' duty to warn in this particular case." (R. 1520.) Crane Co. pointed out in its opening brief that this conclusion may have been valid so long as Crane Co.'s duty to warn was based on the "foreseeability" test the trial court utilized, but this conclusion clearly was invalid if Crane Co.'s duty to warn was to be determined pursuant to the "significant role" test the First Department adopted.[12]

Importantly, Crane Co. nowhere stated or implied in its brief that this document was the *only* evidence that Crane Co. would have offered at trial had it known the governing legal standards at the time of trial. It was not. Crane Co. discussed this specific document and its exclusion because the episode illustrates a more general point—that the decisions of parties to offer or not to offer certain evidence and arguments, and the decisions of a trial court to admit or exclude

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[12] The document at issue, and the testimony Crane Co. offered on it, demonstrated that the Navy made the choice to use asbestos-containing materials with equipment regardless of the wishes of any of its equipment manufacturers, thus suggesting that equipment makers like Crane Co. played no "role" at all, let alone a "significant" one, in the Navy's choices. (R. 1510.)

evidence and various lines of argument, cannot be made intelligently if the governing legal standards are unknown at the time of trial.[13]

3. Crane Co. Did Not "Waive" Its Request for a New Trial.

Plaintiff's brief is replete with suggestions of waiver and non-reviewability, and Crane Co. respectfully submits that Plaintiff's decision to repeatedly raise meritless "waiver" arguments speaks to the absence of any argument on the merits for Plaintiff's positions on the law. The Court should reject all such claims.

As to Plaintiff's argument that Crane Co. has waived the right to request a new trial, Plaintiff provides no authority (and Crane Co. is aware of none) that suggests that a party is capable of "waiving" an issue that (1) could not have been presented to the trial court and (2) was presented to and ruled on by the Appellate Division. *See, e.g., In the Matter of OnBank & Trust Co., supra*, 90 N.Y.2d at 730 n.2, 665 N.Y.S.2d at 391 ("New questions of law, which could not have been raised below, may be presented for the first time on appeal."); *Telaro v. Telaro*, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920 (1969) (holding contentions that could not have been "obviated or cured" below may be raised for the first time on appeal).

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[13] It seems unremarkable to conclude that a defendant should be aware of the controlling legal standards before trial. And it is intuitive to presume that the defendant would shape its evidentiary presentation in light of that controlling standard.

On the latter point, the First Department very clearly reached the question of whether the trial court's use of a foreseeability-based test for duty in instructing the jury warranted a new trial. (COA 44.) Although the First Department (incorrectly) held against Crane Co. on this point, there is no question that Crane Co. raised the issue and the First Department ruled on it.

On the former point, before the First Department proceedings, there was no basis for any request for a new trial with a new set of jury instructions that defined the question of legal responsibility differently than the "foreseeability-based" test utilized by the trial court. Rather, Crane Co. argued that, under *Rastelli* and other New York precedents, there was nothing for a jury to decide, because Plaintiff stipulated there was no evidence that Mr. Dummitt ever encountered an asbestos-containing material that Crane Co. made, sold, or otherwise placed into the stream of commerce and presented no evidence that Crane Co.'s valves required asbestos-containing materials to function.

Meanwhile, Plaintiff consistently defended the trial court's foreseeability-based test for duty. (*See*, *e.g.*, R. 5248-49.) In the First Department, Plaintiff reversed course and no longer defended the foreseeability-based test for duty that the trial court employed, instead advocating for an entirely different "test" for duty. Crane Co. discussed this "shift" in strategy, and its implication, in its reply brief in the First Department, arguing that the First Department should not adopt any of the

newly crafted "tests" for duty Plaintiff proposed, but "even if the Court were to accept one of Plaintiff's 'tests,' the only proper result would be a new trial since the trial court did not charge the jury pursuant to any such test." (Reply Brief for Defendant-Appellant in the First Department 15.) Accordingly, as soon as Plaintiff advocated for what would have been an entirely different set of jury instructions reflecting an entirely different "test" for legal responsibility, Crane Co. pointed out that, accepting Plaintiff's new position, the only appropriate result would be a new trial.

II. Plaintiff Offers No Support for the Trial Court Decisions to Effectively Relieve Plaintiff of the Burden of Proving Proximate Cause.

A. Plaintiff Cites No New York Law or Policy Supporting the Use of a Presumption of Causation in Failure-to-Warn Claims.

1. The Authorities Upon Which Plaintiff Relies Do Not Adopt a Presumption of Causation.

Plaintiff devotes a substantial amount of briefing to detailing circumstances in which New York courts have approved the use of presumptions and inferences, but none of those cases is like this one. Indeed, beyond a line of federal district court decisions that misapply the New York Supreme Court decision of *Power v. Crown Controls Corp.*, 149 Misc.2d 967, 970, 568 N.Y.S.2d 674, 676 (N.Y. Sup. Ct. 1990) (holding, contrary to the federal district court decisions "following" it, that a plaintiff must "prove at trial that the failure to warn was a proximate cause"), Plaintiff does not offer one New York authority supporting the use of a

presumption of causation in the context of a failure-to-warn claim, but that is exactly what the trial court did here.

This Court's precedents establish that "[i]n order to prevail at trial in a negligence case, a plaintiff must establish by a preponderance of the evidence that the defendant's negligence was a proximate cause of plaintiff's injuries." *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 550, 684 N.Y.S.2d 139, 141 (1998). This Court has never suggested, let alone held, that that requirement ceases to apply in the context of product liability claims based on a failure-to-warn theory. And, the Appellate Division has consistently held for years that, in such a case, a plaintiff must establish that (1) the product did not contain adequate warnings, and (2) the inadequacy of the warnings was the proximate cause of the injuries. *Mulhall v. Hannafin*, 45 A.D.3d 55, 60-61, 841 N.Y.S.2d 282, 287 (1st Dep't 2007); *Sosna v. American Home Prods.*, 298 A.D.2d 158, 748 N.Y.S.2d 548 (1st Dep't 2002); *Banks v. Makita, U.S.A., Inc.*, 226 A.D.2d 659, 660, 641 N.Y.S.2d 875, 877 (2d Dep't 1996) (citing *Johnson v. Johnson Chem. Co., Inc.*, 183 A.D.2d 64, 588 N.Y.S.2d 607 (2d Dep't 1992)); *Glucksman v. Halsey Drug Co., Inc.*, 160 A.D.2d 305, 307, 553 N.Y.S.2d 724, 726 (lst Dep't 1990); *Upfold v. Generac Corp.*, 224 A.D.2d 1021, 638 N.Y.S.2d 264 (4th Dep't 1996); *Alston v. Caraco Pharm., Inc.*, 670 F.Supp.2d 279, 285 (S.D.N.Y. 2009). Plaintiff offers the Court no reason to disturb this well-settled point of New York law.

2. Proving Causation Is a Fundamental Requirement in Any Tort Claim, and It Does Not Present an "Impossible" Burden in a Case Like This One.

In order to establish proximate cause in the context of a failure-to-warn claim, a plaintiff must demonstrate that "the user of a product would have read and heeded a warning had one been given." *Sosna*, 748 N.Y.S.2d at 549 (citing *Guadalupe v. Drackett Prods. Co.*, 253 A.D.2d 378, 676 N.Y.S.2d 177 (1st Dep't 1998); *Rodriguez v. Davis Equip. Corp.*, 235 A.D.2d 222, 651 N.Y.S.2d 528 (1st Dep't 1997); *Rochester Refrigerating Corp. v. Easy Heat, Inc.*, 222 A.D.2d 1013, 635 N.Y.S.2d 890 (4th Dep't 1995)). Plaintiff argues that this is a virtually impossible burden to meet if a court is to disregard speculative testimony as to what a particular plaintiff would have done had he or she had observed a particular type of warning. (RB 79.) The Court should reject that argument.

The First Department's decision in *Guadalupe*, among others, directly refutes Plaintiff's argument by defining the type of evidence that may, and the type of evidence that will not, satisfy a plaintiff's burden of proving proximate cause in a failure-to-warn claim. In that case, the plaintiff was injured when she used Crystal Drano in conjunction with "very hot water," which led to a violent eruption of caustic chemicals. *Guadalupe*, 253 A.D.2d at 378, 676 N.Y.S.2d at 178. Nevertheless, because plaintiff testified that she did not attempt to read the label before using the product, and it was not her custom to do so, the defendants were

granted judgment as a matter of law because plaintiff could not create an issue of fact regarding the causal link between the absence of warnings and her injuries. *Id.*

Here, there was a complete absence of any testimony that, *inter alia*, Mr. Dummitt sought out labels and user instructions for the products he encountered in the Navy or otherwise, or that the Navy would have permitted non-approved user instructions to reach him. Plaintiff introduced testimony, over Crane Co.'s objection, regarding what Mr. Dummitt hypothetically would have done had he received various hypothetical warnings (R. 5677–78), but this testimony should not have been admitted since the rebuttal testimony Crane Co. offered to meet it, which rested on the same foundational premise, was excluded.[14] Plaintiff's decision to introduce this testimony from Mr. Dummitt demonstrates that Plaintiff (1) was aware of the need to prove proximate cause and (2) had every opportunity to introduce admissible evidence supporting an inference of causation. Plaintiff failed to do so, and both the trial court and First Department majority erred when they relieved Plaintiff of that burden.

Further, the trial court's use of a clarifying instruction to the jury that the "heeding presumption" the trial court utilized was "rebuttable" did not cure the defect for all of the reasons articulated by the dissenting First Department Justices.

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[14] *See infra*, pp. 42-43. Either both pieces of evidence going to this issue should have been admitted, or neither. Plaintiff cannot have it both ways.

Whether "rebuttable" or not, New York does not recognize the "heeding presumption" the trial court used. And, moreover, as explained below, when the trial court excluded the evidence Crane Co. offered to rebut Plaintiff's case for proximate cause, it effectively rendered the "heeding presumption" it utilized conclusive, *regardless* of the use of a later "curative" instruction that did not cure anything.

B. The First Department Dissent Correctly Determined That the Trial Court's Exclusion of Crane Co.'s Evidence Rebutting the Element of Proximate Cause Was Reversible Error.

1. Admiral David Sargent's Testimony Rested on the Same Foundation as Mr. Dummitt's and Was Wrongly Excluded.

Plaintiff makes much of the fact that the trial court excluded the testimony of Crane Co.'s expert witness in Navy procurement, retired Navy Admiral David P. Sargent, upon finding it "speculative," and not "irrelevant." But, whatever the trial court's reasoning for excluding Admiral Sargent's opinion that the Navy would not have accepted an asbestos-related health warning (or any other warning) not contained in the Navy equipment specification, that decision was error, and it justifies a new trial.

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

for such a warning. (R. 1511.) Unlike Mr. Dummitt, however, Admiral Sargent was not permitted to testify as to what his fellow Navy officers would have done had Crane Co. attempted to give hypothetical warnings. (*Ibid.*) Had he been permitted, Admiral Sargent would have testified that (1) the Navy would have forbidden warnings that were not contained in the Navy equipment specification, and (2) the Navy would not have permitted a supplier to provide material other than asbestos if the Navy specification called for asbestos. (R. 1519-20.)

This testimony possessed precisely the same foundational premise as Mr. Dummitt's responses to the hypotheticals that were posed to him regarding warnings that were never given, and it would have rebutted Mr. Dummitt's testimony because it would have tended to show that the hypothetical warnings, even if given, would never have reached Mr. Dummitt.

Plaintiff suggests that the admitted testimony of Mr. Dummitt concerns an issue "distinct" from the excluded testimony of Admiral Sargent, but it does not. Both the testimony from Mr. Dummitt that the trial court allowed, and the testimony from Admiral Sargent that the trial court disallowed go to the question of whether Plaintiff "establish[ed] by a preponderance of the evidence that the defendant's negligence was a proximate cause of plaintiff's injuries." *Burgos*, *supra*, 92 N.Y.2d at 550, 684 N.Y.S.2d at141. As the dissenting First Department Justices rightly concluded, there was no justification for the trial court's decision to

admit Plaintiff's evidence on this point, but to exclude Crane Co.'s rebuttal evidence, which was based on the same foundational premise.

2. Once Again, Crane Co. Did Not Waive This Issue.

Plaintiff admits that "the Appellate Division addressed th[e] issue" of the trial court's error in excluding the evidence Crane Co. offered to disprove proximate cause (RB 85), but, in stark contrast to this admission, Plaintiff then suggests that Crane Co. did not raise this issue in the First Department. This suggestion is simply inaccurate.

Crane Co. inarguably offered the noted testimony of Admiral Sargent at trial, and in its opening brief in the First Department, Crane Co. detailed at length the trial court's exclusion of Admiral Sargent's opinion testimony, and argued that "[b]ecause it never heard this evidence, the jury lacked the complete information necessary to assess whether the alleged lack of a warning had any causal role in Mr. Dummitt's disease process." (Opening Brief for Defendant-Appellant in the First Department 11-12.) Crane Co. made it explicit that this error justifies a new trial: "Plaintiff's claim should be dismissed on the basis that she did not present evidence necessary to sustain her burden of creating a jury issue on that point. Nevertheless, even if the claim is not dismissed, a new trial is appropriate so that the jurors may consider this issue of fact and have an opportunity to hear and

consider both sides' evidence." (*Id.* at 47.) Two dissenting First Department Justices agreed.

The First Department majority refused this request, but it plainly dealt with the issue at length in its opinion, devoting more than three pages to the question of the propriety of the trial court's exclusion of this evidence. (COA 46-49.) Once again, Plaintiff has done nothing to substantiate Plaintiff's conclusory claims of "waiver."

III. Plaintiff Offers No Defense for the Trial Court's Decision to Impose Joint and Several Liability on Crane Co. When It Was Undisputed Crane Co. Did Not Make or Sell a Single Product That Harmed Mr. Dummitt.

Plaintiff argues that the questions of the jury's allocation of fault and the application of CPLR § 1601, which, together, led the trial court to impose on Crane Co. joint and several liability in this case, are beyond this Court's power to review, citing *Vadala v. Caroll*, 59 N.Y.2d 751, 463 N.Y.S.2d 432 (1983). The Court should reject this argument and find these issues reviewable, to the extent the Court's review needs to reach past the questions of duty and causation that Crane Co. presents above.

In *Vadala* and a number of other decisions cited in it, this Court has made it clear that orders of the Appellate Division reversing trial court decisions to set aside the verdict are not reviewable. However, in this case, both the trial court and

the Appellate Division upheld the verdict, *Vadala* is thus inapposite on its face, and Plaintiff provides no rationale for applying the rule of *Vadala* here.

The Court should likewise reject the suggestion that the questions of whether the trial court properly allowed the jurors to make a "recklessness" finding, the support for that finding, and whether the jury was properly instructed on that question, are "moot." Plaintiff argues that the disposition of these issues "will not change the outcome of this appeal." (RB 93.) That is simply inaccurate. If this Court upholds the allocation of fault, then the trial court's treatment of the issue of the "recklessness" exception to CPLR § 1601 will become moot, and *vice versa* (i.e., the allocation question will be a moot one if the Court upholds the trial court's treatment of the "recklessness" exception to CPLR § 1601 and the jury's finding in that respect). An issue is not "moot," however, merely because reaching it *may* be unnecessary depending on the outcome of other issues presented in an appeal.

A. There Is No Support for the Jury's Allocation of 99% of the Fault to Crane Co.

Although Plaintiff presents suggestions of non-reviewability and "mootness" on the jury's allocation and the trial court's treatment of the "recklessness" exception to CPLR § 1601, Plaintiff hardly addresses the merits of those issues at all. Crane Co. explained at length in its opening brief why the merits strongly suggest decision in its favor on these issues.

With respect to the First Department's decision to uphold the jury's allocation of fault, there is simply no possible justification for a fault allocation that held Crane Co. almost *entirely responsible* for Mr. Dummitt's injury, when it was undisputed that Crane Co. was not among the entities that actually made or sold the products that injured Mr. Dummitt.[15] (COA 56, Friedman, J., dissenting ["Again, it is undisputed that Crane neither manufactured nor sold nor distributed the particular materials that gave rise to Mr. Dummitt's asbestos exposure."].)

Plaintiff argues that the quality of the "fault" evidence against Crane Co. exceeded that against the many third parties that allegedly exposed Mr. Dummitt to asbestos. The testimony from Plaintiff's own expert historian contradicts that claim. That witness testified that *all* of the entities who caused Mr. Dummitt to be exposed to asbestos-containing materials had access to similar information regarding asbestos-related health hazards. (R. 793.) Moreover, even if Plaintiff's argument were correct, it still provides no support for the jury's decision to hold completely blameless the entities that actually made and sold the asbestos-containing materials to which Mr. Dummitt was exposed, while finding Crane Co. almost entirely at fault for causing his injury.

[15] The fact that Plaintiff has collected roughly $3.5 million from others belies any notion that Crane Co. is the 99% cause of Plaintiff's injuries.

B. There Is No Support for the Trial Court's Decision to Instruct the Jury on the "Recklessness" Exception to CPLR § 1601 (or the Jury's Finding in That Respect) or the Trial Court's Use of an Instruction That Deviated From *Maltese*.

In discharging its duty to ensure that the broad remedial purposes of CPLR §1601 are being carried out, *see Rangolan v. County of Nassau*, 96 N.Y.2d 42, 46, 725 N.Y.S.2d 611, 615 (2001) (noting that Article 16 "was intended to remedy the inequities created by joint and several liability on low-fault, 'deep pocket' defendants"), the trial court should not have permitted the jury to find Crane Co. "reckless" in the same factual circumstances in which numerous courts around the country, including ones applying New York law, have refused to even recognize a legal claim. *See, e.g., O'Neil, Braaten, Lindstrom, Conner, Surre, May, supra.*

Moreover, as explained in Crane Co.'s opening brief, the trial court and First Department upheld the jury's recklessness finding simply because Crane Co. allegedly had "access" to certain information on asbestos-related health hazards. (R. 79; COA 37-38.) At best, such evidence only establishes a basis for an inference that Crane Co. may have had a "general awareness" that certain high asbestos exposures could lead to injury. Such evidence is legally insufficient to sustain a recklessness finding pursuant to *Maltese v. Westinghouse Electric Corp.*, 89 N.Y.2d 955, 956-57, 655 N.Y.S.2d 855, 856 (1997), and it should not have been held sufficient to support such a finding here.

Finally, even if the trial court had the discretion to instruct the jury on the "recklessness" exception to CPLR § 1601, it clearly lacked the discretion to provide the jury with a definition of "recklessness" that did not comport with this Court's definition of the same concept in *Maltese*. That is precisely what the trial court did, however, as the following definitions of recklessness, first from *Maltese*, and second from the trial court's jury charge, make clear:

> [T]he actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome.

Maltese, *supra*, 89 N.Y.2d at 956-57, 655 N.Y.S.2d at 856 (internal quotation marks omitted).

> A company acts with reckless disregard for the safety of others, when it intentionally, or with gross indifference to the rights or safety of others, engages in conduct which makes it probable that injury will occur.

(R. 2033.)

Plaintiff attempts to defend the trial court's clear deviation from the *Maltese* standard by contending that the trial court's instruction was correct because the pattern jury instruction from which it was derived invoked this Court's decision in *Maltese*. (RB 95.) This observation may very well be true, but it is irrelevant. As the First Department itself has recognized, "pattern" jury instructions do not take precedence over decisional law "no matter how eminent their authors." *Acerra v.*

Trippardella, 34 A.D.2d 927, 927, 311 N.Y.S.2d 522, 523 (1st Dep't 1970). The instruction the trial court utilized clearly did not include all of the elements (indeed, nearly any of the elements) that this Court adopted to define the "recklessness" inquiry, and this error supports reversal.

IV. If Nothing Else, the Court Should Hold the First Department Erred in Refusing to Exercise Its Discretion to Remit the Verdict.

Although this Court has held that "[t]he power to grant a new trial unless a party agrees to stipulate to pay a greater amount or accept a lower amount . . . is committed to the discretion of the trial court and the Appellate Division," *see Tate v. Colabello*, 58 N.Y.2d 84, 86 n.1, 459 N.Y.S.2d 422, 423 (1983), here, the Appellate Division did not appear to exercise any discretion at all on this issue. Instead, it upheld the excessive verdict in this matter in a single paragraph in its opinion, and without explaining how this verdict is sustainable in light of the First Department's own well-established precedents in this area. *See, e.g., Penn v. Amchem Prods.*, 85 A.D.3d 475, 925 N.Y.S.2d 28 (1st Dep't 2011). Accordingly, if nothing else, this Court should remit this case to the Appellate Division to give appropriate consideration to the excessive nature of the award, when compared to its own precedents.

CONCLUSION

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

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Respectfully submitted,

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