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Appellate Division, Fourth Department Docket No. CA 13-01373
Erie County Clerk's Index No. I2010-12499

Court of Appeals
of the
State of New York

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

Respondent,

– against –

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

Defendants,

CRANE CO.,

Appellant.

MOTION FOR LEAVE TO APPEAL

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STATE OF NEW YORK : COURT OF APPEALS

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION	
JOANNE H. SUTTNER, as Executrix of the Estate of Gerald W. Suttner, deceased, and Individually as the Surviving Spouse of Gerald W. Suttner, Plaintiff-Respondent, -vs- A.W. CHESTERTON COMPANY, et al., Defendants-Appellants.	**<u>NOTICE OF MOTION FOR LEAVE TO APPEAL IN A CIVIL CASE</u>** Index No. 2010-12499 (Erie County) CA 13-01373 (Fourth Department)

<u>MOTION BY:</u> Defendant-Appellant Crane Co., by its attorneys K&L Gates LLP.

<u>DATE, TIME & PLACE OF HEARING:</u> August 11, 2014, at 9:00 a.m., before the New York State Court of Appeals, 20 Eagle Street, Albany, New York 12207. Pursuant to 22 NYCRR § 500.21(a), this motion is submitted without oral argument.

<u>SUPPORTING PAPERS:</u> (1) Procedural History; (2) Jurisdictional Statement; (3) Questions Presented for Review and Why Those Questions Merit Review; (4) Disclosure Statement; (5) Orders and Memorandum Opinions of the Appellate Division, Fourth Department, Affirming Judgment and Denying Reargument or Leave to Appeal, as Well as the Trial Court Judgment and Post-Trial Decision and Order. Defendant-Appellant Crane

Co. is simultaneously filing herewith one copy of the briefs and record below.

RELIEF REQUESTED: An order granting leave to appeal to the Court of Appeals.

GROUNDS FOR RELIEF: CPLR § 5602(a)(1)(i); 22 NYCRR § 500.22(b)(4); this appeal presents issues of state-wide public importance, a conflict with this Court's precedents, and a conflict among the Departments of the Appellate Division.

Dated: July 31, 2014
New York, NY

Respectfully submitted,

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I. PROCEDURAL HISTORY

This appeal raises significant questions of statewide importance that have been the subject of Appellate Division opinions that conflict *both* with one another *and* with the established precedents of this Court. This matter focuses on the question of whether a defendant / product manufacturer can be held liable for allegedly injurious materials that it neither made nor supplied, because the defendant's customers chose to use the allegedly injurious materials with or near the defendant's product. The Fourth Department answered that question in the affirmative, but that holding is squarely at odds with this Court's longstanding precedents.

The underlying lawsuit arises from occupational exposures to asbestos that Plaintiff's decedent, Gerald Suttner, allegedly sustained from 1960 through 1979 while working at a General Motors ("GM") plant in Tonawanda, New York. (R. 84–86.[1]) Plaintiff-Respondent, Joanne Suttner (hereinafter, "Plaintiff"), and Gerald Suttner initiated this action through a summons and complaint filed on December 15, 2010 in the Supreme Court of the County of Erie, alleging that Crane Co., along with thirty-six other named defendants, caused Gerald Suttner to be exposed to asbestos-containing materials that ultimately caused him to contract

[1] Crane Co. is filing herewith a copy of the record and briefs submitted in the Fourth Department.

mesothelioma, a cancer of the lining of the lung. (R. 63–86.) Crane Co. is, and has been for many years, a maker of industrial valves.

Plaintiff proceeded to trial against Crane Co. on October 9, 2012. At trial, Plaintiff limited her theories of liability against Crane Co. to failure-to-warn claims, sounding in negligence and strict liability. (R. 14, 26–27, 75–83.) Plaintiff's case against Crane Co. was based on the allegation that Gerald Suttner was exposed to asbestos fibers released from asbestos-containing products that Mr. Suttner's employer, GM, used with certain Crane Co. valves in its facility.[2] (Brief for Defendant-Appellant, p. 6.) Plaintiff produced no evidence that Crane Co. made, supplied, or otherwise placed into the stream of commerce any of these asbestos-containing materials. (*See id.* at pp. 6-7.) In light of this, Crane Co. twice moved for judgment pursuant to CPLR § 4401, arguing that -- under this Court's decision in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S.2d 373 (1992) and other New York precedents -- it was not legally responsible for asbestos-containing materials that it did not make, sell, or otherwise place into the stream of commerce. (R. 830–31, 1168–75.)

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[2] Specifically, Plaintiff alleged that Mr. Suttner encountered asbestos-containing gasket and packing sealing products that GM used in and on certain Crane Co. valves. (Brief for Defendant-Appellant, p. 6.) The evidence also demonstrated that GM insulated certain of the Crane Co. valves in its plant with asbestos-containing insulation (which was applied to the outside of the valves), but Plaintiff did not argue that Crane Co. was responsible for that insulation, as opposed to third parties' gasket and packing sealing products (which are used as seals inside of the valves). (*Id.* at p. 8; R. 1236.)

The trial court, per the Honorable John P. Lane, Judicial Hearing Officer, ultimately denied these motions. On October 23, 2012, the jury returned a verdict for Plaintiff, awarding a total of $3,000,000 -- all in non-economic damages -- and finding Crane Co. four percent liable. (R. 9.) On November 6, 2012, Crane Co. moved the trial court to set aside the verdict and enter judgment in its favor pursuant to CPLR § 4404. (R. 14.) The trial court denied that motion through a Decision and Order entered on March 18, 2013 (enclosed as Exhibit A), and subsequently entered judgment for Plaintiff on April 15, 2013 (enclosed as Exhibits B & C.) Crane Co. filed an appeal to the Appellate Division, Fourth Department, on May 7, 2013. (R. 2–7.)

The order of the Appellate Division from which leave to appeal is sought was entered on March 21, 2014 (enclosed as Exhibit D). Plaintiff served Crane Co. with a copy of this order, with notice of entry, by U.S. Mail on March 26, 2014 (*Id.*) Crane Co. moved the Appellate Division for reargument or, in the alternative, leave to appeal, through a notice of motion and supporting papers filed and served by overnight delivery on April 22, 2014, and also served by electronic transmission on April 24, 2014. The Appellate Division entered an order denying Crane Co. the relief it sought on June 13, 2014, and Plaintiff served Crane Co. with this order via U.S. Mail on July 2, 2014 (enclosed as Exhibit E).

Crane Co. is proceeding before this Court upon the same issue raised here in its appeal of right pursuant to subdivision (a) of CPLR § 5601 of the order affirming the judgment in *In re New York City Asbestos Litig. (Konstantin & Dummitt)*, __ N.Y.S.2d __, Index No. 190196/2010, 2014 WL 2972304 (1st Dep't July 3, 2014) (hereinafter, "*Dummitt*"), which will be filed on or before August 7, 2014. *See Estate of Duchnowski*, 31 N.Y.2d 991, 341 N.Y.S.2d 449 (1973) (holding that "once an appeal lies as of right under subdivision (a) of CPLR 5601, all questions properly raised below may be reviewed on the ensuing appeal. . . . An appeal, therefore, taken on a dissent in the Appellate Division stating a question of law in appellant's favor is not limited in scope to the question of law stated").

II. JURISDICTIONAL STATEMENT

This motion seeks leave to appeal from a final order of the Appellate Division, Fourth Department, which affirmed a judgment awarding Plaintiff money damages upon a jury verdict. This Court has jurisdiction over the appeal and the motion for leave to appeal because (1) this action originated in the Supreme Court, and (2) the order of the Appellate Division finally determined the action without any dissent and so the order is not otherwise appealable as of right. *See* CPLR § 5602(a)(1)(i).

III. QUESTION PRESENTED & REASONS FOR REVIEW

A. QUESTION PRESENTED FOR REVIEW

Is Crane Co. legally responsible for asbestos-containing materials that it did not manufacture or supply, when Crane Co. controlled neither (1) the selection and use of those asbestos-containing materials, nor (2) the individuals or entities who chose to use those products with Crane Co. products?

B. PRESERVATION OF QUESTION PRESENTED

Crane Co. twice moved the trial court for judgment pursuant to CPLR § 4401, arguing that it was entitled to judgment because Plaintiff produced no evidence that Crane Co. manufactured, supplied, or otherwise placed into the stream of commerce any of the asbestos-containing "gasket" or "packing" sealing products upon which Plaintiff focused her claims. (R. 830–31, 1168–75.) Crane Co. moved for judgment post-trial pursuant to CPLR § 4404 on the same basis. (R. 14-15.) Finally, this question of legal responsibility for the products of others was the sole question Crane Co. presented to the Appellate Division on appeal from the judgment. (Brief for Defendant-Appellant, p. 2.)

C. WHY THE QUESTION PRESENTED MERITS REVIEW

The issue raised here has all of the earmarks of an issue that merits the Court's review pursuant to 22 NYCRR § 500.22(b)(4). This issue is one of public

importance, that presents a conflict with both the prior decisions of this Court and with other departments of the Appellate Division. The topic of the present dispute was addressed by this Court over 20 years ago in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S.2d 373 (1992), and the settled law of the *Rastelli* opinion has been relied upon since by litigants and courts in New York, and in other jurisdictions, confronting cases with facts similar to this one. In *Rastelli*, the Court held that a product manufacturer could not be held liable for allegedly injurious materials made and sold by others, simply because the two items were used together. Rather, *Rastelli* requires that the defendant have some meaningful role in the use of the allegedly hazardous material.

Since *Rastelli* was decided, numerous courts, including two state courts of final review, have relied upon *Rastelli* to hold that a supplier of industrial equipment -- like Crane Co. -- is not legally responsible for third parties' asbestos-containing materials, when the equipment supplier had no role in the use or selection of those asbestos-containing materials. *See, e.g.*, *O'Neil v. Crane Co.*, 53 Cal.4th 335, 353, 266 P.3d 987, 998 (2012); *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 387, 198 P.3d 493, 499 (2008). Moreover, the United States District Court for the Southern District of New York has determined, after a thorough review of applicable precedents, that the law of New York would follow the

holding of *Rastelli* to preclude liability under similar circumstances. *Surre v. Foster Wheeler LLC*, 831 F.Supp.2d 797 (S.D.N.Y. 2011).

In addition to departing from *Rastelli*, the order at issue here conflicts with decisions from other Appellate Division panels. *See In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk)*, 92 A.D.3d 1259, 938 N.Y.S.2d 715 (4th Dep't 2012) (holding that equipment supplier is not responsible for asbestos-containing insulation materials applied to valves post-sale); *Tortoriello v. Bally Case, Inc.*, 200 A.D.2d 475, 606 N.Y.S.2d 625 (1st Dep't 1994) (holding that a freezer manufacturer is not liable for defective floor tiling that it recommended as one of three possible flooring materials). Moreover, while the two decisions reached similar outcomes on essentially the same question, the present matter applies a legal standard that is entirely different from the legal standard applied by the First Department to resolve the same question in the *Dummitt* case, *supra*, which was a three-to-two decision that is being presented to this Court for review. *See Estate of Duchnowski*, 31 N.Y.2d 991, 341 N.Y.S.2d 449 (1973). Indeed, had the legal standard articulated in *Dummitt* been applied to the facts of this case, no liability would lie.

In sum, this case presents several elements of a matter that is appropriate for this Court's review. It presents an important issue that the Court has visited previously, and on which subordinate courts require guidance due to a significant

inconsistency among the various Appellate Divisions. Moreover, the underlying legal question is one that the Court will be reviewing in any event, albeit under a different fact pattern, in *Dummitt*. Accordingly, accepting this matter for review will provide the Court with a more comprehensive view of an important question of law, the resolution of which has widespread implications for New York courts and litigants.

1. THE QUESTION PRESENTED IS A RECURRING ONE.

The question of whether an equipment manufacturer like Crane Co. has a duty to warn of dangers allegedly inherent in asbestos-containing products that may have been used with its equipment, but which it neither manufactured nor supplied, is an important one that arises in numerous asbestos-related personal injury actions pending in New York. (*See, e.g.,* Brief for Plaintiff-Respondent, pp. 26-27.) Crane Co. is currently a defendant in more than 18,000 asbestos-related actions in New York County alone, as well as the Defendant-Appellant in two appeals in the First Department Appellate Division focusing on the issue of one manufacturer's legal responsibility for the products of another, *Dummitt*, *supra*, and *Peraica v. A.O. Smith Water Prods., et al.*, Index No. 190339/2011.[3] As noted,

[3] The question of an equipment manufacturer's potential legal responsibility for products added to its equipment at a later time is also a recurring one outside of the context of asbestos litigation. Indeed, the parties to this appeal cited numerous

the first of these appeals recently generated a three-to-two "split" decision in which both the majority and the dissenting Justices advocated a far different "test" for legal responsibility than that seemingly applied by the Fourth Department here. *See Dummitt, supra.*

The question presented here has become a recurring one (and will continue to recur) because the companies that made the friable asbestos-containing insulation materials that were ubiquitous in industrial America (referred to as the "big dusties" in one recent opinion[4]) have largely entered bankruptcy proceedings on account of their asbestos liabilities, leaving plaintiffs to assert their claims for asbestos-related injury against ever more remote, but solvent, entities like Crane Co., that did not manufacture asbestos-containing materials, but whose equipment may have been used with such materials following its sale.[5] *See*

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cases, involving numerous types of products, and all concerning this same question.

[4] *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014) (*Garlock*).

[5] Bankruptcy laws, and particularly 11 U.S.C. § 524(g), allow entities with present and future asbestos liabilities to fund personal injury trusts that compensate asbestos claimants; thereafter, the companies are protected from asbestos personal injury claims in the civil justice system by "channeling injunctions" entered by the bankruptcy courts, and plaintiffs must submit their claims for compensation to the trusts. *See* 11 U.S.C. § 524(g); *see also* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010), available at:

Garlock, supra. As plaintiffs have shifted their focus to entities, like Crane Co., that were not among the "big dusties," they have developed increasingly novel theories of liability in an attempt to hold these "new" defendants liable for asbestos-containing materials made and sold entirely by other entities, that now may be insolvent. This case, and the *Dummitt* case, *supra*, involve precisely such circumstances.

This case presents the Court with an ideal "vehicle" to address the presented question of legal responsibility because Plaintiff acknowledges that the record contains no evidence that Crane Co. manufactured, supplied, or placed into the stream of commerce any of the asbestos-containing materials Mr. Suttner

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http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf

These trusts have paid out over $15 billion to asbestos claimants, and continue to hold assets valued at over $18 billion. M. Scarcella & P. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, Mealey's Asbestos Bankruptcy Report, vol. 12, no. 11, at p. 2 (June 2013), available at:

www.bateswhite.com/media/publication/7_media.745.pdf

Another $11 to $12 billion in additional assets is designated for trusts pending completion of the 524(g) bankruptcy reorganization process. *Id.*

encountered. (Brief for Plaintiff-Respondent, p. 1.) Accordingly, the resolution of this case depends solely on whether New York recognizes the novel theory of legal responsibility that Plaintiff presents -- than an equipment manufacturer like Crane Co. may bear legal responsibility for third parties' asbestos-containing products over which Crane Co. had no control, when the use of asbestos-containing materials was not necessary to the functionality of Crane Co.'s valves. As explained below, the New York courts subordinate to this one have given conflicting answers to whether liability may lie in such circumstances, but under this Court's longstanding precedents, the answer clearly should be "no."

2. THE APPELLATE DIVISION ANSWERED THE QUESTION PRESENTED HERE IN A MANNER THAT CONFLICTS WITH THE PRECEDENTS OF THIS COURT.

Crane Co. submits that that question presented here is resolved by this Court's decision in *Rastelli, supra,* which established that a seller of a product that is used with defective materials made and supplied entirely by others has no duty to warn of the third parties' defective product, even if it was "foreseeable" or "intended" that the seller's product would be used with other products, some of which could be defective. The well-settled and widely followed legal principle articulated by the Court in *Rastelli* is the law of the State of New York. There is no New York precedent holding, or even suggesting, that the rule of *Rastelli*

applies to certain product liability actions while excluding others, such as this one, where the facts are analogous to those presented in *Rastelli*.[6] However, the Appellate Division declined to apply *Rastelli* here, and reached a holding that is squarely at odds with that decision.

The evidence at trial established that Gerald Suttner encountered three different types of asbestos-containing products (all of which were made and sold by entities other than Crane Co.) while working with Crane Co. valves -- gasket and packing sealing products used to seal connection points within the valves and between the valves and adjacent piping, and external asbestos insulation used to cover the valves following their installation in insulated piping systems at the GM plant at issue. (Brief for Defendant-Appellant, pp. 6-7.) Plaintiff argued and the trial court held that, in spite of *Rastelli*, Crane Co. could bear legal responsibility for certain "replacement" gasket and packing sealing products used with its valves, but not for any asbestos-containing insulation used with its valves post-sale. (R. 16, 18-19, 22; *see also* R. 1236.) The Appellate Division affirmed this holding, but did not articulate any basis for recognizing such a distinction, seemingly

[6] In both cases, the defendant-manufacturer did not make or sell the alleged harm-causing product -- the tire rim in *Rastelli* or the asbestos-containing gasket and packing sealing products here. In both cases, the defendant's product could be used in a number of different ways, and did not require the alleged harm-causing, third-party product to function. Moreover, here, as in *Rastelli*, there was no suggestion that Crane Co. controlled the post-sale use of the equipment that Mr. Suttner encountered, nor was there any evidence that substitute, non-asbestos-containing materials could not be used with the equipment.

"applying" the holding of *Rastelli* to one class of asbestos-containing product, but declining to apply it to another, in favor of some undefined "replacement part" theory of duty.

Contrary to this treatment, this Court's analysis of the factors militating against recognizing a legal duty in *Rastelli* applies equally here. The *Rastelli* court made the following observations in support of its holding:

> Under the circumstances of this case, we decline to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer. Goodyear had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode. Plaintiff does not dispute that if Goodyear's tire had been used with a sound rim, no accident would have occurred. . . .

Id., 79 N.Y.2d at 297-98, 582 N.Y.S.2d at 376-77. The court reached this result even though it was clearly "foreseeable" that Goodyear's tire could be used with a defective rim. In light of *Rastelli*, it seems inarguable that one manufacturer does not become responsible for the allegedly defective product of another manufacturer merely because the products could "foreseeably" be used together.

The facts here are analogous to those presented in *Rastelli*: Crane Co. "had no control over the production" of the allegedly injurious asbestos-containing materials to which Mr. Suttner was exposed, "had no role in placing [those products] in the stream of commerce, and derived no benefit from [their] sale."

Likewise, there is no suggestion that Crane Co.'s valves "create[d] the alleged defect in the" asbestos-containing materials at issue. Finally, Plaintiff does not, and cannot, dispute that, if GM had used non-asbestos-containing materials with the equipment in its extensive piping systems (which incorporated Crane Co. valves, as well as numerous other types of equipment), the alleged injurious exposures would not have occurred. Regardless of whether the product at issue is a tire rim or a gasket, the well-settled principles articulated in *Rastelli* should apply here. Instead, the Fourth Department declined to follow *Rastelli* and adopted some alternative rule of "guilt-by-association" through which Crane Co. became liable for asbestos-containing materials that it did not make, sell, or in any way control. Whatever the precise content of this rule (which the Fourth Department did not clarify), it is entirely inconsistent with this Court's well-settled precedent in *Rastelli*.

3. THE FIRST AND FOURTH DEPARTMENTS HAVE "SPLIT" ON THE QUESTION OF LEGAL RESPONSIBILITY IN CASES LIKE THIS ONE.

Only one month ago, the Appellate Division, First Department, issued a three-to-two decision in a case with facts that were, in many ways, closely analogous to this one. *See Dummitt, supra.* In the *Dummitt* matter, however, contrary to the approach of the Fourth Department here, the court held that "where

there is no evidence that a manufacturer had any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce, it has no duty to warn." *See Dummitt*, *supra*, 2014 WL 2972304, at *11. In fact, the *Dummitt* court relied upon the U.S. District Court for the Southern District of New York's prediction of this Court's disposition of the same issue in *Surre*, *supra*. *See id.*

The First Department described in its opinion the evidence that allegedly supported the conclusion that Crane Co. had some "active role, interest, or influence in the types of products" that the relevant equipment purchaser in the *Dummitt* case, the U.S. Navy, used with Crane Co. valves following their acquisition. Although Crane Co. disputes the accuracy of a number of the factual observations the *Dummitt* court made in its opinion, here, unlike in *Dummitt*, there was *not even a suggestion* that Plaintiff had evidence that Crane Co. played a role, of any kind, in influencing the decision of the relevant equipment purchaser, GM, to use one form of sealing product over another with Crane Co. valves years after their acquisition. Yet, and contrary to the analysis in *Dummitt*, the Fourth Department affirmed the entry of judgment.

In so doing, the court appeared[7] to hold that a manufacturer like Crane Co. may bear legal responsibility for certain types of "replacement" parts used with its equipment, *even in the absence* of evidence the First Department held necessary to impose a legal duty in a case like this one -- evidence that the manufacturer had an "active role, interest, or influence" over the use of the later-added products. Accordingly, these precedents suggest that there is a significant conflict between the First and Fourth Departments on the question of exactly what "factors" must be present to impose legal responsibility upon an equipment manufacturer for asbestos-containing products it neither made nor sold.[8]

Prior appellate decisions in New York addressing the question of an equipment manufacturer's legal responsibility for the asbestos-containing materials of others have likewise reached conflicting conclusions on whether legal responsibility may lie in a case like this one and, if so, the extent of the duty. *Compare Drabczyk*, *supra*, 92 A.D.3d at 1260, 938 N.Y.S.2d at 716 ("[W]e agree with defendant that Supreme Court erred in charging the jury that defendant could be liable for decedent's exposure to asbestos contained in products used in

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[7] As noted, in light of the extreme brevity of the Fourth Department's opinion, it is difficult to characterize the nature of the court's rationale, and it is thus difficult to draw any conclusion beyond that the court adopted some type of novel "guilt-by-association" rule that is squarely at odds with *Rastelli*.

[8] Indeed, there was no evidence in the record, of any kind, regarding any interaction between Crane Co. and Mr. Suttner's employer with respect to the valves at issue.

conjunction with defendant's valves. . . .") *with Berkowitz v. A.C. and S., Inc.*, 288 A.D.2d 148, 149, 733 N.Y.S.2d 410, 412 (1st Dep't 2001) ("Nor does it necessarily appear that [defendant] had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps."). These one to two-page opinions, like the Fourth Department's holding here, do not provide guidance to trial courts on the question of duty presented here, or the policy considerations that underlie that question, and they do not attempt to delineate any "rule" of duty to guide courts and litigants in cases like this one.

If anything, the "rule" of the First Department's decision in *Berkowitz*, which has been consistently interpreted by First Department litigants and trial courts to adopt a pure "foreseeability" test for duty (i.e., if, in hindsight, it appears a manufacturer could "foresee" the potential use of its product with the harm-causing product of another, a duty to warn attaches), is fundamentally at odds with both the "active role" / substantial participation "rule" of *Dummitt* and the replacement part "rule" seemingly adopted by the Fourth Department here.

The New York trial courts tasked with applying these terse and contradictory appellate decisions disagree not only on how the appellate decisions should be applied, but also on the much more basic question of what their holdings even are, and they have "split" accordingly. *See, e.g.*, *Surre*, *supra*, 831 F.Supp.2d at 802-803 (observing that *Berkowitz* "is a one-paragraph opinion with no clear holding"

which clearly does not stand for "the broad proposition that a manufacturer has a duty to warn whenever it is foreseeable that its product will be used in conjunction with a defective one," although that is precisely how First Department litigants and trial courts have purported to interpret it for years); *compare Jones v. Air & Liquid Sys. Corp.*, No. 2010-3265 (N.Y. Sup. Ct. July 11, 2012) (a copy of this decision is included in the Addendum to the Brief for Defendant-Appellant) (citing *Drabczyk* and holding an equipment manufacturer like Crane Co. is not liable for asbestos-containing products it neither made nor sold) *with Peraica v. A.O. Smith Water Prods. Co.*, No. 190339/2011, 2013 WL 6003218, at *7 (N.Y. Sup. Ct. Nov. 6, 2013) (recognizing that the Fourth Department's *Drabczyk* decision seemingly precludes imposing legal responsibility on an equipment manufacturer for asbestos-containing products of others, but refusing to apply it upon finding it conflicted with the First Department's decision in *Berkowitz, supra*).

Recent decisions of the United States District Court for the Southern District of New York, on the other hand, have applied New York law to hold that a manufacturer generally has no duty to warn of asbestos-containing products made and sold entirely by others.[9] *See Surre, supra*; *Kiefer v. Crane Co.,* No. 12 Civ.

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[9] The Superior Court of New Jersey, Appellate Division, recently relied upon *Surre* in holding that a manufacturer of metal equipment cannot be held liable for injuries allegedly caused by asbestos-containing products that were made and sold entirely by others. *See Hughes v. A.W. Chesterton Co.*, 89 A.3d 179, 187 (N.J. Super. App. Div. 2014).

7613 (KBF) (S.D.N.Y. Feb. 3, 2014) (a copy of the transcript in which the *Kiefer* court issued its decision granting Crane Co. summary judgment was included as Exhibit E to Crane Co.'s motion to the Fourth Department, Appellate Division, for reargument or leave to appeal). The approach taken in the *Surre* and *Kiefer* cases is in line with this Court's decision in *Rastelli.*

Accordingly, there is an unmistakable conflict among courts interpreting New York law on the important question of duty presented in a case such as this one, and there is also an intra-state conflict on this same issue, with the decisions in the Fourth Department suggesting, without clearly defining, an entirely different "test" for legal responsibility than that recently applied by the First Department in the *Dummitt* decision. Notably, all of the decisions cited above were rendered by state courts bound by this Court's decision in *Rastelli* or federal courts bound to predict this Court's disposition of the issue. Yet, these decisions reach conflicting outcomes and adopt vastly different interpretations of the *Rastelli* decision and its proper application in a case like the one before the Court here.

As the Court that issued the *Rastelli* decision in the first instance, only this Court is properly situated to assess the policies that led it to its holding and to determine exactly how the rule of *Rastelli* and the policies underlying it apply in a case like the one *sub judice* and in the *Dummitt* matter. Crane Co. respectfully asks the Court to grant leave to appeal for this reason.

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.

CONCLUSION

For the foregoing reasons, Crane Co. respectfully requests that this Court grant Crane Co. leave to appeal.

Dated: July 31, 2014
New York, NY

Respectfully submitted,

K&L GATES LLP

BY: ______________________

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