Appellate Division 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,

Plaintiff-Respondent,

– against –

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

Defendants,

and

CRANE CO.,

Defendant-Appellant.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

LIPSITZ & PONTERIO, LLC
Attorneys for Plaintiff-Respondent
135 Delaware Avenue, 5th Floor
Buffalo, New York 14202
Tel.: (716) 849-0701
Fax: (716) 849-0708

Of Counsel:
John N. Lipsitz, Esq.
Dennis P. Harlow, Esq.

August 7, 2014

PRELIMINARY STATEMENT

I submit this memorandum in opposition to defendant Crane Co.'s Motion for Leave to Appeal, dated July 31, 2014. Crane's motion should be denied because the conclusions of the Fourth Department represent an uncontroversial application of the relevant case law. The five justices who decided the present case merely signaled their agreement with a broad statewide consensus which rejects Crane Co.'s radical attempt to rewrite a quarter century of precedent.

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

The gaskets and packing that Crane incorporated into its valves during manufacture were composed of asbestos fibers and a binding matrix which held the asbestos together. Over time, the heat of the valve's metal caused the matrix to disintegrate, leaving only the asbestos fibers. In order to keep the valves in working order, it was necessary for workers to regularly open the valves, scrape off the old gasket and packing material, and install fresh gaskets and packing. Maintenance of the valves caused carcinogenic asbestos fibers to be released into the breathing zone of workers such as the decedent. (*See, generally,* Brief of Plaintiff-Respondent at 4-10.)

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

Plaintiff's decedent, Gerald Suttner, was a laborer whose job duties included servicing numerous Crane steam valves over a period of decades. He developed mesothelioma as a result of his occupational exposure to asbestos and subsequently died of that disease. A jury found that Crane was 4% liable for his injuries.

The consumable replacement parts that Mr. Suttner installed in and removed from Crane's valves were obtained from a third party supplier, other than Crane. Crane contends that it may not be held liable for injuries resulting from the maintenance of its valves unless it personally supplied the asbestos-containing components.

Crane's contention is based on its erroneous reading of the decision in Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289 (1992). Crane reads Rastelli to create a bright-line rule by which a manufacturer is absolved of its duty to warn of the known hazards of its products where that manufacturer did not

distribute the exact fungible component that happened to be in its product at the time that the plaintiff used it.

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

The Fourth Department correctly, unanimously held that Crane Co.'s hard a duty to warn of the known hazards of the intended maintenance of its products regardless of whether or not it supplied the replacement parts in question. In doing so, it agreed with the First Department and with dozens of New York trial court decisions published over the course of the last decade. *See*, Brief of Plaintiff-Respondent at page 26-27.

Crane has argued that the decision below should be disturbed because the Appellate Division has failed to embrace its esoteric, extra-textual reading of Rastelli. It has also argued that a split in authority exists between the First and

Fourth Departments, based on the recent case In Re New York City Asbestos Litig. [Konstantin & Dummitt], ___ N.Y.S.2d ___, Index No. 190196/2010, 2014 WL 2972304 (1st Dept, July 3, 2014) (hereinafter "Dummitt"). However, contrary to Crane's assertions, the Dummitt Court, including its dissenters, unanimously rejected Crane's interpretation of Rastelli.

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

ARGUMENT

Crane argues that the case law pertaining to the question of the manufacturer's duty to warn about the foreseeable uses of its products is hopelessly confused and requires clarification. However, despite Crane's attempts to create an impression of disorder, a review of the New York appellate case law reveals a robust and coherent body of jurisprudence.

Courts applying Rastelli have always made an inquiry into the strength of the connection between the manufacturer's product and any other products at issue in the case in determining whether or not the manufacturer had a duty to warn under a given fact pattern. This is consistent with the Court of Appeal's subsequent decision in Liriano v. Hobart Corp., 92 N.Y.2d 232, 240 (1998), which

stated that, in the product liability context, the existence of a duty to warn and the scope of that duty are "generally fact specific."

Under some fact patterns, the Appellate Division has found that no duty to warn exists. Under other fact patterns, the Appellate Division has found that a duty to warn does exist. This does not indicate that the courts are confused, but rather that they are correctly following their mandate to evaluate the fact-specific question before them.

A. RASTELLI AND ITS DIRECT PROGENY DEMONSTRATE THAT THERE IS NO CONFLICT OF INTERPRETATION

The decedent in Rastelli was killed when a defective tire rim caused a tire to explode during inflation. The Court of Appeals held that, "[u]nder the circumstances of this case," a manufacturer would not be held liable when (1) that manufacturer's product is "sound" and (2) the product is merely, "compatible for use" with another manufacture's defective product. Rastelli, *supra* 79 N.Y.2d at 297.

The Rastelli decision did *not* state that a manufacturer never has a duty to warn of the hazards of using its product in conjunction with a product manufactured by another entity. Such a rule would be inconsistent with Liriano v. Hobart Corp., 92 N.Y.2d 232, 237 (1998), which states that, "A manufacturer has a duty to warn against the latent dangers resulting from foreseeable uses of its products of which it knew or should have known. [It] also has a duty to warn of

the danger of unintended uses of a product provided those uses are reasonably foreseeable."

Indeed, the Rastelli decision explicitly gives an example of a case where two products, foreseeably used together, might give rise to a risk about which both manufacturers have a duty to warn. Rastelli, *supra* 79 N.Y.2d at 298 *citing* Ilosky v. Michelin Tire Corp., 307 S.E.2d 603 (W. Va., 1983). (In the present case, the plaintiff argued that Crane's valves, when used as intended, caused Garlock's asbestos-containing gaskets to become friable and dangerous.)

Rastelli, in other words, established that a case specific inquiry must be made into the relationship between the two products at issue in order to determine whether a manufacturer had a duty to warn about their synergistic use. The Appellate Divisions have consistently followed that rule in the twenty-two years since Rastelli was decided.

In two cases, the Appellate Division has found that, as in Rastelli, no duty to warn existed. *See*, Tortoriello v. Bally Case, Inc., 200 A.D.2d 475 (1st Dept, 1994) (manufacturer of freezer had no duty to warn of dangers of installing particular tile in freezer when tile was merely potentially compatible); In Re: Eighth Judicial Dist. Asbestos Litig. [Drabczyk], 92 A.D.3d 1259 (4th Dept, 2012) (manufacturer of industrial valves had no duty to warn of asbestos hazards of exterior insulation applied to its products by end users).

In other circumstances, the Appellate Division, citing Rastelli, has found that a duty to warn did exist. *See*, e.g., Rogers v. Sears, Roebuck & Co., 268 A.D.2d 245 (1st Dep't 2000) (grill manufacturer had a duty to warn of the hazards of using its product in combination with injury-causing propane tank that it did not put in the stream of commerce); Berkowitz v. A.C. & S., Inc., 288 AD.2d 148 (1st Dept, 2001) (industrial pump manufacturers had a duty to warn of the hazards of using its pumps with asbestos-containing replacement gaskets and packing that it did not put in the stream of commerce); Penn v. Jaros, Baum & Bolles, 25 A.D.3d 402 (1st Dept, 2006) (alarm manufacturer had a duty to warn of the hazards of using its product in combination with CO2 fire suppression system that it did not put in the stream of commerce); Village of Groton v. Tokheim Corp., 202 A.D.2d 728 (3rd Dept, 1994) (manufacturer of regulator device had a duty to warn of using it in combination with a fuel tank that it did not place in the stream of commerce).

All of these outcomes are consistent with Rastelli, as it has been understood for the nearly quarter of a century since it was first decided. The cases only appear inconsistent if one accepts the defendant's radical, extra-textual interpretation of Rastelli as true.

The Fourth Department's affirmance of Judge Lane's decision is entirely consistent with the wording of Rastelli, and with Rastelli's various other progeny.

B. NONE OF THE NON-PRECEDENTIAL AUTHORITIES CITED BY CRANE WARRANT PERMITTING AN ADDITIONAL APPEAL

In an attempt to bolster its contention that the decision of the Fourth Department is controversial, Crane has cited two Federal District Court decisions and two decisions from out-of-state appellate Courts.

In the Federal arena, Crane relies primarily on Surre v. Foster-Wheeler Inc., 831 F.Supp.2d 797 (S.D.N.Y., 2011), a summary judgment decision from a Federal District Court applying New York law, which found that, under the circumstances of that case, Crane did not have a duty to warn of the hazards associated with use of asbestos-containing components with its boilers.

As the plaintiff-respondent's Brief discusses at length, the Surre case did not embrace Crane's overbroad interpretation of Rastelli. Indeed, the Surre Court specifically wrote, "Where additional circumstances strengthen the connection between the manufacturer's product and the third party's defective one, a duty to warn may arise." Surre at 801. Like Tortoriello, *supra*, the Court merely found that the connection between Crane's boilers and the after-market asbestos components at issue in that case was too attenuated to support a duty to warn. The Surre Court also distinguished Berkowitz, *supra*, but did not assert that is was bad law.

Justice Lane explicitly distinguished Surre in his Decision and Order denying Crane's motion to set aside the verdict. (*See*, Decision and Order, Exhibit

A to Crane's Motion for Leave to Appeal at page 10.) Justice Madden also distinguished Surre in her decision in Dummitt (36 Misc.3d 1234(A), 960 N.Y.S.2d 51 at *6-7) as did the First Department in the Dummitt appeal. *See*, 2014 WL 2972304 at **11. The various Courts failure to grant Crane an exception to the ordinary duty to warn is not the result of the Justices' failure to read and understand Surre. Rather, it is a result of them correctly placing Surre in the context of the overall precedents of the State of New York.

Crane also attempts to rely on Kiefer v. Crane Co., a bench decision from the Southern District of New York dated February 3, 2014 and attached the to the defendant's affidavit in support of its motion to the Fourth Department as Exhibit E. In Kiefer, the Justice, speaking from the bench, offered a paraphrase of the holding in Surre. This paraphrase did not include the language describing circumstances where the duty to warn may arise. Plaintiff respectfully submits that a single federal judge's partial explanation of the law, offered extemporaneously from the bench, does not suggest that the existence of a state of hopeless confusion amongst the courts.

Crane also makes reference to the Supreme Court of California's decision O'Neil v. Crane Co., 53 Cal.4th 335 (2012) and the Supreme Court of Washington's decision Braaten v. Saberhagen Holdings, 165 Wash.2d 373 (2008).

In O'Neill, the Court held that under the facts of that case, California found that Crane could not be held liable for failure to warn of certain asbestos hazards associated with its valves. The California Court made brief reference to precedents from other states which it stated supported its holding, including Rastelli. The California Court specifically noted that, under Rastelli, a defendant would be liable if the operation of its product caused another manufacturer's product to become dangerous. O'Neill, 53 Cal. 4th at 353. (In the present case, experts for both sides indicated that the high operating temperatures of Crane's valves caused Garlock's gaskets to become friable and release their encapsulated asbestos.)

Similarly, in Braaten v. Saberhagen Holdings, 165 Wash.2d 373 (2008), Rastelli is mentioned as part of a string cite in a case which held that a pump manufacturer did not have a duty to warn about the foreseeable use of asbestos insulation in conjunction with its pumps. The case in question contains no particular analysis of Rastelli in particular or New York law in general.

Even if the Supreme Courts of Washington and California had accepted Crane's radical, extra-textual interpretation of Rastelli, this would not be a reason to grant Crane leave to appeal. Foreign Courts' brief synopses of New York law should not be given the same weight as decisions of the New York appellate courts.

C. THE JUSTICES OF THE FIRST AND FOURTH DEPARTMENTS ARE IN UNANIMOUS AGREEMENT THAT CRANE'S INTERPRETATION OF RASTELLI IS INCORRECT

Crane has put forward the rather peculiar argument that the Fourth Department's decision in this case is in conflict with the decision of the First Department in Dummitt, *supra.*

Like Suttner, Dummitt was a products liability case brought against Crane Co. under a failure to warn theory. The plaintiff in Dummitt, like Mr. Suttner, performed maintenance on Crane valves, and was exposed to asbestos-containing gaskets and packing. As in Suttner, the maintenance of the valves necessarily exposed the plaintiff to asbestos. As in Suttner, the replacement parts to which the plaintiff was exposed were supplied by third parties, rather than by Crane. (*See*, Dummitt at **2: "Dummitt conceded that he was never exposed to asbestos from products that were either supplied or sold by Crane.")

In both cases, Crane argued that, because it did not supply the actual asbestos fibers that caused the plaintiff's injuries, it had no duty to warn of the foreseeable consequences of servicing its products. (*See*, Dummitt at **4, "Crane contended that since the asbestos-containing components were manufactured by unrelated third parties, it could not be held liable for failure to warn Dummitt concerning the dangers of asbestos in those products.") In both cases, Crane claimed that Rastelli, *supra*, established that it did not have a duty to warn.

In both cases, the trial courts and Appellate Divisions held that, when Crane sells an asbestos-containing product, and where the asbestos in that product will necessarily need to be replaced over the course of the lifetime of that product, Crane has a duty to warn of the hazards associated with the maintenance of that product, whether or not it supplies the replacement parts.

In both cases, in other words, the Courts followed the precedent of Rastelli, Rogers Berkowitz, Penn, Village of Groton, Tortoriello, Drabczyk, and Surre. They made a fact-specific inquiry into the relationship between Crane's valves and the replacement parts, and determined that, under the facts of the case, Crane had a duty to warn.

It is particularly noteworthy that, while two of the Justices who decided Dummitt dissented on the issue of proximate cause, both dissenting Justices agreed that the majority was correct to reject Crane's radical misreading of Rastelli. *See*, generally, Dummitt at **17 (Friedman and DeGrasse, dissenting in part.) Both trial court judges and all ten Appellate Division judges to have considered this issue have rejected Crane's attempt to carve out an exception to its duty.

Crane has built its argument that a conflict exists around a selective quotation from Dummitt, which reads, "where there is no evidence that a manufacturer had any active role, interest or influences in the types of products to

be used in connection with its own product after it placed its product in the stream of commerce, it has no duty to warn." Dummitt, *supra* at **11.

In the original decision, the passage in question reads:

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

Dummitt, *supra* at **11.

The Court, in other words, agreed with Justice Lane's decision, which agrees with Rastelli. The mere fact that one product is compatible with a second, dangerous product does not give rise to a duty to warn. However, where, as is the case here, a manufacturer sells a product which contains dangerous components, which must periodically be replaced by similar, dangerous components in order for the product to function as intended, then a duty to warn does arise because of the connection between the products.

Crane argues that it did not "play[] 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." (*See*, Crane's Motion for Leave to Appeal at page 15.) However, Crane's valves

contained consumable asbestos parts at the time of their sale. Crane argues that the purchaser could have researched asbestos alternatives and replaced Crane's asbestos parts with a non-asbestos substitute, but it strains credulity to suggest that a manufacturer that sells a product with asbestos-containing internal parts has no role in the subsequent decision of the purchaser to replace like parts with like parts. This fact pattern stands in contrast to Surre, where the record showed that Crane sold a non-asbestos-containing boiler, which subsequent purchasers decided to insulate with asbestos. As Judge Lane rightly observed, "A manufacturer may be held liable where a plaintiff is injured by replacement parts which it neither supplied nor specified, which are substantially similar to the original parts." (*See*, Decision and Order of Judge Lane, Exhibit A to Crane's Motion for Leave to Appeal, at page 6, *citing* Sage v. Fairchild-Swearingen Corp., 70 N.Y.2d 579 (1987)).

CONCLUSION

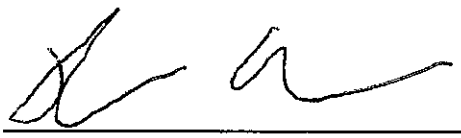
The Fourth Department's decision in the present case, like the First Department's decision in Dummitt, is a straightforward application of the Rastelli rule, and entirely consistent with the other cases decided under Rastelli over the course of the past twenty-three years. Justice Lane, Justice Madden and the Justices of the First and Fourth Department Appellate Divisions have joined the literally dozens of prior trial court decisions issued over the years rejecting Crane's

interpretation of Rastelli. Crane's improper attempt to convince this Court to reject the lower courts' finding of fact should be rejected, and the verdict permitted to stand.

Dated: Buffalo, New York
August 7, 2014

Respectfully submitted,

LIPSITZ & PONTERIO, LLC



Dennis P. Harlow, Esq.
135 Delaware Ave, Fifth Floor
Buffalo, NY 14202
(716) 849-0701
(716) 849-0708 (fax)

Counsel for Plaintiff-Respondent

TO: Michael J. Ross, Esq.
K&L GATES, LLP
Attorneys for Crane Company
210 Sixth Avenue
Pittsburgh, PA 15222