No. S 177401

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA J. O'NEIL, individually and as successor in interest to PATRICK J. O'NEIL; et al.,

Plaintiffs and Appellants,

v.

CRANE CO. and WARREN PUMPS, LLC,

Defendants and Respondents.

WARREN PUMPS, LLC'S PETITION FOR REVIEW

Court of Appeal, Second Appellate District, Div. Five, No. B208225
Los Angeles County Superior Court, No. BC360274
The Honorable Elihu Berle, Judge Presiding

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I

ISSUE FOR REVIEW

Under what circumstances, if any, is the manufacturer of a product liable for harm caused when the purchaser incorporates replacement parts, or affixes new parts, made and supplied by third parties?

II

INTRODUCTION

Two published decisions this year create a sharp conflict over issues of statewide and indeed nationwide importance: the extent of an equipment manufacturer's liability for allegedly defective products. The First District, following the teachings of this Court's decisions and multiple appellate precedents, decided the issues in a way that limited a manufacturer's liability to products it sold or distributed. The Second District panel in *this* case rejected the First District's decision, and instead relied on one of its own decisions to establish a far broader scope of liability. Thus, the decision here amply meets both of the primary criteria for Supreme Court review: a decision from this Court is necessary to secure uniformity of decision in this State *and* to settle important questions of law. (Cal. Rules of Court, Rule 8-500.)

Petitioner Warren Pumps, LLC manufactured and sold pumps to the United States Navy during World War II, for installation on ships,

including the USS Oriskany. The Navy incorporated the pumps into a complex steam-propulsion system that the Navy designed. (Slip Op. at p. 3; see also Petition for Rehearing at pp. 11-14 [seeking to correct inferences that were not legitimate even from this nonsuit record].) Mr. O'Neil served as an officer on the Oriskany between June of 1965 and August of 1966 (Slip Op. at p. 2), nearly two decades after Warren sold the pumps to the Navy.

It was undisputed that by the time Mr. O'Neil boarded the Oriskany, no original asbestos-containing components remained in the pumps, and any asbestos components that Mr. O'Neil may have been exposed to were manufactured and supplied by third-parties and installed by the Navy. (*Id.* at pp. 15-16.) The Navy also affixed external asbestos insulation and flange gaskets, neither of which Warren manufactured or supplied, to the exterior of some of the pumps. (See Petition for Rehearing at pp. 11-14, 17-18.) Mr. O'Neil died of mesothelioma, which he contracted partly as a result of his shipboard exposures to dust from a range of asbestos-containing products including, he claimed, those the Navy used with Warren pumps.[1] (Slip Op. at pp. 2-3, 21.)

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[1] While not relevant for nonsuit review, at trial the defendants disputed that work with or around gaskets or packing causes disease.

Moreover, while this Petition necessarily cites some assertions in the appellate court's opinion that Warren did not challenge on rehearing, Warren emphasizes that those assertions were themselves the product of a

In *Taylor v. Elliott Turbomachinery Co., Inc.* (Feb. 25, 2009) 171 Cal.App.4th 564 ["*Taylor*"], the First District Court of Appeal held that equipment manufacturers have no duty to warn of dangers posed by affixed or replacement parts that they did not manufacture or distribute. *Taylor* held further that the "component-parts defense" precluded failure-to-warn liability, where no defect in the manufacturer's product itself (e.g., a pump or a valve) caused the injury; rather the injury resulted from the purchaser's incorporation of that product into its own product or system, i.e., a Navy ship's steam-propulsion system.

But on September 18, also in a published decision, the appellate court in *this* case expressly disagreed with all of *Taylor*'s conclusions, and reversed a nonsuit judgment. (*O'Neil v. Crane Co.* (2nd Dist., Div. 5) 177 Cal.App.4th 1019 ["*O'Neil*"; further citations are to the Slip Opinion].) As more fully explained below, the facts in *O'Neil* do not differ materially from those on which *Taylor* was decided.

Trial courts in California now have no clear direction. They confront two precedents that reach opposite conclusions of law on essentially the same facts: *Taylor* holds that equipment manufacturers have no duty to warn of the asbestos hazards associated with other

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very liberal review of the nonsuit record, effectively ignoring the defense evidence. (See Slip Op. at p. 2, fn. 1, citing *Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583.)

manufacturers' replacement components or exterior insulation and flange gaskets used with their equipment. *O'Neil* holds that they do. The confusion sown by *O'Neil* affects thousands of product liability cases – primarily but not exclusively asbestos cases – now making their way through and to the California court system from every corner of the nation. The outcome in each Superior Court lawsuit depends on which precedent the particular law-and-motion or trial judge decides to follow. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 [trial courts faced with conflicting precedents on point must choose which to follow].)

Such disarray is untenable. This Court should grant review of *O'Neil* to resolve it.

III

THE KEY FACTS COMMON TO *TAYLOR* AND *O'NEIL* DO NOT MATERIALLY DIFFER

O'Neil is not reconcilable with *Taylor* – which it expressly rejects. The key overlapping facts are as follows:

Both of these cases involved claims for personal injury or wrongful death arising out of a Navy veteran's exposure to asbestos. Plaintiffs Reginald Taylor and Patrick O'Neil each served during the 1960s aboard Navy aircraft carriers that were built during World War II. (*Taylor*, 171 Cal.App.4th at p. 570; *O'Neil* Slip Op. at p. 2.)

The defendants in both cases were manufacturers that sold equipment – primarily pumps and valves – to the Navy during the 1940s for use in the ships' steam-propulsion systems. (*Taylor*, 171 Cal.App.4th at p. 570; *O'Neil* Slip Op. at p. 3.) The defendants in *Taylor* did not "participate[] in the integration of their components [i.e. their pump and valve products] into the design of the [ship's] propulsion system." (*Taylor*, 171 Cal.App.4th at p. 585.) Both sides' experts in *O'Neil* testified similarly. (See Warren's Petition for Rehearing in *O'Neil* at pp. 11-14, contra Slip Op. at pp. 20-21.)[2]

The defendants' products were built to the Navy's precise specifications. (*Taylor*, 171 Cal.App.4th at p. 585; *O'Neil* Slip Op. at p. 5, and see portions of the record cited in Warren's Petition for Rehearing.[3])

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[2] Moreover, Warren did not control what replacement product the Navy used once Warren delivered a pump to the shipyard – i.e. once it relinquished control of its own product. (See Petition for Rehearing at p. 9, fn. 3.) The Navy decided what to use as replacement parts (13 RT 2237; 15 RT 2695-2696, 2698-2699) – the only parts to which Plaintiffs claimed Mr. O'Neil was exposed. And as Plaintiffs' expert Captain Lowell confirmed, no Respondent supplied any of those replacement parts. (7 RT 1017) The Navy installed replacement gaskets and packing manufactured by other companies (11 RT 1900-1904), per the Navy's specifications.

[3] See, e.g., 13 RT 2236-2237; 7 RT 938 and 1058-1060 [the Navy, through instructions to a shipyard and specifications, determined what tasks and level of performance each pump had to achieve]; 14 RT 2489-2491 [decision whether equipment components did or did not contain asbestos dictated by the Navy].) Plaintiffs' expert Captain Lowell explained that Warren Pumps had no role in the development of military specifications issued by the Navy (7 RT 1016; see also 7 RT 1040-1041) – but had to follow them strictly in building its pumps (7 RT 1032-1034); that some

Some (but not all) of the pumps and valves sold by the defendants in these cases came with internal asbestos-containing gaskets and/or packing. (*Taylor*, 171 Cal.App.4th at pp. 570-571; *O'Neil* Slip Op. at p. 3.[4]) Certain maintenance performed on the defendants' pumps and valves required that gaskets and packing be removed and replaced. (*Taylor*, 171 Cal.App.4th at p. 571; *O'Neil* Slip Op. at p. 3.) The plaintiffs alleged that this maintenance generated asbestos dust in their vicinity, to which they claimed exposure. (*Taylor*, 171 Cal.App.4th at p. 572; *O'Neil* Slip Op. at pp. 3-4.)

Neither plaintiff ever saw or heard warnings about asbestos from any source. (Cf. *Taylor*, 171 Cal.App.4th at p. 575; cf. *O'Neil* Slip Op. at pp. 4-5; see also 10 RT 1737.) The plaintiffs contended the equipment manufacturers should have provided such warnings, and both decisions

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military specifications required the use of asbestos (7 RT 1035); and that Warren had to build what the Navy required (7 RT 1032-1034).

Military specifications governed the design of pumps, the composition of internal pump components, and pumps' thermal insulation, and Warren followed them. (13 RT 2218-2219) Lowell conceded that those specifications prescribed the only acceptable performance standards for the pumps. (7 RT 938-940 and 1058-1060) During World War II, some pumps had components that contained asbestos in order to meet certain Navy criteria. Again according to plaintiffs' expert Captain Lowell, "virtually all of those World War II pumps had asbestos packing and asbestos gaskets." (7 RT 922) He testified repeatedly that asbestos was a necessary material in the 1940s for which there was no substitute feasible for use aboard the Oriskany. (7 RT 1052-1054)

[4] By its repeated phrase "packing and insulation," it appears the appellate court meant "packing and gaskets," since early in the Slip Opinion it refers to something called "gasket insulation" (p. 3), which does not exist and the record nowhere mentions.

proceeded on the premise that the risk of harm to the plaintiff from asbestos-containing parts was known or knowable to the manufacturers at the time of manufacture and distribution.

- *Taylor*, reviewing a summary-judgment in the light most favorable to the plaintiff (171 Cal.App.4th at p. 574),"necessarily assume[d] that the dangers of asbestos were either known or knowable during the relevant time period" (*id.* at p. 577, fn. 6).
- The appellate court *here* reviewed a nonsuit, "disregarding conflicting evidence" and indulging all inferences in plaintiffs' favor, which led the court to suggest that both the defendants and the Navy had "actual knowledge of the dangers of asbestos."[5] (*O'Neil* Slip Op. at pp. 5-6, and p. 2 fn. 1.)

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[5] By Petition for Rehearing, Warren protested the *O'Neil* court's inference that it actually knew of the dangers of asbestos when it sold pumps to the Navy in the 1940s. The only record evidence was to the contrary. (See 13 RT 2197-2198 and 2255.) But for purposes of analyzing the duty to warn of the risk that sailors could develop a fatal disease from work on asbestos-containing replacement parts, this Court can assume without deciding (as the *Taylor* court did) that such a risk was "knowable" at the time the defendants sold their products, based solely on the testimony of plaintiffs' expert Barry Horn. (6 RT 719-725, 729, 732) Warren contends that assumption would collapse if contrary evidence were considered, but that is not the issue here. Asbestos plaintiffs frequently rely on similar if not identical evidence to avoid summary judgment (as in *Taylor*) or nonsuit (as here) on failure-to-warn claims.

But the most critical fact common to both cases was that ***no original asbestos-containing part remained in the defendants' pumps and valves*** by the time the plaintiffs boarded their respective ships. In both cases it was undisputed that all such parts had been replaced – before either plaintiff's alleged exposure – with gaskets, packing and internal (covered) insulation ***manufactured and distributed by unidentified companies***. (*Taylor*, 171 Cal.App.4th at pp. 572, 579; see *O'Neil* Slip Op. at pp. 15-16; see also 7 RT 1017 [plaintiffs' expert testified "I know of none of the defendants here today that made asbestos [-containing parts]"].)

Taylor viewed those replacement gaskets and packing as the defective products causing the plaintiff's injury. (*Taylor*, 171 Cal.App.4th at p. 587 ["Mr. Taylor's injuries were caused not by any action of respondents' products, but rather by the release of asbestos from products produced by others"].) *Taylor* concluded there could be no liability for failure to warn of dangers inherent in products that other companies had distributed, even where "the use of asbestos-containing materials with respondents' equipment was both foreseeable and anticipated by respondents." (171 Cal.App.4th at pp. 571, 585.)

On this point the *O'Neil* opinion diverges. Forcing this case into the mold of its prior decision in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577 – in which a demurrer required the

court to assume that "[t]he use of the defendant's 'own product' created the harm" (*O'Neil* Slip Op. at p. 20) – the court here asserts that Mr. O'Neil's "injury was caused by *the operation of respondents' products with* replacement [asbestos-containing parts]," which the respondents' products "needed ... in order to function." (*Ibid.*, italics added.[6]) "*Tellez-Cordova* cannot be distinguished," wrote the author of *Tellez-Cordova* in deciding *O'Neil*. (Slip Op. at p. 20.) "*Tellez-Cordova* holds that a manufacturer is liable when its product is necessarily used in conjunction with another product, and when danger results from the use of the two products together." (*O'Neil* Slip Op. at p. 20.[7])

This Court should grant review regardless of whether that is a fair reading of this record.

As a threshold matter, such factual inferences were not legitimate, even applying the nonsuit standard of review (see Warren's Petition for Rehearing at pp. 3-11):

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[6] "Asbestos does of course have inherent dangers," the *O'Neil* court allowed, "but appellants' evidence was that the asbestos incorporated into (and onto) respondents' products caused injury when it was removed" – a premise from which the court somehow concluded that "[t]he danger was caused by the operation of respondents' products." (*Id.* at p. 20.)

[7] *O'Neil* held that "*Taylor* reached its conclusion through what in our view is a misunderstanding of *Tellez-Cordova*" (Slip Op. at p. 19; see also *id.* at p. 20 ["This analysis misunderstands the facts of *Tellez-Cordova*."])

- Warren's pumps did not "require" asbestos-containing replacement parts to function. This record supports at most the conclusion that realities external to Warren originally drove the inclusion of asbestos-containing parts in these pumps – i.e. the Navy prescribed performance criteria for the pumps, and the only way to meet some of those criteria in the 1940s was to use asbestos.
- Warren's pumps did not create or contribute to the harm from replacement asbestos-containing components. Assuming, as the *O'Neil* court does, that the heat "baked" gasket and packing material onto defendants' equipment (later to be scraped off, possibly producing dust), that heat came from the ship's steam-propulsion system – i.e. from the boilers. (Slip Op. at pp. 1, 3; see also 7 RT 896-897 [Plaintiffs' expert Captain Lowell: "We have to start with boilers and we got to make steam," going on to describe interconnectedness of pumps throughout that steam system].) For all this record shows, asbestos gaskets and packing would "bake onto" any equipment the Navy could hook into its steam-propulsion system. No evidence suggests that any

feature intrinsic to the pumps or valves themselves had anything to do with it.

But even if this record did suggest that Warren pumps "required" asbestos-containing replacement parts to function, this Court should grant review to clarify that such "requirement" would be insufficient to support strict liability, where (among other things) Warren had no part in the chain of distribution for any of the replacement products.

Additional facts not mentioned in the *O'Neil* opinion are nonetheless relevant to the issues raised, as explained in Warren's Petition for Rehearing. Mr. O'Neil's claimed asbestos exposures may be divided into three categories of products, *none* of which Warren manufactured or distributed:

- The first product category consists of *internal* gaskets and packing, and *internal* insulation covered by sheet-metal on one type of pump. Well before Mr. O'Neil boarded the Oriskany, the Navy had replaced all of these internal parts with products from other manufacturers. (Cf. Slip Op. at pp. 15-16; see Petition for Rehearing at p. 5, fn. 2 and pp. 18-19 [describing internal, covered insulation on reciprocating pumps when sold, and lack of testimony regarding exposure to insulation on this type of pump]; 7 RT 1017 [plaintiffs'

expert testified that no defendant here made asbestos-containing parts].)

- The second and third categories of products – both of which Warren asked the appellate court to acknowledge that Warren never manufactured or sold at all – are: external flange gaskets that the Navy affixed to pumps, and external blanket insulation that the Navy wrapped around the pumps. (See Petition for Rehearing at p. 5, fn. 2 and pp. 17-18.)

By order dated October 16, 2009, the court summarily denied rehearing.

IV

THIS COURT SHOULD RESOLVE THE STARK CONFLICT IN PRODUCT LIABILITY LAW PRESENTED BY *O'NEIL*

O'Neil rejects *Taylor*, but *Taylor* more faithfully reflects the law this Court has set down. This Court has never before held anything like what this appellate panel held: a manufacturer is strictly liable not only for dangerous parts originally found in its products, *but also* "for dangerous [parts] with which its product will necessarily be used" – even where the manufacturer has no role in placing those dangerous parts on the market. (*O'Neil* Slip Op. at p. 18, italics added.)

To support its holding, Division 5 of the Second District relied extensively on its own five-year-old decision in *Tellez-Cordova*, *supra*, as

well as gross misreadings of this Court's decisions in *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, and *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725. (See *O'Neil* Slip Op. at pp. 15-20.) Further, while the *O'Neil* court disclaimed any discussion of negligence (*id.* at p. 19, fn. 9), it reviewed strict liability claims using a stunted negligence analysis. Starting "in the middle" of such an analysis – with foreseeability, rather than with the existence of a duty – the court essentially ended there too. (*Id.* at pp. 16-18.) It thus lost sight of the duty concept's analog for strict liability claims: *a sale (or distribution)*, and its consequent limitations on liability.

In contrast, the First District Court of Appeal held in *Taylor* that "California law imposed no duty on respondents to warn of the hazards inherent in defective products manufactured or supplied by third parties." (171 Cal.App.4th at p. 571.) That court affirmed summary judgment for several makers of pumps, valves and other equipment sold to the U.S. Navy during World War II. *Taylor* rejected both strict liability and negligence theories, because it was undisputed that the defendants did not manufacture or sell the asbestos-containing gaskets, packing and insulation to which the plaintiff claimed exposure.

The *O'Neil* opinion acknowledges that *Taylor* is "to the contrary," asserting "several flaws in [*Taylor*'s] reasoning," including a "misunderstanding" of *Tellez-Cordova*. (*O'Neil* Slip Op. at pp. 19-20.)

"In sum," the *O'Neil* court said, "we believe that *Taylor* was wrongly decided ...." (*Id.* at p. 21; see also, e.g., *id.* at p. 13 ["*Taylor* misses the mark"] and p. 15 ["*Taylor* found the argument persuasive. . . . We do not."]) Both decisions are published. This Court should grant review in *O'Neil* to eliminate this confusion.

A. Strict Liability

With respect to strict liability, the *Taylor* court carefully traced the development of California law (*id.* at pp. 575-578), and concluded it would be an unprecedented expansion of tort liability to require a manufacturer to warn of defects in products that it did not manufacture or distribute. "As the California Supreme Court explained three decades ago, the basis for imposing strict products liability on a particular defendant is that 'he has marketed or distributed a defective product.'" (171 Cal.App.4th at p. 575, quoting *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 739.) Following an analysis equally applicable to a design defect theory, *Taylor* concluded:

> Respondents were simply "not a part of the manufacturing or marketing enterprise of the allegedly defective product[s] that caused the injury in question." (*Peterson* [*v. Superior Court* (1995) 10 Cal.4th 1185], 1188.) Consequently, they may not be held strictly liable under California law for such products.

(171 Cal.App.4th at p. 579.)

Taylor further rejected the notion that "a duty to warn exists whenever it is foreseeable that the intended use of a product will expose users or consumers to a risk created solely by the product of another." (171 Cal.App.4th at p. 580.) Again embarking on a detailed assessment of the relevant appellate court decisions and informative decisions from this Court (*id.* at pp. 580-583), the *Taylor* court concluded: "to date, California case law has not imposed on manufacturers a duty to warn about the dangerous propensities of other manufacturers' products. California courts will not impose a duty to warn on a manufacturer where the manufacturer's product 'did not cause or create the risk of harm.'" (*Id.* at p. 583, quoting *Garman v. Magic Chef, Inc.* (1981) 117 Cal.App.3d 634, 638.)

In a single page, *O'Neil* criticized this conclusion, sought support in a mischaracterization of *Vandermark v. Ford Motor Co.*, *supra*, and disposed of two on-point Washington Supreme Court precedents – *Braaten v. Saberhagen Holdings* (2008) 165 Wash.2d 373, and *Simonetta v. Viad Corp.* (2008) 165 Wash.2d 341 – in a footnote. (Slip Op. at p. 19.[8])

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[8] *O'Neil* quoted this Court's statement in *Vandermark* to the effect that "a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another" – without mentioning that the component at issue there was *original*. (61 Cal.2d at p. 261.) *Vandermark* never confronted the question here, and nothing about its rationale supports the appellate court's conclusion. (*O'Neil* Slip Op. at p. 16, echoed at p. 19.)

Beyond that, *O'Neil* has additional prominent weaknesses, reflecting a failure to properly account for this Court's precedent (as well as other precedent). First, the court simply ignored the fact that Warren never placed the asbestos-containing parts that harmed the plaintiff into the stream of commerce. As *Taylor* explained, a manufacturer must make or sell a defective product before it can be held strictly liable. Second, the *O'Neil* court relies heavily on its own prior opinion in *Tellez-Cordova*, *supra*, for the idea that where equipment requires other products to function, or is "designed to work with" those other products (two points not inferable from the record, as noted above), the manufacturer is liable for injury resulting from such use regardless of who made the other products. (Slip Op. at pp. 17-18, 20.) *O'Neil* thus grants the concept of "foreseeability" a far more pivotal role in strict liability than this Court ever intended it to play. (Cf. *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668 ["there are clear judicial days on which a court can foresee forever ..."].)

B. Negligence

With respect to liability for negligent failure to warn, the *Taylor* court again offered a reasoned analysis based on this Court's key precedents. *Taylor* focused on the multi-factor test laid out in *Rowland v. Christian* (1968) 69 Cal.2d 108, to determine whether any equipment-defendant selling pumps or valves to the Navy in World War II had a tort duty to a sailor who encountered replacement parts in those products

decades later. (Slip Op. at p. 19, fn. 9.) *Taylor* properly followed California precedent in first considering whether the equipment defendants owed a duty to the plaintiff before considering foreseeability.

On facts not meaningfully different from this record, *Taylor* concluded they did not, for reasons ranging from the untenable burdens that such a duty would place on commercial defendants, to the remote connection between the manufacturers' World War II-era conduct and the plaintiff's injury, to the difficulty of assigning any "moral blame" to that conduct. (*Taylor*, *supra*, 171 Cal.App.4th at pp. 593-595.)

Citing more recent authority from this Court (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 473-476), Taylor further observed that the social utility of a defendant's conduct is relevant to determining the existence of a legal duty. (171 Cal.App.4th at p. 593.) The First District went on to acknowledge the manifest social utility of "provid[ing] parts essential to powering an aircraft carrier that was used to defend the United States during the greatest armed conflict of the 20th century." (*Id.* at p. 596.)

Despite the substantial policy grounds for absolving Warren of negligence liability, the *O'Neil* court dismissed the issue in a footnote, claiming that although plaintiffs themselves had made arguments about defendants' negligence liability in their briefing, "we need not consider it,

because respondents did not move for nonsuit on that ground." (Slip Op. at p. 19 fn. 9.) To the contrary, Warren and Crane Co. plainly did seek nonsuit of plaintiffs' negligence claims (1 AA 69-70, 78-79; 16 RT 2976), and briefed the issue on appeal.

C. Component-Parts Defense

A third area of express conflict between the *O'Neil* decision and *Taylor* is the application of the component-parts defense to equipment sold to a customer for incorporation into a product or system of the customer's own design. "Under the component parts doctrine, the manufacturer of a product component is not liable for injuries caused by the finished product into which the component is incorporated unless the component itself was defective at the time it left the manufacturer." (*Taylor*, *supra*, 171 Cal.App.4th at p. 584, citing *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 480-481.)

Taylor found it reasonable to apply the component-parts defense to pumps and valves (1) that did not and *could not have* hurt anyone on their own, and (2) which the Navy purchased to incorporate, without the manufacturers' participation, into massive steam-propulsion systems on its ships. (*Taylor*, 171 Cal.App.4th at pp. 584-586.) While a Warren pump or a Crane Co. valve is larger and more complex than a switch or a tub of silicone, they are equally devoid of any function by themselves. By

definition, they are components of a larger "product": in these cases, steam-propulsion systems designed and constructed by the U.S. Navy.

The *O'Neil* court rejected application of the component-parts defense in exactly the same context that *Taylor* adopted it. Addressing the legal criteria for the defense, *O'Neil* relied on a line of appellate court cases and the Restatement (Third) of Torts to conclude that the component-parts defense applies only where a manufacturer "make[s] multi-use or fungible products, ... [that] will be substantially altered by the customer, and the manufacturer of the component will have no control over the design of that finished product, or the warnings or labels on those products." (Slip Op. at p. 12.)[9] The court then explained why it believed the pumps and valves that defendants sold to the Navy met none of those criteria. (Slip Op. at pp. 12-15.)

It further held that the basic requirement of a non-defective "component" (i.e. pump or valve) was not met. (*Id.* at p. 14 ["The trial court here found that respondents' products were not defective because they posed no danger until the asbestos was disturbed. We cannot see that this is correct."]) It was not met, the court held, because the pumps and valves could be deemed "defectively designed" if they were "designed to be used

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[9] The criteria for application of the component-parts doctrine set forth in the Restatement (Third) nowhere mention fungibility or substantial alteration by the customer. (See Rest.3d Torts, Products Liability, § 5.)

with asbestos-containing [parts made by others] which would become dangerous during the ordinary and foreseeable use of the [respondents'] products." (*Ibid.*) As explained above, the court inferred (illegitimately) from the plaintiffs' evidence that defendants' pumps and valves *were* "designed to be used with" such parts, and further concluded that because the danger (friable asbestos fibers) arose "*during* ... the foreseeable use of the [respondents'] products," the danger "was *caused by* the operation of respondents' products." (Slip Op. at pp. 14, 20, italics added.)

The *O'Neil* court never appreciated that the danger to Mr. O'Neil – if it could not be said to arise exclusively from the asbestos-containing parts made by others and affixed to or replaced into Warren's pumps by the Navy – was caused by the operation of an entire Navy steam-propulsion system. The boilers generated steam that flowed through the whole system to "bake on" asbestos from whatever equipment the asbestos-containing gaskets, packing or insulation happened to be used with. (See *supra*, p. 10; Warren's Petition for Rehearing at pp. 10-11.) The generation of steam, of course, can hardly constitute a defect on a steam-powered Navy warship.

This Court should grant review to explain that the component-parts defense is fully appropriate in such a situation, and to disapprove *O'Neil*'s suggestion – contrary to *Taylor* – that "fungibility" or other

factors *O'Neil* listed are pre-requisites to application of the component-parts defense. As long as no defect in the manufacturer's own product caused the ultimate harm, and the manufacturer had no role in designing the product or system that *did*, the component-parts defense should apply.

D. *O'Neil*'s Expansion of Tort Liability Is Not Sound Public Policy

The extension of liability contemplated by *O'Neil* makes manufacturers into insurers of others' hazardous products, and amounts to absolute liability for conduct over which those manufacturers have no control. This Court should accept review to clearly reject liability arising out of the use of another's products with a manufacturer's own durable goods decades after sale, on any theory.

In order to warn users how to maintain their own products safely when incorporating future asbestos-containing parts onto or into them, or to design around such risks, defendants such as Warren would have had an impossible task: to investigate the potential hazards of all future asbestos-containing products, including how those products could safely be handled by military personnel, such as Mr. O'Neil. By reviewing *O'Neil*, the Court can consider the utility, practicality and cost of imposing such liability.

More broadly, with respect to any strict liability theory: this Court created that doctrine for the "avowed purpose" of ensuring "that the costs of injuries resulting from defective products are borne by the

manufacturer that put such products on the market ...." (*Daly*, *supra*, 20 Cal.3d at p. 733.) This Court has since continued to shape the doctrine of strict liability based on the same policy concerns that led to its creation. The Court should step in here to ensure that while the strict liability theory "extend[s] liability for defective product design ... beyond negligence," it stops "short of absolute liability" (*ibid.*), where *O'Neil* takes it.

Imposing liability on Warren for harms resulting from asbestos-containing products manufactured by others, where there is *no evidence that Warren manufactured or supplied such products*, does not serve the core cost-spreading policy that animates strict liability. To require Warren – today – to absorb the social cost of products it did not manufacture or supply would undermine the economic principles endorsed by this Court in *Vandermark v. Ford Motor Co.*, *supra*, and *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1207, among other cases.

Likewise, such liability would not serve the policy of preventing future harm. In the 1940s, Warren had limited, if any, ability to prevent future harm by warning about future use of products it did not manufacture, supply or control. (See *Romito v. Red Plastic Co.* (1995) 38 Cal.App.4th 59, 66-67.) Warren sold pumps to the United States Navy long before Mr. O'Neil served or had any opportunity to become exposed to asbestos from any parts replaced into or affixed to them. The Navy was a highly

sophisticated organization with respect to maintenance and repair of the equipment it selected for installation aboard its ships. After the pumps left Warren's control, the Navy governed all aspects of the pumps' maintenance and repair. Imposing tort liability on Warren now would do nothing to prevent injuries due to alleged exposure from asbestos that took place decades ago.

E. This Conflict In the Law Will Slow and Complicate Trial Courts' Work at a Time When They Can Least Afford It

The legal conflict now besetting California trial courts would warrant review solely on the basis of the huge asbestos caseload that it hamstrings. The trial court dockets in Los Angeles and San Francisco are packed with asbestos product liability cases, and have been for years. After *Taylor*, many claims began to settle or fall away on dispositive motions, where plaintiffs lacked evidence of exposure to asbestos from parts actually supplied by the defendants. The decision in *O'Neil*, absent a grant of review, guarantees endless legal duels over the same issues, resulting in different outcomes for different litigants – and even for the same defendants – on essentially similar facts. It is no great leap of faith to conclude that California's busiest trial courts are themselves earnestly hoping this Court will step in sooner rather than later.

But the conflict between *O'Neil* and *Taylor* will weigh heavily on other cases too, until resolved. Every manufacturer of durable goods

that need replacement parts, such as cars and airplanes, must now consider itself tattooed with potential liability for any dangers posed by replacement parts it did not sell, for years or decades following every initial delivery of an item – unless a trial court judge happens to agree that *Taylor* and the cases it relies on are the more persuasive line of authority. California courts should not host such a free-for-all.

V

CONCLUSION

Warren Pumps, LLC respectfully requests that the Court grant its Petition for Review. This Court's guidance is sorely needed to resolve an express conflict between appellate districts on issues controlling the outcome in countless cases.

Dated: October 27, 2009

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH LLP

By 

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WARREN PUMPS, LLC

CERTIFICATE OF WORD COUNT

I certify that the word-processing program used to produce this brief indicates that the brief contains 4,667 words.

Dated: October 27, 2009

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH LLP

By 
Laurie J. Hepler

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Appendix 1

O'Neil Slip Opinion

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BARBARA J. O'NEIL et al.,

Plaintiffs and Appellants,

v.

CRANE CO. et al.,

Defendants and Respondents.

B208225

(Los Angeles County
Super. Ct. No. BC360274)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elihu Berle, Judge. Reversed.

Waters Kraus & Paul, Paul C. Cook, Michael B. Gurien for Plaintiffs and Appellants.

K&L Gates, Raymond L. Gill, Robert E. Feyder, Geoffrey M. Davis for Defendant and Respondent Crane Co.

Carroll, Burdick & McDonough, James P. Cunningham, Laurie J. Hepler, Gonzalo C. Martinez for Defendant and Respondent Warren Pumps LLC.

Patrick O'Neil died of mesothelioma. His widow, appellant Barbara O'Neil (individually and as successor in interest to Patrick O'Neil), and his children, appellants Michael O'Neil and Regan Schneider, sued respondents Crane Co. and Warren Pumps LLC for negligence, negligent failure to warn, strict liability for failure to warn, and strict liability for design defect on the consumer expectation theory. After 15 days of jury trial, the court granted respondents' motion for nonsuit and judgment was entered in their favor. We reverse.

Facts[1]

Patrick O'Neil died of mesothelioma in 2005, when he was 62 years old. The jury heard evidence connecting his disease to his exposure to asbestos during the period between June of 1965 and August of 1966, when he served as an officer on the *USS Oriskany*, an Essex class aircraft carrier built between 1944 or 1945 and 1950.[2]

On the *Oriskany*, O'Neil was first a Main Engine Junior Officer, then a Boiler Division Officer. In both assignments, he stood watch in the machinery spaces, that is, in the boiler rooms and engine rooms and machine room, where he was responsible for supervising repairs and maintenance of equipment in those rooms. He also supervised repairs when the *Oriskany* was in dry dock for a period of about three months, after a fire.

Through testimony from an expert witness, retired Navy Captain William Lowell, from former Crane and Warren employees, and from other witnesses, appellants produced evidence about the *Oriskany* and about respondents' products:

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[1] In summarizing the facts on this appeal from judgment after nonsuit, we disregard conflicting evidence, give appellants' evidence all the value to which it is legally entitled, and indulge every legitimate inference which may be drawn from the evidence in appellants' favor. (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583.)

[2] The Revolutionary War Battle of Oriskany took place in August of 1777, in New York's Mohawk Valley.

The main power source on the *Oriskany* was steam, produced by eight boilers in four rooms. The steam system operated at very high temperatures, and all valves, flanges, and fittings were necessarily covered in insulation. When the *Oriskany* was built, the primary type of insulation for that purpose was made of 18 percent magnesium and 15 percent asbestos. Asbestos was also used in the packing which was found in pumps and valves.

There were thousands of valves on the *Oriskany*. Most of the valves in the machinery spaces were made by Crane. All of the Crane valves contained asbestos-containing packing, and Crane itself specified that material. Most of the valves had asbestos-containing insulation. The valves had flange connections, and most of the flange connections required the use of asbestos gaskets.[3]

There were several hundred pumps on the *Oriskany*. Fifty-two of them were made by Warren Pumps, including reciprocating steam engine pumps and 6-foot tall bilge pumps. All but 4 or 5 of the 52 pumps were located in the machinery spaces. The pumps had asbestos-containing insulation and asbestos-containing packing and were designed to be used with asbestos-containing gasket insulation. At least in some instances, asbestos-containing packing and insulation were supplied by Warren and were on the pumps when they were delivered. Warren knew that work on the pumps would require removal of asbestos gaskets.

Packing and insulation had to be replaced or removed during the ordinary course of maintenance. The heat involved in steam power meant that the packing and insulation

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[3] On nonsuit, the trial court found that Crane provided only bonnet gaskets, that those gaskets were not shipped with asbestos, that any insulation was added later, by the Navy, and that Crane had no control over the materials used to insulate its gaskets. Appellants, who agree that asbestos insulation was applied to some gaskets by the shipbuilder after the valves were installed, contend that the trial court improperly weighed the evidence to make this finding. We agree. The evidence was that some Crane valves involved bonnet gaskets which did not use asbestos, but that other Crane valves had different gaskets, which did include asbestos.

would bake onto the equipment, and could only be removed by being scraped off with a chisel or knife or wire brush. This work created asbestos dust.[4]

Douglas Deetjen, a shipmate of Patrick O'Neil's, worked in the *Oriskany*'s boiler and engine rooms. He described the process of re-packing valves and pumps, and of removing insulation from the equipment in the course of repair or maintenance. This would be done with a knife, scraper, grinder or wire brush, and produced a lot of dust. Deetjen saw O'Neil in the machinery spaces while this work was going on and dust was created. He testified that during these repairs, the dust floated all over the room, so that there was no way to avoid breathing the dust.

Lowell testified similarly, and also testified about dust-producing work undertaken by ship personnel during the repair of the *Oriskany*.

Deetjen testified specifically that work on Crane valves created dust and that Patrick O'Neil was in the room when that happened. He testified that work on Warren pumps created dust, and that he saw Patrick O'Neil in the room when work was being done on Warren pumps.

The Navy required manufacturers of equipment such as pumps and valves to provide manuals containing information about installation, operation, and maintenance. Manufacturers were required to include information about expected repairs and about safety cautions and requirements. Manuals also identified replacement parts. These manuals were living documents which could be changed during subsequent years.

None of the respondents' manuals included a warning about asbestos dust, or any recommendation concerning use of respirators or dust-reduction methods such as wetting friable asbestos. In the 1980s, Warren questioned Navy specifications on asbestos

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[4] Crane knew all of this. It sold asbestos-containing packing and insulation to its customers, for maintenance and repair work. Its corporate representative testified that Crane was a manufacturer, seller, and distributor of asbestos-containing products.

packing, raising issues about the health hazards. A Warren representative testified that nothing prevented it from doing so sooner, or from including warnings in the manuals.

Deetjen testified that his orders included an order to look at the manuals supplied by manufacturers.

The jury also heard evidence on the Navy's design and procurement process. Appellants' expert witness testified that a ship builder, building a ship for the Navy, would turn to qualified manufacturers and direct them to the "broad specifications" the Navy provided. (For instance, the Navy might specify that pumps should deliver 600 gallons a minute, be turbine driven, and able to operate at temperatures of up to 600 degrees.) The manufacturer would take that information and design the pumps. Lowell testified that "the Navy didn't design pumps. The manufacturers designed the pumps."

Appellants also presented the deposition testimony of Roland Doktor, a manager at Warren Pumps, designated as the person most knowledgeable about issues in this case. When asked "what does it mean to be built to a military specification?" he answered, "There are a certain set of guidelines that are put forward in the specifications as far as materials and properties, testing, things like that, to make sure that the pump will meet the requirements as it needs to be on the ship."

Respondents also called witnesses on this subject. Retired Admiral David Sargent testified about the ship-building process. This included the testimony that the Navy and manufacturers engaged in a design process, going back and forth between the Navy and the manufacturer, in which the manufacturer produced drawings for the Navy. This process resulted in Navy specifications.

There was also evidence concerning scientific knowledge of the dangers of asbestos at the relevant times, and of respondents', and the Navy's, actual knowledge of

the dangers of asbestos;[5] evidence about Patrick O'Neil's disease, damages evidence, and evidence relevant to causation. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 976-977.)

Crane moved for nonsuit on all causes of action on the ground that there was no evidence that Patrick O'Neil was exposed to asbestos from Crane products, that there was no evidence that any exposure from Crane products was a substantial factor in causing O'Neil's disease, and other grounds. Warren Pumps joined in Crane's motion, and also moved for nonsuit on the ground that there was no evidence that Patrick O'Neil was exposed to asbestos from the maintenance or repair of a Warren pump.

Neither motion was based on the component parts defense, but questions concerning that defense arose during oral argument on the motions, and the court granted the motions on that basis. The court also found that the pumps and valves were not dangerous or defective except that they included (or were designed to work with) asbestos, and that the release of asbestos was not caused by the normal use of the equipment but by maintenance which was under the supervision of the Navy.[6]

Standard of Review

Our review is de novo. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542.) The judgment may be affirmed only if, interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all inferences and

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[5] As another court observed "The unpalatable facts are that in the twenties and thirties the hazards of working with asbestos were recognized; that the United States Public Health Service documented the significant risk in asbestos textile factories in 1938; that the Fleischer-Drinker report was published in 1945; that in 1961 Dr. Irving Silikoff and his colleagues confirmed the deadly relationship between insulation work and asbestosis." (*Borel v. Fiberboard Paper Products Corp* (5th Cir. 1973) 493 F.2d 1076, 1106; see also *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1004.)

[6] We cannot agree with Warren Pumps that either motion for nonsuit was based on a sophisticated intermediary theory or that the trial court granted nonsuit on that ground.

doubts in favor of the plaintiff, no facts have been identified which would justify a judgment in favor of the plaintiff. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

Discussion

1. The component parts defense

"[T]he manufacturer of a product component or ingredient is not liable for injuries caused by the finished product unless it appears that the component itself was 'defective' when it left the manufacturer." (*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577, 581.) That is the component parts defense, sometimes called the raw material or bulk supplier defense. As we wrote in *Tellez-Cordova, supra,* "The policy reasons behind the component parts doctrine are well established: '"[M]ulti-use component and raw material suppliers should not have to assure the safety of their materials as used in other companies' finished products. First . . . that would require suppliers 'to retain experts in a huge variety of areas in order to determine the possible risks associated with each potential use.'" [Citation.] A second, related rationale is that 'finished product manufacturers know exactly what they intend to do with a component or raw material and therefore are in a better position to guarantee that the component or raw material is suitable for their particular applications. [Citations.]'" (*Springmeyer v. Ford Motor Co.* [(1998)] 60 Cal.App.4th 1541, 1554.)" (*Tellez-Cordova, supra,* 129 Cal.App.4th at pp. 581-582.)

The trial court found that this defense applied here. We do not.

Walker v. Stauffer Chemical Corp. (1971) 19 Cal.App.3d 669, which is perhaps the first California component parts case, is illustrative. That defendant sold bulk sulfuric acid. One of its customers was a manufacturer of drain cleaner, and the defendant sold the acid with the understanding that its customer would subject it to processes which would render it suitable to be a household product. The customer combined the acid with another product to make drain cleaner. The holding of the case is that the bulk supplier

had no duty to the consumer injured when the drain cleaner exploded. The Court found that the drain cleaner and the bulk acid were not the same product, and wrote: "We do not believe it realistically feasible or necessary to the protection of the public to require the manufacturer and supplier of a standard chemical ingredient such as bulk sulfuric acid, not having control over the subsequent compounding, packaging or marketing of an item eventually causing injury to the ultimate consumer, to bear the responsibility for that injury. The manufacturer (seller) of the product causing the injury is so situated as to afford the necessary protection." (*Id.* at pp. 673-674.) Conversely, manufacturers of a defective product which is not altered when it is incorporated into the final product have a duty to the consumer. (*Jenkins v. T & N PLC* (1996) 45 Cal.App.4th 1224; *Arena v. Owens-Corning Fiberglass Corp.* (1998) 63 Cal.App.4th 1178, 1187 [raw asbestos fibers are not altered when they are incorporated into insulation].)

Lee v. Electric Motor Division (1985) 169 Cal.App.3d 375, is the same, although the defendant there did not sell bulk supplies, but manufactured "ordinary, off-the-shelf" motors. Another manufacturer bought some of those motors to put into its own product, a meat grinder which the defendant had no role in designing. Plaintiff was injured by the meat grinder, and the allegation was that the injury would have been minimized if the motor was designed to stop immediately when turned off. The Court found that the defendant was a component part manufacturer and could not be held liable for the defective design of the finished product. (*Id.* at p. 385.)

The defendant in *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, made a product which was incomplete in itself, and was necessarily going to be incorporated into another product. That is, International Harvester made skeleton trucks which consisted only of an engine, cab and chassis, and in that case, three fuel tanks. These skeleton trucks were made to be modified and could not be used without the customers' modifications. One customer installed a refrigerator unit on the skeleton truck. Five years later, when the modified truck was in an accident, the gas tanks caught fire. The injured plaintiff sought a jury instruction on International's duty to design a

crash-worthy truck. The trial court refused to give the instruction and the Court of Appeal agreed. One basis of that holding was that skeleton trucks were designed to be modified by another manufacturer, in a manner outside International's control. It was the second manufacturer's design of the final product which was the cause of the injury, superseding any causation involving International's product. (*Id.* at pp. 867-868; see also *In re Deep Vein Thrombosis* (N.D.Cal. 2005) 356 F.Supp.2d 1055, 1062-1063 [Boeing, which sold non-defective airplanes with no seats, and did not design, manufacture, purchase or select the seats, which were added by the airlines, was not liable for deep vein thrombosis allegedly caused by faulty seat design].)

As *In re TMJ Implants Products Liability Litigation* (D.Minn. 1995) 872 F.Supp. 1019, 1026, observed, the component part cases involve "generic or off-the-shelf components," or "building block materials" as opposed to those which are "really a separate product with a specific purpose and use." (*Id.* at p. 1026; citing *Fleck v. KDI Sylvan Pools, Inc.* (3d Cir. 1992) 981 F.2d 107; see also *Tellez-Cordova, supra,* 129 Cal.App.4th at p. 581; *Springmeyer v. Ford Motor Co., supra,* 60 Cal.App.4th at p. 1554, *Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 788.)

Artiglio v. General Electric Co. (1998) 61 Cal.App.4th 830, on which the trial court here based its ruling, is no different. In that case, GE supplied bulk silicone to a manufacturer of breast implants. That manufacturer substantially processed the silicone in a manufacturing process over which GE had no control. The silicone was only dangerous when used in medical devices, and GE shipped the product with a disclaimer, disclaiming any responsibility for determining whether the material was suitable for medical applications. GE really had no ability to warn the ultimate user, because it in no way exercised any control over the design, testing or labeling of the implants. Thus, GE was a component parts supplier and was not liable to women who claimed to have been injured by the implants.

In contrast, we found that the defendants in *Tellez-Cordova, supra,* 129 Cal.App.4th 577, were not entitled to the defense. Those defendants made grinders,

sanders and saws, which were (according to the allegations of the complaint) specifically designed to be used with abrasive wheels and discs. Plaintiff became ill as a result of airborne toxic substances produced and released from those discs and wheels. We found that the component parts defense did not protect the defendants, because "The facts before us are not that respondents manufactured component parts to be used in a variety of finished products, outside their control, but instead that respondents manufactured tools which were specifically designed to be used with the abrasive wheels or discs they were used with, for the intended purpose of grinding and sanding metals, that the tools necessarily operated with those wheels or discs, . . . " (*Id.* at p. 582.)

The Restatement Third of Torts is in accord. In section 5, titled "Liability Of Commercial Seller Or Distributor Of Product Components For Harm Caused By Product Into Which Components Are Integrated," it provides that "One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if: (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and (b)(2) the integration of the component causes the product to be

defective, as defined in this Chapter; and (b)(3) the defect in the product causes the harm." (Rest.3d Torts, Products Liability, § 5.)[7]

In comment a, the Restatement defines "components": "Product components include raw materials, bulk products, and other constituent products sold for integration into other products. Some components, such as raw materials, valves, or switches, have no functional capabilities unless integrated into other products. Other components, such as a truck chassis or a multi-functional machine, function on their own but still may be utilized in a variety of ways by assemblers of other products." (Rest.3d Torts, Products Liability, § 5, com. a.)

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[7] In reliance on a draft of the Restatement Third of Torts, *Artiglio*, *supra*, 61 Cal.App.4th at page 839 included the customer's sophistication as a factor in determining whether the component parts doctrine applies. Citing *Artiglio*, the trial court here made findings about the Navy's sophistication as a purchaser and seems to have based its ruling in part on that ground. In its final version, the Restatement Third of Torts considers the component buyer's sophistication only in its discussion of the component seller's duty to warn that buyer of a defect, writing that "The component seller is required to provide instructions and warnings regarding risks associated with the use of the component product. See §§ 1 and 2(c). However, when a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it. To impose a duty to warn in such a circumstance would require that component sellers monitor the development of products and systems into which their components are to be integrated. See Comment *a*. Courts have not yet confronted the question of whether, in combination, factors such as the component purchaser's lack of expertise and ignorance of the risks of integrating the component into the purchaser's product, and the component supplier's knowledge of both the relevant risks and the purchaser's ignorance thereof, give rise to a duty on the part of the component supplier to warn of risks attending integration of the component into the purchaser's product. . . ." (Rest.3d Torts, Products Liability, § 5, com. b.) Thus, under the Restatement, a seller seeking the shield of the component parts defense is *not* required to prove that it sold to a sophisticated customer. We believe that that is as it should be, and that (in this case) the Navy's sophistication is not significant. As we observe elsewhere herein, the point of the doctrine is that a manufacturer should not have to investigate and evaluate its customer's sophistication before it can sell its component product.

We cannot see that respondents' pumps and valves are component parts under this body of law. Component parts manufacturers are exempt from liability because they make multi-use or fungible products, designed to be incorporated into some other product. The component will be substantially altered by the customer, and the manufacturer of the component will have no control over the design of that finished product, or the warnings or labels on those products.

Here, in contrast, respondents did not supply a "building block" material, dangerous only when incorporated into a final product over which they had no control. Instead, respondents made "separate products with a specific purpose and use." (*In re TMJ Implants, supra,* 872 F.Supp. at p. 1026.) The products were not fungible or multi-use, and were not designed to be altered by respondents' customers. Nor were they altered. Instead, they were used as they were designed to be used, with asbestos insulation and packing which would have to be removed during routine repair and maintenance. Further, unlike the manufacturers in the component parts cases, who had no interaction with the user of the finished product, and no ability to warn, respondents supplied manuals with their products. They had the ability to warn the users of their products.

In the component parts cases, the component manufacturer may not even know what the customer intends to do with the part, and the point of the doctrine is that they need not know. Without such a rule, suppliers would have to hire experts to learn of the dangers of each possible use, in order to understand the risks. (*Tellez-Cordova, supra,* 129 Cal.App.4th at p. 581.) As the Restatement explains "Imposing liability [on a component parts manufacturer] would require the component seller to scrutinize another's product which the component seller has no role in developing." (Rest.3d Torts, Products Liability, § 5, com. a.) But here, respondents knew exactly how their products would be used, and they had a role in developing those products. The policy reasons for the component parts doctrine simply do not apply. As we wrote about the defendants in *Tellez-Cordova*, "respondents are not asked to warn of defects in a final product over

which they had no control, but of defects which occur when their products are used as intended . . . ." (*Tellez-Cordova, supra,* 129 Cal.App.4th at p. 583.)

Taylor v. Elliott Turbomachinery Co., Inc. (2009) 171 Cal.App.4th 564 ("*Taylor*"), which was decided after the judgment here, found that the component parts defense was applicable to manufacturers similarly situated to respondents, but we think that *Taylor* misses the mark.

The plaintiff in *Taylor,* like Patrick O'Neil, worked on an Essex-class aircraft carrier, and was exposed to asbestos from pumps, valves and other equipment. *Taylor* found, inter alia, that the component parts defense shielded those defendants. In its analysis, *Taylor* cited the fact that the plaintiff therein acknowledged that the equipment was intended to operate "as part of a larger 'marine steam propulsion system.'" *Taylor* then cited that plaintiff's argument that the equipment was not multi-use, but was manufactured to the Navy's specifications for a particular purpose, but found the argument unpersuasive. Citing *Artiglio v. General Electric Co., supra,* 61 Cal.App.4th 830, *Taylor* ruled that "The mere fact that respondents followed Navy specifications when producing their products does not preclude them from invoking the component parts doctrine." (*Taylor, supra,* 171 Cal.App.4th at p. 585.)

We reach a different conclusion. The defendant in *Artiglio* met all the criteria which define a component parts seller. As we have seen, respondents here do not. We also disagree with the finding that the entire steam system of an aircraft carrier (or, as respondents here argue, the ship itself) is a "finished product" as that term is used in the context of the component parts defense. Such a broad definition would make the analysis unworkable. For instance, under the defense, a component maker may be liable if it is substantially involved in the design of the finished product. (*Springmeyer v. Ford Motor Co., supra,* 60 Cal.App.4th at pp. 1551-1552.) If the entire ship, or steam system were the "finished product," evidence that respondents were substantially involved in the design of their own pumps and valves, and in the integration of that equipment into the rest of ship's systems through insulated flanges, would be inadequate unless appellants

could also prove that respondents were involved in the design of the entire steam propulsion system, or of the ship itself. That simply stretches the defense too far.

Nor are we persuaded by *Taylor*'s reference to *Artiglio, supra,* and customer specifications. *Artiglio* found that GE was not deprived of the component parts defense merely because it had formulated the silicone to its customer's specifications. (*Artiglio, supra,* 61 Cal.App.4th at pp. 840-841.) To say that respondents were not deprived of the defense is not to say that they were entitled to it. Indeed, under California law, compliance with a customer's specification is not a defense to a claim of strict products liability. "[T]he uniqueness of a purchaser's order does not alter the manufacturer's responsibilities and is not a defense." (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1229; *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 208; *Rawlings v. D. M. Oliver, Inc.* (1979) 97 Cal.App.3d 890, 897.)

Moreover, we agree with appellants that respondents would not be shielded by the component parts defense even if they were manufacturers of components, because that defense does not apply if the product itself is defective.

The trial court here found that respondents' products were not defective because they posed no danger until the asbestos was disturbed. We cannot see that this is correct. Appellants' design defect case was that respondents' valves and pumps were defective because they were designed to be used with asbestos-containing insulation and packing which would become dangerous during the ordinary and foreseeable use of the products. That is a perfectly acceptable theory. The performance of a product during ordinary, expected and routine maintenance and repair is part of the functionality of that product. A car which only exploded when the oil was changed or the tires rotated could not be deemed non-defective. (See *DeLeon v. Commercial Manufacturing & Supply Co., supra,* 148 Cal.App.3d 336, 344 [intended use of the component included regular cleaning]; *Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143 [retailer liable for failure to warn with respect to need and method of repair].)

Jones v. John Crane, Inc., supra, 132 Cal.App.4th 990 is instructive. In that case, the plaintiff was exposed to asbestos products, including valve and pump packing materials manufactured by John Crane. He sued for strict liability on a design defect-consumer expectations theory, on evidence that toxic fibers were released during routine use of the products, that is, when packing was replaced. The Court of Appeal affirmed a judgment in plaintiff's favor, rejecting John Crane's argument that the consumer expectation test was inapplicable because expert witnesses were required. (See also *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 465 [plaintiff can recover against manufacturer of asbestos insulation on a theory of strict liability based on design defect on the consumer expectations test, on evidence that expected manner of use included removal of insulation from valves for inspection, creating dust.)

2. "Another manufacturer's product"

Crane's motion for nonsuit was based in part on the evidence that the asbestos which it supplied with its products had been replaced by the time Patrick O'Neil served on the *Oriskany*.[8] Crane contended that under California law, it cannot be liable in strict liability for an injury caused by a product it did not manufacture or supply, unless it was involved in the vertical distribution of the defective product or played an integral role in the producing and marketing enterprise of that product. (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 772-774; *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1188.) Warren Pumps joined in the motion.

This was not a ground for the trial court ruling, but the parties heavily brief the issue on appeal, no doubt because *Taylor* found the argument persuasive, at least insofar as the causes of action were based on a failure to warn. We do not.

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[8] Although Crane did sell replacement parts, appellants did not attempt to prove that the packing and gasket insulation on the *Oriskany* at the time had been purchased from Crane.

We begin with basic principles: "This doctrine of strict liability extends to products which have design defects, manufacturing defects, or 'warning defects.'" (*Sparks v. Owens-Illinois, Inc., supra,* 32 Cal.App.4th at p. 472.) A manufacturer is liable in strict liability for an injury caused by the foreseeable use (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733) and misuse of its product (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833) and for defective components made by others that are incorporated into their products. "[A] manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another." (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 261.)

Under these principles, respondents would clearly be liable to a sailor who was injured as a result of exposure to the asbestos-containing packing and insulation they supplied with their pumps and valves. Respondents do not contend otherwise. Instead, they seek a different result because O'Neil was injured not by the original packing and insulation, but by replacement parts. In support, they cite cases which do not consider a manufacturer's liability for the components of its products, or for replacement parts, or the kind of interdependent products (valves and pumps along with their insulation and packing) which this case presents. We see nothing in these cases which would cut off respondents' responsibility for failure to warn or design defect, at the point in time at which their products were subject to predictable and ordinary maintenance or repair.

For instance, in *Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357, the plaintiff used a Standard Brands product for a project, finished the project with another manufacturer's product, then used an electric buffer. The other product exploded, causing the plaintiff's injury. The Court held that the explosion of the other product was not a reasonably foreseeable consequence of Standard Brands' failure to warn, and that "the manufacturer's duty is restricted to warnings based on the characteristics of the *manufacturer's own products.*" (*Id.* at p. 364.) In *Blackwell v. Phelps Dodge Corp.* (1984) 157 Cal.App.3d 372, a supplier of bulk sulfuric acid filled a customer's tank car with that product, and the plaintiffs were injured in attempting to unload the tank car.

They sued the acid supplier on the theory that it should have instructed its customer concerning safe transportation of the acid, and provided warnings on safe unloading procedures. The Court of Appeal held that the acid supplier could not be held liable, because the dangerous product was not the acid, but the tank car. (*Id.* at p. 378.) *In re Deep Vein Thrombosis, supra,* 356 F.Supp.2d 1055, the defendant supplied an incomplete product, an airplane without seats, and the injury was alleged to have been caused by the seats, which the defendant did not design, manufacture, or even choose.

Cadlo v. Owens-Illinois, Inc. (2004) 125 Cal.App.4th 513 is even more remote. That was an attempt to hold a manufacturer of asbestos insulation liable based on its historic role in the design, manufacture and marketing of the product, even though the manufacturer had sold the product line well before the plaintiff's exposure, and there was no evidence that it had any connection, whether design, manufacture or distribution, to the asbestos to which he was exposed. (*Id.* at p. 516.)

Respondents cannot be analogized to the sulfuric acid supplier, who merely shipped a product in its customer's own choice of transportation, or to the defendants in *Blackwell* and *Deep Vein Thrombosis*, which were connected to the alleged dangerous product only by a choice made by the customer. In the cases respondents rely on, the two products were connected by some actor other than the defendant manufacturer, or by time and happenstance, outside the control of the defendant.

In contrast, respondents incorporated asbestos-containing products into their own products, which needed the asbestos-containing products in order to function. The injury was caused by the operation of respondents' products with replacement products which had the same dangerous propensities as the original parts. Respondents' cases do not address that situation. Other cases do. Under those cases, respondents can be held strictly liable for injury caused by dust emanating from replacement asbestos. We believe that that is the correct rule.

In *Tellez-Cordova, supra,* 129 Cal.App.4th 577, the defendant's tools were designed to be used with attachments, and were useless without them. We thus rejected

the defendant's claim that it had no duty to warn about the metal fibers released from the attachments during use, even though the defendant itself did not manufacture the attachments and the defendant's tools did not themselves release fibers. In *DeLeon v. Commercial Manufacturing & Supply Co., supra,* 148 Cal.App.3d 336, plaintiff presented evidence that the defendant manufactured a bin, which, foreseeably, would have to be cleaned. The plaintiff was injured while cleaning the bin, not by the bin, but by another piece of equipment, to which the plaintiff became vulnerable during the cleaning process. The Court of Appeal found triable issues of fact on plaintiff's design defect theory, given the triable issues on whether the danger was foreseeable. (*Id.* at p. 344.) *Wright v. Stang Manufacturing Co., supra,* 54 Cal.App.4th 1218, is similar. The product, a deck gun, was useful only when installed on a fire truck, but was not designed to accommodate a safe system for attaching the product to the truck.

Under the reasoning of these cases, a manufacturer is liable in strict liability for the dangerous components of its products, and for dangerous products with which its product will necessarily be used. That was appellants' evidence; that respondents incorporated asbestos-containing products into their products and knew those products would over time be replaced with the same kind of product, and that the products were defective because they required asbestos packing and insulation, and because they had no appropriate warnings. We can see no relevance to the fact that the injury was caused by the operation of its product in conjunction with a replacement part which is no different than the original. If respondents had warned the hypothetical original user, or protected that person by avoiding defective design, subsequent users, too, would have been protected.

Again, *Taylor* is to the contrary.[9] It found that the defendants in that case were not liable for the plaintiff's injury, because the injury "did not come from [defendants'] equipment itself, but was instead released from products made or supplied by other manufacturers and used in conjunction with [defendants'] equipment," and that "[a]lthough a manufacturer *may* owe a duty to warn when the use of its product in combination with the product of another creates a potential hazard, that duty arises *only* when the manufacturer's own product causes or creates the risk of harm." (*Taylor, supra,* 171 Cal.App.4th at pp. 579-580.)

We see several flaws in this reasoning. First, because *Taylor* does not seem to distinguish between harm caused by the original packing and insulation and harm caused by replacement parts, the holding is contrary to the rule that a manufacturer is liable for the dangers of its product's components. (*Vandermark v. Ford Motor Co., supra,* 61 Cal.2d at p. 261.)

Next, *Taylor* reached its conclusion through what is in our view a misunderstanding of *Tellez-Cordova*, *DeLeon,* and *Wright*, cases which it sought to distinguish.[10]

Taylor wrote that "in *Tellez-Cordova*, the plaintiff alleged that it was the action of *respondents' tools themselves* that created the injury-causing dust. Here, in contrast, Mr. Taylor's injuries were caused not by any action of respondents' products, but rather by the release of asbestos from products produced by others. This is a key difference,

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[9] *Taylor* also engaged in an analysis under *Rowland v. Christian* (1968) 69 Cal.2d 108, and determined that those defendants were not liable under a negligence theory because they did not owe the plaintiff a duty of care. Appellants make arguments about that point, but we need not consider it, because respondents did not move for nonsuit on that ground.

[10] *Taylor* also relied on foreign state authority, companion cases *Braaten v. Saberhagen Holdings* (2008) 165 Wash.2d 373, 198 P.3d 493 and *Simonetta v. Viad Corp.* (2008) 165 Wash.2d 341, 197 P.3d 127. They suffer from the same flaws as does *Taylor*.

because before strict liability will attach, the defendant's product must 'cause or create the risk of harm.' [Citation.] Second, unlike the abrasive wheels and discs in *Tellez-Cordova,* which were not dangerous without the power of the defendants' tools, the asbestos-containing products at issue in our case were themselves inherently dangerous. It was their asbestos content – not any feature of respondents' equipment – that made them hazardous." (*Taylor, supra,* 171 Cal.App.4th at pp. 587-589, emphasis in the original.)

This analysis misunderstands the facts of *Tellez-Cordova.* The allegation in that case was that the defendant's products, although harmless (and useless) without the attachments, were harmful when used as intended. The fact that the respirable dust emanated from the attachments, not the tools, was thus irrelevant. The use of the defendant's "own product" created the harm.

Tellez-Cordova holds that a manufacturer is liable when its product is necessarily used in conjunction with another product, and when danger results from the use of the two products together. That is appellants' evidence here. Asbestos does of course have inherent dangers, but appellants' evidence was that the asbestos incorporated into (and onto) respondents' products caused injury when it was removed. In fact, there was no evidence that the asbestos packing or insulation was dangerous until it was baked on, and removed. (See *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1325 [danger is from friable asbestos].) The danger was caused by the operation of respondents' products. *Tellez-Cordova* cannot be distinguished. In that case, we observed that the use of attachments with the tools was not mere happenstance. (*Tellez-Cordova, supra,* 129 Cal.App.4th at p. 584.) Here, too, the use of asbestos, and replacement asbestos, was not happenstance. It was design.

Taylor sought to distinguish *DeLeon, supra,* 148 Cal.App.3d 336, by emphasizing that in that case, there were disputed issues of fact concerning the defendant's role in the design and location of its product. (*Taylor, supra,* 171 Cal.App.4th at pp. 589-590.) That was an issue in *DeLeon,* but it is also an issue here. Appellants presented evidence that

through the "back and forth" process of the Navy's design and procurement system, respondents substantially contributed to the design of their pumps and valves, and to the integration of those pumps and valves, with asbestos-insulated flanges, into the rest of the equipment on the *Oriskany*.

Taylor sees *Wright v. Stang Manufacturing Co., supra,* 54 Cal.App.4th 1218, as a case about foreseeable misuse of a product, or as a case about a design defect in the defendant's own product, and thus as irrelevant to the facts of *Taylor*. But the design defect in *Wright* concerned the product's fitness for use with another, necessary, product. The case is thus identical to this one. In sum, we believe that *Taylor* was wrongly decided, and that nonsuit here was wrongly granted.

3. Warren's Nonsuit Motion

Warren also moved for nonsuit on the theory that there was no evidence from which a jury could conclude that Patrick O'Neil had been exposed to asbestos from its products. That was not a ground for the trial court ruling, Warren again urges the theory on appeal.[11] We find sufficient evidence to defeat nonsuit. Appellants presented evidence that Warren pumps were aboard the *Oriskany*, that the pumps used asbestos for insulation and packing, that removal of the asbestos and packing when the pumps were serviced created dust, and that O'Neil was in the machine rooms when the pumps were serviced. That is a circumstantial case that O'Neil was exposed to asbestos from Warren products, and a circumstantial case is enough. *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409 [evidence that the defendant was the exclusive distributor of

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[11] Appellants argue that because Warren failed to obtain a ruling on the issue, it may not raise it on appeal. There is a split of authority on the question (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1328, fn. 8), but we need not add to the length of this long opinion by delving into it, because even if the issue is considered, Warren was not entitled to nonsuit on this ground. At the same time, we reject Warren's contention that appellants waived this issue by failing to raise it in their opening brief. Because the court made no ruling on the question, we do not see that appellants were obliged to raise the issue in their opening brief.

certain asbestos insulation in the relevant geographical area and supplied about half of the asbestos insulation to the refinery where the plaintiff worked for many years, and that the plaintiff worked with and around asbestos insulation at the refinery, was sufficient].)

Disposition

The judgment is reversed. Appellants to recover costs on appeal.

CERTIFIED FOR PUBLICATION

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

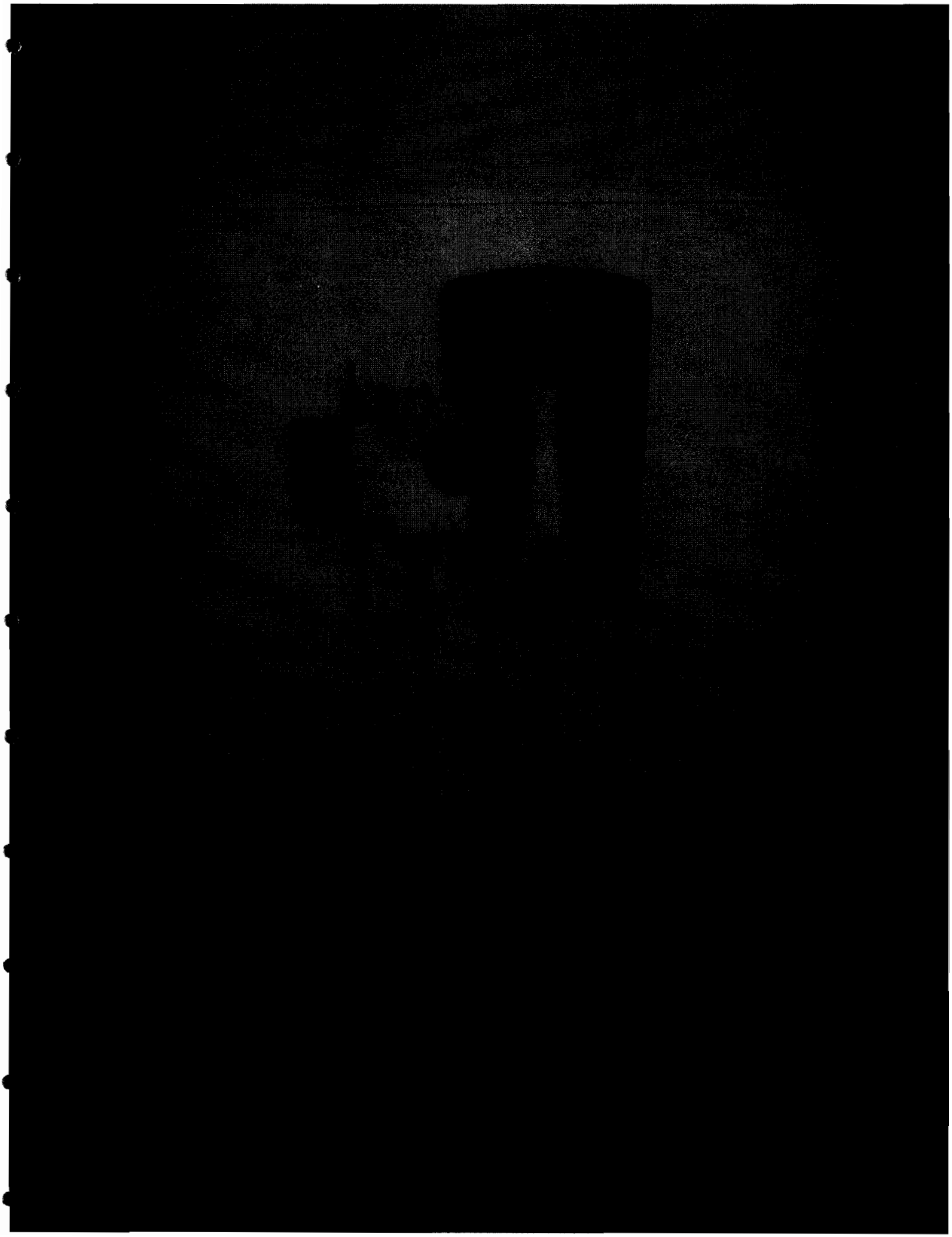
KRIEGLER, J.

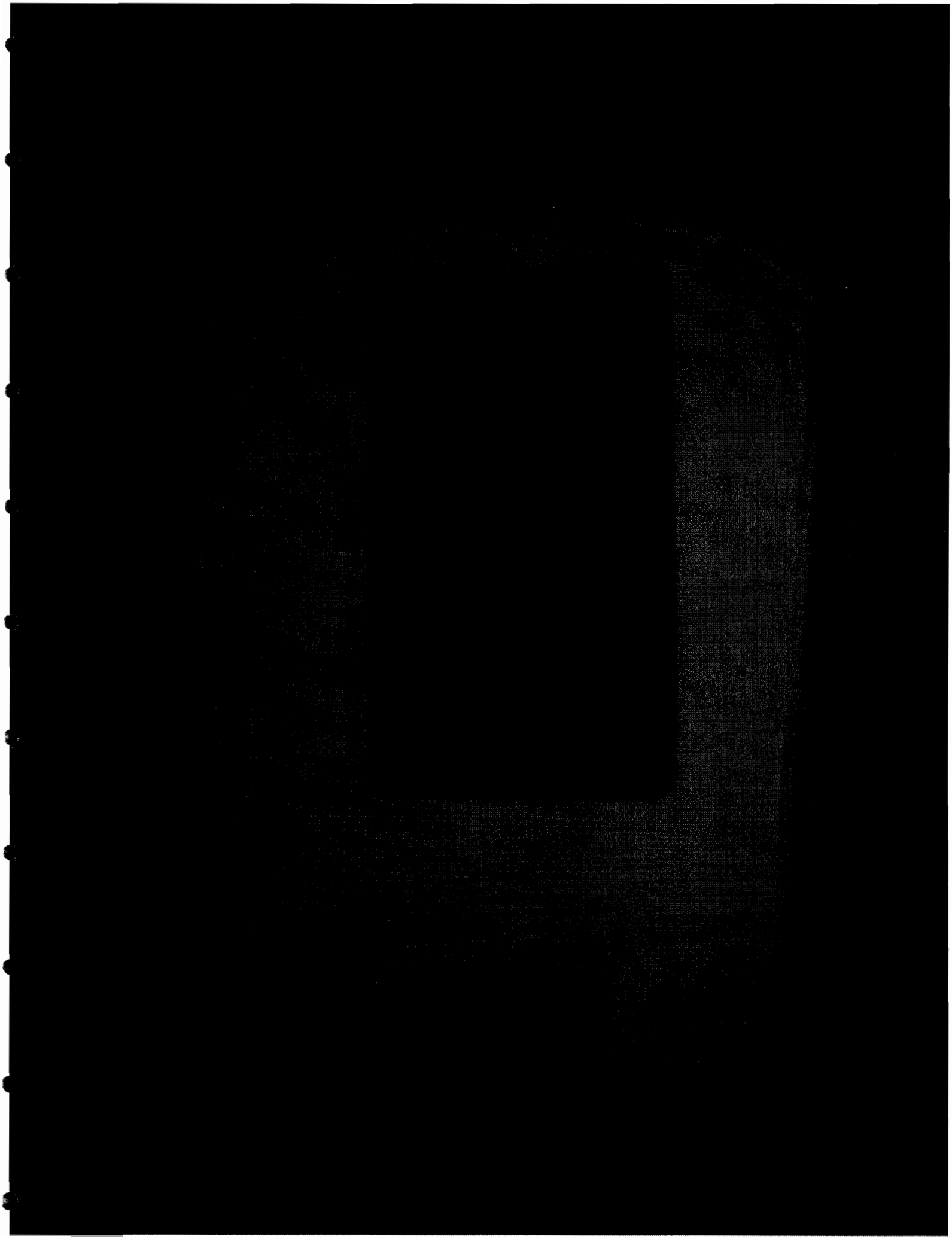
Appendix 2

O'Neil Defense Trial Exhibit 5405

Identified as a Warren steam reciprocating / bilge pump
and admitted into evidence on February 6, 2008.
(See 14 RT 2540-2541; see also 15 RT 2715-2716.)

Attached pursuant to Rule of Court 8.504(e)(1)(B), for the Court's
reference as a reasonably typical example of the pumps at issue.
This is the type of Warren pump being "worked on" (in some way)
the only time that Plaintiffs' sole eyewitness on exposure
could remember Mr. O'Neil being anywhere in the vicinity
(See 11 RT 1933-1935.)





Barbara J. O'Neil, et al. v. Buffalo Pumps, Inc., et al.
Supreme Court of California, Action No. _____
California Court of Appeal, Second Appellate District, Div. 5, Action No. B208225
Los Angeles County Superior Court, Action No. BC360274

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On October 28, 2009 I served the enclosed:

WARREN PUMPS, LLC'S PETITION FOR REVIEW

on the following interested party(s) in said cause:

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The Honorable Elihu Berle c/o Clerk of Court Los Angeles County Superior Court Stanley Mosk Courthouse 111 North Hill Street Los Angeles, CA 90012	*1 Copy*

Court of Appeal
Second Appellate District, Div. 5
Attn: Clerk of Court
300 S. Spring Street, 2nd Fl., N. Tower
Los Angeles, CA 90013

1 Copy

Via Mail by enclosing a true and correct copy thereof in a sealed envelope and, following ordinary business practices, said envelope was placed for mailing and collection in the offices of Carroll, Burdick & McDonough LLP in the appropriate place for mail collected for deposit with the United States Postal Service. I am readily familiar with the Firm's practice for collection and processing of correspondence/documents for mailing with the United States Postal Service; they are deposited with the United States Postal Service in the ordinary course of business on the same day.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 28, 2009 at San Francisco, California.

Stephanie Ferrell