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SUPREME COURT COPY

January 7, 2011

Via Overnight Delivery

Chief Justice Cantil-Sakauye and
Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

SUPREME COURT
FILED
JAN 10 2011
Frederick K. Ohlrich Clerk
Deputy

RE: *O'Neil v. Crane Co., et al.*
Case No. S177401

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Plaintiffs and Appellants Barbara O'Neil, et al. respectfully invite this Court's attention to recently published authority bearing directly on the issue pending before this Court, to wit, whether a manufacturer is responsible for foreseeable dangerous combinations of its own product and products supplied by others. The attached Opinions & Orders are from companion cases in the Southern District of New York, *Curry v. American Standard, et al.*, Case No. 7:08-CV-10228 and *Gitto v. A.W. Chesterton, et al.* Case No. 7:07-CV-04771, and directly address the issue before this court.

The court denied the defendant manufacturers' motions for summary judgment, concluding that "a manufacturer's liability for third-party produced component parts must be determined by the degree to which injury from the component parts is foreseeable to the manufacturer." (*Curry*, Opn, p. 3; *Gitto*, Opn. p. 3.) The *Curry* and *Gitto* cases address authorities cited and discussed by Appellants and Respondents in this matter, *Rastelli v. Goodyear Tire & Rubber Co.* (N.Y. 1992) 591 N.E.2D 222 and *Berkowitz v. A.C. & S., Inc.* (N.Y. App.Div. 2001) 288 A.D.2d 148, and reconciled the "divergent holdings" of the *Rastelli* and *Berkowitz* cases "as resting on consistent application of the same foreseeability principle." (*Id.*, p. 2-3.)

WATERS, KRAUS & PAUL ATTORNEYS AND COUNSELORS
LOS ANGELES: 222 NORTH SEPULVEDA BOULEVARD SUITE 1900 EL SEGUNDO, CALIFORNIA 90245 TEL 310 414 8146 FAX 310 414 8156
SAN FRANCISCO: 711 VAN NESS AVENUE SUITE 220 SAN FRANCISCO, CALIFORNIA 94102 TEL 800 226 9880 FAX 214 777 0470
BALTIMORE: 315 NORTH CHARLES STREET BALTIMORE, MARYLAND 21201 TEL 410 528 1153 FAX 410 528 1006
DALLAS: 3219 McKINNEY AVENUE DALLAS, TEXAS 75204 TEL 214 357 6244 FAX 214 357 7252

Plaintiffs attach copies of the *Curry* and *Gitto* cases hereto for the Court's convenience.

Very truly yours,

Paul C. Cook
Attorney for Plaintiffs and Appellants
Barbara O'Neil, et al.

cc: See Attached Service List

EXHIBIT

A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL CURRY, *et al.*, Plaintiffs, v. AMERICAN STANDARD, *et al.*, Defendants.	CASE NO. 7:08-CV-10228 OPINION & ORDER [Resolving Doc. Nos. 29, 34]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this asbestos-related personal injury case, Defendant Crane Co. moves for summary judgment on the issue of Crane's liability for asbestos-containing products used in conjunction with its own. [Doc. 29.] Crane also objects to this matter being set for trial prior to the resolution of its summary judgment motion. [Doc. 34.] For the following reasons, the Court **DENIES** Defendant Crane's motion for summary judgment and **DENIES** Crane's request to reschedule trial.

Upon remand to this Court from the Eastern District of Pennsylvania Multi-District Litigation Court, Judge Eduardo C. Robreno reserved summary judgment on the issue of Crane's liability for third-party asbestos-containing products. *Curry v. Am. Std.*, No. 2:09-CV-65685, Doc. 59 at 12 (E.D. Pa.). Judge Robreno otherwise denied Crane's motion for summary judgment, finding a genuine issue of material fact as to whether Crane packing and insulation caused Curry's injuries. *Id.* at 9.

Plaintiff Michael Curry, now deceased, developed mesothelioma while serving on the USS

Kitty Hawk, where he worked as a fireman apprentice and a boiler man striker for the United States Navy beginning in 1963. Curry's duties included cleaning and repairing certain machinery aboard the Kitty Hawk, including valves and operating pumps. Curry testified that in the course of these duties, he was repeatedly exposed to the asbestos-containing products, primarily when he opened up valves to replace gaskets or packing material. Curry added that the Kitty Hawk contained "thousands of valves," the majority of which Defendant Crane manufactured. [Doc. 29-4 at 20.]

Crane says it is not legally responsible for any gaskets, packing, or insulation that the Navy applied or affixed to Crane valves post-sale. [Doc. 29.] Crane urges that this Court apply the New York Court of Appeals holding in *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E. 222 (N.Y. 1992), to relieve the company of liability for asbestos-containing component parts used with Crane valves, but not manufactured or installed by Crane itself. In *Rastelli*, the New York Court of Appeals declined to hold a tire manufacturer liable for injury resulting from a defective rim produced and installed by another manufacturer. In so holding, the court noted that the manufacturer "had no role in placing that rim in the stream of commerce, and derived no benefit from its sale." *Id.* at 298.

However, in *Berkowitz v. A.C. & S., Inc*, 288 A.D.2d 148 (N.Y. App. Div. 2001), the New York Appellate Division held that a pump manufacturer could be liable for asbestos-containing insulation manufactured and installed by third parties, where the manufacturer knew that insulation, were it to be used on the pump, would be made of asbestos. Crane characterizes *Rastelli* and *Berkowitz* as directly opposed, and *Rastelli* as necessitating a dismissal of claims against Crane. However, the Court views these divergent holdings as resting on consistent application of the same foreseeability principle.

The Court thus finds that a manufacturer's liability for third-party component parts must be determined by the degree to which injury from the component parts is foreseeable to the manufacturer. Accordingly, the issue of Crane's liability for third-party component products rests in the degree to which Crane could or did foresee that its own products would be used with asbestos-containing components. Where Crane's products merely could have been used with asbestos-containing components, the New York Court of Appeals holding in *Rastelli* cautions against imposing liability. Yet where, as in *Berkowitz*, Crane meant its products to be used with asbestos-containing components or knew that its products would be used with such components, the company remains potentially liable for injuries resulting from those third-party manufactured and installed components.

Crane acknowledges that its valves originally included gaskets and packing that contained asbestos. It further admits that these component parts would at times require repair or replacement. [Doc. 29 at 2, n.3.] In opposition to the Defendant's original motion for summary judgment, filed in the Eastern District of Pennsylvania, the Plaintiff proffered the expert testimony of Arnold Moore, a retired navy engineer. *Curry*, No. 2:09-CV-65685, Doc. 32-3 (E.D. Pa.). Moore testified about the normal industry practice at the time of Curry's employment at the Brooklyn Naval Yard. Moore states that it was normal industry practice for the bodies of Crane's valves to be insulated in asbestos and that the flanged connections to those valves normally contained gaskets with asbestos content. *Id.* Further supporting the point that Crane knew that its valves would be matched with asbestos is Crane's own product catalog. *Curry*, No. 2:09-CV-65685, Doc. 31-5 (E.D. Pa.). This catalog contains a section listing asbestos containing insulating materials produced by Johns-Manville for use with Crane's valves and also lists Crane's own brand of asbestos containing gaskets and packing. *Id.*

Case No. 7:08-CV-10228
Gwin, J.

The Court finds that the Plaintiff has proffered sufficient evidence to create a triable issue of material fact regarding whether it was foreseeable that Crane's valves would be used with asbestos-containing component parts. Accordingly, this Court **DENIES** Crane's motion for summary judgment. Furthermore, because the Court has now decided the remaining issue on summary judgment, it finds no reason to continue the trial date and **DENIES** Crane's objection to the scheduling order as moot.

IT IS SO ORDERED.

Dated: December 6, 2010

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SALVATORE GITTO, *et al.*, Plaintiffs, v. A.W. CHESTERTON, *et al.*, Defendants.	CASE NO. 7:07-CV-04771 OPINION & ORDER [Resolving Doc. Nos. 40, 42]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this asbestos-related personal injury case, Defendant Crane Co. moves for summary judgment on the issue of Crane's liability for asbestos-containing products used in conjunction with its own products. [Doc. 40.] Crane also objects to this matter being set for trial prior to the resolution of its summary judgment motion. [Doc. 42.] For the following reasons, the Court **DENIES** Defendant Crane's motion for summary judgment and **DENIES** Crane's request to reschedule trial as moot.

Upon remand to this Court from the Eastern District of Pennsylvania Multi-District Litigation Court, Judge Eduardo C. Robreno reserved summary judgment on the issue of Crane's liability for third-party asbestos-containing products. *Gitto v. A.W. Chesterton Co. Inc.*, No. 2:07-CV-73417, Doc. 98 at 1 (E.D. Pa.). Judge Robreno otherwise denied Crane's motion for summary judgment, finding a genuine issue of material fact as to whether Crane packing and insulation caused Curry's injuries. *Id*, Doc. 96 at 7-8.

Plaintiff Salvatore Gitto, now deceased, developed mesothelioma as a result of exposure to

asbestos while employed by the United States Navy as a shipfitter mechanic and shipbuilding and hull machinery inspector. Gitto was employed as a shipfitter from 1951 to 1996 and spent the majority of his time working at the Brooklyn Navy Yard. Gitto was responsible for building the structural foundation of new ships, as well as performing structural repairs on re-commissioned older vessels. Specifically, he spent a great deal of time removing asbestos-containing insulation and piping and was also present while other tradesman installed new piping and insulation. Specific to Crane and other valve manufacturers, Gitto also recalls building foundations for valves and was present when old valves were broken down. *Id.*, Doc. 93 at 1-9, Doc, 96 at 2-4.

Crane says it is not legally responsible for any gaskets, packing, or insulation that the Navy applied or affixed to Crane valves post-sale. [Doc. 40 at 2.] Crane urges that this Court apply the New York Court of Appeals holding in *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992), to relieve the company of liability for asbestos-containing component parts used with Crane valves, but not manufactured or installed by Crane itself. In *Rastelli*, the New York Court of Appeals declined to hold a tire manufacturer liable for injury resulting from a defective rim produced and installed by another manufacturer. In so holding, the court noted that the manufacturer "had no role in placing that rim in the stream of commerce, and derived no benefit from its sale." *Id.* at 298.

However, in *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148 (N.Y. App. Div. 2001), a New York Appellate Division court held that a pump manufacturer could be held liable for asbestos-containing insulation manufactured and installed by third parties, where the manufacturer knew that insulation, were it to be used on the pump, would be made of asbestos. Crane characterizes *Rastelli* and *Berkowitz* as directly opposed, and *Rastelli* as necessitating a dismissal of claims against Crane.

However, the Court views these divergent holdings as resting on consistent application of the same foreseeability principle.

The Court thus finds that a manufacturer's liability for third-party produced component parts must be determined by the degree to which injury from the component parts is foreseeable to the manufacturer. Accordingly, the issue of Crane's liability for third-party component products rests on the degree to which Crane could or did foresee that its own products would be used with asbestos-containing components. Where Crane's products merely could have been used with asbestos-containing components, the New York Court of Appeals holding in *Rastelli* cautions against imposing liability. Yet where, as in *Berkowitz*, Crane meant its products to be used with asbestos-containing components or knew that its products would be used with such components, the company remains potentially liable for injuries resulting from those third-party manufactured and installed components.

Crane acknowledges that its valves originally included gaskets and packing that contained asbestos. *Gitto*, No. 2:07-CV-73417, Doc. 62-6 at 12 (E.D. Pa.). Crane further admits that these component parts would eventually require repair or replacement. *Curry v. American Standard*, No. 08-CV-10228, Doc. 29 at 2, n.3, (S.D.N.Y.). In opposition to the Defendant's original motion for summary judgment, filed in the Eastern District of Pennsylvania, the Plaintiff proffered the expert testimony of Arnold Moore, a retired navy engineer. *Gitto*, No. 2:07-CV-73417, Doc. 62-4 (E.D. Pa.). Moore testified about the normal industry practice at the time of Gitto's employment at the Brooklyn Naval Yard. Moore states that it was normal industry practice for the bodies of Crane's valves to be insulated in asbestos and that the flanged connections to those valves normally contained gaskets with asbestos content. *Id.* Further supporting the point that Crane knew that its valves would be matched with asbestos is Crane's own product catalog. *Gitto*, No. 2:07-CV-73417,

Doc. 62-7 at 12 (E.D. Pa.). This catalog contains a section listing asbestos containing insulating materials produced by Johns-Manville for use with Crane's valves and also lists Crane's own brand of asbestos containing gaskets and packing. *Id.*

The Court finds that the Plaintiff has proffered sufficient evidence to create a triable issue of material fact regarding whether it was foreseeable that Crane's valves would be used with asbestos-containing component parts. Accordingly, the Court **DENIES** Crane's motion for summary judgment. Furthermore, because the Court has now decided the remaining issue on summary judgment, it finds no reason to continue the trial date and **DENIES** Crane's objection to the scheduling order as moot.

IT IS SO ORDERED.

Dated: December 7, 2010

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am over eighteen years of age and not a party to the within action; my business address is 222 North Sepulveda Boulevard, Suite 1900, El Segundo, California. I am employed in Los Angeles County, California.

On January 7, 2011, I caused a copy of the following document:

Copy of the Correspondence sent to the Justices of the California Supreme Court re Judicial Notice of Recently Published Authority

in this action by placing the true and correct copies thereof enclosed in sealed envelopes addressed as stated as follows:

☒ (By Overnight Express Courier)

OVERNITE EXPRESS: (CCP §§1013(c), 2015.5)

By placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery by Overnite Express Courier Service as part of the ordinary business practices of Waters, Kraus & Paul described below, addressed to Defendant's counsel.

SEE ATTACHED LIST

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at El Segundo, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

Executed on January 7, 2011, at El Segundo, California.

Annie Caserma
Paralegal

Patrick James O'Neil vs. Crane Co.

Supreme Court S177401

W&K File No. 06-0076-

Plaintiff's Service List

Warren Pumps, LLC
Hepler, Laurie J.
CARROLL, BURDICK & MCDONOUGH LLP
44 Montgomery
Suite 400
San Francisco, CA 94104
Tel: 415-989-5900 Fax: 415-989-0932
CA Speed Dial 125

Crane Co.
Cutting, Curt
HORVITZ & LEVY, LLP
15760 Ventura Blvd.
18th Floor
Encino, CA 91436-3000
Tel: 818-995-0800 Fax: 818-995-3157

Crane Co.
Feyder, Robert E.
K&L GATES LLP
10100 Santa Monica Blvd., 7th Floor
Los Angeles, CA 90067
Tel: 310-552-5000 Fax: 310-552-5001
CA Speed Dial 118

Ehrlich, Jeffrey Isaac
THE EHRLICH LAW FIRM
411 Harvard Ave.

Claremont, CA 91711
Tel: 909-625-5565 Fax: 909-625-5477
