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SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA J. O'NEIL, Individually and as successor in interest to PATRICK J. O'NEIL, Deceased, MICHAEL P. O'NEIL, and REGAN K. SCHNEIDER,

Plaintiffs and Appellants,

vs.

CRANE CO. and WARREN PUMPS, LLC,

Defendants and Respondents.

CRC 8.25(b)
SUPREME COURT
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After A Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B208225

APPELLANTS' ANSWER TO WARREN PUMPS, LLC AND CRANE CO.'S PETITIONS FOR REVIEW

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ANSWER TO PETITIONS FOR REVIEW

Plaintiffs and Appellants BARBARA J. O'NEIL, individually and as successor in interest to PATRICK J. O'NEIL (Deceased), MICHAEL P. O'NEIL and REGAN K. SCHNEIDER (collectively "O'Neil" or "Appellants"), submit this Answer to the Petitions for Review filed by Defendants and Respondents CRANE CO. ("Crane") and WARREN PUMPS, LLC ("Warren") (collectively "Petitioners").

I. RESPONSE TO ISSUES PRESENTED

Petitioners urge this Court to grant review to resolve a conflict among the districts of the Court of Appeal, between the decision of Division Five of the First District in *Taylor v. Elliott Turbomachinery* (2009) 171 Cal.App.4th 564, and the decision of Division Five of the Second District in *O'Neil v. Crane Co.* (2009) 177 Cal.App.4th 1019. Petitioner Crane states the issue to be reviewed is "the scope of a defendant manufacturer's liability for the products of others for which the defendant is outside the chain of distribution." (Crane Petition, p. 1.) The issue according to Petitioner Warren is whether a product manufacturer may be held "...liable for harm caused when the purchaser incorporates replacement parts, or affixes new parts, made and supplied by third parties[.]" (Warren Petition, p. 1.)

These statements of the issue are intended to preordain the answer desired by Petitioners if review is granted.[1] Petitioners claim that Mr. O'Neil's exposures to deadly asbestos fibers in and on Petitioners' products, products that were designed to use asbestos, were supplied with asbestos, and that

[1] Pursuant to Rule 8.504(b), "the petition must begin with a concise, *non-argumentative* statement of the issues presented for review...." (Emphasis added.)

Petitioners knew would operate with asbestos, is the fault of Petitioners' customer (the Navy), and the manufacturers of the asbestos materials that were necessary to the operation of Petitioners' high temperature equipment. Petitioners' statements of the issue omit any mention of their own designs, participation, and knowledge of the use of asbestos with their equipment. As will be seen, Petitioner Crane's statement of the issue also attempts to apply a strict liability concept intended to define the scope of strict liability for non-manufacturing entities, such as retailers and distributors (the "chain of distribution" rationale), and stretch this concept to product manufacturers and to negligence theories.

Contrary to Petitioners' statements of the issue, Petitioners' conduct, designs and knowledge of the use of asbestos are at issue here. The issue, properly stated, is whether there is any sound policy reason to create an exception for product manufacturers for injuries caused by the foreseeable use (or misuse) of their products, under strict liability principles or negligence principles, where (1) the manufacturer designs or supplies its products with dangerous asbestos parts, and those original parts wear out and are replaced with identical dangerous asbestos parts, or (2) where the manufacturers' equipment requires dangerous products supplied by others to operate, and the combined use of the products creates a danger to the user?

II. IF REVIEW IS GRANTED, THIS COURT SHOULD ORDER *O'NEIL* REMAIN PUBLISHED PENDING REVIEW

Petitioners rely on Rule 8-500 (b)(1) of the California Rules of Court as grounds for review, which provides that the Supreme Court "may" order review "[w]hen necessary to secure uniformity of decision or to settle an important question of law[.]" It is readily apparent that the *O'Neil* decision is

in conflict with the *Taylor* decision, directly so on the theory of failure to warn. Significantly, the holdings of *O'Neil* and *Taylor* are not in conflict on the issue of design defect, a wholly independent theory of liability.[2] *O'Neil* and *Taylor* fundamentally differ with respect to whether the "stream of commerce" rationale, which defines the scope of strict liability for non-manufacturing entities that have participated in bringing defective products to market, has any application to cases, such as this one, in which the manufacturers' product combines with products of another to cause the plaintiff's injury. *O'Neil* and *Taylor* also diverge on the application of the "component part" defense, a difference which can be traced in large part to Petitioners' misstatement of the facts regarding their participation in designing their products for specific purposes, and in providing detailed instructions for the intended use of their products.

O'Neil and *Taylor* present a lack of uniformity in the decisions of the Court of Appeal, on an issue of recurring importance in asbestos litigation. If this Court exercises its discretionary power to grant review of the *O'Neil* decision, Mrs. O'Neil requests this court exercise its authority under Rule 8.1105(e)(1) and (2) to order that, while this matter is pending review, the

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[2] *Taylor* expressly declared that it was not deciding the issue of design defect, whereas the *O'Neil* decision squarely held that a manufacturer may be responsible for designing a product to be used with dangerous products supplied by others. (Compare *Taylor, supra,* 171 Cal.App.4th at 577 ["Under California law, strict products liability has been invoked for three types of product defects: (1) manufacturing defects, (2) design defects, and (3) 'warning defects.' We are here concerned solely with the third category, which applies to "products that are dangerous because they lack adequate warnings or instructions.'"]; with *O'Neil, supra,* 177 Cal.App.4th at 1036 ["…the use of asbestos, and replacement asbestos, was not happenstance. It was design."].)

O'Neil decision remain published.[3] The fortuitous fact that *Taylor* was first in time, by a matter of seven months, does not make it the better reasoned decision, but granting review of the *O'Neil* decision while leaving *Taylor* published will, in effect, give it that status. Although a petition for review of the *Taylor* decision was denied, an order denying review has no precedential value, (*Trope v. Katz* (1995) 11 Cal.4th 274, fn. 1), and there was no conflict in the law when that petition was considered, as there is now.

Depublication of *O'Neil* pending review will result in an imbalance in the law, and an inequitable hardship on mesothelioma victims, exposed in circumstances similar to the *O'Neil* and *Taylor* plaintiffs, who are and will be actively litigating their claims while any review is pending. The *Taylor* opinion, as Mrs. O'Neil explains below, is out of step with pre-existing California authority, and if the *O'Neil* decision is correct, *Taylor* is "wrongly decided." (*O'Neil, supra,* 177 Cal.App.4th at 1037.) Until this Court decides which presents the better reasoned view, this Court should not allow depublication of the *O'Neil* decision, leaving *Taylor* as the only published authority. If this Court were to ultimately decide *Taylor* is wrong, and *O'Neil* is correct, the interim period during which review is pending will lead to scores of incorrect judgments and needless appeals. Mesothelioma is a fatal disease and its victims cannot survive extended trial and appellate proceedings that would be necessary to reverse a judgment entered by a trial court bound to follow the *Taylor* decision. This Court has recognized that mesothelioma is "inevitably fatal," has "no known cure", and that "average survival time is less

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[3] Rule 8.1105(e)(1) provides that, "*[u]nless otherwise ordered* under (2), an opinion is no longer considered published if the Supreme Court grants review…." (Emphasis added.) Rule 8.1105(e)(2) provides that "[t]he Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review."

than a year" from diagnosis. (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal. 4th 1127, 1136.) By ordering that *O'Neil* remain published during any review, trial courts will have the ability to follow the *O'Neil* decision, including its holding on design defect (for which there is no conflict), and avoid potential waste of judicial resources. Given the split of authority, a trial court might also decide to follow *Taylor.* (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

If, on the other hand, *O'Neil* is depublished pending review, the hands of the trial court and litigants will be tied, and will be obligated to follow a decision which, as Appellants contend and as *O'Neil* held, is an incorrect statement of the law. At the very least, prior to any decision of this Court, it is uncertain if *Taylor* is correct, having been questioned by another court of co-equal authority. Though the role of this Court is to resolve such uncertainties, depublication of *O'Neil* will effectively sanction the *Taylor* view as the law to be followed by California trial courts, despite its uncertain status. If review is granted, this Court should order that *O'Neil* is to remain published, to avoid giving a preference to one side of an undecided issue. [4]

III. LEGAL DISCUSSION

A. *O'Neil* Is Consistent With Precedent From This Court And the Court of Appeal, Under Which a Manufacturer Is Strictly Liable For Foreseeable Uses (And Misuses) Of Its Product Which Cause Injuries

The liability which was recognized by the *O'Neil* court was based on application of long-standing strict liability principles, under which product

[4] Imbalance in the law caused by depublication of *O'Neil* pending review may also be avoided by an order depublishing the *Taylor* decision. Although there is a 30-day time limit on requests for depublication of an opinion (Rule 8.1125(a)(4)), there is no time limit on this Court's authority to order depublication of an opinion on its own motion. (Rule 8.1125(c)(2).)

manufacturers are held liable for injuries caused by the foreseeable use and misuse of their products, and for defective components that are manufactured by others and incorporated into the manufacturers' product. (*O'Neil* Opn. p. 16, citing *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733; *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 261.)

Under these principles, the liability of Petitioners for the asbestos supplied with its products was undeniable, and conceded by Petitioners. Petitioners readily concede that they have a responsibility to warn and safely design their products so that any sailor who works on the asbestos originally supplied with the equipment is not injured. Under the Petitioners' contention, however, as soon as that sailor is done with his repairs, in which the original asbestos components are replaced, their duty evaporates and the very next sailor to work on that same piece of equipment is owed no duty. The *O'Neil* court rightly rejected the Petitioners' claim that the result should be different because the asbestos parts they supplied with their equipment wore out and were replaced with identical asbestos replacement parts, having the "same dangerous propensities as the original parts." (O'Neil, Opn. p. 17.) Petitioners gave the *O'Neil* court no reason or authority for terminating their liability "at the point in time at which their products were subject to predictable and ordinary maintenance or repair." (*O'Neil,* Opn. p. 16.) *O'Neil* also rejected the contention that Petitioners had no liability for the asbestos insulation and gaskets which were necessary to the operation of their equipment, citing to Court of Appeal authorities which Petitioners are unable to distinguish. (*O'Neil,* Opn. p. 18, citing *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577; *DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336 and *Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218.)

The *O'Neil* decision is consistent with a long line of California authority holding manufacturers strictly liable for injuries caused by the foreseeable uses of their products, including circumstances in which the manufacturer's product is combined with products supplied by others,[5] subjected to foreseeable misuse,[6] foreseeable alterations,[7] and foreseeable negligence of intervening actors and users.[8] This Court has long recognized that the overriding purpose of strict liability is "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63-64.) This Court held that to establish the manufacturer's liability "it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use." (*Ibid;* see also *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 126-130 ["A manufacturer, distributor, or retailer is liable in tort if a defect in the

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[5] *Vandermark v. Ford Motor Co., supra*, 61 Cal.2d 256, 261; *Tellez-Cordova, supra*, 129 Cal.App.4th 577; *DeLeon, supra,* 148 Cal.App.3d 336 ; *Wright, supra*, 54 Cal.App.4th 1218; *Gehl Brothers Manufacturing Co. v. Superior Court* (1986) 183 Cal.App.3d 178.

[6] *Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833-834.

[7] *Torres v. Xomox* (1996) 49 Cal.App.4th 1, 19; *Thompson v. Package Mach. Co.* (1972) 22 Cal. App. 3d 188, 196; *Thomas v. General Motors* (1971) 13 Cal.App.3d 81; *Putensen v. Clay Adams, Inc.* (1970) 12 Cal. App. 3d 1062, 1076.

[8] *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560; *Huynh v. Ingersoll-Rand, supra,* 16 Cal.App.4th 825, 833-834; *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7, overruled on other grounds, *Soule, supra,* 8 Cal.4th at 580.

manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way."].)

Foreseeability of product use was incorporated into the definition of design defect when this Court addressed that issue in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, where the Court set forth the alternative tests for product defect, risk/benefit or consumer expectations:

> [A] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

(*Barker v. Lull Engineering Co., supra,* 20 Cal.3d 413, 432.)

This Court has also recognized that a product manufacturer's responsibility to design a safe product includes the duty to make the product safe for use in circumstances in which a dangerous condition is created by foreseeable negligence of others. Car manufacturers, for instance, are obligated to make their cars "crashworthy," because accidents, caused by the negligence of others, are foreseeable. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560.)

With respect to warning defects, the duty to warn extends to dangers that are known or knowable to a defendant manufacturer, and "a failure to give adequate warnings might subject a manufacturer or distributor to strict liability when it knew or should have known of the danger and the necessity of warnings to ensure safe use." (*Anderson v. Owens-Corning Fiberglas Corp.*

(1991) 53 Cal.3d 987, 996-997.)

A manufacturer must anticipate the realities of the use of its product and anticipate what may happen when its product is subjected to real world stressors and use by third parties and users – not just its pristine, theoretical "function" that would exist in a laboratory. Thus there are circumstances beyond the direct control of the manufacturer, including foreseeable negligence of users and others, which the manufacturer must nevertheless anticipate in designing and marketing its products. A manufacturer may not divorce itself from the components that are part of the intended function of its product. Petitioners here insist that the only aspect of its products that may be considered is the bare metal of the pumps and valves, and that the gaskets, packing and insulation that were originally included and were necessary for the products' operation should be ignored. (*See, e.g.*, Crane Petition, pp. 1-2 [claiming that *O'Neil* "extended the strict liability of a product manufacturer beyond injuries caused by its own product, to injuries caused by a separate product…."]; Warren Petition, p. 2.) In this, Petitioners ignore the teachings of this Court, directing that the issue of product defect must take into consideration the product "as a whole," taking into account the product's intended operation, in its installed and operative state:

> Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop. Similarly, a product's components are not developed in isolation, but as part of an integrated and interrelated whole.….
>
> The danger of piecemeal consideration of isolated components has been expressly recognized. Specifically, it has been observed that a design rendered safe in one situation may become more dangerous in others. However phrased, these decisions emphasize the need to consider the product as an integrated whole.

(*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 746-747.)

In *DeLeon v. Commercial Mfg. & Supply Co., supra*, 148 Cal.App.3d 336, the Court of Appeal considered the issue of whether a product could be considered defective because it caused another product to be dangerous. Defendant in that case manufactured a bin to be used in a canning factory. The bin operated flawlessly during the canning process; however, when cleaning and maintenance were required, the proximity of the bin to a pre-existing rotating line shaft posed a hazard to the worker cleaning the bin if the worker chose to climb onto the conveyor belt to hose down the bin. Reversing a summary judgment for defendant, the Court of Appeal noted that plaintiff had the burden of showing that the bin was defective and that his injury was caused by the defect. (*Id.* at 343.) The Court held, however, that a triable issue of fact regarding product defect was presented by evidence that the bin, although not dangerous in itself, created an excessive amount of preventable danger because of its proximity to the line shaft. (*Id.* at 344.) Quoting this Court's opinion in *Cronin*, the Court stated, "The design and manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use." (*Id.*, quoting *Cronin, supra*, 8 Cal.3d 121, 126.)

In *Huynh v. Ingersoll-Rand, supra,* 16 Cal.App.4th 825, the plaintiff was injured when he was using the defendant's grinder with another manufacturer's abrasive disc, and the disc exploded, injuring the plaintiff. The trial court granted summary judgment in favor of the grinder manufacturer on the basis that defendant's vague warning was adequate. On appeal, the Court of Appeal reversed, having no trouble in finding that defendant Ingersoll-Rand was required to warn of the hazards in using certain abrasive discs made by other manufacturers, and that the adequacy of the defendant's vague warning regarding the hazards of defects in another manufacturer's abrasive discs was a triable issue of fact. (*Id.* at 833- 834.) There was no question that defendant

Ingersoll-Rand had a duty to warn about the hazards presented by products made by other manufacturers and used with Ingersoll-Rand's grinders.

In *Wright v. Stang Manufacturing Co., supra*, 54 Cal.App.4th 1218, the plaintiff, a fireman, was injured when a deck-mounted water cannon manufactured by the defendant broke off its mounting risers during use. The trial court granted summary judgment for the defendant manufacturer of the water cannon on the ground that the cause of the accident was the corrosion and failure of the risers, which were part of the deck of the fire engine and not a part supplied by the defendant manufacturer of the cannon. On appeal, citing *DeLeon* and *Huynh*, the Court of Appeal found that there was a triable issue of fact that the defendant had a duty to warn of the risk posed by the action of the water cannon on the risers, even though defendant did not manufacture the risers. (*Wright, supra*, 54 Cal.App.4th at 1232-1236.)

In *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co., supra*, 129 Cal.App.4th 577, plaintiff developed a respiratory disease caused by dust given off by the abrasive wheels and discs used with a power grinder manufactured by defendant. He sued, alleging that defendant failed to warn of this hazard. Defendants demurred, arguing that the immediate cause of harm was the action of the abrasive wheels and discs on the metal parts on which plaintiff was working, and that "California has a bright-line rule that a manufacturer's duty to warn is restricted to its own products." (*Id.* at 581.) The trial court sustained defendant's demurrer without leave to amend. On appeal, the Court of Appeal reversed, rejecting the argument that defendants were merely the manufacturers of a "component." The Court held,

> Under this complaint, 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-indeed, under

> the allegations of the complaint, as they must be used.

(*Id.* at 583.)

In *Gehl Bros. Mfg. Co. v. Superior Court, supra,* 183 Cal.App.3d 178 the plaintiff was injured when his clothing was caught on the extended rotating shaft of a wagon-mounted forage unloader. The three defendants sued on products liability theories were the manufacturer of the farm wagon, the manufacturer of a forage unloader box, and the distributor of the finished product. Plaintiff settled with the manufacturer of the wagon for a nominal amount. Reviewing and reversing the determination that the settlement was in good faith, the Court of Appeal stated,

> [W]ithout assigning proportionate liabilities, it is also clear that *all of these defendants,* as co-fabricators of a finished product, have *potential* design defect and duty-to-warn liabilities, the extent of which must be resolved by the trier of fact.

(*Id.* at 184-185 (emphasis original).) Accordingly, the Court held that the wagon manufacturer could not escape with a nominal settlement payment in light of its potential substantial liability.

The *O'Neil* decision is a principled application of these precedents. Liability was recognized here because the metal valves and pumps manufactured by the Petitioners all required the use of asbestos containing components,[9] and all of these pieces of equipment caused their asbestos-

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[9] Mrs. O'Neil's expert testified that virtually all World War II era pumps had asbestos containing gaskets and packing. (7 RT 921-922.) All of the Warren steam driven pumps in the machinery spaces on board the USS Oriskany required external asbestos containing insulation. (7 RT 958.) Warren's design drawings specified the use of asbestos insulation. (7 RT 949-952.) Warren designed and supplied its pumps with asbestos packing and gaskets. (7 RT 957, 13 RT 2212.) Equipment manufacturers, including Warren, drafted the manuals that were consulted by sailors to identify replacement parts. (7 RT 940; 10 RT 1729; 13 RT 2206-07.) The Crane

containing parts to deteriorate and become worn, requiring that they be replaced. (10 RT 1708-1709, 12 RT 2067.) Because of the heat at which this equipment operated, it all had to be insulated with asbestos which had to be removed in order to reach the location of the gaskets and packing. (7 RT 897-901, 7 RT 954-955, 10 RT 1709-1710.) Once the insulation was removed, the deterioration which the gaskets and packing had undergone required that they be removed by scraping or wire brushing. (10 RT 1708-1715, 12 RT 2067.) The process of removing and replacing the gaskets and packing caused dangerous asbestos dust to be generated from the gaskets, the packing and from the asbestos insulation. (10 RT 1709-1715, 10 RT 1734-35.) Thus, it was the operation of defendants' equipment, coupled with the components it required and its location which created the hazard. *O'Neil* was faithful to the principles of *Cronin* and its progeny, under which the issue of strict liability for design defect and failure to warn must be analyzed in light of these "realities of their everyday use."

Unlike the Court of Appeal here, the *Taylor* court refused to follow *DeLeon, Huynh, Wright* and *Tellez-Cordova*, finding them distinguishable on the ground that in each of those cases, the defendant's product was defective, whereas in this case, the defect was in the product of another manufacturer. (*Taylor, supra,* 171 Cal.App.4th at p. 588.) The *Taylor* court failed to take into

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valves were designed with flanged connections and required the use of asbestos gaskets. (7 RT 968.) Moving parts of valves were sealed with packing material. All of the Crane valves on the Oriskany contained asbestos packing. (7 RT 969.) A Crane drawing of one of the large valves installed on the USS Oriskany specified the use of asbestos containing packing. (7 RT 969, 971.) A majority of the Crane valves installed on the Oriskany were steam valves, and were therefore insulated. (7 RT 969.) Insulation used when the USS Oriskany was built was primarily 85% magnesia and 15% asbestos. (7 RT 901.)

account that it was the operation of defendant's equipment on these products of other manufacturers which created the hazard and thus necessitated the warning. Accordingly, *Taylor*'s attempt to distinguish these cases is simply incorrect.

The *O'Neil* court pointed out *Taylor's* mistaken reading of California authorities. *Taylor's* attempted distinction of *Tellez-Cordova* is off the mark because *Taylor* focused only on the "inherently dangerous" nature of the asbestos, and ignored the fact that asbestos exposures occur during maintenance of the defendants' equipment, and thus it is the use of defendants' products that is causing the exposure. *O'Neil* therefore held that "*Tellez-Cordova* cannot be distinguished." (*O'Neil* Opn., p. 20.)

Taylor was mistaken in its attempt to distinguish *Wright,* which *Taylor* read as involving defects in the defendants' equipment, even though the failure was in a product supplied by another. *Taylor's* reading of *Wright* is mistaken since "the design defect in *Wright* concerned the product's fitness for use with another, necessary, product. The case is identical to this one." (*O'Neil* Opn., p. 21.)

Taylor's attempted distinction of *DeLeon* was mistaken, because it sought to distinguish *DeLeon* by noting that there were factual issues regarding the defendant's role in the design and location of its product. *O'Neil* found this analysis flawed, based on the evidence that the Navy equipment defendants participated through a "back and forth" process of designing their products, and integrating the products with other equipment used aboard the Navy ship (O'Neil Opn. P. 20-21; 15 RT 2071).

Taylor thus relies on mistaken application of California law. It fails to heed this Court's admonition that products are to be considered "as a whole," and it is inconsistent with several decisions of the Court of Appeal, including

the decision in this case, *Tellez-Cordova, supra, Wright, supra, DeLeon, supra, Gehl Bros., supra,* and *Huyn, supra.* There is no reason it should be on the books as the *de facto* law to be followed by trial courts, if review of *O'Neil* is granted.

B. The "Chain of Distribution" Rationale Does Not Exonerate a Manufacturer From Liability for Dangerous Combined Uses

A central touchstone to Petitioners' arguments is the claim that the "chain of distribution" rationale underlying strict liability does not apply to them as component manufacturers. (See *Vandermark v. Ford Motor Co., supra,* 61 Cal.2d 256, 262 [strict liability applies to all entities that "form an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."].) *O'Neil* properly recognized that Petitioners' reliance on the "chain of distribution" rationale is a misapplication of a doctrine which has developed to define the outer boundaries of liability for entities which are not engaged in manufacturing and designing products which contribute to causing the plaintiff's injury, such as retailers, distributors, and product licensors. (See *Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 773 [collecting and discussing cases in which courts have applied strict liability where "defendants were not necessarily involved in the manufacture or design of the final product," including licensors, retailers, and distributors, but who nevertheless are in a position to influence product safety].)

None of the "stream of commerce" cases relied on by Petitioners involve a product manufacturer that has supplied a product designed to include defective components manufactured by third parties, that are replaced with identical defective components during expected and routine maintenance, or where the necessary and intended use of the defendants' product includes the

use of a dangerous product supplied by a third party. *O'Neil* rejected Petitioners' reliance on the stream of commerce argument for this reason, noting that Petitioners were relying on "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." (*O'Neil* Opn. p. 18.)

O'Neil's understanding of the chain of distribution rationale, and rejection of Petitioners' misuse thereof, was faithful to this Court's articulation of the principle. Petitioners claim they are not part of the overall marketing and distribution chain of an injury-causing product because, as component part manufacturers, they manufactured and sold only a part of the final product, i.e., the entire Navy ship, or alternatively, the entire steam propulsion system, that injured Mr. O'Neil. This contention, that a manufacturer has no liability unless it was in the chain of distribution of every piece of the final product, has been soundly rejected by this Court. It is settled law that suppliers of defective components *are* part of the overall producing and marketing enterprise:

> The policies underlying strict products liability in tort, restated in our decision in *Vandermark, supra,* 61 Cal.2d 256, 37 Cal.Rptr. 896, 391 P.2d 168, are equally applicable to component manufacturers and suppliers. **Like manufacturers, suppliers, and retailers of complete products, component manufacturers and suppliers are "an integral part of the overall producing and marketing enterprise,"** may in a particular case "be the only member of that enterprise reasonably available to the injured plaintiff," and may be in the best position to ensure product safety. And component manufacturers and suppliers, like manufacturers, suppliers, and retailers of complete products, can adjust the costs of liability in the course of their continuing business relationship with other participants in the overall manufacture and marketing enterprise. For purposes of strict products liability, there are "no meaningful distinctions" between, on the one hand, component manufacturers and suppliers and, on the other hand,

> manufacturers and distributors of complete products; for both groups, the "overriding policy considerations are the same."

(*Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 479-480 (internal citations omitted).)

Petitioners ignore the relevant teachings of this Court in *Jimenez*, and instead look to *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, for an inapposite discussion of whether a hotel proprietor could be deemed a part of the overall marketing and distribution chain of allegedly defective bathtubs installed within its hotel rooms. *Peterson* does not assist Petitioners, as *Peterson* clearly draws a distinction between those engaged in *product manufacturing,* like Petitioners here, and the landlords and hotel owners for whom the *Peterson* court found the principles of strict liability inapplicable. (*Id.,* p. 1200-02.) This Court made a policy determination in *Peterson* that hotel rooms are not "products" under California products liability law, and that the hotel operator is not subject to strict products liability for any defects in the bathroom fixtures in those rooms. (*Peterson, supra*, 10 Cal.4th at 1188-1189, overruling *Becker v. IRM Corp.* (1985) 38 Cal.3d 454.) In the present case, it is beyond dispute that the valves and pumps at issue are all products, and that each of the defendants was a manufacturer and/or supplier of the respective product.

Petitioners cite to *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513 (decided by the same court that decided *Taylor*) and the Third District opinion in *Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357. Both of these, however, are cases in which the defendant had arguably manufactured a defective product, but plaintiff was injured by a similar (and similarly defective) product made by an entirely different manufacturer unconnected with the defendant. In *Cadlo* the injury-causing product was

manufactured by a corporation that had purchased the product line from defendant, and in *Powell,* the injury-causing product was made by a competitor. Petitioners in this case were not being sued because of products their competitors or successor companies made; they were being sued because of products which they themselves made. *O'Neil* properly rejected Petitioners' misapplication of these "remote" authorities. (*O'Neil* Opn., p. 16-17.)

Finally, Petitioners cite *Garman v. Magic Chef, Inc.* (1981) 117 Cal.App.3d 634 and *Blackwell v. Phelps Dodge Corp.* (1984) 157 Cal.App.3d 372, for the proposition that one manufacturer cannot be liable for harm caused by another manufacturer's product. In *Garman*, however, a leaky gas pipe allowed gas to escape, and the plaintiff was injured when she lit a gas stove manufactured by defendant, and the stove flame ignited the leaking gas. Defendant had not manufactured or otherwise been responsible for the leaky gas pipe, and there was nothing about the stove which was defective; the stove did not require the use of leaky pipes, it was not supplied with leaky pipes, and nothing about the stove contributed anything to the occurrence of the injury except the mere existence of an ordinary open flame. Similarly, in *Blackwell,* the defendant shipped its sulfuric acid in a tank car that had a leaky valve; when the tank was unloaded, the valve failed and sprayed plaintiff with acid. The defendant, however, did not have any role in the manufacture or marketing of the tank car; it was, in fact, the user of the car. Defendant's acid, while it was the immediate instrumentality of the injury, was not defective in any way; it contributed nothing to the occurrence of the accident other than the mere fact that it had the normal characteristics of acids. Thus, in both *Garman* and *Blackwell* the product was simply not defective under the standards of *Cronin, Barker* and *Anderson*.

In the present case, the defendants were not manufacturers of

nondefective raw materials or of a non-defective product which was misused by coupling it with a defective product. Instead, they were manufacturers of products which, in their intended use with other products, posed a latent deadly health hazard to users and bystanders. None of the cases cited by the Petitioners is contrary to the holding in this case.

C. The "Component Part" Defense Was Properly Rejected in this Case

The *O'Neil* court correctly rejected application of the "component part" defense. Petitioner Warren argues that review should be granted to change California law to support the misguided notion, advanced by the *Taylor* court and rejected by *O'Neil,* that unless a defendant designs the final product, here an entire Navy ship or the entire steam propulsion system, there can be no liability for a manufacturer of a component of that larger final product. *O'Neil* was correct when it said this argument stretches the doctrine "too far." (*O'Neil,* Opn. p. 14.) This Court has likewise rejected such an expansive immunity for component part manufacturers. (*Jiminez, supra,* 29 Cal.4th 473, 479-480.)

Relying on its unlimited view of the component part defense, Petitioner Warren argues the defendants in *Taylor* did not participate in the integration of their pumps and valves "into the design of the [ship's] propulsion system'" (Warren Petition, p. 5, citing *Taylor,* 171 Cal.App.4th at p. 585), and that the experts in this case testified "similarly." Warren is misstating the record. The evidence on this record is that the pumps Warren built and sold for naval use were designed for the specific application for which they were used. (13 RT 2199.) Mrs. O'Neil's expert testified that the Navy provided broad specifications to the shipbuilder, who contacted equipment manufacturers to provide equipment meeting the specifications. (7 RT 938:20 – 939:23.)

Warren's own expert testified that that the original design proposal for the manufacturer's particular piece of equipment is submitted by the manufacturer to the Navy for approval (15 RT 2701), and that there was a "back-and-forth" process by which the equipment is designed. (15 RT 2071.) Before any military specifications were written, there was a design process that preceded the specifications. (15 RT 2702.) When the equipment was delivered to the customer, they were accompanied by manuals written by the manufacturers, providing users with instructions on how to install the equipment, how to operate it, how to maintain and repair it, and listing replacement parts to be used in repairs. (7 RT 940, 10 RT 1729, 14 RT 2589, 2591.)

The evidence, therefore, was that the Petitioners knew exactly what their equipment was being used for, how it was to be used, and how it was to be maintained, according to their own instruction and use manuals. *O'Neil's* determination that the component part defense could not apply where the manufacturer has participated in designing its product for a specific purpose is amply supported by the record and the case law. (*O'Neil,* Opn. p. 9 ["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.'"] citing *In re TMJ Implants Products Liability Litigation* (D.Minn. 1995) 872 F.Supp. 1019, 1026; *Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1554; *Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 788.)

Taylor acknowledged that the component part defense does not apply if "the component itself was defective at the time it left the manufacturer." (*Taylor, supra,* 171 Cal.App.4th at 584.) Inexplicably, *Taylor* went on to deem the defendants' equipment non-defective as supplied by pointing to the asbestos gaskets and packing as the source of the defect, passing over the fact

that these defective components were incorporated into the defendants' equipment from the outset. *O'Neil* did not ignore this significant fact, holding instead that Petitioners were not shielded by the component parts defense because "that defense does not apply if the product itself is defective." (*O'Neil,* Opn. p. 14.) The use of identical asbestos replacement parts, in some cases identified in manufacturer drawings, was not an unforeseeable alteration of the product supplied by Defendants in any sense. *O'Neil* followed this Court's directive that the issue of product defect is to be decided with an acknowledgement of "the need to consider the product as an integrated whole." (*Daly, supra,* 20 Cal.3d at p. 746-747.) *Taylor* did not.

D. A Manufacturer Has A Duty To Use Reasonable Care In Designing and Warning Of Foreseeable Hazards Arising From The Intended Use Of Its Product

Although the Court of Appeal in this matter did not address the negligence theory as a basis for recognizing liability, (*O'Neil* Opn. p. 19, n. 9), Petitioners' statements of the issues presented are broad enough to encompass the issue. (Crane Petition, p. 1; Warren Petition, p.1, 16.) The Court of Appeal noted it was not reaching the issue because it was not a basis for the non-suit motions in the trial court. The record reflects that Crane moved for non-suit of Plaintiffs' negligence claims, based on the absence of exposure to asbestos products originally supplied by Crane. (1 AA 70:11.) Warren did not move for non-suit on the grounds that there was no exposure to products it originally supplied, under any theory, and gave no notice that it was joining in Crane's motion. (1 AA 108; 16 RT 2976.)

Nevertheless, if this Court were to grant review, the issues reviewed should fairly include the issue of negligence as an alternative basis for liability. An alternative basis for liability in this case was that defendants were negligent

in design and in failing to warn of the hazards of exposure of asbestos dust generated by the gaskets, packing and insulation used with their products. Plaintiffs' evidence demonstrated that each of the defendants designed and marketed equipment which required the use of (and in some cases came supplied with) asbestos-containing gaskets, packing and insulation for its proper function (*see* fn. 9, *supra*), knew that this asbestos material would require periodic removal and replacement, (12 RT 2066-67), knew or should have known that the process of removal and replacement would generate respirable asbestos fibers, (13 RT 2213-14, 12 RT 2066-67), and that asbestos presented a deadly, if latent peril. (6 RT 720-722.) Despite this knowledge, Petitioners designed their products to operate with asbestos, and put no warning on their products that the *inevitable and required* process of removal and replacement of worn out gaskets and packing material, and the necessary removal and replacement of insulation in the process, would expose unprotected workers and bystanders to a deadly peril.

The basis for California negligence law is contained in the fundamental public policy expressed in Civil Code section 1714:

> Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

The basic scope of that liability, as explained by this Court in *Dillon v. Legg* (1968) 68 Cal.2d 728, 739, is that ". . . . the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable." In other words, a defendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence

negligent, in the first instance. In *Rowland v. Christian, supra*, 69 Cal.2d 108, this Court considered the application of this statutory policy to the issue of failure to warn of hazards resulting from the activity of the defendant. This Court stated:

> Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.

(*Id.,* at 112.)

In the present case, there evidence that defendants engaged in conduct (designing and marketing of equipment requiring asbestos gaskets, packing and insulation) that posed a very foreseeable hazard to users and bystanders. Thus, under *Dillon* and *Rowland* and section 1714, the defendants are subject to liability for these foreseeable injuries unless there is some other statute or clear public policy that requires a departure from these fundamental principles.

This Court noted in *Rowland* that a departure from this fundamental principle of liability involves the balancing of a number of considerations including the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. (*Id.* at 112-113.) Petitioners do not contest that the risk of harm was foreseeable and do not question the certainty that Mr. O'Neil had suffered harm. They urge this Court

to adopt *Taylor's* conclusion that the the risk of harm was supposedly remote, and that the conduct was morally blame-free and socially useful. These conclusions have no evidentiary support, and their logic doubtful.

First, the conduct in question includes designing products to operate with toxic substances which Petitioners knew or should have known would cause serious injury and death, and the marketing of asbestos-containing equipment without warning of a known hazard accompanying its intended use. However socially useful and morally blame-free the design and marketing of valves and pumps may be, the use of toxic materials and the omission of needed safety warnings meets neither criterion, any more than does the marketing of rat poison without a warning label. Second, the fact that Mr. O'Neil was exposed to asbestos gaskets, packing and insulation twenty years after defendants sold their equipment to the U.S. Navy is a red herring. Defendants submitted no evidence below to show that these ships, with the equipment supplied by defendants, would *not* be in operation for more than twenty years, or that the type of asbestos components which they specified, recommended and (in some cases) supplied would *not* still be in use. In fact, the record shows that Petitioners were continuing to use asbestos containing materials in their valves and pumps into the 1980s, well beyond Mr. O'Neil's exposure. (12 RT 2064, 12 RT 2070 – 2072, 13 RT 2253.) Third, although the risk of future *asbestos* exposure may be relatively less likely due to intervening events of the last quarter century, imposition of liability on manufacturers will prevent future harm from other types of toxic exposures. Finally, the Petitioners introduced no evidence of the unavailability of insurance coverage. None of this Court's stated rationales in *Dillon* and *Rowland* and enunciated in section 1714 justify a radical departure from the fundamental public policy of responsibility for foreseeable injuries caused by a lack of due care. The

decision of the Court of Appeal can and should be affirmed on this additional basis as well.

IV. CONCLUSION

One cannot read the *O'Neil* decision and the *Taylor* decision without concluding that there is disagreement in the Court of Appeal regarding a product manufacturer's liability for dangerous combined uses of their products and products supplied by others. Mrs. O'Neil submits, for reasons shown above, that the *O'Neil* decision faithfully follows this Court's edict to evaluate product defect with regard to the product as a whole, and with regard to its intended use. Conversely, *Taylor* carves out an exception for injuries caused by foreseeable uses of a manufacturers' product, based on misapplied notions of the stream of commerce and the component part defense, that have no application to product manufacturers that have designed their products to operate with dangerous products of others, have supplied their products with dangerous products of others, and know that the intended operation of their products will include the use of dangerous products of others. For these reasons, if review is granted, Mrs. O'Neil requests that any such review be accompanied by an order that the *O'Neil* decision remain published pending review, pursuant to Rule 8.1105(e)(1) and (2).

Respectfully submitted,

Dated: November 17, 2009

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d) of the California Rules of Court, the undersigned hereby certifies that this Answer to Petitions for Review contains 8,352 words, exclusive of tables and this certification.

Paul C. Cook
State Bar Number 170901

Court of Appeal Opinion

Filed 9/18/09

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.

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 November 17, 2009, I caused a copy of the following document:

APPELLANTS' ANSWER TO WARREN PUMPS, LLC AND CRANE CO.'S PETITIONS FOR REVIEW

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 November 17, 2009, at El Segundo, California.

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