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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.

After A Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B208225

APPELLANTS' ANSWER TO CRANE CO. AND WARREN PUMPS, LLC'S OPENING BRIEFS ON THE MERITS

WATERS, KRAUS & PAUL
Paul C. Cook (State Bar No. 170901)
Michael B. Gurien
(State Bar No. 180538)
222 North Sepulveda Boulevard,
Suite 1900
El Segundo, California 90245
Telephone: (310) 414-8146
Facsimile: (310) 414-8156

THE EHRLICH LAW FIRM
Jeffrey I. Ehrlich
(State Bar No. 117931)
411 Harvard Avenue
Claremont, California 91711
Telephone: (909) 625-5565
Facsimile: (909) 625-5477

Attorneys for Plaintiffs and Appellants
BARBARA J. O'NEIL, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

APPELLANTS' ANSWER TO PETITIONERS CRANE CO. AND WARREN PUMPS, LLC'S OPENING BRIEFS ON THE MERITS

I. INTRODUCTION

A. Summary of the underlying facts

Plaintiffs' decedent, Lt. Patrick O'Neil, served his country in the Vietnam War from 1965 to1966, as a junior officer on board the USS *Oriskany* ("*Oriskany*"). In 2005, he died from mesothelioma caused by exposure to asbestos released during routine maintenance procedures of equipment on board the *Oriskany*, including high- temperature valves and steam-driven pumps manufactured, designed and sold by Defendants and Respondents Crane Co. ("Crane") and Warren Pumps, LLC ("Warren") (collectively "Manufacturers"). Crane and Warren were established private manufacturers of asbestos-containing pumps and valves before the start of World War II (when the *Oriskany* was built), and were successful in winning bids to sell their asbestos-containing equipment to the Navy when that opportunity arose.

Both Warren's high-temperature pumps and Crane's high-temperature valves were assembled with asbestos-containing parts installed within them, and they contained these asbestos materials when they were shipped to the customer. Among the pumps manufactured and sold by Warren were large steam-driven pumps, six to nine feet tall and weighing thousands of pounds. Installed within these pumps when they were delivered to the Navy was asbestos-containing packing, used to seal internal moving parts of the pumps. The Warren pumps were designed with a steam cylinder where the pressure of the steam was captured and used to drive the pump. The external surface of the steam cylinder was covered with asbestos insulation, and then covered with sheet metal to protect the

insulation from damage during shipping. Warren specified these asbestos materials on a list of materials it supplied to the Navy with its pumps, and sailors referred to Warren's parts lists when repairing its equipment.

Crane manufactured and sold asbestos-containing valves to the Navy, which were assembled by Crane with asbestos materials inside the valves when shipped to the customer. Crane manufactured most of the thousands of valves that were installed on the *Oriskany*. Inside of the Crane valves were asbestos-containing gaskets sealing metal joints, and asbestos-containing packing used to seal the valve stems. Crane also supplied technical drawings specifying asbestos replacement parts, which sailors referred to when repairing Crane valves.

Because the pumps and valves were designed to move and control the flow of steam and high-temperature fluids, they required the use of asbestos insulation, to maintain the temperature inside the equipment, and to prevent users from being scalded. The pumps and valves were also designed to connect to surrounding equipment through flanged connections, and these flanged connections required asbestos gaskets to seal the metal-to-metal joints.

Routine maintenance of Crane's valves and Warren's pumps required sailors to disturb all of these asbestos-containing materials, releasing dangerous asbestos fibers in the process.

Nobody warned Lt. O'Neil that the asbestos fibers being released during maintenance of Manufacturers' equipment could cause serious respiratory injury and death, despite the fact that asbestos hazards were known and knowable since as early as the 1930s. The Navy did not warn him; the gasket, packing and insulation manufacturers did not warn him; and Manufacturers did not warn him.

B. Issue presented

Product manufacturers owe a duty to warn of foreseeable hazards involved in the use of their products. (*Anderson v. Owens-Corning Fiberglas Corp.* (1991)

53 Cal.3d 987, 996.) They owe a duty to design a product that will be safe for its intended use. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429.) These duties are not controversial and have been recognized under California law for decades. Manufacturers nevertheless claim they owed Lt. O'Neil no duty to design the equipment so it could be safely used without exposing him to asbestos, or warn that use of their equipment could expose him to asbestos, because the asbestos that Lt. O'Neil was exposed to was supplied by "others."

The question before this Court is whether there is any sound basis in public policy for creating an exception to these duties when the dangerous condition is created by the combination of a defendant's product with the product of another. The issue is whether in that circumstance courts should be evaluating relative culpabilities of multiple product manufacturers and employers, each of whom have contributed to creating a hazardous situation, and deciding that only some of the actors are to blame for injuries caused by the combined use of the products. There is no public policy that would support an exception to liability for injuries caused by foreseeable risks in the use of a defendant's product, when the risk is created by a combined dangerous use.

The California Courts of Appeal have repeatedly found that there is no exception to liability when a foreseeable risk in the use of defendant's product is created by the combination of a defendants' product and a product of "another." The Court of Appeal below so held, following indistinguishable California precedent. (Opn., p. 15-16; *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577 ("*Tellez-Cordova*"); *Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218 ("*Wright*"); *DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336 ("*DeLeon*").) These courts held that a manufacturer owes a duty to design and warn of dangers in the foreseeable use of its product, including dangerous

conditions caused or created by the combination of the manufacturer's product with products supplied by others.

The Court of Appeal below directly disagreed with *Taylor v. Elliott Turbomachinery* (2009) 171 Cal.App.4th 564, 571 ("*Taylor*"), decided by Division Five of the First District Court of Appeal. *Taylor* ruled that when injury is caused by a combination of the defendant's product with the product of "another," there is no liability. The view accepted by the *Taylor* court, and advanced by Manufacturers here, depends on a tortured analysis of established product-liability law to arrive at a desired result, fueled by alarmist portrayals of a "flood" of asbestos litigation. The predictable appearance of this bogeyman in Manufacturers' briefs is a sure sign that the merits of their arguments are doubtful. There is, of course, no proof that California courts are being "flooded" with asbestos litigation—and if there were the slightest empirical support for such an assertion Manufacturers would have supplied it.

Warren breathlessly asserts that the decision below has "made the Los Angeles Superior Court a magnet for plaintiffs from around the country." (Warren Opening Brief on the Merits ["Warren OBM"], p. 6.) But asbestos industry lobbyists themselves have acknowledged that there is no glut of cases from other states in California — indeed, they have used this fact for their own purposes in other states. Just last year, for example, House Bill 1811 was introduced in the Texas Legislature for the purpose of ameliorating certain very restrictive features of Texas law in mesothelioma cases. Some claimants asserted that Texas law was so harsh that Texans were being forced to file out of state, including in California.

Attorney Peter C. Coleman defends asbestos cases with the San Francisco office of Sedgwick Detert Moran and Arnold, LLP, counsel for multiple defendants involved in asbestos litigation. On March 30, 2009, Mr. Coleman appeared before the Texas Legislature, and testified that he had analyzed all

mesothelioma cases filed in California in the years 2007 and 2008, and found that 373 claims alleging mesothelioma were filed during that two-year period. Of these 373 claims, Coleman found exposure information on 362, and 342 of these 362 alleged exposures in California. Other claims involve longtime California residents who had exposure elsewhere. (E.g., *McCann v. Foster Wheeler, LLC* (2010) 48 Cal. 4th 68 [plaintiff lived in California for 30 years before dying of mesothelioma, previously exposed to asbestos in Oklahoma].) The vast majority of claims here involve exposure and/or residence in California.[1]

The only "flood" is a flood of dead California victims of mesothelioma. It is perverse in the extreme that the vast scope of the damage caused should be held up as justification for immunity against what would otherwise be a straightforward application of traditional products liability law, holding manufacturers liable for injuries caused by the foreseeable use of their products.

C. Broad categories of defects at issue

Broadly speaking, there are two categories of asbestos-containing materials at issue in this appeal.

Asbestos Replacement Parts. First, there are asbestos-containing materials that Manufacturers assembled into their products prior to shipping them to their customer, and which appear on specifications, drawings and in technical manuals supplied by Manufacturers. These asbestos-containing materials are maintenance items that were expected and intended to wear out and deteriorate during normal use of Manufacturers' equipment, and when they did they were replaced with asbestos replacement materials supplied by others. This category is commonly referred to as "asbestos replacement parts." For Crane, the asbestos replacement parts include asbestos gaskets that were used to seal internal metal-to-metal

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[1] Respondents will promptly provide a record of Mr. Coleman's testimony before the Texas Legislature if desired by the Court.

connecting joints within the valves, and asbestos-containing packing that was used to seal internal moving parts of the valves, such as valve stems. For Warren, the asbestos replacement parts include asbestos insulation that was applied to the steam cylinders of their steam-driven reciprocating pumps, and asbestos packing sealing internal moving parts of the pumps.

External Asbestos Insulation and Flange Gaskets Necessary for the Intended Use of Manufacturers' Equipment. As a second broad category of asbestos materials at issue, the evidence showed that asbestos insulation and flange gaskets were necessarily applied to Crane's *high-temperature* valves and Warren's high-temperature pumps, so that the equipment could function as intended without scalding users, losing temperature and pressure, and leaking. Manufacturers' equipment was specifically designed for the high-temperature applications that required the use of these asbestos materials, and the Manufacturers knew that users would be exposed to asbestos released from these materials during routine maintenance of their equipment.

The duty to warn against foreseeable dangers arising in the use of Manufacturers' products (*Anderson, supra,* 53 Cal.3d at 996), and the duty to design a product safe for its intended use (*Barker, supra,* 20 Cal.3d at 429), extends to the use of Manufacturers' products with both categories of asbestos materials described above. As to the asbestos replacement parts, Manufacturers' participation and connection to the equipment designs and specifications including the use of these asbestos materials is particularly undeniable. Manufacturers' liability for foreseeable injuries caused by the use of their products, however, is not limited to the replacement parts, but includes liability for injuries caused by exposure to asbestos released, during routine maintenance, from the insulation and flange gaskets that were necessary to the intended operation of Manufacturers' products. The Court of Appeal's judgment can and should be affirmed for each of

these categories of asbestos materials.

II. STATEMENT OF THE CASE

A. Crane and Warren designed and sold asbestos-containing pumps and valves at a time when asbestos was in widespread use (1940-1960)

Patrick J. O'Neil served his country as a junior officer on board the *Oriskany*, an Essex class aircraft carrier, from June 1965 through August 1966. (7 RT 930; 10 RT 1686.) In November 2005, he died of mesothelioma, caused by exposure to asbestos that was released during maintenance of equipment on the *Oriskany*, including equipment manufactured and sold by Defendants Crane and Warren.

Construction of the *Oriskany* began in 1943 in Navy and private shipyards, using equipment that was sold to the Navy by privately owned, for-profit manufacturers, including Crane and Warren. (Opn. p. 3, 5; 7 RT 1009-1010.) Among the equipment installed aboard the *Oriskany* were thousands of valves, most of which were manufactured by Crane (7 RT 967-968), and fifty-two pumps manufactured by Warren. (7 RT 947.) These valves and pumps, manufactured by Crane and Warren and sold to the Navy, were designed to move and control the flow of water and steam within the steam-propulsion plant of the *Oriskany*. (7 RT 894-895, 897, 939, 1057–1058; 13 RT 2215.)

Both Crane and Warren were in the business of manufacturing and selling asbestos-containing pumps and valves long before World War II began. Their choice to enter the valve and pump businesses, and to use asbestos in the process, were not decisions compelled by the "imperatives of World War II," as Warren suggests. Both Warren and Crane were manufacturing and selling asbestos-containing pumps and valves to industry and government customers long before they were awarded bids to sell asbestos-containing equipment to the Navy for use on the *Oriskany*.

Crane was selling asbestos-containing valves made in its own factory since 1917, and continued making and selling asbestos-containing valves into the 1980s. (12 RT 2063-2064; 2071-72.) The use of asbestos gaskets and packing in the valve industry was common from the early 1920s. (12 RT 2029) Warren was manufacturing and selling asbestos-containing pumps for both industrial and military use since 1897. (13 RT 2199-2200, 2273.) The Navy has been Warren's biggest customer since the mid-to-late 1970s. (13 RT 2215-2216.) Equipment manufacturers selling products to the Navy employed design engineers that had been working for them well before World War II began. (15 RT 2777.)

The design and construction of a Navy ship was a "back and forth" process involving the Navy, the shipbuilder and the equipment manufacturers. (Opn. p. 5; 7 RT 939-940; 15 RT 2071.) The Navy provided broad performance specifications to the ship builder, and the ship builder solicited vendors to meet those specifications. (Opn. p. 5; 7 RT 938-939.) The Navy designed the ships, and the equipment manufacturers designed the equipment. (Opn. p. 5; 7 RT 939.) Plaintiffs' naval design expert, Captain William Lowell, testified "the Navy didn't design pumps. The manufacturers designed the pumps." (*Ibid.*)

Manufacturers' naval design expert admitted that, in the initial design phase, the Navy looked to manufacturers for equipment that was "available" at the time. (15 RT 2702.) Products adopted for Navy use were similar to products being used in industry. (15 RT 2778.) The Navy accepted products being used in industry if they met the Navy's requirements, subject to some modification if necessary. (15 RT 2778.) The Navy accepted and listened to manufacturer recommendations, and incorporated them into their specifications. (15 RT 2777.) Even after specifications were developed, a process existed for manufacturers to provide input and recommend changes. (Opn. pp. 4-5; 13 RT 2253.) In fact, Warren itself recommended a change in Navy specifications regarding the use of

asbestos – but not until the 1980s. (13 RT 2253.)

At the time Crane and Warren sold their valves and pumps to the Navy, asbestos was in ubiquitous use. The *Oriskany* was powered by steam, and all equipment used in steam applications had to be insulated. The primary type of insulation in use when the *Oriskany* was constructed was asbestos insulation. (7 RT 901; Opinion p. 3.) The Navy's use of asbestos was generally known and recognized. Generally accepted reference books for naval construction and repair taught that the use of asbestos in the Navy was commonplace. (7 RT 901-902.)

Asbestos was used inside pumps and valves as "packing" material to seal internal moving parts, such as rotating shafts. (7 RT 907.) Asbestos was also used in gaskets used to seal metal-to-metal connections. Asbestos gaskets were used to seal internal metal-to-metal connections, and were also used to seal the flanged connections between a valve or pump and another piece of equipment or pipe. (7 RT 908-909.) Virtually all World War II-era pumps had asbestos-containing gaskets and packing. (7 RT 921-922.) Some of the packing used for lower temperature applications was non-asbestos, "but the vast majority of the packing was asbestos packing." (7 RT 908.)

In the 1940s, there were no alternatives to asbestos, and there was no way to build a Navy ship without asbestos. (7 RT 1052-1053; 12 RT 2029-2030.) This was true in the 1940s when construction on the *Oriskany* began, and it was true in the 1960s when *Lt. O'Neil* served on the ship. In the 1940s, 1950s and 1960s, asbestos "absolutely had to be used." (7 RT 1053-1054.)[2]

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[2] The fact that asbestos "had to be used" is not a defense to a claim for design defect under the consumer expectation test or a failure to warn claim. (*Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1186, citing *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 ["Whether or not the defendant is able to design the product in a different way is irrelevant, as the Supreme Court neither requires nor allows proof of the existence of a better design under the consumer expectation test."]; *Titus v. Bethlehem Steel Corp.* (1979) 91

B. Crane and Warren installed asbestos in their products before they were shipped to the customer

Warren and Crane designed their pumps and valves to operate with asbestos materials, and shipped their products to the customer (the Navy) with asbestos materials installed within them.

Crane designed and shipped valves with internal asbestos-containing gaskets and packing. Although Crane carefully postures itself as a manufacturer of "metal valves," it was in fact a manufacturer of asbestos-containing products. (12 RT 2072.) Crane manufactured industrial valves that contained asbestos gaskets and packing. (12 RT 2063, 2072.) Every Crane valve was sealed internally with asbestos packing around the valve stem. (Opn. p. 3; 7 RT 969.) A Crane drawing of one the large valves installed on the *Oriskany* specified the use of asbestos-containing packing. (7 RT 969, 971.)

Warren designed and shipped pumps with internal asbestos-containing gaskets and packing, and asbestos insulation. Almost all of the 52 Warren pumps on the *Oriskany* were located in the machinery spaces where O'Neil worked. (7 RT 945, 947, 957.) The pumps Warren built and sold for naval use were designed for the specific application for which they were used. (13 RT 2199.) They were not fungible, "off-the-shelf" products. (13 RT 2258.)

One type of pump supplied by Warren was a vertical steam reciprocating bilge pump, and Warren's design drawings specified the use of asbestos insulation on the pump. (7 RT 949-952; 13 RT 2209 – 2211.) Warren provided asbestos

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Cal.App.3d 372, 378 [holding "custom and usage is not a defense to a cause of action based on strict liability"]; *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 174 ["Even though the product is flawlessly designed and manufactured, it may be found defective within the general strict liability rule and its manufacturer or supplier held strictly liable because of the failure to provide an adequate warning."].)

insulation with these pumps. (7 RT 953-954.) The pump was designed so that, if any maintenance was to be done to the steam end of the pump, the asbestos insulation that was supplied by Warren had to be removed. (7 RT 954:21-955:4.) Warren pumps were also designed and shipped with asbestos gaskets and packing, factory-installed as an integral part of the pump from the time Warren delivered the pump to the customer. (13 RT 2212.)

Warren designed reciprocating steam pumps to be used as bilge pumps and emergency-feed pumps on the *Oriskany*. Both the bilge pumps and the emergency- feed pumps shared similar designs, except the emergency-feed pump was larger: it was nine feet high, weighed 3,000 pounds, and was used as a back up to the main feed pumps. It was designed to feed water to the boiler and operated at 500 degrees. Just like the bilge pumps, the emergency feed pumps were designed to use asbestos insulation, gaskets and packing. (7 RT 955-956.) A total of 10 Warren reciprocating steam pumps were installed on the *Oriskany*. (*Ibid.*)

Some of the pumps supplied by Warren were motor driven, rather than steam driven. There were approximately 40 Warren motor-driven pumps located in the machinery spaces. (7 RT 957.) These pumps were sealed with asbestos-containing packing when they were delivered by Warren to the shipbuilder, as specified on the plans provided to the Navy by Warren. (*Ibid.*)

C. Crane and Warren specified asbestos products on lists of replacement parts

At the time Crane and Warren delivered their asbestos-containing products to the Navy, they were accompanied by instruction manuals and drawings, to be used as reference materials by those maintaining the equipment – the sailors. (7 RT 939-40; 10 RT 1729; Opn, p. 4-5.) The manuals identified replacement parts to be used during maintenance of the equipment. (Opn. p. 4; 7 RT 940, 951-952;

970-971.) Crane and Warren provided manuals that instructed sailors on how to install the equipment, how to operate it, and how to maintain and repair it. (Opn. p. 4; 7 RT 940.)

The drawings of the equipment provided with the manuals included lists of replacement parts. (Opn. p. 4; 7 RT 940.) The drawings included "piece numbers so if you wanted to order a part later on, you would have a drawing and you could find that part...." (7 RT 940.) Sailors consulted the manufacturers' technical manuals to determine what kind of gasket or packing to use during repairs. (10 RT 1729.) Defense witness James Delaney agreed that the manufacturers' technical manuals were intended to be consulted by the sailors during repairs and maintenance. (14 RT 2589, 2591.) Warren's manuals included instructions to the sailors on how to remove gaskets during maintenance. (13 RT 2213-14.)

Warren's drawings specified asbestos-containing insulation (85 percent magnesium and 15 percent asbestos) on the list of replacement materials. (7 RT 951-952; 7 RT 940.) Warren's list of replacement materials also specified asbestos packing. (7 RT 940, 947-948, 951-954 , 956-957, 13 RT 2212.)

Crane's drawing of the 2,400 lb. steam stop valve specified the use of asbestos packing. (7 RT 969, 971.) Crane knew that repairs and maintenance of its products would require users to disturb asbestos-containing materials. (Opn. p. 4, n. 4.) Crane was well aware when it sold its asbestos-containing valves to the Navy that the packing and gasket material in the valves would wear out and have to be replaced over the life of the valve, as a normal consequence of the valve's operation. (Opn. p. 4, n. 4; 12 RT 2066-67.)

Not only did it know the asbestos gaskets and packing would need replacing, it knew that the packing and gasket materials used on steam valves would become baked on to the metal by the heat of operation, so that the asbestos material would have to be scraped off with chisels, flat knives or wire brushes.

(12 RT 2067.) Crane itself sold asbestos-containing gaskets and packing materials for use as replacement parts for maintenance of its valves. (12 RT 2065, 2070-71.) Crane was a retailer of a full range of asbestos-containing materials used in *high-temperature* pipe systems, including asbestos gaskets, asbestos packing, asbestos sheet packing material, asbestos valve packing material, and asbestos spiral wound gaskets. (12 RT 2070 – 2071.)

D. Crane and Warren provided instruction manuals that warned of hazards arising in the use of the equipment

Cautions and safety requirements were included in the operation manuals that the manufacturers provided with their equipment. (Opn. p. 4; 7 RT 940 – 941; 14 RT 2651-52.) Manufacturers had the responsibility of drafting technical manuals, and the manuals were subject to the same "back-and-forth" as the equipment design, after which the manufacturer's manual would be accepted as the technical manual. (15 RT 2719.) Each of the military specifications governing technical manuals in effect between 1940 and 1967 required the manufacturer to provide warnings of operating and maintenance procedures that could cause injury to the operator if not followed correctly. (15 RT 2783-92.) The manufacturers were not precluded by the military specifications from issuing warnings about asbestos hazards. (Opn. p. 4; 15 RT 2794-95.) Warren's user manuals warned of the risk of injuries that could occur during the use and maintenance of its pumps – but not the risk of injury from exposure to asbestos. (13 RT 2245-46.) Warren admitted that it could have warned of asbestos hazards in its manuals, but denied it knew of the hazards. (13 RT 2255.)[3]

[3] Another supplier of valves to the Navy, Yarway, affixed caution plates directly on its valves, but included no asbestos warnings. (12 RT 2056-57.)

E. Crane and Warren designed their pumps and valves to be used in specific applications that required the use of asbestos insulation and flange gaskets

1. Asbestos flange gaskets were necessary to the intended operation of Crane and Warren's products

The Crane valves and Warren pumps were designed with flanged connections that required the use of asbestos gaskets. (7 RT 968; 7 RT 954:4-954:17.) Because metal-to-metal connections could not be made tight unless they were precision machined, asbestos gaskets were used to seal the flanged connections. (7 RT 908:22-28.) Higher-pressure steam joints were sealed with metal-wound asbestos gaskets, whereas lower pressure steam joints were sealed with asbestos sheet gaskets. (7 RT 910:18-22.)

The Warren reciprocating steam pumps were driven by steam turbines and were designed to have steam pipes connected to them. (15 RT 2761.) Warren designed the pump to connect to a steam source through six flanged connections. (7 RT 954:4-954:17.) Each flange required a gasket, and for this design, it had to be an asbestos gasket. (7 RT 952-53.) Captain Lowell testified that it was the custom and practice in the 1940s and 1950s to install asbestos gaskets at the flange connections of pumps. (7 RT 958.)

2. Asbestos insulation was necessary to the intended operation of Crane and Warren's products

Most of the valves on the ship were insulated, and the insulation had to be removed during maintenance of the valves. (10 RT 1706, 1709; 7 RT 916.) Crane valves were no exception. A majority of the Crane valves installed on the *Oriskany* were steam valves, and were therefore insulated with asbestos insulation. (7 RT 969.) As discussed above, the insulation in use in the 1940s, 1950s and 1960s was predominantly asbestos insulation. (Opn. p. 3.) Crane itself sold asbestos insulation to be used in high-temperature pipe systems. (12 RT 2070 – 2071.)

Warren provided emergency feed pumps for use in the four boiler rooms on the *Oriskany*. (7 RT 955-956.) These Warren pumps were driven by steam at a temperature of 500 degrees, and therefore required external insulation. (7 RT 956.) Captain Lowell testified that all of the Warren steam driven pumps in the machinery spaces on board the *Oriskany* required external asbestos-containing insulation. (7 RT 958.)

Warren supplied the drivers that provided the power to drive its pumps, including steam-driven turbines. (13 RT 2024-25.) The turbine driver and the pump were shipped together as a single unit. (13 RT 2206; 14 RT 2550.) The steam turbines operated at temperatures exceeding 450 degrees, and therefore required insulation for safe (non-scalding) and proper operation. (7 RT 922– 923.)

F. Patrick O'Neil was injured by asbestos replacement parts specified by Crane and Warren, and by asbestos they knew had to be disturbed during maintenance of their products, as a result of maintenance procedures described in instruction manuals

Lt. O'Neil died before this action was filed. Plaintiffs presented testimony from shipmates James Dineen and Douglas Deetjen, who served aboard the *Oriskany* at the same time as O'Neil, to show the work that was done on equipment while O'Neil was in the machinery spaces. These shipmates provided testimony that work on Crane valves and Warren pumps created dust when O'Neil was present. (Opn. p. 4.) Dineen and Deetjen testified that O'Neil stood watches in the main control room and the boiler room of the *Oriskany*, and toured the engineering spaces to supervise equipment repairs on a daily basis. (10 RT 11648-49, 1652-56.) Repairs were performed by enlisted men under O'Neil's supervision. (*Ibid;* 10 RT 1659-60.) Major repairs were required after a fire caused major damage to the *Oriskany*, and O'Neil continued supervising repairs during this period. (10 RT 1661-62.) O'Neil was in the machine spaces while

people were working on equipment. (10 RT 1692, 1707.)

1. O'Neil was exposed to asbestos from Crane valves

Crane was a "prominent" manufacturer of the thousands of valves used in the steam-propulsion system of the *Oriskany*. (7 RT 967.) Most of the valves in the machinery spaces were Crane valves. (7 RT 968.) In a single fire room, there were "a couple hundred valves." (10 RT 1707.) *Lt. O'Neil* was present when work was performed on Crane valves. (Opn. p. 4; 10 RT 1711, 1734.) Crane valves were covered with asbestos insulation. (7 RT 969, 972.) The insulation was removed with utility knives and scrapers, which created visible dust that would get into the workers' noses. (10 RT 1709-1710.) Dust that was being created by the workers would be breathed in by others working around them. (10 RT 1711.) No one, including officers, wore respiratory protection while the work was being performed. (*Ibid.*)

Flange gaskets were removed from the valves with wire brushes. (10 RT 1711-1712.) The gaskets came apart and were a "mess," and flanges had to be completely cleaned of old gasket material before putting in a new one. (10 RT 1713.) To clean off the residue and pieces of the old gaskets, workers used hand wire brushes, and power wire brushes, which created more dust, but completed the job quicker. (10 RT 1714-15.) Both hand brushing and wire brushing created visible dust. (*Ibid;* see also 7 RT 911.) The dust "just floated" and was "everywhere" in the work space. (10 RT 1715.) O'Neil was in the machine spaces while the dust was being created from the removal of gaskets. (10 RT 1715.)

Valve maintenance required removal of the old packing with a corkscrew-type tool. Used packing was made of graphite and asbestos, and dried out from use. (10 RT 1708-1709.) The removal of packing created visible dust breathed by personnel in the area, including O'Neil. (10 RT 1722-23, 1734-35; see also 7 RT 911 – 912.)

2. O'Neil was exposed to asbestos from Warren pumps

Deetjen testified that he saw O'Neil in the area when Deetjen and others were working on Warren pumps that created dust. (10 RT 1736.) Deetjen worked on pumps, including bilge pumps and fuel oil pumps, while on the *Oriskany*. (10 RT 1715-1716.) This work included removing insulation, and when Deetjen was working on the steam end of a pump, visible dust was created that he inhaled. (10 RT 1716.) Captain Lowell testified that the insulation provided by Warren had to be removed for maintenance work. (7 RT 954-955.) Deetjen testified he was around others working on pumps that created dust from insulation, and he breathed that dust. (10 RT 1717.) Deetjen also testified that he saw O'Neil in the area when Deetjen or others were removing insulation from pumps, which created dust. (*Ibid.*)

Deetjen testified that his work on the *Oriskany* included removing flange gaskets from pumps in the same way as gaskets on valves. This process created visible dust that moved around the compartment. (10 RT 1717.) Deetjen testified that he breathed in that dust, and saw O'Neil in the area when Deetjen and others were doing gasket work on pumps that created dust. (10 RT 1717-18.)

Deetjen testified that the removal of packing from pumps created visible dust. Deetjen saw visible dust that was moving around the spaces when others were doing packing work on pumps, and saw O'Neil in the area when he and others were working on packing on pumps. (10 RT 1722-23.)

G. The risk of user injury from exposure to asbestos during product maintenance was foreseeable to Crane and Warren

Before Manufacturers sold a single pump or valve to be installed on the *Oriskany*, it was generally recognized that asbestos in a work environment was capable of causing death and injury in humans. (6 RT 720-721.) By 1930, all of the important characteristics of asbestos disease had been identified. It was known that asbestos disease killed people; that asbestos disease was dose dependent; and

that there was a latency period between exposure and disease manifestation. It was also known that if exposure were reduced, the incidence of asbestos disease would be reduced. (6 RT 721-722.)

Similarly, methods for prevention of asbestos disease were known in 1930. These techniques included wetting down the asbestos, using a vacuum system to reduce exposure, enclosing the process so workers are not exposed, periodic evaluations of workers, the use of respirators, substitution of non-asbestos alternatives, and, significantly, educating workers themselves to the dangers of asbestos. (6 RT 722-23.) These same methods to prevent asbestos disease were also employed in the 1960s. (6 RT 723.)

The first academic paper connecting asbestos with cancer was published in 1935. The body of knowledge about the relationship between asbestos and cancer progressively developed through the 1930s, 1940s and 1950s, culminating in a paper written by Sir Richard Doll in 1955 that unequivocally demonstrated that exposure to asbestos causes lung cancer. (6 RT 724-726.) Case reports linking asbestos exposure to mesothelioma were first published in the 1940s and 1950s (6 RT 727-28), but the definitive work in this area came from Dr. Wagner in 1960 who identified 33 cases of mesothelioma in South Africa, 32 of which involved exposure to asbestos. (6 RT 728-29.) It was generally known and reported in the medical literature in 1960 that workers exposed to asbestos fibers were at risk for developing mesothelioma. (6 RT 729.)

Barry Horn, M.D., testified that in 1964, Dr. Irving Selikoff published a study of asbestos insulation workers in New York and New Jersey demonstrating that these workers were at dramatic risk of lung cancer, mesothelioma and asbestosis. Dr. Selikoff also convened an international symposium in New York City that included investigators from all over the world who presented their studies from their area of the world. Following that conference, the papers presented were

published in the Annals of the New Your Academy of Sciences in 1965, which appeared in most medical libraries. (6 RT 730-31.)

Dr. Horn testified that the literature and the body of knowledge concerning the health risks associated with asbestos were available to anyone who was interested in learning about asbestos disease because the articles were present in medical libraries all over the United States. (6 RT 731-732.)

There was evidence of actual knowledge of asbestos hazards on the part of Crane. The National Safety Council ("NSC") was a trade organization that published advisories regarding the dangers and hazards of dust exposure to its members. (12 RT 2074.) Crane representatives were members of the NSC since as early as 1914, when its employee, Dr. Andrew M. Harvey, was a member. Mr. McLain of Crane also testified that he was a member of the NSC. (12 RT 2073 – 2074.) Crane's Dr. Harvey published an article in 1935 about the dangers and hazards of dust disease, including asbestosis. (12 RT 2074.)

Prior to 1980, Crane did not conduct any tests regarding the potential health hazards associated with asbestos. (12 RT 2076.) At no time did Warren ever conduct tests of any health hazards associated with the asbestos-containing components of its pumps. (13 RT 2275.)

H. The trial court granted non-suit

The foregoing evidence was presented through a 15-day jury trial in the Los Angeles Superior Court, Judge Elihu Berle presiding. Defendants Crane and Warren filed and served written motions for non-suit, and O'Neil filed written opposition. (1 AA 69, 108; 2 AA 155.) Crane argued that it could have no liability for the asbestos-containing insulation, gaskets and packing used with its valves because these materials were supplied by others. (1 AA 69.) Warren moved for non-suit based on a purported lack of exposure to Warren pumps, and orally joined in Crane's motion. (1 AA 108; 16 RT 2976.) The trial court held a hearing on

Manufacturers' motions for non-suit prior to submitting the matter for the jury's deliberations.

Neither Crane nor Warren relied on – or even mentioned – the component-part doctrine to support their motions. Nevertheless, the trial court relied on the unbriefed component-part doctrine as stated in *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, and section 5 of the Restatement Third, Products Liability, and granted Manufacturers' non-suit motions. (16 RT 3000, 3005, 3012-3013.)

The trial court ruled that Manufacturers' products were not "inherently dangerous" or defective because asbestos fibers were not released until repair work was done. (16 RT 3003.) The trial court found that Manufacturers' customer, the Navy, had the sole responsibility for controlling the dangerous conditions in the workplace created by the maintenance of Manufacturers' equipment. (16 RT 3007.) The trial court applied the component part doctrine based on its conclusion that the Manufacturers' products "were integrated in a system manufactured in essence by the United States Navy," and because the release of asbestos fibers was "not caused by normal use of the product but was caused by maintenance under the supervision of the United States Navy." (16 RT 3010.)

I. The Court of Appeal reversed the order granting non-suit

Plaintiffs appealed from the judgment of non-suit, and the Second District Court of Appeal, Division Five, reversed the judgment. It conducted a *de novo* review and, because the appeal was from judgment after non-suit, it disregarded conflicting evidence, and construed all of the evidence in a light most favorable to Plaintiffs, drawing all legitimate inferences in Plaintiffs' favor. (Opn. p. 2, n. 1, citing *Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583.)

The Court of Appeal found that the trial court had misapplied the

component-part doctrine in several respects: because Manufacturers' products were not altered, the products themselves were defective, the Manufacturers had a substantial role in developing and designing the products, the products were "used as they were designed to be used," and Manufacturers were well-situated to provide warnings to the products users. (Opn. p. 12, 14.) The Court of Appeal found that the policy reasons for the component-parts doctrine "simply do not apply." (*Ibid.*)

The Court further found that the First District's decision in *Taylor v. Elliott Turbomachinery* (2009) 171 Cal.App.4th 564, published after the trial court's judgment, but relied on by Manufacturers in support of the judgment, was wrongly decided. (Opn. p. 13, 21.) The three bases of the *Taylor* decision were each flawed. The "stream of commerce" rationale, which is the primary basis of both the *Taylor* decision and Manufacturers' arguments here, was inapposite and misapplied, since the use of Manufacturers' own products caused O'Neil's injury. (Opn. p. 20 ["The danger was caused by the operation of respondents' products.... [T]he use of asbestos, and replacement asbestos, was not happenstance. It was design."].) The second and closely related rationale cited by the *Taylor* court was the absence of a duty to warn of "products of others," a deceptively labeled rationale that is flawed because of its misunderstanding of California precedent, which *Taylor* purported to distinguish, but could not. (Opn. pp. 20-21.) The third basis of the *Taylor* decision is the component part doctrine just discussed, and *Taylor*'s treatment of that issue "miss[ed] the mark," just as the trial court's ruling did. (Opn. p. 13.)[4]

[4] The Court of Appeal also found error in the trial court's finding that Crane did not supply asbestos gaskets with its valves. (Opn. p. 3, n. 3; 16 RT 2999:15-21.) Crane supplied high-pressure valves with corrugated iron gaskets, but other lower-pressure Crane valves were supplied with asbestos-containing gaskets. (8 RT 1209:24 – 1210: 7.)

Manufacturers petitioned this Court for review of the Court of Appeal's decision, citing the split in authority that had been created by the diverging decisions of the First and Second Districts of the Court of Appeal. This Court granted review, effectively leaving the First District's *Taylor* decision as the only published authority on the matter. Subsequent appellate decisions have followed the *Taylor* decision, with this Court granting review and deferring briefing in each case, pending disposition of this case. (*Merrill v. Leslie Controls,* S178957, review granted February 3, 2010; *Hall v. Warren Pumps LLC,* S181357, review granted May 12, 2010.) On April 22, 2010, Division Four of the Second District issued its decision in *Walton v. William Powell Co.* (2010) 183 Cal.App.4th 1470, __ Cal.Rptr.3d __, also following the *Taylor* decision. As of the filing of this brief, the time for filing a petition for review of the *Walton* decision has not yet lapsed, and Plaintiffs anticipate such a petition will be filed.

III. LEGAL DISCUSSION

A. Controlling principles of product-liability law

This Court has long held that a manufacturer is liable in tort if a defect in the design of its product causes injury while the product is being used in a reasonably foreseeable way. (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 126-130 ["*Cronin*"]; *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62 ["*Greenman*"].) Manufacturers are held strictly liable for defects in their products that cause injuries. (*Greenman, supra,* 59 Cal.2d at 62.) "This doctrine of strict liability extends to products which have design defects, manufacturing defects, or 'warning defects.'" (*Sparks v. Owens-Illinois, Inc.,* (1995) 32 Cal.App.4th 461, 472.)

The scope of the doctrine of strict liability is to be determined to large extent by the fundamental policies that underlie it, as set out in *Greenman* and its

progeny. (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995.) One of the overriding purposes of strict liability is to ensure that the cost of injury is borne by the manufacturers that have placed defective products on the market, not by injured persons powerless to protect themselves. (*Greenman, supra,* 59 Cal.2d at 63-64.)

Product manufacturers are also liable for injuries caused by the foreseeable use of their products under traditional negligence law. A manufacturer is under a duty to exercise reasonable care in the design of its product so that it can be safely used as intended. (*Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 465, 470; Rest. 2nd Torts, section 398; Civil Code section 1714 subdivision (a).)

Here, Manufacturers designed their pumps and valves to operate with asbestos-containing materials, including packing, gaskets and insulation. They knew and intended that users would be exposed to asbestos during routine maintenance of their products. They nevertheless seek to avoid liability for injuries caused by the foreseeable use of their products by claiming that the asbestos was supplied by third parties, such that they should not be held liable for injuries resulting from "another's" product.

This brief will explain why Manufacturers' attempts to immunize themselves from tort liability for injuries caused by the foreseeable use of their defective products is incompatible with well-established rules governing claims for strict products liability and negligence. Plaintiffs urge this Court to disapprove of the flawed reasoning and decision in *Taylor v. Elliott Turbomachinery, supra,* 171 Cal.App.4th 564.

Plaintiffs further urge this Court to look beyond Manufacturers' disingenuous invocation of World War II, President Roosevelt and the bargaining power of the United States Navy, and to examine those rationalizations for what they are: an attempt to shift blame to a non-party that is immune from tort liability

(the Navy), and avoid Manufacturers' own fair share of responsibility for manufacturing, designing and selling defective products that have injured and killed thousands of naval servicemen and other victims.

Plaintiffs explain that Manufacturers have liability for asbestos-containing replacement parts. The asbestos replacement parts included packing, gaskets, and for Warren pumps, insulation. Manufacturers unquestionably designed their products to operate with asbestos materials, and supplied them in a defective condition. The foreseeable replacement of original asbestos materials with identical asbestos materials supplied by third parties during the routine maintenance of the products was a continuation of Manufacturers' defective design, and was done according to lists of replacement parts supplied by Manufacturers. There was no substantial and unforeseeable modification of the equipment as it was supplied by Manufacturers, and therefore no basis for avoiding liability for the injuries caused by the design of Manufacturers' products, or for failing to warn of this foreseeable hazard.

Plaintiffs further explain that Manufacturers are liable under strict liability and negligence for injuries caused by asbestos materials that were necessary to the intended use of the equipment. Manufacturers are therefore liable, not only for asbestos replacement parts, but also asbestos insulation and flange gaskets applied by the shipbuilder when the equipment was installed.

The evidence in this case demonstrated that Manufacturers' specially designed, high-temperature steam equipment had to be thermally insulated, and that use of asbestos insulation for this purpose was certain. (7 RT 900-901; 918; see Warren Petition for Review ("PFR"), p. 10 ["the only way to meet some of [the Navy's] criteria in the 1940s was to use asbestos"]; Warren OBM, p. 3 [use of asbestos was "essential"], p. 9-10 [asbestos was the only material available to Warren in 1943].)

The high-temperature pumps and valves were designed to be connected to the surrounding steam equipment through the use of flanged connections, and these flanged connections required the use of asbestos gaskets. (Warren OBM, p. 11 [no available substitute for asbestos gaskets and packing].) Lt. O'Neil's injury was caused by the use of Manufacturers' products when those products were used as designed and intended. This Court should therefore affirm the Court of Appeal's holding, following established California precedent, that Manufacturers are responsible for injuries caused by the combined dangerous use of Manufacturers' *high-temperature* valves and pumps and the asbestos materials required for their intended operation.

Third, Plaintiffs explain the mistaken application of the "stream of commerce" rationale followed by the *Taylor* court. The use of Manufacturers' products caused the release of asbestos fibers and Plaintiffs' injury. Manufacturers' meme, adopted by the *Taylor* court, that O'Neil's injury was caused by "products of others" is simply a mistaken but carefully orchestrated and relentlessly repeated exercise in misdirection. The injury here was caused by the use of Manufacturers' products.

Plaintiffs also explain the inapplicability of the component-part defense to these specially designed, defective products. (Section 5, Rest. 3rd Products Liability.) Plaintiffs further dispel Manufacturers' various red-herrings and other distractions, such as claims that there should be no liability here because of the role that the Navy and others played in contributing to Lt. O'Neil's injuries.

B. Crane and Warren are liable for asbestos-containing replacement parts

1. Crane and Warren supplied defective products

A product may be found defective in design if the plaintiff demonstrates that "the product failed to perform as safely as an ordinary consumer would expect

when used in an intended or reasonably foreseeable manner." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429.) The consumer-expectations test asks if the reasonable minimum safety expectations of the products ordinary consumers were violated. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548.) When that design violates minimum safety assumptions it is defective. (*Id.*, at p. 567.) "Whether or not the defendant is able to design the product in a different way is irrelevant, as the Supreme Court neither requires nor allows proof of the existence of a better design under the consumer expectation test." (*Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1186, citing *Soule, supra*, at p. 567.)

A design defect exists when a product is built in accordance with its intended specifications, but the design itself is inherently defective. (*Barker v. Lull, supra,* 20 Cal.3d at p. 429.) A product is defective due to the absence of a warning when "'it is unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied and no warning is given.'" (*Gonzalez v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151.) "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commerical Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343.)

Here, Manufacturers designed their high-temperature equipment to include internal asbestos gaskets and packing, and asbestos insulation. The evidence included design specifications on drawings from Warren and Crane that required the use of asbestos-containing materials. (7 RT 969, 971; 7 RT 949-952; 13 RT 2209 – 2212.) The pumps and valves were shipped from the factory with asbestos-containing parts. (12 RT 2063, 2072; 7 RT 953-954; 7 RT 957.) The manufacturers provided instruction manuals that listed asbestos materials for replacement purposes. (7 RT 940.)

Moreover, Manufacturers knew and understood these asbestos-containing sealants were "wear parts" that would have to be periodically replaced over the life of the equipment. (12 RT 2066-67; 13 RT 2213-14.) Crane sold asbestos-containing gaskets and packing to be used for maintenance of their valves, and admitted users would need to break down the valves to replace these internal asbestos components. (12 RT 2065, 2067.)

The jury was not allowed to decide the issue of whether Manufacturers' designs to include asbestos in their products violated the consumer-expectation test, or whether Manufacturers failed to warn of a known or knowable risk, because of the order granting non-suit on the ground that the original asbestos materials in the Manufacturers' products had been replaced by the time that Lt. O'Neil was exposed to asbestos dust from maintenance of the products.

Manufacturers here do not contest the defect existing in their products as they were shipped. As the Court of Appeal noted, "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." (Opn. p. 16; see *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 261.) The question is whether Manufacturers' liability is cut off when the asbestos parts are replaced with other asbestos parts during routine maintenance procedures, performed in accord with Manufacturers' instructions, and using replacement part lists provided by Manufacturers.

The Court of Appeal's answer was a resounding "no." The Court of Appeal correctly held there is "nothing in [Manufacturers'] 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 and repair." (Opn. p. 16.) This is a sound holding that should be affirmed by this Court.

2. Strict liability is cut off only by substantial and unforeseeable changes in a product

Manufacturers' contention that their liability ends when the original asbestos is replaced with asbestos products supplied by others cannot be sustained in the face of decades of well-established product-liability law holding manufacturers liable for insubstantial and foreseeable alterations of their products. Foreseeable alterations and modifications that make a product dangerous will lead to liability for the manufacturer, even if the product was safe when it left the factory.

"[A] manufacturer may be held liable where the alteration of the machine or its misuse by the customer was reasonably foreseeable... It has been held repeatedly that the foreseeability of misuse of a product is a question for the trier of the facts." (*Thompson v. Package Machinery Co.* (1972) 22 Cal.App.3d 188, 196; see also *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56; *Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833-835; *Thomas v. General Motors Corp.* (1970) 13 Cal.App.3d 81, 89-90.)

Only where there is a "substantial modification," i.e., an unforeseeable modification, will the manufacturer's responsibility for the safety of its product be terminated. (*Torres v. Xomox* (1996) 49 Cal.App.4th 1, 19.) This black-letter law has been incorporated into the standard jury instructions approved by the Judicial Council. (CACI 1245 Affirmative Defense – Product Misuse or Modification ["Defendant claims that it is not responsible for plaintiff's claimed harm because the product was modified after it left defendant's possession. To succeed on this defense, defendant must prove that: 1. The product was modified after it left defendant's possession; 2. That the modification was not reasonably foreseeable to defendant; and 3. That the modification was the sole cause of plaintiff's harm."].)

The use of asbestos replacement parts to replace the asbestos that was originally supplied and specified by Manufacturers is not an unforeseeable

modification or alteration of the product. Indeed, since asbestos replacement parts were identified on replacement part lists supplied by Manufacturers, there was no change to the Manufacturers' products at all. Manufacturers shipped asbestos-containing valves and pumps, and O'Neil's injury was caused by use of these products in substantially the same condition as when they left Manufacturers' possession.

To the extent use of asbestos replacement parts could be an "alteration" to the product, it is an insubstantial one that does not cut off liability. Because the use of asbestos-containing replacement gaskets, packing and insulation was not a substantial modification, i.e., an unforeseeable modification, Manufacturers are liable for the use of these products under the doctrine of foreseeable modifications and alterations. (*Thompson, supra,* 22 Cal.App.3d at 196; *Campbell, supra,* 22 Cal.3d at 56; *Huynh, supra,* 16 Cal.App.4th at 833-835; *Thomas, supra,* 13 Cal.App.3d at 89-90.)

Manufacturers have no meaningful response to this fundament of product-liability law.[5] They do not cite a single case for the proposition that an insubstantial and foreseeable alteration will cut off liability if the foreseeable alteration is a replacement part supplied by a third party. At no point does Warren address the fact that it supplied parts lists that specified the use of asbestos-containing replacement parts. Although Warren claims it could not have tested replacement parts, there is no question it was obligated to test the original parts that were shipped with its pumps, and which were specified on its list of replacement parts.

Crane argues that alleged differences between original parts and

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[5] As noted, Plaintiffs rely on application of foundational product-liability law, not some "novel" theory, as it is portrayed by Manufacturers. Plaintiffs directly address the novelty of Manufacturers' defense at section III.H.2., below.

replacement parts means that there can be no liability, "even if both contained asbestos." (Crane OBM, p. 32 fn 13.) The doctrine of substantial alteration does not require the replacement part be identical – only that there be no substantial and unforeseeable alteration. The evidence here was that any internal asbestos parts that were supplied by Manufacturers were replaced with asbestos parts. (7 RT 940; 10 RT 1729.) Moreover, Crane violates the standard of review by claiming there is no evidence to support the conclusion that replacements were identical, when in fact there was evidence, through the manufacturers' lists of replacement parts, and the testimony that sailors referred to manufacturer manuals to identify replacement parts, that the replacements were substantially similar, if not identical, to the original. (*Ibid.*)

The Court of Appeal relied on this evidence to conclude that "[t]he injury was caused by the operation of respondents' products with replacement products that had the same dangerous propensities as the original products."]. (Opn. p. 17.) The applicable standard of review of the trial court's non-suit judgment requires the Court to conclude that the replacement gaskets were not substantially different from the originals, i.e., there was no substantial modification which would eliminate liability for defective design or failure to warn of the originally defective condition.

Taylor does not directly confront the issue of insubstantial alteration. At footnote 12 of the decision, it dismisses this line of authority by returning to the refrain that asbestos was released "from products not made or supplied by respondents." (*Taylor, supra,* 171 Cal.App.4th at p. 588, n. 12.) This observation ignores the fact that the "product" shipped by Manufacturers included the defect that caused O'Neil's injury. Manufacturers' "products" are valves and pumps that are insulated and sealed with asbestos. That is how Manufacturers designed, manufactured and shipped the products, and they were in the same condition when

they caused *Lt. O'Neil*'s injury. The only insubstantial and foreseeable difference was the use of asbestos replacement parts supplied by a third party in place of the asbestos Manufacturers included in the original design – not a substantial and unforeseen modification.

Significantly, *Taylor* expressly avoided the issue of design defect – a major omission when considering a manufacturer's liability for replacement parts that are substantially identical to the asbestos parts originally included, by design, with the manufacturer's equipment. (*Taylor,* at p. 572, n. 4, 574.)

Manufacturers rely on out-of-state authority, *Ford Motor Co. v. Wood* (Md. App. 1998) 703 A.2d 1315 ("*Wood*"), for the proposition that a manufacturer cannot be liable for replacement parts. The case is not persuasive, not only because it was not decided under California law, but also because the plaintiff did not try the case on a replacement-part theory. (*Wood, supra,* 703 A.2d at p. 1330.) *Wood* contains no discussion of the doctrine of foreseeable alterations, nor is there any evidence, as here, that the defendant specified the use of asbestos replacement parts and that the replacement parts were not a substantial alteration of the Manufacturers' original design.

Manufacturers also rely on *Baughman v. General Motors Corp.* (4th Cir. 1986) 780 F.2d 1131, for the proposition that there can be no liability for replacement parts supplied by others, but in that case the replacement part was different than the component originally supplied by the defendant. The plaintiff was injured by a multi-piece tire rim that explosively separated when it was being installed. Although the defendant originally supplied a multi-piece rim, the original rim had a different design, and the difference in the design of the replacement rim that exploded directly affected and increased the risk of that the multi-piece rim would separate.

Thus *Baughman* is only authority for the proposition that there is no duty to

warn of dissimilar replacement parts utilizing a design different than the original. *Id.,* at p. 1132. Here the asbestos components that replaced the original asbestos components supplied by the Manufacturers had the identical defect – they released asbestos fibers during routine maintenance and repairs.

Because the products were defective as supplied, the Manufacturers owed a duty to warn of this danger. (*DeLeon v. Commerical Manufacturing and Supply Co., supra,* 148 Cal.App.3d at p. 343.) Indeed, Crane conceded at oral argument of the appeal that they owed a duty to warn the sailors who worked on the parts they shipped that contained the original asbestos-containing material. The defendants have never provided a plausible rationale for how their duty to warn of the danger existing in the product when it was shipped somehow evaporated when the original asbestos was replaced with replacement asbestos that performed the same function in the products.

The contention that the Manufacturers had a duty to warn only the first set of sailors to work on the products violates a fundamental policy underlying strict liability law – that the duty is owed to all persons within the zone of danger created by Manufacturers' hazardous products. (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1072 [strict liability "extends not only to actual consumers or users but to any human being to whom an injury from the defect is reasonably foreseeable."]; *Greenman v. Yuba, supra,* 59 Cal.2d at 62.)

Had Manufacturers satisfied their duty to warn of the original asbestos hazard, by including warnings in their manuals or on the products themselves, that same warning would have benefited and protected subsequent users and bystanders, including *Lt. O'Neil*, at no additional cost of money or effort to Manufacturers. (Opn. p. 18 ["If respondents had warned the hypothetical original user, or protected that person by avoiding defective design, subsequent users, too, would have been protected."].)

C. Crane's valves and Warren's pumps were defective because they required the use of asbestos insulation and flange gaskets

The Court of Appeal held that the Manufacturers could be held responsible, not only for replacement parts, but for "dangerous products with which its product will necessarily be used." (Opn. p. 18; see also *Groll v. Shell Oil* (1983) 148 Cal.App.3d 444, 448 ["[A] manufacturer or supplier of a product is required to give warnings of any dangerous propensities in its product, *or in its use,* of which he knows or should know, and which the user of the product would not ordinarily discover."] (Emphasis added).) Under the Court of Appeal's holding, Defendants Crane and Warren may be held liable for the asbestos insulation and flange gaskets that were necessarily applied to the products as part of their intended function.

The defects in the design of Manufacturers' products included, not only the specified asbestos components included within the pumps and valves, but designs which necessarily required the use of asbestos insulation and flange gaskets. "Design" is not limited to physical, mechanical operations, but extends to a preconceived "plan" for the use of the product. The term "design defect" "relates more to a legal conclusion that a product has deviated in some manner from what is reasonably expected, than it does to a description of a specific mechanical shortcoming or flaw." (*Arena v. Owens Corning Fiberglas Corp., supra,* 63 Cal.App.4th at 1186.)

The term "design" merely means a preconceived plan, so that even raw asbestos has been found to have a "design," in that the miner's subjective plan of "blasting it out of the ground, pounding and separating the fibers, and marketing them for various uses, constitutes a design." (*Ibid.*) When that design violates minimum safety assumptions, it is defective. (*Id.*, citing *Soule v. General Motors*

Corp., supra, 8 Cal.4th 548, 567.) As noted above, the availability of a better design is irrelevant under the consumer expectation test. (*Ibid.*) Here, Manufacturers designed their *high-temperature* pumps and valves to be used with asbestos-containing materials, and designed them in such a way that maintenance of the equipment posed an unreasonable risk of injury from asbestos exposure.

Manufacturers knew their equipment had to be insulated so that the products would not dissipate the heat of the steam or water passing through the pumps and valves, and so that users would not be scalded by 500-degree metal surfaces. (7 RT 898-900.) The internal components could not be maintained without disturbing the insulation. (7 RT 916-917; 7 RT 954-955.)

Exposure to asbestos from flange gaskets was a result of a flaw in the design of the pumps and valves. The equipment was designed to connect to the surrounding equipment by flanged connections that required gaskets to seal the metal-to-metal connections, with asbestos gasket material that could withstand the high operating temperatures. (7 RT 903-904; 7 RT 908-909; 7 RT 968; 10 RT 1722; 15 RT 2761.) Warren's pumps were designed to operate with steam driven turbines, and were designed with flanged connections the required asbestos gaskets to connect to the steam turbine. (7 RT 952-954; 14 RT 2551.)

The temperature at which Manufacturers' valves and pumps operated was a part of the design of the equipment (7 RT 956), and it was the high-temperature operation of the equipment that caused asbestos gaskets and packing to adhere to the metal, requiring forcible removal of the baked on gaskets and packing with scrapers and other implements which released the asbestos fibers. (7 RT 910-912; 7 RT 914; 12 RT 2067.)

Warren claims the steam was incidental to the operation of its pumps. To the contrary, the use of steam was absolutely integral to the design of Warren's pumps. Steam was the driving force of Warren's reciprocating steam pumps. (13

RT 2201 [Warren representative Roland Doktor testifying "the steam would actually move a piston up and down to actually get the pump to reciprocate."].) It was undeniably the high-temperature operation of Warren's pumps that caused gaskets and packing to become adhered to the metal of the pump, requiring users to apply scrapers and other forces to the asbestos materials that released asbestos fibers.

The evidence in this case, therefore, demonstrated that the design of Manufacturers' pumps and valves created a risk of harm, since the design of Manufacturers' products made exposure to asbestos a foreseeable risk. (See *DeLeon, supra,* 148 Cal.App.3d at p. 346 [holding elements of a product's design may be considered to have "caused or created the risk of harm" by making contact with a dangerous product manufactured by a third party "a foreseeable risk."].)

D. California law recognizes liability for combined dangerous uses

The evidence in this case showed that Crane and Warren designed their pumps and valves to control and move high-temperature liquid and steam through the steam-propulsion plant. These functions necessarily required the use of thermal insulation, which at the time was overwhelmingly asbestos-containing, and the use of asbestos flange gaskets to seal the metal-to-metal connections. Additionally, Crane and Warren designed the pumps and valves with internal asbestos components, which were necessarily replaced with asbestos supplied by third parties. The Court of Appeal concluded that the Manufacturers could be liable for the dangerous combined use of their products and products supplied by third parties, by relying on California precedent which *Taylor* "sought to distinguish," but misunderstood. (Opn. p. 18-19.) The authorities relied on by the Court of Appeal below, and misunderstood by the *Taylor* court, are *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577 ("*Tellez-Cordova*"); *Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th

1218 ("*Wright*"); and *DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336 ("*DeLeon*").[6]

In each of these cases, a dangerous condition was created by the combination of the defendant's product and a product supplied by another, but liability was imposed because the danger was foreseeable to the defendant. These cases are in harmony with California product-liability law and should be followed here. Although they have tried, neither Manufacturers nor the *Taylor* court have been able to distinguish these authorities. To rule in favor of Manufacturers, this Court would have to overrule these precedents, which have stood undisturbed as part of the fabric of California law for decades. They are, and should continue to be, the law of California.

In *Tellez-Cordova, Wright* and *DeLeon*, the defendants each manufactured products that were specially designed for the purpose for which they were ultimately used, and either knew or should have known that use of their products would expose the user to dangers from products made by others. Each of these courts heeded this Court's instruction that the safety of a product must be evaluated in light of its intended and foreseeable use, not simply as an inert object sitting on a shelf. (See *Cronin, supra,* 8 Cal.3d at 126 ["The design and

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[6] *Taylor* itself conceded a manufacturer's potential liability for failure to warn of dangerous combined uses, but used an exceedingly narrow causation argument to limit the scope of liability. According to *Taylor,* "[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 (original emphasis).) *Taylor* concludes the use of defendants' products did not "cause or create" the risk of harm, because asbestos was released from the gaskets, packing and insulation supplied by third parties, which would have remained undisturbed without maintenance of defendants' products. (Cf. *DeLeon, supra,* p. 346 [elements of product's design causes or creates risk of harm by making contact with dangerous product supplied by third party a foreseeable risk].)

manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use."].)

These courts were not misled by contentions that a manufacturer may be heedless of dangerous conditions that are created when its products are used in conjunction with products supplied by others. The issue is not whether a manufacturer should have a duty to design a product to be safe for its intended uses, and warn of foreseeable dangers arising in the use of their product – California has long recognized such duties. (*Anderson, supra,* 53 Cal.3d at 996; *Barker v. Lull, supra,* 20 Cal.3d at 429.) The issue is whether there is an exception for liability for foreseeable dangerous uses of defendant's product, when the danger is caused by the combined use of Manufacturers' product and the product of another. There is no such exception.

In *Tellez-Cordova*, the court found plaintiff's complaint stated a cause of action against a manufacturer of grinders for injuries caused by the release of respirable toxins from grinding wheels that were manufactured by a third party and subsequently affixed to the defendant's grinders by the consumer. The *Tellez-Cordova* court held that the manufacturer had a duty to warn despite the fact that the injurious toxins were released from a product that was not supplied by the defendant, since the "specifically designed, intended and reasonably foreseeable use" of the grinders included the use of grinding wheels manufactured by another. (*Tellez-Cordova, supra*, 129 *Cal.App.*4th at 580, 582-583.)

Tellez-Cordova is directly parallel to the circumstances here. Lt. O'Neil was injured during the repair and maintenance of Manufacturers' products, by asbestos fibers released from insulation, gaskets and packing supplied by others, where the foreseeable and intended use of Manufacturers' equipment included the use of asbestos insulation, gaskets and packing.

The *Tellez-Cordova* defendants argued that they could not be held liable for

failing to warn of the risk of respirable toxins released by the grinding wheels, since they did not manufacture them. Defendants argued for a bright-line rule that would prevent any manufacturer from being held liable "for defects in a final product over which it had no control," which is the same argument that Manufacturers make here. (*Tellez-Cordova, supra*, 129 *Cal.App.*4th at 581.) The *Tellez-Cordova* court rejected the argument, holding that the defendants "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 . . . ." (*Id.* at 583.)

Similarly, in *DeLeon*, the court found that the defendant had a duty to warn of dangers from equipment not supplied by the defendant, where the intended use of the product designed by the defendant created a risk of injury from the third party's product. The defendant (Commercial) manufactured a sorting bin to be used as part of the plaintiff's employer's food processing machinery. The bin was manufactured and designed based on a prototype and specifications supplied by the plaintiff's employer.

Because of the physical dimensions of the bin, routine cleaning of the bin placed users close to an exposed rotating line shaft that was manufactured and installed by the plaintiffs' employer. The overhead line shaft "had nothing to do with the operation of the bin," but nevertheless the proximity of these two components of the fruit-sorting process created a dangerous condition. (*DeLeon, supra*, 148 *Cal.App.*3d at 341.) When designing the sorting bins, the defendant's employees inspected the premises but "never noticed" the shaft overhead, and were essentially disinterested in it because it "had nothing to do with the product Commercial built." (*Ibid.*)

The court found the bin manufacturer might have foreseen the danger of the exposed overhead line shaft, and had a duty to warn of the foreseeable hazard. The court found that even though there was a safe way to clean the bin, "the

important factor is whether it is foreseeable that someone would climb onto the belt [for cleaning]...." (*DeLeon, supra*, 148 *Cal.App.*3d at 344.) The defendant was not entitled to summary judgment because "Commercial did not show that such an act was unforeseeable, so even if plaintiff's acts constituted misuse of the product, if her acts were foreseeable, Commercial is not absolved of blame." (*Ibid.*) Therefore, the *DeLeon* court found that the defendant's product, which was not itself defective, nevertheless could "present an excessive preventable danger in its intended use because of its proximity to the line shaft [manufactured by another]." (*Ibid.*)

The *DeLeon* court's holding is supported by a common-sense rationale and sound public policy. The court made clear that the product manufactured by the defendant must not be viewed in a vacuum, but must take into account the reality of the circumstances in which the product operates. (*DeLeon, supra*, 148 *Cal.App.*3d at 344 ["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."]; see also *Daly v. General Motors* (1978) 20 Cal. 3d 725, 746 ["Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop."].)

The duty to warn of foreseeable hazardous combinations of products was also recognized in *Wright*. In that case, the defendant manufactured a piece of equipment used on a fire truck – a water cannon mounted on the deck of the fire truck, called a deck gun. The deck gun was mounted to the fire truck by a three-inch riser pipe supplied by a third party, and assembled by the purchaser. The deck gun itself never failed, but the three-inch riser pipe did, causing the entire apparatus to break loose and injure the plaintiff firefighter.

The deck gun manufacturer claimed it could not be liable for any failure to warn because its product was not defective, and the final product (the fire engine,

deck gun and mount) was subsequently packaged, labeled and marketed by another manufacturer. (*Wright, supra*, 54 *Cal.App.*4th at 1224.) The argument was rejected. The plaintiff introduced evidence that it was "foreseeable to anyone familiar with fire apparatus" that pressure from the deck gun would be too great for the steel riser pipe, and that the combination of the deck gun and riser pipe could result in the failure that injured plaintiff. (*Id.* at 1225-1226.) The deck gun manufacturer did not negate that it "knew that the fire department intended to attach the deck gun to a threaded riser pipe." (*Id.* at 1234-1235.) That is, the deck gun manufacturer had a duty to warn of the foreseeable dangers posed by the combination of its product with a product manufactured by another.

So too here. Manufacturers had a duty to warn of the combination of asbestos-containing products with their own equipment, where that combined use was part of the intended use of their equipment. The duty recognized by *Tellez-Cordova, Wright* and *DeLeon* is not an unlimited duty to warn of the products of "others" over which Manufacturers have no control. Rather, there is a duty to warn of foreseeable dangers in the intended use of Manufacturers' products.

Manufacturers' pumps and valves were specially designed to be used as part of the steam-propulsion and auxiliary steam systems of the *Oriskany*, a Navy ship powered by steam under high pressure. Manufacturers' products were designed to operate in these steam systems and necessarily required the use of thermal insulation, gaskets and packing, both internally and externally for their safe (non-scalding) and efficient operation.

Manufacturers knew, with certainty, that asbestos-containing gaskets and packing were in use in these applications. After all, both Crane and Warren assembled their pumps and valves with asbestos gaskets and packing, and Warren included asbestos insulation with their pumps as they were shipped from the factory. In addition to designing their equipment for *high-temperature* application

according to plans that specified asbestos materials, all vendors had access to ships to see how their products were being used. (14 RT 2577, 2652; see also 7 RT 901-902 [common use of asbestos discussed in naval textbooks].) Manufacturers knew their products had to be covered in asbestos insulation to perform their intended function.

Just as in *DeLeon*, Manufacturers here manufactured equipment that required routine maintenance, and that routine maintenance put workers, like *Lt. O'Neil*, in the immediate proximity of asbestos-containing materials that had to be disturbed, removed, and replaced to maintain Manufacturers' equipment. Manufacturers are liable for creating this foreseeable risk.

1. Other jurisdictions have recognized liability for combined dangerous uses

Many courts around the country have addressed and rejected Manufacturers' claims of immunity for foreseeable injuries caused by the use of their products. In *Berkowitz v. A.C. and S., Inc.* (N.Y. 2001) 288 A.D. 2d 148, 733 N.Y.S. 2d 410, the court found a pump manufacturer had a duty to warn concerning the dangers of asbestos gaskets and insulation used on its pumps, despite the fact the pump manufacturer neither manufactured nor installed the asbestos-containing gaskets and insulation. (*Id.* at 288 A.D. 2d at 149, 733 N.Y.S.2d at 412.) The *Berkowitz* court affirmed the denial of the pump manufacturer's motion for summary judgment, citing triable issues of fact regarding the manufacturer's knowledge that asbestos insulation and gaskets would be used with its equipment. (*Ibid.*)

The United States District Court for the Eastern District of Pennsylvania has overseen all federal asbestos cases for the last two decades. It thus has more experience with this litigation than any other court in the country. When it evaluated similar arguments from naval equipment manufacturers, in *Chicano v.*

General Electric Co. 2004 WL 2250990 (E.D. Pa. 2004), it too rejected them. The court found that General Electric was subject to liability for external insulation manufactured and applied by others to its turbines. Despite the fact that General Electric did not control the form of insulation used to cover its turbines, the court found triable issues of fact as to whether the turbines were "generic components or designed for a particular type of finished product and whether GE could reasonably foresee that its turbines would be combined with asbestos-containing insulation, which together constituted a defective product, absent appropriate warnings of the dangers of asbestos." (*Id.* at *6 (emphasis added).)

In *Kummer v. Allied Signal* 2008 WL 4890175 (W.D. Pa.), the court found liability on behalf of a turbine manufacturer who supplied turbines, but not the asbestos insulation used with the turbine, for injuries caused by exposure to the insulation supplied by a third party. The court held that equipment that had been designed to operate with asbestos supplied by a third party could have liability for design defect. (*Id.*, p. *3; citing *Stark v. Armstrong World Industries, Inc.* (C.A.6 (Ohio) 2001) 21 Fed.Appx. 371, 381, 2001 WL 1216977, 8.) The evidence supporting the defendant's design of the turbines to operate with asbestos materials included, as in this case, evidence that the turbine was designed to meet military specifications that called for the use of asbestos insulation. (*Id.*, p. *4.) This evidence supported the court's conclusion that there was a defect in the design of the turbine manufacturer's product, and that this defect was a proximate cause of the plaintiff's injuries. (*Id.*, p. *3.)

In *Sether v. Agco Corporation*, 2008 WL 1701172 (S.D. Ill. 2008), the court recognized liability for asbestos insulation applied to GE steam turbines by others. The court rejected GE's claims that it could not "control" the use of asbestos insulation on its steam turbines:

> To the extent GE seems to argue that it owed no duty to warn, the Court does not agree. According to GE, it manufactured marine steam turbines without any thermal insulation material on them and shipped the turbines with only a coat of paint on the surface of the metal, so that any thermal insulation material would have been supplied and installed by the shipbuilders at the shipyard. **It is well settled, of course, that a manufacturer of a product has a duty to provide those warnings or instructions that are necessary to make its product safe for its intended use.**

(2008 WL 1701172, supra; accord *Lindquist v. Buffalo Pumps*, 2006 WL 3456346 (R.I. Super. 2006) ["The Court finds that this case contains triable issues of fact in relation to Buffalo's duty to warn of the dangers posed by asbestos gaskets and packing used in its pumps."].)

Many non-asbestos cases are analogous. For instance, in *Ilosky v. Michelin Tire Corp.* (1983) 172 W. Va. 435, 307 S.E.2d 603, Michelin sold a non-defective radial tire, but failed to warn about the dangers associated with the foreseeable use of its non-defective tires in combination with conventional, non-radial tires. Using radial tires on the front axle and conventional tires on the rear axle created a danger of over-steering. The *Ilosky* court expressly approved a jury instruction under which the product seller had a duty to warn that its product, which had no defects of its own, could be dangerous to users when used in connection with another product. (*Id.*, 307 S.E.2d at 610 n.6.)[7]

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[7] The court approved an instruction that the Defendant had a duty to "[w]arn that the product, even if harmless or safe in itself, when mixed or used in connection with another product, [would be] dangerous or potentially dangerous to users,

Other courts have recognized the need to impose shared responsibility on all parties contributing to creating dangerous conditions that harm consumers. In *Hooker v. Super Products Corp.* (La.App. 5 Cir.,1999) 751 So.2d 889, the court found that both a repair parts supplier and the original product manufacturer had a duty to warn of dangerous conditions caused by improper product repair. The plaintiff was injured on the job when an improperly repaired sewer hose he was working with ruptured violently, causing serious injury. The hose manufacturer could foresee the use of inappropriate repair materials, and failed to ensure that the end user received warnings regarding the use of proper repair materials. The court found that the hose manufacturer and the supplier of the inadequate repair parts each shared in the responsibility to ensure the end user received adequate warnings. (*Id.,* 751 So.2d at 908.)

Similarly, in an action for wrongful death, where the decedent was killed by carbon dioxide gas released when she pulled a fire alarm, each of the manufacturers of the products used to assemble the fire alarm system were held responsible for failing to warn of the dangerous condition. (*Penn v. Jaros, Baum & Bolles* (2006) 25 A.D.3d 402, 809 N.Y.S.2d 6.) The court rejected defendants' attempts to shift blame to other defendants contributing to the hazardous condition:

> Kidde-Fenwal was the manufacturer of some of the components in the alarm system, including the electrical remote pull box activated by decedent and the master discharge cylinders that initiated discharge of the gas. While the components worked in the

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where it is reasonably foreseeable that uninformed users may mix the products." (*Id.*, 307 S.E.2d at 610 n.6.)

> intended manner, there was no notice indicating that pulling the alarm would also activate the release of CO^2 gas. Kidde contends that it had no responsibility to place warning labels on the alarm. However, **Kidde was aware, at a minimum, that the alarm could be used in conjunction with a CO^2 suppression system. Unlike the situation in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S.2d 373, 591 N.E.2d 222 [1992], the components acted in the manner in which they were intended, and in conjunction with a suppression system that operated as it was intended. Thus, Kidde cannot claim that its parts were used improperly.**

(*Id.*, 25 A.D.3d at p. 403, 809 N.Y.S.2d at p. 8.)

2. The Court Of Appeal here was faithful to California precedent; *Taylor* was not

The Court of Appeal here reached a different result than *Taylor* because of one fundamental difference: the Court of Appeal here recognized and followed California precedent recognizing liability for dangerous use of a defendants' product, whereas the *Taylor* court held that it was the "asbestos content - not any feature of respondents' equipment - that made them hazardous." (*Taylor, supra*, 171 Cal.App.4th at pp. 587-589.) The Court of Appeal below parted company with *Taylor* because it understood that the asbestos content was a feature of the Manufacturers' equipment.

Taylor's attempt to distinguish California precedent, including *Tellez-Cordova, Wright* and *DeLeon,* betrayed a misunderstanding of the cases. The

Taylor court wrote that "in *Tellez-Cordova*, the plaintiff alleged that it was the action of respondent's 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 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.)

The Court of Appeal here parted company with *Taylor* because this discussion demonstrated a misunderstanding of the facts of *Tellez-Cordova*, a decision also authored by Division Five. (Opn., p. 19.) Contrary to what *Taylor* wrote, *Tellez-Cordova* held a manufacturer could be liable when its product is necessarily used in conjunction with another product, and when danger results from the use of the two products together. (*Tellez-Cordova, supra*, 129 Cal.App.4th at pp. 582-583; Opn. p. 20.)

In *Tellez-Cordova*, it was irrelevant that the respirable dust emanated from the attached grinding wheels, and not the tools themselves, because it was the use of the tools - and not just the attached wheels - that created the harm. (*Ibid.*) *Taylor* itself acknowledges that there are circumstances in which a manufacturer must warn of dangerous combinations of a manufacturer's product and products supplied by others, but decided that the pumps and valves here had not "caused or created the risk of harm." (*Taylor, supra*, 171 Cal.App.4th at p. 579-580.) But the maintenance of Manufacturers' products here caused the release of asbestos fibers, just as the use of the grinding tool in *Tellez-Cordova* caused the release of dust

from the grinding wheels.

Taylor was unable to distinguish *Wright v. Stang, supra,* 54 Cal.App.4th 1218. *Taylor* asserted *Wright* could be distinguished because it involved a defect in the defendant's product, the absence of a flanged mounting system, but according to the *Taylor* court, asbestos-containing pumps and valves have no defect. This attempted distinction fails, because claims of defective design are at issue here, and closely resemble the design defect at issue in *Wright.*

The defect in *Wright* involved defects in the selection of a mounting system, and the defect here includes designing pumps and valves with flanged connections that require the use of asbestos gaskets. The defect in Manufacturers' equipment here is even more compelling than that at issue in *Wright,* since here the Manufacturers designed and shipped their pumps and valves with asbestos gaskets, packing and insulation. Moreover, the *Wright* court did not limit its discussion to design defects, but went on to evaluate the "focus" of the parties' contentions, which was the warning claim. (*Wright, supra,* at p. 1230.)

On the warning issue, *Taylor* states the *Wright* case is of no assistance to plaintiffs because *Wright* did not hold that "a manufacturer has a duty to warn of foreseeable hazards arising from the use of its product in combination with the product of another even where the manufacturers' product does not cause or create the risk of harm." (*Taylor, supra*, 171 Cal.App.4th at 588.) As discussed above, O'Neil did introduce evidence that the use of Manufacturers' equipment contributed to causing his disease, so this distinction is in fact affirmative support for the existence of a duty here.

Taylor narrowly reads *Wright* as dealing solely with allegations of foreseeable misuse of a defendant's product. This distinction is a *non sequitur,* since there is no reason that a case dealing with foreseeable misuses should not be informative of a manufacturers' obligations for foreseeable alterations or changes

made to its products after they have left the factory, i.e., the use of asbestos-containing replacement parts and the use of asbestos insulation and flange gaskets to allow the products to operate. (See *Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833-834; *DeLeon, supra,* 148 Cal.App.3d at 344 ["even if plaintiff's acts could be considered misuse of the product and contributory negligence, this would not foreclose an action in products liability but only reduces any award she might receive in an amount proportionate to the degree she is deemed to be at fault."]; *Tellez-Cordova, supra,* 129 Cal.App.4th at 584 [posing the rhetorical question that, if a manufacturer could be held liable for foreseeable misuse, "[h]ow then can they be exempt from liability for the consequences of the intended use?"].)

Moreover, the dangerous conditions at issue in the *Wright* case were not limited to an alleged defect in the defendant-supplied product, as suggested by the *Taylor* court, but expressly encompassed defects in the riser pipe supplied by others. The riser pipe attachment selected and assembled by the customer fire department was defective because of corrosion on the riser, inadequate depth of thread engagement on the riser pipe, and the use of improper metals in the pipe. (*Wright, supra,* p. 1227.) These were not defects in the deck gun supplied by the defendant. These dangerous conditions in the threaded riser pipe, selected and assembled by others, were foreseeable to the manufacturer, and gave rise to a duty to provide adequate warnings of the danger. (*Id.,* p. 1236.)

Taylor attempted to distinguish *DeLeon* based on the defendant's participation in the design and location of the sorter bin, and concluded that "[t]here is nothing in *DeLeon* that suggests that a manufacturer may be liable for failing to warn of the dangerous qualities of another manufacturer's product." (*Taylor, supra,* 171 Cal.App.4th at p. 589-590.) This is an inexplicable misreading of *DeLeon,* where the danger was a danger of being caught in a spinning line shaft

having "nothing to do" with the operation of the defendant's fruit sorting bin. The *DeLeon* court held the bin manufacturer had to warn of that danger. Further, as the Court of Appeal noted, this case does involve Manufacturers' participation in the design, so that Manufacturers knew of the risk of asbestos exposures. (Opn. p. 20-21.) The uncontradicted evidence here is that the Defendant manufacturers did participate in the design of how their equipment would be used, including the selection of asbestos materials. (7 RT 939:13–14; 15 RT 2701-02; 15 RT 2777.)

Taylor could not distinguish *DeLeon* because *DeLeon* squarely rejects *Taylor's* "causation" premise – that a defendant's product cannot "cause" an injury unless it is the source of the toxin or exerts some immediate physical force that causes injury. *DeLeon* specifically answers the question avoided by the *Taylor* decision, that is, "[d]id the bin cause or create the risk of harm – was there some unreasonably dangerous condition or feature of the bin which caused the injury?" (*DeLeon, supra,* 148 Cal.App.3d at 344-345.) *DeLeon's* answer to the question is telling.

DeLeon notes that, at one time, the elevated exposed line shaft was of no risk to workers, but in combination with the bin, the rotating line shaft became a danger, and "at that time the entire system became a source of danger to the worker." (*Id.,* at p. 346.) The defendant's participation in the design of the bin, including building it based on the customer's prototype, and to dimensions dictated by the customer's existing line system, created a triable issue of its duty to warn of the danger posed by the line shaft. (*Ibid.*) The court expressly held that a product, with no inherent defects of its own, can create or cause a risk of harm from a product of another:

> We agree that particular elements of the bin's design might be considered to have caused or created the risk

> of harm by making a contact with the adjacent line shaft during cleaning a foreseeable risk.

(*DeLeon, supra,* 148 Cal.App.3d at p. 346.)

Thus, contrary to the *Taylor* court's misreading, *DeLeon* directly holds that a manufacturer may have liability for failing to warn of the dangerous qualities of another manufacturer's product. Under *DeLeon,* a product with no inherent defect causes or creates the risk of harm when aspects of the design of the product make exposure to a danger from another product a foreseeable risk. Such a foreseeable risk of injury from the product of another created triable issues of fact on Plaintiffs' strict liability failure to warn claim. (*DeLeon, supra,* 148 Cal.App.3d at 343-344, 348.)

Just as in *Tellez-Cordova*, the evidence in this case showed that the regular maintenance and repair of Defendants' equipment, the conditions in which they were designed and intended to operate, the drying and baking effect the equipment had on the asbestos gaskets and packing, and the normal methods used to remove the insulation, gaskets, and packing, all caused and created the injurious risk of harm presented by respirable asbestos dust. If the asbestos gaskets had not been baked onto Manufacturers' equipment, and the asbestos packing had not dried out and become friable, sailors would not have had to use scrapers, wire brushes, and other tools to remove and replace them, thereby creating and distributing asbestos dust.

Likewise, it was the high operating temperatures that created the need for asbestos insulation on and around the equipment, leading to even more respirable asbestos dust that caused O'Neil's injury. As set forth above, Manufacturers not only designed their equipment to require asbestos insulation, gaskets, and packing, they knew that such dangerous items would have to be removed and replaced in the ordinary and intended use of the equipment. It follows that Manufacturers are,

and should be, legally responsible for failing to warn about the asbestos that was intentionally and, by design, used with its equipment.

E. The "stream of commerce" rationale is not a limit to liability where a plaintiff's injury is caused by the use of defendant's product

A central touchstone to Manufacturers' arguments here 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."]; *Jimenez, supra,* 29 Cal.4th 473, 479-480 [component part manufacturers are part of the stream of commerce].)

Manufacturers' reliance on the "stream of commerce" rationale is a misapplication of a doctrine that has developed to define the outer boundaries of liability for entities that are not engaged in manufacturing and designing products that 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.] Manufacturers here, of course, *are* manufacturers, participating in the design of their products, not passive retailers or distributors passing on goods they have had no opportunity to design or inspect.

None of the "stream of commerce" cases relied on by Manufacturers 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.

The Court of Appeal below rejected the Manufacturers' reliance on the stream of commerce argument for this reason, noting that Manufacturers 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. 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." (Opn., p. 16.)

This Court should likewise reject the inapposite and misapplied "steam of commerce" rationale. Manufacturers 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 that injured the plaintiff. 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 ... 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, supra,* 29 Cal.4th at 479-480 (internal citations omitted).)

Manufacturers ignore the relevant teachings of *Jimenez*, finding that component-part manufacturers are part of the stream of commerce, 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 Manufacturers, because *Peterson* clearly draws a distinction between those engaged in *product manufacturing,* like Manufacturers here, and the landlords and hotel owners for whom the *Peterson* court found the principles of strict liability inapplicable. In fact, the *Peterson* court cites to the product-liability principles set forth by *Vandermark* above, and finds these product-liability principles inapplicable to landlords and hotel proprietors -- the very same passage that *Jiminez* found applicable to component-part manufacturers. (*Peterson, supra,* 10 Cal.4th at 1198 -1199.)

Peterson also noted the result would be different for a landlord or hotel owner that *participates in the construction* of the building containing the defective components. (*Id.*, p. 1200.) Further, *Peterson* found landlords and hotel owners could not be said to have expertise in the design and manufacture of products, and were thus not in a position to exert any influence over product safety. (*Id.*, p. 1202.)

Unlike hotel owners, Manufacturers here are charged with expertise in the use of their products, including the asbestos gaskets, packing and insulation with which they were supplied and designed to operate. Manufacturers never tested the asbestos gaskets, packing and insulation they designed their equipment to operate with, even though they had been manufacturing their pumps and valves with these asbestos products since the turn of the century. (12 RT 2063-2064; 2071-72; 13 RT 2199-2200, 2273.)

Manufacturers are product manufacturers that could influence product safety by selecting, designing and recommending safe materials, and providing adequate instructions for the safe use of the products. As designers, users and retailers of asbestos components themselves, Manufacturers had continuing business relationships with everyone in the chain, including the Navy (as a customer) and the gasket, packing and insulation manufacturers, and were therefore in a position to exert *influence* over the continued use of asbestos materials.

Manufacturers continue to hide behind their customer as the purported arbiter of materials used and the designer of Manufacturers' products, but the only evidence on this record is that the manufacturers were the designers of their own equipment, or at a minimum heavily involved in such designs. (12 RT 2063-2064; 2071-72; 13 RT 2199-2200, 2273; 7 RT 939.) Unlike hotel owners, Manufacturers here had the capability and responsibility to provide instructions for

the correct operation and maintenance of their products in their technical manuals. (Opn. p. 4; 7 RT 940 – 941; 14 RT 2651-52.)

For Respondent Crane to disclaim any ability to influence the entire chain of distribution of asbestos-containing materials used with its equipment borders on the absurd, since it was intimately involved in all aspects of marketing and selling asbestos products used in and with its high-temperature valves. (12 RT 2070 – 2071.) As manufacturers of products incorporating and operating with asbestos materials, Manufacturers were an integral part of the marketing and manufacturing enterprise, and were in a position to ensure the safety of their products.

1. Cases dealing with liability for products of "others" do not preclude liability here

Manufacturers rely on a trio of commonly cited California cases, *Powell v. Standard Brands* (1985) 166 *Cal.App.*3d 357, *Blackwell v. Phelps Dodge Corp.* (1984) 157 *Cal.App.*3d 372 and *Garman v. Magic Chef* (1981) 117 *Cal.App.*3d 634, to claim that there is a generally recognized principle that a manufacturer should not be liable for the defects of someone else's product. None of these cases are applicable here.

In *Powell*, the plaintiff was not using the defendant's brand of floor varnish on the day that fumes from another manufacturer's floor varnish caused an explosion. The plaintiff did not know what brand he was using on the day of the explosion, and so alleged that the manufacturer of the product he was using the day before should have warned him. (*Powell, supra*, 166 *Cal.App.*3d at 360-361.) The court ruled that the first manufacturer did not have to warn of the dangers from using somebody else's product. (*Id.* at 362-367.) Powell is wholly inapplicable where the injury arises, as here, from exposures to asbestos in the maintenance of the defendant's product.

Garman is similarly inapposite. There the injury occurred when a flame

from the defendant's gas stove ignited a gas leak from a faulty pipe, and there was nothing about the operation of the gas stove that called for the use of a defective, leaking gas pipe. (*Garman, supra*, 117 *Cal.App.*3d at 636-639.) That circumstance has no application here, where the intended use of Manufacturers' equipment called for asbestos-containing insulation, gaskets and packing. *Garman* involved the product of a third party that failed and did not operate as intended – the pipe leaked. Here, the asbestos-containing components operated exactly as intended, and the intended use exposed *Lt. O'Neil* to the hazard of contracting mesothelioma.

Manufacturers' reliance on *Blackwell* is equally misplaced. In *Blackwell*, the Court of Appeal affirmed summary judgment for the seller of sulfuric acid, where the plaintiffs were injured in the process of unloading the acid from the tank car in which the acid was shipped. The tank car was allegedly defective because it allowed the acid to become pressurized in transit and contained no warnings or instructions for the proper method of unloading the acid. The court determined there was no allegation that the acid was defective, only an allegation that the tank car was defective. (*Blackwell, supra*, 157 *Cal.App.*3d at 378.) In this circumstance, the seller of the acid could not be held liable for defects in the tank. (*Ibid.*)

Blackwell is inapplicable to the instant circumstance, where Plaintiffs allege a defect arising from use and maintenance of Manufacturers' equipment, the intended use of which exposed *Lt. O'Neil* to asbestos-containing products of others. The equipment manufacturers here are like the tank manufacturer in *Blackwell*, not the acid manufacturer. Implicit in the *Blackwell* court's reasoning is that the tank manufacturer should have warned of the danger of exposure to sulfuric acid arising from the use of the tank. That is, the tank manufacturer should have warned that improper use of its product could expose users to sulfuric

acid burns, even though it was not the manufacturer, seller or supplier of the acid. Liability in such a circumstance is amply supported by case law. (See, e.g., *Torres v. Xomox* (1996) 49 *Cal.App.*4th 1, 18 [valve manufacturer liable for defective design and deficient warnings causing uncontrolled release of sulfuric acid]; compare *Blackwell, supra*, 157 *Cal.App.*3d at 379 ["The tank car (container) was alleged to be defective because it permitted the formation of pressure in its cargo of sulfuric acid, and contained no warning of such pressure or instructions on how properly to unload the acid."].) In short, *Blackwell* held that the sulfuric acid supplier did not need to warn of defects in the tank; it did not insulate the tank manufacturer from liability for warning of dangers from products supplied by another.

Here, Appellants have alleged that use of Manufacturers' equipment exposed Plaintiffs to a hazardous substance supplied by others, allegations that were not at issue in *Blackwell*. *Blackwell* does not insulate a manufacturer from liability for failing to warn that the intended use of its products (e.g., pumps, valves, or tank cars) will expose the user to hazardous substances (e.g., asbestos or sulfuric acid) by the mere fortuity that another manufacturer made or supplied the hazardous substance.

Manufacturers' reliance on *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513 is also misplaced. *Cadlo* is not a case involving a combined dangerous use of products, as here. In *Cadlo* the plaintiff was injured by an asbestos-containing product (Kaylo) distributed by a wholly distinct and separate company (OCF), not by the defendant (OI). Since the defendant's product was not in use at the time of plaintiffs' injury, it could not possibly have caused or contributed to plaintiff's injury. (*Cadlo* at p. 516.) Here Manufacturers' products were being used as intended when they released asbestos fibers that *Lt. O'Neil* inhaled. The Court of Appeal correctly held *Cadlo* is, at best, "remote" and does

not apply. (Opn. p. 17.)

Manufacturers rely on out-of-state authorities, including companion cases decided by the Washington Supreme Court, *Simonetta v. Viad Corp.* (2008) 165 Wash.2d 341, 197 P.3d 127 and *Braaten v. Saberhagen Holdings* (2008) 165 Wash.2d 373, 198 P.3d 493. These cases are inconsistent with California law, and were dismissed by the Court of Appeal as suffering from "the same flaws as does *Taylor.*" (Opn. p. 19, n. 10.) The *Simonetta* court, in fact, expressly disagrees with California law, rejecting application of the *Wright* decision which found liability for combined dangerous uses of a defendant's products with products supplied and assembled by third parties. (*Simonetta, supra,* at p. 137.) This Court should not follow *Simonetta* and *Braaten* for the same reasons *Taylor* should not be adopted – the decisions misfocus the issue on "products of others," when the proper question is whether the anticipated use of Manufacturers' products caused plaintiffs' injuries. (See *Simonetta, supra,* 165 Wash.2d at 364, Stephens, J. dissenting.)

Manufacturers rely on a manufacturing-defect case, *Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488, and claim this case rejected liability under all strict liability theories for products supplied by others. Manufacturers are mistaken. A manufacturing defect is one in which the product has somehow deviated or failed to conform to the manufacturers' suitable design or manufacturing standards, and hence has no bearing on a claim that the product was dangerous as designed, or defective because of a failure to warn of a dangerous condition of the product. (See *In re Coordinated Latex Glove Litigation* (2002) 99 Cal.App.4th 594, 613.)

Nor does *In re Deep Vein Thrombosis* (N.D. Cal. 2005) 356 F.Supp.2d 1055 assist Manufacturers. There the defendant airplane manufacturer supplied an airplane without seats, and the court found the manufacturer could not be held

liable for injuries caused by the airlines' decision to arrange the seats so closely that it caused deep-vein thrombosis in passengers' legs. *Deep Vein* does not apply because here the Manufacturers selected and included defective asbestos-containing components in their products when they shipped them to their customer. *Deep Vein* also fails to acknowledge California law under which a manufacturer has the duty to anticipate safety neglect by a customer, a duty dismissed by the federal trial court because of its view that "[m]anufacturers are not their purchasers' keeper." (*Deep Vein,* 356 F.Supp. at 1066; contra *Thompson v. Package Machinery Co., supra,* 22 Cal.App.3d 188, 193-195 [a manufacturer is not exonerated from liability if its purchaser negligently misuses or alters the manufacturers' product, causing injury to third parties, where such negligence is foreseeable to the manufacturer].)

Manufacturers rely on *Rastelli v. Goodyear Tire & Rubber Co.* (1992) 79 N.Y.2d 289, 591 N.E.2d 222 to support an argument that the combination of two "sound" products that combine to create a dangerous condition should support liability, but that foreseeable combinations of a "sound" product with a defective product should not support liability. (Crane OBM, p. 37.) The argument defies logic. In advancing this argument, Manufacturers necessarily concede that the "stream of commerce" rationale is inapplicable for foreseeably dangerous combinations, so long as both products are "sound." But a manufacturer that knows its product will be used with a dangerous product supplied by another has even greater certainty that the intended use will result in injury. It defies common sense to recognize liability when a manufacturer knows of a dangerous combination of two "sound" products, but to raise a "stream of commerce" barrier when the combined use includes a dangerous product.

F. The component-part doctrine does not apply

The Court of Appeal found that the trial court had misapplied the

component-part doctrine, because the Manufacturers' products were not altered, the products themselves were defective, the Manufacturers had a substantial role in developing and designing the products, the products were "used as they were designed to be used," and Manufacturers were well-situated to provide warnings to the products users. (Opn. p. 12, 14.) The Court of Appeal found that the policy reasons for the component-parts doctrine "simply do not apply." (*Ibid.*)

Manufacturers take the position that once a manufacturer's product has been deemed a component of something larger, i.e., a steam-propulsion system, a mass produced building, or a vehicle, that the component-part doctrine is implicated and exonerates the component-part manufacturer from liability for injuries caused by the larger product. But merely characterizing a defendant's product as a "component" of another larger product or system is an observation of no moment, in and of itself. It is not enough for a component-part manufacturer to simply point to a final product assembler as a party responsible for plaintiff's injuries, even if that final manufacturer or assembler also owes a duty not to cause harm to the plaintiff. Rather, a component-part manufacturer must show its product was not defective, and must further satisfy a number of factors that justify shifting all responsibility to the final product assembler.

The Court of Appeal below properly rejected Manufacturers' contention that there is no liability for component-part manufacturers unless they have participated in designing the final product – here the entire ship or the entire steam-propulsion system. The court found such an expansive definition of the "final product" stretches the component-part defense "too far":

> 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, 71 Cal.Rptr.2d 190.) 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.

(Opn. p. 13-14.)

1. Component-part manufacturers are subject to strict liability

In *Jimenez v. Superior Court,* 29 Cal.4th at pp. 479-481, this Court disapproved *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, which had held that the manufacturer of a component was not strictly liable for product defects. Instead, there is simply a rule, applicable to all manufacturers, that liability attaches if the manufacturer's product is, in fact, defective. (*Id.*) This Court noted that all of the policies underlying strict liability are equally applicable to manufacturers of component-parts, who are every bit as involved in the chain of distribution as the final product manufacturer, and are often in the best position to assure product safety.

2. Manufacturers of defective components are not protected by the component-part doctrine

Manufacturers here are not protected by the component-part doctrine because their pumps and valves were in a defective condition when they were supplied to the customer. This was one of the grounds on which the Court of

Appeal rejected application of the component-part defense. (Opn. p. 14.) Even "[a] component-part manufacturer may be held liable for damages caused by a component-part which was defective at the time it left the component manufacturer's factory. [Citation.]" (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 629.) The component-part manufacturer is liable "whenever the component-part was defective when supplied to the manufacturer of the finished product incorporating the component-part." (*Jenkins v. T&N PLC* (1996) 45 Cal.App.4th 1224, 1228; see also Rest.3d Torts, Products Liability, section 5 [defense is inapplicable if "the component is defective in itself...and the defect causes the harm"].)

Here Manufacturers designed and supplied pumps and valves that were in a defective condition when supplied – they were delivered to the customer with asbestos-containing packing gaskets and insulation already installed. The defect was not cured or altered when the asbestos parts were changed out with asbestos parts having the same defect as the original.

3. The component-part doctrine applies only to fungible "building block" materials, not to the specially designed pumps and valves at issue here

The Court of Appeal rejected application of the component-part defense on the additional ground that Manufacturers here supplied pumps and valves that were in fact "'separate products with a specific purpose and use,'" not fungible building block materials that could be used for myriad purposes and applications. (Opn. p. 12, citing *In re TMJ Implants Products Liability Litigation* (D.Minn. 1995) 872 F.Supp. 1019, 1026.) The products were not altered by the customer, but were used precisely as they were designed and intended to be used. (Opn. p. 12; 12 RT 2063, 2072.) These were not, by Manufacturers' own admission, fungible "off-the-shelf" products. (13 RT 2258.)

Crane places undue reliance on a passing reference in the Restatement to

generic "valves" as an example of a fungible building block material, like sand, gravel and nails. This academic illustration carries no weight against the evidence adduced in this case, demonstrating the special designs and purposes of the Crane valves that were specially engineered for the steam-propulsion plant of the *Oriskany*. (7 RT 969-972.) Though Crane likens its valves to a simple kitchen faucet, it cannot seriously compare a 2,400 pound valve designed to withstand temperatures of 850 degrees Fahrenheit and pressures of 600 pounds per square inch (7 RT 898), to a common household valve that the Restatement authors must have had in mind.

The special design of the products precludes application of the component-part defense, because the purpose of the doctrine is to prevent liability being imposed on a manufacturer that is not in a position to know whether the product, as it is used in its final application, is or is not safe. (*Tellez-Cordova, supra,* 129 Cal.App.4th at p. 581, 583; Rest.3d Torts, Products Liability, section 5, com. a.)

The evidence here is that Manufacturers knew exactly how their products would be used, substantially participated in designing their products to be used in the application for which they were used, and were thus in a position to know the dangers posed by their specific application. (Opn. p. 12, 7 RT 969, 13 RT 2199.) Once again, the principles underlying the component-part defense do not apply, and the fundamental principles underlying strict products liability do apply. (*Jiminez, supra,* 29 Cal.4th at 479-480 [strict liability imposed on component manufacturers that are in a position to influence product safety]; *Wright, supra,* at 1234-1235 [rejecting the component-part defense where manufacturer knew customer intended to use defective pipe supplied by third party in assembly of defendant's product]; *Tellez-Cordova, supra,* at p. 582-583 [rejecting component-part defense where intended use of defendant's product includes use of dangerous product supplied by another].)

G. Crane and Warren's liability for sale of defective products is not eliminated because they were selling to the U.S. Navy

1. Liability is not eliminated by the military-contractor defense, sophisticated employer defense, or other defenses not at issue

Warren argues at length that the alleged actions or inactions of the Navy in the setting of this case should somehow exonerate defendants entirely. (Warren OBM, pp. 58-63.) But the role of the Navy in this or similar cases – whether framed in terms of a "sophisticated employer," or a superseding cause, or some other defensive formulation – is not an issue in this appeal and never has been an issue.

To whatever extent the Court wishes to indulge this argument, it provides no basis for absolving defendants of the duty the Court of Appeal described. The contention that the Navy is responsible for asbestos injuries to servicemen is not new. Over 20 years ago, in an asbestos case arising out of exposure at Puget Sound Naval Shipyard, the Washington Court of Appeals held that the Navy's role could not plausibly be seen as a superseding cause, but rather at most as a concurring cause:

> Section 452 which states the general rule that a third party's failure to prevent harm is not a superseding cause, also supports the district judge's instruction here. *See* § 452(1) Restatement (Second) of Torts (1965). The only exception to the general rule is where the duty to prevent harm has shifted to the third party. Restatement (Second) of Torts, § 452(2) (1965). But in the strict liability context, "the duty to provide a non-defective product is non-delegable." *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 193, 337 A.2d 893, 903 (1975). If the duty is non-

delegable, it cannot be shifted. Therefore, *Berkebile* strongly suggests that in a strict liability situation, a third party's failure to warn will not constitute a superseding cause. . . . . *Van Buskirk*, at 497.

Washington law supports the same conclusion. To remove liability from the original tortfeasor, the intervening negligence of another must be so extraordinary or unexpected that it falls outside the realm of reasonably foreseeable events; unless this threshold is met, there is not superseding cause. *Smith v. Acme Paving Co.,* 16 Wash.App. 389, 558 P.2d 811 (1976). The actions of the government through its management of PSNS were not unexpected or extraordinary, since the procedures for using asbestos products at PSNS were similar or identical to those followed elsewhere. . . .

At most, the failure of the government to warn Hoglund of the danger of asbestos exposure was a concurring cause of his injury and, as such, did not remove Raymark from liability of the injury. . . .

An instruction regarding the duty of PSNS to provide a safe workplace for its employees would have been misleading to the jury, since it would imply that a breach of this duty would relieve the manufacturers of liability for injuries which might have been prevented by PSNS. The trial judge properly refused to give the instruction.

(*Hoglund v. Raymark Ind., Inc.* (1987) 50 Wa.App. 360, 371-72, rev. denied, quoting *Van Buskirk v. Carey Canadian Mines, Ltd.* (3d Cir. 1985) 760 F.2d 481.)

Courts have likewise uniformly rejected the assertion of a similar "sophisticated user" defense in asbestos cases in the Navy context, (*In re Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 837-38 ["We find no merit in defendants' contention that they justifiably relied on the Navy to communicate potential hazards to those who would ultimately work with defendants' asbestos-containing products....Given that the record supports neither a finding that defendants actually relied on the Navy to warn its workers, nor a finding that any such reliance would have been justifiable, the presence of the Navy as an alleged 'sophisticated intermediary' or 'knowledgeable user' does not call into question the jury's finding of defendants' duty to warn."]); in the private shipyard context, (*Oman v. H.K. Porter Inc.* (4th Cir. 1985) 764 F.2d 224; *Eagle-Picher, Inc. v. Balbos* (Md. 1992) 604 A.2d 445, 464); and land-based settings. (*Willis v. Raymark* (4th Cir. 1990) 905 F.2d 793; *In re Joint Eastern & Southern District Asbestos Litig.* (S.D.N.Y. 1993) 827 F.Supp. 1014, 1055.)

As for the notion that Lt. O'Neil could not have refused to work with asbestos-containing products, the point of a warning, of course, is simply to instruct the worker to take precautions. Any number of such precautions—wetting down the insulation, wearing masks, increasing ventilation, etc.—might have saved his life later. (9 RT 1478-1480.) Again, the issue of intervening causation is not before the Court and thus should not be considered. In any event, the same assertion might be made in regard to claims against the insulation manufacturers themselves, yet defendants insist that they are liable in this setting and should be held responsible for providing warnings.

Defendant also can ask the jury to attribute responsibility to the Navy, (Civ. Code § 1431.2), and juries frequently do so. Sometimes juries attribute 100%

responsibility to the Navy, but this does not mean it is so as a matter of law in all cases.

Defendants of course have the military contractor defense available to them. Significantly, that defense is not at issue here, but it nevertheless provides the legal avenue for Warren's contentions. It is an affirmative defense on which defendants bear the burden of proof. Manufacturers would have to prove reasonably precise military specifications that required the defendant to include asbestos-containing materials in its equipment, and specifications that precluded the manufacturer from warning of the dangers in the use of its equipment. *Boyle v. United Technologies Corp.* (1) 487 U.S. 500, 512, 108 S.Ct. 2510; *Jackson v. Deft* (1990) 223 Cal.App.3d 1305, 1315. The trial court expressly stated its order granting non-suit was not based on any findings under the military-contractor defense. (16 RT 3013.) Manufacturers here concede that the military-contractor defense is not met on the facts before this court.

2. Compliance with customer specifications for dangerous products is no defense

Though not claiming the military contractor defense is satisfied, Manufacturers make frequent reference to military specifications as an expression of their customer's "choice" for the use of asbestos. California courts have consistently rejected the contention that merely complying with a customer's specifications, military or otherwise, absolves a manufacturer of liability for defective products. In *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, two servicemen injured in a helicopter crash brought an action against the helicopter manufacturer alleging a defect in the flight control system caused their injuries. At trial, the defendant introduced evidence of compliance with military specifications and argued this showed the product was not defective. The trial court refused plaintiffs' requested instruction to the effect that compliance with

military specifications was not a defense to a claim of strict liability for design defect.

The court of appeal found this was instructional error and reversed the jury's verdict in favor of defendant. The court noted that a claim that a product has been defectively designed "explicitly focuses the trier of fact's attention on the adequacy of the product itself, rather than on the manufacturer's conduct." (*McLaughlin, supra,* at p. 209.) Although the jury may consider the "feasibility of alternative design" under the risk-benefit test described in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, this only allows a consideration of "physical or mechanical feasibility, rather than administrative or bureaucratic feasibility, and does not include the necessity to comply with owner specifications." *Ibid.* Consequently, it was reversible error "to consider the Navy specifications as even a *factor* in determining whether the aircraft's design was defective." (*McLaughlin, supra,* at p. 208.) So too here, the fact that the use of asbestos-containing insulation, gaskets and packing on Manufacturers' equipment was a use prescribed under military specifications is not a defense to the defective design of those products.

Compliance with customer specifications was also rejected as a defense by both the *DeLeon* and *Wright* courts, where the defendants claimed that the decisions made by plaintiffs' employers were responsible for causing the plaintiffs' injuries. In *DeLeon*, the defendants contended the plant owners were responsible for choosing the location of the equipment, and argued that they simply built the sorting bin according to the customer's specifications. (*DeLeon, supra*, 148 *Cal.App.*3d at 346.) In *Wright*, the deck gun manufacturer argued that the fire department was responsible for specifying, installing and selecting the equipment. (*Wright, supra*, 54 *Cal.App.*4th at 1229.)

Both courts rejected the notion that the conduct of the plaintiffs' employers

could be an absolute bar to the manufacturers' independent duty to stand behind the safety of their products. *DeLeon* explained that, where the defendant is a business enterprise regularly engaged in manufacturing and selling machinery parts as a full time commercial activity, "the uniqueness of the customer's order did not alter [the defendant's] responsibilities" for the safe operation of its equipment. (*DeLeon*, *supra*, 148 *Cal.App.*3d at 346-347 (citing *Rawlings v. D.M. Oliver, Inc.* (1979) 97 Cal.App.3d 890, 897.) In fact, the court noted that the defendant had a duty to "anticipate safety neglect" by the customer. (*Ibid*; *see also Wright*, *supra*, 54 *Cal.App.*4th at 1229.)

Manufacturers' attempts here to absolve themselves of any responsibility to avoid injury to users of their equipment by blaming "Navy choice" for the use of asbestos, when Manufacturers' either knew or should have known of the prevalent use of asbestos-containing such materials, must be rejected. Foreseeable misuse and safety neglect by a third party are not a bar to Manufacturers' independent responsibility for the safety of their products. (*DeLeon*, *supra*, 148 *Cal.App.*3d at 346-347; CACI 1205.)

The fact that the manufacturers of the asbestos insulation, gasket and packing share fault for O'Neil's injury in not a bar to the equipment manufacturers' liability. The equipment manufacturers are not liable for what the insulation, packing and gasket manufacturers have done, they are liable for their own role in creating and failing to warn of the hazardous condition. That two manufacturers may share responsibility for the same injury is not a bar to holding each responsible in proportion to their degree of fault. To the extent a defendant may show that some of the fault for plaintiff's injury lies with another, the defendant is entitled to apportion fault to those other parties, and limit its own obligation to several liability for non-economic damages in proportion to its percentage of fault. (*Civ. Code* § 1431.2.)

H. The existence of bankruptcy trusts for non-party co-tortfeasors, and the potential liability of other tortfeasors, do not exonerate Crane and Warren from their fair share of liability

1. The law has established remedies and procedures for allocating liability among responsible parties

Manufacturers portray Plaintiffs' arguments for shared responsibility of all manufacturers participating in creating hazardous conditions as an attempt to line their pockets with recoveries to either supplement or replace recoveries from bankruptcy trusts. (Crane OBM, p. 31, n. 12 [alleging the "average mesothelioma plaintiff" recovers $1.2 million from bankruptcy trusts].) The cited source of Manufacturers' unfounded allegations of the availability of millions of dollars of recoveries for mesothelioma victims is an article written by a defense economic consulting firm and published in the "commentary" section of a legal newsletter. (*Id.*, citing Bates et al., *The Claiming Game* (Feb. 3, 2010) 25 Mealey's Litig. Rep.: Asbestos 19, 27.) Manufacturers also allege plaintiffs are seeking to impose tort liability on product manufacturers because other defendants have filed for bankruptcy protection as a result of their asbestos liabilities.

There is simply no evidence that "average" mesothelioma victims will recover $1.2 million from asbestos trusts. There is no evidence on this record of any bankruptcy recoveries by *Lt. O'Neil* or his estate, and no evidence or argument presented to either the trial court or the intermediate appellate court on this allegation.

To the extent there are recoveries from bankruptcy trusts, any pre-judgment settlements are subject to set-offs under Civil Code section 877(a), and defendants have rights of contribution that would extend to post-judgment bankruptcy settlements, if any. (Civ. Code section 1432.)

Further, the fact that other parties may share responsibility for causing injury is not a ground for avoiding liability. The fundamental rule for indivisible injury caused by multiple tortfeasors is joint and several liability. "[E]ach

tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury." *American Motorcycle Assn v. Superior Court* (1978) 20 Cal.3d 578, 582.

The fact that others may also have been negligent or at fault for the injury, i.e., the Navy and the insulation, gasket and packing manufacturers, is no defense. "A tortfeasor may not escape this responsibility simply because another act, either an 'innocent' occurrence such as an 'act of God' or other negligent conduct, may also have been a cause of the injury." (*Id.*, p. 586.) It is further immaterial that others that may have contributed to causing the injury are bankrupt or immune from suit. "When independent negligent actions of a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain a single recovery for his injuries; the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused." (*Id.*, at p. 587.)

Here, of course, Manufacturers will only be severally liable for non-economic injuries in proportion to their share of fault as determined by the jury. (Civ. Code section 1431.2) The only joint liability is for economic damages, which, in mesothelioma cases involving serious personal injuries and suffering by the plaintiff and his family members, is often only a small percentage of the total damages, and is subject to set-offs from other settling tortfeasors. (Civ. Code section 877.) For many mesothelioma victims, the only medical care available is palliative care, and economic damages in the form of medical costs may be insubstantial.

In short, Manufacturers' attempts to tip the scales by claiming injustice in holding them responsible for their share of liability for contributing to the cause of

O'Neil's injury should be disregarded. Asbestos defendants routinely and vigilantly assert their rights under Civil Code section 1431.2 to place other responsible parties on the verdict form, including bankrupt entities. The law has established procedures for allocating liability among multiple responsible tortfeasors, including rights of set-off, contribution and proportionate allocation of several liability for non-economic damages. To the extent Manufacturers assert the established statutory procedures and remedies do not adequately protect their interests, it is a matter for the legislative branch.

2. Liability for foreseeable dangers in the use of defendants' products is not a "novel" theory

The theme pervading Manufacturers' briefs is that the opinion below represents some radical departure from established tort law. Manufacturers are said to be "victims" of an unending search on the part of plaintiffs to find new deep pockets after the demise through bankruptcy of asbestos mining and manufacturing companies. For this proposition, Crane cites Riehle, et al., *Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West* (2009) 44 U.S.F.L. Rev. 33, 38, but neglects to disclose that all three authors of this article are lawyers at Sedgwick Detert Moran & Arnold, LLP, which commonly represents asbestos defendants. But a look at case law, and objective academic commentary, shows that the only "novel" aspect of recent cases involving equipment manufacturers is the assertion on the part of these defendants—never made in cases in which such manufacturers were involved in the 1980s and 1990s—that they are not liable for uses of their products that were entirely foreseeable.

The California product-liability authorities on which Plaintiffs rely date back to 1983. (*DeLeon, supra,* 148 Cal.App.3d 336.) Further, both plaintiffs with asbestos-related diseases and other asbestos litigants, such as shipowners, have

been bringing suit against equipment manufacturers for almost thirty years. In *Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mutual Ins. Co.* (N.D. Ohio 1992) 867 F. Supp. 573, the district court noted that asbestos-related claims against Babcock & Wilcox, a boiler manufacturer, for the company's "design, manufacture, sale, and service" of boilers had been made since 1979. Moreover, many of the early cases involving litigation with equipment defendants concern not individuals injured by asbestos exposure, but defendants who either impleaded equipment manufacturers or brought third-party claims against them. For example, in *Vaughn v. Farrell Lines, Inc.* (4th Cir. 1991) 937 F.2d 953, the widow of a seaman who died from mesothelioma sued several shipowners under the Jones Act. Those defendants, in turn, "brought in as third-party defendants the manufacturers of the asbestos products involved and the boilers (containing asbestos insulation) that had been used on their ships." (*Id.*, at p. 955.) In the trial that gave rise to the opinion, the district court found that "the presence of asbestos insulation in the boilers manufactured by Foster Wheeler [a boiler manufacturer] on shipowners' vessels rendered them unseaworthy." (*Ibid.*) The district court held that "boiler manufacturers were liable under the doctrine of strict liability in tort." (*Id.*, at p. 958.) Foster Wheeler was deemed "an active wrongdoer in supplying defective boilers to the shipowners;" moreover, the district court found that a cause of plaintiff's illness "was asbestos from the Foster Wheeler boilers." (*Id.*, at p. 957.) (See also, *Abadie v. Metropolitan Life Ins. Co.* (La.App. 5 Cir. 2001) 804 So.2d 11, 16 [upholding jury verdict in favor of heirs of shipyard worker who died of mesothelioma against several defendants including Westinghouse, which manufactured turbine "wrapped in asbestos blankets" which plaintiff "worked around"]; *Feidt v. Owens-Corning Fiberglas Corp.* (3rd Cir. 1998) 153 F.3d. 124, 126 [dismissing appeal by Westinghouse from order remanding to state court mesothelioma case in which worker claimed that "he was

exposed to asbestos products including insulation on turbines manufactured by Westinghouse"]; *Pack v. ACandS, Inc.* (D. Md. 1993) 838 F.Supp. 1099, 1103 [denying remand in case removed by Westinghouse because of government involvement in decisions concerning "the type of asbestos cloth to be used when insulating valves and flanges"].)

In other words, equipment defendants have been present in lawsuits brought by mesothelioma victims such as Lt. O'Neil for almost thirty years—more often at the insistence of other defendants, who brought them in for indemnification purposes. Moreover, equipment defendants, at least early on, did not challenge the notion that they could have a duty to injured workers when those workers were exposed to asbestos that was released during maintenance of their equipment. This position is the only novel aspect of the litigation before the courts today.

The eminent tort scholar Professor David Owen, one of the editors of the classic treatise Prosser & Keeton on torts, and co-author of a treatise on product-liability law, states:

> A manufacturer has a duty to provide warnings concerning particular risks that will foreseeability arise in the environment in which the product may be expected to be used.... When the character, ingenuity, or both of a post-sale product modification is not reasonably foreseeable to the manufacturer, as an expert in the uses and misuses to which its product may be put, no design or warning liability should attach. Some post-sale modifications, however, are of a nature that the manufacturer has actual or constructive notice of their practice or their potential.

> In these settings, a manufacturer may be liable for failure to warn of the risks inhering in such product damages.

(David Owen, M. Stuart Madden & Mary Davis, *Madden & Owen on Products Liability* §9.5 at 552, 557 (3d ed. 2000) (footnotes omitted).)

I. Crane and Warren are liable for negligent failure to warn and negligent design of products causing foreseeable injury to Lt. O'Neil

An alternative basis for liability in this case was that Manufacturers were negligent in failing to warn of the hazards of exposure of asbestos dust generated by the gaskets, packing and insulation used with their products, and negligent in designing their products to incorporate and operate with asbestos materials. O'Neil's evidence demonstrated that each of the Manufacturers marketed equipment which required the use of asbestos-containing gaskets, packing and insulation for its proper function, knew that this asbestos material would require periodic removal and replacement, and knew or should have known[8] that the process of removal and replacement would generate respirable asbestos fibers that presented a deadly, if latent peril.

Despite this knowledge, Manufacturers 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

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[8]A manufacturer is held to the standard of an expert regarding the operation of its products. *Vermeulen v. Superior Court* (1988) 204 Cal.App.3d 1192, 1204 citing *Feldman v. Lederle Laboratories* (1984) 97 N.J. 429. In *Borel v. Fibreboard Paper Products Corp.* (5th Cir. 1973) 493 F.2d 1076, 1106 the federal court sets forth a few of the "unpalatable facts" about the industry's knowledge of asbestos hazards dating back to the 1920's.

deadly peril.

Civil Code section 1714 subdivision (a) provides that *"everyone* is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care..." This section has been interpreted to mean that actors owe a duty of care to all persons who are foreseeably endangered by their conduct. (*Rodriguez v. Bethlehem Steel* (1974) 12 Cal. 3d 382, 399.) Foreseeability is the critical inquiry in evaluating the reasonableness of a tortfeasor's conduct under section 1714. (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 434.) ["The most important of these considerations in establishing duty is foreseeability. As a general principle, a 'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.']; *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46 ["every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. However, foreseeability of the risk is a primary consideration in establishing the element of duty."]; accord *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) As famously stated by Justice Cordoza, "[t]he risk reasonably to be perceived defines the duty to be obeyed[.]" *Palsgraf v. Long Island R. Co.* (N.Y.1928) 248 N.Y. 339, 344, 162 N.E. 99, 100.

This duty arising in negligence has been expressly acknowledged and applied in the context of a manufacturers' duty to warn of dangerous conditions of its products. A manufacturer "has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d

1062, 1077, citing Rest.2d Torts, §§ 388, 394.)

A defendant who authors and disseminates information about a product manufactured and sold by another may be liable for negligent misrepresentation where the defendant should reasonably expect others to rely on that information and the product causes injury. (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 102.) The *Conte* court had no difficulty in concluding that a drug manufacturer could owe a duty in negligence to a user of a generic product manufactured and supplied by others, where it was foreseeable that prescriptions for the manufacturer's product could be filled by the generic brand. (*Id.*, p. 104-105.)[9]

Thus, if O'Neil demonstrated that his injury was foreseeable--as he did, and which even the trial court conceded and assumed -- he has carried his burden of demonstrating the existence of a duty under section 1714. (6 RT 721-722.)

Where a party seeks to carve out an exception to the general duty of care, then policy factors set forth by *Rowland v. Christian* must be examined for the purpose of determining whether a departure from the general duty rule articulated in Section 1714 is justified. *Rowland* makes it clear the policy factors limiting the scope of an actor's liability for foreseeable injuries are to be treated as an exception to the general rule of liability:

> 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

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[9] The *Conte* court also rejected the defendant' arguments that strict liability could not attach because the defendant was not in the chain of distribution of the generic drug. Such arguments were inapposite because the Plaintiff did not allege a strict liability claim against the defendant. (*Conte, supra,* 168 Cal.App.4th at p. 101.)

> fundamental principle enunciated by section 1714 of the Civil Code, **no such exception should be made unless clearly supported by public policy. A departure from this fundamental principle involves the balancing of a number of considerations**; the major ones are 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...."

(*Rowland, supra,* 69 Cal. 2d at 112-113. Accord, *John B. v. Superior Court*, (2006) 38 Cal. 4th 1177, 1191-92 ["Before judicially establishing an *exception* based on public policy, [we] consider a variety of factors....(listing the *Rowland* factors)"]; *Merrill v. Navegar* (2001) 26 Cal. 4th 465, 476-77 [in analyzing the duty question, the court is always bound to begin with Section 1714, while the *Rowland* factors are analyzed when an exception is urged; Defendant Navegar urged the exception and presented the argument in favor of a *Rowland* public policy exception]; *Conte v. Wyeth* (2008) 168 Cal App 4th 89 ["We are not persuaded that the application of these [Rowland] factors *supports a departure* in this case from the general rule [defined in §1714] that all persons have a duty to use ordinary care to prevent harming others"](emphasis added).)

Neighbarger v. Irwin Industries (1994) 8 Cal. 4th 532, 547 provides an illuminating example. The defendants argued they owed no duty to Neighbarger, a private safety-employee responding to an emergency caused by the negligence of one of defendants' employees. The court correctly began its analysis with section 1714, and went on to note that any *exception* must be justified on statutory or public policy grounds, citing *Rowland.* (*Neighbarger, supra,* 8 Cal.4th at p. 537.) The court noted that the defendant urged an exception based on public policy grounds, and concluded the burden of creating an exception to 1714, which lay on the shoulders of the defendant, had not been satisfied:

> "Nor is there any clear policy reason to excuse defendant from the usual duty of care, as we are concerned that all persons in a hazardous industrial setting conduct themselves with due care. Not having provided itself with plaintiffs' services nor having in any way paid to exonerate itself from the usual duty of care, **defendant has established no policy reason** justifying relieving it of a duty of care towards plaintiffs."

(*Neighbarger, supra,* 8 Cal.4th at p. 547)

Thus the California Supreme Court has expressly placed the *Rowland* burden on the party seeking the exception, something the trial court failed to do. Despite the absence of evidence from Manufacturers to meet the exception, Mrs. O'Neil addresses the factors here.

Foreseeability Manufacturers never disputed the foreseeability of *Lt. O'Neil*'s injury, instead taking the position that foreseeability is irrelevant. Evidence was submitted which demonstrated Manufacturers knew or should have known that asbestos fibers would be released during repairs and maintenance of

their equipment, *and* that it was known or knowable from the 1930s onward that exposure to asbestos posed a risk to human health. (6 RT 721-722; 12 RT 2066-67; 13 RT 2213-14; see also *Borel v. Fibreboard Paper Products Corp., supra,* 493 F.2d 1076, 1106.) Manufacturers failed to demonstrate that this public policy consideration precluded their liability for *Lt. O'Neil*'s foreseeable injuries as a matter of law.

Degree of Certainty of Injury As with the foreseeability of injury, the certainty that *Lt. O'Neil* was injured by exposure to respirable asbestos while maintaining the Manufacturers' equipment, and that this exposure was caused his injury and death, is not subject to serious dispute. Manufacturers introduced no evidence that would have questioned the certainty of *Lt. O'Neil*'s injury, acknowledging that he was both exposed to asbestos and that he suffered a signature asbestos-related cancer, mesothelioma. Manufacturers are unable to demonstrate that this *Rowland* factor supports the creation of an exception to the duty of ordinary care imposed by §1714.

Closeness of Connection Manufacturers contend the closeness of connection between their conduct and *Lt. O'Neil*'s injury is attenuated by the intervening conduct of the Navy. However, the intervening negligence of a third party –including the Navy – does not extinguish liability unless "highly unusual or extraordinary." (*Paverud v. Niagra Machine & Tool Works* (1987) 189 Cal.App.3d 858, 861.) But there is nothing "highly unusual or extraordinary" about the fact that the Navy used asbestos-containing materials to replace the asbestos-containing materials originally supplied by Manufacturers, particularly where the Manufacturers provided use and instruction manuals that identified those very materials to be used for replacements. (7 RT 940.) Manufacturers also raise the specter of extended time frames, seeking to create a temporal separation between their original designs from the use of replacement parts 20 years after the

fact. Manufacturers conveniently overlook the fact this is no longer than the expected life-span of their equipment, and that they fully anticipated their products would still be in use. Moreover, the fact is that even over the twenty years of *Lt. O'Neil*'s service in the Navy the design and use of asbestos insulation, gaskets and packing did not change. Manufacturers themselves continued to use asbestos in their equipment through the mid-1980s, long after the time of *Lt. O'Neil*'s exposure. (12 RT 2064; 13 RT 2253.)

Moral Blame The question of moral blame is not whether moral blame should attach to a company that supplies the Navy with industrial equipment, it is whether moral blame ought to attach to a company that supplies the Navy with industrial equipment that it knows poses a deadly hazard to the sailors who will use it *without providing a warning* of those dangers, or in failing to test their products for dangers, or developing alternative designs that would avoid asbestos exposures. While Manufacturers focus only the contribution their conduct made to the war effort, they ignore the cost inflicted on U.S. servicemen, sailors like *Lt. O'Neil*, who had their hands full defending against hidden dangers at sea and should not have had to fear or suffer from dangers hidden in their own ships. Manufacturers having advanced no justifiable reason for failing to warn these soldiers, or having made no attempt to design a safer product, it cannot be said that the moral blame factor weighs in favor of absolving Manufacturers of their duty of ordinary care.

Policy of Preventing Future Harm 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. The latency of *Lt. O'Neil*'s disease should not be a fact that excuses Manufacturers' negligent conduct. The policy of preventing future harm does not support relieving these companies of their duty of ordinary

care.

Extent of Burden Manufacturers introduced no evidence to show a warning would have imposed any undue burden on them, or would have had any adverse impact on the community. In fact, Manufacturers had a duty to warn and design safe equipment as originally supplied. The duty urged here is no greater.

Insurance Again Manufacturers introduced no evidence that they could not insure against the risk in this case, and have not denied that they have insurance coverage for the liability Mrs. O'Neil seeks to impose. This factor provides no basis for the creation of an exception to the duty imposed by § 1714.

Manufacturers bore the burden of producing evidence demonstrating that the weight of public policy warrants a departure from California Civil Code § 1714. Manufacturers provided *no* evidence to demonstrate that the *Rowland* factors weigh in favor of eliminating their duty of due care. Manufacturers failed to carry their burden of establishing that an exception to the general rule of duty exists, rendering judgment against the O'Neils on a purported absence of any duty under the negligence claim inappropriate.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully urge this Court to affirm the judgment of the Court of Appeal in all respects.

Respectfully submitted,

Dated: May 25, 2010

WATERS, KRAUS & PAUL
Paul C. Cook
Michael B. Gurien
Attorneys for Plaintiff and Appellant
BARBARA J. O'NEIL, et al.

LAW OFFICE OF JEFFREY I. EHRLICH
Jeffrey I. Ehrilich
Attorneys for Plaintiff and Appellant
BARBARA J. O'NEIL, et al.

Patrick James O'Neil vs. Crane Co.

Supreme Court S177401

W&K File No. 06-0076-

Plaintiff's Service List

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

Court of Appeals, 2nd App. District
COURT OF APPEALS, 2ND APP. DISTRICT
300 South Spring Street

Los Angeles, CA 90013
Tel: Fax:

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

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

Crane Co.
Gill, Raymond
K&L GATES LLP
Four Embarcadero Center
Suite 1200
San Francisco, CA 94111
Tel: 415-882-8200 Fax: 415-882-8220
CA Speed Dial 437

Los Angeles Superior Court
LOS ANGELES SUPERIOR COURT
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012
Tel: 213-974-8843 Fax:

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 May 25, 2010, I caused a copy of the following document:

APPELLANTS' ANSWER TO CRANE CO. AND WARREN PUMPS, LLC'S OPENING BRIEFS ON THE MERITS

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 May 25, 2010, at El Segundo, California.

Annie Caserma
Paralegal