SUPREME COURT COPY

No. S177401

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs and Appellants,

v.

CRANE CO. and WARREN PUMPS, LLC,

Defendants and Respondents.

SUPREME COURT
FILED
JUN 29 2010
Frederick K. Ohlrich Clerk
Deputy

Court of Appeal, Second Appellate Dist., Div. 5, B208225
Los Angeles County Superior Court
Hon. Elihu Berle, BC360274

WARREN PUMPS, LLC'S REPLY BRIEF

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I

INTRODUCTION

Plaintiffs' position comes down to this:

- The equipment manufacturers "absolutely" had to use asbestos in the products they supplied to the Navy almost 70 years ago. Indeed, asbestos was in "ubiquitous" use for similar purposes throughout the relevant decades. But California should exact tort damages for that "design" feature, because it violated the expectations of a (hypothetical) reasonable consumer in the 1960s.
- California should also make the equipment manufacturers pay tort damages for their failure to warn sailors, who could not have acted any differently, of a risk then barely suspected by anyone.
- All this should be so regardless of the equipment manufacturers' absence from the distribution chain for the replacement and later-added parts that actually released the asbestos claimed to have caused harm to Mr. O'Neil.

This is absolute liability, or nothing is. The Court has rejected that concept throughout its strict product liability cases, because it would make the law unfair and irrational. The Court should now foreclose liability on the grounds Plaintiffs advocate.

II

REPLY TO PLAINTIFFS' RENDITION OF THE FACTS

The six-page Introduction to the Answer Brief lacks a single record citation. The Court should not rely on that rhetoric, and Warren Pumps does not catalogue its various inaccuracies. Warren limits its Reply on factual matters to the Answer Brief's (A) most salient concessions, and (B) single most pervasive mischaracterization, which underlies many of the opposing arguments.

A. MANY POINTS ARE UNCONTESTED OR EXPRESSLY CONCEDED

1. The Answer concedes at page 8 that the U.S. Navy issued specifications for steam-system equipment such as pumps and valves, and that while equipment manufacturers may have worked with the Navy on the design of their products (i.e. pumps, valves, etc.), the Navy accepted a final design only if it met Navy requirements. Moreover, the Answer Brief does not contest Warren's demonstration that the entire process from design and sale of Warren pumps through to their integration into the Oriskany's steam-propulsion system and their maintenance over the ensuing decades, was at least controlled – and some segments exclusively undertaken – by the United States Navy.

2. ***In all events, the Answer concedes at page 9*: "In the 1940s, 1950s and 1960s, asbestos 'absolutely had to be used' (7 RT 1053-1054)" in the manufacture of equipment for U.S. Navy steam-propulsion systems in order to meet Navy requirements.** Plaintiffs strive to imply otherwise with their repeated assertions that Defendants' pumps and valves (a) "were

designed to use asbestos insulation, gaskets and packing," or (b) "required" those materials. (See, e.g., Ans. Brief at pp. 2, 11, 14, 23, 26, 51-52.) But the Warren pumps that used asbestos for that purpose did not "require" it for any reason intrinsic to Warren; the Answer Brief cites no such evidence. Rather, the pumps incorporated asbestos in order to meet the Navy's particular requirements.

3. The Answer concedes at page 8 that "[t]he Navy designed the ships" – necessarily including the steam-propulsion system into which the Navy integrated Defendants' products and countless other components (see Warren's Opening Brief at pp. 10-13).[1] Plaintiffs never dispute the correctness of the trial court's conclusion that the steam-propulsion system was "manufactured in essence by the United States Navy" (16 RT 3008, 3010), with no involvement by equipment suppliers (7 RT 1087 and 1064-1066 [plaintiffs' expert Captain Lowell]; 15 RT 2692 [defendants' expert Admiral Sargent]). This satisfies one of the two criteria set forth in the Opening Brief for the component-parts doctrine to apply. Plaintiffs insist that equipment manufacturers played a role in designing *their own component-*

products – pumps, valves, etc. – but that will be true of almost every component manufacturer and is beside the point of the doctrine.

4. **The Answer Brief clarifies that the only products under discussion that even Plaintiffs contend *physically caused any part of Mr. O'Neil's harm* were those that released asbestos fibers, that is, replacement and later-added asbestos-containing parts.** Plaintiffs never cite or discuss any evidence suggesting that the pumps or valves themselves had any role in physically causing that harm[2], because there is none. (See Warren's Opening Brief at pp. 17 and 35.)

Defendants should prevail even without this concession, for the reasons set forth at pages 38-63 of Warren's Opening Brief. But considering the concession, just as in *Taylor v. Elliott Turbomachinery* (2009) 171

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[1] The Answer Brief does elsewhere try a gloss: "The design and construction *of a Navy ship* was a 'back and forth' process involving the Navy, the shipbuilder and the equipment manufacturers. (Opn. at p. 5; 7 RT 939-940; 15 RT 2071 [sic: 2701].)" (Ans. Brief at p. 8, italics added.) That loose language was the appellate court's; the cited evidence shows only that the manufacturers worked with the Navy to design *their own respective pieces of equipment* – not any shipboard system. (See Warren's Opening Brief at pp. 11, 13.)

[2] Plaintiffs do *say* it was "undeniably the high-temperature operation of Warren's pumps that caused the 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" (Ans. Brief at pp. 35 and 50) – but they *cite* nothing. Plaintiffs' own expert Captain Lowell explained that this "high temperature" came from the ship's boilers. (Warren's Opening Brief at p. 14.) See also page 37 of the Answer, speaking loosely of a danger "caused by the combined use of [a] Manufacturer['s] product and the product of another," but citing no evidence that a pump or valve contributed to that danger.

Cal.App.4th 564, 585, "there is no claim that respondents' equipment released the asbestos that caused Mr. [O'Neil's] injuries." Instead, it is undisputed that "exposure to asbestos fibers released from gaskets, packing, and insulation manufactured by other companies, and installed long after the respondents' products were supplied to the Navy" caused Mr. O'Neil's injuries.

Further, this concession shows that Plaintiffs are not really arguing for the modest-sounding propositions that: (a) manufacturers have a "duty to warn of foreseeable dangers in the intended use of [their] own products," and (b) "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." (Ans. Brief at pp. 40, 22.) Instead, Plaintiffs ask the Court to take a much longer leap: to approve strict liability for harm caused by a danger that did not come from the Defendant manufacturers' own products – the pumps or the valves – but instead from replacement or later-added parts made and sold by others. Such a rule has no precedent in this Court.

5. The Answer impliedly concedes that Warren did not actually know of any risk from the inclusion of asbestos-containing gaskets, packing or (on one kind of pump) internal insulation. (See Ans. Brief at p. 13; 13 RT 2197-2198.) It also impliedly concedes that no studies available by 1943 showed that work with any manufactured asbestos-containing product – as opposed to the overwhelming asbestos exposure associated with *mining* asbestos or with making textiles *from* asbestos fibers – caused mesothelioma or any other kind

of cancer. (Cf. Ans. Brief at pp. 17-19 [citing no such evidence in a review of the medical-literature testimony].) Warren's legal arguments do not depend on this paucity of evidence, but Plaintiffs' equitable case must surely suffer from it.

B. WARREN DID NOT "SPECIFY" ASBESTOS-CONTAINING REPLACEMENT PARTS

The linchpin of several arguments in the Answer Brief is Plaintiffs' contention that the Warren Steam Pump Company's drawings and manuals "specified" asbestos-containing replacement parts for future use in the pumps Warren sold. This theme seems aimed to suggest – the Answer never brings itself to *say* – that the use of either original or replacement asbestos-containing parts was Warren's idea. Setting aside Plaintiffs' failure to explain how a manufacturer's alleged specification of replacement parts made and sold by others would support strict liability for harm caused by those products, *the record does not show* any "specification" of asbestos-containing replacement parts.

First, there is no evidence that Warren endorsed, recommended, or even predicted the use of such parts – concepts at the core of "specified" as the Answer Brief uses that word, but which it never expressly claims occurred here. The Answer Brief points to no document from Warren saying that anyone *should* or *must* use any particular

kind of replacement part, or that a pump would not work properly unless the replacement parts contained asbestos. There is none.[3]

Instead, as to Warren Pumps, Plaintiffs' "specified" contention is predicated (Ans. Brief at pp. 10-12, 26, 29, 31) on about 20 total pages of testimony describing lists of parts that came with the product – nothing more. (7 RT 940, 949-957, 970-971; 10 RT 1729; and 13 RT 2209-2212) A prime example concerns Warren's "vertical steam reciprocating bilge pump." The Answer Brief asserts at page 10 that "Warren's design drawings specified the use of asbestos insulation on the pump (7 RT 949-952; 13 RT 2209-2211)," and again on page 12, we find: "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.)" (See also Ans. Brief at pp. 26, 29.)

As a threshold matter, the cited pages describe that type of pump as having a layer of internal insulation *under sheet metal*, not "on" the pump's exterior. (7 RT 1037-1038; 15 RT 2715-2716; 14 RT 2541) As explained in section II-B of Warren's Opening Brief, any external insulation ever added to a Warren pump came after sale, and was at the sole direction of the Navy.

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[3] But even if there were, such a "recommendation" would have been superfluous, since (a) Plaintiffs agree that asbestos was the only material available, for decades after these pumps were sold, to meet the Navy's requirements; and (b) the Navy was not an average consumer, or even an average commercial buyer, likely to accept any recommendation its vendors made in a drawing or manual.

But more to the point, Plaintiffs mistake *description* for *prescription*. As Warren's Opening Brief explained at page 9: the Navy required the internal insulation on the steam cylinder end of this pump, and the Navy specified that it contain asbestos. (7 RT 1037-1042 [Plaintiffs' expert Captain Lowell]) The drawing the Plaintiffs refer to contained what amounted to a map to the parts of this pump when sold – not a "specification" from the Warren Steam Pump Company aimed to influence the future purchasing of replacement parts by the United States military.

Likewise, Plaintiffs far over-freight the testimony when they claim that "Warren's list of replacement materials also specified asbestos packing." (Ans. Brief at p. 12.) Their expert Captain Lowell described a parts-list for the pump as delivered:

> In almost all cases – there are a few exceptions – you have got to have a manual, sort of a how-to-do-it manual, and the manual will talk about how to install the equipment, how to maintain the equipment, how to operate the equipment and how to take it apart and very importantly will list the drawings of the equipment, the piece numbers so if you wanted to order a part later on, you would have a drawing and you could find that part and deal with the proper nomenclature.

(7 RT 940.) Captain Lowell never said that Warren "specified" any asbestos-containing parts, or anything similar in meaning. He said only that Warren *provided* such materials inside its pumps when Warren first shipped the pumps in the 1940s, and therefore listed those parts in the manuals. (See 7 RT 949-954.)

Indeed, the very appearance of a parts list in any manual or drawing was *itself* compelled by Navy specification. The Navy controlled the kinds of information a

manual or drawing had to contain. (14 RT 2589-2590 [Delaney] and 15 RT 2706, 2718-2720 [Sargent].)

In sum, the Answer Brief's theme that manufacturers "specified" asbestos-containing replacement parts mischaracterizes the facts. The only entity in this case issuing any "specifications" with respect to this steam-propulsion equipment – directives to control the future conduct of the receiving party – was the United States Navy.

III

MANUFACTURERS SHOULD NOT BE STRICTLY LIABLE FOR LATER-ADDED PARTS, OR FOR REPLACEMENT PARTS, THAT THEY DID NOT MAKE OR SELL

Following the structure of its Opening Brief, Warren addresses in turn the two categories of products that Plaintiffs allege caused harm to Mr. O'Neil: (A) *Later-added parts*, i.e. the external insulation pads and external flange gaskets attached by the Navy, that Warren never supplied; and (B) *Replacement parts*, i.e. gaskets and packing, and internal insulation on one kind of pump, that the Navy replaced with parts made by others long before Mr. O'Neil boarded the Oriskany.

A. LATER-ADDED PARTS: *DESIGN-DEFECT* LIABILITY IS NO MORE APPROPRIATE THAN FAILURE-TO-WARN LIABILITY

In section IV-A of its Opening Brief, Warren showed that a manufacturer owes no duty to warn about hazards associated with add-on products that other companies made and sold – here, external insulation and flange gaskets. Warren did not anticipate Plaintiffs would rely on a *design-defect* theory of liability for later-added parts, and therefore did not address such a theory before (see Opening Brief at p. 25, fn. 4) –

but Plaintiffs now do assert such a theory. (Ans. Brief at pp. 14-15, 33-35.) The Court should reject strict design-defect liability for other companies' added parts, just as it should reject failure-to-warn liability.

Plaintiffs argue that Defendants' pumps and valves "were defective because they required the use of [later-added] asbestos insulation and flange gaskets" sold by others, and that this requirement of proximity to others' asbestos-containing products – no matter how necessary or unavoidable in the 1940s – violated "minimum safety assumptions." (*Id.* at p. 33.)

Without belaboring points made in Warren's Opening Brief and above: no design feature attributable to Warren "required" any such added parts to function properly. In other words: *Warren pumps as such* did not need external asbestos-containing insulation or flange gaskets. Rather, the addition of those parts occurred solely on account of the Navy's decisions about how to design its steam-propulsion system, and what materials to use to accomplish that design. The Navy determined the type of connections and what material to use for them, connected the pumps to the steam system, determined which equipment would be externally insulated, and what material to use for *that*. It is unfair and unreasonable to impose strict design-defect liability on Warren itself for harm caused by other manufacturers' added parts, added by the system designer.

The key case on which Plaintiffs rely (p. 35) indeed turns more on the potential for system-assembler liability than on liability for the design of a manufacturer's own component-product. Plaintiffs cite *DeLeon v. Commercial*

Manufacturing & Supply Co. (1983) 148 Cal.App.3d 336, for the proposition that "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.'" (Ans. Brief at pp. 35-39.) But *DeLeon* does not hold that – nor does it hold that "a manufacturer may have liability for failing to warn of the dangerous qualities of another manufacturer's product" (Ans. Brief at p. 50).

In *DeLeon*, the plaintiff cannery worker lost her arm when it became entangled in a rotating line shaft located above the defendant's fruit sorter bin, which she was cleaning. (148 Cal.App.3d at pp. 340-341.) The line shaft had nothing to do with the operation of the bin, and was manufactured and installed by the plant owner. (*Id.* at p. 341.) The danger at issue in *DeLeon* lay in the "proximity" of the line shaft, given the location and dimensions of the later-installed bin. (*Id.* at pp. 344, 346.) The foreseeable prospect that a worker might stand in an improper place to clean the bin, and thus come in contact with the line shaft (p. 344), made it material to resolve *whether or not the bin manufacturer had taken on "responsibility for [the system] design, including location*" (p. 346, italics added) when visiting the site. A fact dispute about *that* was what required reversal of summary judgment. (*Id.* at p. 347 ["assuming that Commercial participated in the design of this custom-made equipment for a particular location in a processing line," case had to be resolved by fact finder]; see also *Walton v. The William Powell Company* (2010) 183 Cal.App.4th 1470, 1483 [distinguishing *DeLeon*].)

There is nothing in *DeLeon* supporting Plaintiffs' proposition to hold equipment manufacturers liable for harm caused by others' products added to the

equipment after sale. That situation is not a foreseeable use of the *manufacturer's* product in the sense justifying strict liability for design-defect.

Plaintiffs' arguments on "combined dangerous uses" (section III-D) and the stream-of-commerce rationale (III-E) appear aimed to justify manufacturer liability for *both* replacement and later-added parts (introduced at sections III-A and -B). Warren replies to these arguments in connection with its discussion of non-liability for replacement parts, below. Likewise, most other arguments set forth below in connection with replacement parts also apply to later-added parts.

B. REPLACEMENT PARTS

1. THE "MODIFICATION" DOCTRINE IS NOT RELEVANT TO THE COURT'S ANALYSIS

Plaintiffs contend that foreseeable replacement of asbestos-containing internal parts is an "insubstantial modification" that does not "cut off liability." (Ans. Brief at pp. 28-30.) But there was no original liability *to Mr. O'Neil or these Plaintiffs* to "cut off," because he did not encounter any Defendant's product (pump or valve) until long after the Navy had replaced the internal asbestos-containing parts. (See Warren's Opening Brief at pp. 47-48.)

Plaintiffs assume that Defendants had some free-floating liability for "defective" equipment originally sold (pp. 26-27) – but even if that were true, it is irrelevant. Liability that a manufacturer might have had to persons encountering its product years earlier when it contained original asbestos-containing parts – even assuming such liability existed – bears no connection to any potential liability to a

different plaintiff who worked with the product after all original asbestos-containing parts were replaced.

The foreseeable/insubstantial modification doctrine is not relevant to this Court's analysis; it amounts to a reincarnation of the "foreseeability equals liability" argument rejected in *Taylor v. Elliott Turbomachinery* (2009) 171 Cal.App.4th 564, 580, 585. As this Court explained in *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56, "product misuse [is] a defense to strict products liability . . . when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product *caused* an injury." The Answer Brief cites no evidence that Defendants' products – pumps or valves – caused any injury in the first instance (see section II-A above), though they frequently make that *assertion*. (See, e.g., Ans. Brief at p. 30: it is not at all a "fact" that "the 'product' shipped by Manufacturers included the defect that caused O'Neil's injury.")

Only the *replacement* internal parts (if any at all) contributed to Mr. O'Neil's injury – because those were the only claimed sources of asbestos fiber in any way connected with Warren pumps. Warren's Opening Brief explained that this degree of connection is not and should not be enough to impose strict liability. And as section II-B above further demonstrates, the record does not support Plaintiffs' argument that Warren specified or recommended the replacement parts.

2. DESIGN DEFECT:

a. WHERE NO BETTER DESIGN WAS POSSIBLE, THE COURT SHOULD NOT PERMIT "CONSUMER EXPECTATION" THEORY TO YIELD VIRTUALLY AUTOMATIC DESIGN-DEFECT LIABILITY

Plaintiffs concede that, due to the Navy's requirements, Defendants could not avoid including asbestos-containing parts in their steam-propulsion equipment when Defendants sold those products more than six decades ago. This precludes any design-defect claim under a risk/benefit theory, since Plaintiffs do not contend that the product designs embodied "excessive *preventable* danger." (*See Barker v. Lull Engineering* (1978) 20 Cal.3d 413, 430, italics added.) Speaking more practically: it is untenable to argue that Defendants should have employed a safer design when no safer design was possible. Plaintiffs do not try.

Instead, Plaintiffs acknowledge that their argument for strict design-defect liability depends on the consumer expectation test also recognized in *Barker*. (Ans. Brief at pp. 25-26, 33-34.) Relying on overstatements in some appellate asbestos decisions, Plaintiffs insist that the unavailability of a different or better product design is "irrelevant" to establishing a claim on the basis of consumer expectation. (*Ibid.*; see also *id.* at p. 9, fn. 2 ["the fact that asbestos 'had to be used' is not a defense to a claim for design defect under the consumer expectation test . . . ."])

But that cannot be true, for the reasons that follow. In addition to the sufficient grounds explained in the Opening Briefs to reject strict design-defect liability for replacement parts that a manufacturer does not make or sell, the Court should reject this extreme proposition as well.

Where plaintiffs themselves say it is impossible to "design out" of a product the very feature that, they also say, violates minimum safety expectations, the consumer expectation theory results in virtually automatic design-defect liability to all who can show contact with the product. In the hundreds of cases like this one, for example: the "reasonable consumer" posited by Plaintiffs never "expects to get mesothelioma" caused (in some relatively small part still deemed "substantial") by asbestos dust generated during maintenance of the equipment – yet Plaintiffs agree the equipment could not have met the Navy's needs without the use of asbestos-containing parts.

In these situations, at least for critically important products such as those at issue here, the Court should preclude strict design-defect liability on any theory, as Warren next explains.[4]

b. THE PUBLIC INTEREST IN PRODUCTION OF MILITARY EQUIPMENT OUTWEIGHS THE POLICIES SUPPORTING STRICT DESIGN-DEFECT LIABILITY

In *Brown v. Superior Court* (1988) 44 Cal.3d 1049, this Court held as a matter of policy that prescription drug manufacturers should not be strictly liable for design defect. It relied on policy considerations similar to – but not as strong as – those here.

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[4] The Court in *Barker*, *supra*, while recognizing the consumer expectation test and risk/benefit test as alternative theories for design-defect claims, had "no occasion to determine whether a product which entails a substantial risk of harm may be found defective [on any theory] even if no safer alternative design is feasible." (20 Cal.3d at p. 430, fn. 10.) Accepting only for the sake of argument Plaintiffs' contention that Defendants' pumps and valves entailed a substantial risk of harm purely by virtue of having been originally delivered with asbestos-containing parts, this case offers an occasion to answer that question "no" – though the Court need not do so in order to reject design-defect liability for replacement parts in these circumstances.

Brown supplies compelling precedent for exempting historical sales of steam-propulsion equipment with asbestos-containing parts from strict liability for design defect.

The Court explained in *Brown* that "[p]ublic policy favors the development and marketing of beneficial new drugs, even though some risks, perhaps serious ones, might accompany their introduction, because drugs can save lives and reduce pain and suffering." (44 Cal.3d at p. 1063.) Likewise, at the time of the equipment sales at issue here, public policy favored in the most emphatic terms the development and sale of equipment for Navy steam-propulsion systems used to defend the nation. The Selective Training and Service Act of 1940 mandated that manufacturers like Warren Pumps and Crane Co. prioritize such sales over traditional commerce. And Plaintiffs agree that this equipment had to contain asbestos to perform its functions to Navy standards – whatever may have been the risks, perhaps even serious ones, of including a material that the War Department deemed essential.

The rationale for *Brown's* rule is stronger here in another way. *Brown* rejected strict design-defect liability for prescription drugs *despite* the Court's view that the usual rationales "could justify" applying the doctrine to those products. Those rationales are "to deter manufacturers from marketing products that are unsafe, and to spread the cost of injury from the plaintiff to the consuming public, which will pay a higher price for the product to reflect the increased expense" to the manufacturer. (44 Cal.3d at pp. 1062-1063.) Here those rationales *cannot* justify application of strict design defect liability to asbestos-containing steam-propulsion equipment. As the Opening Brief explained, (1) "deterrence" is a dead letter given that the manufacturers no longer sell

asbestos-containing products, and (2) the manufacturers never sold those products to "the consuming public" in the first place, and certainly cannot spread the cost of 21st-century liability to the population the doctrine seeks to protect.

The *Brown* Court distinguished, for purposes of exemption from strict liability for design defect, between products "used to make work easier or to provide pleasure" and products "necessary to alleviate pain and suffering or to sustain life." (*Id.* at p. 1063.) The second category properly should include products that the United States military deems necessary to its mission of defending the nation.

c. THE COURT SHOULD REJECT PLAINTIFFS' "COMBINED CAUSATION" ARGUMENTS AND REAFFIRM THE STREAM-OF-COMMERCE LIMITATION

Warren anticipated these arguments in section IV-B-2 of its Opening, and now adds the following to what it said there.

Plaintiffs rely on a theory that Warren pumps are necessarily used in conjunction with later-added and replacement parts that contained asbestos, with the potential danger arising from this combined use. This theory fails for three reasons. First, as shown above, they cite no evidence for any contribution by any pump or valve to the release of asbestos fibers. Second, even if some such evidence existed in another case, the component parts doctrine precludes liability for the reasons explained in section V of Warren's Opening Brief and section IV below. Indeed, carried to its logical conclusion, Plaintiffs' "combined causation" argument renders "defective," for purposes of strict liability, every product forming any part of a Navy steam-propulsion system. This is not and should not be the law – and on its face, the argument tends to confirm that

in fact it was the system itself, rather than any component part, that caused the harm complained of.

Finally, no case law supports Plaintiffs' theory, and this Court should not adopt it. Plaintiffs rely primarily on three California Court of Appeal decisions that do not stand for Plaintiffs' sweeping proposition that a product manufacturer is responsible for others' defective products foreseeably used with its own product. (Ans. Brief at pp. 35-41, 46-51.) To the extent those cases can be read even to imply such a rule, this Court should limit *DeLeon, supra*; *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577; and *Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, to their distinct facts.

As explained above, the result in *DeLeon* turned on evidence that the manufacturer may have participated in designing the *downstream system* that caused the plaintiff's harm, by suggesting placement of its own product (a fruit sorter bin) too near an overhead line shaft. Plaintiffs here do not contend that any manufacturer participated in the design of a Navy steam-propulsion system; both sides' military experts agreed that the Navy solely controlled how the Oriskany's steam system was built, and that equipment suppliers were not involved in the design of the steam system of an aircraft carrier. (7 RT 1087 and 1064-1066 [Plaintiffs' expert Captain Lowell]; 15 RT 2692 [Defendants' expert Admiral Sargent]).

Relatedly, in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577, the allegation deemed true as against a demurrer was that the intended, specific purpose of defendant's grinding wheel was to release harmful dust

from discs supplied by others. (*Id.* at p. 580.) In contrast here, Plaintiffs concede that Defendants' equipment was "designed to move and control the flow of water and steam within the steam-propulsion plant of the Oriskany" (Ans. Brief at p. 7), not to release asbestos dust from replacement or added parts.

Moreover, the *Tellez-Cordova* court was required to assume the truth of an allegation that "the abrasive products were not dangerous without the power of the tools." Plaintiffs here alleged just the opposite: that asbestos-containing gaskets and packing sold by predecessors of Garlock Sealing Technologies, LLC contributed directly to causing Mr. O'Neil's disease. (1 AA 1-2, 8, 10-22.) That is, Plaintiffs in this case (and almost all others like it) allege that those components are inherently dangerous – not, as in *Tellez-Cordova*, that they would only *become* dangerous when used with particular pieces of equipment.

The *Wright* case is also fundamentally distinct, because it involved harm caused by the defendant's own product. A water cannon mounted on a fire truck broke loose while under pressure from the water pump, throwing a firefighter into the air and onto the ground, where the deck gun landed on top of him. (*Id.* at p. 1222.) In the firefighter's product liability action against Stang, the manufacturer of the water cannon, the trial court granted Stang summary judgment on the theory that the mount, rather than the cannon itself, was defective. (*Id.* at pp. 1223, 1226-1227, 1229.)

Reversing, the appellate court concluded that there were triable issues concerning (a) whether the cannon suffered from a design defect because it was incompatible with a sufficiently strong mounting system, and (b) whether the defendant

had failed to warn about a potential mismatch between the cannon's water pressure and the strength of its mount. (*Id.* at p. 1236.) But these disputes were material in *Wright* only because the defendant's own product, the water cannon, injured the plaintiff. (*Ibid.*) Again, Plaintiffs here point to no evidence that Warren pumps themselves did anything to injure Mr. O'Neil; rather, they claim that persons working on Defendants' equipment in Mr. O'Neil's vicinity released asbestos fibers from other manufacturers' replacement asbestos-containing parts.

In sum, the Court should adopt the rule counseled by its own precedents and those from the Washington Supreme Court, as described in the Opening Briefs, rejecting strict liability for harm caused by products that the defendant did not place in the stream of commerce – regardless of whether so-called "combined use" with the defendant's own product was foreseeable. As Plaintiffs recognize (Ans. Brief at p. 22), four California appellate courts have now also taken that sensible and proper approach, led by *Taylor v. Elliott Turbomachinery*, *supra*, 171 Cal.App.4th at pp. 579-580.

For the sake of brevity, Warren joins in co-Respondent Crane Co.'s explanation of why the out-of-state trial court decisions (and one New York appellate decision) found at pages 41-45 of the Answer Brief do not support their position. Warren adds that this case is not at all like *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 126, cited in the Answer Brief at page 36, where this Court observed that a manufacturer must design its product with the perils of *that product's* "everyday use" in mind. *Cronin* held that a vehicle manufacturer is liable – whatever the cause of an accident – for specific collision injuries that would not have occurred but for a manufacturing or design

defect *in the vehicle*. (8 Cal.3d at p. 126.) Nothing in *Cronin* supports Plaintiffs' position that one manufacturer is liable for injury caused by another's product wherever it is foreseeable that the two products may be used together. This Court should reject that proposition.

3. FAILURE TO WARN: APART FROM THE OTHER PROBLEMS, PLAINTIFFS CANNOT SHOW THAT THE LACK OF WARNINGS CAUSED ANY OF THEIR HARM

To the extent Plaintiffs intend any of the arguments addressed in the prior sub-section to support liability for failure-to-warn in addition to design defect, the Court should reject that contention for the same reasons set forth above and in section IV of the Opening Brief.

Warren here adds only a short reply in support of the *military-specific* aspect of its failure-to-warn argument. (See section VII of the Opening Brief.) Plaintiffs never explain, nor do they cite any evidence to support, how any warning in any manual or affixed to any pump or other steam equipment "would have benefited and protected [any] users and bystanders, including Lt. O'Neil . . . ." (Ans. Brief at p. 32.)

"A manufacturer is liable only when a defect in its product was a legal cause of injury." (*Soule v. General Motors* (1994) 8 Cal.4th 548, 572; see also *Garman v. Magic Chef, Inc.* (1981) 177 Cal.App.3d 634, 638 ["Causation is a necessary element in strict liability just as it is in negligence liability"].) "The burden is upon the plaintiff to establish the defective condition of the product and to prove that the defect proximately caused plaintiff's injury." (*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 704.)

Plaintiffs can never sustain that burden in the Navy context, because they cannot show that any warning in a manual or on a pump would have done anything to avoid harm to a sailor breathing asbestos dust aboard a ship, at any time through the mid-1960s when Mr. O'Neil served (and realistically, much later). The Navy trained its sailors and controlled all aspects of their work aboard ships. (11 RT 1889-1890; 7 RT 1098) The Navy also "had more knowledge than the defendants with regard to . . . the use of asbestos on naval vessels" (16 RT 3000, 3007), and could have required the use of respirators if it so chose. (7 RT 1051-1052 [Plaintiffs' expert Captain Lowell].)

But the Navy did not do that, nor did it incorporate any other procedures for reducing asbestos-dust inhalation, at any time during Mr. O'Neil's service (11 RT 1911; 11 RT 1895-1896; 6 RT 789-790) – despite the Navy's leading role in developing those procedures in the 1940s. (6 RT 776-778, 784-785, 791-792) On the contrary, the Navy elected to put tons of asbestos-containing insulation all over its ships, and was in complete control over who would work with asbestos and in what manner they would do so. (6 RT 779-780, 823-825 [Plaintiffs' expert Dr. Horn].)

The Answer Brief's single paragraph at page 66 does nothing to explain how this claim survives the absence of causation. It is irrelevant that "[a]ny number of such precautions . . . might have saved [Mr. O'Neil's] life later," because no evidence shows that Mr. O'Neil or anyone performing work on steam equipment in his vicinity could have or would have *taken* any such precautions, no matter what they read in a manual, on a plate affixed to a pump, or anywhere else. It is likewise irrelevant whether sailors sometimes read equipment manuals to see what gaskets or packing they needed and how

to replace those parts – as Plaintiffs suggest (Ans. Brief at p. 12) – because nothing shows how the lack of warnings in those manuals caused anyone to become ill. The Navy simply did not supply the respirators, the wet-down equipment, the time, or the procedures.

Not only is the duty to warn properly limited to the hazards inherent in a manufacturer's own product, but the scope of the duty should not extend beyond the service of its purpose: "to inform consumers about a product's hazards and faults of which they are unaware, so that they can refrain from using the product altogether or evade the danger by careful use." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) That purpose cannot be served in the context of claims by Navy servicemen for exposure to asbestos in the years before the Navy itself saw fit to implement safety measures.

IV

THE COMPONENT-PARTS DOCTRINE SUPPLIES AN ADDITIONAL BASIS FOR REJECTING LIABILITY

The Answer Brief does not oppose Warren's contention that this Court should recognize as part of California law the component-parts doctrine set forth in section 5(b) of the Restatement (Third) of Torts: Product Liability. Instead it argues, after setting up various strawmen, that one of the two criteria for application of the doctrine – a non-defective component – is not met here.

First, the strawmen. Defendant manufacturers have never "take[n] the position that once a manufacturer's product has been deemed a component of something

larger, i.e. a steam-propulsion system . . . the component-part doctrine is implicated and exonerates the component-part manufacturer from liability for injuries caused by the larger product." (p. 60) The Opening Briefs were more nuanced and specific than that, advocating that the Court require no more and no less than the elements set forth in the Restatement (Third).

While Plaintiffs' assertion as stated deserves no other reply, it hints at a concern worth addressing as the Court confronts how to apply the component-parts doctrine to complex production streams such as this record presents. The answer is quite simple.

1. Each industrial pump Warren sold was certainly itself a "product" composed of many parts, some of which (including the asbestos-containing parts) Warren did not itself make.

2. But each pump was also necessarily a component of a "downstream" product or system, because no pump could ever do anything by itself. Here, that downstream product or system was the Navy's steam-propulsion system.

3. That steam-propulsion system was *both necessary and sufficient* to contribute (Plaintiffs claim) to Mr. O'Neil's injury. The pump alone, as delivered, was incapable of doing so. Hence the *only* relevant role of the pump here is *as a component*,

and strict liability should attach only in the circumstances described in the Opening Brief.[5]

Returning to Plaintiffs' strawmen: No one denies that component-part manufacturers *can* be subject to strict liability (*id.* at p. 61), *if* a defect in their products as delivered to the downstream-manufacturer caused the harm. (See *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481 [defective windows allowed water damage to mass-produced homes].) But that did not happen here – and this is where the parties' positions truly diverge.

Plaintiffs insist that the pumps and valves "were in a defective condition when supplied" solely because they had asbestos-containing internal parts at that time. (Ans. Brief at pp. 61-62.) But that is not enough under section 5(b), which Warren urges the Court to adopt. Assuming the component seller did not participate in the integration of its product into the larger product or system (which the Defendant manufacturers did not), the seller will be liable only when "the component is defective in itself . . . *and the defect causes the harm*." (*Ibid.*, italics added.) Nothing in Warren's pumps as delivered in the early 1940s for use in constructing the Oriskany's steam-propulsion system caused any of Mr. O'Neil's harm. (See sections II-A and III-B-1 above.)

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[5] As Warren explained at page 52 of its Opening, an unusual feature of this case and others like it is that the manufacturer of the "downstream" product or system that actually contributed to Mr. O'Neil's injury is immune from tort liability. But that cannot justify pushing strict liability back "up the chain" to manufacturers that should not otherwise bear it.

Rather, the danger here arose only because of the Navy's decisions in integrating Warren pumps into the Oriskany's steam-propulsion system. Specifically, the Navy attached asbestos-containing insulation and flange gaskets, and replaced old internal parts with products the Navy selected, ordered and controlled, in such a manner that Mr. O'Neil and others were exposed to asbestos from those products when the pumps were undergoing maintenance. (See Warren's Opening Brief at sections II-B through -D.) Nothing inherent in the Warren pumps required the Navy to do any of this, and none of it could have occurred before the Navy's incorporation of the pumps into the steam-propulsion system that the Navy alone designed for the Oriskany. That is the exact situation in which the component-parts doctrine applies. (*See Taylor, supra*, 171 Cal.App.4th at pp. 584-586.)

Plaintiffs rely on the appellate court's rationale for rejecting application of the component-parts doctrine, but that rationale was openly result-oriented. The court lamented that *the evidence Plaintiffs offered would not establish strict liability* if the court were to consider the steam-propulsion system to be the end-product for purposes of this doctrine (which it should be, because Mr. O'Neil would never have inhaled asbestos dust absent the construction and operation of that system):

> If the . . . 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 [by which the court could only have meant: the equipment *had* flanges], would be inadequate unless appellants could also prove that respondents were involved in the design of the entire steam propulsion system, ... That simply stretches the defense too far. (Op. at pp. 13-14, all emphasis added.)

Yes, that evidence is inadequate under the Restatement (Third) approach to establish strict liability for harm allegedly resulting from a downstream assembler's system or product. The point here is that it *should* be inadequate. Plaintiffs never explain why this is wrong.

The closest Plaintiffs come is to rely on two related, incorrect notions in the appellate opinion. The first is that the pumps and valves at issue here were "separate products with a specific purpose and use," as opposed to "building block materials." (Ans. Brief at p. 62, citing Op. at p. 12.) But pumps and valves do absolutely nothing by themselves; they can *only* function as building blocks of some larger product or system, just as with windows, switches, or circuit boards.

Similarly, the fact that these industrial pumps and valves happened to have *fewer* uses than the typical switch, and were not "fungible," are not reasons to decline application of the component-parts doctrine where the purpose of the doctrine is otherwise served.[6] It is served in a situation like this one, where despite the manufacturers' knowledge that their products could be integrated into a steam-propulsion system (see Ans. Brief at p. 63, citing Op. at p. 12), they had no capacity to "even conceptualize how to put together a test scheme" for the whole steam system, much less

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[6] Indeed, the Restatement itself applies the doctrine to a component seller that "designs a component to its buyer's specifications." (Restatement (Third) Torts: Products Liability §5, com. e., p. 135.) One of the Restatement's illustrations even refers to a "component valve" that is redesigned to be integrated into a specific type of tank. (Restatement (Third) of Torts: Product Liability § 5 cmt. f, pp. 135-36.) The Restatement (Third) contains no "fungibility" requirement of the type Plaintiffs suggest.

to assemble it. (15 RT 2694-2625) To put it another way: multiplicity of uses should not be the only test; *complexity* of the ultimate product or system, and the downstream assembler's total control over that process (15 RT 2693-2696), equally invoke the policy served by the component-parts doctrine. In both situations, a component maker or seller should not be held liable for failure to "'second-guess the finished product manufacturer [here: the Navy] whenever any of [the component maker's] employees receive[s] any information about any potential problems.'" (*Walton v. The William Powell Company*, *supra*, 183 Cal.App.4th 1470, 1484, quoting *Taylor*, *supra*, at pp. 585-586.)

The *Walton* panel offered an even more thorough discussion of the component-parts doctrine than *Taylor* did. (*Id.* at pp. 1477, *et seq.*) "Even when joined with the packing, gaskets, and insulation," *Walton* explained, "the valves had no functional value until integrated into broader systems – for example, the Navy's shipboard systems – containing other components." (183 Cal.App.4th at p. 1483.) Moreover, in the *Walton* court's view, *Tellez-Cordova*'s rejection of the component-parts doctrine should not concern this Court:

> In our view, *Tellez-Cordova* stands for the proposition that the component parts doctrine is inapplicable when a manufacturer's product is uniquely designed to complete a system that is hazardous in its intended use. That is not the case here. Unlike *Tellez-Cordova*, in which the tools and discs formed a single system over which the tool manufacturers had significant control, the combination of Powell's valves with the packing, gaskets, and insulation formed no such system.

(*Walton*, *supra*, 183 Cal.App.4th at p. 1483, italics added.) Even more so here: the combination of Warren's pumps with the packing, gaskets, and insulation that the Navy

added or replaced long after sale to complete or maintain its steam-propulsion system left no "control" for Warren over the finished "combination."

The component-parts doctrine should apply to shield a product manufacturer from strict liability for asbestos released from either replacement parts or later-added parts as a result of the operation of the overall system into which a purchaser (here, the Navy) integrates all these products. Where the manufacturer's component-product itself does not cause the harm – and the pumps here simply had nothing to do with releasing asbestos fibers – the component manufacturer should not be held liable in damages for that harm.

V

WARREN CAN HAVE NO NEGLIGENCE LIABILITY BECAUSE IT DID NOT OWE PLAINTIFFS A DUTY OF CARE

Plaintiffs spend almost three pages on a point Warren freely acknowledged: "Civil Code section 1714, subdivision (a), generally imposes liability for 'an injury occasioned to another by . . . want of ordinary care or skill in the management of [one's] property or person,'" but courts establish exceptions based on public policy, considering the *Rowland* factors. (Opening Brief at p. 53; see Answer Brief at pp. 77-79.)

Since Warren indeed "urges" the Court to hold it owed no duty to Mr. O'Neil or his successors to avoid causing him the kind of harm that he experienced (mesothelioma), Warren spelled out why the *Rowland* factors weigh against recognition of such a duty. (Opening Brief at pp. 54-58.) Warren addressed there almost everything

Plaintiffs say about the *Rowland* factors. (See Ans. Brief at pp. 79-82.) Just a few points are worth making in reply:

- Evidence that it was "knowable" at the time Defendants sold their products that "exposure to asbestos posed a risk to human health" (p. 80) is not evidence that Mr. O'Neil's development of mesothelioma half a century after those sales was reasonably foreseeable.
- The "closeness of connection" factor does not turn on the "intervening negligence" doctrine. (p. 80) Instead, like all the other *Rowland* factors, it is a qualitative assessment performed with the goal of determining whether – as a policy matter – "liability should be imposed for damage done." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477, internal quotations omitted.) Here it should not.
- As for the policy of preventing future harm, Plaintiffs concede (see Ans. Brief at p. 81) a basic point from *Taylor, supra*, 125 Cal. App. 4th at p. 439: "Such [asbestos] exposures have already taken place, and in light of the heavily regulated nature of asbestos today, it is most unlikely that holding [Defendants] liable for failing to warn of the danger posed by other manufacturers' products will do anything to prevent future asbestos-related injuries." This Court should not countenance Plaintiffs' alternative proposal to impose liability on equipment manufacturers because it will – in some unexplained way – "prevent future harm from other types of toxic

exposures." (*Ibid.*) Plaintiffs cite no precedent or evidence to support twisting this factor in that way.

VI

THE COURT SHOULD DECLINE TO IMPOSE LIABILITY UPON MILITARY EQUIPMENT MANUFACTURERS FOR HARM TO INDIVIDUALS

It is no exaggeration to say that without asbestos, the Oriskany and many other Navy ships requiring pumps, valves and other steam-propulsion equipment could not have functioned. Indeed, Captain Lowell said as much in testifying for Plaintiffs. (See 7 RT 1052-1053.) Warren presented in section VII of its Opening Brief several reasons that this Court should not require equipment manufacturers to answer in tort for harm to individuals alleged to result from equipment sales to the armed forces. The Answer Brief at pages 64-67 resists arguments that Warren did not make, and fails to meet arguments Warren did make. Some of these have been addressed above, but two important points remain.

First, while there is strong basis for deeming the Navy to be the relevant "user" in these circumstances for purposes of California's sophisticated-user defense (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56), Warren does not rely on that doctrine here and the Court need not determine its applicability in order to reverse the Court of Appeal and direct reinstatement of the nonsuit judgment. (See Ans. Brief at pp. 64-66.)

Second, the parties agree that the federal doctrine of military contractor immunity (*Boyle v. United Tech. Corp.* (1988) 487 U.S. 500; *Snell v. Bell Helicopter Textron, Inc.* (9th Cir. 1997) 107 F.3d 744), which provides a complete defense to design-defect claims where certain criteria are met, "is not at issue in this appeal." (Ans. Brief at pp. 64, 67.) Thus the Court should ignore Plaintiffs' contention that "[l]iability is not eliminated" by that doctrine. (*Id.* at p. 64.) In a proper case, a California state or federal court might well determine that the military-contractor defense does preclude design-defect liability under circumstances like those here.

But in all events: Plaintiffs are wrong that the federal doctrine "provides the [only] legal avenue for Warren's contentions." (Ans. Brief at p. 67.) This Court is free to leave less room for military-sales liability than *Boyle's* immunity does, by declining to recognize state tort liability for such sales. It did something very similar in *Macias v. State of California* (1995) 10 Cal.4th 844 (see Warren's Opening Brief at pp. 59-61) – a case that the Answer Brief ignores. The public-policy rationales that the Court relied on in *Macias* apply here with even greater force.

VII

CONCLUSION

For the foregoing reasons and those explained in Warren's Opening Brief, the judgment of the Court of Appeal should be reversed, and this Court should direct judgment of nonsuit in favor of Warren Pumps, LLC.

Dated: June 29, 2010

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CERTIFICATE OF WORD COUNT

I certify that according to the word count of the computer program used to prepare the foregoing brief, it contains 7,680 words, including footnotes.

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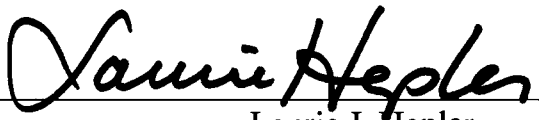
By 
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Supreme Court of California, Action No. S177401

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On June 29, 2010 I served the enclosed:

WARREN PUMPS, LLC'S REPLY BRIEF

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

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 29, 2010 at San Francisco, California.

Stephanie Ferrell

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