Civil Number **B208214**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE WM. POWELL COMPANY,

Defendant and Appellant,

v.

EDWARD WALTON AND CAROL WALTON,

Plaintiffs and Respondents.

Los Angeles County Superior Court Case Number BC361382
The Honorable Ralph Dau, Judge Presiding

APPLICATION OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AND AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT

Pursuant to Rule 8.200 of the California Rules of Court, the Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Manufacturers, Association of California Insurance Companies, American Insurance Association, American Petroleum Institute, and American Chemistry Council apply for leave to file the accompanying brief in support of Defendant-Appellant.

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law rules, and reflects sound public policy.

Amici will show that the trial court's decision to impose liability on Defendant-Appellant, a valve maker, for harm caused by *other manufacturers'* asbestos-containing products (e.g., external thermal insulation, gaskets and packing) is inconsistent with these principles and should be reversed. Defendant-Appellant's valves *contained no asbestos.* Defendant-Appellant supplied none of the asbestos-containing parts that may have been used in conjunction with its valves at the time Plaintiff-Respondent worked with them. *Amici* intend to focus our brief on the duty to warn issue although we support Defendant-Appellant's position with respect to the other points raised in its brief.

Amici are well-suited to provide a broad perspective to this Court on the troubling implications of allowing the judgment below to stand. The proposed brief does not seek to simply repeat Defendant-Appellant's arguments. Rather, we will demonstrate how the judgment is inconsistent with California law and the majority rule nationwide. We also intend to utilize our broad perspective to inform this Court about the serious public policy problems raised by the trial court's approach and will discuss the subject appeal in the context of the overall asbestos litigation environment, particularly in California.

No party or any counsel for a party in the pending appeal authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amici curiae* made a monetary contribution intended to fund the preparation or submission of the brief.

* * *

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The

Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,600 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

---

[1] The Coalition for Litigation Justice includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company; CNA service mark companies; Fireman's Fund Insurance Company; Liberty Mutual Insurance Group; and the Great American Insurance Company.

The Association of California Insurance Companies ("ACIC") is an affiliate of the Property Casualty Insurers Association of America and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.9 percent of the property/casualty insurance in California, including 56.1 percent of personal automobile insurance, 42.8 percent of commercial automobile insurance, 39 percent of homeowners insurance, 32.5 percent of business insurance and 46 percent of private workers compensation insurance.

The American Insurance Association ("AIA") is a leading national trade association representing major property and casualty insurance companies writing business in Ohio, nationwide and globally. AIA members collectively underwrote more than $124 billion in direct property and casualty premiums in 2007. AIA members, based in California and most other states, range in size from small and regional insurers to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

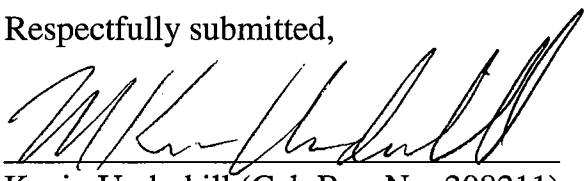
The American Petroleum Institute ("API") is a nationwide, non-profit, trade association headquartered in Washington, D.C., that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

* * *

For these reasons, *amici* request that the Court grant their application for leave to file a brief in support of Defendant-Appellant.

Respectfully submitted,



Kevin Underhill (Cal. Bar. No. 208211)
SHOOK, HARDY & BACON L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281

Attorneys for *Amici Curiae*

Mark A. Behrens
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 783-8400
Counsel for Coalition for Litigation Justice, Inc.

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Lynda S. Mounts
AMERICAN INSURANCE ASSOCIATION
2101 L Street, NW, Suite 400
Washington, DC 20037
(202) 828-7100

Harry M. Ng
Stacy R. Linden
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Of Counsel

Dated: January 18, 2010

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I certify that on January 15, 2010, I served the foregoing document on the interested parties in this action by placing true and correct copies thereof in sealed envelopes sent by U.S. Mail, first-class postage-prepaid, addressed to the following:

Jason R. Litt
Lisa Perrochet
HORVITZ & LEVY
15760 Ventura Blvd., 18th Floor
Encino, CA 91436-3000

Brian P. Barrow
SIMON, EDDINS & GREENSTONE LLP
301 East Ocean Blvd., Suite 1950
Long Beach, CA 90802

The Hon. Ralph W. Dau
LOS ANGELES SUPERIOR COURT
111 North Hill Street
Los Angeles, CA 90012

Dennis Michael Young
FOLEY & MANSFIELD
1111 Broadway 10FL
Oakland, CA 94607

CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94102-4783

I also sent an original and one copy of the foregoing by overnight mail to:

CALIFORNIA COURT OF APPEAL
Second District, Division Four
Ronald Reagan State Building
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013
Tel: (213) 830-7000

Kevin Underhill (Cal. Bar. No. 208211)
SHOOK, HARDY & BACON L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900

Civil Number **B208214**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE WM. POWELL COMPANY,

Defendant and Appellant,

v.

EDWARD WALTON AND CAROL WALTON,

Plaintiffs and Respondents.

Los Angeles County Superior Court Case Number BC361382
The Honorable Ralph Dau, Judge Presiding

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AND AMERICAN CHEMISTRY COUNCIL, IN SUPPORT OF DEFENDANT-APPELLANT

Mark A. Behrens
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211

Of Counsel

Kevin Underhill (Cal. Bar. No. 208211)*
SHOOK, HARDY & BACON L.L.P.
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281

Attorneys for *Amici Curiae*
* Counsel of Record

(Additional Of Counsel Listed on Next Page)

Of Counsel

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Harry M. Ng
Stacy R. Linden
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Lynda S. Mounts
AMERICAN INSURANCE ASSOCIATION
2101 L Street, NW, Suite 400
Washington, DC 20037
(202) 828-7100

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

INDEX

TABLE OF CASES AND AUTHORITIES

CASES **Page**

STATUTES

OTHER AUTHORITIES

Civil Number **B208214**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE WM. POWELL COMPANY,

Defendant and Appellant,

v.

EDWARD WALTON AND CAROL WALTON,

Plaintiffs and Respondents.

Los Angeles County Superior Court Case Number BC361382
The Honorable Ralph Dau, Judge Presiding

Amici curiae Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Manufacturers, Association of California Insurance Companies, American Insurance Association, American Petroleum Institute, and American Chemistry Council file this brief to urge this Court to reverse the decision of the trial court and enter judgment in favor of Defendant-Appellant.

QUESTION PRESENTED

Amici file this brief to address the first point raised in Defendant-Appellant's brief: Whether, under California law, a product manufacturer owes a duty to warn end users about alleged hazards in asbestos-containing external or replacement parts made, supplied, or installed by others and affixed post-manufacture.

STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, follows traditional tort law rules, and reflects sound public policy. *Amici* will show that the trial court's decision to impose liability on Defendant-Appellant, a valve maker, for harm caused by *other manufacturers'* asbestos-containing products is inconsistent with these principles, as well as California law, and should be reversed.

STATEMENT OF THE CASE

Amici adopt Defendant-Appellant's Statement of the Case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Asbestos litigation is the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation* (2008) 37 Sw. U. L. Rev. 511, 511. Since the litigation emerged over three decades ago, lawyers who bring asbestos cases have perpetuated the litigation by seeking out new defendants or raising new theories of liability.

An emerging theory being promoted by some plaintiffs' counsel is that makers of nondefective products such as pumps or valves should be held liable for harms allegedly caused by asbestos-containing products, such as external thermal insulation, gaskets, or packing, made by others and attached post-sale, e.g., by the U.S. Navy. Ordinarily, manufacturers such as Defendant-Appellant are named in asbestos cases only with respect to asbestos that was contained in their *own* products – not to hold them

accountable for asbestos-containing products made by others and affixed to or used around their products post-sale. Indeed, the third-party liability concept Plaintiffs - Respondents seek to impose here is so extreme that almost no plaintiff during the thirty-plus years of asbestos litigation has had the audacity even to raise this argument until recently. The lack of older case law on point, after so many years of litigation and after many hundreds of thousands of filings, by itself, speaks volumes about the exotic nature and recent vintage of Plaintiffs' theory.

In essence, Plaintiffs-Respondents seek to impose rescuer liability on defendants for failure to warn about asbestos-related hazards in products made or sold by others. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products* (2008) 37 Sw. U. L. Rev. 595, 602 (Frank B. Ingersoll, Professor at Cornell Law School and Co-Reporter for the Restatement Third, Torts: Products Liability: "Every student of American tort law knows that American courts will not impose a legal duty to rescue another merely because the would-be rescuer knows that the other requires help that the rescuer is in a position to render."). It is easy to see what is suddenly driving this novel theory: most major manufacturers of asbestos-containing products have filed bankruptcy and the Navy enjoys sovereign immunity. As a substitute, plaintiffs seek to impose liability on solvent manufacturers like Defendant-Appellant for harms caused by products they never made, sold, installed, or profited from.

Plaintiffs-Respondents' justification for this radical expansion of asbestos liability is "foreseeability." As every first-year law student knows, however, foreseeability can be a *Palsgraf*-like slippery slope that has no end. Courts must draw a reasonable line, and that line has been in place for the entire history of asbestos litigation and going back in time through the common law.

In negligence, a plaintiff must establish the existence of a duty owed directly to the injured person. Duty questions involve policy-laden judgments in which a line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. Courts make duty determinations by balancing several factors. *See Rowland v. Christian* (1968) 69 Cal. 2d 108, 113. Under California law – and contrary to Plaintiffs-Respondents' theory – "foreseeability is not coterminous with duty." *Sakiyama v. AMF Bowling Centers, Inc.* (2d Dist. 2003) 110 Cal. App. 4th 398, 407, *reh'g denied* (Aug. 6, 2003), *review denied* (Cal. Sept. 24, 2003); *Thing v. La Chusa* (1989) 48 Cal. 3d 644, 656, 659 (rejecting a "reasonable foreseeability" test for assessing duty because "foreseeability, like light, travels indefinitely in a vacuum" and because of "the importance of avoiding the limitless exposure to liability that the pure foreseeability test of 'duty' would create.") (internal citations omitted). The *Rowland* factors do not support a duty owed here, as the First District Court of Appeal recently held in a virtually identical case, *Taylor v. Elliott Turbomachinery Co., Inc.* (1st Dist. 2009) 171 Cal. App. 4th 564, 596, *review denied* (Cal. June 10, 2009).

Similarly, a touchstone of strict products liability is that the defendant must have participated in the chain of distribution of a defective product. *See Kasel v. Remington Arms Co., Inc.* (2d Dist. 1972) 24 Cal. App. 3d 711, 725. Manufacturers have historically been responsible for products over which they retain some measure of control and responsibility. They are not responsible for the products of others that might have been used in the vicinity of their own product, even if that use was "foreseeable." Both the Second Appellate District's Division Three and the First District Court of Appeal have rejected strict liability claims in cases directly on point. *See Merrill v. Leslie Controls, Inc.* (2d Dist. Nov. 17, 2009) 179 Cal. App. 4th 262, —, 101 Cal. Rptr. 3d 614, 621;[1] *Taylor,* 171 Cal. App. 4th at 575.

This Court should reject Plaintiffs' extreme and unsound invitation to dramatically expand liability law and create a broad new duty rule requiring manufacturers to warn about risks in products made by others. Plaintiffs' theory is contrary to California law and the majority rule nationwide. *See Taylor, supra; Merrill, supra*; *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127; *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493; *Lindstrom v. A-C Prod. Liab. Trust* (6th Cir. 2005) 424 F.3d 488; Henderson, *supra.*

---

[1] The *Merrill* opinion was certified for partial publication. This brief does not cite to the unpublished part of the *Merrill* opinion, which concluded that defendant Leslie Controls could not be held liable in negligence for failure to warn about asbestos-related dangers in products it did not manufacture or supply.

Furthermore, Plaintiffs' theory represents unsound public policy. The decision would worsen the asbestos litigation and invite a flood of new cases into California. Hundreds of companies made products that arguably were used in the vicinity of some asbestos insulation, which in earlier years was ubiquitous in industry and buildings. Many of these companies may have never manufactured a product containing asbestos (e.g., manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could nonetheless be held liable under Plaintiffs' theory.

Civil defendants in other types of cases would also be adversely impacted, as the broad new duty rule sought here presumably would not be limited to asbestos litigation but could require manufacturers to warn about all conceivable dangers relating to hazards in others' products that might be used in conjunction with or near their own. For example, makers of bread or jam would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread. Valve and pump manufacturers, as well as door or drywall manufacturers, could be held liable for failure to warn about the dangers of lead paint made by others and applied to their products post-sale. As this Court can appreciate, the only limit on this type of expansive duty requirement would be the imagination of creative plaintiffs' lawyers.

Consumer safety also could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

For these reasons, the judgment below should be reversed.

ARGUMENT

I. DEFENDANT OWED NO DUTY TO WARN PLAINTIFF ABOUT HAZARDS FROM OTHERS' PRODUCTS

Defendant-Appellant owed no duty to Plaintiffs-Respondents and was not in the chain of distribution of the asbestos-containing products which allegedly caused Plaintiffs' harm. Defendant-Appellant cannot be held liable for failure to warn.

In negligence, it is well established that before a defendant may be liable to a plaintiff, it must be shown that the defendant owed a duty to the plaintiff. The existence and scope of a duty of care, if any, is a question of law to be determined by the court. Duty questions involve policy-laden judgments. "A person may have a moral duty to prevent injury to another, but no legal duty." *Pulka v. Edelman* (N.Y. 1976) 358 N.E.2d 1019, 1022, *reargument denied* (1977) 362 N.E.2d 640.

Here, the Court must determine whether it is fair and reasonable to require a manufacturer of a nondefective product to warn about asbestos-related hazards in *other manufacturers'* products. To make this determination, the Court must balance a variety of factors, including: (1) the foreseeability of harm to the injured party; (2) the degree of certainty he or she suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury; (4) the moral blame attached to the defendant's

conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty of care with resulting liability for breach; (7) and the availability, cost, and prevalence of insurance for the risk involved. *Rowland,* 69 Cal. 2d at 113.

Contrary to Plaintiffs-Respondents' theory, "foreseeability alone is not sufficient to create an independent tort duty." *Erlich v. Menezes* (1999) 21 Cal. 4th 543, 552; *see also Coldwell Banker Residential Brokerage Co. v. Superior Court* (4th Dist. 2004) 117 Cal. App. 4th 158, 167 ("the mere existence of foreseeability of harm . . . is, for public policy reasons, not sufficient to impose liability."). In fact, California courts "may find that no duty exists, despite foreseeability of harm, because of other [*Rowland*] factors." *Sakiyama* 110 Cal. App. 4th at 407.[2]

Sound reasons exist for not imposing liability solely based upon foreseeability of harm. As the Supreme Court of California explained in *Thing v. La Chusa*, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which the foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." *Thing*, 48 Cal. 3d at 668. Here, as the First District Court of Appeal held in *Taylor*, 171 Cal. App. 4th at 596, the *Rowland* factors do not support a finding of a duty owed by the Defendant-Appellant.

---

[2] *See also Elden v. Sheldon* (1988) 46 Cal. 3d 267, 274 (the determination of duty "recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk."); *Burgess v. Superior Court* (4th Dist. 1992) 2 Cal. 4th 1064, 1072 (duty "depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability.")

With respect to Plaintiffs' strict liability claim, it must be shown that Defendant-Appellant participated in the chain of distribution of a defective product. *See Merrill*, 179 Cal. App. 4th at —, 101 Cal. Rptr. 3d at 621; *Taylor*, 171 Cal. App. 4th at 575; *Peterson v. Superior Court* (1995) 10 Cal. 4th 1185, 1188; Restatement (Second) of Torts § 402A (1965); Restatement Third, Torts: Products Liability §§ 1-2 (1997). There is no basis here to hold Defendant-Appellant strictly liable for Plaintiffs' harm.

In a nutshell, whether couched in terms of negligence or strict liability, manufacturers are not liable for harms caused by others' products except in limited situations not present here: (1) where the defendant substantially participated in the integration of its product into the design of another product, *see DeLeon v. Commercial Mfg. & Supply Co.* (5th Dist. 1983) 148 Cal. App. 3d 336; Restatement Third § 5; or (2) where two otherwise safe products combine to create a new, synergistic hazard. *See Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2d Dist. 2004) 129 Cal. App. 4th 577; Henderson, 37 Sw. U. L. Rev. at 599. These bedrock tort principles are part of settled California law as recently addressed by Division Three in *Merrill* and the First District Court of Appeal in *Taylor*.

In *Merrill,* a unanimous panel of Division Three held that Leslie Controls, a valve manufacturer, could not be held strictly liable for failure to warn about hazards posed by asbestos-containing products, or for a design defect in asbestos-containing products, which Leslie Controls did not manufacture, supply, or place in the chain of distribution. The court found the First District's opinion in *Taylor* to be persuasive. The court in

Merrill explained, "Liability for defective products is strict, but not absolute. Strict liability will not be imposed on an entity that does not manufacture or market the allegedly defective product that caused a plaintiff's injury." 179 Cal. App. 4th at —, 101 Cal. Rptr. 3d at 622 (citations omitted). Consequently, Leslie Controls was not strictly liable for asbestos-containing exterior flange gaskets or external insulation made or sold by others. "A manufacturer's duty to warn is limited to its own products." 179 Cal. App. 4th at —, 101 Cal. Rptr. 3d at 623.

The *Merrill* court noted that its analysis was supported by two recent Washington Supreme Court cases, *Simonetta v. Viad Corp.* (Wash. 2008) 197 P.3d 127, and *Braaten v. Saberhagen Holdings* (Wash. 2008) 198 P.3d 493, and a Sixth Circuit opinion, *Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488.

The court in *Merrill* also said that the component parts doctrine provided another reason why Leslie Controls was not strictly liable for failure to warn. "Under the component parts doctrine, the manufacturer of a product component is not liable for injuries caused by the finished product into which the component is incorporated unless the component itself was defective at the time it left the manufacturer." 179 Cal. App. 4th at —, 101 Cal. Rptr. 3d at 626 (quoting *Taylor*, 171 Cal. App. 4th at 584). Leslie Controls' valves were a component of a larger steam production system for naval ships, but plaintiffs were unable to prove that "defects in the component part caused injury." *Id.*

The First District in *Taylor*, following the Washington Supreme Court's recent rulings in *Simonetta* and *Braaten*, held that makers of products supplied to the Navy for

use in a ship's propulsion system had no duty to warn of the dangers inherent in asbestos-containing products supplied by other manufacturers. *Taylor,* 171 Cal. App. 4th at 591. The court explained that the law "restricts the duty to warn to entities in the chain of distribution of the defective product" and that liability may not attach "unless the manufacturer's product itself causes or creates the risk of harm" or the manufacturer "substantially participate[s] in the integration of [its] components into the final product." *Id.* at 575; *see also Peterson,* 10 Cal. 4th at 1188 ("manufacturers, retailers, and others *in the marketing chain* of a product are strictly liable in tort for personal injuries caused by a defective product.") (emphasis added); *Daly v. General Motors Corp.* (1978) 20 Cal. 3d 725, 739 (the basis for imposing strict liability on a particular defendant is that "he has marketed or distributed a defective product.").

The court in *Taylor* concluded that, because defendants "were simply 'not part of the manufacturing or marketing enterprise of the allegedly defective product[s] that caused the injury in question,'" they could not be held liable for failure to warn. 171 Cal. App. 4th at 577 (quoting *Peterson,* 10 Cal. 4th at 1188). The court wisely observed the basis for the bright-line rule that ties liability to the injury-producing product: "manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate." 171 Cal. App. 4th at 576. "This legal distinction acknowledges that overextending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution." *Id.*

Next, the *Taylor* court applied the component supplier doctrine as yet another basis to reject plaintiffs' claims. 171 Cal. App. 4th at 584; *see also* Restatement Third § 5; *id.* at Comment *a* (1997) ("As a general rule, component sellers should not be liable when the component itself is not defective."). The *Taylor* court explained two policy considerations which support this rule:

> First, requiring suppliers of component parts to ensure the safety of their materials as used in other entities' finished products "would require suppliers to 'retain an expert in the client's field of business to determine whether the client intends to develop a safe product.'" Suppliers of "products that have multiple industrial uses" should not be forced "to retain experts in a huge variety of areas in order to determine the possible risks associated with each potential use." A second, related rationale is that "finished product manufacturers know exactly what they intend to do with a component or raw material and therefore are in a better position to guarantee that the component or raw material is suitable for their particular applications."

171 Cal. App. 4th at 584 (internal citations omitted).

Finally, the court held that defendants could not be held liable under a negligence theory for harms caused by products made or sold by others. The court explained, "If Mr. Taylor's injuries may be ascribed to morally blameworthy conduct, it is the conduct of the manufacturers and suppliers of the asbestos-containing materials he actually encountered, who were in the best position to investigate and warn of the dangers posed by their products." *Id.* at 595; *cf. Lineaweaver v. Plant Insulation Co.* (1st Dist. 1995) 31 Cal. App. 4th 1409, 1418 (1995) ("it serves no justice to fashion rules which allow responsible parties to escape liability while demanding others to compensate a loss they did not create.").

In addition to Division Three's decision in *Merrill* and the First District's decision in *Taylor*, there is other well-established California precedent holding that manufacturers cannot be liable for failure to warn about the hazards of subsequently affixed asbestos-containing parts made, supplied, or installed by others. *See Cadlo v. Owens-Illinois, Inc.* (1st Dist. 2004) 125 Cal. App. 4th 513, 524 (no liability where there was no evidence that defendant "played any role in the design, manufacture, distribution, or marketing" of the products that allegedly caused plaintiff's harm); *cf. Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 958 (a plaintiff in an asbestos case "must, in accordance with traditional tort principles, demonstrate . . . that a product or products *supplied by the defendant*, to which he became exposed" causes injury) (emphasis added).

In analogous situations, California courts have held that the manufacturer of one product has no duty to warn of alleged hazards in another's product. For example, in *Zambrana v. Standard Oil Co. of California* (2d Dist. 1972) 26 Cal. App. 3d 209, plaintiff was injured when his car was struck by a Ford automobile that went out of control from a sudden loss of tire pressure. The Ford vehicle's tires were originally equipped with rubber valve stems and metal extensions. The Ford vehicle's owner later purchased a new set of Firestone tires with brass stems and directed the Firestone dealer to affix the Ford metal extensions to the brass stems. Plaintiff contended that the combination of a metal valve stem with a metal extension was dangerously defective, even though neither the valve nor the extension itself was defective. The court affirmed judgment in favor of Firestone, concluding: "Firestone was neither a 'designer' nor

'manufacturer' of the combination of parts which is said to be defective." *Id.* at 217; *see also Wiler v. Firestone Tire & Rubber Co.* (3d Dist. 1979) 95 Cal. App. 3d 621, 629-30 (tire maker not liable for defective valve stem manufactured and affixed to the tire by automobile company).

Numerous other California decisions are in agreement. *See Lee v. Electric Motor Div.* (2d Dist. 1985) 169 Cal. App. 3d 375, 385, *review denied* (Cal. Aug. 29, 1985) ("We have found no case in which a component part manufacturer who had no role in designing the finished product and who supplied a nondefective component part, was held liable for the defective design of the finished product."); *Powell v. Standard Brands Paint Co.* (3d Dist. 1985) 166 Cal. App. 3d 357, 362-63 ("To our knowledge, no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else."); *Blackwell v. Phelps Dodge Co.* (1984) 157 Cal. App. 3d 372, 378 ("The product alleged to have been dangerous and hence defective, for lack of warnings and instructions was not the acid supplied by defendant, but the tank car in which the acid was shipped by defendant to [plaintiff's employer]...under these circumstances, defendant incurred no liability to plaintiffs for its failure to warn them of danger from formation of pressure in the acid allegedly caused by the defective design of the tank car..."); *Garman v. Magic Chef, Inc.* (2d Dist. 1981) 117 Cal. App. 3d 634, 638 ("To say that the absence of a warning [about defects] in other products makes the [defendant's product] defective is semantic nonsense."); *McGoldrick v. Porter-Cable Tools* (2d Dist.

1973) 34 Cal. App. 3d 885, 888 (power saw stand manufacturer not liable for defective saw housing made by another and affixed to the stand).

Likewise, a California trial court has held that, while a broom is commonly used to sweep up dust that might contain silica, a broom manufacturer is not required to warn of the hazards of silica exposure. *See* Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, May 2007, at 6.

Consistent with these decisions, a federal court applying California law rejected failure to warn claims by airlines passengers who sued commercial airlines and aircraft manufacturer Boeing, alleging that prolonged and cramped seating on aircraft created a risk of developing a condition known as deep vein thrombosis. In *In re Deep Vein Thrombosis* (N.D. Cal. 2005) 356 F. Supp. 2d 1055, 1068, the court said it could "find no case law that supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer."

Plaintiffs-Respondents, on the other hand, rely on authorities that "are distinguishable." *Taylor*, 171 Cal. App. 4th at 586. For instance, the court in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2d Dist. 2004) 129 Cal. App. 4th 577, held that a manufacturer of power grinding tools had a duty to warn about the release of respirable dust caused by the interaction of the defendant's power grinders with abrasive

wheels or discs made by another. The court observed that the defendant's grinding tools created the dust and that the other manufacturer's disks would not have been dangerous without the effect of the defendant's tools. 129 Cal. App. 4th at 585. In contrast, no synergistic hazard is involved here. The subject valves may have been safe, but the asbestos supplied by others was potentially hazardous. The subject hazard did not arise from two safe products being used in tandem; rather, it arose solely from the asbestos products made by someone other than the Defendants-Appellants.

Wright v. Stang Mfg. Co. (2d Dist. 1997) 54 Cal. App. 4th 1218, *review denied* (Cal. Aug. 13, 1997), involved a plaintiff injured when a deck gun on a fire truck broke loose and failed under the intense pressure generated by the deck gun and the inadequate capacity of the riser pipe attached to the deck gun. As the Washington Supreme Court explained as one reason for distinguishing *Wright* from a case virtually identical to this one, the defendant's product (like here) "functioned as intended, whereas an entire assembly in *Wright* failed under water pressure. *Simonetta*, 197 P.3d at 137. The First District in *Taylor* agreed, stating: "In short, in *Wright*, the unexpected, immediate cause of injury was not, as in this case, a toxic agent contained in another manufacturer's product, but was either a design defect in Stang's product itself or a misuse of Stang's product, which Stang was in the best position to anticipate." *Taylor*, 171 Cal. App. 4th at 589.

Another case, *DeLeon v. Commercial Mfg. & Supply Co.* (5th Dist. 1983) 148 Cal. App. 3d 336, has no application here. *DeLeon* held that a manufacturer which

"participate[s] in the design of . . . custom-made equipment for a particular location in a processing line" must ensure that the placement of the product does not create a hazard. *DeLeon,* 148 Cal. App. 3d at 347. The holding has no bearing on this case. "There 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." *Merrill*, 179 Cal. App. 4th at —, 101 Cal. Rptr. 3d at 626 (quoting *Taylor*, 171 Cal. App. 4th at 589-590).

This Court should follow the sound reasoning articulated by Division Three in *Merrill* and the First District in *Taylor*, the Washington Supreme Court's recent rulings in *Simonetta v. Viad Corp.* and *Braaten v. Saberhagen Holdings*, and the scholarship of Cornell Law School's Professor Henderson, 37 Sw. U. L. Rev. 595, and hold that Defendant-Appellant is not liable for asbestos-related risks posed by others' products.

II. RECENT OUT-OF-STATE CASES ON POINT HAVE REJECTED PLAINTIFFS' NOVEL DUTY THEORY

Division Three's decision in *Merrill* and the First District's decision in *Taylor* are not only consistent with settled California law, they are also "strongly supported by other persuasive out-of-state authorities that are very closely on point." *Taylor*, 171 Cal. App. 4th at 592; *see also* Henderson, *supra.*

For example, in *Simonetta v. Viad Corp.* and *Braaten v. Saberhagen Holdings*, an en banc panel of the Washington Supreme Court voted 6–3 in 2008 to overturn an appellate court and held that manufacturers have no duty to warn about asbestos-related hazards in products made by others. *See also Anderson v. Asbestos Corp., Ltd.* (Wash. Ct. App. July 13, 2009) 2009 WL 2032332 (following *Braaten* and *Simonetta* to dismiss

claim against Caterpillar for asbestos insulation used with engines it manufactured) (Appendix B). Among other authorities, the Washington Supreme Court cited several California cases as support for its holdings: *Powell v. Standard Brands Paint Co.* (3d Dist. 1985) 166 Cal. App. 3d 357, *Blackwell v. Phelps Dodge Co.* (1984) 157 Cal. App. 3d 372, and *Garman v. Magic Chef, Inc.* (2d Dist. 1981) 117 Cal. App. 3d 634.

In *Simonetta*, the court held that the manufacturer of an asbestos-free evaporator had no duty to warn of danger posed by asbestos insulation that it did not manufacture, sell, or supply, even though the evaporator was built with the knowledge that insulation was required for proper operation. 197 P.3d at 138. The court also held that the manufacturer of the asbestos-free evaporator could not be held strictly liable for failure to warn of the hazard posed by the asbestos product because the evaporated manufacturer was not involved in the manufacture or marketing of the asbestos insulation used in conjunction with its product. *See id.*

The Washington Supreme Court in *Simonetta* began its opinion by discussing the black letter rule set forth in the Restatement (Second) of Torts § 388 (1965): "One who supplies directly or through a third person a chattel for another to use is subject to liability . . . if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that [users] . . . will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." *Id.* at 131. The court then stated that a "careful review of case law

interpreting failure to warn cases under § 388" – from both Washington and nationwide – did not support a finding of liability against the maker of the asbestos-free evaporator. *Id.* at 132. In the many cases read and cited by the court, "the claims for § 388 failure to warn were posited only against parties in the chain of distribution of the product." *Id.* at 132. The court said there was "little to no support" in Washington law "for extending the duty to warn to another manufacturer's product, and also said that "[c]ase law from other jurisdictions similarly limits the duty to warn in negligence cases to those in the chain of distribution of the hazardous product." *Id.* at 133. The court concluded that because the defendant "did not manufacture, sell, or supply the asbestos insulation, . . . as a matter of law it had no duty to warn under § 388." *Id.* at 134.

Next, the *Simonetta* court addressed plaintiff's strict liability claim as embodied in the Restatement (Second) of Torts § 402A (1965). The court explained that strict liability is based on the rationale that imposition of liability is justified on "the defendant who, by manufacturing, selling, or marketing a product, is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained." *Id.* at 134. In contrast, the defendant, a maker of an asbestos-free evaporator, was not in the chain of distribution of the asbestos insulation. Therefore, the court held, the defendant could not be held strictly liable for failure to warn. *See id.*

The court also rejected plaintiff's attempts to position the case in the line of decisions dealing with synergistic hazards. *See id.* at 137. The court correctly

appreciated that the *Simonetta* case did not involve two safe products being used in tandem; rather, it arose solely from the asbestos insulation made by someone other than the defendant.

In *Braaten*, the Washington Supreme Court rejected common law negligence and strict liability failure to warn claims against pump and valve manufacturers for harm caused by plaintiff's exposure to asbestos-containing replacement packing and replacement gaskets and asbestos-containing insulation made by others. 198 P.3d at 501. The court again held that liability for warning-based claims is limited to those in the chain of distribution of the hazardous product, and that liability could not be imposed on a defendant outside of that chain, even if "the manufacturer knew its products would be used in conjunction with asbestos insulation." *Id.* at 498 (citing *Simonetta*, 197 P.3d at 136). The court noted that its "decision in *Simonetta* is in accord with the majority rule nationwide." *Id.*

Next, the court considered whether defendants were required to warn of the danger of exposure to asbestos in replacement packing or replacement gaskets in products which the defendants may have originally sold with asbestos-containing packets or gaskets. The defendants did not dispute that they could be liable for failure to warn of the danger of asbestos exposure from gaskets or packing originally contained in their products; the focus of the court was on replacement gaskets and packing made by others after the original equipment was removed. Once again, the court found the law to be straightforward and easy to apply. The court said, "The general rule under the common

law is, as explained in *Simonetta*, that a manufacturer does not have an obligation to warn of the dangers of another's product. The defendant-manufacturers are not in the chain of distribution of asbestos-containing packing and gaskets that replaced the original packing and gaskets and thus fall within this general rule." *Id.* at 501. The court also said that "whether the manufacturers knew replacement parts would or might contain asbestos makes no difference because such knowledge does not matter, as we held in *Simonetta*." *Id.*; *see also Simonetta*, 197 P.3d at 136 ("[F]oreseeability has no bearing on the question of adequacy of warnings in these circumstances.").

The duty rule sought by Plaintiffs-Respondents was also rejected in 2009 by trial courts in Pennsylvania and Maine. In *Milich v. Anchor Packing Co.* (Pa. Ct. Com. Pl. Butler County Mar. 16, 2009) A.D. No. 08-10532 (Appendix C), a Pennsylvania court held, "to the extent that Plaintiff may have been exposed to replacement packing supplied by a third party, there is no authority that Crane can be held liable for such exposure as a matter of law. To the contrary, the authority relied upon by Crane in its Motion for Summary Judgment indicates that Crane is not subject to such liability." *Id.* at 9.

In the Maine case, *Rumery v. Garlock Sealing Technologies, Inc.* (Me. Super. Ct. Cumberland County Apr. 24, 2009) 2009 WL 1747857 (Appendix D), the court explained, "Maine case law has not imposed upon a manufacturer a duty to warn about the dangerous propensities of other manufacturer's [sic] products." *Id.* at 5. The court added, "it was not the Defendant's product, but the dangers inherent in the asbestos-containing packing and gaskets, a product the Defendant did not manufacture or supply,

that proximately caused the Plaintiff's alleged damages. As there is no strict liability for a failure to warn solely of the hazards inherent in another product, the foreseeability argument regarding the adequacy of warnings is not pertinent." *Id.* at 6.

In addition, the issue was addressed in *Lindstrom v. A-C Product Liability Trust* (6th Cir. 2005) 424 F.3d 488, where a plaintiff with alleged asbestos-related mesothelioma sued several manufacturers of products used in conjunction with other manufacturers' asbestos products. The central issue in *Lindstrom* was causation as it related to component parts, rather than the existence of a duty. The court found no causation, concluding that a manufacturer cannot be held responsible for asbestos contained in another product. *Id.* at 496. For example, the *Lindstrom* court affirmed summary judgment for pump manufacturer CoffinTurbo, which did not manufacture or supply the asbestos products used to insulate its pumps. The court found that Coffin Turbo could not be held responsible for the asbestos contained in another product, though the asbestos was attached to a Coffin Turbo product. *Id.* It was those asbestos products, not Coffin Turbo's pumps, that caused injury.

Similarly, in *Ford Motor Co. v. Wood* (Md. Ct. Spec. App.) 703 A.2d 1315, *cert. denied*, (Md. 1998) 709 A.2d 139, *abrogated on other grounds, John Crane, Inc. v. Scribner* (Md. 2002) 800 A.2d 727, plaintiffs alleged asbestos exposure from replacement parts in older Ford vehicles. Unable to identify the maker of the replacement parts, plaintiffs sued Ford claiming that "regardless of who manufactured the replacement parts, there was sufficient evidence from which a jury could infer that Ford had a duty to warn

of the dangers involved in replacing the brakes and clutches on its vehicles." *Id.* at 1130. The Maryland appellate court, citing *Baughman v. General Motors Corp.* (4th Cir. 1986) 780 F.2d 1131, with approval, held that "a vehicle manufacturer [is liable only for defective components] incorporated...into its finished product." *Id.* at 1331. The court was "unwilling to hold that a vehicle manufacturer has a duty to warn of dangers of a product that it did not manufacture, market, or sell, or otherwise place into the stream of commerce." *Id.* at 1332; *see also Stark v. Armstrong World Indus., Inc.* (6th Cir. 2001) 21 Fed. Appx. 371, 381 (unpublished) (rejecting claim that turbine and boiler manufacturers should be held liable because their equipment "is integrated into the machinery of the vessel, much of which uses and may release asbestos," because "[t]his form of guilt by association has no support in the law of products liability.").

In *Baughman,* the federal appellate decision cited by the Maryland court in *Wood,* the court refused to hold an automobile manufacturer liable for a mechanic's injuries when a tire mounted on a replacement wheel exploded. Plaintiff contended that even though the vehicle's manufacturer did not place the replacement wheel into the stream of commerce, the vehicle was nevertheless defective because the manufacturer failed to adequately warn of the dangers with similar wheels sold by others. The Fourth Circuit rejected this argument:

> Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and *did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had the opportunity to test, evaluate, and inspect the component; it has derived no*

> *benefit from its sale*; and it has not represented to the public that the component part is its own.

Id. at 1132-33 (emphasis added); *see also Wiler,* 95 Cal. App. 3d at 629-30; *Reynolds v. Bridgestone/Firestone, Inc.* (11th Cir. 1993) 989 F.2d 465, 472; *Spencer v. Ford Motor Co.* (Mich. App. 1985) 367 N.W.2d 393, 396; *Acoba v. General Tire, Inc.* (Haw. 1999) 986 P.2d 288, 305.

This Court should follow the sound reasoning of Division Three in *Merrill* and the First District in *Taylor*, as well as the Washington Supreme Court's recent rulings in *Simonetta* and *Braaten,* among others, and hold that Defendant-Appellant is not liable for failure to warn regarding the danger of exposure to products made, sold, or installed by others.

III. OTHER AUTHORITY SUPPORTS DEFENDANT-APPELLANT

Numerous other decisions from around the country support a finding that Plaintiffs-Respondents' claims fail as a matter of law. *See Rastelli v. Goodyear Tire & Rubber Co.*, (N.Y. 1992) 591 N.E.2d 222, 225-226 (court "decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of another manufacturer."); *Mitchell v. Sky Climber, Inc.* (Mass. 1986) 487 N.E.2d 1374, 1376 ("we have never held a manufacturer liable. . . for failure to warn of risks created solely in the use or misuse of the product of another manufacturer."); *Shaw v. General Motors Corp.* (Colo. App. 1986) 727 P.2d 387, 390 ("The burden of guarding against the injury suffered here should appropriately be placed upon the entity that

designed the final product, arranged for the acquisition of all the component parts, and directed their assembly."); *Walton v. Harnischfeger* (Tex. App.-San Antonio 1990) 796 S.W.2d 225, 226 (crane manufacturer had no duty to warn about rigging it did not manufacture, integrate into its crane, or place in the steam of commerce); *Sperry v. Bauermeister, Inc.* (E.D. Mo. 1992) 804 F. Supp. 1134, 1140 (seller not liable for incorporation of its parts into system designed by another), *aff'd* (8th Cir. 1993) 4 F.3d 596; *Fricke v. Owens-Corning Fiberglas Corp.* (La. App. 1993) 618 So. 2d 473, 475 (manufacturer not liable for inadequate warning on product it neither made nor sold); *Firestone Steel Prods. Co. v. Barajas* (Tex. 1996) 927 S.W.2d 608, 615-616 (manufacturer not liable for tire made by licensee); *Toth v. Economy Forms Corp.* (Pa. Super. 1990) 571 A.2d 420, 423 (Pennsylvania does not "impose liability on the supplier of metal forming equipment to warn of dangers inherent in wood planking it did not supply."), *appeal denied*, (Pa. 1991) 593 A.2d 422; *Fleck v. KDI Sylvan Pools* (3d Cir. 1992) 981 F.2d 107, 118 (stating it would be "unreasonable" to impose failure to warn liability on a manufacturer of a "safe pool" for injuries sustained as a result of a lack of depth warnings on a replacement pool liner made by another manufacturer), *cert. denied sub nom. Doughboy Recreational, Inc., Div. of Hoffinger Indus., Inc. v. Fleck* (1993) 507 U.S. 1005; *Petrucelli v. Bohringer and Ratzinger* (3d Cir. 1995)46 F.3d 1298, 1309 (recycling machine component part manufacturer was not liable for a failure to warn of the danger of another component which it neither manufactured nor assembled); *Exxon Shipping Co. v. Pacific Res., Inc.* (D. Haw. 1991) 789 F. Supp. 1521, 1526 (chain

manufacturer not liable for defectively designed replacement chain made by another even though the replacement part was "identical, in terms of make and manufacture, to the original equipment"); *Timm v. Indian Springs Recreation Assoc.* (Ill. App.) 543 N.E.2d 538, 542 ("Liability will not be imposed upon a defendant who is not a part of the original producing and marketing chain."), *appeal denied* (Ill. 1989)548 N.E.2d 1079; *Torres v. Wilden Pump & Eng'g Co.*, (N.D. Ill. 1009) 740 F. Supp. 1370, 1371 (no liability where defendant did not make, design, or distribute machine that allegedly caused plaintiff's harm); *Niemann v McDonnell Douglas Corp.* (S.D. Ill. 1989) 721 F. Supp. 1019, 1030 (airplane manufacturer had no duty to warn about replacement asbestos chafing strips it did not manufacture).

In addition, as the California appellate court held in *Taylor,* and as the Washington Supreme Court held in *Simonetta* and *Braaten,* foreseeability of harm does not trigger a responsibility to warn about harms posed by others' products. For instance, in *Brown v. Drake-Willock Int'l, Ltd.* (Mich. App. 1995) 530 N.W.2d 510, *appeal denied,* (Mich. 1997) 562 N.W.2d 198, a Michigan appellate court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean the machines. The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id.* at 515.

Other decisions are in accord. *See, e.g., Childress v. Gresen Mfg. Co.* (6th Cir. 1989) 888 F.2d 45, 49 (Mich. law) (component maker's knowledge of the design of the final product was insufficient to impose liability); *In re Silicone Gel Breast Implants Prods. Liab. Litig.* (N.D. Ala. 1997) 996 F. Supp. 1110, 1117 ("[t]he issue is not whether GE was aware of the use to be put by [breast] implant manufacturers of its [silicone gel] – clearly it knew this - . . . such awareness is irrelevant to the imposition of liability."); *Kealoha v. E.I. Du Pont de Nemours & Co.* (D. Haw. 1994) 844 F. Supp. 590, 595 ("The alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer."); *Palermo v. Port of New Orleans* (La. Ct. App.) 951 So. 2d 425, 439 (shipping dock board had no duty to protect dock workers from raw asbestos shipped by other companies; "[w]hether the Dock Board knew generally that asbestos was being shipped through the port is *irrelevant to this inquiry*; absent a defect in its premises . . . the pertinent fact is that the Dock Board had no custody or control of the asbestos-containing cargo or of the loading, unloading or ship repair operations.") (emphasis added), *writ denied*, (La. 2007) 957 So. 2d 1289.

Here, no defect is alleged in the product sold by Defendant-Appellant. Any harm which occurred arose from hazards in products made or sold by others. No liability should attach to Defendant-Appellant. *See* Henderson, 37 Sw. U. L. Rev. 595.

IV. IMPOSITION OF A DUTY REQUIREMENT WOULD REPRESENT UNSOUND PUBLIC POLICY

Public policy dictates that manufacturers be held liable for defects in their *own* products, or in the use of their *own* products – not those of others. To place a duty to warn on a defendant for harms caused by others' products, or the use of others' products, is contrary to longstanding tort law principles that: (1) economic loss should ultimately be borne by the one who caused it, and (2) the manufacturer of a particular product is in the best position to warn about risks associated with it. *See, e.g.*, Restatement Third § 5 Cmt. *a.* ("If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective.").

"[C]ourts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree." *In re New York City Asbestos Litig.* (*Holdampf v. A.C.&S., Inc.*) (N.Y. 2005) 840 N.E.2d 115, 119 (quoting *Hamilton v. Beretta U.S.A. Corp.* (N.Y. 2001) 750 N.E.2d 1055). That policy would be significantly undermined by the broad new duty theory being promoted here by Plaintiffs-Respondents; "an expansion of the liability for failure to warn under these circumstances becomes untenable and unmanageable." Tardy & Frase, *supra*, at 6; *see also Taylor,* 171 Cal. App. 4th at 595-596 ("Defendants whose products happen to be used in conjunction with defective products made or supplied by others could incur liability not only for their own products, but also for every other product with which their product might foreseeably be used.").

In the real world of product design and usage, virtually every product is connected in some manner with many others in ways that may be anticipated, if courts are willing to extend foresight far enough. Such a duty rule would lead to "legal and business chaos – every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers' products. . . ." John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, Toxic Torts & Env'tl L. 7 (Defense Research Inst. Toxic Torts & Env'tl L. Comm. Winter 2005).

"For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the manufacturer of bread [or jam] would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread." Tardy & Frase, *supra*, at 6. "Can't you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health?" Petereit, *supra*, at 7. Packaging companies might be held liable for hazards regarding contents made by others. The Court no doubt appreciates there are many other examples.

We will not belabor this exercise further because similar scenarios could be developed for virtually any product. If a manufacturer's duty were defined by foreseeable uses of *other* products, the chain of warnings and liability would be so endless, so unpredictable, and so speculative as to be worthless. No rational manufacturer could operate under such a system. Manufacturers also cannot be expected

to have R&D facilities to identify potential dangers with respect to all products that may be used in conjunction with or in the vicinity of their own products. Now, however, this Court is faced with an attempt to create just such a liability system. The proposition advanced by Plaintiffs-Respondents would require makers of products that might have been used anywhere near asbestos to warn about it.

Of course, the dramatic shift in tort law sought by Plaintiffs-Respondents would likely be extended beyond asbestos cases. Presumably, Plaintiffs' third-party liability theory would be product-neutral and applied as a principle of law across all types of cases. *All* manufacturers would somehow be required to anticipate *all* possible products that could be used in conjunction with their own; research the potential harms associated with those products (generally in entirely different fields of expertise); and develop some system for placing multiple and possibly inconsistent warnings on their products to deal with every such scenario.

Plaintiffs-Respondents' *foreseeability* theory is thus extremely broad, with no limiting factor except foreseeability, which itself is limited only by the imagination of the manufacturer (or, perhaps more pertinent here, only by the creativity of attorneys asserting liability long after the product was used or sold). Product liability law has never extended this far.

"Consumer safety also could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information on different components and finished products." David C. Landin et al., *Lessons Learned from the*

Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation (2008) 16 Brook. J.L. & Pol'y 589, 630 (urging courts to reject the duty Plaintiffs-Respondents seek here); *see also* Restatement Third § 5 Cmt. *a.;* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory* (1983) 52 U. Cin. L. Rev. 38, 43 ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . .").

V. IMPOSITION OF A DUTY REQUIREMENT WOULD EXACERBATE THE ASBESTOS LITIGATION

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200. The United States Supreme Court in *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597, described the litigation as a "crisis."

So far, the litigation has forced over eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, and has had devastating impacts on defendant companies' employees, retirees, shareholders, and surrounding communities. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* (2003) 12 J. Bankr. L. & Prac. 51.

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR

1993314.[3] One plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).[4] Over 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, Aug. 2004, at 5, up from 300 defendants in 1982, *see* James Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses* 5 (RAND Inst. for Civil Justice 1984). Nontraditional defendants now account for more than half of asbestos expenditures. *See* Stephen J. Carroll et al., *Asbestos Litigation* 94 (RAND Inst. for Civil Justice 2005).

California has not escaped these problems. *See* Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview* (2008) 37 Sw. U. L. Rev. 459, 462 ("[T]here is a sense locally among the bar that Southern California may be in the midst of a surge."); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 599 ("[P]laintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles, which was an important asbestos venue in the

---

[3] *See also* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486; Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1.

[4] *See also* Steven B. Hantler et al., *Is the Crisis in the Civil Justice System Real or Imagined?* (2005) 38 Loy. L.A. L. Rev. 1121, 1151-52 (discussing spread of asbestos litigation to "peripheral defendants").

1980s but is only recently seeing an upsurge in asbestos cases."); Steven D. Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L. Rev. 883, 885 ("With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state."); Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), *at* 2006 WLNR 4514441; Cortney Fielding, *Plaintiffs' Lawyers Turn to L.A. Courts for Asbestos Litigation*, Daily J., Feb. 27, 2009, at 1.

Judges in California have acknowledged the ever-increasing burden placed on the judicial system by the state's asbestos docket. For example, San Francisco Superior Court Judge James McBride has said that the length of asbestos trials causes hardship for jurors, leaving many citizens unable to serve and forcing the courts to "use jurors at an absolutely abominable rate." *Judicial Forum on Asbestos*, HB Litigation Conferences, New York City, June 3, 2009 (quoting Judge McBride), *available at* http://litigation conferences.com/?p=6669. Judge McBride said that the rate at which asbestos litigation depletes potential jurors from the overall pool could lead the jury system to "collapse" if the economy worsens significantly; these impacts would be most likely to occur in areas, such as Los Angeles County, which tend to have lower response rates on summonses. *See also Judges Roundtable: Where Is California Asbestos Litigation Heading?*, HarrisMartin's Columns–Raising the Bar in Asbestos Litigation, July 2004, at 3 (San Francisco Superior Court Judge Ernest Goldsmith stating that asbestos cases take up twenty-five percent of the court's docket); Dominica C. Anderson & Kathryn L. Martin,

The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis (2004) 45 Santa Clara L. Rev. 1, 2 ("The sheer number of cases pending at any given time results in a virtually unmanageable asbestos docket.").

The broad new duty rule created by the trial court would worsen the litigation and fuel claims against defendants, such as Defendant-Appellant. Claimants are already drawn to California courts because of the belief that the state's asbestos litigation rules will give them an advantage. *See* Victor E. Schwartz et al., *Litigation Tourism Hurts Californians*, 21:20 Mealey's Litig. Rep.: Asbestos 41 (Nov. 15, 2006) (stating that, in a 2006 sample of 1,047 California asbestos plaintiffs for whom address information was available, an astonishing *thirty percent* had addresses outside California); Steven D. Wasserman & Sunny S. Shapiro, *State's Courts Overburdened With Asbestos Suits*, The Recorder, July 24, 2009, at 5-6. If Plaintiffs prevail here, the decision will reinforce this perception and signal to plaintiffs throughout the country that they should file in California because they can obtain judgments based on a novel theory that has been rejected elsewhere.

The increase in new filings which could be expected to flow into California courts would further strain the state's judicial system. As this Court knows, the state's court system is facing serious challenges due to the unprecedented statewide fiscal crisis. The Judicial Council has ordered ALL California courts to close the third Wednesday of each month, starting September 16, 2009 and running through the fiscal year, which ends June

30, 2010. *See* Judicial Council of California, *Judicial Council Approves Reallocation of $159 Million to Support Trial Courts*, July 30, 2009, *at* http://www.courtinfo.ca.gov/presscenter/newsreleases/NR40-09.PDF. The Los Angeles Superior Court chose to observe a furlough day a month earlier, on August 19, 2009. *See* Los Angeles Superior Court, *Los Angeles Superior Court Scheduled Furlough Day, August 19, 2009*, *at* http://www.lasuperiorcourt.org/courtnews/Uploads/142009724931111FURLOUGHDAYINFORMATION7-22-09.htm. As the enabling statute for these extreme actions explains: "The Legislature finds and declares that the current fiscal crisis, one of the most serious and dire ever to affect the state, threatens the continued operations of the judicial branch." Cal. Govt. Code § 68106(a).

Finally, it is important to note that while Plaintiffs-Respondents no doubt seek to impose liability on a solvent manufacturer as a substitute for proper entities that are now bankrupt, trusts have been established to pay claims involving those companies' products. In fact, one study concluded: "For the first time ever, trust recoveries may fully compensate asbestos victims." *See* Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006); *see generally* William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts* (2008) 17 Norton J. Bankr. L. & Prac. 257.

CONCLUSION

For these reasons, *amici curiae* ask this Court to reverse the trial court's decision and enter a new judgment in favor of Defendant-Appellant.

Respectfully submitted,

Kevin Underhill (Cal. Bar. No. 208211)
SHOOK, HARDY & BACON L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281

Attorneys for *Amici Curiae*

Mark A. Behrens
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 783-8400
Counsel for Coalition for Litigation Justice, Inc.

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Lynda S. Mounts
AMERICAN INSURANCE ASSOCIATION
2101 L Street, NW, Suite 400
Washington, DC 20037
(202) 828-7100

Harry M. Ng
Stacy R. Linden
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

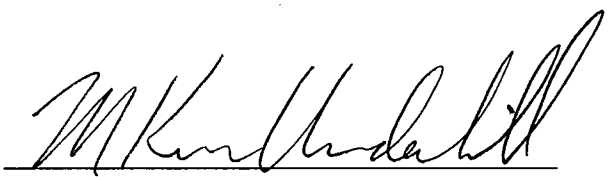
Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Of Counsel

Dated: January 18, 2010

CERTIFICATE OF WORD COUNT

Pursuant to Rule 14(c)(1) of the California Rules of Court, the undersigned hereby certifies that this Brief contains 9,273 words, exclusive of captions, tables, and this certification.



Kevin Underhill (Cal. Bar. No. 208211)
SHOOK, HARDY & BACON L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281

Dated: January 18, 2010

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I certify that on January ~~18~~ 15, 2010, I served the foregoing document on the interested parties in this action by placing true and correct copies thereof in sealed envelopes sent by U.S. Mail, first-class postage-prepaid, addressed to the following:

Jason R. Litt
Lisa Perrochet
HORVITZ & LEVY
15760 Ventura Blvd., 18th Floor
Encino, CA 91436-3000

Brian P. Barrow
SIMON, EDDINS & GREENSTONE LLP
301 East Ocean Blvd., Suite 1950
Long Beach, CA 90802

The Hon. Ralph W. Dau
LOS ANGELES SUPERIOR COURT
111 North Hill Street
Los Angeles, CA 90012

Dennis Michael Young
FOLEY & MANSFIELD
1111 Broadway 10FL
Oakland, CA 94607

CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94102-4783

**Four copies*

I also sent an original and four copies of the foregoing by overnight mail to:

CALIFORNIA COURT OF APPEAL
Second District, Division Four
Ronald Reagan State Building
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013
Tel: (213) 830-7000

Kevin Underhill (Cal. Bar. No. 208211)
SHOOK, HARDY & BACON L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900
Fax: (415) 391-0281

APPENDIX A

Anderson v. Asbestos Corp., Ltd., 151 Wash.App. 1005, 2009 WL 2032332
(Wash. Ct. App. Div. 1 July 13, 2009)

Not Reported in P.3d, 151 Wash.App. 1005, 2009 WL 2032332 (Wash.App. Div. 1)
(Cite as: 2009 WL 2032332 (Wash.App. Div. 1))

HOnly the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 1.

Ruby J. ANDERSON, for herself and as Personal Representative of the Estate of Decedent, Kenneth L. Anderson, Appellant,

v.

ASBESTOS CORP., Ltd.; Caterpillar, Inc.; Crown Cork & Seal Company, Inc.; Garlock Sealing Technologies, LLC; Foster-Wheeler Energy Corporation; Fraser's Boiler Service, Inc.; Goulds Pumps (IPG), Inc.; Ingersoll-Rand Company; Lockheed Shipbuilding Company; Metropolitan Life Insurance Company; Saberhagen Holdings, Inc.; Todd Shipyards Corp.; and Viacom, Inc., Successor by Merger to CBS Corporation, f/k/a Westinghouse Electric Corporation, Respondents.

No. 60271-3-I.

July 13, 2009.

West KeySummary

Products Liability 313A 133

313A Products Liability
313AII Elements and Concepts
313Ak132 Warnings or Instructions
313Ak133 k. In General. Most Cited Cases

Products Liability 313A 165

313A Products Liability
313AII Elements and Concepts
313Ak163 Persons Liable
313Ak165 k. Manufacturers in General; Identification. Most Cited Cases

Products Liability 313A 201

313A Products Liability
313AIII Particular Products
313Ak201 k. Asbestos. Most Cited Cases

An engine manufacturer had no duty under common law products liability or negligence principles to warn of the danger of asbestos insulation used in manufacturing its engines. The engines that were used on ships on which the injured plaintiffs worked had insulation that contained asbestos. The asbestos exposure occurred as a result of asbestos insulation in the engines that was manufactured by a different company.

Appeal from King County Superior Court; Honorable John P. Erlick, J.

William Joel Rutzick, Schroeter Goldmark & Bender, Seattle, WA, for Appellant.

John Alan Knox, William Kastner & Gibbs, PLLC, Walter Eugene Barton, Attorney at Law, Robert Hopkins Madden, Attorney at Law, Seattle, WA, for Respondent.

UNPUBLISHED

COX, J.

*1 On August 11, 2008, we filed our original decision in this case. [FN1] There, we affirmed the trial court's summary dismissal of the claims against defendants Lockheed Shipbuilding Company and Todd Shipyards Corporation. But we reversed its order in limine at trial excluding the theory of the case that Caterpillar, Inc. had a duty to warn of the dangers of using asbestos insulation with the engines it manufactured. Thereafter, the supreme court granted Caterpillar's petition for review and remanded this case to this court for reconsideration in light of its decisions in *Braaten v. Saberhagen Holdings*[FN2] and *Simonetta v. Viad Corporation*.[FN3] Accordingly, we have reconsidered our original decision and now affirm the judgment on the defense verdict at trial. We discussed the background of this case in our original decision and will not repeat that discussion here. We do not read the supreme court's grant of Caterpillar's petition for review as affecting our ruling in favor of summary dismissal of Todd and Lockheed. Thus, our discussion is limited only to the question of the duty of Caterpillar.

FN1. *Anderson v. Asbestos Corp.*, noted at 146 Wn.App. 1030 (2008).

FN2. 165 Wash.2d 373, 198 P.3d 493 (2008).

FN3. 165 Wash.2d 341, 197 P.3d 127 (2008).

DUTY TO WARN

Anderson claims the trial court incorrectly excluded any evidence regarding his theory that Caterpillar had a duty to warn about asbestos insulation used with engines it manufactured. Based on the supreme court's recent decisions, we disagree.

Both *Braaten* and *Simonetta* discuss the duty to warn in asbestos cases. In *Simonetta,* the defendant manufactured evaporators, which were machines used on naval ships.[FN4] The evaporators Joseph Simonetta serviced were encased in asbestos insulation and Simonetta had to remove the insulation in order to repair the equipment and reinsulated it when he was finished.[FN5] The manufacturer did not supply the insulation.[FN6]

FN4. *Simonetta,* 165 Wash.2d at 346, 197 P.3d 127.

FN5. *Id.*

FN6. *Id.*

The supreme court held that a manufacturer may not be held liable in common law products liability or negligence for failure to warn of the dangers of asbestos exposure resulting from another manufacturer's insulation applied to its products after sale of the products to the navy.[FN7]

FN7. *Id.* at 363, 197 P.3d 127.

In *Braaten,* the defendants manufactured pumps and valves used on naval ships.[FN8] Some of the manufacturers' products originally contained packing and gaskets with asbestos in them, but the packing and gaskets were manufactured by third parties and installed in the defendants' products.[FN9] The navy also applied asbestos-containing insulation to the valves and pumps after they were installed on the ships.[FN10] In his work as a pipefitter, Braaten had to both remove and reapply asbestos insulation from pumps and valves on naval ships.[FN11]

FN8. *Braaten,* 165 Wash.2d at 379, 198 P.3d 493.

FN9. *Id.* at 380, 198 P.3d 493.

FN10. *Id.* at 379, 198 P.3d 493.

FN11. *Id.* at 381, 198 P.3d 493.

The first issue in *Braaten* was whether the defendants had a duty to warn of the danger of exposure during maintenance of their products to asbestos in insulation that the navy would foreseeably apply to their equipment.[FN12] Following *Simonetta,* the court held that the defendants had no duty to warn under common law products liability or negligence theories.[FN13]

FN12. *Id.* at 380, 198 P.3d 493.

FN13. *Id.* at 380, 398, 198 P.3d 493.

***2** The remaining issue in *Braaten* was whether the defendant-manufacturers had a duty to warn of the danger of exposure to asbestos in replacement packing and gaskets that the defendants did not manufacture, sell, or otherwise supply. The court held "that the general rule that there is no duty under common law products liability or negligence principles to warn of the danger of exposure to asbestos in other manufacturers' products applies with regard to replacement packing and gaskets."[FN14] The court noted, "[t]he defendants did not sell or supply the replacement packing or gaskets or otherwise place them in the stream of commerce, did not specify asbestos-containing packing and gaskets for use with their valves and pumps, and other types of materials could have been used."[FN15]

FN14. *Id.* at 380, 198 P.3d 493.

FN15. *Id.*

Here, evidence showed that Caterpillar manufactured engines used on ships on which Anderson worked. Anderson sought to pursue the theory that Caterpillar

had a duty to warn about asbestos "which [Caterpillar] did not supply but which it was aware would be used in connection with" its engines.[FN16] But under the supreme court's recent decisions, there is no duty under common law products liability or negligence principles to warn of the danger of exposure to asbestos in other manufacturers' products.[FN17] Further, "[i]t makes no difference whether the manufacturer knew its products would be used in conjunction with asbestos insulation." [FN18]

FN16. Brief of Appellant at 1.

FN17. *Simonetta*, 165 Wash.2d at 354, 363, 197 P.3d 127; *Braaten*, 165 Wash.2d at 398, 198 P.3d 493.

FN18. *Braaten*, 165 Wash.2d at 385, 198 P.3d 493 (citing *Simonetta*, 165 Wash.2d at 358, 197 P.3d 127).

Here, the trial court decided that Caterpillar had no duty to warn about asbestos insulation used with the engines it manufactured. Accordingly, its ruling on the motion in limine was correct under *Simonetta* and *Braaten*. Thus, the defense verdict should stand.

We now affirm the judgment in favor of Caterpillar.

WE CONCUR: LAU and APPELWICK, JJ.
Wash.App. Div. 1,2009.
Anderson v. Asbestos Corp.
Not Reported in P.3d, 151 Wash.App. 1005, 2009 WL 2032332 (Wash.App. Div. 1)

END OF DOCUMENT

APPENDIX B

Milich v. Anchor Packing Co., A.D. No. 08-10532
(Pa. Ct. Com. Pl. Butler County Mar. 16, 2009)

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALTER MILICH, an individual,	:	CIVIL DIVISION-ASBESTOS
	:	
Plaintiff,	:	A.D. No. 08-10532
	:	
vs.	:	
	:	
ANCHOR PACKING COMPANY, et al.,	:	
	:	
Defendants.	:	

Attorney for Plaintiff: Carrie L. Furlan

Attorney for Crane Co.: Eric R. I. Cottle/David Shelton

Horan, J. March 16, 2009

MEMORANDUM OPINION AND ORDER OF COURT

Presently before the Court for consideration is the Motion for Summary Judgment of Crane Co. For the reasons set forth below, said Motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action by filing a Complaint alleging that he developed mesothelioma as the result of exposure to asbestos-containing products manufactured, supplied, distributed or utilized by the above-captioned

Defendants, including valves manufactured and/or supplied by Defendant Crane.

Mr. Milich's deposition was conducted over the course of four days. Mr. Milich's testimony establishes that he was employed by Mine Safety Appliance ("MSA") at its Evans City, Pennsylvania facility from 1952 until 1987. He testified that he worked as a lead engineer in the Testing Facility. In this position, Mr. Milich worked with liquid metals projects and performed small scale experiments. From 1953 to 1956, he worked on a large liquid metals test unit called the "Missy Project" or "Missy System." He recalled that Crane valves were used in connection with liquid metals projects. Mr. Milich further testified that "[m]aybe on one or two occasions" he observed workers repacking the stems of Crane valves. (Deposition of Walter Milich, 5/1/08, 24 and 60). He stated that he never performed "hands-on" work with the Crane valves and did not know if the valve contained asbestos. (Deposition of Milich, 5/1/08, 50 and 59). He further testified that the valve packing was moist and "wasn't

brittle." Mr. Milich did not know if the packing was original to the valve. (Deposition of Milich, 5/1/08, 58-59).

Defendant Crane has filed a Motion for Summary Judgment, which is presently before the Court. Therein, Crane argues that the record in this case contains no evidence that Plaintiff worked in proximity of Crane asbestos-containing valves and/or packing on a regular and frequent basis during his tenure at MSA.

LEGAL STANDARD

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides that a party may move for summary judgment "whenever there is no genuine issue of material fact as to a necessary element of the cause of action . . . ." Pa.R.C.P. 1035.2(1) Rule 1035.2(2) further provides that a party may move for summary judgment when "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.C.P. 1035.2(2). Once a motion for summary

judgment is made, the non-moving party may not simply rest upon the mere allegations or denials in his pleadings, but is required to set forth specific facts showing that there is a genuine issue for trial. Pa.R.C.P. 1035.3. That is, once the motion for summary judgment has been properly supported, the burden then shifts to the non-movant to disclose evidence that is the "basis for his or her argument resisting summary judgment." *Samarin v. GAF Corp.*, 571 A.2d 398, 402 (Pa.Super. 1989). In *Samarin*, the Superior Court clarified the legal standard governing a motion for summary judgment:

> In passing upon a motion for summary judgment the court must examine the record in the light most favorable to the nonmoving party . . . . It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried . . . . Any doubt must be resolved against the moving party . . . .

Id. at 401-402. (citations omitted).

The legal standard for summary judgment based upon a lack of product identification in an asbestos-related exposure case was established in the landmark decision of *Eckenrod v. GAF Corp*, 544 A.2d 50 (Pa.Super. 1988), *allocator denied*, 533 A.2d 968 (Pa. 1988). The *Eckenrod* court held that:

> In order for liability to attach in a products liability action, plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. *Berkebile vs. Brantley Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). Additionally, in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product. *Wible vs. Keene Corp.*, No. 86-4451 Slip Op. (E.D. Pa. August 19, 1987) [available on WESTLAW, 1987 W.L. 15833]; *Anastasi vs. Pacor, Inc.*, No. 6251 (C.P. Phila. Co. March 8, 1983); *aff'd* 349 Pa.Super. 610, 503 A.2d 44 (1985). Therefore a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use. *Pongrac vs. Consolidated Rail Corp.*, 632 F.Supp. 126 (E.D.Pa. 1985).

Id. at 52. The *Eckenrod* court concluded by succinctly stating that "[w]hether a plaintiff could successfully . . . defeat a motion for summary judgment by showing circumstantial evidence depends upon the frequency of the use of the product and the regularity of plaintiff's employment in proximity thereto." *Eckenrod*, 544 A.2d at 53, (citation omitted).

In *Gregg v. V-J Auto Parts, Inc.* 943 A.2d 216 (Pa. 2007), the Supreme Court of Pennsylvania refined the summary judgment standard established in *Eckenrod*. There, the Supreme Court held that it is appropriate for courts at the summary judgment

stage to assess a plaintiff's evidence of exposure to a defendant's asbestos-containing product, whether direct or circumstantial, to determine whether the evidence meets the frequency, regularity, and proximity requirements developed in *Eckenrod* and its progeny. *Id.* at 226-227. The *Gregg* Court further noted that the trial court's role at the summary judgment stage is to assess a plaintiff's quantum of evidence. The court further held that summary judgment is proper where there is only evidence of a "de minimus" exposure to a defendant's product. *Id.* at 226. The Supreme Court in *Gregg* observed that:

> In summary, we believe that it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

Id. at 227.

The *Gregg* court also generally observed that plaintiffs commonly proffer expert opinions that any exposure to asbestos, "no matter how minimal," is a substantial

contributing factor to an asbestos-related disease. The court held that "such generalized opinions do not suffice to create a jury question in a case where the exposure to the defendant's product is *de minimus* . . . ." *Id.* at 226-227.

LEGAL ANALYSIS

In opposition to Crane's Motion for Summary Judgment, Plaintiff submitted, among other documents, the depositions of Plaintiff, the affidavit and deposition transcript of co-worker Jack Bicehouse, and Crane's answers to written discovery. As summarized above, Plaintiff's testimony establishes that he did not perform any hands-on work with Crane valves, but rather merely saw other workers repacking the valve stems on perhaps one or two occasions at most.

The affidavit and deposition testimony of Jack Bicehouse does not establish Plaintiff's frequent and/or regular exposure to an asbestos-containing product manufactured or supplied by Crane. Mr. Bicehouse worked at MSA during the relevant time period as an engineering aide. According to Mr.

Bicehouse's affidavit testimony, he and Mr. Milich worked on the Missy System and were "exposed to various asbestos-containing products," including Crane valves. Notwithstanding this generalized affidavit testimony, Mr. Bicehouse could not explain at his deposition why he associated Crane with valves, nor could he describe the valves or recall any characteristics thereof. Moreover, Mr. Bicehouse did not have any recollection of observing any persons working on Crane valves in Plaintiff's presence. (Deposition of Jack Bicehouse, 90-91). Further, Mr. Bicehouse's testimony does not indicate that the valve packing was original to the valve.

Plaintiff also relies on Crane's written discovery responses in this case and in an unrelated case. Therein, Crane generally indicates that it incorporated asbestos-containing packing into its valves and that it sold replacement packing to its valve customers. However, there is no indication whatsoever that Crane supplied such packing to MSA and that Plaintiff was exposed to such packing.

It should also be noted that Plaintiff has not presented competent evidence that Crane specified the use of asbestos

packing in its valves and/or specified that replacement packing must be asbestos-containing. Furthermore, to the extent that Plaintiff may have been exposed to replacement packing supplied by a third party, there is no authority that Crane can be held liable for such exposure as a matter of law. To the contrary, the authority relied upon by Crane in support of its Motion for Summary Judgment indicates that Crane is not subject to such liability. *See Toth v. Economy Forms Corp.*, 571 A.2d 420 (Pa.Super 1989) (scaffolding manufacturer not liable for defective planking that it did not manufacture or supply, but which was subsequently affixed to its product by a third party).

Finally, Plaintiff relies upon the generalized testimony of certain experts in opposition to Crane's Motion for Summary Judgment. These experts generally opine that each and every exposure, "however brief or trivial," contributes to asbestos-related diseases. (See e.g.; Affidavit of David Laman, M.D.; Exhibit 3 of Plaintiff's Consolidated Response to All Defendants' Motions for Summary Judgment). Under the *Gregg* decision, however, these generalized opinions are insufficient

to create an issue of fact where exposure is *de minimus*. 943 A.2d at 226-227.

Under Pennsylvania law, exposure must be "of such a nature as to raise a reasonable inference that [the plaintiff] inhaled asbestos fibers" from the product. *See Andalaro v. Armstrong World Industries, Inc.* 799 A.2d 71, 86 (Pa.Super. 2002) (citations omitted). Plaintiff must also produce evidence that he worked on a regular and frequent basis in the vicinity of a product manufactured or supplied by Crane. *See Wilson v. A.P. Green Industries*, 807 A.2d 922 (Pa.Super. 2002) (applying the *Eckenrod* principles to a mesothelioma claim).

In the case at bar, Plaintiff has failed to set forth specific facts that demonstrate that there is a genuine issue of fact relative to his inhalation of asbestos dust shed from valves or packing specifically manufactured or sold by Crane. Although there is evidence that Crane valves were present at MSA, Plaintiff has not identified evidence that he regularly and frequently worked with or around any Crane asbestos-containing product. As a result, Plaintiff has failed to satisfy the standard set forth in *Eckenrod* and its progeny

relative to successful opposition to a motion for summary judgment predicated on lack of product identification. Accordingly, the Defendant's Motion for Summary Judgment is GRANTED.

Accordingly, We Enter the Following:

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALTER MILICH, an individual,	:	CIVIL DIVISION-ASBESTOS
	:	
Plaintiff,	:	A.D. No. 08-10532
	:	
vs.	:	
	:	
ANCHOR PACKING COMPANY, et al.,	:	
	:	
Defendants.	:	

ORDER OF COURT

AND NOW, March 16, 2009, it is hereby ORDERED that the Motion for Summary Judgment of Crane Co. is GRANTED.

BY THE COURT,

Marilyn J. Horan
Judge

APPENDIX C

Rumery v. Garlock Sealing Technologies, Inc., 2009 WL 1747857
(Me. Super. Ct. Cumberland County Apr. 24, 2009)

Superior Court of Maine.
Cumberland County
Carolyn **RUMERY**, individually and as personal representative of the Estate of Donald **Rumery**, Plaintiff,
v.
GARLOCK SEALING TECHNOLOGIES, INC., et al., Defendants.
No. 05-CV-599.
April 24, 2009.

Decision and Order (Foster Wheeler)

In this action, Plaintiff seeks to recover for damages allegedly resulting from the death of Donald **Rumery**, due to his exposure to asbestos during the course of his employment with Central Maine Power Company. Plaintiff alleges that as the result of exposure to products manufactured or supplied by Defendant Foster Wheeler Energy Corp., a/k/a, Foster Wheeler Energy, Inc. (Foster Wheeler), the decedent contracted asbestos-related illnesses, which ultimately resulted in his death. This matter is before the Court on Defendant Foster Wheeler's motion for summary judgment.

I. Summary Judgment Standard of Review

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact ... and that [the] moving party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. Aube Corp.*, 2002 ME 79, 2,796 A.2d 683,685.

To avoid summary judgment, a plaintiff must establish a *prima facie* case for each element of the cause of action. *See Barnes v. Zappia*, 658 A.2d 1086, 1089 (Me. 1995). In *Arrow Fastener Co. v. Wrabacon, Inc.*, 2007 ME 34, 917 A.2d 123, the Law Court observed:

[A]lthough summary judgment is no longer an extreme remedy, it is not a substitute for trial. It is, at base, "simply a procedural device for obtaining judicial resolution of those maters that may be decided without factfinding." If facts material to the resolution of the matter have been properly placed in dispute, summary judgment based on those facts is not available except in those instances where the facts properly proffered would be flatly insufficient to support a judgment in favor of the nonmoving party as a matter of law.

Id. ¶ 18, 917 A.2d at 127 (citations omitted) (quoting *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18, 21-22).

The opposing party to a summary judgment motion is given the benefit of any inferences which might be reasonably drawn from the evidence. *See Porter*, 2001 ME 158, 9,784 A.2d at 22. However, neither party can rely on unsubstantiated denials, but "must identify specific facts derived from the pleadings, depositions, answers to interrogatories, admissions and affidavits to demonstrate either the existence or absence of an issue of fact." *Kenny v. Dep't of Human Servs.*, 1999 ME 158, ¶ 3, 740 A.2d 560, 562 (quoting *Vinick v. Comm'r of Internal Revenue*, 110F.3d 168,

171 (1st Cir. 1997)).

II. Causation Standard

In this case, Plaintiff asserts claims of negligence and strict liability. For Plaintiff to prevail, Plaintiff must demonstrate, among other elements, that Defendant's conduct caused the damages for which Plaintiff seeks to recover. In Maine, to prove causation, a plaintiff must prove that the defendant's conduct "is a *substantial factor* in bringing about the harm." Spickler v. York, 566 A.2d 1385, 1390 (Me. 1989); *see also* Wing v. Morse, 300 A.2d 491, 495-96 (Me. 1973). On Defendant's motion for summary judgment, the question is, therefore, whether a material issue of fact remains for trial as to Plaintiff's allegation that Defendant's conduct or product caused Plaintiff's damages.

As asbestos litigation has evolved both nationally and within Maine, the level of proof necessary to establish the requisite relationship between the plaintiff's injuries and the defendant's product has been the subject of much debate. A majority of jurisdictions have adopted the standard articulated by the court in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986), where the court construed the "substantial factor" test of the Restatement (Second) of Torts.[FN1] In *Lohrmann,* the court announced and applied the "frequency, regularity and proximity test," which requires a plaintiff to "prove more than a casual or minimum contact with the product" that contains asbestos. *Id.* at 1162. Rather, under *Lohrmann,* a plaintiff must present "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 1162-63. *Lohrmann* suggests that the Court engage in a quantitative analysis of a party's exposure to asbestos in order to determine whether, as a matter of law, the party can prevail.

> FN1. The Restatement (Second) of Torts is consistent with the causation standard in Maine. Section 431 provides in pertinent part that "[t]he actor's negligent conduct is a legal cause of harm to another if ... his conduct is a substantial factor in bringing about the harm." RESTATEMENT (SECOND) OF TORTS § 431.

Although the Maine Law Court has not addressed the issue, at least one Justice of the Maine Superior Court has expressly rejected the *Lohrmann* standard. Justice Ellen Gorman rejected the *Lohrmann* standard "[b]ecause it is entirely the jury's function to determine if the conduct of the defendant was a substantial factor in causing the plaintiff's injury and because it is not appropriate for the court to determine whether a plaintiff has proven that a defendant's product proximately caused the harm." *Campbell v. H.B. Smith Co.,* LINSC-CV-04-57, at 7 (Me. Super. Ct., Lin. Cty., Apr. 2, 2007) (Gorman, J.).[FN2] In rejecting the *Lohrmann* standard, Justice Gorman wrote that to establish a *prima facie* case, a plaintiff must demonstrate:

> FN2. Justice Gorman also rejected the *Lohrmann* standard for similar reasons in *Boyden v. Tri-State Packing Supply,* CUMSC-CV-04-452 (Me. Super. Ct., Cum. Cty., Feb. 28,2007) and *Buck v. Eastern Refractories, Co.,* OXFSC-CV-04-15 (Me. Super. Ct., Oxf. Cty., July 23, 2007).

(1) "medical causation" - that the plaintiff's exposure to the defendant's product was a substantial factor in causing the plaintiff's injury and (2) product nexus - that the defendant's asbestos-containing product was *at the site where the plaintiff worked or was present, and that the plaintiff was in proximity to that product at the time it was being used* ... a plaintiff must prove not only that the asbestos products were used at the worksite, but that the employee inhaled the asbestos from the defendant's product.

Campbell, at 7 (citing 63 AM. JUR. 2D *Products Liability* § 70 (2001)).

Insofar as under *Lohrmann* a plaintiff must prove exposure to asbestos over a sustained period of time, while under

the standard applied by Justice Gorman a plaintiff must only demonstrate that plaintiff was in proximity to the product at the time that it was being used, the *Lohrmann* standard imposes a higher threshold for claimants. The Court's decision as to the applicable standard cannot, however, be controlled by the standard's degree of difficulty. Instead, the standard must be consistent with basic principles of causation. In this regard, the Court agrees with the essence of Justice Gorman's conclusion-to require a quantitative assessment of a plaintiff's exposure to asbestos, as contemplated by *Lohrmann,* would usurp the fact finder's province. Whether a defendant's conduct caused a particular injury is at its core a question of fact. *See* Tolliver v. Dep't of Transp., 2008 ME 83, ¶ 42, 948 A.2d 1223, 1236; *Houde v. Millett,* 2001 ME 183, ¶ 11, 787 A.2d 757, 759. The Court perceives of no basis in law to deviate from this long-standing legal principle. The Court, therefore, concludes that in order to avoid summary judgment, in addition to producing evidence of medical causation, a plaintiff must establish the product nexus through competent evidence. In particular, a plaintiff must demonstrate that: (1) the defendant's product was at the plaintiff's work place, (2) the defendant's product at the plaintiff's work place contained asbestos, and (3) the plaintiff had personal contact with asbestos from the defendant's product.[FN3] If a plaintiff produces such evidence, which can be either direct or circumstantial, the question of whether the defendant's product was a "substantial factor" in causing the plaintiff's damages is for the jury.[FN4]

FN3. The Court recognizes that in many of the asbestos-related cases, the plaintiff asserts the claim, at least in part, on behalf of the estate of a person who was allegedly exposed to asbestos. In those cases, the plaintiff would be required to demonstrate that defendant's asbestos-containing product was present at the decedent's work place, and that the decedent had contact with the product.

FN4. The Court notes that the causation standard applied by Justice Gorman in *Campbell, Boyden,* and *Buck* may not be entirely equivalent with that employed in *Bessey v. Eastern Refractories, Inc.,* SAGSC-CV-99-001, 99-020, 99-035, 99-041,99-050, and 00-001 (Me. Sup. Ct., Sag. Cty., Feb. 19, 2002) (Bradford, J.), an earlier case in which the Superior Court addressed the issue. While *Bessey* also rejected the *Lohrmann* standard and utilized the "medical causation/product nexus" framework described in 63 AM. JUR. 2D *Products Liability § 70, Bessey* arguably imposes a different factual burden to establish causation at the summary judgment stage. Without affirmatively adopting either the *"Bessey* Standard" or the standard articulated by Justice Gorman in *Campbell, Boyden,* and *Buck,* the Court will analyze the causation issue in a manner consistent with established causation principles set forth by the Law Court. *See, e.g., Spickler,* 566 A.2d at 1390; *Morse,* 300 A.2d at 495-96.

III. Discussion

In support of her contention that Defendant Foster Wheeler is legally responsible for the decedent's illness and death, Plaintiff relies on the testimony of several former employees of Central Maine Power Company, the decedent's employer, as well as information contained in various documents. For purposes of this motion, Plaintiff has established that: (1) the decedent worked at Central Maine Power Company's Wyman Station, (2) Defendant Foster Wheeler manufactured three of the boilers that were located at the Wyman Station during the time of the decedent's employment, (3) asbestos-containing material, including insulation, block, and joint compound, was used on component parts of the boilers, (4) the decedent started the boilers on occasion and was present when maintenance was performed on the boilers, and (5) dust from the asbestos-containing material was generated when maintenance was performed on the boilers.

To avoid summary judgment, Plaintiff must produce evidence from which a reasonable fact finder could conclude that the decedent had contact with an asbestos-containing product manufactured by Defendant Foster Wheeler. For summary judgment purposes, given the number of boilers at the Wyman Station that Defendant Foster Wheeler manufactured, and given that the decedent worked in and around the boilers on occasion, Plaintiff has established that the decedent had contact with the product of Defendant Foster Wheeler, and that the product contained asbestos-containing material. However, there is no evidence upon which a fact finder could rely to conclude that the boil-

ers contained asbestos material when they left Defendant Foster Wheeler's control. The issue is thus whether Defendant Foster Wheeler can be legally responsible for the asbestos-containing material that was incorporated in the boilers after the boilers left the control of Defendant Foster Wheeler.

Plaintiff maintains that she need not prove that the boilers contained asbestos when the boilers left the control of Defendant Foster Wheeler. Under Maine law, Plaintiff must prove that Defendant Foster Wheeler's product "[was] expected to and [did] reach the user or consumer without significant change in the condition in which it is sold." 14 M.R.S. § 221. In *Marois v. Paper Converting Mach. Co.*, 539 A.2d 621, 624 (Me. 1988), the Law Court, when defining the scope of Maine's strict liability statute, concluded that "... even if a substantive change is made in a product, the manufacturer will not be relieved of liability unless the change was an unforeseen and intervening proximate cause of the injury." Plaintiff argues that she has at least generated an issue of fact as to causation because the addition of asbestos material to the boilers was a foreseeable event. More specifically, Plaintiff maintains that Defendant Foster Wheeler was aware that insulation must be added to the boilers and, under *Marois,* Defendant Foster Wheeler is not relieved of liability.

Plaintiff's argument essentially concedes that Defendant Foster Wheeler's product (i.e., the boilers) did not contain asbestos when it left the Defendant's control. Plaintiff maintains that she need not prove that the Defendant's product contained asbestos when the product left the control of the Defendant. Instead, Plaintiff claims that, under 14 M.R.S. § 221 (2008),[FN5] a manufacturer or supplier is liable for asbestos-containing components that were foreseeably used in conjunction with their products, even though the manufacturer or supplier had not manufactured or supplied the asbestos-containing components that actually caused the injuries.

> FN5. The strict liability statute provides in its entirety: "One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume of be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller." 14 M.R.S. § 221.

Strict liability pursuant to 14 M.R.S. § 221 may arise under any of three different theories: (1) a defect in the manufacture of a product; (2) a defect in the design of a product; or (3) a failure of the manufacturer to adequately warn with respect to danger in the use of a product. *See Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 537 n.3 (Me. 1986); *Walker v. General Elec. Co.*, 968 F.2d 116, 119 (1st Cir. 1992). The basis for imposing strict liability on a particular defendant is that "the product must be in some respect defective." *Bernier*, 516 A.2d at 537.

Where, as here, there is no evidence that the defendant's product contained asbestos at the time of its manufacture and otherwise functioned as designed, Plaintiff cannot contend that the defendant's products were defective in design or manufacture. Instead, Plaintiff's theory of liability must be premised upon a failure to warn. *See Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 196 (Me. 1990) (explaining that under section 221, even where a product is faultlessly made, it may be deemed "defective" if it is "unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied without such warning"). Essentially, Plaintiff claims that because the use of asbestos-containing packing and gaskets in conjunction with Defendant's product was foreseeable, liability for the failure to warn of the dangers of asbestos should attach. The Court disagrees.

A product liability action for failure to warn requires a three-part analysis: (1) whether the defendant held a duty to warn the plaintiff; (2) whether the actual warning on the product, if any, was inadequate; and (3) whether the inade-

quate warning proximately caused the plaintiff's injury. *Pottle v. Up-Right, Inc.*, 628 A.2d 672, 675 (Me. 1993). "A duty to warn arises when the manufacturer knew or should have known of a danger sufficiently serious to require a warning." *Id.; see also* *Bernier*, 516 A.2d at 540 ("A manufacturer has a responsibility to inform users and consumers of dangers about which he either knows or should know at the time the product is sold."). Such an articulation of the duty to warn would, at first, seem to indicate that any foreseeable use of asbestos in conjunction with a defendant's products would be a fundamental issue in determining a defendant's duty to warn. Importantly, however, the issue of knowledge or forseeability relates to whether a manufacturer or supplier knew of the dangers of its *own* product at the time of distribution. Although the Law Court does not appear to have addressed this issue directly, the Law Court has described a manufacturer's liability for failure to warn in terms of the manufacturer's responsibility to alert consumers of defects inherent in the manufacturer's own products. *See, e.g.*, *Bernier*, 516 A.2d at 537 (discussing whether "a manufacturer's actual or constructive knowledge of *his product's* danger" is relevant) (emphasis added); *Pottle*, 628 A.2d at 674-75 ("Strict products liability attaches to a manufacturer when by ... the failure to provide adequate warnings about *its hazards,* a product is sold in a condition unreasonably dangerous to the user.") (emphasis added). To date, Maine case law has not imposed upon a manufacturer a duty to warn about the dangerous propensities of other manufacturer's products. Moreover, the Court is not aware that the Law Court has deviated from the majority rule that "a manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products." *See* *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 498-99 (Wash. 2008) (collecting cases supporting "the majority rule nationwide").[FN6]

FN6. *See also* *Taylor v. Elliott Turbomachinery Co.*, 171 Cal. App. 4th 564, 580-84 (Cal. Ct. App. 2009) (reviewing of some of the relevant policy considerations supporting the majority rule).

Recent extra-jurisdictional authority is particularly analogous to the present case. In *Braaten* and a companion case from the Washington Supreme Court, *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008), which addressed the duty to warn under the RESTATEMENT (SECOND) OF TORTS § 402A,[FN7] the court held that liability will not arise if the failure to warn of the danger of asbestos exposure arises from asbestos-containing insulation applied to a defendant's product which the defendant did not manufacture or distribute.[FN8] *See* *Braaten*, 198 P.3d at 498; *Simonetta*, 197 P.3d at 138; *see also Taylor v. Elliott Turbomachinery Co.*, 171 Cal. App. 4th 564,591-92 (Cal. Ct. App. 2009) (finding *Braaten* and *Simonetta* to be "convincing support" for court's determination of same issue); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 495 (6th Cir. 2005) (manufacturer could "not be held responsible for material 'attached or connected' to its product on a claim of manufacturing defect"). Similarly, in this case, it was not the Defendant's product, but the dangers inherent in the asbestos-containing packing and gaskets, a product the Defendant did not manufacture or supply, that proximately caused the Plaintiff's alleged damages. As there is no strict liability for a failure to warn solely of the hazards inherent in another product, the forseeability argument regarding the adequacy of warnings is not pertinent. In sum, although not controlling authority, the Court agrees with the reasoning articulated in *Braaten* and *Simonetta:* the Defendant is not liable for the injury-causing materials supplied by third parties used in conjunction with the Defendant's products.[FN9]

FN7. "The Legislature formulated section 221 directly from section 402A of the Restatement (Second) of Torts (1965)." *Bernier*, 516 A.2d at 537-38. When interpreting 14 M.R.S. § 221, the Law Court has customarily looked to the Restatement, including its commentary. *See, e.g.*, *Bernier*, 516 A.2d at 538 ("Since section 221 and its legislative history does not have anything to say ... the commentary to section 402A is an appropriate place to begin our analysis.")

FN8. The court in *Braaten* and *Simonetta* also found that the Defendant-manufacturers were not strictly liable for a failure to warn because they were not part of the chain of distribution of the injury-causing products (i.e., the asbestos-containing packing and gaskets). *Braaten*, 198 P.3d at 497; *Simonetta*, 197 P.3d at 136; *see also* *Taylor*, 171 Cal. App. 4th at 577-78 (same).

FN9. Plaintiff argues that a "manufacturer will not be relieved of liability unless the change was an unforeseen and intervening proximate cause of the injury." *Marois v. Paper Converting Mach. Co.*, 539 A.2d 621, 624 (Me. 1988). Whether the application of asbestos to the defendant's product was unforeseen or a substantial alteration, however, addresses the issue of proximate cause. *See id.* at 623 ("The proximate cause issue in the case at bar arises from the modification of this machine after it left the Defendant's control."). Because, as discussed, the Defendant has no duty to warn, the Court does not reach this issue.

IV. Conclusion

Based on the foregoing analysis, the Court denies the Motion for Summary Judgment of Defendant Foster Wheeler.

The entry is:
The Defendant's motion for summary judgment is GRANTED. Judgment is entered in favor of Defendant on all counts.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Dated: 4/24/09

<<signature>>

Justice, Maine Superior Court

Rumery v. Garlock Sealing Technologies, Inc.
2009 WL 1747857 (Me.Super.) (Trial Order)

END OF DOCUMENT