

DENNIS H. WOODARD and MYRA J. WOODARD, Plaintiffs and Appellants, vs.
CRANE CO, Defendant and Respondent.

S196969

SUPREME COURT OF CALIFORNIA

2011 CA S. Ct. Briefs 96969; 2011 CA S. Ct. Briefs LEXIS 1523

October 5, 2011

After A Decision By The Court of Appeal, Second Appellate District, Division Four, Case
No. B219366. (Los Angeles Superior Court, Case No. BC 387774).

Petition for Appeal

COUNSEL: [*1] WATERS, KRAUS & PAUL, Paul C. Cook (State Bar No. 170901), Michael B. Gurien (State Bar No. 180538), El Segundo, California, Attorneys for Plaintiffs and Appellants, DENNIS H. WOODARD and MYRA J. WOODARD.

JUDGES: HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE

EXPERT NAME: Navy Admiral David Sargent, Jr. (retired); Navy Captain Arnold Moore (retired)

TITLE: Appellants' Petition for Review

TEXT: TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Plaintiffs and Appellants Dennis H. Woodard and Myra J. Woodard respectfully petition this Court for review of the decision of the Court of Appeal for the Second Appellate District, Division Four, in the above-entitled matter. A true and correct copy of the Court of Appeal's decision, filed on August 25, 2011, not certified for publication, is included in the appendix hereto. No petition for rehearing was filed.

INTRODUCTION AND ISSUE PRESENTED

This is an asbestos-related personal injury action presenting the same issue as four other cases currently under review in this Court: (1)0 *Neil v. Crane Co. (2009) 177 Cal.App.4th 1019* [*2] ("*O'Neir*"), review granted December 23, 2009, No. S177401; (2) *Merrill v. Leslie Controls, Inc. (2009) 179 Cal.App.4th 262* ("*Merrill*"), review granted February 3, 2010, No. S178957; (3) *Hall v. Warren Pumps LLC* ("*Hall*"), review granted May 12, 2010, No. S181357;

and (4) *Walton v. William Powell Co.* (2010) 183 Cal.App.4th 1470 ("*Walton*"), review granted June 30, 2010, No..S183059.

Plaintiff and Appellant Dennis H. Woodard ("Mr. Woodard") developed mesothelioma caused by exposure to asbestos. Following his diagnosis, he and his wife, Plaintiff and Appellant Myra J. Woodard (collectively, "Plaintiffs"), filed a personal injury action against several defendants, including Defendant and Respondent Crane Co. ("Defendant Crane" or "Crane"), alleging that his mesothelioma was caused by exposure to asbestos from defendants' products during his service in the Navy. As to Crane, Plaintiffs alleged that Mr. Woodard was exposed to asbestos while working on Crane steam valves on two ships.

After a trial of almost three weeks, the jury returned a verdict in favor of Plaintiffs on their claim against Defendant Crane for strict liability for failure [*3] to warn. Following entry of judgment, Crane filed a motion for judgment notwithstanding the verdict based on *Taylor v. Elliott Turbomachinery Co.* (2009) 171 Cal.App.4th 564, which was decided a few weeks after the jury's verdict by Division Five of the Court of Appeal for the First Appellate District. Relying on *Taylor*, Crane argued that it had no duty to warn Mr. Woodard of the hazards of exposure to asbestos from the packing, flange gaskets and insulation used in and with its valves because there was no evidence that it manufactured, sold or supplied these materials, even though the evidence showed that these materials were part of the foreseeable and intended use of the valves and, in the case of the packing, the valves were designed and originally supplied by Crane with asbestos packing and the replacement packing was identical to the original. The trial court granted the motion, over Plaintiffs' opposition, finding that *Taylor* was controlling, and entered judgment for Crane.

In an unpublished opinion filed on August 25, 2011, Division Four of the Court of Appeal for the Second Appellate District affirmed the judgment in favor of Defendant Crane. Relying [*4] on *Taylor*, the court held that Crane was not subject to strict liability for failing to warn of the hazards of the asbestos packing, gaskets and insulation used in and with its valves because those products were manufactured and supplied by others. (Typed opn. at pp. 5-6, 7-8.) The court stated that it saw "no reason to depart from *Taylor*, which we believe was correctly decided." (*Id.* at p. 6; *see also id.* at p. 1.) The court also relied on *Taylor* to hold that Crane was shielded from liability by the "component part" defense. (*Id.* at pp. 6-7.)

Pursuant to California Rule of Court ("CRC") 8.500(b)(1), n1 review in this case is necessary to secure uniformity of decision, to address whether the bases for the Court of Appeal's decision in this case, premised entirely on *Taylor*, represent a correct statement of California product liability law, and to settle the following important question of law:

Can a manufacturer of high temperature valves installed on Navy ships, originally supplied or designed to be used with asbestos packing, gaskets, and/or insulation, be held strictly liable under a failure to warn theory for injuries caused by the dangerous [*5] combined use of the manufacturer's product with asbestos products supplied by others, or is such liability precluded by the "component part" defense or related theories?

As noted, this identical issue is presently pending before this Court in *O'Neil*, *Merrill*, *Hall*, and *Walton*, all of which are factually similar to this case. n2 n3 n4

n1 CRC 8.500(b)(1) states: "The Supreme Court may order review of a Court of Appeal decision . . . [w]hen necessary to secure uniformity of decision or to settle an important question of law."

n2 In a footnote at the beginning of its opinion in this case, the Court of Appeal stated that "[t]he issue [of whether *Taylor* was erroneously decided] is presently before the California Supreme Court" in *O'Neil*, *Merrill* and *Walton*. (Typed opn. at p. 2 & n.2.)

n3 Both this case and *Walton* were decided by Division Four of the Court of Appeal for the Second Appellate District.

n4 CRC 8.504(e)(3) states that "[n]o incorporation by reference is permitted except a reference to a petition . . . filed in a case that raises the same or similar issues and in which a petition for review is pending or has been granted." Pursuant to this rule, Plaintiffs incorporate by reference the grounds for review and arguments set forth in the petitions for review filed in *Merrill, Hall and Walton*, all of which were granted.

[*6]

Accordingly, Plaintiffs respectfully request this Court to grant review of the Court of Appeal's decision in this case under the "grant and hold" procedure of CRC 8.512(d)(2), n5 as it did in *Merrill, Hall and Walton*, pending resolution of the appeal in the lead case of *O'Neil*.

n5 CRC 8.512(d)(2) states: "On or after granting review, the court may order action in the matter deferred until the court disposes of another matter or pending further order of the court."

FACTUAL BACKGROUND

I. Mr. Woodard's Exposure To Asbestos-Containing Crane Steam Valves.

Mr. Woodard served aboard two Navy vessels from 1961 to 1965: the USS *Rogers* ("the *Rogers*"), a steam-operated destroyer, and the USS *Salisbury Sound* ("the *Salisbury Sound*"), a steam-operated sea plane tender. (Typed opn. at p. 2.) Both ships were built between 1943 and 1945 and both had steam propulsion systems that contained valves manufactured and supplied by Crane. (*Ibid.*) Plaintiffs alleged that Mr. Woodard was [*7] exposed to asbestos fibers from asbestos packing, gaskets and insulation used in and with, and that were part of the design and intended operation, of the valves, and that Crane was strictly liable for Mr. Woodard's injuries for failing to warn him of the asbestos-related hazards of its valves. (*Id.* at p. 5.)

II. The Crane Valves In This Case Were Designed And Supplied With Asbestos Packing, And Asbestos Flange Gaskets And Insulation Were Part Of Their Intended Operation.

A. The testimony of Defendant Crane.

Defendant Crane did "not dispute[] that Crane Co. valves were incorporated into the steam-propulsion system on the *USS Rogers* at [*sic*] the *USS Salisbury Sound*." (1 Appellant's Appendix ["AA"] 165.) Nor did it dispute that it manufactured valves with asbestos materials, including packing. (1 Reporter's Transcript on Appeal ["RT"] 44, 52, 54, 63 [opening statement by Crane that it has been manufacturing valves for over 150 years and that it manufactured valves with asbestos packing and gaskets]; *see also id.* at 159 [interrogatory responses by Crane that it manufactured valves with asbestos packing and gaskets before and throughout Mr. [*8] Woodard's service in the Navy]; 2 RT 322-323, 359-360 [same].)

Plaintiffs introduced the deposition of testimony of Defendant Crane, as given by its corporate representative/person most knowledgeable, Anthony Pantaleoni. (4 RT 689-691; 1 AA 45-82.) n6 Mr. Pantaleoni produced six manufacturing drawings prepared by Crane for six different types of Crane valves that were installed in the machinery spaces of the *Rogers*, including the engine and boiler rooms. (1 AA 67-76.) Each drawing included a material list that specified the materials used by Crane in the design and manufacture of that valve type. (*Ibid.*) The material lists on four of the drawings specified that asbestos packing was used in the manufacture of those four valve types. (*Id.* at 69-76; 3 RT 459-460, 535-541, 547-548; 6 RT 854-856, 914-915.) n7 The valve types depicted in the other two drawings did not have packing because they did not have operating stems. (1 AA 68-69, 74-76; 3 RT 515-516, 547-548) n8

n6 Mr. Pantaleoni's deposition testimony was shown to the jury by videotape. By agreement of the parties, the court reporter did not record his videotaped testimony. (4 RT 689-691.) Instead, transcripts of his testimony were prepared and filed with the trial court, and those transcripts were included in the Appellants' Appendix. (*Ibid*; 1 AA 45-82.)

[*9]

n7 The four Crane manufacturing drawings that specified asbestos packing were: (1) drawing number 22236 (deposition exhibit number 5) for an alloy steel globe and angle valve; (2) drawing number 22237 (deposition exhibit number 6) for a forged alloy steel angle valve; (3) drawing number 22254 (deposition exhibit number 7) for a forged alloy steel globe and angle valve; and (4) drawing number 22299 (deposition exhibit number 9) for a cast alloy steel globe valve. (1 AA 69-76.) Mr. Pantaleoni testified that the material lists on these drawings listed symbol 1108 for the packing, and thus those valve types might have utilized asbestos packing because, according to him, symbol 1108 could mean either asbestos or non-asbestos packing. (*Ibid*.) This ambiguity was resolved by Defendant Crane's naval expert, retired Navy Admiral David Sargent, Jr., who testified that symbol 1108 was the specification for asbestos packing. (6 RT 854-856, 914-915.) Plaintiffs' naval expert, retired Navy Captain Arnold Moore, agreed. He testified that the aforementioned Crane drawings specified the use of asbestos packing. (3 RT 459-460, 535-541, 547-548.)

n8 The drawing for these valves were Crane drawing numbers 22134 (deposition exhibit number 4) and 22308 (deposition exhibit number 8). (1 AA 68-69, 74-76; 3 RT 515-516, 548.)

[*10]

Mr. Pantaleoni testified that these six drawings did not represent the only types of Crane valves on the *Rogers*, but were simply the drawings that Defendant Crane was able to find. (1 AA 70-71.) In addition, he agreed that the inability of Crane to locate records regarding Crane valves on the *Salisbury Sound* did not mean that there were no Crane valves on the ship. (*Id.* at 70-71, 76-78.) He testified that he had no information that Crane valves were not on the *Salisbury Sound*, and that he had no basis to dispute Mr. Woodard's testimony identifying and describing work with and around Crane valves on the ship. (*Id.* at 76-78.) Moreover, as already noted, Crane did not dispute that Crane valves were utilized in the ship's steam-propulsion system. (1 AA 165; *see also* typed opn. at 2.)

Mr. Pantaleoni testified that when Defendant Crane sold valves with asbestos packing to the Navy, it shipped the valves from its manufacturing facility with the packing already installed. (1 AA 63, 73.) He testified that the purpose of the packing was to prevent the valves from leaking, and that Crane knew that the packing in its valves would be disturbed and replaced during regular [*11] maintenance onboard ship. (*Id.* at 63, 72-73.) Crane knew that the packing in its valves had to be replaced when it wore out and became ineffective, otherwise the valves would leak, and that the replacement packing would be *the same* as the original packing it supplied in the valves. (*Id.* at 72-73.)

Mr. Pantaleoni testified when Defendant Crane manufactured a valve for use on a Navy ship, it received manufacturing specifications that "identified specifically what the valve was to be used for." (1 AA 78-79.) Crane knew from the specifications whether the valve would be used for "steam, superheated steam or some other fluid," and it "designed [the valve] specifically for the application." (*Id.* at 79.)

Defendant Crane "stipulated that Crane Co. valves had no warnings concerning potential asbestos hazards through 1965." (4 RT 691-692.)

B. Plaintiffs' naval expert: retired Navy Captain Arnold Moore.

Plaintiffs introduced the expert testimony of retired Navy Captain Arnold Moore ("Captain Moore"). (3 RT

373-374.) Captain Moore testified that the *Rogers* was a steam-operated *Gearing-class* destroyer that was constructed between 1943 and 1945. (*Id.* at 412-413, 486-487.) [*12] He testified that the *Salisbury Sound* was a steam-operated sea plane tender that was constructed during the same period. (*Id.* at 423-425, 486-487.)

Based on his review of records relating to the *Rogers*, including Navy records from the National Archives and the six Crane valve manufacturing drawings, Captain Moore testified that Crane manufactured and supplied valves, including steam valves, for hot systems in the machinery spaces of the *Rogers*. (3 RT 409-410, 431-436, 515-516, 535-541, 547-548.) He testified that the Crane drawings depicted six different types of Crane valves, all of which were used in hot applications, and that specifications on four of the drawings indicated that those valve types were manufactured and supplied by Crane with asbestos packing. (*Id.* at 515-516, 536-541, 547-548.) He testified that the valves in the other two drawings had no packing because they did not have operating stems and, thus, "there was no need for packing." (*Id.* at 515-516, 547-548.)

With regard to the *Salisbury Sound*, Captain Moore testified that while he was able to locate records relating to the ship, including records discussing valves, none of the records [*13] identified the manufacturer(s) of the valves. (3 RT 433-434, 537-538.) This was not uncommon, he explained, because "very often these documents will talk about valves, but they will talk about them based on what they do rather than who manufactured them." (*Id.* at 433-434.) However, given the prevalence of Crane valves on Navy ships built during World War II and Mr. Woodard's testimony regarding Crane valves on the *Salisbury Sound*, he testified that he had no reason to doubt the presence of Crane valves on the ship. (*Id.* at 421-423, 434-436, 465-466.)

Captain Moore testified that packing is a sealing material used inside a valve to prevent it from leaking. (3 RT 425-427, 441-444, 496-497.) Because it wears out over time, he testified that packing must be periodically replaced, otherwise the valve will leak, resulting in operational inefficiency and a potential safety hazard. (*Id.* at 425-428, 441-444, 545.) He testified that when packing is removed, it typically comes out in pieces, and that it is replaced with the same type of packing that was originally supplied by the manufacturer. (*Id.* at 441, 546-547.) He testified that asbestos packing was used in valves on [*14] ships constructed during World War II; that it was more likely than not that asbestos packing was used for valves in hot applications during Mr. Woodard's service in the Navy (from 1961 to 1965), including the Crane valves that he worked with and around; and that it was known during this period that if a valve was originally supplied by the manufacturer with asbestos packing, the replacement packing would also contain asbestos, in accordance with the specification selected by the manufacturer and the material list on the manufacturer's drawing. (*Id.* at 419-420, 444-445, 460-461, 501, 546-547.)

Captain Moore testified regarding the use of asbestos gaskets on the flanges of valves. He testified that the flange is the exterior portion of the valve that connects to the piping system, and that it is necessary to apply a gasket to the surface of the flange to seal and prevent the connection from leaking. (3 RT 437-440, 496.) Like packing, Captain Moore testified that flange gaskets are wear materials that require periodic replacement to ensure proper sealing and safe operation of the valve. (*Id.* at 427-428, 437-440, 545.) He testified that it is important to fully remove the old [*15] gasket from the flange, before installing the new one, because if there are "pieces and parts" of the old gasket remaining, the new gasket will not create a proper seal. (*Id.* at 439-440.) He also testified that because of the high temperatures involved in the operation of a steam system valve, the old gasket would "tend to stick to the surface of the flange," and thus it was "pretty typical," as Mr. Woodard described, for flange gaskets to be removed by scraping them off with tools, such as putty knives and wire and electric brushes. (*Id.* at 438-440, 450.)

Captain Moore testified that asbestos gaskets were the "[t]he most common type of gaskets" used to seal valve flange connections on ships constructed during World War II. (3 RT 419-420.) He testified that Mr. Woodard described using a flange gasket that "was a compressed asbestos sheet gasket made from material with asbestos fibers"; that asbestos flange gaskets were "certainly" used with valves in high-temperature applications during Mr. Woodard's service in the Navy; that the use of these gaskets was known; and that it was more likely than not that asbestos flange gaskets were used with the Crane valves that Mr. Woodard [*16] worked with and around. (*Id.* at 437-438, 444-445, 460-461, 540-541.)

Captain Moore testified regarding the use of insulation on high-temperature valves and other equipment in the machinery spaces of steam-driven Navy ships. He testified that such valves required insulation to operate safely, efficiently and as designed. (3 RT 413-418, 463-466.) Without insulation, the valves would dissipate heat, causing the steam system to lose energy. (*Id.* at 415-416.) In addition, the valves would not operate at their designed temperatures and pressures, and they would be hazardous to sailors because of their extreme heat. (*Id.* at 415-418.)

Captain Moore testified that high-temperature valves on Navy ships were insulated with asbestos insulation in the 1940s, when the *Rogers* and the *Salisbury Sound* were built, as well as during Mr. Woodard's service aboard the ships between 1961 and 1965. (3 RT 413-414, 418-420, 424-425, 460-461, 463-466, 487.) He testified that when the ships were built, valve manufacturers were aware of the operating temperatures and pressures of the valves they supplied to the Navy; that this information was contained in the manufacturers' drawings; that [*17] manufacturers knew that valves supplied by them for high-temperature applications would be insulated; and that it was more likely than not that asbestos insulation would be used. (*Id.* at 460, 463-466, 538-540.)

Consistent with Mr. Woodard's testimony, Captain Moore testified that valves, or portions of them, were typically insulated with removable pads. (3 RT 445-448.) These pads were sometimes used to insulate "the actual body of the valve," but they were "usually" and "almost always" used to insulate the flanges and bonnet (top portion) of the valve. (*Ibid.*) He testified that the pad was "wired in place so that it could be removed without destroying the insulation and could be reused later," (*id.* at 446), and that "normally, those pads were made out of asbestos felt materials, as well as asbestos cloth." (*Ibid.*)

Captain Moore testified that the Navy had specifications to "guide the procurement of material." (3 RT 457-458.) He testified that "[i]n many cases," including for packing and gaskets, there were multiple specifications that provided manufacturers with a range of materials and that the manufacturer could select the materials it wanted to use. (*Id.* [*18] at 3 RT 459-460, 483-484.) After selecting the specifications and materials it intended to use, the manufacturer would indicate its selections in its technical drawings and documentation for the equipment. (*Id.* at 460.)

Captain Moore testified that beginning in 1936, Navy equipment manufacturers were required to include safety precautions and warnings in the instruction books and technical manuals they supplied with their equipment. (3 RT 466-468.) He testified that warnings were sometimes placed directly on products onboard ship, (*id.* at 468), and that the Navy never precluded manufacturers from providing warnings about potential dangers associated with their products. (*Id.* at 468-469.) To the contrary, he testified that "the Navy placed the requirement upon manufacturers to identify what the hazards and safety precautions were related to their equipment and asked the manufacturers to spell that out, based on their judgment." (*Id.* at 469.) He also testified that beginning in 1952, Navy equipment manufacturers were required to update their instruction books and technical manuals with new information relevant to their equipment, including information regarding potential [*19] hazards. (*Id.* at 469-470.)

C. Defendant Crane's naval expert: retired Navy Admiral David Sargent, Jr.

Defendant Crane's naval expert, retired Navy Admiral David Sargent, Jr. ("Admiral Sargent"), testified that "the Navy bought many Crane Co. valves" over the years," (6 RT 912-913), and that valves on Navy ships were designed by their manufacturers, not the Navy. (*Id.* at 848-851, 927-929.) He testified that "a lot of" asbestos packing was utilized in valves on Navy ships, that valves with asbestos packing were delivered by their manufacturers with the packing already installed, and that he personally removed asbestos packing from valves. (*Id.* at 913-915, 925-927.)

Admiral Sargent testified that high-temperature, high-pressure systems on Navy ships were insulated for multiple reasons, including thermal and operational efficiency, to ensure that the system operated as designed, and to protect sailors working around the equipment, and that it was "a good assumption" that valves would be insulated. (6 RT 908-912; *see also id.* at 918-919.) He testified that when Defendant Crane designed and supplied a valve to the Navy, Crane was informed of the intended use of the [*20] valve and the temperature and pressure requirements for its operation, based on the procurement specifications it received from the Navy. (6 RT 921-924.) If the specifications

indicated that the valve was to operate at high temperatures, he testified that the valve would "most likely" be insulated and that "the design department at Crane that was responding to the Navy specifications [for the valve] . . . clearly . . . knew that" the valve would be insulated. (*Id.* at 918-920.) He further testified that he personally removed asbestos insulation from valves. (*Id.* at 913-914.)

Admiral Sargent testified that Defendant Crane prepared and provided the Navy with technical drawings of its valves. (6 RT 848-851.) These drawings included a "list of materials" that specified the parts used to manufacture the valves, which served as "a quick cross-reference" whenever the valves had to be repaired. (*Id.* at 854-856.)

LEGAL ARGUMENT

I. This Court Has Already Granted Review To Resolve The Issue Presented In This Case.

The *O'Neil* court, on one hand, and the *Taylor*, *Merrill*, *Hall* and *Walton* courts, on the other, came to opposite conclusions as to whether [*21] manufacturers of asbestos-containing equipment, including valves, can be held liable for failing to warn of hazards created by the combined dangerous use of their products with asbestos products supplied by third parties. Presented with nearly identical facts, the *O'Neil* court criticized *Taylor*, found it to be wrongly decided and refused to follow it. The *Merrill*, *Hall* and *Walton* courts adopted *Taylor* without further analysis, assuming it to be correct, as did the Court of Appeal in this case. However, neither *Taylor* nor the decision in this case can be reconciled with basic principles of California product liability law and well established authority that a manufacturer is liable for injury caused by the foreseeable use of its product. As explained in *O'Neil*, *Taylor* was incorrectly decided and does not represent a correct statement of California law. The Court of Appeal's adoption of *Taylor* in this case suffers from the same flaws. Review was granted in *O'Neil*, *Merrill*, *Hall* and *Walton* to address these issues, and it should likewise be granted in this case.

II. The Court Of Appeal's Decision In This Case And *Taylor* Conflict With Basic [*22] Principles Of California Product Liability Law Holding Manufacturers Liable For Injuries Caused By Foreseeable Use Of Their Products.

It is well established in California that a product manufacturer is strictly liable for injury caused by the foreseeable use of its product. (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733.) "[A] manufacturer or supplier of a product is required to give warnings of any dangerous propensities in its product, *or in its use*, of which he knows or should know, and which the user of the product would not ordinarily discover." (*Groll v. Shell Oil* (1983) 148 Cal.App.3d 444, 448 [italics added].)

Defendant Crane made no showing that Mr. Woodard's exposure to the asbestos materials used in and with its valves - regardless of who manufactured or supplied them - was somehow unforeseeable. In fact, Crane did not have to foresee or predict that its valves would be used with asbestos materials; it already *knew*, for a fact, that they would be so used, since, at a minimum, it designed and supplied the valves with asbestos packing. Crane, having intentionally designed and manufactured its valves to use and operate [*23] with asbestos materials, cannot claim that exposure to asbestos from use of its valves - regardless of who manufactured or supplied the materials, or when any replacement materials became necessary - was unforeseeable. This is not a situation of foreseeable misuse, or where Crane designed its valves to use materials other than asbestos and those materials were later replaced with asbestos materials. To the contrary, the use of asbestos materials was by Crane's design, that design was carried out and maintained, and Crane's failure to warn of the hazards of the asbestos materials led directly to Mr. Woodard's injury. Under these circumstances, Crane should not be permitted to escape liability by claiming that it did not manufacture or supply the asbestos materials that were part of the ordinary and intended use of its valves.

III. The Court Of Appeal Erroneously Rejected Application Of The Doctrine Of Foreseeable Modifications.

California law has long recognized that a manufacturer's liability for a defective product extends not only to the condition of the product when it left the manufacturer's possession, but to any reasonably foreseeable modifications

made to the product [*24] thereafter. (See *Thompson v. Package Mach. Co. (1971) 22 Cal.App.3d 188, 196* ["[A] manufacturer may be held liable where the alteration of the machine or its misuse by the customer was reasonably foreseeable," and whether the "alteration . . . was reasonably foreseeable" is an "issue[] of fact to be left to the jury."]; *Thomas v. General Motors Corp. (1970) 13 Cal.App.3d 81, 89-90*; see also *Pike v. Frank G. Hough Co. (1970) 2 Cal.3d 465, 475* [manufacturer is strictly liable for defective product if product was in substantially the same condition at time of use as when it left manufacturer's possession].)

Product modification is a defense to a claim of strict liability *only* if the modification was unforeseeable, (*Campbell v. Southern Pac. Co. (1978) 22 Cal.3d 51, 56*; *Torres v. Xomox (1996) 49 Cal.App.4th 1, 18-19*), and "foreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion." (*Torres, supra, 49 Cal.App.4th at 19*; see also CACI 1245, Affirmative Defense - Product Misuse or Modification [product modification [*25] is a defense to strict liability only if the modification "was not reasonably foreseeable"].)

Here, the use of asbestos replacement packing, to replace the original asbestos packing in Defendant Crane's valves, was not only a reasonably foreseeable modification, if it can be viewed as a modification at all, it was an *intended and expected* modification. The evidence showed that Crane designed and originally supplied the valves with asbestos packing to seal and prevent them from leaking; that packing was a wear material that required periodic replacement; that Crane *knew* that the packing in its valves had to be replaced periodically because it wore out over time; and that Crane *knew and expected* that the replacement packing would be *the same* as the packing it originally supplied with the valves. Thus, under the foreseeable modification doctrine, the fact that Mr. Woodard was exposed to asbestos replacement packing supplied by someone other than Crane does not cut-off Crane's liability because the use of such packing was both intended and reasonably foreseeable.

Defendant Crane undeniably had a duty to warn of hazards arising out the foreseeable use of it valves as [*26] they were originally supplied, and this duty extended to components that it did not manufacture, such as the asbestos packing. (See *Vandermark v. Ford Motor Co. (1964) 61 Cal.2d 256, 261* ["Since the liability is strict it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another."]; accord, *Blackhawk Corp. v. Gotham Ins. Co. (1997) 54 Cal.App.4th 1090, 1100.*) There is no plausible explanation why this duty to warn of a hazard that existed in the valves when they were originally supplied should suddenly disappear because the original source of the hazard - the asbestos packing supplied by Crane - was replaced, *as intended and expected by Crane*, with identical asbestos packing that performed the exact same function and presented the exact same hazard as the original packing.

Relying on "California's product liability law as enunciated in *Taylor*," the Court of Appeal in this case rejected application of the doctrine of reasonably foreseeable modifications because "Crane is not subject to strict liability for asbestos-containing [*27] products with which it had no connection." (Typed opn. at p. 7.) This observation ignores the fact that Defendant Crane's "products" - its valves - included the defect that caused Mr. Woodard's injury when they were originally supplied. Crane designed, manufactured and supplied the valves with asbestos packing, and the valves were in the *exact same condition* when Mr. Woodard was exposed to them. The only difference between the valves as supplied and when Mr. Woodard worked with them was that the original asbestos packing had worn out and been replaced with identical replacement packing. This, however, was a foreseeable, intended and expected modification that did nothing to alter or change the hazard presented by valves when they were originally supplied.

Accordingly, the fact that Mr. Woodard was not exposed to the original asbestos packing supplied by Defendant Crane in its valves, but to identical replacement packing manufactured and supplied by someone else, does not preclude its liability for failure to warn. Replacement of the original asbestos packing with identical asbestos packing, after the original material wore out, was reasonably foreseeable, intended and expected, [*28] and it did not alter or change the hazard presented by valves when they were originally supplied.

IV. The Court Of Appeal's Decision In This Case And *Taylor* Conflict With California Product Liability Cases Recognizing Liability For Combine Dangerous Uses.

The evidence at trial showed that Defendant Crane specially designed its valves to control the movement of high-temperature steam through the steam propulsion plants of the *Rogers* and *Salisbury Sound*. These functions necessarily required the use of thermal insulation, which at the time was overwhelmingly asbestos-containing, and the use of asbestos flange gaskets to seal the flanged metal-to-metal connections between the valves and piping.

Multiple California cases recognize that a manufacturer can be held strictly liable for failing to warn of foreseeable hazards arising out of the combined use of its product with a product manufactured or supplied by another. (*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.* (2004) 129 Cal.App.4th 577, 582-583; *Wright v. Stang Mfg. Co.* (1997) 54 Cal.App.4th 1218, 1233-1234; *DeLeon v. Commercial Mfg. and Supply Co.* (1983) 148 Cal.App.3d 336, 344.) [*29] In each of these cases, a dangerous condition was created by the combined use of the defendant's product with a product supplied by another; the defendant, however, was subject to liability because the danger created by the combined use was foreseeable.

In *Tellez-Cordova*, the court held that the plaintiffs' complaint stated a cause of action for strict liability for failure to warn against manufacturers of power grinding tools for injuries caused by the release of respirable toxins from grinding attachments (wheels and discs) that were manufactured and supplied by others and subsequently affixed to the defendants' tools by the consumer. The *Tellez-Cordova* court held that defendants had a duty to warn, despite the fact that the injurious toxins were released from the grinding attachments they did not manufacture or supply, because the "specifically designed, intended and reasonably foreseeable use" of the grinding tools included the attachments. (*Tellez-Cordova, supra*, 129 Cal.App.4th at 580, 582-583.)

The defendants in *Tellez-Cordova* argued that they could not be held liable for failing to warn of the risk of respirable toxins released by the grinding [*30] attachments because the attachments were not their products. (*Tellez-Cordova, supra*, 129 Cal.App.4th at 581.) Defendants argued for a bright line rule that would preclude any manufacturer from being held liable "for defects in a final product over which it had no control," which is the same argument made by Defendant Crane in this case. (*Ibid.*) The Court of Appeal rejected this argument, finding that the defendants "are not asked to warn of defects in a final product over which they had no control, but of defects which occur when their products are used as intended" (*Id.* at 583.)

In *Wright*, the defendant manufactured a deck gun on a fire truck, which separated during use and injured the plaintiff. (*Wright, supra*, 54 Cal.App.4th at 1222-1223.) The deck gun was mounted to the truck by a three-inch threaded riser pipe that was selected, supplied and attached by the defendant's customer, the fire department. The riser pipe was *not* designed, manufactured or supplied by the defendant, and the defendant was *not* in the riser pipe's chain of distribution. (*Id.* at 1222-1226.) When the deck gun and riser [*31] pipe separated from the fire truck, it was not because of any failure in the deck gun itself or at the point of connection between the deck gun and the riser pipe. Rather, the separation occurred at the point of connection between the riser pipe and the truck. (*Id.* at 1222-1224.) The riser pipe was defective because of corrosion, inadequate depth of thread engagement, and use of improper metals in the pipe. (*Id.* at 1227.)

In reversing summary judgment, the *Wright* court cited to plaintiffs' evidence that it was "foreseeable to anyone familiar with fire apparatus" that pressure from the deck gun would be too great for the steel riser pipe, and that the combination of the deck gun and riser pipe could result in the failure of the riser pipe that injured the plaintiff. (*Wright, supra*, 54 Cal.App.4th at 1225-1226.) The deck gun manufacturer did not negate that it "knew that the fire department intended to attach the deck gun to a threaded riser pipe." (*Id.* at 1234-1235.) That is, the deck gun manufacturer had a duty to warn of the foreseeable danger posed by the combination of its product with a product manufactured [*32] by another, even though there was no malfunction or failure in its own product. The foreseeable use of the defective riser pipe, supplied by another manufacturer and selected by the customer, created a risk of harm that required a warning so that the deck gun could be safely used. (*Id.* at 1234-1236.)

In *DeLeon*, the defendant manufactured a sorting bin for use in a fruit processing line. (*DeLeon, supra*, 148 Cal.App.3d at 340-341.) The bin was manufactured and designed based on a prototype and specifications supplied by

the plaintiff's employer. (*Ibid.*) There were no inherent defects in the bin itself; however, because of its dimensions, routine cleaning of the bin could place workers in close proximity to an exposed rotating overhead line shaft that was manufactured and installed by the employer. (*Ibid.*) The overhead line shaft "had nothing to do with the operation of the bin," but their proximity to each other created a dangerous condition. (*Id.* at 341.)

Based on these facts, the Court of Appeal found that the defendant could have foreseen the danger of the exposed overhead line shaft and, therefore, had a duty to warn [*33] of this foreseeable hazard. (*DeLeon, supra, 148 Cal.App.3d at 343-344.*) The fact that there was a safe way to clean the bin did not preclude liability, since "the important factor is whether it is foreseeable that someone would climb onto the belt" for cleaning, thus exposing the person to the danger of the overhead line shaft. (*Id.* at 344.) The defendant was not entitled to summary judgment because it "did not show that such an act was unforeseeable, so even if plaintiff's acts constituted misuse of the product, if her acts were foreseeable, [the defendant] is not absolved of blame." (*Ibid.*) Thus, the court held that the defendant's product, which was not itself defective, nevertheless could "present an excessive preventable danger in its intended use because of its proximity to the line shaft [manufactured by another]." (*Ibid.*) In so holding, the court made clear that products must not be viewed "'in an industrial vacuum,'" and must take into account "'the realities of their everyday use.'" (*Ibid.* [citing *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal.3d 121, 126.*])

The Court of Appeal, in its decision in this case, [*34] offered no analysis of *Tellez-Cordova, Wright* and *DeLeon*, other than to state that they did not "consider[] whether defendants who are absolved of liability as to their own products may be held strictly liable for failing to warn of the potential risks of other products manufactured and supplied by third parties." (Typed opn. at p. 8.) This purported distinction fails because it does not recognize that the courts in those cases found that, regardless of any defect in their own products, the defendants were subject to liability for failing to warn of hazards created by the combined dangerous use of their products with products of others. Indeed, in *DeLeon*, the defendant's sorting bin had no inherent defects and the overhead line shaft "had nothing to do with the operation of the bin"; however, their proximity to each other created a dangerous condition, of which the defendant was required to warn. (*DeLeon, supra, 148 Cal.App.3d at 341, 343-344.*)

The Court of Appeal in this case also stated that *Tellez-Cordova, Wright* and *DeLeon* were "distinguishable on procedural grounds" because there were "design defect claims [that] remained to be litigated [*35] in all three cases." (Typed opn. at 9.) This distinction has no legal significance, since warning and design claims are separate and distinct theories of liability. (*Boeken v. Phillip Morris Inc. (2005) 127 Cal.App.4th 1640, 1668-1669; Arnold v. Dow Chem. Co. (2001) 91 Cal.App.4th 698, 717.*) Moreover, the presence of the design claims did not alter or impact the courts' analyses of the warning claims, or whether the defendants could be held strictly liable for failing to warn of hazards arising of the combined use of their products with products manufactured and/or supplied by third parties.

The *Taylor* court also tried to distinguish *Tellez-Cordova, Wright* and *DeLeon*, but its attempt to do so served only to demonstrate its misunderstanding of these cases. For example, with respect to *Tellez-Cordova*, the *Taylor* stated:

[I]n *Tellez-Cordova*, the plaintiff alleged that it was the action of *respondent's tools themselves* that created the injury-causing dust. Here, in contrast, Mr. Taylor's injuries were caused not by any action of respondents' products, but rather by the release of asbestos from products produced by [*36] others. This is a key difference because before strict liability will attach, the defendant's product must "cause or create the risk of harm." Second, unlike the abrasive wheels and discs in *Tellez-Cordova*, which were not dangerous without the power of the defendants' tools, the asbestos-containing products at issue in our case were themselves inherently dangerous. It was their asbestos content - not any feature of respondents' equipment - that made them hazardous.

(*Taylor, supra, 171 Cal.App.4th at 587-588, [italics in original] [citation and footnote omitted.]*)

The *Taylor* court's discussion of *Tellez-Cordova* reflects a misunderstanding of its facts. Contrary to its view, *Tellez-Cordova* held that a manufacturer could be liable when its product is foreseeably used in conjunction with

another product, and when danger results from the combined use. (*Tellez-Cordova, supra, 129 Cal.App.4th at 582-583.*) It was irrelevant that the respirable dust emanated from the attached grinding wheels, and not the defendants' tools themselves, because it was the combined use of the tools and the attachments, which the defendants did not manufacture [*37] of supply, that created the harm. (*Ibid.*) *Taylor* itself acknowledges that there are circumstances in which a manufacturer must warn of hazards arising out of the dangerous combination of its product with products supplied by others: "Although a manufacturer *may* owe a duty to warn when the use of its product in combination with another creates a potential hazard, that duty arises *only* when the manufacturer's own product causes or creates the risk of harm." (*Taylor, supra, 171 Cal.App.4th at 579-580* [italics in original].)

Taylor tried to distinguish *Wright* on the ground that it involved claims for both failure to warn and design defect, and that the warning claim was based on the defendant's failure to warn of the foreseeable misuse ("mismatch") of its deck gun with a threaded riser pipe. (*Taylor, 171 Cal.App.4th at 588-589.*) The fact that *Wright* involved both warning and design claims is immaterial, since, as noted above, they are separate and distinct theories of liability. (*Boeken, supra, 127 Cal.App.4th at 1668-1669; Arnold, supra, 91 Cal.App.4th at 717.*) And the *Wright* court did not [*38] limit its discussion to the design claim; it went on to evaluate the "focus" of the parties' contentions, which was the warning claim. (*Wright, supra, 54 Cal.App.4th at 1230.*)

Taylor narrowly read *Wright* as dealing solely with foreseeable misuse of the defendant's product. (*Taylor, 171 Cal.App.4th at 588-589.*) At the threshold, this distinction is a *non sequitur*, since there is no reason why a case dealing with foreseeable misuse should not be instructive regarding liability for foreseeable use of a product or for foreseeable alterations made to a product after it has left the manufacturer's possession. (*See Tellez-Cordova, supra, 129 Cal.App.4th at 584* [posing the rhetorical question that if a manufacturer can be held liable for foreseeable misuse, "[h]ow then can [it] be exempt from liability for the consequences of the intended use?"].) Moreover, the dangerous conditions in *Wright* were not limited to an alleged defect in the product supplied by the defendant (the deck gun), as suggested by the *Taylor* court, but expressly encompassed defects in the riser pipe attachment that the defendant did not manufacture [*39] or supply.

Taylor attempted to distinguish *DeLeon* based on the defendant's participation in the design and location of the sorting bin, and concluded that "[t]here is nothing in *DeLeon* that suggests that a manufacturer may be liable for failing to warn of the dangerous qualities of another manufacturer's product." (*Taylor, supra, 171 Cal.App.4th at 589-590.*) This is an inexplicable misreading of *DeLeon*, where the hazard was the risk of being caught in a spinning line shaft that had "nothing to do" with the operation of the defendant's sorting bin. (*DeLeon, supra, 148 Cal.App.3d at 341.*) The *DeLeon* court held that the defendant had to warn of that danger. (*Id. at 343-344.*)

In this case, the evidence showed that the design and intended operation of the high-temperature Crane steam valves, the attendant need for asbestos flange gaskets and insulation, the regular maintenance of the valves, and the normal methods use to remove and replace these materials, all combined to create the risk of injury from exposure to asbestos. If the heat of the valves had not caused the gaskets to bake and stick to their metal flanges, [*40] Mr. Woodard would not have had to use tools to scrape and remove the gaskets, thereby releasing asbestos fibers. Similarly, it was the high operating temperatures of the valves that created the need for asbestos-containing insulation, which released asbestos fibers when the insulation had to be removed to perform routine maintenance on the valves. Thus, in both instances, the valves had a direct role in causing or creating the risk of harm. While Crane might not have been the only party responsible for creating this foreseeable risk, it was certainly one of the responsible parties and it is therefore subject to liability.

V. The Court Of Appeal In This Case And *Taylor* Misapplied The Component Part Defense.

Relying on *Taylor*, the Court of Appeal in this case applied the component part defense, finding that it relieved Defendant Crane of liability because there was "no claim that Crane's valves released the asbestos that caused Woodard's injuries" and because Crane supplied its asbestos-containing valves "in accordance with Navy specifications." (Typed opn. at pp. 6-7.) This conclusion is directly at odds with the conclusion of the under-review

decision in *O'Neil* [*41] , where the Court of Appeal held that the component part defense did not apply in these circumstances. The Court of Appeal's decision in this case, which followed *Taylor*, is flawed for the same reasons.

"Components" are typically defined as "raw materials, bulk products, and other constituent products sold for integration into other products." (Rest.3d Torts, *Products Liability* § 5 cmt. a.) "[T]he manufacturer of a product component or ingredient is not liable for injuries caused by the finished product unless it appears that the component itself was 'defective' when it left the manufacturer." (*Tellez-Cordova, supra, 129 Cal.App.4th at 581.*) Examples of typical component parts include sand, gravel, nails, or the bulk liquid silicone that General Electric ("GE") supplied to a breast implant manufacturer in *Artiglio v. General Electric Co. (1998) 61 Cal.App.4th 830*. In that case, GE had no control over the process in which its bulk silicone was used to manufacture the implants and had no ability to warn the ultimate consumers.

Here, Defendant Crane's valves were not raw materials, nor were they bulk, fungible, or multi-use products meant [*42] to be subsequently altered by the customer. (See *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal.App.4th 780, 788* [component part defense applies only to "generic" or "off-the-shelf products with a wide variety of potential uses, and does not apply to products "with a specific purpose and use."]; *Tellez-Cordova, supra, 129 Cal.App.4th at 582* [same]; *Springmeyer v. Ford Motor Co. (1998) 60 Cal.App.4th 1541, 1554* [same].) Rather, the valves were used as they were specifically designed and intended to be used, with asbestos packing, gaskets and insulation that had to be removed and replaced during normal maintenance and repairs. Importantly, unlike a true component manufacturer, who has no interaction with the user of the finished product and no ability to warn, Crane made design choices for the use of asbestos materials and supplied instruction books and technical manuals in which it could have warned of the asbestos-related hazards of its valves, or it could have placed a warning directly on the valves. Crane therefore had the means and opportunity for interaction with sailors like Mr. Woodard and was in a position to warn.

Regardless, [*43] the component part defense could not apply because the valves themselves were defective. (*Gonzalez, supra, 154 Cal.App.4th at 788; Tellez-Cordova, supra, 129 Cal.App.4th at 581.*) Plaintiffs showed that Defendant Crane's valves were designed to use asbestos materials, including packing, which would become dangerous during ordinary and foreseeable maintenance and repairs. The Court of Appeal in this case did not address this point, even though *Taylor* acknowledged that such asbestos items are "inherently dangerous." (*Taylor, supra, 171 Cal.App.4th at p. 588.*)

Between the lack of evidence demonstrating that Defendant Crane was a "component" manufacturer, and the undisputed evidence that Crane designed its valves to use inherently dangerous asbestos materials, the Court of Appeal in this case improperly relied on the *Taylor* court's misapplication of the component part defense.

CONCLUSION

Plaintiffs request this Court to grant review because there is conflicting authority created by the decisions in this case, *Taylor, O'Neil, Merrill, Hall, and Walton*, the last four of which are currently under review in this [*44] Court. Review is necessary to secure uniformity of decision and to settle important questions of law, and should be granted pursuant to the "grant and hold" procedure of CRC 8.512(d)(2).

Dated: October 4, 2011

Respectfully submitted,

WATERS, KRAUS & PAUL

By: /s/ [Signature]

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d)(1) of the *California Rules of Court*, the undersigned hereby certifies that this Appellants' Petition for Review contains 7,940 words, exclusive of the caption, tables, the signature block, and this certification, as counted by the Microsoft Word word-processing program used to generate it.

/s/ [Signature]
Michael B. Gurien
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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, ANNIE CASERMA, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 222 North Sepulveda Boulevard, Suite 1900, El Segundo, California. I am employed in Los Angeles County, California. [*45]

On October 4, 2011, I served a copy of the following document described as

Appellants' Petition for Review

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

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

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

SEE ATTACHED SERVICE LIST

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

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at El Segundo, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter [*46] date is more than one day after the date of deposit for mailing in this affidavit.

Executed on October 4, 2011, at El Segundo, California.

/s/ [Signature]
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[SEE APPENDIX: OPINION OF THE COURT OF APPEAL IN ORIGINAL]