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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF NEW YORK CITY ASBESTOS LITIGATION, DUMMITT,

Respondent,

-against-

No. 83

A.W. CHESTERTON CO.,

Appellant.

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MATTER OF EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION,  
SUTTNER,

Respondent,

-against-

No. 84

A.W. CHESTERTON CO.,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
May 03, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

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1 JUDGE PIGOTT: Chief Judge DiFiore has  
2 recused herself from these cases.

3 Let's see, first, what do we have here, we  
4 have two; 83, Matter of New York City Asbestos  
5 Litigation, and 84, Matter of Eighth Judicial  
6 District Asbestos Litigation.

7 Ms. Halligan, good afternoon.

8 MS. HALLIGAN: Good afternoon.

9 JUDGE PIGOTT: Welcome.

10 MS. HALLIGAN: I will change my opening  
11 accordingly, Judge Pigott, and not start with Chief  
12 Judge DiFiore's name. Caitlin Halligan on behalf of  
13 Crane. I represent Crane, both in Dummitt, the first  
14 case, and also in Suttner, the second case.

15 I would like to reserve three minutes for  
16 rebuttal in each of those cases.

17 JUDGE PIGOTT: Each. Okay. You have it.

18 MS. HALLIGAN: This court's decision in  
19 Rastelli exemplifies the kind of decision making that  
20 has long made this court the preeminent common law  
21 court in the country. As it so often has, this court  
22 struck a careful balance between competing policy  
23 considerations, and held that a third-party  
24 manufacturer like Crane is not responsible for  
25 warning about dangers of a product that it did not

1 make, and does not control.

2 Today, we ask this court to rie - - -

3 JUDGE RIVERA: You made a product that  
4 required - - - or your client, I'm sorry, made a  
5 product that required the component parts. And those  
6 component parts required asbestos, right?

7 MS. HALLIGAN: Those component parts did  
8 not - - -

9 JUDGE RIVERA: At the time.

10 MS. HALLIGAN: Absolutely not, Your Honor.  
11 And I'm glad you brought that up, because I think  
12 this question of a required use has created a lot of  
13 confusion in other courts, and also with respect to  
14 what happened factually in this case.

15 So my client, Crane, made metal valves. Those  
16 valves needed some sort of seal, some customers chose to  
17 use a seal that had asbestos, other customers - - -

18 JUDGE RIVERA: But when you made the  
19 valves, was there really an alternative to asbestos  
20 that was really used by the industry?

21 MS. HALLIGAN: There is, and the catalogs  
22 are replete. And I know there is a large record  
23 here, so I'd actually like to direct the court to a  
24 couple of specific places that I think might be  
25 helpful to take a look there.

1                   With regard to whether or not the valves  
2                   required asbestos to function, first of all, I would - - -  
3                   I would direct you to a range of catalogs from a number of  
4                   years. Now, not all of these are actually relevant  
5                   because there was evidence at trial that concerns catalogs  
6                   that Crane put out long after the sale of these parts,  
7                   which was in the thirties and forties. But nonetheless,  
8                   3746, here at the Dummitt record, 3899, 3659, 3910, and  
9                   3746. They make clear that there are a range of gaskets,  
10                  same page, asbestos, non-asbestos gaskets.

11                  In addition, the naval machinery manual itself,  
12                  which plaintiffs point to at page 3892, lists ten  
13                  different kinds of insulation that can be used. The  
14                  drawings and specs that the plaintiffs have relied on made  
15                  clear - - - the testimony makes clear that those decisions  
16                  in the procurement process were the Navy's. Sargent's  
17                  testimony at pages 1506 to 11 - - -

18                  JUDGE STEIN: But didn't - - - didn't Crane  
19                  admit that - - - that as a practical matter, these -  
20                  - - these products with asbestos were the most  
21                  efficient and effective, and they communicated that  
22                  in a number of ways. Not only in what they sent with  
23                  their valves, but also in - - - in, you know, maybe  
24                  some catalogs showed other component parts, but they  
25                  encouraged, they - - - they promoted the use of

1 asbestos in these parts.

2 MS. HALLIGAN: That question of promotion,  
3 Your Honor, is no more precise or definite a standard  
4 than the kind of substantial guidance that this court  
5 rejected just today in Finerty.

6 JUDGE STEIN: But it's more than just  
7 foreseeability that it might be used, it's more than  
8 Rastelli; isn't it?

9 MS. HALLIGAN: Well, first of all, in  
10 Rastelli, Rastelli answers this question, because  
11 Rastelli makes clear that their - - - Goodyear knew  
12 about the use of its defective tire rims.

13 JUDGE STEIN: Right, and said that's not  
14 enough.

15 MS. HALLIGAN: And so the court said,  
16 knowledge - - -

17 JUDGE STEIN: Okay, but if it's - - -

18 MS. HALLIGAN: - - - knowledge - - -  
19 certain knowledge is not enough, foreseeability is  
20 not enough, and I'm not even sure if plaintiffs still  
21 defend that foreseeability could be in a - - -

22 JUDGE STEIN: But what I am suggesting - -  
23 -

24 MS. HALLIGAN: Yes.

25 JUDGE STEIN: - - - and what I think

1 Rastelli left open, was that there could be something  
2 more that would sufficiently connect the non-  
3 manufacturer to the product, that might result in  
4 some liability. And the question in my mind is, have  
5 we reached that here.

6 MS. HALLIGAN: Yes, and - - - and so, Your  
7 Honor, first of all, Rastelli makes clear that it is  
8 reflecting this court's longstanding touchstone for  
9 assessing strict liability, which is "Control over  
10 the production of a product", and I'm quoting from  
11 Rastelli, "or that you placed it in the stream of  
12 commerce." And that's because those are - - -

13 JUDGE STEIN: Or that you benefited from  
14 it. That's - - -

15 MS. HALLIGAN: That's to derive - - -  
16 that's to derive an economic benefit, which is some  
17 kind of an ownership interest or something like that.  
18 Not that it's one of many parts that your product can  
19 use. If knowledge was enough, then Rastelli would  
20 have had to have come out differently.

21 What - - - what has been suggested in a  
22 couple of cases that plaintiffs have - - - have sent  
23 to the court over the intervening months since this  
24 case was first - - - leave was first granted, is that  
25 required use somehow is enough.

1                   Now, let's look at what we have here. What we  
2 have here is, as I was indicating earlier, catalogs that  
3 lay out a range of different products. Businesses  
4 everyday offer to their customers a range of products, and  
5 they may make recommendations. If that sort of everyday  
6 exchange was enough to create legal responsibility on a  
7 small or a large business, then there would be complete  
8 paralysis.

9                   JUDGE RIVERA: But what was the industry  
10 practice when you say that range, was there really a  
11 true range? Was there that much diversity of use?

12                  MS. HALLIGAN: What we know, Your Honor, is  
13 what's in the record, which is that there were  
14 various products, both available and recommended.  
15 But if the question is what did the market tend to  
16 make available, that should not be enough for  
17 liability, because that's - - -

18                  JUDGE ABDUS-SALAAM: What's the rule - - -  
19 what is the rule that you're asking us regarding duty  
20 in this case?

21                  MS. HALLIGAN: We are asking you to  
22 reaffirm Rastelli, and to say that control over the  
23 production, which is exactly what this court has  
24 looked to, and again, reaffirmed just this morning in  
25 Finerty. This morning in Finerty, the court said,

1 the manufacturer alone knows how a product is made,  
2 has the opportunity and incentive, that goes back to  
3 Codling, forty years ago. We ask you to hue to that  
4 long line of precedent, and to do so - - -

5 JUDGE RIVERA: So - - - so the valve maker  
6 knows that asbestos is definitely going to be used,  
7 and stays mute.

8 MS. HALLIGAN: In some cases - - -

9 JUDGE RIVERA: Is that your - - - is that  
10 you rule?

11 MS. HALLIGAN: - - - asbestos will be used.  
12 But again, knowledge - - -

13 JUDGE RIVERA: Let's say you know it's  
14 going to be used.

15 MS. HALLIGAN: Even - - - even if we do  
16 know that it's going to be used, knowledge is not  
17 enough, because knowledge is not control over the  
18 production of the product itself. Take for example -  
19 - -

20 JUDGE ABDUS-SALAAM: Wasn't that only one  
21 of the factors in Rastelli - - -

22 MS. HALLIGAN: Yes, Your Honor.

23 JUDGE ABDUS-SALAAM: - - - there were other  
24 factors - - -

25 MS. HALLIGAN: So - - - so let me - - -

1 JUDGE ABDUS-SALAAM: Yeah.

2 MS. HALLIGAN: Pardon me.

3 JUDGE ABDUS-SALAAM: Okay. No, I was just  
4 going to say, could you deal with the three other  
5 factors - - -

6 MS. HALLIGAN: Yes.

7 JUDGE ABDUS-SALAAM: - - - because they  
8 seem to support a duty here. You might - - -

9 MS. HALLIGAN: I think - - - I think much  
10 to the contrary, Your Honor, and let me explain why.

11 Rastelli says control over production. That  
12 means the manufacturer makes that the reason that that's  
13 inappropriate grounds from posing legal responsibility is  
14 because, as the court has noted repeatedly, that  
15 manufacturer is in the best position to understand the  
16 safety implications, and to - - - to have an incentive to  
17 put the product on the market safely.

18 The second category that Rastelli identifies is  
19 to place something in the stream of commerce. Now that  
20 makes sense because the court had already held in Codling,  
21 that a supplier is liable for the product that it puts on  
22 the market, because of the special relationship that it  
23 has.

24 Here, there is no proof whatsoever that Crane  
25 sold the particular gaskets, or packing, or insulation

1           that the plaintiffs here came into contact with thirty or  
2           fifty years after these valves were initially sold to  
3           their customers.

4                        JUDGE STEIN:  Is there any difference  
5           between strict liability for a defective product and  
6           a duty to warn?

7                        MS. HALLIGAN:  There is some difference  
8           with respect to what the standard is for conduct and  
9           for breach, but the court has said that there is no  
10          distinction with respect to the question of whether a  
11          duty attaches in the first instance.  And that is  
12          reflected in Rastelli, which has both claims in it.  
13          So no, Your Honor.

14                       JUDGE FAHEY:  It seems like what you're - -  
15          - what you are arguing in Rastelli would create a  
16          bright line rule.  But the way I read the case on - -  
17          - it seems to say we're confined to the circumstances  
18          of this case, and then the converse of that is that  
19          the plaintiffs are relying on Sage, which seems to  
20          push us into a case by case analysis.  And it's hard  
21          for me to get to that bright line rule in the context  
22          of reading those two cases together, particularly in  
23          that language.

24                       MS. HALLIGAN:  Your Honor, let me address  
25          both parts of that question, if I can.

1           Judge Abdus-Salaam, you asked me what rule do we  
2 want, and I said we would like you to reaffirm Rastelli.  
3 We would like you to be clear that knowledge and  
4 foreseeability is not sufficient, that some kind of  
5 recommendation or influence is not sufficient.

6           Do you need to say, Judge Fahey, that for all  
7 time there can never be any liability that goes beyond a  
8 manufacturer or the seller? I don't think that you do.  
9 And in the California Supreme Court, which just a few  
10 years ago, unanimously held that there is no duty to warn,  
11 relying on Rastelli, on - - -

12           JUDGE FAHEY: You're talking about O'Neil?

13           MS. HALLIGAN: Yes, yes, Your Honor, on  
14 facts identical here, against Crane company, same  
15 valve, same time period.

16           The court there reserved, in footnote 6, the  
17 question of whether there could be some set of  
18 circumstances - - -

19           JUDGE STEIN: Well, what would those  
20 circumstances be in your view?

21           MS. HALLIGAN: Well, I don't think that you  
22 need to identify them here. And I think that the  
23 court - - -

24           JUDGE STEIN: Well - - -

25           MS. HALLIGAN: So by way of example - - -

1 JUDGE STEIN: Help us know where to draw  
2 the line.

3 MS. HALLIGAN: So I don't want to evade the  
4 question, Your Honor, but I do want to say first that  
5 this court has proceeded when it has drawn lines in  
6 the context of - - - of tort law, very incrementally  
7 because it is useful to the court to have a factual  
8 developed record in front of it, so it can see  
9 whether the policy considerations at issue have been  
10 furthered.

11 In Rastelli, I would argue that the court really  
12 did survey the landscaping. You can see that from the  
13 citations in Rastelli itself.

14 So for example, Rastelli went out of its way to  
15 say that where you have two safe products that combine  
16 together to create a dangerous condition, that that could  
17 give rise to a legal responsibility and a duty to warn.  
18 Citing - - -

19 JUDGE STEIN: So there we have a safe  
20 product and an unsafe product that are combined  
21 together. Why - - - why wouldn't that fit into that  
22 rubric?

23 MS. HALLIGAN: Because you have to look at  
24 who made which product. If you're looking at the  
25 manufacturer who makes the unsafe product, that

1 manufacturer has legal responsibility for that  
2 product, and that may include a design defect claim  
3 or a duty to warn.

4 JUDGE GARCIA: But you made the unsafe  
5 product for a while, right? Crane.

6 MS. HALLIGAN: If Your Honor is referring  
7 to Cranite, that - - - predicating liability on the  
8 fact that - - - that Crane made Cranite is really  
9 nothing more than market share liability. There is  
10 no evidence here, Your Honor, that the plaintiffs  
11 here were exposed to Cranite gaskets.

12 JUDGE GARCIA: Agreed. But it's so - - -  
13 to me very different, and I think that's what we've  
14 been trying to get at - - -

15 MS. HALLIGAN: Yes.

16 JUDGE GARCIA: - - - that Rastelli,  
17 because you made this product - - - when you put it  
18 into the marketplace, it could have asbestos in it  
19 that you were marketing it with, it could not, right?

20 The use in the Navy particularly was high  
21 temperature, which everyone was thinking was the ideal  
22 situation for the asbestos component, which you continued  
23 to make. So to me, the idea that you have Rastelli, where  
24 you have a good tire and a bad rim, would be, Goodyear I  
25 think it was in that case, marketed the bad rim

1 originally. Said it's great to have this bad rim in  
2 certain weather conditions.

3 But then, other people marketed the bad rim  
4 after that. That would be more analogous to Rastelli.  
5 Here, you marketed - - - to say, we didn't put - - - you  
6 put it in the stream of commerce. You put it in the  
7 stream of commerce with asbestos in it. Other people  
8 later replaced your asbestos with another product. Isn't  
9 that different than Rastelli?

10 MS. HALLIGAN: Your Honor, a couple of  
11 points in response to that, if I can. First of all,  
12 this case, and the openings in the summation and the  
13 instructions make it clear, was tried on a  
14 foreseeability theory. And so the question of  
15 whether or not there was some need to use asbestos in  
16 a high-heat application was really not something that  
17 was - - -

18 JUDGE GARCIA: It's not need, it's  
19 recommended, right? It's not need.

20 MS. HALLIGAN: Again, again, Your Honor.  
21 With - - - with respect, I think that that construct  
22 is no different than the substantial guidance  
23 construct the court rejected just today. And it  
24 would put into question a wide range of business  
25 dealings. It is certainly the case that businesses

1 recommend products every day.

2 And the fact that Crane - - -

3 JUDGE GARCIA: But you're talking Ford, you  
4 know, subsidiary in another country, downstream,  
5 putting a separately made product into the stream of  
6 commerce, versus you marketing - - - Crane marketing  
7 a product that contained asbestos here?

8 MS. HALLIGAN: I'd like to - - - to  
9 disaggregate those two points.

10 JUDGE GARCIA: I know you would, but I'm  
11 having trouble doing it.

12 MS. HALLIGAN: Well - - - well, and here is  
13 why. With regard to whether or not Crane recommended  
14 asbestos, as it recommended a range of other gaskets  
15 and left it to the user to make a choice, that is no  
16 different than when I go into the local hardware  
17 store, and I want to buy a product, and I ask the  
18 person behind the desk for some recommendation. If  
19 every single one of those interactions gave rise to  
20 legal responsibility down the road, it would be a  
21 very different world.

22 With respect to Cranite, this court has  
23 looked repeatedly at the question of market share  
24 liability. And that's what this is. There is no  
25 evidence that the particular gaskets that were - - -

1 that the plaintiffs here were exposed to were  
2 Cranite, were made by Crane, were sold by Crane.

3 JUDGE GARCIA: But I - - - I think there  
4 you're disassociating. I mean, that's not what they  
5 were using this for, market share. I think what this  
6 was going towards was, you marketed this product with  
7 asbestos in it, then you marketed the replacement  
8 product itself, not market share, but what are you  
9 signaling, what are you recommending, what's your  
10 role in the use of asbestos going forward as a  
11 replacement part?

12 MS. HALLIGAN: Your Honor, there is - - -

13 JUDGE GARCIA: And for me, that's how I see  
14 Cranite, not as a market share issue.

15 MS. HALLIGAN: Right. Well, I would - - -  
16 I would disagree with that because when you - - -  
17 when you look at strict liability, which is a very  
18 onerous burden to impose, the court has imposed it  
19 because it provides a manufacturer with the  
20 opportunity and incentive to not only put a safe  
21 product on the market, but to treat those safety  
22 costs as a cost of business, to ensure against them,  
23 and to have definite liability there.

24 If - - - if you - - - in doing so, you have  
25 always looked at a particular product. You don't - -

1           - you have never suggested that duty just runs in the  
2           air, and if someone puts a product on the market, or  
3           advertises it, that even though there is no showing  
4           that that particular product caused some harm, that  
5           they nonetheless had a duty because they are engaged  
6           in the marketplace.

7                        On that theory, any seller of - - - of a gasket  
8           or packing that had asbestos in it, would also have a duty  
9           to warn. And that is completely intention with tying the  
10          strict liability to the policy considerations, which are  
11          tethered directly to the manufacturer that's put the  
12          product on the market.

13                       JUDGE GARCIA: But then I - - - and I know  
14          your time is up, but then I think you get back to the  
15          concerns raised on the other side of the bench, which  
16          is, where is the bright line there, and aren't we  
17          looking at facts that are fairly unique to Crane as a  
18          manufacturer in this context, and can a court  
19          conclude, a jury conclude that based on those facts  
20          you had a duty to warn, which are very different than  
21          the Rastelli facts and, you know, show I think much  
22          more participation in the product that's being  
23          replaced then you have in your hypothetical.

24                       MS. HALLIGAN: If - - - if I can just  
25          respond to the question - - -

1 JUDGE PIGOTT: Certainly.

2 MS. HALLIGAN: - - - I know that my time is  
3 up.

4 Your Honor, participation is a very amorphous  
5 indefinite standard. This court has said two things,  
6 which I think demonstrates why that can't be the right  
7 standard. It has said, first of all, in Pulka, that the -  
8 - - that assigning duty in the absence of control over the  
9 particular interaction or product is no different than  
10 absolute or limitless liability.

11 And it has also stressed that second point,  
12 which is that this court should be very careful about  
13 assigning strict liability because it - - - if it is not  
14 tied very directly to a particular plaintiff and to a  
15 particular product, it ends up being no more than social  
16 insurance.

17 JUDGE PIGOTT: Thank you, Ms. Halligan.

18 Mr. Dymond.

19 MR. DYMOND: Thank you. Seth Dymond on  
20 behalf of the plaintiff-respondent, the Estate of  
21 Ronald Dummitt.

22 I just want to start with saying that if the  
23 facts of this case don't lead us to a duty to warn, then  
24 we are in a scenario of a bright line rule where there  
25 simply will never be a duty to warn in any circumstance.

1                   JUDGE ABDUS-SALAAM:  What - - - what's - -  
2                   - what is the rule that you would like us to adopt,  
3                   counsel?

4                   MR. DYMOND:  I think, Your Honor, that this  
5                   court should simply say, let's look at the Rastelli  
6                   considerations, all of them, not simply the tail end  
7                   ones that the appellant is proposing to be looked at,  
8                   and weigh them on a fact-specific basis, which we  
9                   have always held duty to warn is a fact-intensive  
10                  basis, and then under those circumstances, decide  
11                  where the balance of those factors weigh.

12                  And that's not simply my suggestive rule,  
13                  over the past twenty four years, since Rastelli has  
14                  been decided, each and every time this has been  
15                  looked at, it has been saying, let's look at those  
16                  Rastelli considerations under the particular facts of  
17                  these case - - -

18                  JUDGE STEIN:  Did the court give the right  
19                  jury instruction on this standard - - - on the duty  
20                  here?

21                  MR. DYMOND:  Yes, Your Honor, and - - -

22                  JUDGE STEIN:  I'm concerned about that,  
23                  because it seems to only talk about reasonable  
24                  foreseeability, and - - - and that seems - - - that  
25                  seems a bit broader than - - - than really what

1           you're talking about here.

2                       MR. DYMOND: Well, at the outset, we have  
3           to distinguish between the role of the court in  
4           deciding the existence and scope of the duty, which  
5           is the legal question for the court to decide, and  
6           what the jury decides, which is breach of that duty  
7           and the extent of the breach.

8                       JUDGE FAHEY: So you're saying the scope of  
9           the duty is a question for court? The existence of  
10          duty is clearly a question for the scope, but isn't  
11          scope of duty simply foreseeability?

12                      MR. DYMOND: It is foreseeability, and  
13          certainly there is an intertwining - - -

14                      JUDGE FAHEY: Well, that's a question of  
15          fact for the jury.

16                      MR. DYMOND: No, Your Honor, because - - -  
17          because scope still is something that the court  
18          decides in determining whether the duty will go too  
19          far, or how it should be limited in a controllable  
20          degree. Now certainly, there is interlap between  
21          those factual scenarios that the court looks at in  
22          scope, and what the jury decides in determining  
23          breach.

24                      But going back to your question, Judge  
25          Stein, about the charge, the charge is on page 2031

1 of the record. And first of all, what the court did  
2 before that is say, I'm deciding as a question of  
3 law, that a duty exists here, and it's within the  
4 scope. And so what was charged to the jury, first of  
5 all, was telling them what the duty is. And that  
6 came verbatim from Rastelli, that a manufacturer has  
7 a duty to warn against latent dangers resulting from  
8 foreseeable uses of its product of which it knew or  
9 should have known. All the - - -

10 JUDGE ABDUS-SALAAM: But we - - - if we  
11 disagree with you that that - - - well, that that was  
12 not the right instruction or that it was error, is it  
13 harmless error?

14 MR. DYMOND: It is, Your Honor, because  
15 there's simply no view of the evidence under which  
16 the appellant could have prevailed. And that was  
17 recognized by the dissent, even at the Appellate  
18 Division. Because we have clear factual  
19 circumstances where they had been marketing these for  
20 years in these exact uses, they had been specified  
21 components for uses on these particular ships, they  
22 were deemed essential to the economic operation of  
23 the valves in these particular circumstances.

24 And Crane had an active role in really  
25 defining - - -

1                   JUDGE FAHEY: You know, Justice Friedman's  
2                   dissent had a, I thought, a strong point on the  
3                   preclusion of Admiral Sargent's testimony. You want  
4                   to address that?

5                   MR. DYMOND: Sure.

6                   JUDGE FAHEY: On causation.

7                   MR. DYMOND: I think that the problem, I  
8                   would submit, with the dissent is that it was off  
9                   base in why Admiral Sargent's testimony was  
10                  precluded. And that is partly because the issue  
11                  wasn't really briefed before the Appellate Division;  
12                  it was raised for the first time in reply, so we  
13                  didn't get a chance to present an argument.

14                  If we had, we would have argued what we  
15                  argue now to this court, was that it was precluded on  
16                  speculation grounds. And just by way of background,  
17                  the opinion that they wanted to elicit was that  
18                  between 1940 and 1980, if Crane had attempted to  
19                  warn, for any product, in any context, in any  
20                  circumstance, the Navy would have universally  
21                  rejected that.

22                  Now, this court decided a case called Cassano in  
23                  a 1959, where it said, expert opinion must be based on  
24                  either personal knowledge or facts in the record. We know  
25                  that Admiral Sargent had no personal knowledge about what

1 the Navy would've done between 1940 and 1988, because he  
2 didn't begin working in Navy procurement until 1988. And  
3 - - -

4 JUDGE ABDUS-SALAAM: Well, could there have  
5 been - - - could Crane have provided him with some  
6 sort of documents that showed what their procurement  
7 practices - - - what the Navy's procurement practices  
8 were, and then if they had, could he have testified  
9 as to his expert opinion regarding those practices?

10 MR. DYMOND: Well, they tried - - -

11 JUDGE ABDUS-SALAAM: Warning.

12 MR. DYMOND: They tried to do that, it's  
13 not that they didn't have the ability to do that;  
14 they tried to do that but there simply is nothing  
15 there. And this is the reason, the Navy, in no  
16 instance, prescribed or proscribed asbestos warnings.

17 JUDGE ABDUS-SALAAM: So you're saying there  
18 is no document and what - - - what do you mean they  
19 tried to do that? Is there anything in the record  
20 that showed, or that they argued that there was some  
21 materials or documents that could show what the  
22 warning and procurement practices were, before 1985,  
23 I mean?

24 MR. DYMOND: Not - - - not as a whole, Your  
25 Honor. On maybe a particular piece of equipment, the

1 answer is probably, yes, they could have done that.  
2 But still, it's not something that inferentially  
3 would lead to Admiral Sargent's opinion testimony,  
4 because he acknowledged that there were  
5 specifications in the record that actually directed  
6 vendors like Crane to warn about operations of their  
7 product that could lead to loss of life or personal  
8 injury. That's in the record at page 1509.

9 And when that's the case, and there is simply  
10 not a shred of evidence that would allow him to  
11 inferentially make that, then under Cossano, this court  
12 deems that type of opinion testimony to be worthless as  
13 evidence, and that's why supreme court precluded it on  
14 speculation grounds.

15 And so I would submit that the dissent on that  
16 issue was of no moment, because the argument in the  
17 dissent is that it was relevant; and relevancy is not why  
18 it was precluded.

19 And I think it's also important to keep in mind  
20 that reviewing that, our standard of review is an abuse of  
21 discretion as a matter of law. And we need to leave the  
22 admission of expert opinion to the sound discretion of the  
23 trial court.

24 Now, as far - - - going back to the duty issue,  
25 I want to jump off of something that Judge Garcia was

1 discussing, which is that Crane had been marketing these  
2 components in this exact use for almost ninety years  
3 before selling a single valve to the Navy in this case.

4 And the reason I think that's significant is  
5 because there are considerations in Rastelli that are  
6 ignored by the appellant. And there's three salient  
7 considerations that tell us what this court's starting  
8 point for its analysis was in Rastelli. First, there was  
9 no dispute that that tire manufacturer never marketed the  
10 injurious rim at all, ever. So there's no connection at  
11 all between those products.

12 The second is that there wasn't even an argument  
13 that the tire was defective in any way at the time it was  
14 sold. That's why this court spoke of a sound product.

15 And the third, which flows from the first two  
16 really, is that the only argument advanced in Rastelli is  
17 merely because they could be used together in some  
18 scenario that arbitrarily on some car, that that was  
19 enough to create a - - -

20 JUDGE GARCIA: And counsel, going to the  
21 last point, what is the - - - your record evidence  
22 that Crane was involved in the specifications for  
23 asbestos in the time after they were actively  
24 marketing their own asbestos component?

25 MR. DYMOND: Well, they - - - I think the

1 key is the Navy machinery manual. And this is on  
2 page 3867 of the record, where the Navy actually  
3 thanks Crane for its valuable assistance in setting  
4 forth what are the correct components to use in  
5 particular services for particular pieces of  
6 equipment, and that these were deemed essential to  
7 the economic operation.

8 So Crane certainly played a role in what  
9 the Navy was doing. And consider this from a  
10 practical sense, this was the world's leading  
11 manufacturer of valves. So certainly, the Navy  
12 didn't know more about valve use than Crane did, and  
13 it's natural to say that the Navy is going to adopt  
14 the exact same standardization procedure that Crane  
15 had been using for almost a century. And they did.

16 JUDGE PIGOTT: What did you think of the  
17 O'Neil case?

18 MR. DYMOND: The O'Neil case, at the  
19 outset, was decided under California precedence,  
20 where they follow a true strict liability approach.  
21 And that's different from our jurisprudence where we  
22 follow a negligence base failure to warn approach,  
23 and that's what this court stated in Enright v. Eli  
24 Lilly in 1991, where we don't divorce the concepts of  
25 reasonable care, and even foreseeability from this

1 theory of liability.

2 And under our negligence based approach, which  
3 is entirely distinct from California, and I - - - I would  
4 submit, Judge Pigott, that that standing alone is  
5 sufficient to distinguish what we have from O'Neil, and  
6 even the Washington Supreme Court noted that in the  
7 Braaten decision in footnote 6, where Washington  
8 distinguished its true strict liability approach from  
9 other jurisdictions like New York that employ a negligence  
10 based approach.

11 And we have always held, under our negligence  
12 based approach, that the defect in a product is the lack  
13 of warning or lack of adequate warning for a danger  
14 incident to product use. Now, put that in the context of  
15 this case. When Mr. Dummitt is asked how he was exposed  
16 to asbestos, this begins on page 1168 of the record, and  
17 goes to about 1176. His initial, intuitive response is, I  
18 had to maintain Cranes valves.

19 So the product at issue is the valve; that's the  
20 product he is using. And only then is he asked, well,  
21 what about maintaining the valves caused you to be exposed  
22 to asbestos? And he says, I had to take those lagging  
23 pads off to get to the inside of the valves, then I had to  
24 scrape and wire brush those components, all of which  
25 created asbestos dust.

1                   So the product at issue - - -

2                   JUDGE ABDUS-SALAAM: But with who - - -

3                   which party to this litigation, or was it the Navy,  
4                   that actually determined what the procedure would be  
5                   for - - - for Mr. Dummitt and other technicians to  
6                   change those valves, and what packing or what  
7                   materials they would use? Was that the Navy, or was  
8                   it Crane?

9                   MR. DYMOND: Well, ul - - - I would say  
10                  ultimately, it was the Navy. But Crane certainly had  
11                  a hand in that. And what the Navy did came directly  
12                  from what the leading valve manufacturer in the world  
13                  was doing, which is using replaceable asbestos  
14                  components, and using asbestos insulation on their  
15                  valves to ensure that they functioned as intended in  
16                  the specific services that they were intended to be  
17                  used.

18                  JUDGE RIVERA: Were - - - were there  
19                  numerous non-asbestos options as counsel claims?

20                  MR. DYMOND: The answer is, yes, but not  
21                  for these valves. They were - - - those other ones  
22                  were used for other services. And that comes in each  
23                  and every page, cited by Ms. Halligan, in Cranes'  
24                  catalogs where they do identify other types of  
25                  gaskets, but they say these are appropriate to be

1 used in coal water, or these are appropriate to be  
2 used up to a certain temperature range.

3 That's the distinction here. We shouldn't  
4 disassociate the valve from the intended use of the  
5 valve.

6 JUDGE RIVERA: There was no realistic  
7 alternative at the time that the industry was using  
8 other than asbestos for purposes of the use of the  
9 Navy uses - - -

10 MR. DYMOND: Correct, and that's why we see  
11 not only this use in the Navy, but in the private  
12 sector, and as you'll see in a moment in the Suttner  
13 case, where in that private sector case, we have the  
14 exact same situation.

15 And I think there is a reason why this court has  
16 repeatedly and consistently refused to make bright line  
17 pronouncements in the context of our products liability  
18 law. Because doing so leads to inequitable and harsh  
19 results.

20 And if we really look at this as a fact-  
21 intensive analysis as it should be, what we see here is  
22 kind of a spectrum. And if we look at Rastelli and its  
23 progeny over the last twenty four years, some of those  
24 fact-intensive patterns have fell in the range of no duty,  
25 and some have fell in the range of a duty imposed. And

1           that's how our common law is supposed to work on fact-  
2           specific analyses.

3                         And that actually tells us two very important  
4           things that I would submit are critical to this. The  
5           first is that we can't have a fear of limitless liability  
6           here because we already have in our jurisprudence the  
7           outer boundary set. Rastelli tells us where the outer  
8           limits are, and we have had cases since that have further  
9           narrowed the duty, like even the Surre case from the  
10          Southern District that held Crane didn't know what duty to  
11          warn on the particular facts of that case. We have  
12          already limited this to a controllable degree.

13                         Secondly, which is more of a broader point, when  
14          we survey those cases, Rastelli and its progeny, what we  
15          see is that our judges have gotten it right each and every  
16          time. They've had no difficulty in fixing the duty point  
17          in these types of cases.

18                         And if that's true, why would we be changing  
19          that rule to a more automatic bright line stance that will  
20          lead invariably to harsh results? This court decided a  
21          case in 1976 called Micallef v. Miehle, where it  
22          aggregated a no liability automatic rule in a patent  
23          danger circumstance. And if that's true in a patent  
24          danger circumstance, certainly it's true in latent danger  
25          circumstance.

1                   And just two years ago, in 2004, in Hoover v.  
2                   New Holland, in an opinion written by Justice Abdus-  
3                   Salaam, this court again declined to impose a automatic no  
4                   liability rule in a situation where a component is removed  
5                   from a product, post-sale, but not replaced, because doing  
6                   so, having such an unwavering rigid view, would lessen the  
7                   manufacturer's duty to design safe and effective  
8                   equipment.

9                   And the distinction here is we wouldn't be  
10                  lessening the manufacturer's duty by imposing this  
11                  automatic rule. We would be eviscerating it for all  
12                  circumstances that involve perishable, breakable, flimsy,  
13                  expendable components incorporated into a product by  
14                  design and function. And so I would submit that there is  
15                  simply is no basis to overturn this judgment.

16                  Thank you.

17                  JUDGE PIGOTT: Thank you, Mr. Dymond.

18                  Ms. Halligan.

19                  MS. HALLIGAN: I would like to make a few  
20                  points about Dummitt, if I can, before we turn to  
21                  Suttner, Your Honor.

22                  First of all, Judge Garcia, to follow up on our  
23                  exchange, Crane did not make Cranite; it sold it. There  
24                  were many companies that sold gaskets and packing; Crane  
25                  was among them. There was no evidence that the Navy

1 bought replacement parts from Crane. In fact, Dummitt  
2 testified that the replacement parts that he worked with  
3 were from Garlock; that's at page 5657 of the record.

4 Secondly, with respect to the Navy's specs. I  
5 urge the court to look at the page that Mr. Dymond cited  
6 to you that he claims shows that Crane affected the Navy's  
7 choices. It is a page of acknowledgements from a Navy  
8 manual which thanks thirty eight companies for some  
9 unspecified review or - - - or weighing in on a lengthy  
10 Navy manual. That cannot come close to proving that, and  
11 in fact, at page 267 of the record, defendant's counsel  
12 said that the Navy specified the use of asbestos in his  
13 opening.

14 With regard to this question of whether we need  
15 a bright line rule, and we can come back to this in  
16 Suttner, but if the court is concerned that there may be  
17 circumstances where the use of a harm-causing product is  
18 mechanically necessary, then you can reserve that,  
19 obviously, the court can decide this case however it  
20 wants, but O'Neil reserved that. And it allowed the lower  
21 courts to wrestle with that question on facts that came  
22 before it. Mechanically necessary is a term with much  
23 more definition than required.

24 With respect to the heating presumption.  
25 Justice Friedman lays that out very clearly. I would only

1 add that that his - - - Mr. Sargent's qualifications were  
2 unchallenged, at page 1054 of the record, it's made clear  
3 that he was the head of procurement practices. So of  
4 course he would have relevant non-speculative - - -

5 JUDGE STEIN: But not during the time when  
6 all of this was taking place but at a later time.

7 MS. HALLIGAN: No, but a historical  
8 perspective, which is what he would have testified  
9 to, and as Justice Friedman said, he certainly should  
10 have been allowed to do that.

11 JUDGE ABDUS-SALAAM: But what would that  
12 have been based upon?

13 MS. HALLIGAN: It would have been based  
14 upon his knowledge that he had accumulated during his  
15 time there, which surely would have - - - have  
16 included an understanding of how the Navy operated  
17 before he arrived on the job.

18 JUDGE FAHEY: And the way I understood it  
19 though is he needed to point to a place in the record  
20 where there was a basis for him to offer an opinion  
21 on the condition that was in '77 or whenever the year  
22 was. And I guess if - - - point me where that is in  
23 the record, and I'll look at it.

24 MS. HALLIGAN: Okay. We'll look at that,  
25 Your Honor, but I think the broader point is that he

1 was able, by virtue of his experience as the head of  
2 procurement practices, to testify to what the Navy  
3 did over a course of years, because it was something  
4 that he was familiar with. And where there are  
5 questions about that, that surely would have gone to  
6 the weight of his testimony, but not to whether or  
7 not he was qualified to present it, especially  
8 because it's so compound of the error in giving that  
9 instruction.

10 One last point, my opposing counsel sent you to  
11 Micallef and Hoover. Those cases, of course, involved the  
12 manufacturer's own product. And so whatever lines the  
13 court is drawing there, it's doing with regard to a  
14 product that the manufacturer is able to understand and to  
15 anticipate the safety implications.

16 Thank you.

17 JUDGE PIGOTT: Thank you, Ms. Halligan.

18 Case number 84. Matter of Eighth Judicial  
19 District Asbestos Litigation.

20 Ms. Halligan.

21 MS. HALLIGAN: Your Honor, may it please  
22 the court. I'd like to start by addressing two  
23 points out that are specific to the Suttner case.

24 First of all, in the Suttner case, there  
25 was no evidence whatsoever about the original valves

1 or seals that were sold or provided with the gaskets  
2 that Crane sold.

3 What plaintiff points to is pages of the Crane  
4 catalogs, but that provides no information about what was  
5 sold to GM in the 1930s, and what kind of gaskets might  
6 been included in that.

7 In addition, in the Suttner record itself, as  
8 with the Dummitt record, there is testimony that the  
9 valves did not require asbestos to function. For example,  
10 I would point you to page 588 and 785 of the record there.  
11 So there is no way of even knowing what those valves went  
12 out with.

13 Your Honor, I want to return to your question  
14 about Sage, because Sage really is - - - is a case that  
15 the plaintiffs tried to use to put together some kind of a  
16 theory that there can be liability that rests on  
17 replacement parts.

18 JUDGE FAHEY: Um-hum.

19 MS. HALLIGAN: With respect to Sage itself,  
20 as Finerty confirms today, Sage is a case about a  
21 design defect where the designer was the  
22 manufacturer. It is not a case about holding a  
23 manufacturer liable for a product that it did not  
24 make. It's a case where you have a design defect  
25 that arises from the conjunction of a door and a

1 hanger, and there is harm, a hazard that's created,  
2 regardless of who the fabricator is.

3 So it doesn't stand for the proposition  
4 that this court has done something that it has never  
5 before done, which is what plaintiffs are asking you  
6 to do, which is to hold a manufacturer legally  
7 responsible for a product that it didn't make.

8 Let's set Sage to the side and let me focus, if  
9 I can, on the replacement parts theory. There are three  
10 reasons why that theory does not serve, and in fact,  
11 undermines the policy considerations behind strict  
12 liability.

13 First of all, with replacement parts, the seller  
14 of the product that has some replacement part with it  
15 doesn't control, either the product - - - the replacement  
16 product itself, or the way in which it is manufactured,  
17 and it doesn't control the choice that the purchaser makes  
18 about what kind of replacement part to use.

19 But isn't it in the trial court find that in  
20 this record, "Crane had specified the use of asbestos for  
21 packing and gaskets for its valves. Evidence at trial  
22 also allowed the jury to conclude Crane designed and  
23 marketed a product, which when used for one of its  
24 intended purposes on high pressure steam lines, required  
25 asbestos-containing gaskets and packing."

1                   That's the supreme court - - -

2                   MS. HALLIGAN: Well - - -

3                   JUDGE GARCIA: - - - that's the trial court  
4                   hearing.

5                   MS. HALLIGAN: Your Honor, the only  
6                   question that was put to the jury in Suttner, the  
7                   instruction was, was there a foreseeable or a  
8                   replacement part, and the verdict sheet said, was - -  
9                   - was the valve defective because of a failure to  
10                  warn about dangers of asbestos, gaskets, and packing  
11                  that were used with the valves.

12                  JUDGE GARCIA: But is that an incorrect  
13                  finding that the record contains ample evidence of  
14                  those things?

15                  MS. HALLIGAN: I believe that it is, for  
16                  the reasons that I just laid out, Your Honor, and I  
17                  think if you look at the record cites that - - - that  
18                  I went through for you, you will see why that is.  
19                  That also goes to why these theories are so  
20                  indeterminate, which this court has cautioned  
21                  against. Obviously, this court doesn't sit to find  
22                  facts, but - - -

23                  JUDGE GARCIA: But if that were true, then  
24                  would there be a duty to warn?

25                  MS. HALLIGAN: If it were true - - -

1 JUDGE GARCIA: If these findings were  
2 correct.

3 MS. HALLIGAN: If it was true that the only  
4 way in which a valve - - -

5 JUDGE GARCIA: No, no, not that, but if  
6 it's true what the court found, that "Crane specified  
7 the use of asbestos for packing and gaskets for its  
8 valves," and that "Evidence in trial allowed the jury  
9 to conclude that Crane designed and marketed product  
10 which, when used for its intended purposes on high  
11 pressure steam lines, required asbestos-containing  
12 gaskets and packing." If that's a correct finding,  
13 would there be a duty to warn?

14 MS. HALLIGAN: I understand that to mean  
15 that asbestos is required - - - mechanically required  
16 for use in - - - in - - - with these valves. If that  
17 were a correct finding, then that would be I think a  
18 much closer case as the court - - -

19 JUDGE STEIN: So let's go - - - let's go a  
20 little further than that though. Because I don't  
21 think that's what that trial court's finding is, that  
22 it was required.

23 MS. HALLIGAN: Yes.

24 JUDGE STEIN: I think that it was a - - - a  
25 near certainty, and that, you know, that some of the

1 language that is used is a reasonable certainty, or a  
2 near certainty, and that's not quite the same as  
3 required. So what about that?

4 MS. HALLIGAN: A known certainty - - -

5 JUDGE STEIN: Known certainty.

6 MS. HALLIGAN: - - - is no different than  
7 the knowledge that Goodyear had in Rastelli.  
8 Goodyear knew that the tires that it put out on the  
9 market were being used in some significant number of  
10 cases with defective rims. And so the court has  
11 already confronted that question.

12 JUDGE STEIN: But it wasn't a - - - it  
13 wasn't a near certainty that they would use a  
14 defective rim, they might. In this case, if - - - I  
15 think if you take what the trial court said, it was,  
16 of course, the, you know, GM, or the Navy, or  
17 whoever, was going to use it; there was no question  
18 about it. It may not have been essential - - -

19 MS. HALLIGAN: Your - - -

20 JUDGE STEIN: - - - but that's what was  
21 being promoted, and that's what they were being told  
22 was the best thing, and they - - - and that's what  
23 they were going to use - - -

24 MS. HALLIGAN: Your Honor - - -

25 JUDGE STEIN: Everybody knew it.

1 MS. HALLIGAN: I - - - I don't think that  
2 the - - - that the record supports that at all. The  
3 plant in - - -

4 JUDGE STEIN: No, I know you don't. But if  
5 - - - but that's - - - if that's what the court found  
6 - - -

7 MS. HALLIGAN: Okay, but I do think that  
8 you need to look at what exactly was before the  
9 court. This plant was built in the ni - - - because  
10 - - - because that's what will give definition to the  
11 rule.

12 JUDGE STEIN: I think we're both trying to  
13 get you to answer a somewhat hypothetical question.

14 MS. HALLIGAN: Yes.

15 JUDGE STEIN: It may not be exactly what  
16 you think are the facts here.

17 MS. HALLIGAN: And - - - and what I'm  
18 saying is if - - - if the only way the valves  
19 function is with asbestos, that's a harder question.

20 If it's simply that Crane knows, I would say no  
21 - - - no responsibility there. And the reason is, that  
22 Crane doesn't make that other part, it doesn't control it,  
23 and this court has drawn a clean line, which it has never  
24 transgressed between - - -

25 JUDGE RIVERA: But it - - - but it - - -

1 and I know you have a different view of benefit under  
2 Rastelli, but - - - but if Crane knows with a near  
3 certainty - - -

4 MS. HALLIGAN: Yes.

5 JUDGE RIVERA: - - - that what the industry  
6 is using is these component parts that have asbestos,  
7 and you have designed and so - - - or your client,  
8 I'm sorry, designed, sold, and profits off a valve  
9 that requires those component parts, right, you  
10 didn't - - - your client didn't create a disposable  
11 valve. The whole point that maintains your client in  
12 a competitive market is that the valve can be used  
13 for a long period of time, because component parts  
14 can be found that will be put into the valve, and it  
15 can continue to be used after its get - - - gets  
16 friable.

17 So it - - - when Crane knows that these  
18 component parts are required, and profits off of the fact  
19 that it's created something that can be used in this way,  
20 and Crane knows that the industry use is to have this  
21 asbestos, and for this particular type of valves' use, the  
22 likelihood is pretty high, why not require it's - - - it's  
23 - - - I understand from your side that it's quite an  
24 expensive duty at the end of the day, but as a societal  
25 duty, it's de minimis; it's a warning.

1 I agree with you that we're not talking about  
2 the manufacturer, but in - - - for your client to close  
3 their eyes, and profit off of these component parts that  
4 they know have to be used for the valves to be competitive  
5 and valuable, and not warn, a de minimis burden on you.

6 MS. HALLIGAN: Your Honor, I want to make  
7 sure I understand the hypothetical.

8 If there was evidence, which there is not, that  
9 these valves only operated if they had asbestos in them,  
10 that is a harder case, and that's why the California Court  
11 of - - - the California Supreme Court reserved that  
12 question. But what required means there is mechanically  
13 necessary.

14 So here, you have something sold in the 1930s,  
15 Crane has no idea how it's going to be used in the 1960s,  
16 it has no idea, and there is no evidence about whether it  
17 could well have been shipped out with a non-asbestos-  
18 containing gasket. Crane has no knowledge about that.

19 And so, not only are you imposing a duty to warn  
20 based on a product that Crane didn't make, but based on  
21 the possibility that it could be used with someone else's  
22 harm causing product, that is extraordinarily broad, it's  
23 extraordinarily difficult to define, and - - - and - - -

24 JUDGE RIVERA: What if the likelihood of  
25 the component having asbestos is ninety nine percent?

1 MS. HALLIGAN: Certainly - - - certainly  
2 there is no evidence of that in - - - in Suttner - -  
3 -

4 JUDGE RIVERA: I know that; that wasn't my  
5 question.

6 MS. HALLIGAN: And - - - and what I would  
7 say to that is, the court should - - - should draw  
8 the same line it did in Rastelli, which is to say  
9 that knowledge is not relevant, because knowledge  
10 does not equate to control.

11 It doesn't allow for the court - - - for  
12 the - - - for the manufacturer to internalize those  
13 costs, it doesn't allow them to treat them as a cost  
14 of business and insure against them, it also creates  
15 a danger the courts warned against, which is over-  
16 warning, excessive warnings, and most importantly, it  
17 dilutes, and this is in response to your concerns as  
18 well, Judge Garcia, it dilutes the incentive on the  
19 entity where it should be placed, which is on the  
20 manufacturer of the harm-causing product.

21 JUDGE RIVERA: No, no, they could be liable  
22 too; they could be liable too.

23 MS. HALLIGAN: Your Honor, the court - - -

24 JUDGE RIVERA: Isn't that your liability,  
25 or your client's liability for failing to warn?

1 MS. HALLIGAN: The court has been very  
2 clear over the decades that it draws these lines of  
3 liability very carefully to place responsibility in a  
4 way that will enhance public safety. When you  
5 diffuse that, as such a rule would do, you are  
6 necessarily diluting that, and the manufacturer of  
7 the harm-causing product may well say, gee, I don't  
8 have to worry about it because there's going to be  
9 another pocket at the table.

10 I just want to go back if I can, Your Honor, for  
11 a moment, I see my light is on, to Sage.

12 That rule doesn't - - - the reason that the  
13 replacements rule itself, setting Sage aside, doesn't make  
14 sense is that the manufacturer there, not only has no  
15 control over the way in which a replacement part is made,  
16 it can't assess the safety of it, it can't affect the  
17 safety - - -

18 JUDGE FAHEY: You're talking about in Sage  
19 you can't.

20 MS. HALLIGAN: Well, I'm saying setting  
21 Sage aside and looking at a replacement parts theory,  
22 or an original parts theory, which is what the  
23 Appellate Division in the Fourth Department seems to  
24 have - - - have proposed. Both Sage - - -

25 JUDGE FAHEY: I'm not sure about that. I

1 thought it kind of distinguished (indiscernible)  
2 case, I think I was on that with Holdsworth  
3 afterwards - - -

4 MS. HALLIGAN: Well, that's the insulation,  
5 and that's why they're - - - they - - - there is no  
6 insulation in Suttner, although in Dummitt, they do  
7 actually hold Crane liable for the insulation there.

8 But here, you have an intervening forty years.  
9 There are all kinds of factors that can go into what  
10 selection of a replacement part the purchaser makes.

11 Just to look at the Navy, for example, I realize  
12 this is not the Navy case, but the durability, whether  
13 it's lightweight, fireproof, the Navy can buy a lot of it,  
14 all of those are factors that the manufacturer has no  
15 control over, and no insight into.

16 JUDGE FAHEY: Just - - - just one - - - go  
17 ahead, Judge.

18 JUDGE ABDUS-SALAAM: It's all right, you  
19 can follow - - -

20 JUDGE FAHEY: I just - - -

21 JUDGE ABDUS-SALAAM: I just have a - - -

22 JUDGE FAHEY: I have a - - - just a side -  
23 - - side issue. I'm wondering about the remedy you  
24 are requesting. In Suttner, are you just - - - it  
25 seems like it's all or nothing, you're either saying

1 a legal duty or not; are you requesting a new trial?

2 MS. HALLIGAN: Well, we think that - - -  
3 that - - -

4 JUDGE FAHEY: I just - - - just want to  
5 clarify for myself - - -

6 MS. HALLIGAN: If you - - -

7 JUDGE FAHEY: - - - kind of a - - -

8 MS. HALLIGAN: If you were to set forth a  
9 different standard - - -

10 JUDGE FAHEY: Um-hum.

11 MS. HALLIGAN: - - - then we should be  
12 given an opportunity to try that case under whatever  
13 standard you set forth, as opposed to the  
14 foreseeability standard that it was tried under.

15 And just to - - - I see my light is on, just to  
16 finish that - - -

17 JUDGE ABDUS-SALAAM: One more point,  
18 counsel, I understand - - - do you agree or do you  
19 disagree that this - - - even if the foreseeability  
20 standard was error, why wasn't it harmless?

21 MS. HALLIGAN: Because foreseeability is as  
22 - - - as low a bar as there can possibly be. And  
23 it's one that this court has absolutely said cannot  
24 give rise to a duty repeatedly. And so when that's  
25 the instruction, then that can't be - - - that can't

1 be a harmless - - - a harmless error.

2 Just to finish our exchange, if I can, both  
3 state high courts, both federal circuit courts that have  
4 looked at that replacement parts theory have rejected it,  
5 O'Neil, Braaten, Lindstrom, and Baughman. And we'd ask  
6 the court to reject it for the same reasons.

7 JUDGE FAHEY: Thank you.

8 JUDGE PIGOTT: Thank you, Ms. Halligan.

9 Mr. Lipsitz, good afternoon, sir.

10 MR. LIPSITZ: May it please the - - -  
11 please the court, good afternoon, Your Honor.

12 I think I'd like to begin briefly by speaking  
13 about warnings, and then talk in a little bit more detail  
14 about the facts in the Suttner case.

15 With regard to warnings, I think it's important  
16 to note that Crane does not argue that placing a warning  
17 on its steam valves would constitute an infeasible or  
18 onerous burden. Nor does it argue that a warning would  
19 have added nothing to Mr. Suttner's appreciation of the  
20 dangers of working with the valves because of the  
21 interaction between the valves and the eventually baked-on  
22 asbestos that had to be scraped off.

23 This is really quite important when you get down  
24 into the weeds because Crane was in at least as good a  
25 position, and possibly in a superior position, to warn

1 about the hazards of performing routine maintenance on its  
2 valves. Crane should have warned Mr. Suttner and others  
3 in the same position before their first encounters with  
4 friable asbestos materials, in connection with the regular  
5 routine maintenance of Crane's valves.

6 A warning inscribed on a metal plate before the  
7 first inevitable encounter was incumbent and just as  
8 important - - -

9 JUDGE ABDUS-SALAAM: Why isn't that  
10 incumbent on the manufacturer of the, you know - - -  
11 Crane's valve is essentially a product that is - - -  
12 well, for a lack of a better word, the good product,  
13 and then the - - - attaching it to the asbestos,  
14 which is the bad part. So why wouldn't that be on  
15 the manufacturer?

16 MR. LIPSITZ: Two responses, Your Honor.  
17 First of all, Crane's product was not the good  
18 product; it was a product that was defective at the  
19 time of sale for failure to put a warning on it about  
20 the intended and normal uses of the product in which  
21 you would encounter friable asbestos.

22 What the next your answer is, Your Honor, of  
23 course there's a duty on the manufacturer of the  
24 replacement component parts. In this case, sheet gasket  
25 material, a flap flexible material contained of seventy

1 five to eighty five percent asbestos in a rubber binder.

2 But if you look at the mechanics of what is  
3 happening here, the initial first encounter is going to be  
4 opening up the valve, taking out the old baked-on spent  
5 asbestos containing gasket and packing, that's where  
6 you're going to have the exposure to the airborne dust.

7 And if you - - - if you just tell the industry,  
8 only - - - only put the warning on the replacement  
9 component parts, you're going to be having a mechanic look  
10 at the - - - at the valve, the replacement component  
11 parts, he's going to be told open up the valve, you got to  
12 maintain it, you got to pull out the old gasket, you got  
13 to pull out the old packing, don't worry about being, you  
14 know, breathing in a lot of dust, but here is what you're  
15 going to put in when you're done.

16 And he is going to look at the product that he  
17 is going to put in when he is done, and it looks benign.  
18 It's - - - it's flexible, it's pliable, it's not friable,  
19 it's not breaking apart, it's not causing dust, it's only  
20 after you put it in and then take it out.

21 And the initial user of these valves in 1936,  
22 when the plant was built, and by the way, that's when  
23 Crane said in its - - - its literature, the Cranite, its  
24 product, and by the way, as far as it not having made  
25 Cranite, it doesn't matter, it branded Cranite, it sold

1 Cranite, it was Crane's product. But that initial user,  
2 he is ex - - - he is exposed to the as - - - friable  
3 asbestos in the same way as the next user, and the next  
4 user, and the next user; it's a routine maintenance  
5 operation.

6 So of course both the valve manufacturer and the  
7 manufacturer of the replacement part have a legal  
8 responsibility to warn, and a warning by one would not  
9 relieve the duty of the other.

10 Now, as far as the facts of the case are  
11 concerned, because - - -

12 JUDGE FAHEY: Before you go to the facts,  
13 Mr. Lipsitz - - -

14 MR. LIPSITZ: Yes.

15 JUDGE FAHEY: - - - just - - - just on the  
16 jury charge itself, on duty, so let's - - - since  
17 you're on that I just want to ask a question about  
18 that. Between this case, the Suttner case, and the  
19 Dummitt case, have you had a chance to really compare  
20 the charge in Suttner to the charge in Dummitt on the  
21 manufacturer's duty? Did you look at those two?

22 MR. LIPSITZ: Your Honor, my understanding  
23 is that they - - - both charges were essentially  
24 derived from Rastelli and Liriano, in terms of the,  
25 you know, the foreseeable use of the product. And I

1 don't know the - - - I don't have a word by word  
2 comparison, but the product here, I mean, Crane would  
3 like Your Honors to look at the valve and say, well,  
4 there is a valve, and that's a product, and then  
5 there are these replacement component parts, and  
6 that's a separate product.

7 But to look at them in that conceptual way is  
8 really very artificial, because you can't really separate  
9 the pieces from the use. And we've contended that there  
10 is ample evidence in the record which was remarked upon,  
11 found by Judge Lane, that the gasket - - - that the valves  
12 were sold with original asbestos containing gaskets and  
13 packing, we go back for that to Crane's statement that all  
14 of its steam valves were used for intended use with  
15 Cranite.

16 JUDGE PIGOTT: How long - - - how long  
17 between replacements?

18 MR. LIPSITZ: I, you know, mister - - - and  
19 for Mr. Suttner's testimony, he was constantly going  
20 from one valve to another. But I don't - - - you  
21 can't say whether it was six months to replace, or a  
22 year, whenever they would start to leak, there would  
23 be a replacement.

24 JUDGE PIGOTT: I just wondered, I think  
25 there was some allusions in one of the briefs about

1 the fact that if somebody is smoking, and they're  
2 trying to stop, and they're smoking Marlboros, does  
3 Malboro have to warn them that if they start smoking  
4 Camels they don't help themselves? I mean, where  
5 does the foreseeability, you know, of this stuff  
6 happen?

7 MR. LIPSITZ: Well, it's a normal and  
8 intended use of these Crane valves sold for steam  
9 service that they would be used with asbestos  
10 containing component parts. And that's a uniform  
11 product.

12 If you look at Rastelli, about the third or  
13 fourth sentence in, it says, multi-piece tire - - -  
14 tire rims are not a uniform product. There were a  
15 whole variety of manufacturers of multi piece rims,  
16 and - - - and you couldn't expect Goodyear to become  
17 educated and to test products that it didn't make.  
18 But here, you have Crane, it sold a product with  
19 asbestos containing gaskets and packing, very  
20 familiar with that product, it had been selling that  
21 product from - - - beginning in 1855, and all the way  
22 through about 1985.

23 JUDGE PIGOTT: Are you suggesting that it's  
24 - - - it's a closed society then, within which we are  
25 operating in terms of warnings? Because obviously,

1           you know, Goodyear is selling tires all over the  
2           nation. Here, you're talking about selling to large  
3           manufacturers.

4                       MR. LIPSITZ: Well, it's a completely  
5           different market. And it's - - - it has a different  
6           - - - the industry has a different definition to it,  
7           and a different (indiscernible).

8                       JUDGE PIGOTT: Is the standard different  
9           then, in your view?

10                      MR. LIPSITZ: Pardon?

11                      JUDGE PIGOTT: Is the standard different  
12           then, in your view?

13                      MR. LIPSITZ: I wouldn't say the standard  
14           is different, the circumstances are different.

15                      JUDGE PIGOTT: Okay.

16                      MR. LIPSITZ: Certainly.

17                      But let me just go back to Crane's brief where  
18           they repeatedly say that there was no evidence that Crane  
19           Company valves required the asbestos components of any - -  
20           - of any kind to operate.

21                      You know, it - - - it's important that we set  
22           the record straight about that because asbestos containing  
23           pa - - - you know, gaskets and packing were component  
24           parts of Crane valves intended for steam service as  
25           originally sold. Crane's interrogatory answers entered

1 into evidence prove this, that's at record 40 - - - 432  
2 through 433. Crane's expert witness agreed with this,  
3 that's record 115 - - - sorry, 1115, as to Crane's  
4 corporate representative, and that's record 5309.

5 According to Crane's product literature, "An  
6 asbestos-containing product called Cranite used for  
7 packing and gaskets on its valves was used on all Crane  
8 valves for high pressure steam." That's record 3572.

9 And Mr. Suttner testified, and he got - - - he  
10 began doing this work in the early sixties, that the  
11 packing he used when working on Crane steam valves  
12 contained asbestos, because asbestos packing and gaskets  
13 were all he ever used at GM, and that's at General Motors,  
14 and the only kind they had. And that's record 882.

15 The Crane catalogs throughout the thirties,  
16 forties, and fifties, and - - - and into 1960, promoted  
17 Cranite asbestos packing for high pressure steam service,  
18 and they are in multiple cites, that's 4784, 6019, 6039,  
19 3806, 4278, 5397, 5569 - - -

20 JUDGE ABDUS-SALAAM: Does all that just go  
21 to Crane's knowledge that these valves would be used  
22 with asbestos, or does it go to something else?

23 MR. LIPSITZ: Well, it goes to Crane's - -  
24 - not just knowledge, not simply the knowledge, but I  
25 would say it approaches a certainty, in the sense

1           that this was the intended and the normal use of  
2           Crane's valves sold for steam service.

3                         But the really interesting thing about the  
4           record in Suttner, is that the testimony of the experts,  
5           and there were experts - - - there were a couple of  
6           experts that testified for the plaintiff, there was an  
7           expert that testified for the defendant, and there was a  
8           corporate representative that testified for the defendant.

9                         Mr. Hatfield, who was a material scientist,  
10          testified for the plaintiff that once you get steam up to  
11          300 or 400 degrees, you're certainly going to use asbestos  
12          gaskets. That's at record 574 through - - - through 75.

13                        Mr. Hatfield testified that this would be the  
14          case until about 1985, because that's when substitute  
15          materials were available on the market that would take the  
16          place of asbestos. He said it was beyond question that  
17          during the relevant period, asbestos would be used for  
18          steam service.

19                        Crane's interrogatory answers state that  
20          asbestos was not removed as a component from its  
21          industrial valves until the mid 1980s. That's at record  
22          5201.

23                        JUDGE PIGOTT: So your - - - your argument  
24          is, essentially, it doesn't make any difference  
25          whether it's foreseeable, whether there's component

1 parts whether - - - you know, it's theirs, theirs,  
2 theirs.

3 MR. LIPSITZ: Well, it's theirs, theirs,  
4 theirs, but it's also the normal and intended use of  
5 their product. I mean, they - - - they hang their  
6 whole hat, entire hat really, on some testimony taken  
7 on cross-examination from Mr. Hatfield, at page 5 - -  
8 - I believe it's 588, through 589. And this is  
9 really quite interesting because it is a house of  
10 cards; the defense on the facts is a house of cards.

11 They ask, on cross-examination, Mr. Hatfield,  
12 "Today," this - - - the trial took place in 2012. "Today,  
13 if we took one of those valves that was in service in a  
14 steam line, and it had an asbestos flange gasket on both  
15 sides, okay, asbestos spiral gasket, and an asbestos piece  
16 of steam packing, if we took that same valve and put it in  
17 a steam line today, would we need asbestos to make it  
18 work?"

19 And he says, "No." Of course he says no. It  
20 wasn't required after 1985. Once some - - - once other  
21 materials were available, it could function without  
22 asbestos.

23 JUDGE RIVERA: You said GM had no other  
24 alternatives until after 1985?

25 MR. LIPSITZ: For - - - for valves that

1 were for steam service, there was no other  
2 alternative.

3 JUDGE RIVERA: No alternative.

4 MR. LIPSITZ: And then they go on and ask  
5 him, "Let me ask you this, I understand your opinion  
6 on this, but I just want to explore it a little bit.  
7 If we took the same valve," and this a valve for  
8 steam service, "all right, in the plant, in a power  
9 plant, or GM plant in the 1960s, asbestos gaskets on  
10 both ends, asbestos bonnet, asbestos packing in a  
11 steam line, if we took it and moved it to an ambient  
12 water line, in your opinion, would we need asbestos  
13 to make it work?" Answer, "No."

14 And everywhere in the brief that Crane submitted  
15 to this court, where it says that you don't need asbestos  
16 containing gaskets and packing in order for their - - -  
17 their steam service valves to function, that's what they  
18 cite. They cite those two pages. And they - - -

19 JUDGE ABDUS-SALAAM: Was it - - - was it,  
20 I'm sorry, counsel, was it that there were no  
21 alternatives or the alternatives were too costly?

22 MR. LIPSITZ: According to Crane, there  
23 were no alternatives. They looked around, they did  
24 some - - - some - - - attempted to find an  
25 alternative material, they began some point in the

1           seventies trying to do that, this is in their  
2           interrogatory answers. And finally, it wasn't until  
3           1985 that they were able to - - - to use something  
4           else other than asbestos for their steam valves.

5                     I can probably give you a cite to that. "Crane  
6           had difficulty locating suitable substitute alternative -  
7           - - substitute materials until the mid - - - mid 1980s."  
8           That's in the record at 3517 and at 5415.

9                     But I think if we - - - if - - - and I realize  
10          that I'm probably beginning to go a little bit overboard  
11          with the facts, but I think there are important. I think  
12          if you - - - if you go and you look at the summation that  
13          Crane's lawyer made to the jury, and in that summation - -  
14          - and again, this is - - - the very crux of Crane's case  
15          at trial was, our valves did not need asbestos containing  
16          packing and gaskets to work.

17                    I see my light is on, and I'll just do this  
18          quickly. In summation, Crane's lawyer said to the jury,  
19          "You were being asked to find that Crane knew that  
20          asbestos containing materials were going to be used at GM  
21          with its valves," record at 1275. "You were going to be  
22          asked that - - - to determine whether the valves required  
23          asbestos gaskets, true or not? You're going to have - - -  
24          you know the experts disagree, so you have to determine  
25          the facts from the evidence."

1           Well, the jury determined the facts from the  
2 evidence, agreed with the plaintiff, and even - - - it  
3 even gets better. Crane's lawyer even told the jury, "If  
4 you view the evidence in a way that lets you find Crane at  
5 fault, then you should also assign shares to the other  
6 equipment manufacturers." Other manufacturers of valves  
7 and pumps.

8           The jury did view the evidence in a way that  
9 found Crane at fault, and the jury was consistent in  
10 finding the other equipment manufacturers at fault as  
11 well.

12           I think my time is up.

13           JUDGE PIGOTT: Thank you, Mr. Lipsitz.

14           MR. LIPSITZ: Thank you, Your Honor.

15           JUDGE PIGOTT: Ms. Halligan.

16           MS. HALLIGAN: Three points if I can, Your  
17 Honor.

18           First of all, Judge Rivera, your questions about  
19 whether it was reasonable to warn. Those questions go to  
20 whether there would have been a breach of a duty of  
21 reasonableness, as about whether or not there was in fact  
22 a failure; it doesn't go to the antecedent question of  
23 whether there was a duty.

24           Secondly, with regard to the evidence at trial,  
25 very briefly. There is no evidence that Mr. Suttner

1 encountered Cranite, which would have been the gasket or  
2 packing.

3 With respect to the statement about what was  
4 available. What's available on the market is something  
5 that a manufacturer has no control over, it shouldn't be a  
6 basis for strict liability.

7 Third, with respect to the rule that the court  
8 articulates here. Judge Pigott, you're absolutely right  
9 in suggesting that there has to be one standard here.  
10 There can't be an asbestos specific rule, and this court  
11 has so held in a range of cases. There may be hard cases  
12 at the margins that present circumstances, that the record  
13 does not here, as the Supreme Court in California held.

14 Mechanically required use, for example, this  
15 court can confront them when they arise. But with this  
16 case, duty runs from a specific product to a specific  
17 plaintiff. That's the way this court has always viewed  
18 tort law for good reason, because it's that line that  
19 allows for the incentives of strict liability to be  
20 satisfied.

21 The only harm-causing product here that could  
22 possibly have come from my client is in the Dummitt case,  
23 the original gaskets and packing. Those were long gone;  
24 neither of the plaintiffs were exposed to them.

25 Duty cannot run in the air from those parts to

1           some plaintiff that encounters the valve a couple of  
2           decades later. Again, Enright, Pulka, Holdampf, they all  
3           hold that, and they draw a line there. We would ask you  
4           to - - -

5                         JUDGE RIVERA: Doesn't that just cut  
6           against ever having a duty to warn, period?

7                         MS. HALLIGAN: Ab - - -

8                         JUDGE RIVERA: Even for the manufacturer.

9                         MS. HALLIGAN: Absolutely not because that  
10          manufacturer has a duty for as long as that  
11          individual is exposed to that product, and that's not  
12          what's presented here.

13                        So we ask you not to depart from what the -  
14          - - has been the mainstay of this court's strict  
15          liability precedence for decades, which is because  
16          control over the manufacturer of a product allows for  
17          the promotion of public safety, that's what you need  
18          to have.

19                        The rules that have been proposed here  
20          undermine that, they dilute responsibility on the  
21          company that makes the dangerous product, they raise  
22          a lot of concerns about limitless liability that will  
23          spill far out of Crane and asbestos litigation, and  
24          they will lead to the kinds of excessive and  
25          inefficient warnings that this court cautioned

1           against in Liriano.

2                       So we would ask you to reaffirm Rastelli,  
3           and to be clear that where there is not control over  
4           the production, and where a company didn't put a  
5           product into the stream of commerce, that there is no  
6           obligation that arises - - -

7                       JUDGE RIVERA:   What would have made  
8           warnings from Crane unnecessary?   Why - - - why would  
9           that have been unnecessary?

10                      MS. HALLIGAN:   What would have made warning  
11           - - -

12                      JUDGE RIVERA:   Unnecessary, I think you  
13           said, this will lead to unnecessary warning.   What  
14           would make - - -

15                      MS. HALLIGAN:   A rule that - - -

16                      JUDGE RIVERA:   - - - a rule unnecessary  
17           from the Crane - - -

18                      MS. HALLIGAN:   A rule that diffuses  
19           responsibility among various companies, not just the  
20           manufacturer who is in the best position to  
21           understand the product, will mean that numerous  
22           companies have an obligation to warn.   Those warnings  
23           might be conflicting, but as the court said in  
24           Liriano, excessive warnings have a cost; they are not  
25           cost free, and they will drive up costs of products

1 across the board. So an obligation on the manu - - -

2 JUDGE RIVERA: What's conflict - - - what's  
3 the potential for conflicting warnings - - -

4 MS. HALLIGAN: There could - - -

5 JUDGE RIVERA: - - - here, aren't you just  
6 giving out warnings that there is asbestos in - - -  
7 in the valve and in these component parts, and there  
8 maybe am - - - they go into the air?

9 MS. HALLIGAN: Your Honor, it may well be  
10 that the adequacy of a warning would be challenged.  
11 And if you are looking at what kind of a warning you  
12 want to put out there, once you have an obligation,  
13 you may decide you may need to be more specific. And  
14 of course, asbestos comes in very different types and  
15 concentrations that pose different kinds of risks.

16 So there's every reason in this case, but  
17 also in countless other cases, to anticipate that you  
18 might have warnings with different substance. I see  
19 my time is up, thank you.

20 JUDGE PIGOTT: Thank you, Ms. Halligan.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York City Asbestos Litigation (Dummit v. A.W. Chesterton Company), No. 83, and Matter of Eight Judicial District Asbestos Litigation (Suttner v. A.W. Chesterton Company), No. 84, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

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