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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

EUGENE W. ROLLIN, JR., et al., Plaintiffs and Appellants, v. FOSTER WHEELER, LLC et al., Defendants and Respondents.	B209935 (Los Angeles County Super. Ct. No. BC372275)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard L. Fruin, Jr., Judge. Reversed and remanded for new trial.

Waters, Kraus & Paul, Paul C. Cook and Michael B. Gurien for Plaintiffs and Appellants.

Sedgwick, Detert, Moran & Arnold, Frederick D. Baker and Kelly Savage Day; Brydon, Hugo & Parker, John R. Brydon and James C. Parker for Defendant and Respondent Foster Wheeler, LLC.

Morgan Lewis & Bockius, Joseph Durry, P. Daffodil Tyminski, and John M. Boylston for Defendant and Respondent Yarway Corporation.

Walsworth, Franklin, Bevins & McCall, Thomas G. Scully and Elizabeth L. Huynh for Defendant and Respondent Elliott Company.

Plaintiffs and appellants Eugene W. Rollin, Jr. (Rollin) and Elizabeth Rollin (collectively, plaintiffs)[1] appeal from the judgment entered in favor of defendants and respondents Foster Wheeler, LLC (Foster Wheeler), Yarway Corporation (Yarway), and Elliott Company (Elliott) (collectively, defendants) after the trial court granted defendants' motions for judgment notwithstanding the verdict (JNOV) and, in the alternative, their motions for a new trial.[2] Rollin, who suffers from malignant pleural mesothelioma, claimed to have been exposed to asbestos fibers released from equipment manufactured by defendants during his employment at Mobil Oil Company's (Mobil) Torrance refinery. After a three-week trial, the jury returned a verdict in favor of plaintiffs on their claims for strict liability design defect, strict liability failure to warn, and negligence.

One month after the jury returned its verdict, the California Supreme Court issued its decision in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56 (*Johnson*), ruling that the "sophisticated user defense" applied to relieve a manufacturer of the duty to warn of a product's potential hazards when the user knew or should have known of those hazards. Defendants filed motions for JNOV and a new trial on various grounds, including that the sophisticated user defense barred plaintiffs' causes of action and that the jury should have been instructed regarding that defense. The trial court granted the motions for JNOV, concluding that all of plaintiffs' causes of action were barred because Rollin's employer, Mobil, was a sophisticated user of asbestos products. The trial court reasoned that there had been sufficient evidence that Mobil was a knowledgeable user of asbestos-containing products during the period that Rollin was exposed to asbestos as a Mobil employee, obviating the need to provide any asbestos warnings. The trial court also found that all of plaintiffs' causes of action, including the design defect claim, were premised on a failure to warn.

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[1] By order dated May 10, 2012, Elizabeth Rollin was substituted in place of Eugene W. Rollin, Jr. who died during the pendency of the appeal.

[2] Following oral argument we received notice that the case settled as to defendants and respondents Yarway and Elliott.

The trial court in the alternative granted defendants' motions for a new trial, "to be effective only if the court's grant on the JNOV motion is overturned." The court granted the new trial motions on the ground that its failure to instruct the jury on the sophisticated user defense after defendants requested such instruction was an error in law. Judgment was subsequently entered in favor of defendants, and this appeal followed.

While this appeal was pending, the California Supreme Court issued its decision in *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335 (*O'Neil*), in which the court held "that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." (*Id.* at p. 342.)[3] The Supreme Court in *O'Neil* undertook a comprehensive analysis of strict liability principles for three types of product defects -- manufacturing defects, design defects, and failure to warn. The Supreme Court also applied these principles to asbestos-containing components and insulation used with the *O'Neil* defendants' products, but not manufactured or distributed by any of them. (*Ibid*.)

We hold that the sophisticated user defense does not apply to the circumstances presented in the instant case, and that the trial court erred by granting defendants' motions for JNOV based on that defense. We therefore reverse the judgment. We affirm the trial court's alternative order granting the motions for a new trial, but not for the reasons stated by the trial court. Rather, we do so to enable the parties to address the issues and legal principles framed by the Supreme Court in *O'Neil*, as those principles are applicable here.

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3 We requested and received additional briefing from the parties as to how the Supreme Court's holding in *O'Neil* affected the issues presented in this appeal.

FACTUAL BACKGROUND

1. Foster Wheeler

Foster Wheeler makes industrial boilers. In 1965, Foster Wheeler sold Mobil a single industrial boiler for use in the fluid catalytic cracker (FCC) unit of Mobil's Torrance refinery. The boiler sold to Mobil was designed in accordance with Mobil's general specifications, unless such specifications were not specific to the particular unit, in which case the parties agreed that Foster Wheeler's standard procedures and design bases would apply.

The Foster Wheeler boiler was delivered to Mobil in 1966. The boiler was configured with one steam drum and one water drum, which contained four manhole covers sealed with asbestos gaskets. Asbestos-containing insulation also covered portions of the boiler. Foster Wheeler did not manufacture the asbestos gaskets or the asbestos-containing insulation. Contract specifications provided by Foster Wheeler to Mobil stated that the asbestos insulation used on the boiler was to be furnished and installed by Foster Wheeler's Fired Heater Division. However, later contract documents indicated that Mobil was to supply the asbestos insulation for the boiler and that an entity named Fiberglass Engineering & Supply Division installed the insulation.

2. Rollin's work at Mobil

Rollin began working at Mobil's Torrance refinery in December 1970. Sometime between late 1972 and early 1973, he became a stillsman in the FCC unit, where he worked until the mid-1980's. Rollin retired in 1997.

The FCC was a large unit that contained many different pieces of equipment. As a stillsman, Rollin was responsible for the FCC's operation, including oversight of work performed by others on boilers, valves, turbines, and other equipment.

Boilers in the FCC, including a Foster Wheeler boiler, were insulated on the outside. Rollin was present when the insulation was disturbed during work on the boilers, releasing dust into the air. Because the boilers were under positive internal pressure, dust from inside the boilers was blown out during maintenance. Rollin breathed this dust.

Valves in the FCC were also insulated, and the insulation released dust when it was disturbed. Rollin was present when valve insulation was removed and breathed the dust generated while this occurred. Rollin was also present when gaskets and internal packing were removed and replaced from valves in the FCC and he breathed the dust generated from the gasket and packing materials.

Turbines in the FCC were insulated, and Rollin was present when the insulation was disturbed and when turbine gaskets were replaced. He breathed the dust released during these procedures.

There were no asbestos-related warnings on equipment at the refinery, and Rollin received no information from Mobil regarding asbestos at the refinery, or the need to use respiratory protection until the mid-1980's, when Mobil instituted an asbestos program.

PROCEDURAL BACKGROUND

1. Trial and verdict

Plaintiffs brought the instant action in June 2007 against defendants and others for negligence, strict liability, false representation, intentional failure to warn, and loss of consortium. The case proceeded to trial. Before the jury was instructed, defendants requested a jury instruction concerning the sophisticated user doctrine.[4] The trial court denied that request.

The jury subsequently returned a verdict finding that Foster Wheeler's boiler, Elliott's turbine, and Yarway's valves failed to perform as safely as an ordinary consumer would have expected, and that the boiler, turbine and valves were defective because the defendants failed to provide an asbestos warning. The jury awarded plaintiffs economic damages of $440,000, Rollin's noneconomic damages of $6 million, and Mrs. Rollin's

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[4] The specific instruction requested was as follows: "A manufacturer has no duty to warn the user of a product who knows or should know of a potential product danger. There's no duty to give warning to one in a particular trade or profession against a danger generally known to that trade or profession. If you find that risk of asbestos [was] generally known to [Rollin], to others in his trade or to his employers, [Mobil] or other contractors/employers at the [Mobil] refinery, then you must find the defendant had no duty to provide warnings about those risks to [Rollin] or to [Mobil] or to other contractors/employers at [the Mobil refinery]."

noneconomic damages of $3.5 million. The jury found five percent of the fault was attributable to Foster Wheeler, and two percent attributable each to Elliott and Yarway. Judgment was entered against Foster Wheeler in the amount of $475,000.

2. Motion for JNOV and new trial

In its motion for JNOV, Foster Wheeler argued that plaintiffs' claims were barred under the sophisticated user doctrine, and the evidence of Rollin's exposure to asbestos-containing products used in connection with Foster Wheeler's boiler was insufficient to support an allocation of five percent fault to Foster Wheeler.

Elliott brought both a motion for JNOV, or in the alternative, for a new trial in which it argued that the trial court erred by not instructing the jury on the sophisticated user defense, that there was insufficient evidence to support the jury's finding that any asbestos-containing insulation was used in connection with an Elliott turbine that was sold, supplied, or specified by Elliott, and that a new trial was warranted pursuant to Code of Civil Procedure section 657.

The trial court granted the motions for JNOV on the ground that the sophisticated user defense barred plaintiffs' claims, which were all premised on defendants' failure to warn of asbestos hazards associated with their products. The court reasoned that the documentary evidence showed that Mobil was aware, as early as May 1972, of the Occupational Health & Safety Administration (OSHA) regulations requiring Mobil as an employer to protect its workers who were exposed to asbestos hazards. The trial court concluded that this evidence was sufficient to establish that Mobil was a sophisticated user of asbestos-containing products during the period that Rollin was exposed to asbestos as an employee in Mobil's FCC unit and that under *Johnson* defendants had no duty to warn Mobil of the asbestos hazards associated with their products. The court further concluded that Mobil's knowledge about the OSHA regulations obviated the need for defendants to present any additional evidence that Mobil was a sophisticated user.

The trial court also granted Elliott's motion for a new trial, to be effective only if the court's ruling on the motion for JNOV was overturned. The court reasoned that its failure to instruct the jury on the sophisticated user defense was an error of law

warranting a new trial. The trial court noted that its ruling granting Elliott's motion for a new trial inured to the benefit of Foster Wheeler and Yarway as well.

The trial court thereafter vacated the judgment on the jury's verdict in favor of plaintiffs and entered judgment in favor of defendants. The court awarded $15,961.27 for Foster Wheeler as costs. Plaintiffs appealed from the judgment and the trial court's orders.

DISCUSSION

I. Standard of Review

"'"A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. . . ." [Citation.]'" (*Clemmer v. Hartford Ins. Co*. (1978) 22 Cal.3d 865, 878.) When the motion for JNOV raises a legal issue, we review the trial court's ruling under a de novo standard of review. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

We review the trial court's ruling on a motion for a new trial for abuse of discretion. (*Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1800.)

II. JNOV--Sophisticated User Defense

Manufacturers generally have a duty to warn consumers about the hazards inherent in their products, and can be held strictly liable for injuries caused by their failure to warn. (*Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, 1003.) The sophisticated user defense relieves a manufacturer from its usual obligation to warn product users about the product's potential hazards. The defense and its underlying rationale has been explained by our Supreme Court as follows: "Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. [Citation.] Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause.

[Citation.] The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' [Citation.] This is because the user's knowledge of the dangers is the equivalent of prior notice. [Citation.]" (*Johnson, supra*, 43 Cal.4th at p. 65.)

In *Johnson*, the Supreme Court applied the sophisticated user defense to bar an action by a trained and certified heating, ventilation, and air conditioning (HVAC) technician asserting causes of action for negligence, strict liability, failure to warn, strict liability design defect, and breach of implied warranties based on the defendant's alleged failure to warn him of the potential hazards of exposure to R-22, a refrigerant commonly used in large air conditioning systems. (*Johnson, supra*, 43 Cal.4th at p. 61.) The court in *Johnson* found that as an HVAC technician, the plaintiff knew or should have known about the hazards of R-22 exposure. (*Id.* at p. 74.)

The Supreme Court in *Johnson* did not address the situation presented here, as defendants do not claim that Rollin was a sophisticated user. Rather, they contend Mobil was knowledgeable about the hazards of asbestos and was required by OSHA to warn employees such as Rollin about those hazards. The court in *Johnson* did not impute a sophisticated employer's knowledge to the plaintiff, or charge him with any knowledge except that which had been made available to him through his own training and professional certification. The sophisticated user doctrine articulated in *Johnson* accordingly does not apply to the factual situation involved here.

Defendants argue that a variant of the sophisticated user defense known as the "sophisticated intermediary doctrine" applies in this case. Under that doctrine, a manufacturer can be absolved of its duty to warn a consumer if there has been an adequate warning to an intermediary. (See, e.g., *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 170-172.)

The sophisticated intermediary doctrine does not apply here. "[T]hat doctrine, where it applies at all, applies only if a manufacturer provided adequate warnings to the intermediary. [Citations.]" (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23,

29.) No California court has applied the sophisticated intermediary doctrine to absolve a manufacturer of any duty to warn based solely on an intermediary's knowledge or sophistication with respect to a particular type of product. In the instant case, there was no evidence that defendants provided any warnings to Mobil. For that reason, the sophisticated intermediary doctrine does not apply.

Because neither the sophisticated user defense nor the sophisticated intermediary doctrine applies to the factual situation presented in the instant case, the trial court erred as a matter of law by granting defendants' motions for JNOV based on the court's determination that Mobil was a sophisticated user of asbestos products during the relevant time period.

Reversal of the JNOV requires review of the trial court's order granting defendants' motions for a new trial.[5] For reasons we discuss below, we affirm the order granting the motions for a new trial.

III. New Trial Motion--*O'Neil*

While this appeal was pending, the Supreme Court issued its decision in *O'Neil*, in which the court held "that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." (*O'Neil, supra*, 53 Cal.4th at p. 342.) The defendants in *O'Neil* sold valves and pumps to the United States Navy for use in steam propulsion systems on Navy ships. Navy specifications required the use of asbestos-containing insulation on all external surfaces of its steam propulsion

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[5] Code of Civil Procedure section 629 provides in pertinent part: "If the court grants the motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed."

systems as well as in the internal gaskets and packing materials in valves. (*Id.* at pp. 343, 344.)

The pumps and valves sold to the Navy were not made or shipped with external insulation. Such insulation was applied subsequently by the Navy. (*O'Neil, supra*, 53 Cal.4th at pp. 344, 349.) The valves sold to the Navy contained internal asbestos-containing gaskets and packing at the time they were sold; however, the Navy replaced the gaskets and packing during routine maintenance operations, and there was no evidence that the *O'Neil* defendants ever made or sold these replacement parts. (*Id.* at p. 344.)

The plaintiff in *O'Neil* served on a Navy ship from 1965 to 1967 and was exposed to asbestos fibers released from external insulation, gaskets and packing during repair and maintenance of the ship's equipment. The *O'Neil* defendants supplied equipment for the ship's steam propulsion system in 1943 or earlier, at least 20 years before the plaintiff worked aboard the ship. (*O'Neil, supra*, 53 Cal.4th at p. 345.) The plaintiff in *O'Neil* argued that the defendants were liable for his injuries caused by the asbestos exposures because their products included and were used in connection with asbestos-containing parts. The plaintiff also argued that the defendants should be held strictly liable for failing to warn him about the potential hazards of breathing asbestos released from their products. (*Id.* at p. 348.)

A. Strict liability

The Supreme Court in *O'Neil* analyzed strict liability principles for three types of product defects -- manufacturing defects, design defects, and failure to warn -- and concluded the defendants were not strictly liable for the plaintiff's injuries under any of these principles. (*O'Neil, supra*, 53 Cal.4th at p. 347.)

1. Manufacturing defect

The court in *O'Neil* determined that the defendants were not strictly liable for the plaintiff's injuries as the result of any manufacturing defect because the plaintiff was exposed to no asbestos from a product made by the defendants. The evidence showed that the plaintiff was exposed to asbestos dust released from exterior insulation the Navy

had applied to the pumps and valves. None of the defendants manufactured or sold that insulation, nor had they required or advised that it be used with their products. (*O'Neil, supra*, 53 Cal.4th at p. 349.) The uncontroverted evidence also showed that the plaintiff had been exposed to asbestos from replacement gaskets and packing inside the pumps and valves that were not the original parts supplied by the defendants, but were replacement parts the Navy had purchased from other sources. (*Ibid.*) The court in *O'Neil* therefore determined that "even assuming the inclusion of asbestos makes a product defective, no defect inherent in defendants' pump and valve products caused O'Neil's disease." (*Id.* at p. 350.)

2. Design defect

The court in *O'Neil* also rejected the plaintiff's argument that the products were defective because they were "designed to be used" with asbestos-containing components. (*O'Neil, supra*, 53 Cal.4th at p. 350.) The court stated: "The products were designed to meet the Navy's specifications. Moreover, there was no evidence that defendants' products *required* asbestos-containing gaskets or packing in order to function. Plaintiff's assertion to the contrary is belied by evidence that defendants made some pumps and valves without asbestos-containing parts. As alternative insulating materials became available, the Navy could have chosen to replace worn gaskets and seals in defendants' products with parts that did not contain asbestos. Apart from the Navy's specifications, no evidence showed that the design of defendants' products required the use of asbestos components, and their mere compatibility for use with such components is not enough to render them defective." (*Ibid.*, fn. omitted.)

3. Failure to warn

The Supreme Court in *O'Neil* similarly rejected the plaintiff's claim of strict liability premised on the defendants' failure to warn about the dangers of asbestos in the gaskets and packing originally included in their products. The court stated: "We reaffirm that a product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product. The only exceptions to this rule arise when the defendant bears some direct responsibility for the harm, either because the

defendant's own product contributed substantially to the harm [citation], or because the defendant participated substantially in creating a harmful combined use of the products [citation]." (*O'Neil, supra*, 53 Cal.4th at p. 362.) For these exceptions to apply, the court imposed a threshold requirement that the defendant manufactured, sold or supplied the injury-causing product. (*Ibid*. ["That the defendant manufactured, sold, or supplied the injury-causing product is a separate and threshold requirement that must be independently established"].)

The court in *O'Neil* discussed at length the First Appellate District's decision in *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564 (*Taylor*), noting that that case also addressed the liability of pump and valve manufacturers for asbestos-containing gaskets and packing manufactured by others but used in conjunction with the pumps and valves. In *Taylor*, the First Appellate District gave three reasons for concluding that the pump and valve manufacturers could not be held strictly liable for failing to warn about the dangers of asbestos exposure. First, the *Taylor* court noted that California law recognizes "a bright-line legal distinction" imposing liability only on those entities responsible for placing an injury-producing product into the stream of commerce. (*Id*. at p. 576.) The pump and valve manufacturers could not be strictly liable for failure to warn, the *Taylor* court reasoned, because they "were not part of the 'chain of distribution'" for the asbestos-containing gaskets, packing and insulation that the plaintiff in that case had encountered. (*Id.* at p. 579; *O'Neil, supra*, 53 Cal.4th at p. 354.)

Second, the court in *Taylor* reasoned that under California law, "a manufacturer has no duty to warn of defects in products supplied by others and used in conjunction with the manufacturer's product unless the manufacturer's product itself causes or creates the risk of harm." (*Taylor, supra*, 171 Cal.App.4th at p. 575; *O'Neil, supra*, 53 Cal.4th at p. 354.) The *Taylor* court went on to note that "[a]though a manufacturer *may* owe a duty to warn when the use of its product in combination with the product of another creates a potential hazard, that duty arises *only* when the manufacturer's own product causes or creates the risk of harm." (*Taylor*, at p. 580; *O'Neil*, at p. 355.)

Third, the *Taylor* court relied on the component parts doctrine as a basis for concluding the pump and valve manufacturers owed no duty to warn about the dangers of asbestos.[6] (*Taylor, supra*, 171 Cal.App.4th at pp. 584-586; *O'Neil*, *supra*, 53 Cal.4th at p. 355.) Noting that the pumps and valves at issue were "part of a larger 'marine steam propulsion system'" (*Taylor*, at p. 584), the *Taylor* court concluded the manufacturers could be held liable only if the defects in these components caused injury or if the manufacturers participated in the integration of their pumps and valves into the ship's propulsion system. (*Id*. at p. 585; *O'Neil*, at p. 355.)

After its detailed discussion of *Taylor*, the Supreme Court then discussed *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577 (*Tellez-Cordova*), on which the appellate court in *O'Neil* had based its decision to impose liability on the pump and valve manufacturers for injury caused by asbestos packing and insulation used in conjunction with their products. The plaintiff in *Tellez-Cordova* developed lung disease from breathing toxic dust generated from metals he cut and sanded using power tools manufactured by the defendants. (*Tellez-Cordova, supra*, at p. 579.) He sued the defendants, claiming that their tools were "specifically designed" to be used with abrasive discs for grinding and sanding metals, and it was reasonably foreseeable that toxic dust would be generated when the tools were used for their intended purpose. (*Id*. at p. 580.) The defendants demurred, arguing California law imposed no duty to warn of hazards associated with the abrasive discs, which were products of another manufacturer. The *Tellez-Cordova* court rejected their argument, reasoning that the intended purpose of defendants' tools was to abrade metal surfaces, and toxic dust was a foreseeable product of this activity. (*Id*. at p. 585.)

In *O'Neil* the Supreme Court noted that *Tellez-Cordova* differed factually from the case before it in two significant respects: "First, the power tools in *Tellez-Cordova* could

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6 "The component parts doctrine provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm. [Citations.]" (*O'Neil*, *supra*, 53 Cal.4th at p. 355.)

only be used in a potentially injury-producing manner. Their sole purpose was to grind metals in a process that inevitably produced harmful dust. In contrast, the normal operation of defendants' pumps and valves did not inevitably cause the release of asbestos dust. This is true even if 'normal operation' is defined broadly to include the dusty activities of routine repair and maintenance, because the evidence did not establish that defendants' products needed asbestos-containing components or insulation to function properly. It was the Navy that decided to apply asbestos-containing thermal insulation to defendants' products and to replace worn gaskets and packing with asbestos-containing components. Second, it was the action of the power tools in *Tellez-Cordova* that *caused* the release of harmful dust, even though the dust emanated from another substance. . . . The same is not true here. . . . Nothing about defendants' pumps and valves caused or contributed to the release of [asbestos] dust." (*O'Neil, supra*, 53 Cal.4th at p. 361.) The *O'Neil* court then reaffirmed the principle that "California law does not impose a duty to warn about danger arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." (*Ibid.*)

4. Applying *O'Neil* to the instant case

Applying the principles set forth in *O'Neil* to the instant case, we cannot conclude as a matter of law that defendants are not strictly liable for plaintiffs' injuries. In the case of Foster Wheeler, there was evidence that the equipment sold to Mobil included asbestos-containing components or insulation. The evidence is conflicting or incomplete, however, as to whether Foster Wheeler or Mobil specified the use of such asbestos-containing components and there was no finding as to who made such specification. There was also no evidence as to how often asbestos-containing components or insulation was replaced during maintenance operations in the FCC unit. Accordingly, there could be no determination that Rollin was exposed only to asbestos from replacement components that were not the original parts supplied by defendants. In light of these unresolved factual issues, liability cannot be decided as a matter of law.

We cannot conclude as a matter of law that Foster Wheeler is not strictly liable for Rollin's injuries as the result of exposure to asbestos insulation on its boiler. Foster

Wheeler's contract specifications for the boiler state that the boiler was to be externally insulated with sprayed asbestos insulation. Although Foster Wheeler contends the boiler was designed "in complete conformity with Mobil specifications," it fails to direct us to the particular Mobil specification requiring the external surface of the boiler to be insulated with sprayed on asbestos.

The evidence shows that Foster Wheeler did not merely incorporate Mobil's specifications without question but rather took an active role in modifying certain specifications in order to meet cost and scheduling parameters. A Foster Wheeler internal memorandum dated July 26, 1965, states "that the use of Asbestospray and the sprayed on Epoxy type coating could save a month of lapsed time in the field" and "strongly suggested this route if we can get customer acquiescence." A letter dated July 16, 1965, from Foster Wheeler to Mobil confirming certain contract terms states: "In the interests of providing the best possible erection time, Foster Wheeler reserves the right to employ the 'limpet' asbestos spray external insulation."

Foster Wheeler also reserved the right to use its own design specifications in instances when Mobil's specifications were not specific to the boiler unit. An October 13, 1965 memorandum from Foster Wheeler to Mobil states: "As per our proposal, the heater design, etc., will generally conform with SMOC specs. Where such specifications are not specific to the particular unit, however, it has been agreed that Foster Wheeler standard procedures and design basis shall prevail."

Finally, there was evidence that the asbestos insulation used on the boiler was supplied by Foster Wheeler's own Fired Heater Division. Foster Wheeler argues that other documents offered into evidence show that Mobil, and not Foster Wheeler, actually supplied the asbestos insulation for the boiler, and that the insulation was applied by another company, not Foster Wheeler. This conflict in the evidence presents a factual issue that precludes us from concluding that Foster Wheeler is not strictly liable as a matter of law.

The absence of a Mobil specification requiring the use of asbestos-containing insulation on the external surface of the boiler, Foster Wheeler's active role in specifying

the use of such asbestos insulation, and Foster Wheeler's potential role in supplying the asbestos insulation to Mobil distinguishes the instant case from *O'Neil*, in which Navy specifications required the use of asbestos-containing insulation on all external surfaces of the steam propulsion system used on its warships and the defendants' products were designed to meet the Navy's specifications. (*O'Neil, supra*, 53 Cal.4th at pp. 343, 350.)

B. Negligence

For the same reasons, a new trial should be granted as to plaintiffs' negligence claim. Although the Supreme Court in *O'Neil* concluded that "strong policy considerations counsel against imposing a duty of care on pump and valve manufacturers to prevent asbestos-related disease" (*O'Neil, supra*, 53 Cal.4th at p. 365), the court ultimately based its decision on the particular factual circumstances presented in that case. The court in *O'Neil* reasoned that the connection between the defendants' conduct and the plaintiff's injury was "extremely remote" because the defendants did not manufacture, sell, or supply any asbestos product that may have caused the plaintiff's mesotheliomia; the plaintiff did not work around the defendants' pumps and valves until more than 20 years after they were sold; and he did not develop an injury from the replacement parts until nearly 40 years after his workplace exposure. (*Ibid*.)

The parties here did not have the benefit of the court's reasoning in *O'Neil* at the time of the trial. They accordingly did not have the opportunity to marshal the evidence and present the case necessary to address the legal principles set forth in that case. A new trial is therefore appropriate.

DISPOSITION

The judgment is reversed. The order granting the motions for a new trial is affirmed, for the reasons stated in this opinion. The trial court is directed to conduct a new trial. The parties will bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD