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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION DONNA F. WALLS, individually and as the Executrix of the Estate of JOHN W. WALLS, JR., deceased, and COLLIN WALLS, as surviving child, Appellants, Plaintiffs below, v. FORD MOTOR COMPANY, Appellee, Defendant below.	: : : : : : : : : :	No. 389, 2016 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. 14C-01-157

APPELLANTS' CORRECTED OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT

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NATURE OF THE PROCEEDINGS

Plaintiffs Donna F. Walls, individually and as the Executrix of the Estate of John W. Walls, Jr., deceased, and Collin Walls, as surviving child ("Plaintiffs") filed their complaint alleging, *inter alia*, negligence against, *inter alia*, Ford Motor Company ("Ford") on January 1, 2014. (D.I. 1, below). Plaintiffs filed their First Amended Complaint on August 1, 2014.[1] Ford filed its Motion for Summary Judgment on July 29, 2015, arguing in relevant part that Ford had no duty to warn John W. Walls, Jr. ("John") about the dangers of removing and replacing asbestos brakes in its automobiles if John was not exposed to the automobile's original brakes.[2] Plaintiffs filed their Summary Judgment Answering Brief on August 13, 2015,[3] and Ford filed its reply on August 21, 2015.[4] The Superior Court held oral argument on September 10, 2015 and granted Ford's motion for summary judgment as to duty to warn where John had not been exposed to Ford original brakes.[5] The Superior Court held there was an issue of fact as to whether John had been exposed to Ford original brakes or other asbestos-containing original component parts and denied summary judgment regarding duty to warn where John was exposed to Ford

[1] A100-A125, First Amended Complaint.
[2] A126-A136, Ford Motor Company Motion for Summary Judgment.
[3] A137-A707, Plaintiff's summary judgment answering brief (SJAB) and appendix.
[4] A708-A716, Ford Reply in Support of Motion for Summary Judgment.
[5] Exhibit B, September 10, 2015 Walls v. Ford Summary Judgment Hearing transcript ("Summary Judgment Hearing Transcript"), p. 29:1-13.

original asbestos-containing component parts.[6] Ford also moved for summary judgment on causation and punitive damages on September 11, 2015. (D.I. 245, 246 below). These motions were denied.[7] Trial on the issue of whether John could establish a negligence claim against Ford based on exposure to Ford original brakes was held from June 13, 2016 to June 29, 2016.[8] On June 29, 2016, a defense verdict was returned when the jury found that Ford was not liable.[9] Plaintiffs timely appealed on July 28, 2016. This is Plaintiffs'/Appellants' Opening Brief in support of their appeal.

[6] Exhibit B, September 10, 2015 summary judgment hearing transcript at 20:22-28:16.
[7] D.I. 269 below, Order denying Ford's motion for summary judgment on punitive damages; D.I. 386 below, Order denying Ford's motion for summary judgment on causation.
[8] D.I. 407, 408, below.
[9] Exhibit A, Special Verdict Form, June 29, 2016, D.I. 408 below.

SUMMARY OF THE ARGUMENT

Ford manufactured and supplied automobiles from at least the 1950s until 1984 that contained asbestos brakes and required asbestos brakes to function properly. Ford also supplied asbestos brakes separately for use as replacement brakes in their vehicles.

This Court has stated that a manufacturer's duty to warn is dependent on whether it knew or should have known of the hazards associated with its product. In re Asbestos Litig. (Colgain), 799 A.2d 1151, 1152 (Del. 2002). Under Restatement (Second) §§ 388 and 389 (2nd 1979), Dawson v. Weil-McLain, C.A. No. 00C-12-177 (Del. Super. July 20, 2005) (TRANSCRIPT) (Exhibit D), and Wilkerson v. Am. Honda Motor Co., 2008 Del. Super. LEXIS 26 (Del. Super. Jan. 17, 2008), when a supplier of a product has a reason to know that the intended use of that product is or is likely to be dangerous, it has a duty to warn of said danger. Ford was aware of the dangers of asbestos exposure in the removal and replacement of asbestos brakes that its vehicles required to function, especially when users of its product would blow out brakes, by using a compressed air hose to remove dust from the brakes and their housing during the brake removal replacement process. The asbestos danger in the use of Ford's automobile was therefore not limited to Ford's original brakes. Therefore, the Superior Court erred when it granted summary

judgment and held that Ford had no duty to warn unless John was exposed to Ford's original brakes.

John was a lifetime auto mechanic who removed and replaced brakes from Ford vehicles as part of his lifetime career before he died of mesothelioma on July 26, 2012. He used a compressed air hose to blow out the brakes when he was removing and replacing them on Ford's automobiles, and was thus exposed to asbestos in the exact manner Ford foresaw that he would be.

Because of the summary judgment ruling that Ford only had a duty to warn when John was exposed to original brakes on Ford's vehicles, the main issue at trial became whether John had been exposed to original Ford brakes. This was difficult for Plaintiffs to prove, particularly when John had died before he could give his testimony. It was clear he had removed brakes from Ford vehicles, but witnesses could not swear that they knew he did the first brake replacement or used Ford replacement brakes. The limitations placed on the case by the summary judgment ruling led to a verdict in Ford's favor.

STATEMENT OF FACTS

A. Ford's Automobiles Contained and Required Asbestos Brakes.

Automotive brake linings, brake shoes, and clutch facings have had asbestos since the beginning of the 20th Century.[10] They contained 50% asbestos.[11] From at least the 1950s until 1984 all of Ford's automobiles contained asbestos brakes, with the exception of some police cars for a couple of years.[12] Ford also supplied asbestos brakes separately to be used in its vehicles as replacement brakes.[13] Ford admitted that every vehicle through 1984 was designed to have asbestos brakes and needed asbestos brakes in order to function correctly.[14] Ford designed its braking systems to work properly only with asbestos-containing brakes. In a 1985 memo, Ford explained the necessity of using asbestos brakes in its automobiles:

One particular problem that concerns us and that we feel must be

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[10] A434, Castleman, Barry I., Asbestos Medical and Legal Aspects (Wolters Kluwer Law & Business, 5th ed. 2011), p. 451. (SJAB Ex. R). This Court has referred to Dr. Castleman's book, Asbestos Medical and Legal Aspects, as a "learned treatise." Nicolet, Inc. v. Nutt, 525 A.2d 146, 148 (Del. 1987). This Court has also stated that "Dr. Ba[rr]y I. Castleman [is] a well-recognized expert in the field of asbestos research." In re Asbestos Litigation (Colgain), 799 A.2d at 1153.

[11] A434, Castleman, Barry I., Asbestos Medical and Legal Aspects (Wolters Kluwer Law & Business, 5th ed. 2011), p. 451. (SJAB Ex. R).

[12] A359:14-A360:8, Mark Taylor (Ford corporate representative) 1/13/12 (SJAB Ex. M); A409, Mark Taylor 2/7/12 at 147:21-148:10 (SJAB Ex. N); Exhibit B, September 10, 2015 Summary Judgment Transcript at 5:15-6:4. There is no evidence John worked on police cars.

[13] A694, 3/15/85 Ford Memo, p.2 (SJAB Ex. U). See also A777-778.

[14] A409, Mark Taylor 2/7/12 at 147:21-148:10 (SJAB Ex. N); see Exhibit B, September 10, 2015 Summary Judgment Transcript, p.5:15-19.

> highlighted is the continued availability of asbestos-containing parts for vehicles currently in production, or no longer in production, which employ such parts. **Ford Motor Company, through its Parts and Service Division, is a major marketer of aftermarket disc and drum brakes and related brake system parts**.[15]
>
> **Car and truck brakes are sophisticated systems made up of parts which are carefully matched to function compatibly with each other, so as to provide appropriate braking characteristics for their vehicles under a wide range of operating conditions. A brake system is not simply a collection of disparate parts -- pads, shoes, discs, drums, etc. The pads and shoes of car and truck braking systems that use asbestos friction materials have very different properties from the pads and shoes of those that do not contain asbestos, One cannot simply use a non-asbestos substitute brake shoe in conjunction with a drum that was designed for an asbestos-containing friction material.** Likewise, a disc brake that was designed for a semi-metallic friction material will not perform satisfactorily if an asbestos-containing pad is substituted. A whole host of performance, noise, durability, and other problems may occur if a friction material is introduced into a system which was not designed to employ it.[16]

No non-asbestos friction material available to Ford met Ford's internal specifications by 1975.[17] As of 1977, Ford was aware that there was no known suitable replacement for asbestos in brake linings and it would take at least 5-8 years to develop production of non-asbestos brake linings.[18]

Ford knew if its designed braking system used asbestos containing brakes then the replacement brakes also had to contain asbestos.[19] Brakes were necessary

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[15] A694, 3/15/85 Ford Memo p. 2 (emphasis added) (SJAB Ex. U). See also A777-778.
[16] Id.
[17] A364-A365, Mark Taylor 1/13/12 at 41:17-42:1 (SJAB Ex. M).
[18] A675-A676, May 13, 1977 memo (SJAB Ex. T).
[19] A419, Mark Taylor testimony from Bretzke v. Ford, C.A. 62-CV-08-1189 (MA

to Ford vehicles so they could be safely stopped and came with every Ford vehicle.[20] Ford has always known that brakes would have to be replaced.[21] Ford's documents show contemplation of replacing brake linings every 10-50,000 miles.[22] They further show that when asbestos linings would wear, "brake dust" would accumulate.[23] In 1979 Ford's Engineering and Research Staff employee wrote that "Asbestos, for now and the foreseeable future, is critical to the performance of many components, and suppliers should not be encouraged to drop it from the marketplace."[24] In 1981, Ford was planning to develop asbestos-free brake linings to eliminate the toxicity hazard while maintaining performance standards, demonstrating that by then asbestos-free brake linings did not meet performance standards.[25]

B. Ford Knew of the Dangers of Asbestos in its Automobiles.

At the very least, Ford should have known of the dangers associated with asbestos by the mid 1960's when John began being exposed to asbestos dust from blowing out brakes on its vehicles.[26] However, during the time period that Ford was

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Second Judicial Ct.) at 36:17-25 (SJAB Ex. O); see A362:17-A363:16, Mark Taylor 1/13/12 (SJAB Ex. M).

[20] A355:6-25, Mark Taylor 1/13/12 (SJAB Ex. M).

[21] A358:12-24, Id.

[22] A562, Stenberg, T.R, Brake Linings (1935) at p. 68 (SJAB Ex. T).

[23] A555, Stenberg, T.R, Brake Linings (1935) at p. 61 (SJAB Ex. T).

[24] A677, 10/31/79 Memo from J.W. Durstein (SJAB Ex. T).

[25] A679-A680, A684, September 24, 1981 memo and attachments (SJAB Ex. T).

[26] A426-A431, Walls' Witness and Exhibit List, Castleman disclosure (SJAB Ex.

designing its vehicles to use only asbestos brakes, Ford had extensive actual knowledge of the dangers of asbestos arising from regular maintenance and repairs on its braking systems and was instructing its own employees on how to avoid such exposure.

Ford joined the Industrial Hygiene Foundation in 1947 through 1974. Ford's documents included a "Bibliography on Carcinogenic Effects of Asbestos or Asbestos Dust/Indexes checked from 1954-November 1965," dated December 14, 1965.[27] "There is also a copy of an IHF report, Asbestos Bioeffects Research for Industry, written in 1966, a discussion of the status of epidemiological and experimental knowledge and research suggestions." Id. Ford Industrial Hygenist D.E. Hickish wrote a report entitled "Exposure to Asbestos During the Servicing of Brakes of Passenger Cars" in July 1968 where samples were taken to measure asbestos exposure to Ford's mechanics.[28] In 1971 Ford was aware that asbestos caused mesothelioma and cancer.[29] That same year, Ford was asked to comment on a proposed ban of asbestos in automobiles in Illinois.[30] The proposed ban warned

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[27] A480, Castleman, Barry I., Asbestos Medical and Legal Aspects (Wolters Kluwer Law & Business, 5th ed. 2011), p. 526 (SJAB Ex. R).

[28] Id. at A474.

[29] A606, November 19, 1971 Intracompany Memo, p. 1 (SJAB Ex. T).

[30] A606-A607, November 19, 1971 memo; A599-A605, Memo dated July 19, 1971 and attachments (SJAB Ex. T).

that asbestos workers contracted high rates of asbestosis and cancer.[31] The ban also noted that medical science was indefinite as to why asbestos caused cancer.[32] The proposed ban stated that asbestos's durability made it "potentially dangerous to present and future generations because of the tendency of the fibers to accumulate in the atmosphere and in the lungs."[33] It also stated:

> If brake lining decomposition emits asbestos fiber, then the tremendous number of vehicles using asbestos, and the impracticality of controlling these numerous small emission sources would appear to speak to the need for a product ban. The prohibition is carefully worded to avoid the necessity of fitting vehicles produced prior to 1975 with non-asbestos brakes.[34]

At this time, in 1971, Ford acknowledged that "Inhalation of fibrous asbestos has been considered the source of asbestosis and mesothelioma."[35] In 1972, Ford became aware that one of its asbestos suppliers was discontinuing the use of asbestos due to OSHA regulations, and therefore intended to survey all its asbestos suppliers as to the continued availability of their product.[36] In 1973, Ford was aware of OSHA regulations concerning asbestos regulation.[37]

By 1973, Ford's studies had "demonstrated overexposure to asbestos" in "brake rebuilding and inspection operations," particularly when compressed air was

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[31] A601, attachment to July 19, 1971 memo at FAFD1321 (SJAB Ex. T).
[32] Id.
[33] Id.
[34] A602, attachment to July 19, 1971 memo at FAFD1323 (SJAB Ex. T).
[35] A606, November 19, 1971 memo (SJAB Ex. T).
[36] A609, August 21, 1972 memo from G.F. Bush (SJAB Ex. T).
[37] A621, March 27, 1973 Memo from Henry Lick (SJAB Ex. T).

used to blow-off brakes.[38] In 1973, Ford internally discontinued the use of compressed air to clean brakes.[39] Studies at Ford confirmed asbestos exposure exceeding OSHA limits occurred "whenever air hoses were used to clean dust out of the brake drums," which led to this 1973 internal recommendation to use vacuum methods instead.[40] Ford admits that a suggestion of potential hazards associated with asbestos brake replacement was made to Dr. Roy Gealer of Ford Research and Engineering in April 1975.[41] In September 1975 Ford Industrial Hygienist Paul Toth recommended the following caution be place in Ford's Parts and Service's Division's brake service manuals:

> **Dust and dirt present on brake assemblies and drums may contain asbestos fibers that can represent a potential health hazard when made airborne by cleaning with compressed air. Brake assemblies and drums should therefore be cleaned only with a vacuum cleaner suitable for use with asbestos fibers.** This type of vacuum is available through the Rotunda Dealer Equipment Catalog. Dust and dirt from the vacuum should be disposed of in a manner that prevents dust exposure. Any machining done on brake linings or pads should be done using properly exhaust ventilated equipment.[42]

"Ford's support was acknowledged in the paper published by Arthur Rohl, *et al.*

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[38] A476, Castleman, Barry I., Asbestos Medical and Legal Aspects (Wolters Kluwer Law & Business, 5th ed. 2011), at 522 (citing Memo by Paul Toth, "Vehicle Brake Rebuilding," August 3, 1973) (SJAB Ex. R).

[39] A476, Id. at 522 (citing J.B. Williams, "Vehicle Brake Rebuilding," August 23, 1973).

[40] A477, Id. at 523 (citing Memo by Paul Toth, "Exposure of Garage Mechanics to Brake Dust," April 23, 1975) (emphasis added).

[41] A477, Id. (citing R. Gealer memo to T. Cole, "Exposure of Brake Maintenance Shop Workers to Brake Dust," April 14, 1975).

[42] A630, 9/4/75 Memo from Paul Toth to Ford Parts and Services Division (emphasis added) (SJAB Ex. T).

(Asbestos Exposure During Brake Lining Maintenance and Repair. *Env. Research* 12:110-128, 1976). The report concluded 'Potentially hazardous asbestos exposure exists during automotive brake servicing.[] *It is recommended that stringent industrial hygiene measures to control exposure be implemented as rapidly as possible*. (Emphasis added).'"[43] In 1977, Ford became aware that one of its asbestos friction suppliers, Raybestos Manhattan, had commissioned a study indicating that the proposed OSHA standard of 0.5 fibers/cc was not feasible for compliance by asbestos manufacturers.[44] Ford did not warn purchasers of the dangers or presence of asbestos in its automobiles except in 1980, when it placed a caution on its boxes of brakes sold as replacement parts stating "breathing asbestos dust may cause serious bodily harm" and advising not to use an air hose to clean brakes.[45]

C. John Walls is Exposed to Asbestos from Ford Vehicles when Removing and Replacing Brakes.

John spent the majority of his career as an auto mechanic working at his family's service station until his death from mesothelioma on July 26, 2012.[46]

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[43] A478, Castleman, Barry I., Asbestos Medical and Legal Aspects (Wolters Kluwer Law & Business, 5th ed. 2011), p. 524. (SJAB Ex. R).
[44] A675-A676, May 13, 1977 Memo from M. Weintraub (SJAB Ex. T).
[45] A479, Castleman, Barry I., Asbestos Medical and Legal Aspects (Wolters Kluwer Law & Business, 5th ed. 2011), p. 525. (SJAB Ex. R).
[46] A104, ¶ 8 (a), Walls First Amended Complaint, A186:5-A187:17, A187:8-13, A187:3-17, Veal (SJAB Ex. C)

Plaintiffs alleged his mesothelioma was caused by exposure to asbestos.[47] He died before he could be deposed, but co-workers testified about his exposure to asbestos containing brakes on Ford vehicles.

Co-worker witness, Michael Veal was deposed on August 22, 2014 (A183) and his video deposition was played at trial on June 16, 2016. (A747:1-7, 6/16/16 Trial Transcript ("Tr.").[48] Mr. Veal started working with John at John's father's service station on Saturdays in the late 1960's when they were both about 12 years old.[49] John also worked there after school.[50] He continued to work with him on Saturdays.[51] John Walls, Sr. passed his knowledge of brake work on to his son, John and then John passed his knowledge to Mr. Veal.[52]

John worked on 50 % Fords and 50 % Chrysler automobiles.[53] John did brake work on these Fords.[54] When John removed brakes in Ford automobiles, it was very dusty, and he would use an air hose to clean the dust by blowing it out.[55] John may

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[47] A114, First Amended Complaint, p. 14, ¶ 28.
[48] All citations to Mr. Veal's deposition were played for the jury. See A748-A751 (page designations).
[49] A186:5-187:23, A189:5-A190:7, Veal (SJAB Ex. C).
[50] A187:4-5, Id.
[51] A198:2-A200:23, Id.
[52] A188:12-23, A189:1-4, Id.
[53] A190:8-A191:11, Id.
[54] A191:12-15, Id.
[55] A191:16-A192:6, A188:19-24 and A775, 19:1-12, Veal 8/22/14. (P.19 of Veal 8/22/14 was cited on p. 1 of Plaintiffs' SJAB (A138), but was inadvertently not included in the SJAB appendix below. That Mr. Veal used an air hose to blow out brakes was not disputed by Ford below. The Court below also found that John used

have performed at least two brake jobs a day when he worked there during junior high and high school.[56] Mr. Veal could not remember the exact number, but explained that they had a lot of customers.[57] Customers brought their newer Ford cars in to John Walls to be serviced.[58] He did not know the maintenance history or mileage of any of the vehicles Mr. Walls worked on and was unable to identify Mr. Walls ever removing or installing Ford asbestos-containing parts.[59]

In the mid-1980's John worked with Mr. Scott Schulze at Walls Service Center.[60] At trial, Mr. Schulze stated that John did brake work on Fords.[61] While he could say new cars were worked on,[62] he could not "swear" that original Ford brakes were removed by John.[63] He never saw John remove or install original Ford equipment.[64] Another man told him that John removed original brakes from some of his Ford vehicles.[65] However Mr. Schulze admitted that was speculative because he

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an air hose which created dust. Ex. B, September 10, 2015 Summary Judgment Hearing, p. 21:21-22:2. Veal 8/22/14 p. 19 is attached hereto at A775).

[56] A189:5-18, Veal.

[57] Id.

[58] A196:15-A197:14, Veal.

[59] A128-A129, Ford's Motion for Summary Judgment at pp. 3 and 4 (citing p. 180, Veal). See also, A776, Veal 180:13-17.

[60] A214:23-A215:18, A222:5-9, Schulze (SJAB Ex. E); see also A732:4-15, Schulze trial testimony, 6/16/16 Tr.

[61] A733:11-18, A735:8-10, Schulze trial testimony, 6/16/16 Tr.

[62] A733:1-5, Id.

[63] A736:6-8, Id.

[64] A737:5-9, A740:2-10, Schulze trial testimony, 6/16/16 Tr.; A219:1-14, Shulze (SJAB Ex. E).

[65] A737:12-A740:10, Schulze trial testimony, 6/16/16 Tr.

heard it from someone who was no longer living.[66]

D. The Superior Court Granted Ford's Motion for Summary Judgment as to Duty to Warn. Plaintiff alleged that Ford was negligent in selling automobiles without warning of the dangers of asbestos.[67] Ford filed a motion for summary judgment and argued 1) that Plaintiff was not exposed to Ford original brakes or replacement brakes; and 2) that Ford had no duty to warn about its automobiles if Plaintiff was not exposed to the original brake sold with the Ford or Ford original replacement brakes.[68] The Superior Court determined that there was a dispute of fact as to whether John was exposed to original Ford brakes or Ford replacement brakes.[69] However, the Superior Court granted summary judgment as to Ford's duty to warn claim, based on the Superior Court's prior decision in Bernhardt v. Ford, C.A. 063-06-307-ABS (Del. Super. March 30, 2010) (TRANSCRIPT) (Exhibit C).[70]

E. Trial. That Ford was only responsible for Ford original brakes removed or replaced in its automobiles was Ford's main theme at trial. Ford told the jury in opening:

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[66] A741:6-19, Schulze trial testimony, 6/16/16 Tr.
[67] A110-111, First Amended Complaint, p. 10,11, ¶ 23.
[68] A127-A132, Ford Motion for Summary Judgment, p. 2-7.
[69] Exhibit B, September 10, 2015 Summary Judgment Hearing Transcript, p. 28:4-16.
[70] Ex. B, September 10, 2015 Summary Judgment Hearing Transcript at 29:1-29.

> And we believe the testimony in this case is going to support our position that Mr. Walls was not exposed to Ford original equipment brake dust. I'm going to keep hammering on than point. As the Court has already indicated, we are only responsible for our equipment, original OEM. It's called OEM stands for Original Equipment Manufacturer, OEM brakes. We're not responsible for anybody else's brakes. We're not responsible if somebody put a another brake on the Ford vehicle and drives it in, we're not responsible for that.

A720:17-A721:5, 6/13/16 Tr.

In accordance with the court's summary judgment rulings, the trial judge read the following stipulated instruction:

> I instruct you as a matter of law that you're not to consider Ford responsible for any component parts manufactured by other companies that were identified as being removed or installed on Ford vehicles by Mr. Walls or others around him. Ford is only responsible for original genuine Ford asbestos-containing parts.

A718:21-A719:5, 6/13/16 Tr.

The exposure evidence cited in Statement of Facts, C., was presented. Mr. Veal testified by deposition, as he died between his deposition and trial, and Mr. Schulze testified live.

Plaintiffs' expert industrial hygienist, Dr. Candace Tsai, testified that John's exposure from removal and beveling of Ford brakes was significant and above background.[71] On cross-examination she testified that John worked with Ford brakes.[72] However she could not say that John removed original Ford brakes.[73] She

[71] A725:14-A726:11, 6/15/16 Tr.
[72] A727:2-11, A729:11-14, Id.

did not recall clear testimony that people brought their new cars to have work done at Walls.[74] She could not say John beveled original Ford brakes.[75]

Plaintiff's medical causation expert, Dr. John Maddox, M.D., testified that Ford's asbestos-containing products were a cause of John's mesothelioma.[76] He relied on Dr. Tsai's Industrial Hygiene report for specifics regarding John's exposure to Ford brakes.[77] On cross-examination, Dr. Maddox admitted he was not aware that Dr. Tsai had testified in trial that there was no clear testimony people brought their new cars in to be serviced at Walls.[78] Upon being shown her transcript, he agreed she testified in trial that she could not say that John had removed original Ford brakes.[79] He agreed she testified during trial that John had not beveled original Ford brakes.[80]

Dr. Dennis Paustenbach, Ford's industrial hygienist, testified "there was really minimal evidence of any exposure of Mr. Walls to Ford original equipment brakes and friction products."[81] He relied on Dr. Tsai's trial testimony that there

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[73] A729:15-17, Id.
[74] A728:10-13, Id.
[75] A729:18-23, Id.
[76] A755:12-A756:8, A757:5-14, 6/21/16 Tr.
[77] A753:14-17, A754:15-A755:11, Id.
[78] A758:1-11, Id.
[79] A760:4-8, 6/22/16 Tr.
[80] A760:21-A761:8, Id.
[81] A763, 6/27/16 Tr. at 159:3-6.

was no evidence of exposure to original Ford brakes.[82] He relied on and recounted Mr. Schulze's trial testimony that he did not remember a customer requesting a Ford original part on a specific vehicle or seeing John install a Ford original part on a specific vehicle.[83] He explained that he reviewed Mr. Veal's trial testimony and it showed Ford original asbestos containing parts were not provided to John.[84]

In closing arguments, both parties' counsel reminded the jury that Ford could only be held responsible for original Ford brakes.[85] Ford's counsel stated:

> At the very beginning of this case the Court gave the instruction. And the important part of that instruction is that Ford is only responsible for the original equipment that it put on the automobiles in the case. That is all it can be held liable for.

A768, 6/28/16 Tr. at 233:12-17.

> The issue in this case if the car is a Ford that doesn't that the brakes on the car are also Ford brakes. That's the critical issue. We are only liable for original equipment, not replacement brakes.

A769, 6/28/16 Tr. at 238:6-10.

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[82] A763, Id. at 160:10-22.
[83] A763, Id. at 161:10-21.
[84] A764, 6/27/16 Tr. at 162:7-11.
[85] A766-A767 at 194:2-197:22, A768 at 233:13-19, A769 at 235:5-11, A769-A771 at 235:15-245:20, A772 at 255:7-9, A773 at 276:14-15, 6/28/16 Tr. This was because of the Superior Court's decision on summary judgment. See Ex. B, September 10, 2015 Summary Judgment Hearing Transcript, at 29:1-29.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN FORD HAD A DUTY TO WARN ABOUT THE HAZARDS ASSOCIATED WITH THE USE OF ITS AUTOMOBILES.

A. Question Presented. Did the Superior Court err in granting the Ford's motion for summary judgment when Ford had a duty to warn about the hazards associated with the use of its automobiles? This issue was preserved in Plaintiffs' Summary Judgment Answering Brief and at oral argument on summary judgment.[86]

B. Scope of Review. The Court below made an error of law in granting Defendant's Motion for Summary Judgment. Therefore, the standard of review on appeal is *de novo.*[87]

C. Merits of Argument.

1. Standard of Review on Motion for Summary Judgment.

"Following the grant of a motion for summary judgment, the applicable standard of appellate review requires this Court to examine the record to determine whether, viewing the facts in the light most favorable to the non-moving party, the

[86] A144-A149, Plaintiffs' SJAB; Exhibit B, September 10, 2015 Summary Judgment Hearing Transcript. p. 16:18-18:9.
[87] Dabaldo v. USR Energy & Const., 85 A.3d 73, 77 (Del. 2014).

moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[88]

2. Under Delaware law, Ford Had a Duty to Warn about the Dangers of Asbestos in its Automobiles.

Delaware follows the Restatement (Second) of Torts in determining whether a duty is owed in a tort case.[89] Ford is clearly the manufacturer and supplier of its automobiles. This Court has stated that a manufacturer's duty to warn is dependent on whether it knew or should have known of the hazards associated with its product. In re Asbestos Litig. (Colgain), 799 A.2d 1151, 1152 (Del. 2002). Under Sections 388 and 389 of the Restatement, when a supplier of a product has a reason to know that the intended use of that product is or is likely to be dangerous, it has a duty to warn of that danger:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388.

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[88] Sostre, 603 A.2d at 811-12.
[89] Riedel v. ICI Americas Inc., 968 A.2d 17, 21 (Del. 2009).

> One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for physical harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has informed the other for whose use the chattel is supplied of its dangerous character.

Restatement (Second) of Torts § 389.

In Graham v. Pittsburgh Corning Corp., 593 A.2d 567 (Del. Super. 1990), the Superior Court determined that a manufacturer and supplier's duty to warn about its product is measured in terms of reasonableness and foreseeability of a chance of harm. Id. at 569 ("Restatement § 388 requires a warning if the supplier 'knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied'. As used throughout the Restatement, the word danger is equated to risk, and risk connotes chance of harm."); Id. 571 ("Hence, the standard for determining the duty of a manufacturer to warn is that which a reasonable (or reasonably prudent) person engaged in that activity would have done, taking into consideration the pertinent circumstances at that time.").

In Dawson v. Weil-McLain, et al., C.A. No. 00C-12-177 (Del. Super. July 20, 2005) (TRANSCRIPT),[90] the Superior Court permitted testimony regarding a boiler manufacturer's knowledge regarding other manufacturer's boilers and other types of

[90] Ex. D.

asbestos products used on the boiler that the Defendant did not manufacture, such as asbestos cement, that would likely be disturbed when Defendant's boilers were installed.[91] Defendant in that case objected to a question regarding its knowledge of whether, during installation of its boilers, a person would have to remove old boilers, manufactured by others, with asbestos products attached to them not manufactured by Defendant.[92] The Court cited to Restatement §§ 388 and 389[93] and held:

> Both of these Restatement provisions trigger the duty to warn based on the foreseeable harm that might be caused by the use or probable use of the product. If it can be established in the facts that the defendant knew or should have known that in the installation of its boilers, there was a need to be exposed to a toxic dangerous substance, and that falls within the foreseeable harm contemplated by these two Restatement provisions, and therefore, on a negligence theory, if supported by the facts, that duty will lie.[94]

In Wilkerson v. Am. Honda Motor Co., Inc., the Superior Court considered "whether [Defendant] had a duty to warn [Plaintiff] that removing and replacing a gasket, manufactured by [Defendant] or another company, may lead to asbestos exposure." Wilkerson, 2008 Del. Super. LEXIS 26, at *3. In that case, it was agreed by both parties that asbestos exposure did not occur in the installation of the gasket, but only in the removal and replacement of the Defendant's or a third party's gasket. Id. The Superior Court, citing, *inter alia*, Dawson v. Weil-McLain, et al.,

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91 Id. at 129:8-138:19.
92 Id. at 129:8-131:1.
93 Id. at 136:4-137:19.
94 Id. at 137:20-138:8.

Restatement § 388, and In re Asbestos Litig. (Colgain), 799 A.2d at 1152, held that it did. Id. at *3, 6. The Court held that "Any necessary warning must be tailored to the risks associated with the reasonably-anticipated use of the manufacturer's own product. Id. at *6.

Here, because Ford knew its automobiles manufactured and sold prior to 1984 required asbestos brakes to properly function, and knew that customers and users would have to replace those brakes with other asbestos brakes,[95] which it knew would expose customers and users to harmful asbestos exposure,[96] it had a duty to warn of the potential danger customers and users would encounter during the removal and replacement of those asbestos brakes.

Bernhardt v. Ford was the first Delaware Superior Court case to decide an automobile manufacturer does not have liability for its vehicles if the plaintiff was not exposed to original brakes.[97] This was the sole basis for the Superior Court below's decision to grant Ford's summary judgment motion on duty to warn.[98] Bernhardt was decided by the same Judge who decided Wilkerson, 2008 Del. Super. LEXIS 26. In Bernhardt, the Court granted Ford's summary judgment motion on

[95] Statement of Facts, A.
[96] Statement of Facts, B.
[97] Bernhardt v. Ford, C.A. 063-06-307-ABS (Del. Super. March 30, 2010) (TRANSCRIPT) (Ex. C);
Bernhardt v. Ford Motor Co., 2010 Del. Super. LEXIS 329, at *3 (Del. Super. July 30, 2010) (motion for reargument denied).
[98] Ex. B, September 10, 2015 Summary Judgment Hearing Transcript, p. 29:1-29.

duty to warn where the Plaintiff removed and replaced brakes on Ford automobiles but could not show he was exposed to asbestos from Ford original brakes or Ford original replacement brakes.[99] First, this decision was flawed because it considered Ford's asbestos-containing products to be brakes rather than the asbestos-containing automobiles that Ford manufactured and supplied.[100] Second, the Bernhardt decision did not discuss how its holding conformed to previous Delaware case law such as In re Asbestos Litig (Colgain), 799 A.2d 1151, 1152 (Del. 2002), Dawson v. Weil-McLain, et al., C.A. No. 00C-12-177 (Del. Super. July 20, 2005) (TRANSCRIPT) (Exhibit D), or the Restatement §§ 388 and 389. The Court explained that in Wilkerson, 2008 Del. Super. LEXIS 26, at *3 it had been referring to products manufactured by the Defendant, not supplied.[101] However, this does not explain why Wilkerson cited to Restatement §§ 388 and 389, which references suppliers, not manufacturers. Moreover, Ford both manufactured and supplied its asbestos-containing automobiles. The Court also stated that it was not "holding

[99] Bernhardt v. Ford, C.A. 063-06-307-ABS, 34:14-35:3 (Del. Super. March 30, 2010) (TRANSCRIPT) (Ex. C); see also Bernhardt, 2010 Del. Super. LEXIS 329, at * 3.

[100] Bernhardt v. Ford, C.A. 063-06-307-ABS, at 34:14-15 (Del. Super. March 30, 2010) (TRANSCRIPT) (Ex. C); see also Bernhardt, 2010 Del. Super. LEXIS 329, at *4. Ford also argued that its products were automobiles, Bernhardt v. Ford, C.A. 063-06-307-ABS, at 22:3-4 (Del. Super. March 30, 2010) (TRANSCRIPT) (Ex. C) and that it had a duty to warn about those automobiles. Id. at 23:12-13.

[101] Bernhardt v. Ford, C.A. 063-06-307-ABS, at 34:23-35:4 (Del. Super. March 30, 2010) (TRANSCRIPT) (Ex. C); see also Bernhardt, 2010 Del. Super. LEXIS 329, at *4.

Ford to an understanding of another manufacturer's asbestos-containing products."[102] Plaintiffs are not asking the Court to hold Ford to an understanding of anything other than its own product. Further, in Walls and unlike Bernhardt, there is record evidence that Ford had an understanding that the use of its automobiles would entail removing and replacing asbestos brakes, an integral and necessary component of the automobile. In Bernhardt plaintiff did not submit any record evidence that Ford knew that asbestos replacement brakes were required in its automobiles or that Ford knew asbestos brake removal and replacement was dangerous.[103] Here, however, Plaintiff submitted evidence that Ford designed its vehicles to use asbestos brakes,[104] knew brakes needed to be replaced,[105] knew only asbestos brakes could be used as replacement parts,[106] and knew of the dangers of asbestos exposure during the asbestos brake replacement which would be necessary to do on its

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[102] Bernhardt v. Ford, C.A. 063-06-307-ABS, at 34:16-18 (Del. Super. March 30, 2010) (TRANSCRIPT) (Ex. C); see also Bernhardt, 2010 Del. Super. LEXIS 329, at *4.

[103] A779-A783, Bernhardt summary judgment answering brief.

[104] A409 at 148:2-10, Mark Taylor 2/7/12 (SJAB Ex. N); A694, 3/15/85 Ford Memo p. 2. (SJAB Ex. U); See also A777-A778 for complete 3/15/85 Ford memo.

[105] A358:12-24, Mark Taylor 1/13/12 (SJAB Ex. M), A562, Brake Linings 1935 at 68 (SJAB Ex. T), A555, Brake Linings 1935 at 61 (SJAB Ex. T), A693-A694, 3/15/85 Ford Memo p. 2. (SJAB Ex. U); See also A777-A778 for complete 3/15/85 Ford memo.

[106] A418:17-25, Mark Taylor testimony from Bretzke v. Ford, C.A. 62-CV-08-1189 (MA Second Judicial Ct.) (SJAB Ex. O, p. 36), A362:17-A363:16, A364:17-A365:1, Mark Taylor 1/13/12 (SJAB Ex. M), A409 at 147:21-148:10, Mark Taylor, 2/7/12 (SJAB Ex. N); A693-A694, 3/15/85 Ford Memo p. 2. (SJAB Ex. U); See also A777-A778 for complete 3/15/85 Ford memo.

automobiles.[107] On the record below, unlike in Bernhardt, there is ample evidence Ford did know, had a reason to know, and should have known of the asbestos hazards associated with its vehicles and failed to warn consumers.

3. Other State and Federal Courts Have Held that Ford can be Liable where the Plaintiff was Not Exposed to Original Ford Brakes.

The decision in Bernhardt is contrary to decisions from other courts in asbestos cases where the Plaintiff could not show he was exposed to an original Ford brake.

A federal court applying Pennsylvania strict liability law and Restatement Section 402(A) of the Restatement (Second) of Torts similarly held that Ford had a duty to warn where the plaintiff was exposed to non-Ford replacement brakes on Ford automobiles because Ford vehicles "were specifically designed to use asbestos-containing friction materials" and "Ford was aware that non-asbestos brakes could not be used in its vehicles unless it redesigned its braking systems." Hoffeditz v. AM Gen., LLC (In re Asbestos Prods. Liab. Litig.), 2011 U.S. Dist. LEXIS 110282, at *3 n.1 (E.D. Pa. July 28, 2011).[108] The Court held:

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[107] A476, Castleman, Barry I., Asbestos Medical and Legal Aspects (Wolters Kluwer Law & Business, 5th ed. 2011) at 522 (citing Memo by Paul Toth, "Vehicle Brake Rebuilding," August 3, 1973) (SJAB Ex. R); A477, Id. at 523 (citing Memo by Paul Toth, "Exposure of Garage Mechanics to Brake Dust," April 23, 1975); A630, 9/4/75 Memo from Paul Toth to Ford Parts and Services Division (SJAB Ex. T).

[108] "Under Pennsylvania law, a defendant can be held strictly liable for failure to

> Because Plaintiffs raised a genuine issue of material fact as to whether Mr. Hoffeditz was exposed to replacement brakes between 1968 and 1993, Mr. Hoffeditz suffers from mesothelioma, and Ford knew of the asbestos-containing replacement brakes, this Court concludes that Ford had a duty to warn Mr. Hoffeditz of the known dangers of using replacement brakes.

Id. (citations omitted). This case clearly recognizes a duty to warn by Ford even where Plaintiff was exposed to non-original Ford brakes.

In Brawley v. Ford, Case No. 759955 (Ohio Ct. Com. Pl. Jan. 17, 2013) (Ex. E),[109] the Court denied summary judgment to Ford in a case where the Plaintiff was not able to testify he was exposed to original Ford brakes or Ford replacement brakes:

> The Plaintiff Robert Brawley was a "shade tree" mechanic and worked on automobiles replacing brakes and clutches. There is evidence he performed brake work on a number of Ford vehicles. He replaced the worn brakes with asbestos containing brakes not made by Ford. The Plaintiff was exposed to asbestos dust when he installed the new brakes.
>
> Ford Motor Company contends it is not responsible for replacement parts made or supplied by others. There is some evidence that Ford was aware that nonasbestos brakes could not be used in its vehicles unless it redesigned its braking system. Ford vehicle braking systems were designed and required the

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warn when Plaintiff establishes "(A) that defendant had a duty to warn of the dangers inherent in his product; (B) that the product was defective or in a defective condition; (C) that the defect causing the injury existed at the time the product left the seller's hands; and, (D) that the defective product was the cause of plaintiff's injuries." Id. at *3. This is very similar to Delaware's standard for negligent failure to warn.

[109] Ohio has adopted the Restatement (Second) of Torts § 388. Schwartz v. All. Mach. Co., 2012 Ohio Misc. LEXIS 472, at *13 (Ohio Ct. Com. Pl. Nov. 12, 2012).

use of asbestos containing friction material. Ford Motor Company's Motion for Summary Judgment is Denied.

4. Other State Courts Have Found a Duty to Warn where Plaintiff was Not Exposed to Asbestos Originally Supplied or Manufactured by the Defendant.

Other state courts have recognized a duty to warn in similar contexts. In May v. Air & Liquid Sys. Corp., the Maryland Court of Appeals "determine[d] the interesting question of whether a manufacturer can be liable for failing to warn about the risk of harm from exposure to asbestos-containing replacement parts that it neither manufactured nor placed into the stream of commerce, but which were integral to the operation of its product. May, 129 A.3d at 986. Plaintiff, Mr. May, had died of mesothelioma. Id. at 987, 988 n.7. Respondents were pump manufacturers who manufactured and sold steam pumps to the Navy which contained asbestos gaskets and packing when first delivered. Id. at 986. Mr. May replaced asbestos gaskets and packing on these pumps, which exposed him to asbestos. Id. at 987. However, he never replaced the original gaskets and packing that had been manufactured and sold by Respondents. He only replaced gaskets and packing on the pumps that had been manufactured and sold by third parties. Id.; Id. at 989.

Respondents argued, similar to Ford below, that "they 'did not owe [] May a duty of care for the fundamental reason that they did not manufacture or sell the

injurious asbestos parts.'" Id. In products liability cases, Maryland follows the general principles of Restatement § 388. Id. at 989; Moran v. Faberge, Inc., 332 A.2d 11, 15 (1975). Foreseeability of harm was an important factor in determining whether to impose a duty. Id. at 990. The Court stated that "[w]here a manufacturer's product contains asbestos components and those components must be replaced periodically with new asbestos components, the risk of harm to a machinist removing the old and installing the new is highly foreseeable." Id.

The Court looked at the issue of the "'closeness of the connection between the defendant's conduct and the injury suffered'" Id. The May Court determined that the evidence was "sufficient to permit a reasonable inference that asbestos was crucial to operation of the pumps at such high temperatures." Id. at 992, noting the evidence that no suitable non-asbestos component parts existed at the time Respondents sold their pumps to the Navy. Where the "noxious component of the product is essential to its intended operation," the "connection" between the Respondents' conduct and the injury suffered by the Plaintiff was strengthened and supported a duty to warn. Id.

The May Court also found the burden on Defendants to warn was minimal, Id. at 992-993, there was some "moral blame" assigned to Respondents for failing to warn, Id. at 993, the policy of preventing future harm was neutral, Id. at 993-994, and there was insurance available. Id.

The Court held that "[t]he foreseeability of harm to workers servicing pumps with asbestos gaskets and packing is especially strong where a manufacturer knows or should know that these components are necessary to the proper functioning of its product and must be replaced periodically." Id. at 994. When balancing this with the other factors it considered, the Court determined a duty to warn "exists in the limited circumstances when (1) a manufacturer's product contains asbestos components, and no safer material is available; (2) asbestos is a critical part of the pump sold by the manufacturer; (3) periodic maintenance involving handling asbestos gaskets and packing is required; and (4) the manufacturer knows or should know of the risks from exposure to asbestos." Id. It was a "narrow and limited duty. Cabining the duty in this way serves the policy of preventing harm without exposing manufacturers to limitless liability for products they did not manufacture or sell." Id. at 995.

The Court also discussed O'Neil v. Crane Co., 266 P.3d 987 (Cal. 2012), a case frequently cited by Defendants, which held that a Defendant had no duty to warn if it did not place into the stream of commerce the asbestos-containing product which injured the Plaintiff. Id. at 995 (citing O'Neil, 266 P.3d at 991). The Court stated that the O'Neil court recognized an exception that is applicable here:

> [E]ven *O'Neil* recognized there might be circumstances where a manufacturer could be strictly liable for products it has not placed into the stream of commerce. The California Supreme Court explicitly 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.

Further, O'Neil based its holding in part on the fact that there was no evidence that Defendant's products needed asbestos components to function properly. May, 129 A.3d at 995-96 (citing O'Neil, 266 P.3d at 1004). In contrast to the products at issue in O'Neil, and like the evidence in this case,[110] the Respondents' products in May needed asbestos components to function correctly. Id. at 996.[111]

The May Court stated "We are not persuaded by Respondents' argument that the asbestos gaskets and packing themselves are the 'product' for purposes of strict liability analysis. Common sense tells us that the pumps were what Respondents sold to the Navy, and the gaskets and packing are included within that product." Id. at 999. The Court faulted cases that ignored the fact that the "product" for purposes

[110] A409 at 147:21-148:10, Mark Taylor 2/7/12 (SJAB Ex. N); A693-A694, 3/15/85 Ford Memo p. 2. (SJAB Ex. U) (see also A777-A778 for complete 3/15/85 Ford memo); Statement of Facts, A.

[111] Another case that is frequently cited by Defendants arguing there is no duty to warn is Simonetta v. Viad Corp., 165 Wash. 2d 341 (2008). In that case, the Washington Supreme Court held there was no duty to warn by an evaporator manufacturer of the dangers of asbestos insulation that would be required to be used with its product. Id. at 345, 354. The Court held that the duty to warn is limited to those in the chain of the distribution of the hazardous product and because Defendant did manufacture, sell, or supply the asbestos insulation, there was no duty to warn under Restatement § 388. Id. at 354. Importantly, the evaporator was sold without asbestos insulation, id. at 345, unlike in this case where Ford's automobiles were always sold with asbestos brakes in them.

of duty to warn was the finished product itself, here an automobile, not the expendable component, here a brake:

> When an expendable noxious component such as asbestos is essential to a product that is sold, we should not consider the expendable component as the "product." Rather we should focus on the final product, the pump. It is undisputed that the pump contained asbestos, and there is sufficient evidence that the asbestos was essential to its operation, needed periodic replacement, and was dangerous.

Id. at 1000. It is clear that the May Court considered the pump to be the product for purposes of its negligent failure to warn analysis as well. See Id. at 989, 994.

In McKenzie v. A. W. Chesterson Co., 373 P.3d 150 (Or. Ct. App. 2016), rev. denied, 2016 Ore. LEXIS 580 (Or. Sept. 15, 2016), the Plaintiff, Mr. McKenzie, was exposed to asbestos through repairing Defendant's pumps. Id. at 152-153. The pumps had originally been sold with gaskets, packing, and insulation material that Defendant did not manufacture. Id. at 152. Mr. McKenzie was not exposed to the gaskets, packing, or insulation material originally supplied with the pumps. Id. at 153.

The Oregon Court determined that the "products" at issue were the pumps sold to the Navy with asbestos in them, and not the component parts of those pumps that had been replaced by the time Mr. McKenzie came into contact with them. Id. at 155. Here, this Court should also consider Ford's automobiles the products manufactured and sold, not the brakes.

Mr. McKenzie alleged Defendant was negligent "because it sold

asbestos-containing products; knew, or should have known, about asbestos-related hazards; but failed to provide adequate warnings about the dangers associated with asbestos and to advise users about how and when to use respiratory protection," Id. at 161, citing Restatement § 388 and Oregon case law based on it. The Oregon Court rejected Defendant's "bare metal" or "no duty" defense on liability, explaining that the duty to warn is predicated on foreseeability. Id. at 162. The Court held that "A jury could find that defendant knew that the Navy required the placement of asbestos-containing parts in and on the exterior of some pumps by defendant's design and pursuant to the Navy's specifications. A jury could also find it was foreseeable to defendant that the Navy would continue to use such parts in and on the pumps on which McKenzie worked and that McKenzie would be exposed to asbestos as a result." Id. The court held that the trial court had erred in granting summary judgment. Id. Similarly, since it was foreseeable to Ford that consumers such as John would be exposed to asbestos as a result of asbestos brakes used in its automobiles, it had a duty to warn about those dangers.

New York has also recognized such a duty. In Matter of N.Y.C. Asbestos Litig., 2016 NY Slip Op 05063 (NY 2016),[112] the Court determined that Crane, a valve manufacturer, had the duty to warn about asbestos-containing gaskets,

[112] Under New York law, "a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" as well as "dangers arising from the product's 'intended use or a reasonably foreseeable unintended use'" Id. at **20 (citations omitted).

packing, and insulation that were used in connection with its valves, where the Plaintiff was only exposed to non-original component parts. Id. at **3-4, **7, **11. The Court held that "the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." Id. at **2; see Id. at **11.

These cases are more consistent with Delaware law than Bernhardt, because they generally hold that a manufacturer and supplier have a duty to warn where they know or should know that their product will subject a user to possible harm.

CONCLUSION

An application of the law to the facts of this case leads inexorably to the conclusion that summary judgment was improvidently granted. The jury was not able to hold Ford responsible for harm that it foresaw and caused to John Walls. Wherefore, Plaintiff respectfully requests that this Court reverse the Superior Court's decision granting summary judgment.

Respectfully submitted,
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