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Case Number 15,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION	)	
	)	No. 15, 2020
SANDRA KIVELL, individually, and as Personal Representative of the Estate of MILTON J. KIVELL, deceased,	)	
Plaintiff Below, Appellant,	)	On appeal from the Superior Court of the State Delaware
v.	)	C.A. No. N15C-07-093 (ASB)
UNION CARBIDE CORPORATION,	)	
Defendant Below, Appellee.	)	

ANSWERING BRIEF OF APPELLEE UNION CARBIDE CORPORATION

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NATURE OF THE PROCEEDING

This appeal arises from an asbestos lawsuit filed in July 2015, by decedent Milton Kivell and his wife, Plaintiff-Appellant Sandra Kivell.[1] The lawsuit claims that Mr. Kivell developed mesothelioma as a result of asbestos exposure while employed as a union pipefitter and welder from 1966 through 1993.[2] In those 27 years, Mr. Kivell is alleged to have worked at dozens of commercial and industrial sites throughout southern Louisiana. These included two years at Union Carbide's Taft petrochemical facility outside of New Orleans, while Mr. Kivell was employed by third-party engineering and construction companies.[3] Union Carbide was named as 1 of 38 Defendants in the lawsuit.[4]

Mr. Kivell was deposed in August 2015 before his passing. A year later, in September 2016, Ms. Kivell amended her pleading to add a wrongful-death claim in order to pursue the lawsuit on Mr. Kivell's behalf.[5]

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[1] A182 (Complaint).

[2] A185 (Complaint).

[3] *See id.*; A380-85 (M. Kivell union records).

[4] A275 (Second Amended Complaint).

[5] *See id.* In March 2018, the Superior Court dismissed Plaintiff's wrongful-death and survival claims as untimely. A165 (Docket). Plaintiff sought re-argument of that dismissal, which the Superior Court denied. A171 (Docket). Plaintiff has not appealed the dismissal of her wrongful-death or survival claims, leaving Plaintiff with only her claim for loss of consortium.

At all relevant points for purposes of this appeal, Plaintiff's lawsuit was assigned to the Delaware asbestos litigation November 2017 Trial Group.[6] The deadline for Plaintiff to complete fact discovery relating to any issue impacting summary judgment was May 5, 2017.[7] On February 6, 2017, Plaintiff served written discovery on Union Carbide, consisting of 61 interrogatories and 67 requests for production.[8] On April 10, 2017, Union Carbide filed written responses to Plaintiff's discovery, in addition to offering Plaintiff's counsel the opportunity to visit Union Carbide's Taft-specific document repository in Louisiana.[9] Plaintiff never filed a motion to compel or otherwise challenged the adequacy of Union Carbide's responses. Nor did Plaintiff request any additional information or documents prior to the deadline for summary-judgment discovery.

One month after the deadline for Plaintiff to complete discovery for summary judgment, on June 6, 2017, Union Carbide filed its motion for summary judgment.[10] On July 10, Plaintiff filed her opposition brief; and on July 25, Union Carbide filed its reply brief.[11] A hearing was scheduled for August 31. At no point

[6] B0030 (Master Trial Scheduling Order dated June 8, 2017).

[7] *See id.*; B0005-00006 (General Scheduling Order dated December 17, 2015).

[8] A325 (Docket).

[9] A469-72.

[10] A370 (Docket).

[11] A398, 473 (Docket).

did Plaintiff ever contend summary judgment should be reserved or denied on the basis that any additional discovery was necessary.[12]

On July 24, 2017, the day before summary-judgment briefing closed, Plaintiff contacted Union Carbide for the first time regarding documents implicated by her discovery requests.[13] Plaintiff requested that Union Carbide narrowly search for and produce contracts between it and co-Defendant Kiewit Corporation in connection with the construction/modification of the Taft Facility between 1967 and 1969, as well as specifications, bid sheets and proposals for the subject work.[14] Union Carbide searched the repository and on August 10, 2017, provided Plaintiff with copies of the three operative contracts governing Kiewit's work at Taft.[15]

On August 15, 2017, Plaintiff served written discovery requests on Kiewit Corporation relating to the Taft facility. On August 29, 2017, Kiewit produced documents to Plaintiff reflecting its work at the Taft refinery, including many documents outside the timeframe and scope of Mr. Kivell's work there.[16]

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[12] *See* Del. Super. Ct. Rule 56(f).

[13] A551-55 (Email chain; Ex. C to Plaintiff Motion for Re-argument).

[14] *See id*.

[15] After a second search of the repository, Union Carbide later confirmed that it did not have any invitations to bid or specifications referenced in the subject contracts. *See id*.

[16] A149 (Docket).

On August 30, 2017, the Superior Court decided oral argument was unnecessary in light of the papers and issued a written order granting Union Carbide judgment on Plaintiff's negligence and strict-liability claims.[17] In doing so, the Superior Court found no evidence that Union Carbide (1) negligently exposed Mr. Kivell to unreasonable risk of injury or harm through its own actions or omission or (2) "had any type of direction, control or ownership of an asbestos product used by [Mr. Kivell]" for purposes of Plaintiff's strict-liability claim.[18]

On September 7, 2017, Plaintiff filed a motion for re-argument based on what she described as "newly discovered evidence," relying principally on several documents obtained from Defendant Kiewit's production.[19] Plaintiff also argued that the Superior Court ignored evidence that asbestos-containing materials were necessarily "within [Union Carbide]'s custody" at the time of Mr. Kivell's alleged exposure.[20] Union Carbide responded that Plaintiff failed to meet her burden under Superior Court Rule 59 to show that the late-discovered evidence could not, "in the

[17] Ex. A to Plaintiff Opening Br.

[18] *Id*. at 5-6.

[19] A485. Plaintiff characterizes the documents obtained from Kiewit as "newly discovered evidence." But the documents were provided to Plaintiff (1) *before* the Superior Court ruled on summary judgment and (2) in response to a discovery request issued three months *after* the close of summary-judgment discovery. For summary-judgment purposes, then, the documents were neither new nor newly discovered, and they were discovered late only because of Plaintiff's lack of diligence in discovery.

[20] A490.

exercise of reasonable diligence, have been discovered for use at the time" of the motion.[21] Union Carbide alternatively argued that, even if Plaintiff had exercised reasonable diligence, the documents she relied on were irrelevant or taken out context.[22] Union Carbide also pointed out that Plaintiff's arguments ignored settled Louisiana law holding that a premises owner is not liable for a third-party's use of asbestos-containing materials.[23] The Superior Court requested additional briefing from both parties,[24] which was submitted in January and February 2018.[25]

On May 1, 2018, the Superior Court again granted Union Carbide's motion for summary judgment.[26] The Superior Court accepted Plaintiff's supplemental materials as "newly discovered evidence because it was evidence that the Court did not have and was not able to consider at the time of its [August 30] decision."[27] But the Superior Court concluded there was still "no evidence that [Union Carbide] retained the right to control its independent contractors sufficient to hold [Union Carbide] vicariously liable" or that Union Carbide "failed to provide a safe

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[21] A593.

[22] A594.

[23] *See id*.

[24] A595.

[25] A598, A681.

[26] Ex. B to Plaintiff Opening Br.

[27] *Id*. at 2.

working environment for its independent contractors."[28] The Superior Court also held that Plaintiff's argument regarding strict liability was inconsistent with settled "Louisiana precedent that mere physical presence on the premises does not constitute custody."[29]

After Union Carbide was dismissed from the case on summary judgment, at least three parties remained as Defendants in the case.[30] Upon information and belief, the remaining three Defendants reached financial settlements with Plaintiff at various points during the fall of 2019, and final judgment issued on December 11, 2019.[31] On January 10, 2020, Plaintiff filed her appeal with this Court, limited to the Superior Court's grant of summary judgment for Union Carbide.

[28] *Id*. at 6-7.

[29] *Id*. at 9 (internal quotations omitted).

[30] A176-79 (Docket) (reflecting individual dismissals of Honeywell International, Inc., Kiewit Corporation, and Georgia-Pacific Consumer Products LP between September and December 2019).

[31] A178-79 (Docket).

SUMMARY OF ARGUMENT

1. Denied. Plaintiff has failed to identify any genuine issue of material fact. The record is uncontroverted that Mr. Kivell's alleged asbestos exposures at the Taft facility occurred in the context of his work for independent contractors, Kiewit Corporation and Stearns Rogers Company. Conversely, there is no record evidence that (1) Union Carbide's premises were inadequate for the safe handling of asbestos; (2) Union Carbide exercised operational control over the manner or method of Kiewit's or Stearns Rogers's work, the areas where they performed that work, or the materials they worked with; or (3) Union Carbide approved of any unsafe work practices. In the absence of such evidence, the Superior Court correctly applied settled Louisiana law and properly granted Union Carbide summary judgment on Plaintiff's negligence and strict-liability claims.

STATEMENT OF FACTS

A. Mr. Kivell's employment with Kiewit Corporation and Stearns Rogers Company

Mr. Kivell never worked for Union Carbide directly. Instead, Mr. Kivell was employed by two different third-party contractors, Stearns Rogers Company and Kiewit Corporation, as a union pipefitter and welder at Union Carbide's Taft petrochemical facility for approximately two years between 1967 and 1969.[32] Plaintiff misstates the record by asserting that Mr. Kivell's work at the Taft facility spanned nearly four years[33] and included employment with another contractor, Parsons Corporation.[34] Neither assertion is supported by admissible evidence.

During this period, Kiewit and Stearns Rogers were two of North America's largest and most-respected construction-and-engineering contractors, involved in many of the large-scale construction projects of that era, including hydroelectric

[32] A380-85 (union records).

[33] *See* Opening Br. At 4 n.2. Mr. Kivell initially speculated at his deposition that he worked at Taft for three or four years through 1970 or 1971, but his union records reflect that two of those years were spent at Tulane and Shell Oil—not Taft. *See* A380-85.

[34] Mr. Kivell testified at his deposition that he was not sure whether he worked for Parsons at Taft and that he could not "swear to it." (B0092-0102) (M. Kivell Discovery Deposition Tr.) (Ex. B to Defendant Parsons Corporation's motion for summary judgment). He offered no testimony about any work he may have performed for Parsons at Taft, let alone any exposure to asbestos in the context of that work. In fact, Plaintiff did not oppose Parson's summary-judgment motion, and Parsons was dismissed on this basis below. A143-44 (Docket).

dams and missile-base projects for the U.S. military.[35] Kiewit's contract price, alone, to perform its work at the Taft facility (including the construction of five major plants and dozens of additional stations, processes, lines and ancillary facilities) was approximately $20 million in 1965 dollars—or the equivalent of $164 million in today's dollars accounting for inflation.[36]

Plaintiff does not dispute that Kiewit and Stearns Rogers performed the subject work at the Taft facility as independent contractors. The uncontested record reflects that Kiewit and Stearns Rogers retained exclusive control of their respective work areas, supplied their own tools and safety equipment, and were responsible for the manner and method of their work.[37] The contractor was also responsible for furnishing all consumable supplies, including gasket material, packing, insulating brick and cement.[38] Contract language reflects that Union Carbide was relying on its contractor's engineering and construction expertise in so far as the contractor agreed to (1) complete its obligations in accordance with

[35] A371.

[36] A558-60 (discussing scope of Kiewit's work); A563, A636 (discussing contract price). Calculation performed on www.dollartimes.com/inflation based on 3.91% annual rate of inflation between 1965 and 2020.

[37] A390-92 (M. Kivell Discovery Deposition Tr.); A397 (J. Lemitre Deposition Tr.); A558, 561, 567-68 (Kiewit contract 511-776-18); A634-35 (Kiewit contract 511-406-19); A692 (Plaintiff Reply Br. in support of motion for reargument) ("[a]dmittedly, there is evidence that independent contractors controlled Mr. Kivell's day-to-day worksite").

[38] A656, A665-80 (Kiewit contract 511-406-19).

prevailing regulations and safety practices; (2) review Union Carbide's specifications to confirm that the work would not violate laws or impose any public health or safety issues; and (3) indemnify Union Carbide for any violations of the same.[39] Union Carbide had no contractual authority to order, direct or control the contractor's employees. Union Carbide's only recourse for non-compliance with the provisions of the contract was to notify the contractor in writing to allow the opportunity to correct the non-compliance.[40]

Contrary to Plaintiff's claim, there is no record evidence that Union Carbide required or recommended that its contractors use asbestos-containing insulation at the Taft Facility. Plaintiff cites to Union Carbide's specifications for two types of asbestos-containing insulation—bonded expanded silica (22-H) and hydrous calcium silicate (32-H).[41] But there is no evidence that those specifications were drafted to govern construction of the Taft facility specifically. Moreover, the referenced pages merely provide that, if and only if the *contractor elected* to use asbestos-containing materials, those materials must have complied with certain specifications (including thickness, density, alkalinity, etc.). Of the seven exemplar insulations listed, Union Carbide also provided at least four

[39] A650-53.

[40] A567-68 (Kiewit contract 511-776-18); A646 (Kiewit contract 511-406-19).

[41] *See* Plaintiff Opening Br. at 15, 17 (citing A793-94, 827-831).

specifications for non-asbestos-containing insulation alternatives.[42] Union Carbide's contractors ultimately selected the products and materials used in the construction of the Taft facility on their own. And as discussed above, contract language reflects that Union Carbide was relying on its contractors to review all general specifications to confirm that the work would not impose any safety issues. So Plaintiff's suggestion that Union Carbide required Kiewit or Stearns Rogers to use asbestos-containing insulation at Taft is simply untrue.

B. Mr. Kivell's alleged exposure to asbestos at the Taft facility

While employed with Kiewit and Stearns Rogers, Mr. Kivell was responsible for welding and installing pipe for certain plants, stations and facilities being constructed at the then-new Taft facility.[43] Mr. Kivell admits that he spent the majority of his time laying large metal pipe with a crane, preparing the ends with a torch and then connecting the pipes together.[44] Mr. Kivell claimed that he may have been exposed to asbestos while installing and removing gaskets on

[42] *See id*. at 17 (conceding that "[o]f the seven types of insulation specified," there is only evidence that "three contained asbestos"). Plaintiff also references selective Union Carbide "Piping and Valve Specifications" from 1964. *See* Opening Br. at 14. But the origin and application of those specifications is unknown; and there is no evidence that those specifications applied to construction work that Mr. Kivell at Taft was involved with between 1967 and 1969.

[43] A389 (M. Kivell Trial Deposition Tr.)

[44] A412-14 (M. Kivell Trial Deposition Tr.); A727 (M. Kivell Discovery Deposition Tr.)

flanges and pumps.[45] Mr. Kivell would occasionally have to "tie-in" a new pipe to an existing line or process.[46] To do that, Mr. Kivell stated that he and his co-workers would remove any insulation on the existing pipe by "hack[ing]" it away, which he claims created dust.[47] Mr. Kivell also claimed that he worked "side by side" with insulators who were cutting asbestos insulation—"[i]t created dust because [they] were cutting things to fit and form… Sometimes they were pushing you. You couldn't get out of their way."[48]

C. Kiewit and Stearns Rogers controlled the manner and method of Mr. Kivell's and the adjacent trades' work

Kiewit and Stearns Rogers retained exclusive control over Mr. Kivell's work area.[49] They (and not Union Carbide) directed and controlled the manner and method of both Mr. Kivell's work.[50] Kiewit and Stearns Rogers *also* directed and controlled the work of the insulators working beside Mr. Kivell, who were likewise employed by or subcontracted with the contractor rather than Union Carbide.[51] As

[45] A726-28 (M. Kivell Discovery Deposition Tr.)

[46] A414 (M. Kivell Trial Deposition Tr.) When asked how often he performed "tie-ins" at Taft, Mr. Kivell responded "[n]ot too often." A418.

[47] A417.

[48] A423-24.

[49] *See supra* at 9 & n.37.

[50] *See id*.

[51] *See id*.

owner of the premises and by contract, Union Carbide had the right to inspect its contractors' work, but it did not have the contractual right to control that work, and it did not do so. Union Carbide hired some of the most-prominent contractors in the country, paid them a tremendous amount of money, and trusted their experience and expertise to carry out the tasks in the manner and with the materials they deemed appropriate.

Mr. Kivell stated that he occasionally saw Union Carbide employees, but he admitted they were strictly operators of existing units with no involvement in the new construction.[52] In fact, there is no evidence that Mr. Kivell received *any* direction from, Union Carbide personnel while working at the Taft facility.

Plaintiff suggests that Union Carbide directed Mr. Kivell in performing "tie in" work and assigned him maintenance work, which is inaccurate.[53] Mr. Kivell testified that he sometimes needed "permission" from Union Carbide employee operators to shut down specific lines before opening the line and connecting a another pipe.[54] But there is no testimony or evidence that Union Carbide directed or controlled the manner or method of Mr. Kivell's work once the line was shut

[52] A627-28 (M. Kivell Discovery Deposition Tr.) ("They were operators. That's all I know. They were responsible for -- well, there were a lot of adjacent units, and they were responsible for operating them.").

[53] Plaintiff Opening Br. at 4.

[54] A699-700 (M. Kivell Trial Deposition Tr.)

down. Instead, the record suggests that Union Carbide personnel acted upon requests *from Mr. Kivell and his employers* in shutting down the line, not vice versa.[55] Similarly, although Union Carbide assigned maintenance projects to Kiewit and Stearns Rogers as contemplated by the contracts,[56] there is no evidence that Union Carbide controlled the manner or method of that maintenance work once it was assigned.

[55] A626 (M. Kivell Discovery Deposition Tr.); A700-01 (M. Kivell Discovery Deposition Tr.)

[56] *See* Plaintiff Opening Br. at 16 & n.54.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY INTERPRETTED LOUISIANNA LAW AND APPROPRIATELY HELD THAT THERE WAS NO EVIDENCE REFLECTING A GENUINE ISSUE OF MATERIAL FACT

A. Questions Presented

Whether the Superior Court properly held that Plaintiff failed to offer evidence showing that Union Carbide (1) negligently exposed Mr. Kivell to unreasonable risk of injury or harm through its own actions or omission or (2) exercised custody over asbestos-containing materials that rendered its premises unreasonably dangerous?

B. Scope of Review

Union Carbide agrees that the Superior Court award of summary judgment is subject to *de novo* review.

Summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law.[57] This means that "[t]he party bearing the burden of proof at trial must provide sufficient evidence to carry that burden at trial;[58] and where "an essential element of the non-movant's claim is unsupported by sufficient evidence for a

[57] *See* Super. Ct. Civ. R. 56(c).

[58] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

reasonable juror to find in that party's favor, then summary judgment is appropriate."[59]

In applying this standard, Union Carbide agrees that the Court views the facts and the reasonable inferences arising from them in a light most favorable to the non-moving party.[60] But inferences cannot be based on mere speculation, and "[t]he Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based."[61]

Plaintiff notes that Union Carbide as the movant bears "the burden … to demonstrate the absence of a material disputed fact.[62] But Rule 56 does not impose upon the moving party an obligation to support its motion with "affidavits or other similar materials negating the opponent's claim."[63] Rather, the movant

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[59] *Edmisten v. Greyhound Lines, Inc*., 2012 WL 3264925, *2 (Del. Aug. 13, 2012) (affirming summary judgment in asbestos case).

[60] *See id*.

[61] *In re Asbestos Litig. (Barbara Reed)*, 2017 WL 510463, *1 n.2 (Del. Feb. 7, 2017); *see also Gannett Co. v. Kanaga*, 750 A.2d 1174, 1188 (Del. 2000) ("While the plaintiff is entitled to the benefit of reasonable inferences from established facts, the jury cannot supply any omission by speculation or conjecture."); *Timblin v. Kent Gen. Hosp. (Inc.)*, 640 A.2d 1021, 1026 (Del. 1994) ("While a jury may draw inferences from the facts of a case, those inferences may not be based upon speculation.").

[62] Plaintiff Opening Br. at 22.

[63] *Celotex*, 477 U.S. at 323.

may discharge its burden by "showing—that is, pointing out to the trial court—that there is an absence of evidence to support the non-moving party's case."[64]

C. Merits of Argument

Union Carbide neither employed Mr. Kivell nor controlled the manner in which he worked. In such cases, Louisiana law is clear: Union Carbide is not liable for the harm that Mr. Kivell encountered as a result of his employment. Plaintiff attempts to shoehorn the facts of this case into a number of exceptions to that general rule of a premises owner's nonliability. But when Plaintiff failed to identify admissible evidence necessary to support those exceptions, the Superior Court properly granted Union Carbide summary judgment.

Plaintiff fares no better on appeal. Her brief advances three theories of liability: direct liability for Union Carbide's own negligence, vicarious liability for the negligence of Mr. Kivell's employers, and strict liability. As discussed above, the uncontested record reflects that Mr. Kivell's employers exercised operational control over all aspects of Mr. Kivell's work, the work performed by adjacent trades (including insulators), and the areas where Mr. Kivell and his co-workers performed that work.[65] There is also no evidence that Union Carbide's premises were inadequate for the safe handling of asbestos or that Union Carbide approved

[64] *Id*. at 325.

[65] *See supra* at 9 & n.37.

any unsafe work practices. In short, Plaintiff has failed to proffer evidence from which any reasonable juror could find in her favor, and the Superior Court properly entered judgment for Union Carbide as a matter of law.

1. The Superior Court properly granted Union Carbide summary judgment on Plaintiff's negligence claims

a. Plaintiff's direct-negligence claim

A premises owner generally owes a duty to provide a safe workplace for the employees of its independent contractors. Plaintiff contends that Union Carbide breached that duty by "its negligent failure to warn Mr. Kivell of the dangers of asbestos."[66] But, conspicuously, Plaintiff never identifies what it was about the *workplace* in question that was unsafe. On closer scrutiny, the record is clear that any exposure to asbestos at the Taft facility was not the result of the workplace itself; instead, it was the result of the negligence of Mr. Kivell's employers—the contractors—who may have elected to use asbestos or handle it in an unsafe manner.

Louisiana recognizes this distinction as a matter of law, namely, "between hazards that are inherent in a defendant's premises (for which a premises owner owes a duty) and hazards inherent in an independent contractor's job (for which a

[66] Plaintiff Opening Br. at 24.

premises owner does not owe a duty)."[67] In *Roach v. Air Liquide America*, the court granted the defendant summary judgment on a similar record: a premises owner hired a contractor to perform painting and sandblasting work, and an employee of the contractor fell ill as a result of exposure to silica dust during the sandblasting process.[68] There was nothing hazardous "inherent in defendant's premises"; because the contractor had supplied the silica and controlled the manner in which it was used.[69]

The same is true of Mr. Kivell's work at Taft. Plaintiff attempts to distinguish this case by arguing that "Mr. Kivell was a pipefitter – a job which does not inherently entail asbestos."[70] This argument rests on a fundamental misunderstanding of the case law. The question is not whether the hazard was inherent in the work of any given individual employee of a contractor. Instead, as the Superior Court observed, it is whether the hazard is inherent in the work *of the contractor* writ large—as distinguished from the hazard being inherent the premises themselves.[71] In other words, the contractor owes a duty to its employees to make sure the work the contractor is doing is safe and to protect them from

[67] 2016 WL 1453074 (W.D. La. Apr. 11, 2016).

[68] *Id.* at *1-2.

[69] *Id.* at *4.

[70] Plaintiff Opening Br. at 29.

[71] May 1, 2018 Order at 8-9.

hazards caused by that work. So to the extent that other employees or subcontractors hired by the same contractor (including the insulators about which Plaintiff complains) mishandled asbestos in performing the contracted work, the contractor was responsible. It could hardly be otherwise. As the Superior Court noted, to hold differently would require premises owners to exert an unprecedented level of control over their contractors' individual employees and thus essentially undo the independent-contractor relationship.[72]

The cases on which Plaintiff relies are all distinguishable on this basis: in each case, the hazard was inherent in the premises or actions of the owner, as opposed to the work being performed by the contractor or its employees.[73] In *Thomas v. A.P. Green Industries*, for example, the plaintiff was able to pursue a direct-negligence claim against the premises owner, because the court found that plaintiff's exposure was caused by other contractors present on the premises—

[72] *Id.* at 8.

[73] *See Roach*, 2016 WL 1453074 at *4; *Jefferson v. Cooper/T. Smith Corp*., 858 So.2d 691, 695 (La. App. 2003) (suggesting that plaintiff was exposed to asbestos through the actions of *other* contractors unaffiliated with his employer that premises owner hired); *Legendre v. Anco Insulations, Inc*., 2013 WL 3107471 (M.D. La. June 18, 2013) (no evidence that plaintiff was exposed to asbestos through persons associated with his employer).

contractors unaffiliated with plaintiff's own contractor-employer.[74] What mattered was that the other contractors came with the premises, rendering it unsafe.

Here, the other workers (such as insulators) did not come with the premises. Rather, they were Mr. Kivell's coworkers at Kiewit and Stearns Rogers, and they were working within the scope of their employer's independent contractor contract with Union Carbide. Plaintiff concedes that Kiewit and Stearns Rogers "controlled Mr. Kivell's day-to-day worksite"; and Kiewit's and Stearns Rogers's work included insulation.[75] So under *Roach*, Union Carbide owed no duty to protect or warn Mr. Kivell from "hazards" inherent in the insulators' work, which would include dust generated by the cutting and application of thermal insulation.[76]

Plaintiff's arguments to the contrary are unavailing. First, there is no evidence that the mere presence of asbestos at the Taft facility constituted a breach of any duty that Union Carbide owed to Mr. Kivell. Louisiana case law expressly holds that asbestos-containing materials and insulation can be used safely.[77] Even

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[74] 933 So. 2d 843, 851-52 (La. App. 2006).

[75] A565-68; A692.

[76] 2016 WL 1453074 at *4.

[77] *See Smith v. Union Carbide*, 2014 WL 4930457, *5 (E.D. La. Oct. 21, 2014) (addressing asbestos at Taft Facility in the 1960s—"it seems that Plaintiff and Defendants admit that asbestos can be used safely"); *Thomas*, 933 So.2d at 868-69 (rejecting plaintiff's argument that asbestos "presented an unreasonably dangerous condition," noting asbestos can be used safely and the issue is the manner in which it is cut or disturbed).

today, asbestos is regularly abated or removed from buildings without incident. The issue, of course, is the *manner* in which the asbestos-containing material is cut or disturbed. For purposes of this direct-negligence claim, it is dispositive that there is no evidence that Union Carbide controlled or directed that manner or that the construction site was inadequate for the safe handling of asbestos. That is what it means for the premise owner to be directly negligent. If the premise owner is not negligent, then there is no direct negligence. The Louisiana Court of Appeals recently discussed these principles in *Jordan v. Thatcher Street, LLC*.[78] Mr. Jordan was an insulator working for a construction contractor at a nursing home in the 1960s.[79] The lower court granted summary judgment in favor of the premises owner finding no evidence that the owner supplied the asbestos or maintained operational control over the construction site.[80] The Court of Appeals affirmed, explaining:

> There is no evidence to suggest that the construction site was inadequate for the safe handling of asbestos or that the alleged exposure was due to the failure of the premises owner to provide a safe work environment, rather, or in addition to, some breach of a duty owed by … Jordan's employer.[81]

[78] 167 So.2d 1114

[79] *See id*. at 1115.

[80] *See id*. at 1116.

[81] *Id*. at 1119.

In other words, there was no evidence that the premise owner was negligent. The same is true here with respect to Mr. Kivell's work at Taft.

Second, while *Smith* facially supports Plaintiff's position, *Smith* was subsequently criticized and rejected by *Roach* as an "improper expansion of Louisiana law."[82] *Smith* was never binding and is no longer even persuasive authority for a broad duty requiring owners to warn or protect independent contractors' employees from hazards inherent in the contractor's work.

Finally, Plaintiff describes *Jefferson* and *Legendre* as directly on point.[83] Both cases denied summary judgment for premises owners—relying on the general proposition that the owner owes a general duty to exercise reasonable care for persons on its premises.[84] But both cases predate *Roach* and *Jordan* and do not withstand the more rigorous reasoning of those later cases. Both cases are also distinguishable on their facts. In *Jefferson*, the plaintiff was a longshoreman working for a stevedore company under contract from the local Dock Board.[85] There was evidence that the Dock Board's "facilities were inadequate [in terms of

[82] *Id*.

[83] *See* Plaintiff Opening Br. at 25, 27.

[84] *Jefferson*, 858 So.2d at 695; *Legendre*, 2013 WL 3107471 at *3.

[85] 858 So.2d at 692.

ventilation] for the handling and storage of asbestos on or in its premises."[86] Deficient buildings and ventilation would constitute a hazard inherent in the premises, sufficient to impart a duty on the Dock Board.[87] Conversely here (like the *Jordan* case discussed above), none of the alleged asbestos exposure was the result of anything inherent in the Taft facility or other personnel employed or contracted by Union Carbide. Rather, it was the result of construction overseen and performed by Kiewit and Stearns Rogers and *their* employees. The record in *Jefferson* also reflects that the Dock Board hired "numerous stevedore companies" as independent contractors to handle cargo on the wharves, including asbestos-containing materials.[88] In this regard, the plaintiff relied on testimony from longshoremen who were employed with the "other stevedore companies" working at the Port to establish Mr. Jefferson's exposure to asbestos.[89] This suggests that in *Jefferson* (unlike the present case), there was evidence that the injured worker was exposed to asbestos from *other* sources and conduct *unaffiliated* with his own employer, which would also constitute a hazard inherent in the premises as described in *Roach*.

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[86] *Id*. at 695-96.

[87] *See Roach*, 2016 WL 1453074 at *4.

[88] *Id*. at 695.

[89] *Id*. at 694-95.

In *Legendre*, similarly, there was no evidence that the adjacent insulators were affiliated with Mr. Legendre's independent-contractor employer or that insulation fell within the scope of that contractor's work.[90] Here, it is undisputed that Kiewit and Stearns Rogers hired or employed the insulators who allegedly exposed Mr. Kivell to asbestos at the Taft facility.[91] So in Mr. Kivell's case, any exposure arising from adjacent insulation work was not inherent in the premises but rather in the contractor's conduct.

Because it is undisputed that Mr. Kivell's alleged asbestos exposures all occurred in the context of his work with Kiewit and Stearns Rogers, and there is no evidence that Union Carbide's premises were inadequate for the safe handling of asbestos, the Superior Court properly granted summary judgment in favor of Union Carbide on Plaintiff's claim for direct negligence.

b. Plaintiff's vicarious-negligence claim

As an initial matter, Plaintiff waived any claim based on vicarious liability in the Superior Court, and this Court can and should affirm on that basis.[92] In her opposition to summary judgment, Plaintiff expressly stated that judgment could be

[90] 2013 WL 3107471.

[91] *See supra* at 9 & n.37.

[92] *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019) (alteration in original) ("This Court may affirm on the basis of a different rationale than that which was articulated by the trial court[] if the issue was fairly presented to the trial court.").

entered for Union Carbide with respect to vicarious liability.[93] Plaintiff's current vicarious-liability argument rests entirely on documents that she obtained *before* the Superior Court's summary-judgment ruling but which she later presented to that court as "newly discovered evidence" only after the court had ruled in Union Carbide's favor. As discussed above, the evidence was neither new nor newly discovered, and it could have been obtained in a timely fashion but for Plaintiff's failure to seek it until months after the summary-judgment discovery deadline.[94] Where a plaintiff fails to diligently pursue a claim, expressly waives that claim, and then attempts to reassert it using evidence mischaracterized as new, this Court should not countenance that claim's attempted revival. In light of Plaintiff's waiver, this Court should affirm the Superior Court's judgment in Union Carbide's favor on this claim.

But even if this Court is inclined to reach the merits of Plaintiff's vicarious-liability claim, it should nevertheless affirm. A premises owner is not liable for the negligence of independent contractors performing work on its property.[95] There are two narrow exceptions to this general rule of premises-owner nonliability:

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[93] A403.

[94] *See supra* at n.19.

[95] *See Roach v. Air Liquide America*, 2016 WL 1453074, *2 (W.D. La. Apr. 11, 2016); *Migliori v. Willows Apartments*, 727 So.2d 1258, 1261 (La. App. 1999); *Williams v. Gervais F. Favrot Co.*, 499 So.2d 623, 625 (La. App. 1986).

(1) an owner may not avoid liability for inherently or intrinsically "ultrahazardous" work by an independent contractor, and (2) an owner may be held liable if it controlled the independent contractor's work or gave express or implied authorization for the contractor to perform work in an unsafe manner.[96] Only the second of these exceptions is at issue in this appeal.[97]

Plaintiff concedes as a matter of fact that Union Carbide lacked "control over the day-to-day manner in which Mr. Kivell performed new construction."[98] But she contends that Union Carbide (1) exercised "control over the construction" generally, (2) "directly controlled" "some aspects" aspects of Mr. Kivell's work, and (3) approved "unsafe work practices" that led to Mr. Kivell's exposure to asbestos.[99] Plaintiff cites a 1972 memo reflecting Union Carbide's monitoring of contractor work for asbestos release—implicitly suggesting that Union Carbide should have been aware of the release of respirable asbestos by insulation

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[96] *See Roach*, 2016 WL 1453074 at *2; *Williams*, 499 So.2d at 625.

[97] Plaintiff has never argued that Union Carbide is liable under the ultrahazardous-work exception to the independent-contractor doctrine. *See also Fulgium v. Armstrong World Indus., Inc.*, 645 F. Supp. 761, 763 (W.D. La. 1986) ("[a]sbestos… does not fit within the scope of Louisiana's ultrahazardous activity doctrine"); *Smith*, 2014 WL 4930457 at *2 (noting that exception does not apply, because "working with asbestos-containing insulation is not an ultrahazardous activity").

[98] Plaintiff Opening Br. at 35.

[99] *Id*. at 10, 12, 27, 30-32, 35.

contractors working for Kiewit and Stearns Rogers.[100] Plaintiff further suggests that the Superior Court erred by relying on *Hawkins* and *Davenport* for the proposition that a principal has no duty to discover and remedy hazards created by acts of its independent contractors.[101]

Plaintiff's vicarious-liability argument is unpersuasive for several reasons. First, despite Plaintiff's generalized assertions, there is no evidence that Union Carbide exercised operational control over the construction or Mr. Kivell's work.[102] "Control" for purposes of premises-owner liability requires control over the "manner" and "method" or "step by step process of accomplishing the job."[103] As discussed above, uncontradicted evidence reflects that (1) Kiewit and Stearns Rogers retained exclusive control over Mr. Kivell's work area and controlled the manner and method of his work; and (2) the only Union Carbide employees that Mr. Kivell saw were operators who had no involvement with the new construction.[104] So Plaintiff's conclusory claim that Union Carbide "directly controlled" aspects of Mr. Kivell's work is patently false. Plaintiff also cites to

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[100] See *id*. at 30-31.

[101] See *id*. at 31-32.

[102] Plaintiff does not specifically reference Union Carbide's alleged control as a basis for vicarious liability. *See id*. at 30-32. But Union Carbide addresses that factual allegation here for the sake completeness.

[103] *Perkins v. Gregory Mfg. Co.*, 671 So.2d 1036, 1040 (La. App. 1996).

[104] See *supra* at 9 & n.37.

Union Carbide's design drawings and specifications for the proposition that Union Carbide "exercised control over the construction on site."[105] But Louisiana law is clear that requiring a contractor to comply with drawings and specifications is insufficient control to trigger the exception to nonliability.[106] The Louisiana Supreme Court has also held that specifications referencing or requiring asbestos-containing materials are likewise insufficient to constitute control.[107]

Second, there is no evidence that Union Carbide was aware, let alone approved, of any unsafe work practices by Kiewit or Stearns Rogers. Plaintiff rests this entire argument on a single piece of record evidence: a 1972 memo reflecting Union Carbide's monitoring of contractor work for asbestos exposure in compliance with newly issued OSHA regulations. But Mr. Kivell never worked at

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[105] Plaintiff Opening Br. at 12.

[106] *See Perkins*, 671 So.2d at 1039 (affirming summary judgment where "only control retained by [owner] is the right to periodically inspect the operations to ensure that the contract specifications are being met"); *Migliori*, 727 So.2d at 1261 (affirming summary judgment; "[t]he fact that the owner periodically inspected the job site to be sure that work was being performed in accordance with the specifications does not constitute the exercise of operational control"); *Williams*, 499 So.2d at 625 (affirming summary judgment; "where the contract provides that the owner's control over the contractor is limited to providing plans and specifications and his only right is to insist that the job be performed in accordance with those plans and specifications, an independent contractor relationship exists and the owner is not vicariously liable for the contractor's negligence"). Also, as discussed above, there is no evidence that Union Carbide required Kiewit or Stearns Rogers to use asbestos-containing materials in performing their work at Taft.

[107] *See Rando v. Anco Insulations, Inc*., 16 So.3d 1065, 1084 (La. 2009).

the Taft facility after 1969.[108] So an air-monitoring program implemented in 1972 is irrelevant to Plaintiff's claims in this case and, if anything, cuts against Plaintiff's position that Union Carbide knowingly condoned unsafe work practices. Moreover, as the Superior Court correctly noted, the mere fact that Union Carbide "was aware of dangers associated with asbestos is not to imply that they condoned unsafe practices related to it."[109] Union Carbide hired Kiewit and Stearns Rogers as two of North America's largest and most-respected construction-and-engineering contractors. Plaintiff admits in her pleading that Kiewit and Stearns Rogers were knowledgeable about the hazards of asbestos during the relevant period.[110] Contract language also reflects that Union Carbide was relying on its contractors to complete their obligations in accordance with prevailing regulations and safety practices.[111]

Plaintiff attempts to distinguish the cases cited by the Superior Court, *Hawkins* and *Davenport*, by pointing out factual differences without explaining their legal relevance. But Plaintiff does not cite any case holding that a premises

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[108] A380-85 (M. Kivell union records).

[109] May 1, 2018 Order at 8. *Cf. Melancon v. Lamorak Ins. Co.*, 2018 WL 480823, *4 (E.D. La. Jan. 19, 2018) (noting distinction between a principal requiring the use of asbestos and its requiring that the asbestos be used or handled in a particular way).

[110] A286, 303-06 (Second Amended Complaint).

[111] A650-53 (Kiewit contract 511-406-19).

owner owes a legal duty to discover or remedy hazards created by acts of its independent contractors. In fact, multiple Louisiana cases stand for the undisputed proposition that no such duty exists, including several cases granting or affirming summary judgment in favor of premises owners on this basis.[112] In *Perkins*, the Louisiana Court of Appeals stated the rule and public policy behind it succinctly as follows:

> Under the terms of the instant contract, it is the contractor's responsibility to oversee the contract provisions regarding safety procedures and OSHA regulations. [Any suggestion to the contrary] would require [the premises owner] to become directly involved in the day to day operations of its contractor thereby eliminating the existence of the principal-independent contractor relationship. The purpose behind contracting is because the principal cannot or will not engage themselves, for whatever reason, in the work contracted

[112] *Perkins*, 671 So.2d at 1041 (affirming lower court grant of summary judgment in favor of premises owner); *Iglesias v. Chevron U.S.A. Inc*., 656 F.Supp.2d 598, 602 (E.D. La. 2009) (granting summary judgment in favor of premises defendant; "[i]t is well established that Courts do not require a principal to discover and correct unsafe loading procedures performed by independent contractors."); *Thomas v. Burlington Resources Oil & Gas Co*., 2000 WL 1528082, *2 (E.D. La. Oct. 13, 2000) (granting summary judgment in favor of premises owner; "duty of exercising reasonable care for the safety of person on his premises … does not extend so far as to require the owner or operator to intervene in and correct the work practices selected by an independent contractor"); *Blanchard v. Riley Stoker Corp.*, 492 So.2d 1236, 1238 (La. App. 1986) (premises owner did not "breach[] its duty to provide a safe place to work by not by not warning [contractor's] employees about unsafe procedures"); *McCormack v. Noble Drilling Corp*., 608 F.2d 169 (5th Cir. 1979) (where defendant "exercised no control over the manner" contractors conducted operations, defendant "owed no duty to ensure that [its contractors] performed their obligations in a reasonably safe manner").

> out. We can find no basis for requiring the principal to become that entangled in the operations of its independent contractor.[113]

Because there is no evidence that Union Carbide exercised control or approved any unsafe work practices by Kiewit or Stearns Rogers, the Superior Court properly granted summary judgment in favor of Union Carbide on Plaintiff's claim for vicarious negligence.

2. The Superior Court properly granted Union Carbide summary judgment on Plaintiff's strict-liability claim

To establish strict or custodial liability, Plaintiff "must prove: (1) the thing which caused the damage was in the care, custody and control of the defendant; (2) the thing had a vice or defect which created an unreasonable risk of harm; and (3) the injuries were caused by this defect."[114]

Before assessing whether the evidence supports Plaintiff's strict-liability claim, it is necessary to determine the nature of "the thing" that Plaintiff is claiming caused Mr. Kivell's injury. This is because the analysis under Louisiana law is different depending on the nature of "the thing which caused the damage." One possibility is that "the thing" is asbestos-containing materials used in the construction of the Taft facility. Another possibility is that "the thing" is the

[113] 671 So.2d at 1041.

[114] *Migliori*, 727 So.2d at 1260.

premises itself (i.e. asbestos released from maintenance or work on existing structures or equipment). Either way, Union Carbide has no strict liability.

To the extent that "the thing" is the asbestos-containing materials used in the construction, there is no evidence that Union Carbide had care, custody, or control over the asbestos to which Mr. Kivell claimed he was exposed. Custody, as distinguished from ownership, refers to "the right of supervision, direction, and control as well as the right to benefit from the thing controlled."[115] "Mere physical presence of the thing on one's premises does not constitute custody."[116] Although the issue of custody can be factual, summary judgment is appropriate where there is a lack of evidence that a party had custody over the injury causing thing.[117]

Here, it is uncontroverted that Kiewit and Stearns Rogers retained exclusive control over Mr. Kivell's work area and materials, and they controlled the manner and method of both Mr. Kivell's work and the adjacent trades.[118] So there should be no dispute Kiewit and Stearns Rogers had custody of any asbestos-containing materials to which Mr. Kivell was exposed in connection with the construction of the Taft facility. Plaintiff claims that Union Carbide "retained the right to benefit

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[115] *Haydel v. Hercules Transport, Inc.*, 654 So.2d 408, 414 (La. App. 1995).

[116] *Id*.

[117] *See Butler v. Re/max New Orleans Prop., Inc.*, 828 So.2d 43, 47 (La. App. 2002); *Royer v. Citgo Petroleum Corp.*, 53 F.3d 116, 119 (5th Cir. 1995).

[118] See *supra* at 9 & n.37.

from the thing controlled."[119] But the mere fact that Union Carbide somehow benefitted from the construction of the facility is likewise insufficient to establish that Union Carbide had "custody" of its contractors' construction materials during construction, given that it lacked supervision, direction, and control. As the Superior Court explained: "to hold that a premises owner meets the care and custody requirement for strict liability based on receiving a benefit from the premises itself would be to overrule Louisiana precedent that mere physical presence of the thing on one's premises does not constitute custody."[120] It would also be inconsistent with the entire concept of independent contractors, who obviously are working for the benefit of the principal and, by necessity, have a different relationship with the principal than an employer-employee relationship. And yet, under Plaintiff's theory of strict liability, a principal would be held liable without any regard to the separate independent-contractor relationship and the relationship between that contractor and its own employee who is injured.

To the extent that the "the thing" is asbestos released from maintenance or repair work on the existing premises, Union Carbide would not be strictly liable for that work for two reasons. First, while Union Carbide owned the premises, it contractually transferred custody of the premises in connection with its

[119] Plaintiff Opening Br. at 35 (internal quotations omitted).

[120] May 1, 2018 Order at 9.

contractors' work.[121] Second, Louisiana law recognizes that strict liability does not apply to injuries occurring in connection with "the construction or repair of a building."[122] The rationale is that dangerous conditions that arise during repair or maintenance are temporary; and while a temporary condition may constitute a hazard for negligence purposes, it does not constitute a *defect* for purposes of strict liability.[123] For example, fluid and sludge discharged from cutting pipe that causes a person to slip and fall does not give rise to a strict-liability claim.[124] Here, Mr. Kivell's claimed maintenance and tie-in work at Taft necessarily reflect "construction or repair" activities; so Union Carbide is not strictly liable for that work. To the extent that Mr. Kivell and his contractor coworkers conducted tie-ins in an unsafe manner resulting in asbestos exposure, that exposure was not the

[121] The presumption that an owner has custody of its property is rebuttable. *See Cologne v. Shell Oil Co*., 2013 WL 5781705, *5 (E.D. La. Oct. 25, 2013); *cf. Doughty v. Insured Lloyd's Ins. Co*., 576 So.2d 461, 464 (La. 1991) ("[t]o find otherwise would rewrite article 2317 to impose strict liability for the '*ownership*' of a defective thing rather than liability arising out of '*custody*' of the thing") (emphasis added). One way to rebut the presumption is offer evidence showing "a contractual undertaking by another to maintain and control the property"—which the record reflects occurred here. *Gallina v. Hero Lands Co*., 859 So.2d 758, 762 (La. App. 2003).

[122] *Temple v. General Insurance Co. of America*, 306 So.2d 915, 917 (La. App. 1974).

[123] *See Dauzat v. Thompson Const. Co., Inc*., 839 So. 2d 319, 323 (La. App. 2003); *Barron v. Webb*, 698 So.2d 727, 730 (La. App. 1997).

[124] *See Hammons v. Forest Oil Corp*., 2008 WL 348765 (E.D. La. Feb. 7, 2008).

result of any defect in the premises. And as explained above, there is no evidence that the Taft facility was inadequate for the safe handling of asbestos.

The fact that a premises owner is strictly liable for *neither* a contractor's supply and use of asbestos-containing *nor* exposure to asbestos during maintenance or repair activities was discussed in *Smith*:

> Assuming that the thing in question is the asbestos, this Court finds that Defendants did not have custody of the asbestos at the time of Mr. Smith's exposure. Deposition testimony reveals that the contractors and the insulators themselves had custody of the asbestos at that time … Assuming in the alternative that the thing in question is the premises itself, the Court finds that the hazard in the thing was temporary in nature and therefore does not constitute a defect in satisfaction of the second element of a strict liability claim under Article 2317. The record reveals that Mr. Smith's exposure to the asbestos dust occurred during construction or maintenance activities on the premises. Those activities and the dusty conditions they created were temporary in nature. They therefore cannot constitute a defect under Article 2317.[125]

In her briefing to the Superior Court below, Plaintiff argued that *Smith* is distinguishable, because the plaintiff in that case was an insulator working directly with the asbestos insulation, while Mr. Kivell was primarily exposed through the work of adjacent trades.[126] But the issue is not whether Mr. Kivell had custody of the asbestos. Rather, the issue is whether *Union Carbide* had custody during the

[125] 2014 WL 4930457 at *6-7.

[126] A404 (Plaintiff opposition to Union Carbide motion for summary judgment).

period of alleged exposure. The undisputed record reflects that it did not: the adjacent trades were employees or subcontractors of Mr. Kivell's contractor-employers, and those contractor-employers had custody of the areas in which their employees worked as well as the materials they used.

Plaintiff's attempts to distinguish away the other strict-liability cases are similarly misplaced. Plaintiff argues that *Rando* "does not control the situation here, where Mr. Kivell was exposed … to asbestos already at the premises, unassociated with his employers work."[127] Plaintiff's argument erroneously assumes, however, that there is evidence that Mr. Kivell was exposed to asbestos at Taft outside the context of his employment with Kiewit and Stearns Rogers—which again is not the record. All of Mr. Kivell's alleged exposures were associated with construction and maintenance work within the scope of his employers' contracts. Plaintiff also attempts to distinguish *Haydel* arguing that it does not apply to areas of the premises that were already operational and "over which UCC maintained custody and control."[128] But again, Plaintiff assumes facts not in evidence. The record demonstrates that Kiewit and Stearns Rogers always controlled the areas in which Mr. Kivell worked, as well as the manner and

[127] Plaintiff Opening Br. at 34 (citing *Rando*, 16 So.3d 1065).

[128] *Id*. at 34-35 (citing *Haydel*, 654 So. 2d at 414).

methods of his work, even when he was performing tie-ins and maintenance on existing equipment.[129]

[129] Plaintiff cites *Jefferson* and *Legendre* as examples where Louisiana courts denied premises-owner defendants' motions for summary judgment finding "questions of facts" relating to strict-liability claims. But neither case provides a meaningful discussion of the supposed evidence creating a material issue of fact. Nor do those cases address Union Carbide's arguments in this case relating to its lack of custody, the temporary nature of the subject work, or the settled Louisiana law cited herein supporting the dismissal of Plaintiff's strict-liability claim. It is also worth noting that *Jefferson* was a divided appellate ruling and both cases are out of step with a large body of settled Louisiana case law, including at least one more-recent Louisiana Court of Appeals decision. *See, e.g.*, *Jordan*, 167 So.2d 1114. These facts substantially limit the precedential value of *Jefferson* and *Legendre* here.

CONCLUSION

For the foregoing reasons, Union Carbide respectfully requests that the Superior Court decision below be affirmed.

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