Filed 5/22/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FERN BARKER et al., Plaintiffs and Appellants, v. HENNESSY INDUSTRIES, INC., Defendant and Respondent.	B232316 (Los Angeles County Super. Ct. No. BC414806)

APPEAL from a judgment of the Superior Court of Los Angeles County. Amy D. Hogue, Judge. Affirmed.

Keller, Fishback & Jackson, Stephen M. Fishback and J. Bruce Jackson for Plaintiffs and Appellants.

Gordon & Rees, Roger M. Mansukhani, Steven A. Sobel, Matthew G. Kleiner, and Kevin Whelan for Defendant and Respondent.

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The trial court granted summary judgment in favor of defendant and respondent Hennessy Industries, Inc. (Hennessy) on the asbestos-related wrongful death complaint filed by plaintiffs and appellants Fern Barker, James Barker, Carmen Barker and Tamara Worthen (appellants), the widow and surviving children of decedent Richard Barker (Barker). Hennessy manufactured machines Barker had used in his work. The trial court ruled that Hennessy could not be held liable for Barker's death under the theories of strict liability or negligence because the undisputed evidence showed that any harm was caused by products containing asbestos and not Hennessy's machines.

We affirm. The undisputed evidence showed that Hennessy's machines did not contain asbestos and could be operated independently without asbestos-containing materials. Guided by the principle recently articulated by the California Supreme Court in *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 361 (*O'Neil*), that "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together," we conclude that Hennessy owed neither a duty to warn about nor a duty of care to prevent the dangers arising from asbestos-containing products that were used with its machines.

FACTUAL AND PROCEDURAL BACKGROUND

Barker worked as a mechanic in an automotive repair garage from 1967 to 1995. Asbestos-containing clutch components, brake linings and brake shoes were necessary component parts to the automobiles, trucks, tractors and heavy equipment on which he worked. Barker's work included repairing, arcing, grinding, sanding, cutting, drilling and installing these asbestos products. In performing repairs, Barker worked with or near brake shoe arcing machines and brake drum lathes (machines), which were manufactured by Hennessy's predecessor Ammco Tools, Inc. (Ammco). Barker was diagnosed with asbestosis and asbestos-related lung cancer and died of those diseases in December 2008.

In May 2009, appellants filed a wrongful death action against Hennessy and several other entities, alleging causes of action for negligence, strict liability, false representation, and concealment, as well as a survival claim. They characterized

Hennessy as "a manufacturer, supplier, seller of AMMCO lathes and/or grinders" and alleged that Barker worked with and around others using the machines "to lathe and grind asbestos containing products including brake linings/shoes and clutch linings/facings." Appellants alleged that Barker's exposure to harmful respirable asbestos dust occurred as a result of Hennessy's failure to warn of the dangers of such exposure.

Hennessy moved for summary judgment on the ground that its machines did not cause or create the risk of harm to which Barker was exposed. It argued that it could not be held liable for injuries caused by another's inherently dangerous, asbestos-containing products, even if it was foreseeable that its machines would be used in conjunction with those products. In support of the motion, Hennessy submitted appellants' case report and discovery responses, as well as the declaration of product engineer Craig Mountz, who authenticated documents showing the parts specifications for the machines.

Mountz averred that he was employed by Ammco, and subsequently Hennessy, continuously from 1975 to the present. He was personally involved with the design of the machines and had detailed knowledge of their engineering, construction and component parts. As part of his job, he was also familiar with the function and operation of brake shoes and drums, and the proper use of the machines with those brake parts. He declared that the machines, as manufactured and as supplied with replacement parts, were not comprised of any asbestos-containing parts, did not contain respirable asbestos and did not use asbestos in order to operate. Rather, he averred that the machines were designed to reshape brake parts regardless of whether those brake parts were composed of or contained asbestos. He declared that the machines did not require asbestos-containing brake parts to operate and, correspondingly, any asbestos-containing brake parts did not require the machines in order to function. Hennessy's machines were complete, independent products, in and of themselves. Mountz added that neither Hennessy nor its predecessor had any role in designing, manufacturing, marketing or selling any asbestos products used with its machines, including brake shoes, brake linings, brake pads, clutches, clutch linings, or clutch facings.

Appellants opposed the motion. They took the position that Hennessy had not shifted the burden of producing evidence, primarily arguing that Mountz's declaration was inadmissible. Separately, they filed evidentiary objections to the declaration. In support of their opposition, they submitted counsel's declaration which attached Hennessy's discovery responses, pleadings in other matters and asbestos study reports conducted by the National Loss Control Service Corporation. They sought to establish that Hennessy had known for years that the operation of its machines with asbestos-containing brake parts created the release of respirable asbestos dust. Hennessy, in turn, filed evidentiary objections to appellants' counsel's declaration and attached exhibits.

At the January 2011 hearing on the motion, the trial court sustained Hennessy's evidentiary objections in their entirety, and overruled appellants' objections. Given the state of the admissible evidence, the trial court ruled that Hennessy had affirmatively shown its machines were stand-alone products that did not contain asbestos or require asbestos to operate. It reasoned that the evidence showed "it is someone else's products that create the exposure of risk of injury to the user, not Hennessy's." The trial court ruled that there was no triable issue of fact on the question of duty as to any cause of action and granted summary judgment.[1]

Judgment was entered in Hennessy's favor and this appeal followed.

DISCUSSION

Challenging only the interpretation and not the admission of the evidence offered in connection with the summary judgment motion, appellants contend that Hennessy owed a duty to warn about and a duty of care to prevent the risk of harm created by the intended use of its machines. As alleged, the facts in this case arguably fall in the margin

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[1] At the hearing on the motion, the trial court stated that its ruling hinged on the absence of a triable issue as to the element of duty; the order granting summary judgment later characterized the basis of the ruling as the absence of a triable issue on the element of causation. We synthesize the trial court's ruling as concluding that Hennessy owed no duty to warn Barker about its products because those products did not cause or create the risk of harm to which he was exposed.

between *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564 (*Taylor*), which held a manufacturer owes no duty to warn of the risk of asbestos-containing products used in combination with its own products, and *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577 (*Tellez-Cordova*), which held a manufacturer owes a duty to warn of the risks created by the intended and necessary operation of its own products with other asbestos-containing products.

But here we have moved beyond appellants' allegations. The admissible evidence on summary judgment establishes that this case falls squarely within *O'Neil, supra*, 53 Cal.4th 335,[2] which confined the reach of *Tellez-Cordova* and held that a defendant product manufacturer may be held strictly liable for harm caused by another manufacturer's product when "the defendant's product was intended to be used with another product *for the very activity that created a hazardous situation.*" (*O'Neil, supra*, at p. 361.) Because the undisputed evidence showed nothing more than the foreseeable—and not the intended and inevitable—use of asbestos-containing products with Hennessy's machines, Hennessy could not be held liable for failing to warn of the risk of harm from those products and summary judgment was properly granted.

I. Standard of Review.

To be entitled to summary judgment, the moving party must show by admissible evidence that the "action has no merit or that there is no defense" thereto. (Code Civ. Proc., § 437c, subd. (a).) To satisfy this burden, a moving defendant is not required to "conclusively negate an element of the plaintiff's cause of action. . . . All that the defendant need do is to 'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff. [Citation.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 853, fn. omitted.) Once the defendant makes this showing, the burden shifts to the plaintiff to show the existence of a triable issue of material fact,

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[2] Because the Supreme Court decided *O'Neil, supra,* 53 Cal.4th 335, after this matter was fully briefed, we permitted supplemental briefing to address the case.

which must be demonstrated through specific facts based on admissible evidence and not merely the allegations of the pleadings. (Code Civ. Proc., § 437c, subd. (p)(2); *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1188.)

"The purpose of summary judgment is to separate those cases in which there are *material* issues of fact meriting a trial from those in which there are no such issues. Thus, where the parties have had sufficient opportunity adequately to develop their factual cases through discovery and the defendant has made a sufficient showing to establish a prima facie case in his or her favor, in order to avert summary judgment the plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of the defendant's showing. [Citations.] For this purpose, responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact. [Citations.]" (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162–163.)

We review a grant of summary judgment de novo, independently examining the evidence and determining whether the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404; *Peart v. Ferro* (2004) 119 Cal.App.4th 60, 69.) "It is well settled that 'in reviewing a summary judgment, the appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal. [Citations.]' [Citations.]" (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 962.)

Although we independently review a grant of summary judgment, we review the trial court's evidentiary rulings for an abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) But in order to demonstrate an abuse of discretion, an appellant must affirmatively challenge the evidentiary rulings on appeal. That is, the asserted erroneous evidentiary rulings must be identified "as a distinct assignment of error" and be supported by analysis and citation to authority. (*Roe v. McDonald's Corp.*

(2005) 129 Cal.App.4th 1107, 1114.) Here, appellants have not challenged the trial court's evidentiary rulings and, in their reply brief, they affirmatively conceded they had not raised any claim of error relating to those rulings, describing them as "immaterial." When an appellant does not challenge the trial court's sustaining objections to evidence offered in support of a summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been properly excluded. [Citation.]"[3] (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014–1015.)

II. The Undisputed Evidence Established That Hennessy Cannot Be Held Strictly Liable for the Failure to Warn.

In California, strict liability may be imposed on a manufacturer for three types of product defects: Manufacturing defects, design defects, and "'warning defects,' i.e., inadequate warnings or failures to warn."[4] (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995; accord, *O'Neil, supra*, 53 Cal.4th at p. 347; *Taylor, supra*, 171 Cal.App.4th at p. 577.) As in *Taylor, supra*, at page 577, "[w]e are here concerned solely with the third category, which applies to 'products that are dangerous because they lack adequate warnings or instructions.' [Citation.] Our law recognizes that even '"a product flawlessly designed and produced may nevertheless possess such risks to the user

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[3] Correspondingly, we conclude that the trial court properly admitted Mountz's declaration. Although written evidentiary objections made before a summary judgment hearing preserve those objections for appeal (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 517, 534), appellants' failure to identify any objections they maintain were improperly overruled or to make any argument as to why the trial court abused its discretion constitutes a waiver of any claim on appeal. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived"]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 9.21, p. 9–6. (rev. # 1, 2011).)

[4] Legal responsibility for product defects extends to successor corporations. (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 31; *Taylor, supra*, 171 Cal.App.4th at p. 575.)

without a suitable warning that it becomes 'defective' simply by the absence of a warning." [Citation.]' [Citation.] Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. [Citation.]" (Fn. omitted.)

Asbestos has been recognized as an inherently dangerous product. (See *Taylor, supra,* 171 Cal.App.4th at pp. 587–588.) The evidence was undisputed that Hennessy's machines neither contained asbestos nor required asbestos-containing products to operate. Rather, according to the allegations of appellants' complaint (relevant portions of which Hennessy incorporated into its separate statement of undisputed facts), the use of Hennessy's machines by "removing, repairing, arcing, grinding, sanding, cutting, drilling and installing" asbestos-containing brake parts caused Barker to be "exposed to harmful, respirable asbestos." The evidence was likewise undisputed that Hennessy had never designed, manufactured, distributed or sold the asbestos-containing brake parts. Thus, the question before us is whether and to what extent a manufacturer owes a duty to warn of a defect in another manufacturer's product when the use of that product with the manufacturer's own product creates a risk of harm.

In explaining "the limits of a manufacturer's duty to prevent foreseeable harm related to its product," the Supreme Court in *O'Neil, supra*, 53 Cal.4th at page 342 answered that precise question: "We hold 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." Applying this principle, the *O'Neil* Court determined that valve and pump manufacturers could not be held strictly liable for harm created by asbestos-containing gaskets and insulation used in conjunction with their products. We find no basis to depart from either the reasoning or the result in *O'Neil.*

A. A Manufacturer Owes No General Duty to Warn of Defects in Another Manufacturer's Product.

1. A manufacturer's duty to warn does not extend to hazards arising solely from other products.

The decedent in *O'Neil* developed fatal mesothelioma from his exposure to asbestos while working aboard a warship where he supervised those who repaired equipment in the ship's engine and boiler rooms. (*O'Neil, supra,* 53 Cal.4th at pp. 345–346.) His family brought a wrongful death action alleging claims for strict liability and negligence; among the defendants were valve and pump manufacturers that had produced valves and supplied pumps, respectively, for Navy ships according to military specifications. (*Id*. at pp. 343–344, 346.) At all relevant times, those specifications required that the valves' internal gaskets and packing be made of materials that contained asbestos, and the defendant valve and pump manufacturers acquired those items from other manufacturers for use with their products. (*Id*. at p. 344.) Harmful asbestos fibers were released when the repairmen needed to access a piece of equipment, which required that they remove asbestos-containing insulation and asbestos-containing gaskets. (*Id*. at p. 345.) No one warned the repairmen of the hazards associated with their work. (*Ibid*.)

The evidence offered at trial in *O'Neil* showed that the defendants did not make the asbestos-containing products, and there was no evidence to show that any harmful asbestos dust came from a product they manufactured or sold. (*O'Neil, supra,* 53 Cal.4th at p. 345.) Moreover, at trial, the plaintiffs offered no evidence that either the valves or the pumps required the use of asbestos-containing internal components in order to function properly. (*Ibid*.) On the basis of this evidence, the defendants moved for nonsuit, arguing there was no evidence that any defect in their products or any failure to warn by them was a substantial factor in causing the decedent injury, and the trial court granted the motion. (*Id*. at p. 346.)

After the Court of Appeal reversed the grant of nonsuit, the Supreme Court reversed that decision, holding that the "defendants were not strictly liable for O'Neil's injuries because (a) any design defect in *defendants' products* was not a legal cause of

injury to O'Neil, and (b) defendants had no duty to warn of risks arising from *other manufacturers'* products." (*O'Neil, supra,* 53 Cal.4th at p. 348.) In connection with the first prong of its analysis, the Court explained that the defendants' products were not defective "because they were 'designed to be used' with asbestos-containing components." (*Id*. at p. 350.) The Court emphasized that beyond "the Navy's specifications, no evidence showed that the design of defendants' products required the use of asbestos components, and their mere compatibility for use with such components is not enough to render them defective." (*Ibid*.)

Finding no evidence that the defendants' products were defective, the *O'Neil* court then turned to the question of whether the defendants "had a duty to warn O'Neil about the hazards of asbestos because the release of asbestos dust from surrounding products was a foreseeable consequence of maintenance work on defendants' pumps and valves." (*O'Neil, supra,* 53 Cal.4th at p. 351.) The Court cautioned that it had "never held that a manufacturer's duty to warn extends to hazards arising exclusively from *other* manufacturers' products." (*Ibid*.) It cited a line of cases illustrating the limits of a manufacturer's duty to warn, beginning with *Garman v. Magic Chef, Inc*. (1981) 117 Cal.App.3d 634 (*Garman*). (*O'Neil, supra*, at pp. 351–352.) There, the plaintiffs sued the defendant stove manufacturer after an explosion resulted from a leak in the propane gas tubing system attached to the defendant's nondefective gas stove. *Garman* affirmed a grant of summary judgment on the ground that the undisputed facts showed the explosion was proximately caused by a defect in the tubing system. The court rejected the plaintiffs' contention that they had demonstrated a triable issue of fact as to whether there was a warning defect, given the absence of any warning about the risks of gas leaks. (*Garman*, *supra*, at p. 637.) *Garman* held the defendant owed "no duty to warn of the possible defect in the product of another and is not liable for failure to do so." (*Id.* at p. 639.) Moreover, evidence that lighting the stove triggered the explosion was an inadequate basis to find a warning defect: "The use of any product can be said to involve some risk because of the circumstances surrounding even its normal use. Nonetheless, the makers of such products are not liable under any theory, for merely failing to warn of

injury which may befall a person who uses that product in an unsafe place or in conjunction with another product which because of a defect or improper use is itself unsafe." (*Id*. at p. 638.)

Other cases cited by the *O'Neil* Court likewise emphasized that a manufacturer's duty to warn does not extend to defects in another manufacturer's product. (*O'Neil, supra,* 53 Cal.4th at pp. 351–353; see *Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357, 362 [affirming summary judgment for paint thinner manufacturer on claim that explosion occurred while using another manufacturer's similar product, as "no reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else"]; *Blackwell v. Phelps Dodge Corp.* (1984) 157 Cal.App.3d 372, 377 [affirming summary judgment for chemical manufacturer on claim it owed a duty to warn about dangers of pressure formation allegedly caused by tank car's defective design, finding no duty to warn "where it was not any unreasonably dangerous condition or feature of *defendant's* product which caused the injury"]; *In re Deep Vein Thrombosis* (N.D.Cal. 2005) 356 F.Supp.2d 1055, 1068 [granting summary judgment for airplane manufacturer on claims including that it owed a duty to warn about risk of injury from another manufacturer's seating design, stating "no case law . . . supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer"].)

2. A manufacturer's duty to warn may be triggered when its own product creates a risk of harm.

In applying the limits of a manufacturer's duty to warn in the asbestos context, the *O'Neil* Court was guided in large part by the holding in *Taylor*, *supra*, 171 Cal.App.4th 564. (*O'Neil, supra,* 53 Cal.4th at pp. 353–358.) There, like the decedent in *O'Neil,* a serviceman developed mesothelioma from his exposure to asbestos aboard a Navy warship; he worked in the ship's engine room and sometimes removed and replaced

asbestos-containing gaskets, packing and insulation used in pumps, valves and tanks manufactured by the defendants. (*Taylor, supra,* at pp. 571–572.) The evidence showed that he removed the old gaskets by scraping them off with a knife, wire brush or piece of metal, which released dust and particles into the air. (*Id.* at p. 572.) The serviceman and his wife sued the ship's valve manufacturers and pump and tank suppliers. (*Id.* at p. 570, fn. 2.)

In opposing motions for summary judgment filed by those defendants, the plaintiffs argued "that a 'manufacturer has a duty to warn of hazards arising from the foreseeable uses of its product, even if that hazard arises from the addition of a product that, although manufactured by another, is used in the normal and intended operation of the defendant's product.'" (*Taylor, supra,* 171 Cal.App.4th at pp. 572–573, 580.) Affirming summary judgment, the *Taylor* court listed three reasons why the manufacturers could not be held strictly liable for failing to warn about the dangers of asbestos exposure. Pertinent here, one of the reasons was that "in California, a manufacturer has no duty to warn of defects in products supplied by others and used in conjunction with the manufacturer's product unless the manufacturer's product itself causes or creates the risk of harm."[5] (*Id.* at p. 575.) The court concluded that the duty to warn is triggered only by the dangerous propensity of the manufacturer's own product. Stated another way, "'[t]he product must, in some sense of the word, "create" the risk. If it does not, then the manufacturer should not be required to supply warnings, even if the risks are not obvious to users and consumers.' [Citation.] As California law now stands, unless the manufacturer's product in some way causes or creates the risk of harm, 'the risks of the manufacturer's own product . . . are the only risks [the manufacturer] is

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5 The other two reasons relied on by the *Taylor* court—that "California law restricts the duty to warn to entities in the chain of distribution of the defective product" and that "manufacturers or suppliers of nondefective component parts bear no liability when they simply build a product to a customer's specifications but do not substantially participate in the integration of their components into the final product"—do not have meaningful application to the undisputed evidence presented here. (*Taylor, supra,* 171 Cal.App.4th at p. 575.)

required to know.' [Citation.]" (*Id.* at p. 583.) Because there was no evidence that the defendants' equipment caused or created the risk of harm, the *Taylor* court determined the defendants owed no duty to warn.

Both *O'Neil* and *Taylor* distinguished *Tellez-Cordova, supra,* 129 Cal.App.4th 577 as an example of a manufacturer's duty to warn of the risks caused or created by its own product. (*O'Neil, supra,* 53 Cal.4th at pp. 360–362; *Taylor, supra,* 171 Cal.App.4th at pp. 586–588.)[6] In *Tellez-Cordova,* the appellate court reversed an order sustaining a demurrer and dismissing the plaintiff's complaint against defendant tool manufacturers. The plaintiff lampmaker alleged that he "cut, sanded, and ground metal parts" while working with and around the defendants' grinders, sanders and saws, and that he developed a pulmonary illness "as a result of exposure to airborne toxic substances produced and released from the metal parts and from the discs, belts, and wheels used on the grinders, sanders, and saws." (*Tellez-Cordova, supra,* at p. 579.) Significantly, the complaint further "alleged that the tools were specifically designed to be used with abrasive wheels or discs, 'for the intended purpose of grinding and sanding metals,' that the tools 'necessarily operated' with wheels or discs composed of aluminum oxide and other inorganic material, that when the tools were used for their intended purpose, respirable metallic dust from the metal being ground and from the abrasive wheels and discs was generated and released into the air, causing the injury, and that the 'specifically designed, intended, and reasonably foreseeable use' of the tools resulted in the injury." (*Id*. at p. 580.)

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[6] Both courts also distinguished *DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336 (*DeLeon*). (*O'Neil, supra,* 53 Cal.4th at p. 359; *Taylor, supra,* 171 Cal.App.4th at p. 589.) In *DeLeon,* an employee was injured when she was cleaning the defendant's shaker bin and her arm was caught in an exposed, overhead line shaft. (*DeLeon, supra,* at pp. 340–341.) Reversing summary judgment, the appellate court concluded there were triable issues of fact concerning the manufacturer's liability for its design and placement of the bin. (*Id*. at p. 346.) We agree with *Taylor* that "nothing in *DeLeon* . . . suggests a manufacturer may be liable for failing to warn of the dangerous qualities of another manufacturer's product." (*Taylor, supra,* at p. 590.)

On the basis of these allegations, the appellate court concluded that the plaintiff had stated a cause of action for the failure to warn. The *Tellez-Cordova* court explained that the allegations established the defendants manufactured tools that were specifically designed to be used with the abrasive wheels and discs that created respirable asbestos dust; the tools were used for their intended purpose; the tools "'necessarily operated'" with the wheels and discs; and the asbestos was not harmful without the power supplied by the tools. (*Tellez-Cordova, supra*, 129 Cal.App.4th at p. 582.) The court determined that in order to provide a warning, the defendants "would only be required to know what happened when their tools were used for their sole intended purpose" when a consumer is "using the product exactly as respondents intended." (*Id*. at pp. 582, 583.) The court summarized: "Under this complaint, respondents are not asked to warn of defects in a final product over which they had no control, but of defects which occur when their products are used as intended—indeed, under the allegations of the complaint, as they must be used." (*Id*. at p. 583.)

The *O'Neil* Court determined the facts in *Tellez-Cordova* differed from those before it in that "the power tools in *Tellez-Cordova* could *only* be used in a potentially injury-producing manner. Their sole purpose was to grind metals in a process that inevitably produced harmful dust. In contrast, the normal operation of defendants' pumps and valves did not inevitably cause the release of asbestos dust." (*O'Neil, supra*, 53 Cal.4th at p. 361.) Both *O'Neil* and *Taylor* identified as another distinguishing feature the allegation that the use of the tools in *Tellez-Cordova* necessarily created the injury-producing asbestos dust. (*O'Neil, supra*, at p. 361; *Taylor, supra,* 171 Cal.App.4th at p. 587.) Finally, *Taylor* noted that while the abrasive wheels and discs in *Tellez-Cordova* were not dangerous without the use of the defendants' tools, "manipulation and removal of the asbestos-containing products at issue here would have presented a danger to Mr. Taylor's health whether they were used in combination with respondents' equipment, some other type of equipment, or even all by themselves." (*Taylor, supra,* at p. 588.)

B. Hennessy Owed No Duty to Warn of the Hazards of Asbestos, Even if It Was Foreseeable That Its Machines Would Be Used in Conjunction with Asbestos-Containing Products.

We have explored the state of the law at some length to highlight the distinction between those circumstances which establish a manufacturer's duty to warn and those which do not. In our view, the undisputed evidence offered here does not fit precisely into the parameters set by either *Taylor* on the one hand or *Tellez-Cordova* on the other. We acknowledge that appellants' allegations—again, incorporated into Hennessy's statement of undisputed facts—established that it was the process of using Hennessy's machines to grind, sand, cut, drill and install asbestos-containing brake parts which caused Barker to be exposed to harmful, respirable asbestos. Thus, Hennessy's evidence is slightly different than that in *Taylor,* where there was no evidence that the release of asbestos was directly caused or created by any interaction between the defendants' products and the asbestos-containing products. (*Taylor, supra*, 171 Cal.App.4th at p. 587.)

Conversely, we do not construe the undisputed evidence to rise to the level of the allegations in *Tellez-Cordova*, which established that the asbestos dust generated by the defendant's tools necessarily resulted from the "inevitable" and "intended" use of the tools. (*Tellez-Cordova, supra*, 129 Cal.App.4th at p. 584.) The *Tellez-Cordova* court construed the plaintiffs' allegations as demonstrating the defendants' grinding tools had a "sole intended purpose"—one which necessarily created harmful asbestos dust. (*Id*. at p. 582.) In contrast, according to Mountz's declaration, use of Hennessy's machines on asbestos-containing brake parts was neither inevitable nor intended, as the machines were designed to be equally operable with products that did not contain asbestos and therefore did not necessarily generate harmful consequences when operated.

Under these circumstances, we are guided by *O'Neil*'s and *Taylor*'s comments regarding the limitations of *Tellez-Cordova*. (*O'Neil, supra*, 53 Cal.4th at p. 361; *Taylor, supra,* 171 Cal.App.4th at pp. 586–588.) Unlike the tools in *Tellez-Cordova*, the undisputed evidence established that Hennessy's machines could be used in a manner that

was not necessarily harmful. (*O'Neil, supra*, at p. 361.) Further, while appellants contend that Hennessy's machines caused or created the risk of harm because asbestos dust was generated by the use of Hennessy's machines on the asbestos-containing brake parts, *Taylor* clarified that finding a manufacturer's product causes or creates the risk is simply another way of concluding the product is defective. (*Taylor, supra,* at p. 583.) Here, the defective product is the asbestos-containing brake parts—not Hennessy's machines. Additionally, there was no evidence that the brake parts were dangerous only when used in combination with Hennessy's machines. (See *Id.* at p. 588.) To the contrary, the undisputed evidence showed that the asbestos-containing brake parts did not require the use of Hennessy's machines to operate.

The *O'Neil* Court described "*Tellez-Cordova* as holding 'that a manufacturer is liable when its product is necessarily used in conjunction with another product, and when danger results from the use of the two products together.'" (*O'Neil, supra*, 53 Cal.4th at p. 361.) The Court further remarked that neither element was satisfied there, as "[d]efendants' pumps and valves were not 'necessarily' used with asbestos components, and danger did not result from the use of these products 'together.'" (*Ibid.*) We believe the *O'Neil* Court would have reached the same result even if only the first element were lacking. *O'Neil* found it particularly significant that "the power tools in *Tellez-Cordova* could *only* be used in a potentially injury-producing manner. Their sole purpose was to grind metals in a process that inevitably produced harmful dust. In contrast, the normal operation of defendants' pumps and valves did not inevitably cause the release of asbestos dust." (*O'Neil, supra*, at p. 361.) Similarly, the undisputed evidence here established that Hennessy's machines were not used *only* in an injury-producing manner and did not inevitably cause the release of asbestos dust because they could be used in conjunction with non-asbestos-containing products.

As confirmed in *O'Neil*, a manufacturer does not owe "a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." (*O'Neil, supra*, 53 Cal.4th at p. 361.) The Court elaborated that it had never "required manufacturers to warn about all foreseeable harms

that might occur in the vicinity of their products." (*Id*. at p. 362.) Here, the evidence showed nothing more than the foreseeable possibility that Hennessy's machines could produce asbestos dust when used together with asbestos-containing brake parts. To impose a duty to warn under these circumstances would be no different than the example posited by *O'Neil,* where the Court reasoned that a foreseeability-based test could lead to the imposition of a duty to warn on the manufacturers of saws used to cut insulation. (*Id*. at p. 361.) Likewise, a foreseeability-based test could result in the imposition of a duty to warn on the manufacturers of putty knives, wire brushes and metal scraps—products which created the release of harmful asbestos dust when used to scrape the asbestos-containing gaskets in *Taylor, supra,* 171 Cal.App.4th at page 572.

To support its conclusion that foreseeability of harm is an inadequate basis for the imposition of a duty to warn, *O'Neil* found instructive several out-of-state cases. (*O'Neil, supra,* 53 Cal.4th at pp. 355–358; see also *Taylor, supra,* 171 Cal.App.4th at pp. 590–592.) In *Simonetta v. Viad Corp.* (2008) 165 Wn.2d 341 [197 P.3d 127], Washington's highest court affirmed a grant of summary judgment in favor of an evaporator manufacturer. The evidence showed that a shipboard evaporator had been insulated with another manufacturer's asbestos-containing material, and the plaintiff suffered injury from asbestos exposure from his servicing the evaporator, which required him to "'pry or hack away' the asbestos insulation with a hammer and then reinsulate the machine after he was done." (*Id*. at p. 130.) The court concluded that the evaporator manufacturer owed no duty to warn about the hazards of another manufacturer's asbestos-containing product even though the evidence showed that the evaporator manufacturer knew or should have known—i.e., it was foreseeable—that the evaporator required asbestos-containing insulation to function properly and that insulation would be disturbed during regular maintenance. (*Id*. at pp. 131–132, 136; see also *Braaten v. Saberhagen Holdings* (2008) 165 Wn.2d 373, 388, fn. 8 [198 P.3d 493] [evidence it was foreseeable that asbestos-containing insulation would be applied to the defendants' pumps and valves held immaterial to the question of duty to warn]; *Macias v. Mine Safety Appliances Co.* (2010) 158 Wn.App. 931, 943 [244 P.3d 978] ["respirator manufacturers' ability to

foresee that their products would be used in tandem with hazardous substances like asbestos, and that cleaning and maintaining their respirators might expose workers to asbestos, does not give rise to a duty to warn"].)

Foreseeability of harm is therefore an inadequate basis for the imposition of strict liability on the manufacturer of a product that will be used in conjunction with a defective product. (*O'Neil, supra*, 53 Cal.4th at p. 362.) *O'Neil* explained that "[a] contrary rule would require manufacturers to investigate the potential risks of all other products and replacement parts that might foreseeably be used with their own product and warn about all of these risks," and reasoned that imposing such a broad duty to warn would constitute "an excessive and unrealistic burden on manufacturers." (*Id.* at p. 363.) Applied here, *O'Neil* compels the conclusion that Hennessy did not owe a duty to warn of the risks associated with the use of its machines on asbestos-containing brake parts, because it was merely foreseeable and not inevitable that its machines would be used with asbestos-containing products.

Our conclusion is dictated by the record below. We recognize that a different result could be required if the evidence offered below had shown, for example, that Hennessy's machines necessarily operated with asbestos-containing brake parts because non-asbestos-containing brake parts were not manufactured at the time Barker was exposed to asbestos dust. For this reason, our conclusion is not inconsistent with two recent First District cases holding that allegations concerning Hennessy's machines were sufficient to state causes of action for strict liability and negligence. (See *Bettencourt et al. v. Hennessy Industries, Inc.* (May 4, 2012, A129379) __ Cal.App.4th __ [2012 Cal.App. Lexis 536] (*Bettencourt*); *Shields et al. v. Hennessy Industries, Inc.* (Apr. 13, 2012, A130213) __ Cal.App.4th __ [2012 Cal.App. Lexis 511] (*Shields*).)

In *Bettencourt*, the appellate court reversed a judgment on the pleadings, concluding that the plaintiffs' allegations and proposed amendment were sufficient to bring the case within the ambit of *Tellez-Cordova, supra*, 129 Cal.App.4th 577. (*Bettencourt, supra*, __ Cal.App.4th __ [2012 Cal.App. Lexis 536, at pp. *27–28].) In sharp contrast to the undisputed evidence offered here, the plaintiffs in *Bettencourt*

alleged: "Hennessy manufactured and distributed brake shoe grinding machines, the sole and intended purpose of which was to grind asbestos-containing brake linings. At the time in question, all brake shoe linings used on automobiles and trucks in the United States contained asbestos, and it was not only foreseeable that Hennessy's machines would be used to grind such linings, this was their inevitable use. . . . [W]hen used as designed and intended, Hennessy's machines caused the release of the toxic agent that injured plaintiffs, although that agent did not emanate from Hennessy's machines." (*Id.* at pp. *26–27.) The court reasoned that the plaintiffs had sufficiently stated a claim for strict liability for a warning defect, stating that "as in *Tellez-Cordova*, plaintiffs allege the sole purpose of Hennessy's machines was to grind brake linings 'in a process that inevitably produced harmful dust.'" (*Id.* at p. *27)

The appellate court in *Shields* likewise reversed a judgment on the pleadings, finding that the plaintiffs had pleaded viable causes of action for strict liability and negligence on the basis of allegations including that "'[d]uring all relevant time periods, all brake shoe linings used with or on automobiles, light trucks and commercial trucks, as serviced by [Hennessy's] products in the United States contained asbestos.' . . . Hennessy's 'asbestos brake shoe grinding machine[s] . . . ground and abraded th[e] hard lining[s], as they were designed to do, . . . releasing the formerly bound-up asbestos into the air as airborne fibers that presented a significant danger to human health,' . . . [and] [t]he 'only intended use' of these machines was 'for grinding brake shoe linings, in order to match the size and shape between the shoe and [brake] drum. . . .'" (*Shields, supra*, __ Cal.App.4th __ [2012 Cal.App. Lexis 511 at pp. *7–8].) Because the allegations established that the "sole and intended use of the brake arcing machine resulted in the release of contained asbestos particles," the *Shields* court had no difficulty in concluding that the plaintiffs had satisfied the parameters of liability outlined in *Tellez-Cordova*, even as circumscribed by *O'Neil*. (*Shields, supra*, at p. *33.)

Here, had appellants' evidence created a triable issue as to the existence of the facts as alleged in *Bettencourt* and *Shields*, we would reach a different conclusion. But unlike the allegation that the "sole intended use [of Hennessy's machines] was for an

activity known to Hennessy to pose an unreasonable risk of harm" (*Shields, supra*, __ Cal.App.4th __ [2012 Cal.App. Lexis 511 at p. *34]), the undisputed evidence offered by Hennessy showed that its machines were designed to and could be used in a non-hazardous manner and that its machines were hazardous only when used in combination with asbestos-containing materials. In light of this evidence, the trial court properly concluded that there was no triable issue of fact giving rise to a duty to warn of another manufacturer's defective product.

III. The Undisputed Evidence Established That Hennessy Was Not Negligent for the Failure to Warn.

Hennessy's motion for summary judgment also encompassed appellants' cause of action for negligence, which was premised, among other things, on Hennessy's "failing to warn Dedecent of the dangers, characteristics, and potentialities of their asbestos-containing products when [it] knew or should have known that exposure to [its] asbestos-containing products would cause disease or injury." The undisputed evidence demonstrated that Hennessy's products did not contain asbestos. Thus again, the question before us is the same as that posed in *O'Neil*—whether a manufacturer owes a duty of care to prevent the risks posed by another manufacturer's asbestos-containing products. (*O'Neil, supra*, 53 Cal.4th at pp. 364–366; see *Taylor, supra,* 171 Cal.App.4th at p. 593 ["A fundamental element of any cause of action for negligence is the existence of a legal duty of care running from the defendant to the plaintiff"].) The existence of duty is a legal question for the court, "'particularly amenable to resolution by summary judgment.'" (*Taylor, supra,* at p. 593; see *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.) *O'Neil* answered that question negatively, as must we. (*O'Neil, supra,* at pp. 364–366; accord, *Taylor, supra*, at pp. 593–596.)

In *O'Neil,* as here, the plaintiffs' negligence claim focused on the manufacturers' ability to foresee the likelihood of harm resulting from the use of their products with other asbestos-containing products. But "'foreseeability alone is not sufficient to create an independent tort duty.' [Citations.]" (*O'Neil, supra*, 53 Cal.4th at p. 364.) Rather,

"the recognition of a legal duty of care '"depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability."' [Citation.]" (*Ibid.*) In addition to foreseeability, those considerations include "'the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]' [Citation.]" (*Ibid.*, quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

On the basis of the undisputed evidence, the trial court properly determined that Hennessy did not owe Barker a duty of care to prevent or warn about the dangers of asbestos exposure. While Hennessy did not dispute that Barker's death was caused by asbestosis and asbestos-related lung disease, the connection between Hennessy's conduct and Barker's injury was remote "because [Hennessy] did not manufacture, sell, or supply any asbestos product that may have caused" Barker's disease. (*O'Neil, supra*, 53 Cal.4th at p. 365.) Further, "little moral blame can attach to a failure to warn about dangerous aspects of *other* manufacturers' products and replacement parts." (*Ibid.*; accord, *Taylor, supra*, 171 Cal.App.4th at p. 595.) Imposing liability would not serve the policy of preventing future harm, not only because asbestos products are no longer used in connection with any other manufacturer's product, but also because a manufacturer rarely has control over the safety of companion parts made by another manufacturer. (*O'Neil, supra*, at p. 365.) It would be burdensome to impose a duty on a manufacturer, rendering it liable for a product it neither made nor sold; the community could also be burdened by an abundance of potentially conflicting warnings about other manufacturer's products. (*Ibid.*) Finally, "it is doubtful that manufacturers could insure against the 'unknowable risks and hazards' lurking in every product that could possibly be used with or in the manufacturer's product. [Citation.]" (*Ibid.*)

In sum, the relevant policy considerations weigh heavily against the imposition of a duty. As the *O'Neil* Court recognized, "'"[s]ocial policy must at some point intervene to delimit liability" even for foreseeable injury . . . .' [Citation.]" (*O'Neil, supra*, 53 Cal.4th at pp. 365–366.) California law has never imposed a duty of care on a manufacturer to prevent harm that may result from every other product with which its product might foreseeably be used. (*Taylor, supra*, 171 Cal.App.4th at p. 596.) Because Hennessy owed Barker no duty of care, the trial court properly granted summary judgment on the cause of action for negligence.

DISPOSITION

The judgment is affirmed. Hennessy is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.

DOI TODD

I concur:

_____, P. J.

BOREN

ASHMANN-GERST, J.—Dissenting.

I respectfully dissent.

The issue presented is whether Hennessy can be held liable under a strict liability or negligence theory for manufacturing machines if: (1) the machines were intended to be used only on clutches, brake linings and other third party automotive component parts; (2) during the relevant time, the type of automotive component parts that the machines were used on always contained asbestos; (3) when the machines were used to manipulate the asbestos-containing automotive component parts, the machines created airborne asbestos dust; (4) as airborne dust, the asbestos became harmful or more harmful; (5) the decedent's injury was caused solely or substantially by the airborne asbestos dust; (6) Hennessy knew about the risk of harm; (7) Hennessy failed to warn users of the risks or failed to take reasonable measures to protect them; and (8) Hennessy was in a better position to protect users than the third parties who made the asbestos-containing automotive component parts.

If each of the foregoing is true, I would conclude that Hennessy is liable. Consequently, because Hennessy's motion for summary judgment did not dispose of these issues, this matter should be tried. My conclusion is consistent with *Shields v. Hennessy Industries, Inc.* (Apr. 13, 2012, A130213) ___ Cal.App.4th ___ [2012 Cal.App. Lexis 511] (*Shields*) and *Bettencourt v. Hennessy Industries, Inc.* (May 4, 2012, A129379) ___ Cal.App.4th ___ [2012 Cal.App. Lexis 536] (*Bettencourt*). In *Shields* and *Bettencourt*, the First District held that Hennessy could be sued for strict liability based on the same assumed facts present here.

I. Strict liability law: Overview.

In 1963, the California Supreme Court announced the following rule: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57,

62 (*Greenman*).) The court explained that the "purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Id*. at p. 63.)

Recently, the court "reaffirm[ed] that a product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product. The only exceptions to this rule arise when the defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm [citing *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577 (*Tellez-Cordova*)], or because the defendant participated substantially in creating a harmful combined use of the products [citing *DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336]." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362 (*O'Neil*).) The *O'Neil* court noted that "[t]he question whether to apply strict liability in a new setting is largely determined by the policies underlying the doctrine." (*Id*. at pp. 362–363.)

The policy considerations underlying strict liability include the following. The risks and costs of injury should be spread to those most able to bear them. (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1003–1004.) Product manufacturers generally have no continuing relationship with each other. Thus, a manufacturer cannot be expected to exert pressure on other manufacturers to make their products safe. (*O'Neil, supra*, 53 Cal.4th at p. 363.) "It is . . . unfair to require manufacturers of nondefective products to shoulder a burden of liability when they derived no economic benefit from the sale of the products that injured the plaintiff." (*Ibid*.) Furthermore, it does not comport with principles of strict liability to impose the responsibility and cost of becoming an expert in the products of other manufacturers. (*Ibid*.) But it is fair to require a manufacturer to have an expert understanding of the consequences of using its product when it has one intended purpose. (*Tellez-Cordova, supra*, 129 Cal.App.4th at pp. 582–583.)

II. Particular applications of policy in the strict liability context.

A. Cases finding strict liability.

The plaintiff in *Tellez-Cordova* worked as a lamp maker. As part of his job, he cut, sanded and ground metal parts. He eventually developed a pulmonary disease. (*Tellez-Cordova*, *supra*, 129 Cal.App.4th at p. 579.) In his complaint, the plaintiff alleged a strict liability claim against the manufacturers of the various tools. He alleged that their tools were "specifically designed to be used with the abrasive wheels or discs they were used with, for the intended purpose of grinding and sanding metals, that the tools necessarily operated with those wheels or discs, that the wheels and discs were harmless without the power supplied by the tools, and that when the tools were used for the purpose intended by respondents, harmful respirable metallic dust was released into the air." (*Id*. at p. 582.) In effect, he alleged that the harmful use was inevitable. (*Id*. at p. 584.) The *Tellez-Cordova* court concluded that the pleading was factually sufficient. In doing so, it dismissed the argument that the manufacturers were not required to warn of defects in the products of others. It stated that the "argument . . . misses the point of [the plaintiff's] complaint, which is that [the manufacturer's] tools created the dust, even if the dust did not come directly from the tools. . . . Here, the allegation is that the tools had no function without the abrasives which disintegrated into toxic dust . . . [and] that the abrasive products were not dangerous without the power of the tools." (*Id*. at p. 585.) The manufacturers argued that because it did not make the component parts, they could not be held liable. Once again, the court disagreed. It explained that the plaintiff had "sued under a different kind of theory, that [the manufacturers'] tools, when used as intended, caused toxic particles to be released from otherwise harmless wheels and discs." (*Id*. at p. 586.)

In a proposed amended complaint, the plaintiffs in *Shields* alleged that Hennessy negligently manufactured and designed asbestos brake shoe grinding machines. (*Shields, supra,* ___ Cal.App.4th ___ [2012 Cal.App. Lexis 511, at pp. *7–9].) During all relevant time periods, "'all brake shoe linings used with or on automobiles, light trucks and commercial trucks, as serviced by [Hennessy's] products in the United States contained

asbestos.' 'Until subjected to [Hennessy's] products, asbestos fiber bundles were physically bound or otherwise attached in a matrix in the non-friable asbestos brake lining[s].' Hennessy's 'asbestos brake shoe grinding machine[s] . . . ground and abraded th[e] hard lining[s], as they were designed to do, and subjected [them] to pressures, temperatures and force inadequate to convert asbestos into inert fosterite, making portions of [the linings] into a fine powder and releasing the formerly bound-up asbestos into the air as airborne fibers that presented a significant danger to human health, as they would be breathed in by anyone in the area around the . . . machine during or after its use.' The 'only intended use' of these machines was 'for grinding brake shoe linings, in order to match the size and shape between the shoe and [the] [brake] drum. . . .' [¶] Hennessy 'knew, or should have known, that [its] brake shoe grinding machines would be used on asbestos-containing brake linings and, when used in the manner intended, would cause the release of asbestos fibers into the air around the users and . . . create a hazard from [the machine's] intended and only use.' Hennessy 'specifically designed [its] machines for grinding asbestos-containing brake linings [and they] had no other function than to grind asbestos-containing brake linings.' This was '[t]hus [the] only "inevitable use" of the machines, within the meaning of [*Tellez-Cordova*].'" (*Ibid.*)

In *Bettencourt*, the First District summarized the plaintiffs' proposed amended complaint thusly: "Hennessy manufactured and distributed brakeshoe grinding machines, the sole and intended purpose of which was to grind asbestos-containing brake linings. At the time in question, all brakeshoe linings used on automobiles and trucks in the United States contained asbestos, and it was not only foreseeable that Hennessy's machines would be used to grind such linings, this was their inevitable use. The asbestos fibers bundles were physically bound in a matrix in the nonfriable linings, and only when subjected to the action of Hennessy's machines were the fibers released into the air where they posed a danger to those exposed. Thus, when used as designed and intended, Hennessy's machines caused the release of the toxic agent that injured plaintiffs, although that agent did not emanate from Hennessy's machines." (*Bettencourt*, *supra*, ___ Cal.App.4th ___ [2012 Cal.App. Lexis 536, at pp. *26–27].)

The First District held that the allegations were sufficient to withstand a motion for judgment on the pleadings. (*Shields, supra*, ___ Cal.App.4th ___ [2012 Cal.App. Lexis 511, at p. *32]; *Bettencourt, supra*, ___ Cal.App.4th ___ [2012 Cal.App. Lexis 536, at pp. *26–28].) According to *Shields*, "[t]hese allegations distinguish Hennessy from the defendants in *Taylor* and *O'Neil* because the products manufactured by the defendants in those cases were not shown to have caused, created or contributed substantially to the harm of airborne asbestos fibers to which the injured persons in those cases were exposed." (*Shields, supra*, ___ Cal.App.4th ___ [2012 Cal.App. Lexis 511, at pp. *33–34].) In *Bettencourt*, the First District found the "allegations indistinguishable from those *Tellez-Cordova* held sufficient to survive demurrer." (*Bettencourt, supra*, ___ Cal.App.4th ___ [2012 Cal.App. Lexis 536, at p. *27].)

B. Cases rejecting strict liability.

In *Garman v. Magic Chef, Inc.* (1981) 117 Cal.App.3d 634 (*Garman*), the product under scrutiny was a stove that was connected to a propane gas tank by copper tubing with a leak. Minutes after the decedent lit the stove, a pool of leaking propane gas was ignited. There was an explosion. The *Garman* court concluded there was no liability for failure to warn because the stove did not have an unreasonably dangerous condition or feature which caused the injury. (*Id.* at p. 638.) According to the court, even if the stove required the use of natural gas, "that fact does not require a special warning. Use of natural gas is not an activity the danger of which is not known by a substantial number of people. To the contrary, natural gas has been in use for generations. . . . The use of any product can be said to involve some risk because of the circumstances surrounding even its normal use. Nonetheless, the makers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe place or in conjunction with another product which because of a defect or improper use is itself unsafe. This is especially so where the risk is commonly known. [Citation.]" (*Ibid.*)

The issue in *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564 (*Taylor*) was whether the manufacturers of equipment used in a Navy ship could be

held strictly liable for the failure to warn of asbestos hazards inherent in replacement gaskets, packing and insulation manufactured or supplied by third parties. The answer was no. There was no evidence or inference that the equipment made the asbestos-containing products substantially more harmful, or that there was a harmful combined use. Notably, however, *Taylor* recognized that a "manufacturer *may* owe a duty to warn when the use of its product in combination with the product of another creates a potential hazard." (*Id*. at p. 580.) The court further stated: "[I]n California, a manufacturer has no duty to warn of defects in products supplied by others and used in conjunction with the manufacturer's product unless the manufacturer's product itself causes or creates the risk of harm." (*Id*. at p. 575.) Taylor distinguished *Tellez-Cordova*. "[T]he plaintiff [in *Tellez-Cordova*] alleged that it was the action of *respondents' tools themselves* that created the injury-causing dust." (*Taylor, supra*, at p. 587.) But in *Taylor*, the injuries were caused "not by any action of respondents' products, but rather by the release of asbestos from products produced by others. This is a key difference, because before strict liability will attach, the defendant's product must 'cause or create the risk of harm.' [Citation.] Second, unlike the abrasive wheels and disks in *Tellez-Cordova*, which were not dangerous without the power of the defendants' tools, the asbestos-containing products at issue [in *Taylor*] were themselves inherently dangerous. It was their asbestos content—not any feature of respondents' equipment—that made them hazardous." (*Taylor, supra*, at pp. 587–588, fn. omitted.)

The defendants in *O'Neil* made pumps and valves used in Navy warships. They were sued for "a wrongful death allegedly caused by asbestos released from external insulation and internal gaskets and packing, all of which were made by third parties and added to the pumps and valves postsale." (*O'Neil, supra*, 53 Cal.4th at p. 342.) The plaintiffs did not argue that the defendants' products caused the third party products to be more dangerous. Rather, they argued that the defendants had a duty to warn about the harmful effects of asbestos dust released from third party products used with the pumps and valves. The court held that the defendants were not strictly liable for wrongful death "because (a) any design defect in *defendants' products* was not a legal cause of injury

. . . , and (b) defendants had no duty to warn of risks arising from *other manufacturers'* products." (*Id*. at p. 348.) The court added that "the foreseeability of harm, standing alone, is not a sufficient basis for imposing strict liability on the manufacturer of a nondefective product." (*Id*. at p. 362.)

III. The issues left unresolved by Hennessy's motion.

As the majority recognizes, the appellants alleged that it was the process of using Hennessy's machines to grind, sand, cut, drill and install asbestos-containing brake parts that caused Barker's exposure to asbestos. Moreover, in its motion for summary judgment, Hennessy recognized that the appellants "claim that Hennessy is liable because its asbestos-free machinery was used in conjunction [with] asbestos-containing automobile clutches and brake linings[.]" According to the opposition, the appellants "alleged that [Hennessy's] grinders and lathes . . . caused the release of asbestos[.]" In order to eliminate a triable issue under *O'Neil*, *Shields* and *Bettencourt*, Hennessy had to negate the possibility that its machines were a substantial factor in Barker's injury.

In its separate statement, Hennessy stated that it was entitled to summary judgment because it did not "manufacture[], market[], design[] or distribute[] an asbestos-containing product to which [d]ecedent was exposed." In other words, Hennessy's defense was that it could not be held liable absent proof it manufactured an asbestos-containing product. Hennessy offered the following 12 facts in support of its motion: (1) The appellants sued Hennessy. (2) The complaint alleges causes of action for negligence and strict liability. (3) The decedent allegedly worked in an auto shop. (4) Clutches, brake linings and brake shoes were necessary component parts to automobiles, trucks, tractors and heavy equipment. (5) Asbestos-containing clutch components, braking linings and brake shoes are inherently dangerous. (6) The appellants allege that Hennessy manufactured grinders and lathes and the decedent used them to lathe and grind asbestos-containing products including brake linings/shoes and clutch linings/facings. (7) There is no evidence that Hennessy's brake shoe arcing machines and brake drum lathes themselves contained any asbestos or asbestos-containing component parts. (8) Hennessy never manufactured asbestos-containing

products. (9) The asbestos-containing products at issue were manufactured by third parties. (10) Hennessy's brake shoe arcing machines are designed to reshape the friction material of a brake shoe and do not need asbestos to operate. (11) Hennessy's brake drum lathes are designed to reshape brake drums and do not require asbestos to operate. (12) Hennessy never represented that asbestos-containing products are not harmful. Virtually the same facts were repeated 16 times in connection with Hennessy's request for summary adjudication of 16 issues.

Hennessy's separate statement did not resolve whether the intended and inevitable use of its machines was to grind or lathe asbestos-containing automotive parts in a manner that created toxic asbestos dust as a byproduct. In particular, the separate statement did not resolve whether the relevant automotive parts always contained asbestos at the time Hennessy sold its machines and at the time the decedent operated them. Also left unresolved was whether Hennessy's machines made asbestos-containing automotive parts substantially more harmful by causing the release of asbestos fibers into an operator's breathable airspace.

IV. The majority's analysis.

In order to frame my own analysis, it is necessary to first explain my respectful disagreement with the majority.

To begin its analysis, the majority states: "Because the undisputed evidence showed nothing more than the foreseeable—and not the intended and inevitable—use of asbestos-containing products with Hennessy's machines, Hennessy could not be held liable for failing to warn of the risk of harm from those products and summary judgment was properly granted." (Maj. Opn., at p. 5.) Elsewhere, the majority states: "[A]ccording to [the declaration of Craig Mountz (Mountz)], use of Hennessy's machines on asbestos-containing brake parts was neither inevitable nor intended, as the machines were designed to be equally operable with products that did not contain asbestos and therefore did not necessarily generate harmful consequences when operated." (Maj. Opn., at p. 15.) And then they state: "[T]he undisputed evidence here established that Hennessy's machines were not used *only* in an injury-producing manner and did not

inevitably cause the release of asbestos dust because they could be used in conjunction with non-asbestos-containing products." (Maj. Opn., at p. 16.)

In its reply brief in connection with the motion for summary judgment, Hennessy stated: "[J]ust as in *Taylor*, for the purposes of this motion, **it is assumed that it was both foreseeable and intended that Hennessy's machinery would be used in conjunction with asbestos-containing brake linings.**" (Emphasis in original.) Moreover, the separate statement did not broach the subject of intended use. Mountz offered no direct evidence regarding the intended use of Hennessy machines. Rather, he simply declared the following: "[Hennessy] brake shoe arcing machines are designed to reshape the friction material of a brake shoe (brake lining), regardless of the brake shoe's composition, by mechanical abrasion. [Hennessy] brake shoe arcing machines are designed to reshape any brake shoe friction material, whether composed of asbestos or not. Individuals operating [a Hennessy] brake shoe arcing machine can reshape whatever variety of brake shoe they wish. [Hennessy] brake shoe arcing machines do not require asbestos in order to operate, nor do brake shoes/linings, asbestos-containing or otherwise, require arcing in order to operate." "[Hennessy] brake drum lathes are designed to reshape brake drums, regardless of the brake drum's composition or whatever type of dust or dirt that may be on the brake drum at the time a user places a brake drum on [a Hennessy] brake drum lathe. Individuals operating [a Hennessy] brake drum lathe can reshape whatever variety of brake drum the wish. [Hennessy] brake drum lathes do not require asbestos in order to operate, nor do brake drum require lathing in order to operate."

I am unclear as to how the majority concludes that the undisputed evidence shows that use on asbestos-containing products was not intended. At best, Mountz's declaration establishes that Hennessy machines could have been used on asbestos free brake parts *if those parts had existed*. He did not say that asbestos free brake parts did exist at the relevant times. He therefore offered no evidence regarding what Hennessy knew and intended about the use of its machines as dictated by the market.

Turning to the summary judgment statute, it notably provides that "[in] determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, . . . and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).) I deduce that the majority is drawing an inference regarding intended use. Based on the dearth of evidence on that topic, however, I conclude that this supposable inference is not reasonable. But even if it was reasonable, it is contradicted by a counter-veiling inference. There is no evidence regarding the composition of brake shoes and brake drums on the market at the relevant times. Thus, there is doubt as to whether they all contained asbestos. It is axiomatic that doubts are resolved in favor of the party opposing summary judgment. (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 97.) Consequently, we must assume that asbestos was in all brake shoes and brake drums. If the machines were designed to reshape brake shoes and brake drums, and if they all contained asbestos at the time the machines were sold, then there is a reasonably deducible inference that the machines were intended to be used on asbestos-containing automotive parts.

The same analysis regarding inferences applies to inevitable use. If all brake shoes and brake drums contained asbestos at the relevant time, then there is a reasonable inference that the inevitable use of the machines was on asbestos-containing products. This is an issue that a trier of fact must decide.

Simply put, Hennessy did not meet its burden. The California Supreme Court explained that the "'"moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish,'" the elements of his or her cause of action. [Citation.]' [Citation.]" (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 ["[f]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is

entitled to judgment as a matter of law"].) More specifically, Code of Civil Procedure section 437c "'places the initial burden on the moving party, and shifts it to the opposing party upon a 'showing' that one or more elements of the cause of action cannot be established. [Citation.]' [Citations.]" (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Because Hennessy failed to demonstrate that the appellants cannot establish that brakes shoes and brake drums always contained asbestos at the relevant time, Hennessy did not meet its burden and never shifted the burden to the appellants.

According to the majority's opinion, it recognizes "that a different result could be required if the evidence offered below had shown, for example, that Hennessy's machines necessarily operated with asbestos-containing brake parts because non-asbestos-containing brake parts were not manufactured at the time Barker was exposed to asbestos dust." (Maj. Opn., at p. 18.) By making this statement, the majority has rewritten the summary judgment statute and departed from binding precedent by shifting the burden to the appellants to offer evidence supporting their claims even though Hennessy did not meet its initial burden to eliminate a triable issue. As I explained, there was no evidence regarding the market for brake shoes and brake drums at the relevant time, and all presumptions favor the appellants as the opposing parties. Case law therefore dictates denial of summary judgment.

I note that the majority made this additional observation: "Here, had appellants' evidence created a triable issue as to the existence of the facts as alleged in *Bettencourt* and *Shields*, we would reach a different conclusion." (Maj. Opn., at p. 19.) Once again, the majority has turned the summary judgment statute on its head. The appellants were not required to offer evidence of the facts alleged in *Bettencourt* and *Shields* unless and until Hennessy shifted the burden of proof.

V. There are triable issues.

Due to the triable issues regarding the market for brake shoes and brake drums as well as the intended and inevitable use of Hennessy's machines, *Shields* and *Bettencourt* are directly on point and establish the existence of triable issues. Appellate courts ordinarily follow the decisions of other districts unless there is good reason to disagree.

(*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529.) Based upon my independent analysis, I perceive no reason to disagree with the holdings in *Shields* and *Bettencourt*.

If Hennessy's machines had one purpose, which was to be used on asbestos-containing automotive component parts, and if Hennessy's machines contributed substantially to the harm by releasing asbestos fibers and making them more dangerous, no one else was in a better position to provide safeguards for that particular risk. Moreover, Hennessy is the most able to bear the risks and costs of injury. It could have obtained insurance, and it could have warned users of the hazard or developed a method for neutralizing the toxic asbestos dust and passed on the cost to buyers. To protect itself from liability, and to protect users of its machines, Hennessy did not have to retain experts in a huge variety of areas to determine the possible risks with each potential use. There was only one contemplated use and one necessary byproduct: the grinding and lathing of asbestos-containing automotive component parts and the creation of airborne asbestos dust. And if Hennessy's own products "contributed substantially to the harm" or Hennessy "participated substantially in creating a harmful combined use" of products (*O'Neil*, *supra*, 53 Cal.4th at p. 342), then there is a nexus between Hennessy's machines and the decedent's injury. These policy considerations, in my view, cut in favor of imposing strict liability.

The plaintiff in *O'Neil* did not assert a claim like the one in *Tellez-Cordova*, i.e., that the action of the defendant's product caused harm. On that basis, *O'Neil* is distinguishable. In *Taylor*, it was alleged and presumed that the specific asbestos-containing materials at issue were inherently dangerous. There was no allegation, as there is here, that the manufacturer's own products caused the release of harmful asbestos fibers via abrasion and were therefore themselves defective. In fact, the decedent in *Taylor* abraded the third party products himself with knives, brushes or sharp pieces of metal, and that was how asbestos fiber was released into the air. (*Taylor*, *supra*, 171 Cal.App.4th at p. 572.) I therefore conclude that *Taylor* is distinguishable and does not foreclose liability in the case at bar. Neither is *Garman* an obstacle to the appellants'

claims. The stove in *Garman* could be used safely under normal circumstances. In other words, every use did not involve an explosion. Here, in contrast, the appellants' assertion is that every single use of Hennessy's machines created toxic and respirable asbestos dust. Hennessy's motion did not negate that possibility. Thus, there is a triable issue as to whether 100 percent of the time the intended and inevitable use of the machines was unavoidably dangerous or unsafe.

VI. Negligence.

In light of my analysis of strict liability, I would also conclude that there is a triable issue as to negligence.

_____, J.
ASHMANN-GERST