

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 22, 2015)

DENNIS R. BAUMGARTNER and :
GAIL L. BAUMGARTNER, :
Plaintiffs, :
v. :
AMERICAN STANDARD, INC., et al., :
Defendants. :

C.A. No. PC-13-4151

DECISION

GIBNEY, P.J. Before the Court is a request by Defendants, pursuant to G.L. 1956 §§ 9-19-3 through 9-19-6 and Super. R. Civ. P. 44.1 (Rule 44.1), that it apply the substantive law of the states of Ohio and Michigan, taking judicial notice thereof to the above-captioned case.1 Defendants also move for summary judgment pursuant to Super. R. Civ. P. 56 (Rule 56).2 The Court addresses each matter in turn.

I

Facts & Travel

Plaintiffs, both of whom are Ohio residents, allege that Dennis R. Baumgartner (Mr. Baumgartner or Plaintiff) was exposed to Defendants' asbestos-containing products, which allegedly caused or contributed to his mesothelioma. Specifically, Plaintiffs allege, inter alia, that Mr. Baumgartner was exposed to asbestos-containing products during the course of his

1 Defendants Riley Power, Inc. (Riley), Oakfabco, Inc. f/k/a Kewanee Boiler Corp. (Oakfabco), Crane Co., Robertshaw Controls Co. (Robertshaw), CBS Corp./Westinghouse Electric Corp. (CBS), Rockwell Int. (Rockwell), Cleaver-Brooks Co. Inc. (Cleaver-Brooks), Honeywell International Inc. (Honeywell), and Foster Wheeler, LLC (Foster Wheeler) filed motions to apply foreign law and have asked this Court to take judicial notice of the applicable foreign law.

2 Defendants Riley, Oakfabco, Crane Co., Robertshaw, CBS, Cleaver-Brooks, Honeywell, Foster Wheeler, and General Electric Co. (G.E.) have filed motions for summary judgment.

employment as an insulator helper and insulator at various jobsites located in Ohio and Michigan.

Mr. Baumgartner was born in Toledo, Ohio and has lived there his entire life. See Baumgartner Dep. Vol. I. 13:1-14:8, Oct. 15, 2013. On June 7, 2013, Mr. Baumgartner was diagnosed with mesothelioma at Toledo Hospital and he continues to receive treatment in Toledo. See Pl.’s Answers to Defs.’ Interrog. ¶ 31. Even Mr. Baumgartner’s discovery deposition occurred in Maumee, Ohio. Aside from the filing of the instant suit, there is no indication that Mr. Baumgartner has any relationship with the State of Rhode Island. Mr. Baumgartner has never lived, worked, or received medical treatment in Rhode Island.

II

Standard of Review

A

Choice of Law/Judicial Notice

Pursuant to §§ 9-19-3 through 9-19-6, a party relying on foreign law may ask the court to take judicial notice of foreign statutory law and may introduce into evidence statutes or cases to prove the foreign law.³ See §§ 9-19-3 through 9-19-6. Section 9-19-3 provides that “[e]very

³ Rule 44.1 provides in pertinent part as follows:

“A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Rhode Island Rules of Evidence. The court’s determination shall be treated as a ruling on a question of law.” Rule 44.1.

However, “[w]ith respect to the applicability of Rule 44.1 to issues concerning the law of another state (as contrasted with another country), [the] [Rhode Island Supreme] Court has expressly stated that, ‘[a]lthough the language of the rule itself speaks to law of a foreign country, the

court of this state shall take judicial notice of the *common law* and *statutes* of every state, territory, and other jurisdiction of the United States.” Sec. 9-19-3 (emphasis added).

Furthermore, § 9-19-6 provides:

“[a]ny party may . . . present to the trial court any admissible evidence of foreign laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.” Sec. 9-19-6.

Our Supreme Court has held that “[w]henver there is a case . . . in which it is undisputed and agreed that the law of a sister state applies, the trial court [is] . . . required to take judicial notice of all statutes and judicial decisions of that state *relevant* to the issue presented under [Rhode Island’s] Uniform Judicial Notice of Foreign Law Act, (G.L. 1956) [§§] 9-19-2 to 9-19-8[.]” Clougherty v. Royal Ins. Co., 102 R.I. 636, 648, 232 A.2d 610, 616 (1967) (Kelleher, J., concurring) (internal citations omitted and emphasis added). Thus, once the court has determined that the law of a foreign state shall be applied, any party may ask the court to take judicial notice of the relevant laws of that foreign state. “The determination of foreign laws shall be made by the court and not by the jury, and shall be reviewable.” Sec. 9-19-5.

However, prior to taking judicial notice of a foreign state’s laws, this Court must first determine if the laws of a foreign state are to be applied. In order to do so, this Court must conduct a choice-of-law analysis. Such a choice-of-law analysis consists of two steps. First, the Court must determine whether the laws of the forum and that of the foreign state are in conflict, i.e., a “true conflict” exists. See Nat’l Refrigeration, Inc. v. Standen Contracting Co., 942 A.2d

committee notes to that rule make it clear that the intention was to require notice in any case involving law of a foreign country or state” Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 525 n.17 (R.I. 2011) (citing Rocchio v. Moretti, 694 A.2d 704, 706 n.2 (R.I. 1997)); see Committee Notes to Rule 44.1. Furthermore, the Committee Notes to Rule 44.1 indicate that the current rule, as of the 1995 amendment, is essentially the same as Federal Rule 44.1 adopted in 1966.

968, 973-74 (R.I. 2008) (noting that it is well established that “[a] motion justice need not engage in a choice-of-law analysis when no conflict-of-law issue is presented to the court”); Peavey Co. v. M/V ANPA, 971 F.2d 1168, 1171 (5th Cir. 1992) (holding that “the first inquiry [in a choice-of-law analysis] is whether there is a true or false conflict of interest”). On one hand, a “true conflict” exists when each state retains an interest in the application of its contradictory laws. Peavey Co., 971 F.2d at 1172. On the other hand, a “false conflict[]” is present when either “(1) *there is no true conflict of laws because only one state is interested in the application of its law* or (2) the laws of the two states are found to be compatible.” Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 19 n.26 (1st Cir. 1979) (emphasis added). If a false conflict is found, *i.e.*, there is no conflict, then the law of the interested state shall prevail.⁴ However, if the laws are found to be in “true conflict,” then this Court shall apply Rhode Island’s “interest-weighting approach.” *See Peavey Co.*, 971 F.2d at 1172 (finding that a “true conflict” exists when each state retains an interest in the application of its contradictory laws); Erwin v. Cotter Health Ctrs., 167 P.3d 1112, 1120 (Wash. 2007) (concluding that “[i]f the result for a particular issue is different under the law of the two states, there is a ‘real’ conflict”).

In Harodite Indus., 24 A.3d at 534, the majority of the Rhode Island Supreme Court adopted the “interest-weighting approach” with respect to choice of law questions. In doing so, the majority reaffirmed its holding in Cribb v. Augustyn, 696 A.2d 285, 288 (R.I. 1997), that the

⁴ “There is authority that where a false conflict exists, the court should avoid the choice-of-law question, or need not decide it, and should apply the presumptive local law. It has also been said that where a false conflict exists, the law of the interested state prevails.” 16 Am. Jur. 2d Conflict of Laws § 4. However, considering that the Plaintiff has resided in Ohio for his entire life, the majority of his asbestos exposure occurred in Ohio, and none of the parties have any connection to Rhode Island, this Court shall apply the law of Ohio, *i.e.*, the interested state.

lex loci delicti conflict-of-law doctrine⁵ had been abandoned in Woodward v. Stewart, 104 R.I. 290, 299, 243 A.2d 917, 923 (1968).⁶ Under the “interest-weighting approach[,] . . . an action is separated into its various elements and each individual element or issue is governed by the law of the jurisdiction that has the most significant contacts relative thereto.” Harodite Indus., 24 A.3d at 536.

In applying the “interest-weighting approach” this Court “look[s] at the particular . . . facts and determine[s] therefrom the rights and liabilities of the parties in accordance with the law of the state that bears the most significant relationship to the events and the parties.” Id. at 534 (quoting Cribb, 696 A.2d at 288). In an action sounding in tort, the following four factors shall be taken into account:

- (1) the place where the injury occurred;
- (2) the place where the conduct causing the injury occurred;
- (3) the domicile, residence, nationality, place of corporation and place of business of the parties; and
- (4) the place where the relationship, if any, between the parties is centered. See Harodite Indus., 24 A.3d at 526; Brown v. Church of the Holy Name of Jesus, 105 R.I. 322, 326–27, 252 A.2d 176, 179 (1969).

In addition, the policy considerations which must be taken into account in making this determination are as follows:

- “(1) [P]redictability of result;
- “(2) [M]aintenance of interstate and international order;
- “(3) [S]implification of the judicial task;

⁵ “The former approach (known as the *lex loci delicti* doctrine) was a subjective determination of whether a particular element was labeled as substantive or procedural that often controlled which law would be applied.” Harodite Indus., 24 A.3d at 536.

⁶ The dissent in Harodite Indus., argued that the Cribb decision misconstrued the Court’s intent in Woodward in that the Woodward Court did not intend to wholly abandon the lex loci delicti doctrine. Rather, the dissent argued that the interest-weighting approach outlined under Woodward was only to be employed when it was not clear that an element was either procedural or substantive. Harodite Indus., 24 A.3d at 536 (Flaherty, J., dissenting in part and concurring on the rest).

“(4) [A]dvancement of the forum’s governmental interests; and
“(5) [A]pplication of the better rule of law.” Id.

Moreover, our Supreme Court has held, “in an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship” Najarian v. Nat’l Amusements, Inc., 768 A.2d 1253, 1255 (R.I. 2001) (quoting Restatement (Second) Conflict of Laws § 146).

B

Summary Judgment

“[S]ummary judgment is an extreme remedy that warrants cautious application.” Gardner v. Baird, 871 A.2d 949, 952 (R.I. 2005). Pursuant to Rule 56(c), “[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.” Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001).

Once a summary judgment motion is made, “[t]he burden rests upon the nonmoving party ‘to prove the existence of a disputed issue of material fact by competent evidence; it cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.’” Mut. Dev. Corp. v. Ward Fisher & Co., 47 A.3d 319, 323 (R.I. 2012) (quoting Hill v. Nat’l Grid, 11 A.3d 110, 113 (R.I. 2011)). Thus, “by affidavits or otherwise[,] [opposing parties] have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact.” Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). Accordingly, in order for a plaintiff to survive a defendant’s summary judgment motion as to a particular claim, the plaintiff must “produce evidence that would establish a prima facie case for [that] claim” DiBattista v. State, 808

A.2d 1081, 1089 (R.I. 2002). Conversely, summary judgment is proper where the plaintiff is unable to establish a prima facie case. Kelley v. Cowesett Hills Assocs., 768 A.2d 425, 430 (R.I. 2001).

III

Analysis

A

Choice-of-Law Analysis/Judicial Notice

To resolve the procedural snarl that is this case's conflicts-of-law question, this Court shall address four issues. First, this Court will examine whether Rhode Island has adopted the doctrine of depechage and, if so, whether the doctrine would permit the application of different state laws to different Defendants named in this suit. Second, this Court must determine whether Rhode Island's laws are in conflict with those of Ohio and Michigan. Third, if the laws are found to be in conflict, the Court shall apply Rhode Island's "interest-weighting approach" by separating the instant action into its various elements and then determining which state law bears the most significant relationship to the Plaintiffs' case. Fourth, and finally, the Court shall take judicial notice of the relevant and applicable foreign laws.

1

Depechage

"In legal parlance, depechage erects the framework under which different *issues* in a single case, arising out of a common nucleus of operative facts, may be decided according to the substantive law of different states." Putnam Res. v. Pateman, 958 F.2d 448, 465 (1st Cir. 1992) (emphasis added). "Although the Rhode Island Supreme Court has yet to pledge express allegiance to the principle of depechage, the court's [prior] decisions make it clear that Rhode

Island, like most other jurisdictions, adheres to the principle in the tort context.” Id. Here, Defendants urge this Court to apply the principle of depeceage in a manner that would parcel out applicable laws to different Defendants depending upon the location in which Mr. Baumgartner came into contact with their products.

This Court, however, “find[s] no precedent to support [the Defendant’s] use of *depeceage*, that is, on a defendant-by-defendant basis.” Gregory v. Beazer E., 892 N.E.2d 563, 580 (Ill. App. 2008). Rather, “it is the *issues* presented in a case to which *depeceage* applies, *not the different defendants in a case.*” Id. (emphasis added); see La Plante v. Am. Honda Motor Co., 27 F.3d 731, 741 (1st Cir. 1994) (concluding that “[u]nder the doctrine of depeceage, different substantive issues in a tort case may be resolved under the laws of different states where the choices influencing decisions differ”). Furthermore, “[a]s the court recognized in Gregory, depeceage is inappropriate in the context of multi-defendant asbestos litigation because, *inter alia*, ‘applying different legal standards to each joint tortfeasor-defendant in a multi-defendant suit alleged to have caused a single injury could lead to inconsistent results.’” Bootenhoff v. Hormel Foods Corp., 2014 WL 3810383, at *4, n.8 (W.D. Okla. Aug. 1, 2014) (quoting Gregory, 892 N.E.2d at 580).

2

Whether the Laws are in Conflict

Having determined that different state laws shall not be applied to different Defendants, this Court shall now analyze whether the enumerated laws of Rhode Island and Ohio are in conflict.⁷ If the laws are not found to be in conflict, then the laws of Ohio shall be applied;

⁷ Under the principle of depeceage, Defendants urge this Court to apply Michigan law if Mr. Baumgartner came into contact with their products while working in Michigan. This Court declines to do so. As discussed above, the principle of depeceage applies to the issue present in

however, if there is a “true conflict,” then the Court shall apply its “interest-weighting approach.” See Avco Corp. v. Aetna Cas. & Sur. Co., 679 A.2d 323, 330 (R.I. 1996) (holding that plaintiff’s choice-of-law contention was “feckless” because the trial justice’s finding would have been the same regardless of law applied). The Defendants have advised this Court of the evident conflict of laws between Rhode Island and Ohio, including (1) defenses, inter alia, the bare-metal defense, the sophisticated user defense, the state-of-the-art defense, the open-and-obvious hazard doctrine, and the nonparty defense; (2) the statute of repose; (3) joint and several liability; (4) statutory caps on damages; and (5) standards of proof for product identification in asbestos cases.

a

Defenses

i

Bare-Metal and Replacement Component Defenses

Defendants have advised this Court that the so-called “bare-metal defense” is recognized in Ohio, but not in Rhode Island. Generally,

“[t]he clear thrust of the bare metal defense is that a manufacturer cannot be held liable for asbestos-containing products used in conjunction with its bare metal [product], absent evidence that the manufacturer was part of the chain of distribution for those products.’ Morgan v. Bill Vann Co., Inc., 969 F. Supp. 2d 1358, 1369 (S.D. Ala. 2013). In other words, the bare metal defense stands for the proposition that a manufacturer is not liable for injuries caused by asbestos products, such as insulation, gaskets, and packing, that were incorporated into their products or used as

the case, not to the different Defendants. Gregory, 892 N.E.2d at 580. Furthermore, in considering which state has the most significant interest in the litigation, “[t]he entire litigation must be considered[.]” Denton v. Universal Am-Can, Ltd., 2015 IL App (1st) 132905, ¶ 18; see Gregory, 892 N.E.2d at 580 (holding that “[t]he entire litigation must be considered in assessing which forum has the more significant contacts with the litigation”). Looking at the litigation as a whole, Mr. Baumgartner spent the vast majority of his career as an insulator in Ohio. The fact that he may have worked sporadically in Michigan does not alter the ultimate conclusion that Ohio has the most significant relationship with the case.

replacement parts, but which they did not manufacture or distribute. Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791, 793 (E.D. Pa. 2012).” Thurmon v. A.W. Chesterton, 2014 WL 6621262, at *3 (N.D. Ga. Nov. 21, 2014) (internal quotations omitted); see generally 4 Toxic Torts Litigation Guide § 33:18 (“The ‘bare metal’ defense shifts the burden of proof to the plaintiffs and requires them to prove more than just exposure to products that contained asbestos.”).

This Court shall now examine whether Rhode Island or Ohio has adopted the “bare-metal defense.”

The Rhode Island Supreme Court has yet to be presented with the issue of whether the “bare-metal defense” is recognized in Rhode Island. However, in Sweredoski v. Alfa Laval, Inc., this Court declined to adopt the “bare-metal defense,”⁸ finding that “Rhode Island tort law requires a more fact-specific and nuanced analysis to determine whether liability in negligence or strict liability may attach for third-party replacement parts.” 2013 WL 5778533, at *4 (R.I. Super. Oct. 21, 2013) (Gibney, P.J.). Accordingly, the Court found that a defendant manufacturer could be held liable for the plaintiff’s exposure to asbestos—even if the plaintiff’s exposure was due to a replacement part—under the principles of negligence and strict product liability.⁹ As such, it appears that Rhode Island jurisprudence, although not precedential, has

⁸ The Sweredoski Court did not refer to the defense as the ‘bare metal’ defense, but rather cited a string of decisions which held that “a product seller cannot be held liable for injuries suffered as a result of a plaintiff’s exposure to asbestos in the seller’s product when that asbestos came from non-original, replacement components.” Sweredoski, 2013 WL 5778533, *4 (citing Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 495 (6th Cir. 2005); Niemann v. McDonnell Douglas Corp., 721 F. Supp. 1019, 1030 (S.D. Ill. 1989); and Simonetta v. Viad Corp., 197 P.3d 127, 138 (Wash. 2008)).

⁹ With respect to strict liability, the Court held:

“There is evidence in this case to suggest that [the defendant] not only knew that the asbestos in its valves would need to be replaced, but also that [the defendant] actively encouraged its customers to replace the original asbestos with more asbestos. Thus, because [the defendant] may be held liable for failing to

rejected the “bare-metal defense” and supports recovery against a manufacturer of a product even where the manufacturer’s original product did not contain asbestos. See Sweredoski, 2013 WL 5778533, at *4.

Similarly, the Ohio Supreme Court has not directly resolved the question of whether the “bare-metal defense” is available in asbestos cases under state law.¹⁰ However, more generally, “Ohio law is settled that a component part manufacturer has no duty to warn end-users of the finished product of the potentially dangerous nature of its parts in that product.” Jacobs v. E.I. du Pont de Nemours & Co., 67 F.3d 1219, 1236 (6th Cir. 1995). “In Temple v. Wean United, Inc., 50 Ohio St.2d 317, 364 N.E.2d 267 (1977), the Ohio Supreme Court held that the supplier of operating buttons in a power press, which when assembled and modified by third parties caused serious injuries to the plaintiff, did not have a duty to warn end-users of the dangers posed by the inclusion of those buttons in the final power press.” Id. Specifically, the court held:

“In our opinion, the obligation that generates the duty to warn does not extend to the speculative anticipation of how manufactured components, not in and of themselves dangerous or defective, can become potentially dangerous dependent upon the nature of their integration into a unit designed and assembled by another.

warn users that its products could be dangerous when used as intended, [the defendant] may be held liable for failing to warn [the plaintiff] of the dangers of replacing old packing and gaskets with new asbestos-containing parts.” Sweredoski, 2013 WL 5778533, *5.

Similarly, with respect to the plaintiff’s negligence claim, the court concluded that “it is possible that even a plaintiff who had been exposed only to asbestos from replacement parts could make out a *prima facie* case for negligence.” Id.

¹⁰ In Lindstrom, 424 F.3d at 495, the Sixth Circuit, affirming a Ohio Federal District Court’s grant of summary judgment, held that the manufacturer of valves that used asbestos packing materials and gaskets could not be held responsible where the defendant did not provide replacement packing or gaskets. However, in Lindstrom, the court was applying maritime law, and thus its analysis is neither persuasive nor applicable.

Because of limited contact with [the power press manufacturer] there is no indication that [the operating button supplier] could have known that its components were to be fashioned or fabricated into the power press in the particular manner that they were.” Temple, 364 N.E.2d at 272. See also Searls v. Doe, 29 Ohio App. 3d 309, 505 N.E.2d 287, 290 (1986) (“[D]efendants, as manufacturers of component parts, had no duty to warn plaintiff of a potentially dangerous or defective design of a [beer can ejection system], where defendants were not responsible for the design and manufacture of the entire system and where the component parts, not in and of themselves dangerous or defective, were manufactured in accordance with [the purchaser/manufacturer’s] specifications.”).

Furthermore, Ohio trial courts have addressed the issue of liability for after-applied, third party asbestos-containing products. Generally, such courts have “acknowledged that certain factual scenarios may arise under Ohio law where liability may attach to manufacturers of products for injuries caused by a plaintiff’s exposure to a different manufacturer’s asbestos-containing products.” Fischer v. Armstrong Int’l, Case No. 07-615514 (Ohio Com. Pl. Feb. 14, 2008) (Sweeney, J.). For instance, in Perry v. Allis-Chalmers Corp. Prods. Liab. Trust, Case No. 608652 (Ohio Com. Pl. Oct 26, 2007) (Hanna, J.), the court denied summary judgment because the defendant specified replacement parts must contain asbestos. Nevertheless, the courts have held that a plaintiff must produce some evidence indicating that the original manufacturer recommended or required the use of asbestos insulation upon its products. Fischer, Case No. 07-615514, at 3; see Cupp v. Anchor Packing Co., Case No. 541307 (Ohio Com. Pl. June 20, 2008) (Hanna, J.) (requiring that there be some evidence that manufacturer specified that an asbestos-containing gasket must be installed on the compressor to enable it to function in its normal intended use). Put another way, the fact that the defendant manufacturer may have foreseen that asbestos products could later have been used in conjunction with the original product, standing alone, is not sufficient to impose liability. See Davis v. Bondex Int’l, Case No. 629433 (Ohio

Com. Pl. Feb. 13, 2009) (Hanna, J.) (holding that while “[d]efendants might have foreseen that the products could have been . . . utilized [with asbestos products], that alone does not impose liability upon them”); Fischer v. Armstrong Int’l, No. 07-615514 (Ohio Com. Pl. Jan. 2, 2008) (Sweeney, J.) (finding that a supplier of valves and steam traps had no duty to warn of exposure to after-applied asbestos products where there was no evidence that plaintiff came into contact with internal asbestos gaskets).

Here, the trial court decisions indicate that the Ohio Supreme Court, if faced with the question, would recognize a “bare-metal defense.” Therefore, this Court finds that Ohio and Rhode Island law differ as to whether a product seller may be held liable for the injuries suffered as a result of a plaintiff’s exposure to asbestos in the seller’s product when that asbestos came from non-original, replacement components.

ii

Sophisticated User Defense

Defendants contend that Ohio courts recognize and apply the “sophisticated user” or “knowledgeable purchaser” doctrine.

“Under the sophisticated-or-knowledgeable-purchaser doctrine, a manufacturer’s duty to warn may be discharged by providing the information about the dangers of the product to a third person upon whom it can reasonably rely to communicate the warning to the ultimate users of the product. The question is whether the manufacturer was reasonable in relying on an employer to convey the necessary information to its employees. The reasonableness of the manufacturer’s reliance on the employer to convey the warning involves a fact-specific evaluation.” Doane v. Givaudan Flavors Corp., 919 N.E.2d 290, 297 (Ohio App. 2009); see Mary-Christine (M.C.) Sungaila & Kevin C. Mayer, Limiting Manufacturers’ Duty to Warn: The Sophisticated User and Purchaser Doctrines, 76 Def. Couns. J. 196 (2009) (The [sophisticated user] doctrine negates a manufacturer’s duty to warn of a potential danger posed by a product where the plaintiff (or present user) has, or should have had, advance knowledge of a product’s inherent hazards).

In support, Defendants rely upon the case of Roberts v. George V. Hamilton, Inc., 2000 WL 875324, at *1 (Ohio Ct. App. June 30, 2000).

“Roberts involved a claim against a manufacturer of asbestos-containing insulation brought by the widow of a man who had formerly been employed by an industrial company that used the insulation, and the plaintiff alleged that the manufacturer had failed to warn her deceased husband’s employer about the risks associated with the insulation.” Eastman v. Stanley Works, 907 N.E.2d 768, 782 (Ohio App. 2009) (citing Roberts, 2000 WL 875324, at *1).

However, in Roberts, the “sophisticated user” was the employer, not the plaintiff’s decedent. Eastman, 907 N.E.2d at 782. Thus, this Court finds that Ohio law has yet to recognize the application of the “sophisticated user” doctrine to an individual employee.¹¹ Nevertheless, the Defendants are entitled to present evidence that Mr. Baumgartner’s employers had knowledge of the dangers of asbestos. See Aikins v. Gen. Elec. Co., 2011 WL 6415117, at *1 (E.D. Pa. Dec. 9, 2011) (citing In re Related Asbestos Cases, 543 F. Supp. 1142, 1151-52 (N.D. Cal. 1982)) (allowing “the manufacturer defendant’s assertion of the sophisticated user defense on grounds of the Navy’s having knowledge of asbestos-related hazards, without even considering the level of sophistication of the individual plaintiff”).

As to Rhode Island, this Court has found no case law indicating that the “sophisticated user” doctrine is recognized in this jurisdiction. Generally, “[i]n negligence, the defendant only

¹¹ Regarding the application of the “sophisticated user” doctrine to an employee carpenter, the Eastman Court concluded:

“No Ohio court has ever applied the ‘sophisticated user’ doctrine to a non-failure-to-warn claim, and appellant has cited no authority for the proposition that we should do so. We find no abuse of discretion in the trial court’s refusal to instruct the jury that, as a matter of law, appellee’s experience as a carpenter warrants that he be deemed aware of the risk of a quench crack in his hammer.” Eastman, 907 N.E.2d at 782.

has a duty to warn if he had reason to know about the product's dangerous propensities which caused plaintiff's injuries Under strict liability, a seller need only warn of those dangers that are reasonably foreseeable. If he [or she] does not provide such a warning, then the product is rendered defective.” Raimbeault v. Takeuchi Mfg. (U.S.), Ltd., 772 A.2d 1056, 1063-64 (R.I. 2001) (quoting Thomas v. Amway Corp., 488 A.2d 716, 722 (R.I. 1985)). Because this Court finds that Rhode Island does not recognize the “sophisticated user” doctrine, there is a conflict of laws.

iii

State-of-the-Art Defense

Defendants argue that the state-of-the-art defense is recognized in Ohio, but not in Rhode Island. Section 2307.75(f) of the Revised Ohio Code provides:

“A product is not defective in design or formulation if, at the time the product left the control of its manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks to recover compensatory damages without substantially impairing the usefulness or intended purpose of the product.” Ohio R.C. § 2307.75 (West 2015).

Rhode Island, in contrast, has not enacted a statute providing for the so-called “state-of-the-art defense,” nor has such a defense been recognized by our Supreme Court. See generally Fortier v. Olin Corp., 840 F.2d 98, 101 (1st Cir. 1988) (holding that the “‘state of the art’ defense, which is predicated upon the theory that the defendant manufacturer should not be held liable for risks that were ‘scientifically unknowable’ at the time of manufacture, but only for risks then discoverable, which should be measured by the state of the art at the time of distribution or sale”). Therefore, this Court finds the two laws are in conflict.

Open-and-Obvious Hazard Doctrine

Defendants point out that the Ohio General Assembly has passed a statute explicitly recognizing the open-and-obvious hazard doctrine. Section 2307.76(B) of the Revised Ohio Code provides, in full:

“[a] product is not defective due to lack of warning or instruction or inadequate warning or instruction as a result of the failure of its manufacturer to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge.” Ohio R.C. § 2307.76(B).

As such, “[u]nder Ohio statute, [d]efendants do not have a duty to warn where the risks of injury are open and obvious or are a matter of common knowledge. Likewise, [d]efendants cannot be liable for negligent failure to warn if the risk is open and obvious. McConnell v. Cosco, Inc., 238 F. Supp. 2d 970, 977-78 (S.D. Ohio 2003) (internal citations omitted). “In considering whether a product presents an open-and-obvious risk, it is necessary to determine whether the particular hazard giving rise to the subject injury was obvious or commonly known.” Lykins v. Fun Spot Trampolines, 874 N.E.2d 811, 816 (Ohio 2007).

Conversely, the Rhode Island General Assembly has not enacted an analogous statute; however, “[i]n Rhode Island the defense of assumption of risk remains viable in products-liability cases.” Mignone v. Fieldcrest Mills, 556 A.2d 35, 41 (R.I. 1989); see Gentile v. Vecchio, 92 R.I. 38, 41, 166 A.2d 126, 127 (1960) (holding that “where a risk incident to the employment is obvious or is as apparent to the employee as to the employer, an employee who undertakes to work under such conditions assumes the risk of the perils involved”). Here, there is a conflict in the respective laws because Rhode Island, although it recognizes an analogous

doctrine, does not explicitly allow for an exception to the duty to warn based upon an open or obvious danger.

v

Nonparty Defense

Defendants have advised this Court that the nonparty defense is recognized in Ohio, but not Rhode Island. Under Ohio law, the trier of fact may allocate fault to a nonparty to the suit. See Fisher v. Beazer E., Inc., 138 Ohio St. 3d 1469 (“The statute provides for the apportionment of fault to others, including persons or entities not present at the time of trial.”). Ohio R.C. § 2307.23 sets forth the requirements when determining percentage of tortious conduct attributable to a party and provides as follows:

“(A) In determining the percentage of tortious conduct attributable to a party in a tort action . . . the jury in a jury action shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following:

“(1) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this action;

“(2) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is *attributable to each person from whom the plaintiff does not seek recovery in this action.*

“(B) The sum of the percentages of tortious conduct as determined pursuant to division (A) of this section shall equal one hundred per cent.

“(C) For purposes of division (A)(2) of this section, *it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action . . .*” Ohio R.C. § 2307.23 (emphasis added).

Pursuant to Ohio R.C. § 2307.011(G), “Persons from whom the plaintiff does not seek recovery in this action” include, but are not limited to, the following:

“(1) Persons who have entered into a settlement agreement with the plaintiff;

“(2) Persons whom the plaintiff has dismissed from the tort action without prejudice;

“(3) Persons whom the plaintiff has dismissed from the tort action with prejudice;

“(4) Persons who are not a party to the tort action whether or not that person was or could have been a party to the tort action if the name of the person has been disclosed prior to trial.” Ohio R.C. 2307.011(G).

In contrast, the Rhode Island General Assembly has not enacted a statute that provides for a nonparty defense, nor has our Supreme Court recognized such a defense. Thereby, there is a conflict between Ohio and Rhode Island law.

b

Statutes of Repose

Both Ohio and Rhode Island have enacted statutes which provide a ten-year statute of repose for any claims related to damages arising out of the defective or unsafe condition of an improvement to real property.¹² Preliminarily, Plaintiffs argue that the statute of repose is

¹² Ohio Revised Code § 2305.131(A)(1) provides, in full:

“Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code and except as otherwise provided in divisions (A)(2), (A)(3), (C), and (D) of this section, no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of

inapplicable to asbestos-related injuries because Ohio R.C. § 2305.10—the applicable statute of limitations for asbestos-related injuries—should be construed to supersede the statute of repose.

Ohio R.C. § 2305.10(A) and (C) provide:

“(A) Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues.

...

“(C)(1) Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, no cause of action based on a product liability claim shall

bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property *shall accrue* against a person who performed services for the improvement to real property or a person who furnished the *design*, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.” Ohio R.C. § 2305.131(A)(1) (emphasis added).

Similarly, G.L. 1956 § 9-1-29, provides, in full:

“No action (including arbitration proceedings) in tort to recover damages shall be brought against any architect or professional engineer who designed, planned, or supervised to any extent the construction of improvements to real property, or against any contractor or subcontractor who constructed the improvements to real property, or material suppliers who furnished materials for the construction of the improvements, on account of any deficiency in the design, planning, supervision, or observation of construction or construction of any such improvements or in the materials furnished for the improvements:

“(1) For injury to property, real or personal, arising out of any such deficiency;

“(2) For injury to the person or for wrongful death arising out of any such deficiency; or

“(3) For contribution or indemnity for damages sustained on account of any injury mentioned in subdivisions (1) and (2) hereof more than ten (10) years after substantial completion of such an improvement; provided, however, that this shall not be construed to extend the time in which actions may otherwise be brought under §§ 9-1-13 and 9-1-14.” Sec. 9-1-29.

accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

...

“(C)(6) Division (C)(1) of this section does not bar an action for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.” Ohio Rev. Code Ann. § 2305.10(A) and (C).

As such, Plaintiff contends that the asbestos exception found in Ohio R.C. § 2305.10(C)(6) should prevail over the general language found within the Ohio R.C. § 2305.131 of the statute of repose, thereby allowing for an asbestos related exception to the statute of repose. In support, Plaintiff cites the Ohio trial court decision of Bowling v. Allen Bradley Co, Inc., et al. Case No. 673790 (Ohio Com. Pl. May 10, 2010) (Hanna, J.), where the court found that both statutes could be read together harmoniously so that a “10-year period is given effect with an exception to this limitation for an injury caused by exposure to asbestos.” Bowling, Case No. 673790, at 3.

Plaintiff’s argument, however, fails to account for the express language found within Ohio R.C. § 2305.131, which provides, “[n]otwithstanding an otherwise applicable period of limitations specified in this chapter” (emphasis added). Such language clearly means that Ohio R.C. § 2305.131(A)(1), the statute of repose, is to operate “without . . . obstruction from” or “in spite of” Ohio R.C. § 2305.10. Bd. of Educ. Maple Heights City Sch. Dist. v. Maple Heights Teachers Ass’n, 322 N.E.2d 154, 157 (Ohio Com. Pl. 1973) (“The first words, ‘notwithstanding Section 5705.41,’ must mean ‘without prevention or obstruction from or by; in spite of’ Section 5705.41”); see Black’s Law Dictionary (10th ed. 2014) (defining

‘notwithstanding’ as: “[d]espite; in spite of”); see also In re Asbestos Litig., Case No. N10C-07-145 ASB, at 11 (Del. Super. May 2, 2013) (Parkins, J.) (interpreting Ohio law and concluding that “[t]he inclusion of the ‘notwithstanding’ clause in the improvement to real estate statute manifests a clear intent that the improvement to real estate statute, when applicable would preempt the field of § 2305.131 requires that it . . . be read independently of other periods of limitation.”). Thus, this Court finds that the ten year statute of repose, found within Ohio R.C. § 2305.131, is unaffected by the language found in Ohio R.C. § 2305.10.¹³

The Ohio Supreme Court has yet to directly address whether the statute of repose operates to bar an asbestos-exposure claim.¹⁴ However, the Sixth Circuit, in construing Ohio law, found that suppliers of products or “materialmen” do not fall under the definition of “persons” protected under Ohio R.C. § 2305.131. Miles v. Paulding Cnty. Rd. Comm’rs, 837 F.2d 476 (6th Cir. 1988). “[The court] d[id] not interpret ‘design’ as used in the statute to mean the general design of a manufactured product which might be used in improvements of real

¹³ “There is nothing provided in . . . 2305.10 . . . that requires a conclusion that [it] [is] not applicable to a claim to which R.C. 2305.131 is applicable. Further, there is nothing inconsistent in holding that both a statute of repose and a statute of limitations are applicable to the same claim. . . . [T]he statute of repose at issue in this case begins running upon the completion of services and construction; statutes of limitations begin running upon accrual of a cause of action. Both serve to limit the duration of liability and the attendant risks of stale litigation.” Dreher v. Willard Constr. Co., 93 Ohio App. 3d 443, 447, 638 N.E.2d 1079, 1081 (1994) (internal quotations omitted).

¹⁴ “R.C. 2305.131 is a statute of repose and begins to run upon the completion of services and construction related to an improvement. As explained by the Ohio Supreme Court in Sedar v. Knowlton Constr. Co., 49 Ohio St. 3d 193, 551 N.E.2d 938 (1990), a statute of repose is different from a statute of limitations which begins to run upon accrual of an injured party’s cause of action. In fact, the period contained in R.C. 2305.131 may expire prior to the date a particular party is injured and, therefore, prior to that party’s cause of action accruing[.]” Dreher, 638 N.E.2d at 1080-81. “Unlike a true statute of limitations, which limits the time in which a plaintiff may bring suit *after* the cause of action accrues, a statute of repose, such as R.C. 2305.131, potentially bars a plaintiff’s suit *before* the cause of action arises.” Sedar v. Knowlton Constr. Co., 551 N.E.2d 938, 941 (Ohio 1990), overruled by Brennaman v. R.M.I. Co., 639 N.E.2d 425 (Ohio 1994).

estate.” Id. at *6. Rather, the court found the meaning of the word to be limited to “the architectural or engineering design of a particular building or the particular parts thereof.” Id.; see Sedar, 551 N.E.2d at 947 (overruled on other grounds) (noting that Ohio R.C. § 2305.131 “cuts off the tort liability of architects and builders after expiration of ten years—but does not so limit the liability of owners and materialmen”). Thus, Ohio case law indicates that “materialmen” are not protected under the statute of repose.

Having found that “materialmen” are not protected by the Ohio statute of repose, this Court now turns to Rhode Island’s statute of repose. Section 9-1-29 provides:

“No action (including arbitration proceedings) in tort to recover damages shall be brought against any architect or professional engineer who designed, planned, or supervised to any extent the construction of improvements to real property, or against any contractor or subcontractor who constructed the improvements to real property, *or material suppliers who furnished materials for the construction of the improvements*, on account of any deficiency in the design, planning, supervision, or observation of construction or construction of any such improvements or in the materials furnished for the improvements:

“(1) For injury to property, real or personal, arising out of any such deficiency;

“(2) For injury to the person or for wrongful death arising out of any such deficiency; or

“(3) For contribution or indemnity for damages sustained on account of any injury mentioned in subdivisions (1) and (2) hereof more than ten (10) years after substantial completion of such an improvement; provided, however, that this shall not be construed to extend the time in which actions may otherwise be brought under §§ 9-1-13 and 9-1-14.” Sec. 9-1-29 (emphasis added).

“Our Supreme Court has had the occasion to analyze which parties are granted immunity by § 9-1-29 in Qualitex, Inc. v. Coventry Realty, 557 A.2d 850 (R.I. 1989); Desnoyers v. Rhode Island Elevator Co., 571 A.2d 568 (R.I. 1990); and Allbee v. Crane Co., 644 A.2d 308 (R.I. 1994).”

Sharp v. Afc-Holcroft, 2010 WL 3643306, at *4 (R.I. Super. Sept. 16, 2010) (Gibney, P.J.); see Qualitex, Inc., 557 A.2d at 853 (holding that defendant, which manufactured, installed, and supplied fire-sprinkler systems, was a materialman for the purposes of § 9-1-29); Desnoyers, 571 A.2d at 570 (finding that an elevator was an improvement to real property and the installation of the elevator by the defendant-elevator-manufacturer afforded the defendant immunity per § 9-1-29); Allbee, 644 A.2d at 308 (holding that a passive pump manufacturer could benefit from the immunity protections of § 9-1-29).¹⁵

In Qualitex, the Court held that the “statute [of repose] does not expressly exclude manufacturers or any particular class from its operation.” Qualitex, Inc., 557 A.2d at 853. Furthermore, it noted that “[t]he language of the statute was broadly written, and it [was] clear that the Legislature intended a broad application.” Id. As such, the Court concluded that the statute “must be read to include manufacturers [because] [m]anufacturers, just like architects, engineers, contractors, and subcontractors, need protection from individuals whose negligence in maintaining an improvement to real property may cause liability.” Id. As such,

¹⁵ This Superior Court has issued a number of decisions regarding the statute of repose and its applicability to asbestos-exposure claims. See In re Asbestos Litig., 2002 WL 31332792, at *7 (R.I. Super. Sept. 4, 2002) (Gibney, P.J.) (holding that “[t]here is little doubt that Rhode Island, generally, stands with the states that apply statutes of repose to cases involving asbestos-related injuries[;]” however, each defendant must make a threshold demonstration that its product qualifies as an improvement to real property); Lapointe v. 3M Co., 2007 WL 447113 (R.I. Super. Nov. 5, 2007) (Gibney, P.J.) (concluding “that installation of [a] burner[] constituted improvements to real property under the Statute of Repose; however, the Court further [held] that service, repair, and maintenance of the burners do not constitute improvements within the meaning of the statute”); Sharp, 2010 WL 3643306, at *6 (holding that “[b]ecause [defendant was] not a ‘material man’ who was directly involved in the installation of the tiles, nor was [defendant] a judicially-recognized ‘manufacturer’ deserving of protection because there could have been some third party negligence related to the later maintenance of the tiles, . . . [defendant] f[e]ll[] outside the gambit of § 9-1-29 immunity as articulated by [the] Legislature and [the Rhode Island] Supreme Court”).

there is a clear conflict between Ohio and Rhode Island law as to whether materialmen or manufacturers are protected under the statute of repose.

c

Joint and Several Liability

As indicated by the Defendants, both Rhode Island and Ohio recognize the doctrine of joint and several liability; however, the respective doctrines differ in some material respects. Compare G.L. 1956 §§ 10-6-1 et seq., with Ohio Rev. Code §§ 2307.22 and 2307.23 (West 2015). In Rhode Island, “[i]t is a well-settled doctrine that a plaintiff may recover 100 percent of his or her damages from a joint tortfeasor who has contributed to the injury in *any degree*. The joint tortfeasor may then seek contribution pursuant to statute either by a separate action or by impleading the fellow joint tortfeasor under third-party practice.” Roberts-Robertson v. Lombardi, 598 A.2d 1380, 1381 (R.I. 1991) (emphasis added) (citing Sousa v. Casey, 111 R.I. 623, 637–38, 306 A.2d 186, 194 (1973)). Section 10-6-2 defines a “joint tortfeasor” as “two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them[.]” Sec. 10-6-2. Our Supreme Court has determined that “[t]here are two requirements in order for parties to be joint tortfeasors under the act.” Lawrence v. Pokraka, 606 A.2d 987, 988 (R.I. 1992)

“‘First, the parties must be ‘liable in tort.’ The phrase ‘liable in tort’ has been construed to mean to have negligently contributed to another’s injury. Second, the statute refers to the same injury. The same injury is caused by parties who engage in common wrongs. To constitute joint tortfeasors under the act, both parties must have engaged in common wrongs.’” Wilson v. Krasnoff, 560 A.2d 335, 339 (R.I. 1989) (quoting Zarella v. Miller, 100 R.I. 545, 548, 217 A.2d 673, 675 (1966)).

Ohio, in contrast, has adopted a limited or modified joint and several liability doctrine. Ohio R.C. § 2307.22 provides, in relevant part as follows:

“(A) Subject to [enumerated exceptions] joint and several tort liability . . . shall be determined as follows:

“(1) In a tort action in which the trier of fact determines that two or more persons proximately caused the same injury or loss to person or property or the same wrongful death and in which the trier of fact determines that *more than fifty per cent* of the tortious conduct is attributable to one defendant, that defendant shall be jointly and severally liable in tort for all compensatory damages that represent economic loss.

“(2) If division (A)(1) of this section is applicable, each defendant who is determined by the trier of fact to be legally responsible for the same injury or loss to person or property or the same wrongful death and to whom *fifty per cent or less* of the tortious conduct is attributable shall be liable to the plaintiff only for that defendant’s proportionate share of the compensatory damages that represent economic loss. . . .”

...

“(C) In a tort action in which the trier of fact determines that two or more persons proximately caused the same injury or loss to person or property or the same wrongful death, each defendant who is determined by the trier of fact to be legally responsible for the same injury or loss to person or property or for the same wrongful death shall be liable to the plaintiff only for that defendant’s proportionate share of the compensatory damages that represent noneconomic loss.” Ohio R.C. § 2307.22 (emphasis added).

Furthermore, the term “tort action” includes asbestos claims under Ohio R.C. § 2307.91. See Ohio R.C. § 2307.011(J). Thus, under Ohio law a joint tortfeasor that is determined to be more than fifty percent at fault shall be jointly and severally liable for all compensatory economic damages, while a joint tortfeasor that is fifty percent at fault, or less, shall be liable to the plaintiff only for that defendant’s proportionate share of the compensatory damages that represent economic loss. See Ohio R.C. § 2307.22(A)(1)-(2). Additionally, each joint tortfeasor who is found to be legally responsible for the injury or wrongful death shall be liable to the plaintiff only for that defendant’s proportionate share of the compensatory damages that

represent noneconomic loss. See Ohio R.C. § 2307.22(C). Accordingly, this Court is satisfied that the laws of Ohio and Rhode Island, as to joint and several liability, are in conflict.

d

Damages

Defendants have indicated that a conflict exists as to the following damages principles.

i

Noneconomic Compensatory Damages

Both Rhode Island and Ohio recognize a plaintiff's right to recover noneconomic compensatory damages. Nevertheless, Ohio has codified this right. Ohio's R.C. § 2315.18(B)(1)-(2) provides:

“(B) In a tort action to recover damages for injury or loss to person or property, all of the following apply:

“(1) There shall not be any limitation on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action.

“(2) Except as otherwise provided in division (B)(3) of this section, *the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss*, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.” Ohio R.C. § 2315.18(B)(1)-(2) (emphasis added).

Furthermore, “[i]n determining an award of compensatory damages for noneconomic loss in a tort action, the trier of fact shall not consider any of the following: (1) Evidence of a defendant's alleged wrongdoing, misconduct, or guilt; (2) Evidence of the defendant's wealth or financial

resources; (3) All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.” Ohio R.C. § 2315.18(C).

“Rhode Island courts, on the other hand, have repeatedly stressed that a plaintiff should be fully compensated for his personal injuries, including pain and suffering.” La Plante, 27 F.3d at 743. Accordingly, Rhode Island does not cap noneconomic damages. See also Asbury v. A.W. Chesterton Co., 2010 WL 1280470, at *10 n.4 (R.I. Super. Mar. 29, 2010) (Gibney, P.J.) (“Rhode Island does not cap punitive damages”). Thus, it is clear to this Court that there is a conflict between the respective laws.

ii

Standard for Punitive Damages

Both Rhode Island and Ohio recognize a plaintiff’s right to recover punitive damages. However, the states differ regarding the assessment and calculation of such damages. In Rhode Island, “[t]he standard . . . for imposing punitive damages is rigorous and will be satisfied only in instances wherein a defendant’s conduct requires deterrence and punishment over and above that provided in an award of compensatory damages.” Palmisano v. Toth, 624 A.2d 314, 318 (R.I. 1993). Our Supreme Court has found that “the party seeking punitive damages has the burden of producing ‘evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality, which for the good of society and warning to the individual, ought to be punished.’” Id. (quoting Sherman v. McDermott, 114 R.I. 107, 109, 329 A.2d 195, 196 (1974)). Put another way, “for punitive damages to be awarded there must be a showing that the defendant acted with malice or in bad faith.” Id. Ultimately, “[w]hether a party seeking punitive damages has met the high standard imposed on such an award is a question of law for the trial justice. Once a trial justice determines that there are adequate facts to support an award

of punitive damages, then the question of whether and to what extent the party is entitled to punitive damages is in the discretion of the trier of fact.” Id.

Conversely, the Ohio General Assembly has enacted a specific statute regarding punitive or exemplary damages. Ohio R.C. § 2315.21(C) provides:

“(C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

“(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

“(2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.” Ohio R.C. § 2315.21(C).

In Griffin v. Lamberjack, the Ohio Court of Appeals, determined that “R.C. 2315.21(C)(1) and (2) clearly state that liability for punitive or exemplary damages can be determined by the trier of fact, but that the amount of those damages shall be determined by the court.” 644 N.E.2d 1087, 1092 (1994). In addition, the Ohio General Assembly has provided for the bifurcation of a plaintiff’s case for punitive damages. See Ohio R.C. § 2315.21(B).

Here, there is clearly a conflict as to the assessment of punitive damages. See e.g., Dodson v. Ford Motor Co., 2006 WL 2642199, at *2 (R.I. Super. Sept. 5, 2006) (finding a true conflict of laws existed between the laws of Rhode Island and Michigan as to punitive damages). On one hand, Rhode Island requires the plaintiff to show that the defendant’s conduct amounts to criminality. Palmisano, 624 A.2d at 318. Whether the plaintiff has met that high standard is a question of law. Id. However, if the judge determines that the plaintiff has produced evidence of willful, reckless or wicked behavior, then the question of whether and to what extent the plaintiff

is entitled to punitive damages is in the discretion of the trier of fact. *Id.* On the other hand, Ohio leaves the question of whether punitive damages are appropriate up to the trier of fact; however, if the trier of fact finds that punitive damages are warranted, the judge determines the amount thereof. *Griffin*, 644 N.E.2d at 1092. Furthermore, Ohio statute—upon a motion by the defendant—allows for the bifurcation of the plaintiff’s case for punitive damages.

e

Standard of Proof for Product Identification

In both Rhode Island and Ohio, a plaintiff must establish that exposure to a defendant’s asbestos was a “substantial factor” in causing the plaintiff’s injury. The Ohio General Assembly has enacted a comprehensive statutory scheme for the management of asbestos cases. *See* Ohio Rev. Code Ann. §§ 2307.91, *et seq.* Specifically, Ohio R.C. § 2307.96 sets forth the plaintiff’s burden of proof in tort actions for injury resulting from exposure to asbestos.¹⁶

“(A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a *substantial factor* in causing the injury or loss on which the cause of action is based.

“(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was *manufactured, supplied, installed, or used* by the defendant in the action and that the plaintiff’s exposure to the defendant’s asbestos was a *substantial factor* in causing the plaintiff’s injury or loss. In determining whether exposure to a particular defendant’s asbestos

¹⁶ Generally, Ohio R.C. § 2307.92 dictates that a plaintiff must make a prima facie showing prior to bringing an asbestos claim based on a nonmalignant condition. However, Ohio R.C. § 2307.92(E) provides that “[n]o prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.” Ohio R.C. § 2307.92(E). Here, the Plaintiff was diagnosed with mesothelioma and thus, no prima facie showing is required. *See* Pl.’s Compl. ¶ 6.

was a *substantial factor* in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

“(1) The manner in which the plaintiff was exposed to the defendant's asbestos;

“(2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;

“(3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;

“(4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.” Ohio R.C. § 2307.96 (emphasis added).

Accordingly, Ohio R.C. § 2307.91(FF) defines “‘substantial contributing factor’ to mean both of the following: (1) that exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim, and (2) that a competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.” Wilson v. AC&S, Inc., 864 N.E.2d 682, 698 (Ohio 2006).

Conversely, the Rhode Island General Assembly has not enacted a comprehensive scheme for the management of asbestos cases. However, in the recent decision of Sweredoski v. Alfa Laval, Inc., 2013 WL 3010419, *5 (R.I. Super. June 13, 2013) (Gibney, P.J.), this Court adopted the “‘frequency, regularity, proximity’ test as the proper causation standard for asbestos cases in Rhode Island.” In arriving at this conclusion, the Court first noted that “[a]ll cognizable negligence claims in Rhode Island must set forth four essential elements: duty, breach, causation, and damages.” Id. at *2. Second, the Court concluded that the causation prong would be satisfied if the defendant's conduct was a “‘*substantial factor* in bringing about the harm.” Id.

(emphasis added) (quoting Wells v. Uvex Winter Optical, Inc., 635 A.2d 1188, 1191 (R.I. 1994)).

In order “[t]o satisfy the ‘frequency, regularity, proximity’ test, plaintiffs must present evidence showing ‘(1) exposure to a particular product; (2) on a regular basis; (3) over an extended period of time; and (4) in proximity to where the plaintiff actually worked.’” Id. at *5 (quoting Chavers v. Gen. Motors Corp., 79 S.W.3d 361, 368 (Ark. 2002)).¹⁷ Furthermore, “[w]hen applying the ‘frequency, regularity, proximity’ test, . . . courts must ‘make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff’s/decendent’s asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant’s product and the asserted injury.’” Id. at *6 (quoting Gregg v. V-J Auto Parts, Co., 943 A.2d 216, 227 (Pa. 2007)). Here, the laws are not in conflict because both states require plaintiffs to demonstrate that the defendant was a substantial factor in causing the plaintiff’s harm or injury. As such, this Court shall apply Ohio law to the instant issue.

3

Choice-of-Law Analysis

Having concluded that a conflict of laws exists as to: (1) the aforementioned defenses; (2) the interpretation of the statute of repose; (3) joint and several liability; and (4) damages, this Court shall now conduct a choice-of-law analysis under Rhode Island’s “interest-weighting approach.”

¹⁷ In Sweredoski, this Court noted that “in cases alleging that the plaintiff developed mesothelioma as a result of exposure to a particular defendant’s product, meeting ‘the frequency and regularity prongs become[s] somewhat less cumbersome’ for plaintiffs because medical evidence has established that mesothelioma can develop from less intense exposures to asbestos than other asbestos-related diseases, such as asbestosis.” Sweredoski, 2013 WL 3010419, at *6.

a

Defenses

The first issue is whether to apply the defenses recognized under Ohio law, *i.e.*, the bare-metal defense, the sophisticated user defense, the state-of-the-art defense, the open-and-obvious hazard doctrine, and the nonparty defense to the instant suit. See generally Bailey v. Wyeth, Inc., 28 A.3d 856, 864 (N.J. Super. 2008) (“Choice-of-law issues color the available defenses and standard of proof in a products liability action.”). Applying the tort factors under the “interest-weighting” approach, this Court finds that the defenses recognized under Ohio law shall be applied to the instant suit.

Plaintiff was exposed to asbestos in Ohio and Michigan, was later diagnosed in Ohio, and continues to reside in Ohio. Although it is sometimes difficult to determine where the actual harm occurred in an asbestos-related disease; here, the majority of Mr. Baumgartner’s exposure occurred in Ohio. See Asbury, 2010 WL 1280470, at *12 (noting “[m]esothelioma and its related illnesses are, by their very nature, caused by cumulative exposure to asbestos over one’s lifetime”). Accordingly, this Court finds that the first three tort factors weigh in favor of applying Ohio law. As to the fourth prong, the relationship between the parties, “there being no ‘relationship’ between the parties in the ordinary sense of the word, this factor is unhelpful in making [the] choice-of-law determination. La Plante, 27 F.3d at 741; see Allison v. ITE Imperial Corp., 928 F.2d 137, 142 & n.5 (5th Cir. 1991) (holding this factor is not helpful in products liability cases where there was no preexisting relationship between the parties). Accordingly, this Court is satisfied that Ohio has the most significant relationship with the instant litigation, thereby mandating the application of the aforementioned defenses recognized under Ohio law. See Estate of Barnes, 478 N.E.2d 1046, 1051 (Ill. App. 1985) (holding that

“[t]he simple fact of domicile will be indicative of the jurisdiction’s superior interest in having its laws applied in order to give effect to those tort policies”).

b

Statute of Repose

In seeking to determine whether this Court should apply Rhode Island or Ohio’s statute of repose, this Court first looks to the Rhode Island federal district court case of Pinkham v. Collyer Insulated Wire Co., 1994 WL 385375, at *5 (D.R.I. Mar. 22, 1994). In Pinkham, the court analyzed—under Rhode Island’s interest-weighting approach—whether to apply Rhode Island or Massachusetts’ statute of repose. After weighing the tort and public policy factors, the court determined that “the advancement of Rhode Island’s interests outweigh[ed] those of Massachusetts.” Pinkham, 1994 WL 385375, at *12. In reaching this conclusion, the court found Rhode Island had a strong interest in protecting manufacturers under the statute, especially where the defendant manufacturer was domiciled in Rhode Island. As a result, the court applied Rhode Island’s statute of repose. Id. at *13

Here, the instant facts can be distinguished from those in Pinkham. Neither Plaintiffs nor the Defendants are domiciled in Rhode Island. See Mitchell ex rel. Mitchell v. McNeilus Truck & Mfg., Inc., 2012 WL 5233630, at *5 (Mich. Ct. App. Oct. 23, 2012) (finding that “Michigan ha[d] little or no interest in this North Carolina accident involving a North Carolina resident”). As such, Ohio has a stronger interest in applying its statute of repose because: (1) the Plaintiffs are residents of Ohio; (2) the majority of Mr. Baumgartner’s alleged exposure to Defendants’ asbestos-containing products occurred in Ohio; and (3) Mr. Baumgartner was diagnosed in Ohio. See Standard Fire Ins. Co. v. Ford Motor Co., 723 F.3d 690, 698 (6th Cir. 2013) (affirming Michigan district court’s application of the Tennessee statute of repose and finding it “would

benefit the interests it was designed to protect by shielding manufacturers . . . from open-ended product liability claims”); Allison, 928 F.2d at 144 (finding “that Tennessee has a strong interest in limiting a manufacturer’s exposure and insuring that products liability actions are brought within a reasonable time frame while evidence is still available”); Linden v. CNH Am. LLC, 753 F. Supp. 2d 860, 867 (S.D. Iowa 2010) (noting that “statutes of repose are, *inter alia*, designed to protect manufacturers within a state); Albrecht v. Gen. Motors Corp., 648 N.W.2d 87, 91 (Iowa 2002) (citing 51 Am. Jur. 2d Limitation of Actions § 18) (holding “statutes of repose ‘reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct”). Accordingly, as Ohio has the most significant relationship with the instant litigation, this Court shall apply Ohio’s statute of repose.

c

Joint and Several Liability and Damages

Preliminarily, because joint and several liability and damages are interrelated, this Court—for the purpose of determining whether Ohio or Rhode Island law should apply—shall combine the analysis. See Erny v. Estate of Merola, 792 A.2d 1208, 1214-15 (N.J. 2002) (holding that “[t]he law of joint and several liability addresses plaintiff’s recovery of damages, and allows plaintiff under certain circumstances to recover the entire amount of damages from any one of several defendants, subject to that defendant’s right to seek contribution”).

In Najarian, our Supreme Court noted that “in an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship” Najarian, 768 A.2d at 1255. Here, the injury occurred in Ohio. Thus, Ohio law should govern unless some other state has a more significant relationship. Id. As detailed above, Rhode

Island has no relationship with the instant suit. Therefore, it is clear to this Court that Ohio law, as to damages, should apply. See La Plante, 27 F.3d at 743 (finding “[d]omiciliary states have a strong interest in the welfare of their plaintiffs, and in seeing that their plaintiffs are adequately compensated for their injuries” and this “interest is best served by applying the law of the plaintiff’s domicile to the measure of compensatory damages”); Dodson, 2006 WL 2642199, at *3 (quoting 1 Linda L. Schlueter, Punitive Damages § 4.1(B)(3) (5th ed. 2005)) (observing “that ‘punitive damages are generally governed where the place of the wrong occurred’ because ‘the state where the wrongdoing occurred will have the greatest interest in ensuring that such conduct by this defendant or others like him will not happen or be repeated’”).

4

Judicial Notice

Pursuant to § 9-19-6 and Rule 44.1, Defendants Riley, Oakfabco, Crane Co., Robertshaw, CBS, Rockwell, Cleaver-Brooks, Honeywell, and Foster Wheeler have provided notice of their intent to ask this Court to take judicial notice of Ohio law. As this Court has found that Ohio law shall apply to the following—(1) defenses, inter alia, the bare-metal defense, the state-of-the-art defense, the open and obvious hazard doctrine, and the non-party defense; (2) the statute of repose; (3) joint and several liability; and (4) damages—it hereby takes judicial notice of the applicable common and statutory law of the aforementioned areas of law.

B

Summary Judgment

Generally, Defendants have moved for summary judgment based upon the following theories: (1) the bare-metal defense; (2) Ohio’s statute of repose; (3) failure to establish that exposure to Defendants’ product was a substantial factor in causing the injury on which the

cause of action is based; (4) insufficiency of Plaintiff's conspiracy claim; and (5) lack of merit behind Plaintiff Gail Baumgartner's loss of consortium claim.^{18,19,20,21,22,23,24,25,26}

¹⁸ In its motion for summary judgment, Defendant, Crane Co., argues: (1) Plaintiffs have failed to establish exposure to its products; (2) the bare-metal defense bars the Plaintiffs' claims; (3) the statute of repose bars the Plaintiffs' claims; (4) Plaintiffs' conspiracy claim fails as a matter of law; and (5) Gail Baumgartner's loss of consortium claim fails as a matter of law.

¹⁹ In its motion for summary judgment, Defendant, CBS, argues that Plaintiffs' claims are barred by the applicable statute of repose.

²⁰ In its motion for summary judgment, Defendant, Cleaver-Brooks, argues: (1) Plaintiffs' claims are barred by the applicable statute of repose; and (2) Plaintiffs have failed to prove that any alleged exposure from a Cleaver-Brooks product was a "substantial factor" in producing the alleged injury.

²¹ In its motion for summary judgment, Defendant, Robertshaw, argues: (1) Plaintiffs have failed to establish that Mr. Baumgartner's injuries were caused by Robertshaw products; (2) Plaintiffs have failed to show exposure to Robertshaw products was a "substantial factor" in producing Mr. Baumgartner's injury; (3) the bare-metal defense bars the Plaintiffs' claims; (4) Plaintiffs' Common Law Claims are abrogated by the Ohio Product Liability Act; (4) Plaintiffs' conspiracy claim fails on the merits; and (5) Gail Baumgartner's loss of consortium claim fails as a matter of law.

²² In its motion for summary judgment, Defendant, Foster Wheeler, argues: (1) Plaintiffs have failed to show, as a matter of law, that alleged exposure from Foster Wheeler products were a "substantial factor" in causing Mr. Baumgartner's injury; (2) Plaintiffs' claims are barred by the applicable statute of repose; and (3) the bare-metal defense bars the Plaintiffs' claims.

²³ In its motion for summary judgment, Defendant, Honeywell, argues: (1) the bare-metal defense bars the Plaintiffs' claims; (2) Plaintiffs' claims are barred by the applicable statute of repose; (3) Plaintiffs' conspiracy claim fails on the merits; and (4) Gail Baumgartner's loss of consortium claim fails as a matter of law.

²⁴ In its motion for summary judgment, Defendant, Riley, argues: (1) Plaintiffs have failed to show, as a matter of law, that alleged exposure from Riley products were a "substantial factor" in causing Mr. Baumgartner's injury; (2) the bare-metal defense bars the Plaintiffs' claims; (3) Mr. Baumgartner's employers were knowledgeable and sophisticated users of asbestos-containing insulation products; and (4) Ohio's Statute of Repose for improvements to real property expressly bars Plaintiffs' claims.

²⁵ In its motion for summary judgment, Defendant, G.E., argues: (1) Plaintiff was not exposed to an asbestos-containing product manufactured by G.E.; and (2) Plaintiffs' claims are barred by the applicable statute of repose.

²⁶ In its motion for summary judgment, Defendant, Oakfabco, argues: (1) Plaintiffs have failed to prove that any alleged exposure from a Kewanee boiler was a "substantial factor" in producing Mr. Baumgartner's injury; (2) the bare-metal defense bars the Plaintiffs' claims; (3) Plaintiffs' claims are barred by the applicable statute of repose; (4) Plaintiffs' conspiracy claim fails on the merits; (5) Gail Baumgartner's loss of consortium claim fails as a matter of law.

Preliminarily, it is important to note that there are three general classes of defendants in an asbestos-related injury claim: (1) a manufacturer of asbestos; (2) an employer whose business required employees to be exposed to asbestos; and (3) a manufacturer that produced a product—such as a turbine, valve, pipe, or boiler—that either originally included asbestos or specified its use in conjunction with the product. Here, each of the instant Defendants falls within the third or latter class. See e.g., Hembree v. Celotex Corp., 1992 WL 172164 (Ohio Ct. App. 2d Dist. Montgomery County 1992) (rejecting summary judgment where plaintiff brought case against manufacturer of asbestos and plaintiff introduced evidence that manufacturer shipped asbestos to the plaintiff’s worksite); Christopher M. Ernst, Baldwin’s Oh. Pract. Tort. L. § 27:1 (noting “employees exposed to toxins at work sometimes bring intentional tort claims against their employers”); Vince v. Crane Co., 2007-Ohio-1155, ¶ 33 (affirming “summary judgment for a manufacturer of valves, holding that the record showed only that the valves were used in the plant along with other asbestos-containing equipment but not the extent of exposure, if any, the decedent’s relatives had with the valves”). As such, before addressing the parties’ respective legal arguments, this Court shall briefly detail Mr. Baumgartner’s deposition testimony. Specifically, the proceeding sections shall serve to illustrate what products Mr. Baumgartner worked with, what these products were comprised of, in what manner, if any, he was exposed to asbestos-containing materials, and his knowledge of the respective products.

Deposition Testimony**Valves, Strainers and Pumps****Crane Valves, Strainers and Pumps**

Mr. Baumgartner's deposition testimony indicates that he remembered working on Crane valves, strainers, and pumps while at separate Whirlpool plants in Findlay and Clyde, Ohio. These strainers, valves, and pumps were made of a "cast material" or "cast iron[.]" Baumgartner Dep., 899:7-10. At the point when he encountered these Crane products, no asbestos or insulation was attached. Id. Mr. Baumgartner identified these products based upon tags that were attached to the metal. Id. at 899:14-23; 909:12-14. It was Mr. Baumgartner's job, as an insulator, to "insulate any piping or equipment that [he] [was] told to do so by [his] superiors[.]" Id. at 884:12-15. While Mr. Baumgartner was instructed by various supervisors to insulate Crane products, "[h]e never . . . personally observed any specifications coming directly from Crane that required the use of asbestos in association with any of [the Crane] equipment that [he] worked with throughout [his] lifetime[.]" Id. at 1034:20-1035:2. Furthermore, he admitted that he did not associate Crane with the actual insulation products that he used, but rather, only with the valves, strainers, and pumps. Id. at 886:15-18; 907:13-16.

Honeywell Valves

Over the course of his career, Mr. Baumgartner insulated Honeywell control valves. See Baumgartner Dep. 869:10-17. Specifically, he insulated Honeywell valves while working at

“Riverside Hospital[,] Toledo Hospital[,] St. Charles Hospital[,] East Toledo [Hospital][, and] St. Vincent’s Hospital.” Id. at 876:7-9. Such control valves were made of alloy brass. Id. at 869:21. Mr. Baumgartner was able to identify these valves, as manufactured by Honeywell, based on the tags that were affixed. Id. at 871:1-5. Mr. Baumgartner did not install, repair, or perform any kind of maintenance on the valves; rather, his sole responsibility was to insulate the valves. Id. at 871:25-872:5. Mr. Baumgartner testified that he insulated both heating and cooling valves. Id. at 873:24-874:8. However, he admitted that he never “reviewed any literature or documents from Honeywell that instructed that their control valves be insulated[.]” Id. at 874:21-25. Conversely, “[i]f [he] would have insulated something, it would have been done according to the . . . job specs. [Which] [were] what [he] had to follow.” Id. at 875:3-8. Such job specifications came from the project engineer. Id. at 875:9-10.

Defendant Honeywell has submitted the affidavit of Ralph Morrisett, a mechanical engineer and former employee of Honeywell. Mr. Morrisett testified that “[he] [is] familiar with Honeywell[’s] commercial control valves and actuators . . . through [his] work experience and [his] review of historical commercial control valve documents and information, as well as [his] review of historical actuator documents and information.” Morrisett Aff. ¶ 3, Nov. 10, 2014. After reviewing the deposition testimony of Mr. Baumgartner, Mr. Morrisett stated that Honeywell never specified that its hot or cold water control valves needed to be insulated. Id. at ¶ 10-11. Furthermore, he testified that “Honeywell Inc. never manufactured, supplied or sold exterior valve insulation as part of its business manufacturing and selling commercial and industrial control valves.” Id. at ¶ 12.

Robertshaw Controls Valves

Mr. Baumgartner testified that he remembered working with Robertshaw products at two separate jobsites in Bowling Green, Ohio: the Bowling Green State University science building and the Wood County Hospital. Baumgartner Dep. 936:2-11. He worked on both sites from May until October of 1969. Id. at 936:19-23. However, of that time, he estimates that he spent eighty percent at the science building and only twenty percent at the hospital. Id. at 937:4-8. At both of these worksites, Mr. Baumgartner was tasked with doing general insulation work. Id. at 937:16-18.

At the science building, he “specifically recall[ed] insulating the two control valves on the chill water.” Id. at 937:24-938:1. Mr. Baumgartner described these valves as a “brass type alloy” with a “sort of a goldish bronze color.” Id. at 939:17-19. He was able to identify the Robertshaw products based upon name tags which were attached to the valves. Id. at 938:15-18. As to the hospital building, Mr. Baumgartner indicated that he performed similar work “plac[ing] external insulation on [one] control valve[.]” Id. at 943:4-7.

In his deposition, Mr. Baumgartner admitted that he “ha[d] no personal knowledge that Robertshaw specified the use of insulation on the[] valve[.]” Id. at 943:18-21. Furthermore, he testified that he “never worked with any internal parts of the Robertshaw valves” and “ha[d] no way of knowing whether or not insulation was necessary for the valve[s] to work correctly[.]” Id. at 943:25-944:6. However, he stated that “[n]ormally on the chill water . . . you insulate everything” because “that’s just the way it is[.]” Id. at 944:7-11. Additionally, he indicated that “if [a valve] wasn’t insulated and [was] put [into] operation, it would sweat and drip” and that

was a “no-no[.]” Id. at 944:21-25. Thus, Mr. Baumgartner testified—with “chill water, you insulated 100 percent.” Id. at 944:24-25.

b

Turbines and Boilers

i

Foster Wheeler Boilers

Mr. Baumgartner testified that in the summer of 1973 he worked on a Foster Wheeler boiler in the basement of the Woodville Junior High School in Woodville, Ohio. Baumgartner Dep. 497:6-24. He estimated that based upon the type of insulation used, the boiler was installed sometime in the 1950s. Id. at 499:14-18. Mr. Baumgartner described the boiler as “a heavy gauge cast iron . . . [which] had about 75 to 80% of the original insulation . . . on the shell, the outside of the boiler.” Id. at 501:12-17. Additionally, he described the boiler as not a “jacketed boiler[.]” Id. at 1021:17. The job required that he “reinsulate it” in order to “try to match the way it was originally done[.]” Id. at 1021:2-4. However, prior to beginning the reinsulation job, Mr. Baumgartner had to clean up the insulation that had been removed from the boiler. Id. at 1020:8-17. Once the old insulation was removed, Mr. Baumgartner reinsulated the boiler by using a “nonasbestos cable[.]” “put[ting] chicken wire over that” and applying “EaglePicher one-coat cement[.]” Id. at 1021:20-25. Mr. Baumgartner testified that the EaglePicher one-coat cement contained asbestos. Id.

Furthermore, in 1972, Mr. Baumgartner worked for one and one-half weeks on a Foster Wheeler boiler at a British Petroleum plant. Id. at 1036:14-24. This particular job “was a repair and reinsulate job[.]” Id. at 1038:9-11. Essentially, the metal jacket was removed and “boilermakers and the fitters . . . went in and did . . . work” and “then [Mr. Baumgartner]

repaired the areas that they worked on.” Id. at 1038:21-25; 1040:5-16. And by repair, Mr. Baumgartner “reinsulated the areas that they worked on[.]” Id. at 1039:2-4. Once Mr. Baumgartner was done reinsulating, he then covered the insulation with new metal. Id. at 1041:3-6. He testified that he was sure the insulation contained asbestos. Id. at 1045:19-21. However, Mr. Baumgartner never observed any of Foster Wheeler’s specifications for the job. Id. at 1040:17-19.

ii

Cleaver-Brooks Boilers

During Mr. Baumgartner’s deposition, he described three work sites—the Uniroyal Plant in Port Clinton, Ohio, the Dana Plant in Ottawa Lake, Michigan, and the Hayes-Albion Plant in Spencerville, Ohio—where he worked with boilers manufactured by Cleaver-Brooks. To start, counsel for Cleaver-Brooks had Mr. Baumgartner generally describe his job as a union insulator.

“Q. As a union insulator, obviously, you had a particular job to do on various job sites, as did the other trades; correct?”

“A. Yes.

“Q. And you wouldn’t be involved in doing the type of work that the union boiler mechanics or tenders or boilermakers would be doing; correct?”

“A. No. Normally not. They would normally be done with their work, but there were times where they were still doing applications of their work when I would be there doing my work.

“Q. Sure. But in other words, boilers, an installation or a maintenance or repair job on a boiler, that was for another trade, not someone like yourself who was an insulator; correct?”

“A. Right. They would do the rebuild, whatever had to be done, and I would come along and patch up, replace insulation.”
Baumgartner Dep. 345:23-346:16.

Regarding his work at the Uniroyal Plant, Mr. Baumgartner stated that it took about three weeks in 1968. Id. at 346:22-23;348:17-21. At this site, Mr. Baumgartner was working on a newly installed Cleaver-Brooks boiler. Id. at 347:2-5. This boiler was “jacketed[.]” Id. at

349:14-16. Specifically, Mr. Baumgartner was tasked with insulating the “steam lines” and then the “stack[.]” Id. at 347:11-13. He “put high temperature fiberglass insulation” on the “stacks that came off the top” of the boiler and “then over that, . . . put asbestos paper, which [he] cut to length . . . [and] wired . . . on[.]” Id. at 100:17-101:6. Next, he “[applied] a heavy canvas . . . and then a Lagfas. Foster Lagfas material which basically sealed the canvas.” Id. Mr. Baumgartner did not recall the manufacturer of the asbestos paper. Id. at 101:15-17.

As to his work at the Dana Plant, Mr. Baumgartner testified that he worked in a boiler room where a new Cleaver-Brooks boiler was being put in during the winter of 1972. Id. at 352:12-15; 354:3-5. Here, Mr. Baumgartner worked with the pipes extending out from the boiler and on the boiler itself. Id. at 353:15-22. He testified that “they opened [the boiler] up a little bit and [he] patched it. [He] put some insulation back in there, and some metal.” Id. at 353:20-22. The job took about “a day-and-a-half at most.” Id. at 354:17.

Lastly, Mr. Baumgartner described his work at the Hayes-Albion Plant in Spencerville, Ohio. Id. at 354:18-24. He worked at this site from July into August of 1973. Id. at 355:1-3. According to Mr. Baumgartner’s testimony, the boiler at this location was an older boiler, which was being rebuilt. Id. at 355:21-23. A contractor was called in to “[take] the boiler apart[.]” “replace some of the tubes in it” and perform some “other general maintenance work[.]” Id. at 356:2-8. In order to perform this work, the contractor had to remove some of the jacketing and “it exposed the old insulation, which was asbestos.” Id. at 293:19-24. Because “[t]hey [had] removed some of the jacketing, and tore off some of the insulation in two or three areas . . . on the sides of the boiler [Mr. Baumgartner] patched that, and then [he] insulated some of the piping that they” had installed. Id. at 356:15-21. Moreover, “[he] basically had to patch the

boiler, the shell itself, and of course, [he] used the non-asbestos, but . . . [he was] tying it in to asbestos[.]” Id. at 294:1-4.

iii

C.B.S. Turbines

In October or November of 1970, Mr. Baumgartner began work repairing an “old Westinghouse turbine” at the Acme Power Plant in Toledo, Ohio. Id. at 193:4-6; 194:18-19. He stated:

“[the] Plant in Toledo [t]hey had a turbine. One of the turbines or one of the bigger units there, a couple of the blades in the turbine broke off and went right through the casing of the turbine and a right out the roof of the building. And they had to redo the turbine. They had to literally tear it apart and they had to replace a lot of the main parts in the turbine itself. And we had a lot of tear-off and re-insulating on that.” Id. at 145:7-17.

Much of this work required “a lot of insulation removal.” Id. at 193:8-9. Mr. Baumgartner testified that the insulation that was removed “was old stuff . . . probably built and done in the late ‘40s, early ‘50s[.]” Id. at 193:7-12. He also “reinsulate[ed] the turbine itself” by applying “blankets” made of fiberglass and ceramic fibers covered by an asbestos cloth. Id. at 193:14-194:1. The brand name of the fiberglass was “Kaowool.” Id. at 193:23.

Additionally, in 1963, Mr. Baumgartner helped finish the installation of two Westinghouse turbines. When Mr. Baumgartner arrived on the site, the turbines “[were] already all in place, piped, and they were doing insulation work on both[.]” Id. at 437:20-23. As such, Mr. Baumgartner could not tell “whether there was any asbestos associated with the turbine or the generator when it [first] came to the plant[.]” Id. at 438:14-19.

Riley Boilers

During his deposition testimony, Mr. Baumgartner testified that he recalled working with Riley boilers at the following jobsites: (1) Mercy Hospital in Toledo, Ohio; (2) H.J. Heinz Co. in Fremont, Ohio; and (3) British Petroleum in Toledo, Ohio.

(1)

Mercy Hospital

Mr. Baumgartner testified that he worked on “one of the [Riley] boilers in th[e] boiler room” at Mercy Hospital because “[t]hey had a problem with it and [he] had to do some revamping around it and redo some of the piping[.]” Baumgartner Dep. at 213:22-214:2. At this point in time, Mr. Baumgartner was working as an apprentice insulator for Sussman Asbestos. Id. at 215:9-10. The work he performed was on the piping connected to the boiler and the boiler itself. On the boiler tank, he had to install some new insulation where some old pieces had been cut away. Id. at 215:1-5. He remembers that his employer, Sussman, supplied all of the materials he was working with. Id. at 215:11-13.

Defendant, Riley, submitted the affidavit of Michael Smith, which provides in relevant part:

“7. Mr. Baumgartner identified a boiler he worked on at Mercy Hospital as a “Riley Stoker” boiler.

“8. I conducted a search and review of Riley’s records to determine whether Riley sold, designed, engineered, manufactured or erected any Riley Stoker boilers for use at Mercy Hospital in Toledo, OH.

“9. Riley has no record of the sale, design, engineering or manufacture of any “Riley Stoker” boilers for use at Mercy Hospital in Toledo, OH, however, Riley Stoker’s records do indicate that Union Iron Works (“UIW”) furnished two (2) “Full-

Front” boilers to Mercy Hospital in approximately 1917 pursuant to contract nos. 7264 and 7324.

...

“11. UIW was a separately owned and operated company, and did not become a subsidiary of Riley Stoker until 1960. After its acquisition, UIW was eventually merged into Riley Stoker in 1969.

“12. The UIW boilers at Mercy Hospital were not constructed by Riley Stoker, and would not have used the “Riley Stoker” name or displayed any other “Riley Stoker” identification.

“13. Contracts nos. 7264 and 7324 do not indicate the use of any asbestos-containing insulation on the two (2) UIW boilers erected at Mercy Hospital in 1917.

“14. As shown in the contract documents, the walls of the UIW boilers at Mercy Hospital were made of solid brick. This brick wall design was a standard engineering configuration at the time these boilers were erected, and did not require the use of exterior insulation to operate properly.” Smith Aff., ¶¶ 7-14.

(2)

H.J. Heinz Co.

Mr. Baumgartner testified that in 1972, as an apprentice insulator for Service Products Insulation, he worked on Riley Stoker boilers at H.J. Heinz Co. (Heinz). He testifies that he re-insulated a condensate tank using a variety of asbestos-containing insulation materials. Baumgartner Dep. 189:3-21. The affidavit of Mr. Smith indicates that Riley products did not require the use of “Calsil” insulation and it was likely that Mr. Baumgartner mistook a B&W boiler for a Riley or UIW boiler. Smith Aff. ¶¶ 15-31.

(3)

British Petroleum

Additionally, Mr. Baumgartner testified that in the fall of 1973, he worked on a Riley boiler in Toledo, Ohio. Id. at 249:14-250:3. He stated that he “worked on the side of one of the

boiler[]” and did some “patchwork” with “Thermobestos[,]” which was asbestos-free. Id. at 251:24-252:9. However, he noted the work required “piecing [the new material] in” with the old material, which contained asbestos. Id. at 252:11-17. Mr. Smith, on behalf of Riley, conducted a search and review of Riley’s records and found “no record of the sale, design, engineering or manufacture of any Riley Stoker boilers for use at [BP] in Toledo, OH.” Smith Aff. ¶¶ 33-34.

v

General Electric Turbines

Preliminarily, Mr. Baumgartner testified that there were four turbines at the Bay Shore jobsite: two of which were G.E. and the other two Westinghouse. Baumgartner Dep. 59:10-16. However, the deposition of Douglas Ware, an employee of Westinghouse, indicates that Westinghouse actually manufactured all four turbines at the Bay Shore jobsite. See Ware Aff. ¶ 4.

Nevertheless, Mr. Baumgartner also contends that he worked on G.E. turbines during his time spent at the Monroe Power Plant. Of the four turbines built at the Monroe Power Plant, units two and three were manufactured by Westinghouse. See Ware Aff. ¶ 6. However, Mr. Baumgartner testified that he worked on the new construction of units three and four in 1973. Baumgartner Dep. 428: 10-24.

vi

Oakfabco (Kewanee) Boilers

Mr. Baumgartner testified that in 1962 he worked at a DuPont plant—for approximately two weeks—for a mechanical contractor named Kagan & Hughes. At this time, he was working as an “improver helper” and his job was to help repair an existing boiler. Id. at 911:22-23. Mr. Baumgartner stated:

“That boiler probably been in there [8] to 10 years, I would guess. And they had to replace some of the tubes. They had to—they revamped the boiler room itself, added a new steam header, which we did, insulated, and there was some new piping that tied into that boiler. They took and opened up around the various pipes that were welded to the shell, they opened up, took and removed some of the metal jacketing off the boiler and the insulation around there so that the welds could be inspected. I’m going to guess these were probably the factory welds initially and that. And they had to inspect them and that. And once that was done and I got everything hooked up, we patched up on the boiler itself and then insulated all the piping that needed to be insulated, steam, condensate that went to and from the boiler.” Id. at 912:18-913:11.

In describing the boiler itself, Mr. Baumgartner remembered the boiler to be jacketed. Id. at 917:3-5. Specifically, his testimony reads:

“Q. All right. Do you know if the—we talked about being jacketed, but can you tell me whether or not this Kewanee boiler that was being worked upon, was it insulated internally or was it insulated externally or not insulated?

“A. The outside shell of the boiler was insulated. And then that metal jacketing was over it on the outside of the insulation.

“Q. So it was a metal jacket?

“A. Yes.

“Q. Covering over the insulation underneath it?

“A. Yes.

“Q. Do you know what that insulation material was made out of?

“A. It looked like to me it was an old style Calsil insulation and definitely it was an asbestos product. The manufacturer I’m not sure, because that insulation had been in there and it was a little bit crumbled and that.” Id. at 920:7-921:1.

He stated that he was able to identify this boiler because the foreman on the job identified it as Kewanee boiler and he observed a Kewanee stamp on the boiler itself. Id. at 913:23-914:16.

Another location at which Mr. Baumgartner worked on a Kewanee boiler was at the Uniroyal plant in Port Clinton, Ohio. Id. at 925:3-5. Mr. Baumgartner remembered working at this location in the fall of 1968. Id. at 930:4. Like his work on the Kewanee boiler at the DuPont plant, Mr. Baumgartner was tasked with assisting with the “overhaul” of the boiler. He testified:

“we had a little bit of patching on the boiler itself and then the piping, whatever they removed and that, then we just reinsulated. And we did the stack off of the boiler itself, too, insulated that, because I think they actually replaced the stack as I recall.” Id. at 925:20-25.

This boiler, like the boiler at the DuPont plant, was jacketed and had “Calsil” material underneath. Id. at 934:16-20.

Lastly, Mr. Baumgartner testified that in the early 1970s, he worked on a Kewanee boiler which had been installed in the First National Bank building in downtown Toledo, Ohio. Id. at 926:7-10. At the time Mr. Baumgartner worked on the boiler, it was newly installed and was not “even in operation yet[.]” Id. at 926:14-15. Because it was newly installed, Mr. Baumgartner stated that he was able to read “the name Kewanee . . . on it.” Id. at 926:7-19. On this particular project, Mr. Baumgartner “didn’t actually [perform] any work on the boiler itself[;]” rather, “[h]e just basically . . . insulate[d] the new piping that was put in[.]” Id. at 924:9-22. This boiler “was insulated and had a nice metal jacket over it, fairly heavy gauge metal jacket.” Id. at 927:20-12.

2

The Bare-Metal Defense

As discussed above, the Ohio Supreme Court has yet to expressly adopt the so-called “bare-metal defense,” but the trend among the lower courts is to recognize the defense in Ohio. See Fischer, Case No. 07-615514 (Jan. 2, 2008) (Sweeney, J.) (holding that, under Ohio law, defendant manufacturer had no duty to warn of exposure to after-applied asbestos products).

Accordingly, a defendant manufacturer will be entitled to summary judgment if a plaintiff fails to “presen[t] any evidence that any of the [d]efendants’ products left production with external or internal asbestos components” or defendants otherwise specified or required that asbestos components be incorporated into their products. Davis, Case No. 629433, at 2; see Morgan, 969 F. Supp. 2d at 1369 (“The clear thrust of the bare metal defense is that a manufacturer cannot be held liable for asbestos-containing products used in conjunction with its bare metal pumps, absent evidence that the manufacturer was part of the chain of distribution for those products.”).

A plaintiff may, however, establish that a bare-metal manufacturer is liable if he or she can provide some evidence that the defendant “explicitly specified or even recommended the use of asbestos insulation in conjunction with the subject” product. Fischer, Case No. 07-615514, at 4 (Jan. 2, 2008); see Perry, Case No. 608652 (denying summary judgment because the defendant specified that replacement parts must contain asbestos); Raniolo v. Am. Laundry Mach., Case No. 752429 (Ohio Com. Pl.) (Hanna, J.) (denying summary judgment because evidence, when viewed in light most favorable to plaintiff, would permit the inference of “some awareness of [defendant] Ford’s part of the hazards of asbestos, the uncertainty of that hazard, an insistence of continuing to use asbestos in its brakes into the 1990’s . . . and continued use of a braking system that *required* replacement brakes to include asbestos”). Furthermore, a plaintiff may avoid summary judgment by presenting some evidence that he or she worked with asbestos that was part of the original product. See Smart v. Crane Co., Case No. 703102 (Ohio Com. Pl.) (Spellacy, J.) (holding that plaintiffs “created a genuine issue of material fact to be decided at trial regarding [plaintiff’s] exposure to asbestos from [defendant’s] pumps). Nevertheless, the fact that the defendant manufacturer may have foreseen that asbestos products could later have been used in conjunction with the original product, standing alone, is not sufficient to impose

liability. See Davis, Case No. 629433, at 2 (holding that while “[d]efendants might have foreseen that the products could have been . . . utilized [with asbestos products], that alone does not impose liability upon them”).

Thus, in the absence of evidence that (1) Defendants’ respective products (i.e., valves, turbines, or boilers) were manufactured with asbestos-containing products or originally included asbestos-containing products, (2) Plaintiff was present when those original asbestos materials were replaced, and/or (3) Defendants supplied replacement products containing asbestos, any asbestos dust which Plaintiff was exposed to in connection with the Defendants’ products would not be attributable to the Defendants. Such exposure would instead be solely the result of a third party’s components, for which the Defendants cannot be liable pursuant to the bare-metal defense. Morgan v. Bill Vann Co., 2013 WL 4657510, at *6 (S.D. Ala. 2013).

a

Valves, Strainers, and Pumps

i

Crane’s Bare-Metal Defense

Defendant Crane argues that it cannot be held liable under Ohio law for the utilization of replacement asbestos-containing components, including after-applied exterior insulation manufactured by a third party, that Mr. Baumgartner alleges was used in or on Crane’s products. In his deposition, Mr. Baumgartner described Crane’s strainers as a “cast [iron] material[.]” Baumgartner Dep. 899:8. Regarding Crane’s valves, Mr. Baumgartner’s testimony reads:

“Q. And these valves were made of some type of a bare metal, correct?

“A. They were -- they looked like they were a cast, the body of them.” Id. at 883:22-25.

Thus, while Mr. Baumgartner was able to identify Crane’s products, “[he] never . . . personally observed any specifications coming directly from Crane that required the use of asbestos in association with any of the . . . [Crane] equipment that [he] worked with[;]” rather, he simply “insulate[d] any piping or equipment that [he] [was] told to do so by [his] superiors[.]” Id. at 1034:20-1035:2; 884:13-15. Furthermore, he admitted that he did not “associate Crane Company with the actual insulation products that [he] used[.]” Id. at 886:15-18. As such, Plaintiffs have not presented any evidence that Defendant Crane (1) explicitly specified or even recommended the use of asbestos insulation in conjunction with its products or (2) manufactured its products with asbestos-containing products. See Alexander v. A.W. Chesterton Co., 2014 WL 7190244, *3 (Ohio Com. Pl. 2014) (granting summary judgment to defendant Crane Co. because “there [was] no basis in law for holding Crane Co. responsible for the replacement parts to its valves which came from other packing and gasket manufacturers.”); Roberts, Jr. v. Adience, Inc., 2014 WL 7190246, *2 (Ohio Com. Pl. 2014) (granting summary judgment to defendant Crane Co. because the evidence indicated that “the [defendant’s] valves apparently function[ed] well without asbestos, [and] it [was] clear that Crane Co. did not mandate the use of either asbestos packing or gaskets”). Therefore, this Court finds that the bare-metal defense bars the Plaintiffs’ claims as to Crane and summary judgment is appropriate.

ii

Honeywell’s Bare-Metal Defense

Honeywell argues that Mr. Baumgartner has presented no evidence that its valves came with external insulation already applied. Furthermore, Honeywell contends that it never specified, or instructed, that its valves be insulated with asbestos-containing products. Such assertions are supported by the Morrisett affidavit. See Morrisett Aff. Mr. Baumgartner’s

deposition testimony indicates that he insulated Honeywell control valves. However, he has not presented any evidence that the Honeywell valves came with original external insulation or that the application of such insulation was either specified or recommended by Honeywell. Baumgartner Dep. 874:21-875:10. Rather, he testified that he never “reviewed any literature or documents from Honeywell that instructed that their control valves be insulated [.]” Id. at 874:21-25. Because Mr. Baumgartner has not submitted any evidence to support the conclusion that Honeywell valves either contained original insulation or required the use of insulation, this Court is satisfied that the bare-metal defense bars the Plaintiffs’ claims, as to Honeywell, and summary judgment is appropriate. See Roberts, Jr., 2014 WL 7190246, at *2 (granting summary judgment to defendant manufacturer because the evidence indicated that “the [defendant’s] valves apparently function[ed] well without asbestos, [and] it [was] clear that [the defendant manufacturer] did not mandate the use of either asbestos packing or gaskets”).

iii

Robertshaw’s Bare-Metal Defense

Robertshaw contends that it cannot be held liable under Ohio law for the utilization of replacement asbestos-containing components, i.e., gaskets, packing, or for any after applied exterior insulation manufactured by a third party, that Mr. Baumgartner alleges was used in or on a product made by Robertshaw. Here, the Plaintiffs have not “presented any evidence that any of the [d]efendants’ products left production with external or internal asbestos components” or the defendant otherwise specified or required that asbestos components be incorporated into its products. Davis, Case No. 629433, at 2. To the contrary, Mr. Baumgartner testified that he “ha[d] no way of knowing whether or not insulation was necessary for the valve to work correctly[.]” Id. at 943:25-944:6. Furthermore, he “never worked with any internal parts” and

only applied external insulation on the control valves. Id. at 943:25-944:3. Thus, while it may be common within the industry to insulate such valves, the fact that Robertshaw “might have foreseen that the[ir] products could have been . . . utilized [with asbestos products], that alone does not impose liability upon them[.]” Davis, Case No. 629433, at 2; see Roberts, Jr., 2014 WL 7190246, at *2 (granting summary judgment to defendant manufacturer because the evidence indicated that “the [defendant’s] valves apparently function[ed] well without asbestos, [and] it [was] clear that [the defendant manufacturer] did not mandate the use of either asbestos packing or gaskets”). Accordingly, this Court finds that summary judgment is appropriate because the Plaintiffs’ claims, as to Robertshaw, are barred by Ohio’s bare-metal defense.

b

Boilers

i

Foster Wheeler’s Bare-Metal Defense

Defendant Foster Wheeler argues that it cannot be held liable for the utilization of replacement asbestos-containing components, including after-applied exterior insulation, manufactured by a third party. Specifically, Foster Wheeler’s memorandum states that Mr. Baumgartner did not work with the internal components of any Foster Wheeler equipment, and there is no alleged exposure based on the removal or replacement of any internal components. However, Mr. Baumgartner’s deposition testimony directly refutes such a claim. He states that when he performed work on a boiler at the Woodville Junior High School, part of his job was to clean up the old insulation that had been removed from the boiler. His testimony provides:

“[a]nd some contractor went in there, did a bunch of repair work on it, and *they knocked off a lot of the insulation that was on the boiler itself*, piping, the stack, and all that. *And we had a cleanup job to do before we could do anything. They just left this stuff*

laying on the floor. There was a lot of asbestos.” Baumgartner
Dep. 1020:10-17 (emphasis added).

Here, Mr. Baumgartner’s testimony serves as some evidence that he was exposed to insulation which contained asbestos and was originally on Foster Wheeler’s boiler. As such, summary judgment, based on the bare-metal defense, is inappropriate. See Dalton v. 3M Co., 2013 WL 4886658, at *11 (D. Del. Sept. 12, 2013) (recommending summary judgment because although Foster Wheeler supplied internal insulation, plaintiff had only presented evidence that he was exposed to after-applied external insulation).

ii

Riley’s Bare-Metal Defense

Defendant Riley asserts that Mr. Baumgartner was not exposed to any asbestos-containing products that were originally manufactured, supplied, or specified by Riley. More specifically, Riley avers that its boilers were not even at the locations at which Mr. Baumgartner worked. Conversely, Mr. Baumgartner testified that he worked with Riley boilers and was exposed to original asbestos. Specifically, he testified that at the British Petroleum plant, he had to “piec[e] [the new insulation material] in” with the old material, which he believed contained asbestos. Id. at 252:11-13. Here, there are two questions of material fact: (1) whether Riley boilers were present at the jobsites at which Mr. Baumgartner worked; and (2) if Riley boilers were present, whether Mr. Baumgartner was exposed to insulation which was originally manufactured with the boiler. Specifically, Plaintiffs have presented evidence that Riley “supplied only internal insulation” and Mr. Baumgartner was exposed to such insulation. Dalton, 2013 WL 4886658, at *11. As such, summary judgment, based upon the bare-metal defense, is inappropriate.

Oakfabco's Bare-Metal Defense

Defendant Oakfabco contends that it cannot be held liable, under Ohio law, for harm caused by, and owed no duty to warn of the hazards inherent in, asbestos insulation that it did not manufacture or distribute. Oakfabco argues that Mr. Baumgartner patched two of their boilers, using insulation that was produced by a third company, and that they did not provide such insulation or instruct it be used. In response, Plaintiffs contend that Mr. Baumgartner was exposed to both asbestos from the insulation used to patch the boilers as well as to asbestos that was original to the boiler—pre-existing, original asbestos insulation. In his deposition, Mr. Baumgartner accurately described how the metal jacket was removed and how he worked with the original insulation material beneath it. Baumgartner Dep. 920:7-921:1. As such, summary judgment is inappropriate because the Plaintiff has set forth “[some] evidence of exposure sufficient that a reasonable jury might conclude the exposure was a substantial factor in” causing the Plaintiff’s disease. Fischer, No. 07-615514, at 4 (Feb. 14, 2008) (holding “there must be some evidence of exposure sufficient that a reasonable jury might conclude the exposure was a substantial factor in” causing the plaintiff’s disease).

Causation–Substantial Factor

Although this Court has granted Crane, Honeywell, and Robertshaw’s motions for summary judgment based upon the bare-metal defense, this Court, for the purposes of discussion, shall briefly examine whether the Plaintiffs have met their burden of proving exposure to

Defendants'²⁷ products and that such products were a substantial factor in causing the Plaintiff's injury. In Horton v. Harwick, the Ohio Supreme Court held that "[f]or each defendant in a multidefendant asbestos case, the plaintiff has the burden of proving exposure to the defendant's product and that the product was a *substantial factor* in causing the plaintiff's injury." Horton v. Harwick Chem. Corp., 73 Ohio St. 3d 679, 653 N.E.2d 1196, 1197 (1995) overturned due to legislative action (Sept. 2, 2004) (emphasis added). In the wake of the Horton decision, the Ohio General Assembly enacted R.C. § 2307.96, which delineates a plaintiff's burden of establishing a claim against a particular defendant and states as follows:

"(A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, *the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.*

"(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was

²⁷ This Court shall address whether the Plaintiff has presented evidence that exposure to products manufactured by Defendants Robertshaw, Honeywell, and Crane were a substantial factor in causing his injury. However, as to Foster Wheeler, Riley, G.E., Oakfabco, and Cleaver-Brooks, this Court is satisfied that Mr. Baumgartner's deposition testimony is sufficient evidence, when viewed in a light most favorable to the nonmoving party, to create a question of fact regarding whether the Defendants' products were a substantial factor in causing Mr. Baumgartner's injury. See Fisher v. Alliance Mach. Co., 947 N.E.2d 1308, 1317 (Ohio App. 2011) (finding that plaintiff's estate "presented sufficient evidence to create a question of fact whether he worked alongside pipefitters as a regular part of his job and as a result, was directly exposed to asbestos fibers"). Specifically, Mr. Baumgartner's testimony indicates that he was exposed to original insulation that was affixed or otherwise attached to the aforementioned Defendants' boilers or turbines. See Baumgartner Dep. 193:7-12; 293:19-24; 252:11-17; 354:17; 432:2-11; 912:18-913:11; 1020:8-17; 1045:19-21; DiCenzo v. A-Best Prods. Co., 2007 WL 1976735 (Ohio Ct. App. 8th Dist. Cuyahoga County 2007) (judgment rev'd on other grounds) (reversing trial court's grant of summary judgment to the manufacturer because there was testimony that the defendant's product was used at the decedent's place of employment and that the decedent would have been in a position to be exposed to the product, creating a genuine issue of material fact regarding whether the decedent was, in fact, exposed to the defendant's product).

manufactured, supplied, installed, or used by the defendant in the action and that the *plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss*. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

“(1) The manner in which the plaintiff was exposed to the defendant's asbestos;

“(2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;

“(3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;

“(4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

“(C) This section applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are brought on or after the effective date of this section.”²⁸ Ohio R.C. § 2307.96 (emphasis added).

As such, “[a] plaintiff need not prove that he was exposed to a specific product on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that the product was a substantial factor in causing his injury.” Horton, 653 N.E.2d at 1202. However, the plaintiff does have the burden of proving: 1) exposure to the defendant's product, and 2) that the product was a substantial factor in causing the plaintiff's injury. Here, Defendants Robertshaw, Honeywell, and Crane argue that there is no evidence that Mr. Baumgartner's asbestos exposure from their products, if there was any, was a substantial factor in causing his injury.

²⁸ Ohio R.C. § 2307.91(FF) defines “‘substantial contributing factor’ to mean both of the following: (1) that exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim, and (2) that a competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.” Wilson, 864 N.E.2d at 698.

In Vince, the court affirmed the trial court's grant of summary judgment based upon the plaintiff's failure to demonstrate that her second-hand exposure to asbestos products, manufactured by the various defendants, constituted a substantial factor in her death caused by mesothelioma. Vince, 2007-Ohio-1155, ¶ 1. Although the plaintiff introduced evidence that her father worked with Crane valves, no evidence was introduced that indicated the product was originally delivered with asbestos. Id. at ¶¶ 22-23. To the contrary, there was evidence that the "valves were not manufactured with asbestos." Id. at ¶ 24. As such, the court concluded that "[n]o reasonable trier of fact could find on this evidence that Crane's products were a substantial factor in causing [plaintiff's] disease." Id. at ¶ 28.

Similarly, in Fischer, Case No. 07-615514 (Jan. 2, 2008), a number of valve manufacturers sought summary judgment based upon the plaintiff's failure to prove that exposure to their products was a substantial factor in causing his injury. The court noted that the "[d]efendants supplied valves[.] [However,] it appear[ed] uncontested that the valves, to the extent they may have contained asbestos materials as supplied, would have only contained asbestos in the interior packing and gaskets." Id. at 2. In this instance, the plaintiff "was an insulator who applied and removed other companies' asbestos insulation throughout the plant and upon the exterior of the [d]efendants' valves[.]" Id. In sum, the court found:

"the record [was] clear that the Plaintiff was exposed to asbestos insulation, but this insulation was not manufactured or supplied by the . . . defendants. It also appear[ed] that [the] [p]laintiff worked around the [d]efendants' valves . . . , but there [was] no evidence indicating that he was exposed to any internal asbestos components supplied with [d]efendants products. Thus, there [was] insufficient evidence upon which a reasonable jury could conclude that [p]laintiff was exposed to defendants' asbestos-containing products, and that such exposure was a substantial factor in his disease." Id. at 2-3.

Here, the instant Defendants are also entitled to summary judgment. First, there is no indication that any of the Defendants' products were delivered with asbestos attached to the exterior of the product. Baumgartner Dep. 876:7-9; 899:7-10; 939:17-19; see Vince, 2007-Ohio-1155, at ¶ 24 (granting summary judgment because there was evidence that the "valves were not manufactured with asbestos"). Furthermore, even if there was asbestos in the interior of the valves—of which Plaintiff has not presented any evidence—there is no indication that Mr. Baumgartner ever worked with the interior components of the valves, strainer, and pumps. Baumgartner Dep. 937:38-943:44; see Fischer, Case No. 07-615514, at 2 (Jan 2, 2008) (granting summary judgment because there was "no evidence indicating that [the plaintiff] was exposed to any internal asbestos components supplied with [the] [d]efendant[‘s] products"). Second, it is clear that Mr. Baumgartner applied insulation to the exterior of the valves that was neither manufactured nor directed to be used by the Defendants. Baumgartner Dep. 876:21-25; 938:13-17; 940:12-15; 942:13-16; 1034:20-1035:2; Morrisette Aff. ¶ 12. Accordingly, it is clear to this Court that there is insufficient evidence upon which a reasonable jury could conclude that Mr. Baumgartner was exposed to Defendants' asbestos-containing products, and that such insulation was a substantial factor in his disease. Fischer, Case No. 07-615514 (Jan. 2, 2008), at 3; see Rhodes v. McNeil & NRM, Inc., 2012 WL 9190058, *4 (Ohio Com. Pl. 2012) (holding that "[no] evidence [was] presented that [plaintiff] was exposed to [the] [defendant’s] product").

4

Statute of Repose

As discussed above, this Court has determined—after conducting the "interest-weighting" test—that the Ohio statute of repose shall govern the instant suit. Furthermore, as discussed supra, this Court determined that Ohio's ten-year statute of repose, Ohio R.C. § 2305.131, is

unaffected by the language found in Ohio R.C. § 2305.10. Section 2305.131 provides in relevant part as follows: “no cause of action to recover damages for . . . wrongful death that arises out of a defective and unsafe condition of an improvement to real property . . . shall accrue against a person²⁹ who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.” Sec. 2305.131(A)(1).

“Thus, the statute applies to construction work and has two requirements. First, the damage must arise out of a defective and unsafe condition. And second, that defective and unsafe conduction must come from an improvement to real property.” Stacey v. Winters, 2010-Ohio-2703, ¶ 20. Assuming that the use of asbestos insulation was a “defective and unsafe condition[,]” this Court will consider two issues: (1) whether the Defendants’ products are “improvement[s] to real property” covered by the Ohio statute of repose³⁰ and (2) whether the Defendants are “materialmen[,]” to whom the statute would not apply.³¹

²⁹ Ohio R.C. § 1.59(C) provides: “‘Person’ includes an individual, corporation, business trust, estate, trust, partnership and association.” Sec. 1.59(C).

³⁰ In Brennaman, the court found that “whether [a] facility is an improvement to real property under R.C. 2305.131 . . . is not a question of fact but a question of law.” Brennaman, 639 N.E.2d at 430; see Gill v. Evansville Sheet Metal Works, Inc., 970 N.E.2d 633, 642 (Ind. 2012) (“Whether something constitutes an improvement to real property under the commonsense approach is a question of law, though its resolution is grounded in fact.”); McSweeney v. A C & S, Inc., No. 96-4025, 2014 WL 4628030, at *3 (C.D. Ill. June 18, 2014) (“Although grounded in fact, the question of whether something constitutes an ‘improvement to real property’ is one of law.”).

³¹ The Ohio General Assembly, in enacting the current statute of repose, made its purpose behind the reenactment of Ohio R.C. § 2305.131 clear as follows: In enacting section 2305.131 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:

“(1) To declare that the ten-year statute of repose prescribed by section 2305.131 of the Revised Code, as enacted by this act, is a specific provision intended to promote a greater interest than the

interest underlying the general four-year statute of limitations prescribed by section 2309.09 of the Revised Code, the general two-year statute of limitations prescribed by section 2305.10 of the Revised Code, and other general statutes of limitation prescribed by the Revised Code;

“(2) To recognize that, subsequent to the completion of the construction of an improvement to real property, all of the following generally apply to the persons who provided services for the improvement or who furnished the design, planning, supervision of construction, or construction of the improvement:

“(a) *They lack control over the improvement, the ability to make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement;*

“(b) They lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement.

“(c) They have no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes described in division (E)(5)(b) of this section.

“(3) To recognize that, more than ten years after the completion of the construction of an improvement to real property, the availability of relevant evidence pertaining to the improvement and the availability of witnesses knowledgeable with respect to the improvement is problematic;

“(4) To recognize that maintaining records and other documentation pertaining to services provided for an improvement to real property or the design, planning, supervision of construction, or construction of an improvement to real property for a reasonable period of time is appropriate and to recognize that, because the useful life of an improvement to real property may be substantially longer than ten years after the completion of the construction of the improvement, it is an unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after that completion;

“(5) To declare that section 2305.131 of the Revised Code, as enacted by this act, strikes a rational balance between the rights of prospective claimants and the rights of design professionals, construction contractors, and construction subcontractors and to declare that the ten-year statute of repose prescribed in that section is a rational period of repose intended to preclude the pitfalls of stale litigation but not to affect civil actions against those in actual control and possession of an improvement to real property at the

First, this Court looks to the “improvement to real property” requirement. In Brennaman, the Ohio Supreme Court opted to apply a “common-sense definition of ‘improvement[.]’”³² 639 N.E.2d at 429 as amended, 71 Ohio St. 3d 1211, 643 N.E.2d 138 (1994). Accordingly, the Court “conclude[d] that when determining whether an item is an improvement to real property under R.C. § 2305.131, a court must look to the enhanced value created when the item is put to its intended use, the level of integration of the item within any manufacturing system, whether the item is an essential component of the system, and the item’s permanence.” Id. at 429-30.

Additionally, Ohio courts have grappled with the related issue of whether manufacturers of standard products, *i.e.*, “materialmen,” should be protected under the statute. In Sedar, the court found that “R.C. 2305.131, . . . cuts off the tort liability of architects and builders after expiration of ten years[,] but does not so limit the liability of owners and materialmen[.]” Sedar, 551 N.E.2d at 947, overruled by Brennaman, 639 N.E.2d 425. In its analysis, the court found that “the differences in work conditions provide a rational basis for limiting the liability of architects and builders, but not materialmen[.]” Id. at 948. The court went on to cite with approval Burmester v. Gravity Drainage Dist. No. 2 of St. Charles Parish, 366 So. 2d 1381, 1386 (La. 1978), which held:

“Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In

time that a defective and unsafe condition of that improvement causes an injury to real or personal property, bodily injury, or wrongful death.” 2004 SB 80 § 3, eff. 4-7-05 (emphasis added).

³² In Brennaman, the court found the prior version of Ohio R.C. § 2305.131 to be unconstitutional because it violated the right to remedy clause in Section 16, Article I of the Ohio Constitution; however, the same language “improvement to real property” is also used in the current version of Ohio R.C. § 2305.131. Stacey, 2010-Ohio-2703, ¶ 22.

addition, the inspection, supervision and observation of construction by architects and contractors involv[e] individual expertise not susceptible of the quality control standards of the factory.”

Similarly, the Sixth Circuit, interpreting the Ohio statute of repose, concluded:

“[w]e do not interpret ‘design’ as used in the statute to mean the general design of a manufactured product which might be used in improvements of real estate. The meaning of the word is limited to the architectural or engineering design of a particular building or the particular parts thereof.” Miles, 837 F.2d 476, at *5.

Nevertheless, “[t]he exemption for materialmen does not extend to all manufacturers. While Sedar precludes application of the statute to manufacturers of standardized products, it upholds that statute’s limitation of liability for those who manufacture products which are *individually designed to suit specific applications*. This distinction comports with the language of the statute which expressly protects those who design and construct improvements to real property.” Hall v. Harnischfeger Corp., 785 F. Supp. 675, 677 (N.D. Ohio 1991) (citing Miller v. Consol. Aluminum Corp., 729 F. Supp. 1154, 1160 (S.D. Ohio 1990) (emphasis added)).

As such, in determining whether the Defendants’ respective products are “improvements to real property[,]” this Court must consider whether the products were “standardized products” or “individually designed to suit specific applications.” Hall, 785 F. Supp. at 677. Furthermore, because this suit does not involve Mr. Baumgartner’s employers, whether Mr. Baumgartner’s activities in repairing or reinsulating the boilers and turbines constitute improvements to real property, is of no moment. As such, this Court will cabin its analysis to the issue of whether the respective turbines and boilers are improvements to real property. Lastly, in making its determination, this Court is guided by the Ohio General Assembly’s expressed legislative intent, which specifically sought to protect those who “lack control over the improvement, the ability to

make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement[.]” 2004 SB 80 § 3, eff. 4-7-05.

a

General Electric and C.B.S. Turbines

Because G.E. and C.B.S. turbines are comparable for purposes of determining whether they constitute improvements to real property, this Court shall address them jointly. See G.E.’s Mot. for Summ. J 15. Both G.E. and C.B.S. contend that the turbines at issue were custom designed, shipped to the plant or facility, and installed under the direction and with the assistance of G.E. and C.B.S. representatives. See G.E.’s Mot. for Summ. J. 24; C.B.S. Mot. for Summ. J. 10; Ware Aff. ¶¶ 7 – 11. In response, Plaintiffs generally argue that the statute of repose does not apply to asbestos-related injuries. See Pl.’s Obj. to C.B.S. Mot. for Summ. J. 2.

As Mr. Ware stated in his affidavit, the turbines were “enormous machine[s] that used steam to generate electricity.” Ware Aff. ¶ 10. These turbines were “custom-designed . . . according to specifications provided by the architect engineer.” Id. at ¶ 7. Furthermore, they were “individually designed . . . to meet the specific needs of the [plant] . . . , to fit the structure housing the unit, and to interface, as necessary, with the other . . . components [of the plant.]” Id. at ¶ 7. As such, these turbines were not mass-manufactured products, but rather custom-designed machines that powered the various manufacturing and power plants. See Hall, 785 F. Supp. at 677 (holding that the exemption for materialmen does not extend to all manufacturers because the statute of repose applies to “those who manufacture products which are individually designed to suit specific applications”). Accordingly, the turbines that were installed by G.E. and C.B.S. are improvements to real property and thus fall within the protection of the statute of repose. See Harder v. ACandS, 179 F.3d 609, 612 (8th Cir. 1999) (concluding that “turbines are

improvements to real property”); Rabatin v. Allied Glove Corp., 24 A.3d 388, 394 (Pa. 2011) (holding that “GE is entitled to the protections of [Pennsylvania’s statute of repose] based upon its design and construction of the finished product—the turbine itself”); Cherokee Carpet Mills, Inc. v. Manly Jail Works, Inc., 257 Ark. 1041, 521 S.W.2d 528 (1975) (holding that a 12,122–gallon tank, containing three different compartments with mixing motors and turbines and with internal pipe and couplings in the tank wall, installed for use in a carpet plant, was an improvement to real property); Chuck v. AGL Welding Supply, 1998 WL 35282363, at *1 (N.J. Super. Ct. App. Div. July 8, 1998) (concluding that “the statute [of repose] precludes claims against Westinghouse from exposure to asbestos contained in the materials with which its turbines were originally insulated”). Because it is undisputed that all of the turbines that Mr. Baumgartner worked with were installed well over ten years prior to the filing of the instant suit, his claims are barred by Ohio’s statute of repose.³³

b

Cleaver-Brooks, Foster Wheeler, Riley, and Oakfabco Boilers

Although the boilers and furnaces of the above Defendants are not identical—for the purposes of the determination as to their status as “improvements to real property”—this Court shall analyze them together. Defendants argue that their boilers are “improvements to real property” within the meaning of Ohio R.C. § 2305.131. In support, each contends that its boilers (1) were large complex machines that were incorporated into the building via a series of pipes; (2) powered or heated the facilities in which they were installed; and (3) were integral to the use

³³ “Although this interpretation may seem harsh to asbestos plaintiffs who will not even know they have a claim until long after the statute of repose has barred their action (assuming it arises from an improvement to real property), ‘[i]t is not our function as the judiciary to construct an asbestos-related exception to the statute of repose in construction cases.’ That role properly lies with the legislature.” Peter v. Sprinkmann Sons Corp., 860 N.W.2d 308, 314 (Wis. Ct. App. 2015) (quoting Graver v. Foster Wheeler Corp., 96 A.3d 383, 389 (Pa. Super. Ct. 2014)).

of the respective facilities. In response, Plaintiffs generally argue that the statute of repose does not apply to asbestos-related injuries and that Ohio R.C. § 2305.10(c)(1) provides an asbestos-related exception to the statute of repose.

In Adair, v. Koppers Co., the Sixth Circuit, interpreting Ohio’s statute of repose, held a coal conveyor was an improvement to real property. 741 F.2d 111, 116 (6th Cir. 1984). The court noted that “[t]he coal handling system, which transport[ed] raw material to processing facilities, [was] essential to the operation of the factory as designed and enhance[d] the utility of the property.” Id. at 115. As such, the court concluded that “there [was] no question of material fact concerning the nature of the conveyor as an integral component of an essential system, its usefulness to the purpose of the factory, and its permanence.” Id. at 116. Similarly, in Brennaman, the Ohio Supreme Court determined that a sodium handling area—essentially a material handling facility necessary to the delivery of raw material to the processing plant—was an improvement to real property. Brennaman, 639 N.E.2d at 429; see also Stewart v. Houghton Elevator Co., 87 Ohio App. 3d 122, 124, 621 N.E.2d 901, 903 (1993) (finding that an elevator was an improvement to real property); Hall, 785 F. Supp. at 677 (finding that a defendant crane manufacturer was not a “materialman” because the crane “[was] not a standardized product, but was uniquely designed for this particular plant”).

Here, each of the Defendants’ boilers was a large, complex machine that was affixed to the floor and permanently integrated into the structure of the building via a network of piping. See Bailey v. Smart Papers LLC, 2009 WL 891749, at *5 (S.D. Ohio Mar. 30, 2009) (finding a paper machine that was “permanently affixed to the floor with bolts and [was] connected to the mill through pipes and heating and electrical systems” to be an improvement to real property). Furthermore, such boilers were essential to the operations of the respective facilities because,

without them, there would not have been heat or electricity. See Pacific Indem. Co. v. Thompson–Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977) (superseded by statute) (holding as a matter of law that the installation of a furnace in a shopping center constituted the construction of an improvement to real property). As such, the boilers enhanced the value of the facilities because, without them, the facilities would not have functioned. See Adair, 741 F.2d at 115 (finding a coal handling system enhanced the utility of the property by “transport[ing] raw materials to processing facilities”); Matthews v. Beloit Corp., 807 F. Supp. 1289, 1292 (W.D. Mich. 1992) (finding that a “stack calendar” papermaking machine was an improvement to real property because without it, the plant could not manufacture paper).

Because the boilers were all of following—permanent, fully integrated, enhancing of the overall value, and essential to the operation of the facilities they were housed in—this Court finds that the instant Defendants are distinguishable from “materialmen” who typically supply components in large quantities and can standardize the items they produce. See Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1372 (6th Cir. 1984) (“A materialman typically supplies components in large quantities and can standardize the items he produces.”). Unlike the traditional “materialman” who produces a standardized product, the Defendants delivered and installed large industrial boilers that had to be incorporated into the unique facilities with pipes and valves. Compare Barile v. 3M Co., 2013 WL 4727128, at *8 (N.J. Super. Ct. App. Div. Sept. 4, 2013) (holding “[t]here is no question in this case . . . that the forty-foot customized boiler built to Exxon’s specifications for the Bayway refinery was not a standardized product that Foster Wheeler sold to Exxon but an improvement to Exxon’s real property”), with Colomba v. Fulchini Plumbing, 788 N.E.2d 555, 557 (Mass. App. Ct. 2003) (finding that replacement boiler was not an improvement to real property because

“[t]he record [was] devoid of any evidence of [defendant’s] having provided the kind of individualized expertise performed by architects, design professionals, or contractors as contemplated by the statute”). Furthermore, once the boilers were installed, the respective Defendants lacked control over the improvements or otherwise lacked the ability to make determinations with respect to the improvements. For example, once a boiler was installed, the owner of the facility was free to insulate the boiler with any material that he or she saw fit.

As such, this Court is persuaded that the Defendants’ boilers are “improvements to real property” within the meaning of Ohio R.C. § 2305.131. See Sette v. Benham, Blair & Affiliates, 591 N.E.2d 871, 872 (1991) (holding that a “pressurized hot water system” designed to supply hot water to the manufacturing process was an improvement to real property); Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Prods., 522 N.W.2d 607, 611 (Iowa 1994) (finding that a furnace—including its component control valve—to be an improvement to real property and thus covered under the statute of repose); Kephart v. ABB, Inc., 2015 WL 1245825, at *5 (W.D. Pa. Mar. 18, 2015) (finding a boiler system to constitute an improvement to real property under the statute of repose). Because this Court finds that the Defendants’ boilers are improvements to real property, and thus protected under the statute of repose, Plaintiffs’ claims as to Cleaver-Brooks, Foster Wheeler, Riley, and Oakfabco are barred by the Ohio statute of repose.

IV

Conclusion

For the foregoing reasons, this Court (1) grants Crane, Honeywell, and Robertshaw’s motions for summary judgment based upon the bare-metal defense and the Plaintiffs’ failure to provide any evidence that exposure to the Defendants’ products was a substantial factor in

causing Mr. Baumgartner's injury; and (2) grants G.E., C.B.S., Cleaver-Brooks, Foster Wheeler, Riley, and Oakfabco.'s motions for summary judgment based upon Ohio's statute of repose.³⁴

Counsel shall submit an appropriate order for entry.

³⁴ As this Court has granted Crane, Robertshaw, Honeywell and Oakfabco's motions for summary judgment, this Court need not reach either the conspiracy claim or Gail Baumgartner's loss of consortium claim.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Baumgartner v. American Standard, Inc., et al.

CASE NO: PC-13-4151

COURT: Providence County Superior Court

DATE DECISION FILED: July 22, 2015

JUSTICE/MAGISTRATE: Gibney, P.J.

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